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**FW: 2024-09-20 Letter to City Council re Waivers of Development Standards - Union Avenue LLC, 1334 and 1348 Miller Avenue, San Jose [IMAN-IMANAGE.FID1096518]**

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**From** City Clerk <city.clerk@sanjoseca.gov>  
**Date** Fri 9/20/2024 2:40 PM  
**To** Agendadesk <Agendadesk@sanjoseca.gov>

 1 attachments (52 KB)

2024-09-20 Letter to City Council re Waivers of Development Standards.pdf;

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**From:** Karen Irias <[REDACTED]>  
**Sent:** Friday, September 20, 2024 11:24 AM  
**To:** Mahan, Matt <Matt.Mahan@sanjoseca.gov>  
**Cc:** Webmaster Manager <webmaster.manager@sanjoseca.gov>; Maguire, Jennifer <jennifer.maguire@sanjoseca.gov>; City Clerk <city.clerk@sanjoseca.gov>; Lee, Jason <Jason.Lee@sanjoseca.gov>; District1 <district1@sanjoseca.gov>; District2 <District2@sanjoseca.gov>; District3 <district3@sanjoseca.gov>; District4 <District4@sanjoseca.gov>; District5 <District5@sanjoseca.gov>; District 6 <district6@sanjoseca.gov>; District7 <District7@sanjoseca.gov>; District8 <district8@sanjoseca.gov>; District9 <district9@sanjoseca.gov>; District 10 <District10@sanjoseca.gov>; Jia Li <[REDACTED]>; Bryan Wenter <[REDACTED]>; Karen Irias <[REDACTED]>  
**Subject:** 2024-09-20 Letter to City Council re Waivers of Development Standards - Union Avenue LLC, 1334 and 1348 Miller Avenue, San Jose [IMAN-IMANAGE.FID1096518]

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*This email is sent on behalf of Bryan Wenter.  
Replies may be directed to Mr. Wenter at [Bryan.Wenter@msrlegal.com](mailto:Bryan.Wenter@msrlegal.com). Thank you.*

**Karen Irias | Miller Starr Regalia**  
**Legal Assistant to Bryan Wenter**  
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September 20, 2024

**VIA E-MAIL**

Matt Mahan, Mayor  
City of San Jose  
200 E. Santa Clara St.  
San Jose, Ca 95113  
E-Mail: [Matt.mahan@sanjoseca.gov](mailto:Matt.mahan@sanjoseca.gov)

**Re: September 24, 2024 City Council Agenda Item 10.3**

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Dear Mayor Mahan and Honorable Councilmembers:

This firm represents Union Avenue LLC in connection with the above-referenced nine-unit housing development project on approximately 1.07 acres at 1334 and 1348 Miller Avenue in San Jose. Two (or 22%) of the nine units will be deed restricted for low-income households, making the project eligible under the state Density Bonus Law (Gov. Code §§ 65915-65918) for two incentives or concessions and unlimited waivers or reductions of development standards.

As explained in our May 23, 2024 letter to the City, the project application was filed in September of 2021 and deemed complete in October of 2021 as a matter of law under the Permit Streamlining Act (Gov. Code § 65943(a)). The project application requested six waivers or reductions of development standards, including four waivers or reductions from the Inclusionary Housing Ordinance's design standards. The project was thereafter deemed consistent with the City's regulations in November of 2021 as a matter of law under the Housing Accountability Act because the City did not timely provide any notice of inconsistency within 30 days after the application was deemed complete (Gov. Code § 65589.5(j)(2)).

On August 14, 2024, the Planning Commission motion to approve the project failed on a 4-4-1 vote despite the fact there was no neighborhood opposition to the Project. And despite staff's recommendation that the City Council approve the project, staff also presented its concerns with the applicant's use of waivers to utilize the "Build-On-Site" option of meeting the City's Inclusionary Housing Ordinance. City staff's concerns related to the affordable housing units were echoed by two of the dissenting Planning Commissioners when they voted on the project. We write to address the issues raised at the Planning Commission meeting with the requested waivers or reductions of development standards, particularly those that relate to the IHO.

First, as noted above and set forth in more detail in our May 23, 2024 letter to the City, the project is deemed consistent with the City's regulations—and specifically, with the IHO—as a matter of law. Several times during the review process, the City did not provide a timely notice of inconsistency as required by the HAA. As a result, the project is deemed consistent and does not require any waivers or reduction of development standards.

Second, even if the project required waivers or reductions of development standards related to the IHO or otherwise (which the applicant vehemently denies), Density Bonus Law would still entitle the project to its requested waivers or reductions despite the City's stated objection to the use of density bonus waivers to obtain relief from provisions of the IHO. On this point, we note that the California Department of Housing and Community Development, the state agency with enforcement authority over the DBL, has provided several technical assistance letters agreeing that the Density Bonus Law can be used to obtain incentives and concessions / waivers or reductions of local inclusionary housing requirements.

For example, in an April 26, 2024 letter to the County of Sonoma, HCD agreed that an incentive/concession can be used to modify provisions of an inclusionary ordinance. Similarly, in a September 2, 2022 letter to West Hollywood, HCD agreed that the DBL can be used to modify or waive provisions of an inclusionary ordinance. In the same letter HCD also agreed that the provisions of an inclusionary ordinance, such as the underlying local inclusionary requirement itself, can act as an unlawful constraint on the development of housing.

The unreasonable burden of meeting both the DBL and a conflicting IHO policy is exemplified by the Miller project. It is a small development where the economics of providing any affordable units—let alone 1 of the 5 larger single-family homes as would be required to meet the “equivalency” requirements of the IHO, or to redesign the project several years into the entitlements process to address late comments, would render this project economically infeasible. As it stands, the Project provides two high-quality 3-bedroom units in a high-resource area with no government subsidies. The City's position, while lofty in its goals, is not practical or feasible and would impose affordability obligations on the applicant that greatly exceed what is required by Density Bonus Law. As HCD noted in its letter to West Hollywood, “a local ordinance is preempted if it conflicts with the density bonus law by increasing the requirements to obtain its benefits . . . [l]ocal agencies should maintain an awareness of potential unintended impacts of local inclusionary requirements on SDBL applications.”

As you render your decision on this project, it bears noting that a City may only lawfully disapprove a given waiver or reduction of development standards under three specific and uncommon circumstances:

1. if the waiver or reduction would have a specific, adverse impact upon health or safety, as defined in the HAA, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact;
2. if the waiver or reduction would have an adverse impact on any real property that is listed in the California Register of Historical Resources; or
3. if granting the waiver or reduction would be contrary to state or federal law. (Gov. Code § 65915(e)(1)).

Here, there is no evidence that would allow the City to make any of these findings and no such findings accompanied the Planning Commissioner's recommendations.

In particular, there is no evidence in the record, much less a preponderance of evidence, of the existence of any written public health or safety standard much less any standard against which the project could be determined to have a significant, direct, quantifiable, *and* unavoidable impact if any of the requested waivers or reductions of development standards are granted. There is also no evidence that the project site contains any historic resources much less that granting the requested waivers or reductions of development standards would have an adverse impact on any historic resources. And there is no evidence that granting the requested waivers or reductions of development standards would be contrary to state or federal law.

We note that the Memorandum to the Planning Commission dated August 14, 2024 indicates that staff discussed the requested waivers or reductions of development standards with HCD and that HCD determined that there is *no valid basis* to deny the requests. Indeed, according to the Memorandum:

“HCD staff shared their belief that state law (i.e. the Housing Accountability Act, Density Bonus Law, Housing Element Law, and Affirmatively Furthering Fair Housing<sup>1</sup>), as well as federal fair housing laws, do not explicitly require affordable units in non-multifamily development to be functionally equivalent to

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<sup>1</sup> Assembly Bill 686 is a 2018 statute modeled on federal law that requires California's cities and counties to “affirmatively further fair housing.” AB 686 is but one part of an extensive and complex statutory scheme and does not invalidate or trump state housing production laws such as the HAA and DBL. Grounded in part in the federal Fair Housing Act, AB 686 defines “affirmatively furthering fair housing” to mean “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” (Gov. Code § 8899.50(a)(1)). A bit tautological, affirmatively furthering fair housing requires the state, cities, counties, and public housing authorities to administer their programs and activities related to housing and community development in a way that affirmatively furthers fair housing. Nothing in the statute or in any cases mandates or even allows cities to apply AB 686 to specific private development projects, particularly where doing so would defeat other pro-housing statutes such as the DBL. AB 686 is aimed only at things like housing elements, not housing development projects.

market-rate units, and that there is no requirement that the affordable units be dispersed throughout the development. Therefore, it is HCD's belief that there is no specific basis upon which to deny the waivers as contrary to state or federal law . . . ."

In short, the project does not require any waivers or reductions of development standards because it was deemed consistent as a matter of law with all applicable standards. Moreover, for the reasons explained herein and in the Memorandum to the Planning Commission, even if the project was not already deemed consistent it would still be entitled to every requested waiver or reduction as there is no lawful basis for disapproval.

Sincerely,

MILLER STARR REGALIA



Bryan W. Wenter, AICP

BWW/kli

cc: Vince Rocha, Senior Advisor to the Mayor  
Rosemary Kamei, Councilmember  
Sergio Jimenez, Councilmember  
Omar Torres, Councilmember  
David Cohen, Councilmember  
Peter Ortiz, Councilmember  
Devora "Dev" Davis, Councilmember  
Bien Doan, Councilmember  
Domingo Candelas, Councilmember  
Pam Foley, Councilmember  
Arjun Batra, Councilmember  
Jennifer Maguire, City Manager  
Jason Lee, Planner II  
Toni Taber, City Clerk



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**FW: agenda section 10.3 on sep 24 meeting**

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**From** City Clerk <city.clerk@sanjoseca.gov>  
**Date** Mon 9/23/2024 7:53 AM  
**To** Agendadesk <Agendadesk@sanjoseca.gov>

-----Original Message-----

**From:** [REDACTED] <[REDACTED]>  
**Sent:** Monday, September 23, 2024 5:09 AM  
**To:** City Clerk <city.clerk@sanjoseca.gov>  
**Subject:** agenda section 10.3 on sep 24 meeting

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Dear city council,

I am a resident of Murdock neighborhood in west San Jose and my kids went to meyerholz-miller-lynbrook since 2016.

I warmly welcome and look forward to the positive impact the Miller Project on our community. This initiative not only addresses the need for additional housing but also brings a refreshing uplift to our neighborhood, enhancing its overall atmosphere. It's a wonderful chance for new families to join our welcoming community, allowing us all to experience the gradual and meaningful changes this project will inspire. As you know, in the last few years, the neighborhood has been fighting really hard to keep the schools from closure. With new family housing in the neighborhood, we could have more family with young kids to join this lovely community and keep our excellent education history continue in the area. I offer my full support for the Miller Project and look forward to the beneficial enhancements it will introduce to our area.

Thanks!

Jennie Zhang

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**FW: Support for Agenda Item 10.3 - Planned Development Permit for 1334 and 1348 Miller Avenue**

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**From** City Clerk <city.clerk@sanjoseca.gov>  
**Date** Mon 9/23/2024 5:16 PM  
**To** Agendadesk <Agendadesk@sanjoseca.gov>

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**From:** Yue Zhuo <[REDACTED]>  
**Sent:** Monday, September 23, 2024 4:43 PM  
**To:** City Clerk <city.clerk@sanjoseca.gov>  
**Subject:** Support for Agenda Item 10.3 - Planned Development Permit for 1334 and 1348 Miller Avenue

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Dear City Council Members,

I am writing to express my strong support for Agenda Item 10.3, regarding the Planned Development Permit for the properties located at 1334 and 1348 Miller Avenue.

As a resident of West San Jose for over 20 years, I have seen a significant decline in the availability of housing for families. Many families, including my own, choose to stay in their homes due to the rising cost of housing, making it difficult for new families, particularly those with young children, to move into the neighborhood. This lack of housing turnover has contributed to a decline in school enrollment, and recently, two local elementary schools have been closed.

The approval of this development would bring much-needed new housing to our community, providing opportunities for young families to settle here. In turn, this would help revitalize our neighborhood and support the local schools and community services. I strongly believe that developments like this one are essential for ensuring the long-term vitality and inclusivity of West San Jose.

I hope you will consider voting in favor of this permit and supporting the future growth of our community.

Thank you for your time and consideration.

Sincerely,  
Yue Zhuo

[REDACTED]



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