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M E M O R A N D U M

November 14, 2022

TO: Mayor and City Council

FROM: Cassie Bronson, Deputy City Attorney; Monica Hammer, Deputy City Attorney

RE: Oppidan, Inc.'s Appeal Related to the Inclusionary Requirement for 126 Eucalyptus Avenue

CC: Tony Condotti, City Attorney; Matt Huffaker, City Manager; Planning Department Staff

I. Issue Presented and Short Answer

Planning Department staff and the City Manager asked our office to, for the November 29, 2022 open session Council meeting, provide a formal legal opinion related to Oppidan, Inc.'s appeal for the 126 Eucalyptus Avenue Project ("the Project"). The Oppidan appeal objects to the following Planning Commission condition of approval:

As provided under Section 24.16.030.08 of the Zoning Ordinance, the Planning Commission as an approval body for the project, and based on substantial evidence, determines that the project includes congregate care living units and assisted living units and is therefore subject to the requirement that 15% of the congregate living or assisted living units shall be made available for rent to low-income households for an affordable rent.¹

This memorandum addresses whether the condition above was properly applied to the Project.

In summary, it is our legal opinion that the Planning Commission erred in applying the condition above. Under SCMC § 24.16.020, the Project's 13 "dwelling units" are subject to the City's 20% basic on-site inclusionary housing requirement, and the Project applicant committed to building the requisite number of inclusionary units under Section 24.16.020. It was not appropriate to apply SCMC § 24.16.030(8) as a mandatory requirement that 15% of the project's congregate/assisted living units be made available to low-income households because Section 24.16.030(8) is an "alternative method" to comply with the City's inclusionary housing

¹ Planning Commission Action Summary, dated 10/6/2022, p. 5-6.

requirements, and the Project applicant did not seek to take advantage of any of the City’s “alternative methods” of inclusionary housing compliance.

II. Factual Background

The Planning Commission met on October 6, 2022 to consider the permits associated with a planned development at 126 Eucalyptus Avenue for 76 units of senior housing.² Thirteen of the 76 planned units have full kitchens, and 63 units designated do not have kitchens. Of the thirteen units with full kitchens, the Project’s plans indicated 11 units were set aside for assisted living and that two of the dwelling units would be designated as “affordable”.³ After consulting with outside counsel (Barbara Kautz) on a number of issues related to the project, the Planning Department staff recommended that a condition of approval require that the two affordable units be set aside for independent living, assisted living, or staff housing.⁴ The developer did not request an “alternative method” to comply with the City’s inclusionary housing requirements.⁵

It is also worth noting that staff recommended a condition that stated

Units that do not meet the definition of dwelling unit shall not contain food preparation fixtures or appliances that would meet the definition of a kitchen. A change in the number of dwelling units would require approval of a permit to modify this approved permit, and all applicable standards, including . . . inclusionary housing requirements[.]⁶

In preparation for the October 6, 2022 Planning Commission meeting, staff submitted an Agenda Report which concluded that the plan for two inclusionary full dwelling units complied with the City’s “basic on-site” inclusionary housing requirement.⁷ During the meeting, questions were raised as to whether the City’s “alternative method” to comply with the inclusionary housing requirement (SCMC § 24.16.030(8)) could be applied to units that do not contain full kitchens. Staff replied that they had discussed this matter with the City Attorney’s Office and outside counsel and that the “alternative method” cannot be applied to those units unless the applicant proposed them, pursuant to SCMC § 24.16.030.

Eventually, Commissioner Schiffrin made a motion that was seconded by Commissioner Maxwell to approve the project with a condition that 15% of the congregate living or assisted living units be made available for rent to low-income households for an affordable rent, citing SCMC § 24.16.030(8).⁸ The motion passed on a 3-2-2 vote.⁹

² Planning Commission Action Summary, dated 10/6/2022.

³ *Id.*

⁴ *Id.*

⁵ October 13, 2022 Notice of Appeal letter to City Clerk from Roger Bernstein, VP of Construction Oppidan

⁶ Exhibit A Conditions of Approval, 126 Eucalyptus – CP20-0068, p. 7, ¶ 42.

⁷ Planning Commission Agenda Report, dated 10/6/2022, p. 14.

⁸ October 6, 2022 Planning Commission Action Summary, p. 5.

⁹ October 6, 2022 Planning Commission Action Summary, p. 6.

On October 13, 2022, the developer, Oppidan, Inc., filed a Notice of Appeal. In their letter of Appeal, Oppidan reiterates that: (a) the company planned to meet the City’s inclusionary housing requirement by designating 20% of the dwelling units (those units with kitchens) as affordable housing;¹⁰ and (b) they do not wish to submit any “alternative methods” to comply with the City’s inclusionary housing requirement.¹¹

III. Legal Analysis

The Eucalyptus project is a rental residential development with two or more additional dwelling units and is therefore subject to the City’s inclusionary housing requirement under SCMC § 24.16.020(1), which states:

The inclusionary housing requirements defined in this chapter are applicable to all residential developments that create two or more new and/or additional dwelling units or SOU or SRO units at one location by construction or alteration of structures.

As for *how much* inclusionary housing the Project must provide, SCMC § 24.16.020(5) states:

Rental residential developments that would create five or more new or additional dwelling units . . . shall provide twenty percent of the *dwelling units* as inclusionary units, which shall be made available for rent to low-income households at an affordable rent. . . . If the number of dwelling units required results in a fractional requirement of 0.7 or less, then there will be no inclusionary requirement for the fractional unit.¹²

In the proposed Project, 13 of the proposed 76 units are properly characterized as “dwelling units” because 13 units contain “food preparation facilities” (i.e., kitchens) as that term is defined by SCMC § 24.22.372.¹³

Given that the Project contains 13 “dwelling units”, it must include 2 affordable units to comply with the City’s “basic on-site” inclusionary housing requirements.¹⁴

¹⁰ October 13, 2022 Notice of Appeal letter to City Clerk from Roger Bernstein, VP of Construction Oppidan

¹¹ *Id.*

¹² SCMC § 24.16.020(5) (italics added).

¹³ SCMC § 24.22.320 defines a “dwelling unit” as: “a portion of a building including one or more rooms . . . with facilities for living, sleeping, eating, sanitation, and food preparation. A dwelling unit shall have only one domestic food preparation facility”

A food preparation facility is, in turn, defined as: “Any room or portion of a room used or designed to be used for cooking and/or preparation of food and containing two or more of the following appliances and/or fixtures; any sink (larger than fourteen inches by fourteen inches and/or having a drain outlet larger than one and one-half inches in diameter), refrigerator (larger than two and one-half cubic feet), hot plate, microwave, burner, stove or oven.” SCMC § 24.22.372.

¹⁴ Note that $13 \times 0.2 = 2.6$, which is rounded down to 2 under SCMC § 24.16.020(5).

Santa Cruz Municipal Code § 24.16.030 provides a variety of “alternative methods” that a project applicant might wish to take advantage of to fulfill the City’s inclusionary housing requirements.¹⁵ For example, instead of building the number of affordable units required by SCMC § 24.16.020 (the “basic on-site” inclusionary housing requirement), an applicant might propose to pay an in-lieu housing fee¹⁶, dedicate land to the City¹⁷, or construct inclusionary units off-site¹⁸.

Relevant to the Planning Commission’s decision and Oppidan, Inc.’s appeal, SCMC § 24.16.030(8) states:

An applicant *may propose* to satisfy the inclusionary housing requirements of this chapter by providing congregate living units or assisted living units. If the approval body determines that a proposed residential development includes congregate living units or assisted living units, the following alternative requirements shall apply:

- a. Fifteen percent of the congregate living or assisted living units shall be made available for rent to low-income households at an affordable rent.

In other words, just like a project applicant might choose to pay an in-lieu fee, or dedicate land to the City, or build inclusionary units offsite, as an *alternative method*, an applicant could propose to include congregate or assisted living units as a way to fulfill the City’s inclusionary requirements. If the applicant chooses that path, then certain requirements apply, including a requirement that 15% of the congregate units be available to rent for low-income households.¹⁹

In making its decision, the Planning Commission likely focused on to the second sentence above, which states “If the approval body determines that a proposed residential development includes congregate living units or assisted living units, the following alternative requirements *shall* apply: . . .”²⁰ It is important to note that a court is unlikely to read that sentence in a vacuum. That sentence is qualified by: (1) the prior sentence which states “An applicant *may propose* to satisfy the inclusionary housing requirements of this chapter by providing congregate living units or assisted living units”²¹; and (2) the fact that this requirement is in a section entitled “Alternative Methods to Comply with Inclusionary Housing Requirements”, which contains a host of voluntary, alternative measures that can be taken at the project applicant’s discretion²². A court is also likely to opine that, if the City is going to impose an expensive inclusionary housing requirement on a project applicant, then the language in the

¹⁵ See SCMC § 24.16.030 (1-11).

¹⁶ SCMC § 24.16.030(6).

¹⁷ SCMC § 24.16.030(7).

¹⁸ SCMC § 24.16.030(3).

¹⁹ SCMC § 24.16.030(8).

²⁰ SCMC § 24.16.030(8)(italics added).

²¹ SCMC § 24.16.030(8)(italics added).

²² SCMC § 24.16.030(8).

Municipal Code should make that abundantly clear, so that project applicants can adequately economically assess whether or not to pursue their projects.

In this instance, the Project applicant submitted a plan to meet the City's "basic on-site" inclusionary housing requirement under SCMC § 24.16.020(5) and did not request an "alternative method" to comply with inclusionary housing under SCMC § 24.16.030.²³ Therefore, the Planning Commission erred when it included a condition that mandated the Project be subject to one of the "alternative methods" contained in SCMC § 24.16.030(8).

IV. Conclusion

Thank you for your attention to this memo, and we would be happy to answer any questions that the Council may have.

We suspect that the Planning Commission majority is of the opinion that congregate care facilities should be subject to greater inclusionary requirements. If the Council agrees with this sentiment, then the Council, for future projects, could consider amending the Municipal Code to specifically apply inclusionary requirements to these types of units that do not have kitchens. With that said, as currently written, SCMC § 24.16.030(8) is an "alternative method" that cannot be involuntarily imposed on a project applicant who is willing to meet the City's "basic on-site" requirements.

Very truly yours,



Cassie Bronson,
Deputy City Attorney



Monica Hammer,
Deputy City Attorney

²³ Planning Commission Agenda Report, dated 10/6/2022, p. 14.