Development Services Department
Planning Division
13220 Central Avenue
Chino, CA 91710
(909) 334-3253

www.cityofchino.org

CITY of CHINO

Appeal Application

Appeal Process

The applicant or any interested aggrieved person may appeal the determination of the Development Services Director or Planning Commission within ten (10) calendar days from the date of such determination. The appeal must be in writing in accordance with Section 20.23.150 of the City of Chino Zoning Ordinance. The required appeal fee as adopted by the City Council must accompany an appeal to the Planning Commission of a decision of the Development Services Director or an appeal to the City Council of a decision of the Planning Commission or it will be considered incomplete and the appeal will not be considered. A building permit will not be issued until after the 10-day appeal period is complete. If an action of the Commission is appealed, the City Council will hear the appeal and render a final decision.

General Information (Print of Type)

Appellant's Name: Robert J Nigg
Phone Number: [redacted]
Mailing Address: [redacted]
Email Address: [redacted]
Fax Number:
Contact Name: SAME
Phone Number: SAME

Type of Appeal Requested

- ☐ An appeal to the Planning Commission of an administrative action or determination
- ☒ An appeal to the City Council of a Planning Commission action or determination
- ☐ An appeal to the City Council of an environmental action or determination

Project number(s): 25-018
Project address or location: DIRECTOR, Development SERVICES
Specific action or decision which is being appealed:
DECISION of PLANNING COMMISSION on 2/19/2025 for File# 25-018
Specific grounds for the appeal, and the relief requested is as follows:
FAILURE TO ISSUE FINDINGS OF FACT AS REQUIRED IN ZONING Code 20.23.150(A)(4).

SEE ATTACHMENT

Staff Use Only

File No.	Date Received	Filing Fee ☐ Resident ☐ Non-Resident	Received By
Related Files	Time Received	Receipt No.	Supervisor Authorization

Rev. 04/16/2020

Appellant's Affidavit

I hereby certify that the statements and information contained herein are in all respects true and correct to the best of my knowledge and belief.

Appellant's Signature: Robert J Nigg II Date: _____

Print Name: Robert J Nigg II

Relationship to Subject Appeal:

- ☐ Property Owner
- ☐ Business Owner
- ☒ Resident
- ☐ Other: _____

This appeal is being made under City of Chino, Zoning Code Section 20.23.150(B)

1. The specifics of this appeal to the City Council concern the appeal of Robert J. Nigg ("appellant") heard as agenda item No. 4 before the Planning Commission on February 19, 2025 under File No.25-018. The original appeal was submitted on December 13, 2025 to the planning commission, via the planning division. The original appeal under File 25-018 related to a decision and interpretation by the Director of Development Services for the calculation and enforcement of Floor Area Ratio ("FAR") in the Mixed Use Overlay District ("MUO").

2. There will be two separate appeals concerning the decision by the planning commission of February 19, 2025 to uphold the recommendation by the City Planner to deny the appeal by the appellant.

3. This first appeal is being made regarding the failure of the planning commission to include all findings of fact as required under Zoning Code 20.23.150(A)(4). This sections states:

> Within thirty days following the conclusion of the hearing, the planning commission shall render its decision on the appeal. The planning commission may deny the appeal, or may grant the appeal in whole or in part. **The decision shall include all required findings of fact.** (emphasis added)

4. Wherein, appellant submitted a five page narrative to the planning commission on February 19, 2025, prior to the scheduled meeting, the planning commission, in its quasi-judicial capacity, took a vote to deny appellant's appeal without making or stating any findings of fact. The appellant's narrative included numerous questions of fact. The planning commission provided no written or verbal explanations of why—legally and factually—the planning commission made it decision.[1] The appellant specifically requested that the five page narrative be included in the official record. Included on pages 4-5 of the narrative, paragraph 19, it was specifically requested:

> *"In reaching its decision on this appeal, the Planning Commission should address and issue its decisions to include all required findings of fact.. A finding of fact should also be issued on how FAR is to be determined when addressing each of the articulated inconsistencies and contradictions as cited in this submission."*

5. The failure to issue findings of fact is a violation of the Zoning Code, Section 20.23.150(A)(4). Not issuing finding of facts is also inconsistent and contradictory to California guidelines and procedures. As example, *"Planning commission decisions must be based on a rational decision-making process. Often, the commission must adopt written "findings" explaining the factual reasons for its decision. A finding is a statement of fact relating the information that the commission has considered to the decision that it has made*[2]*.*

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[1] Findings are written explanations of why—legally and factually—the planning commission made a particular decision. They map how the commission applied the evidence presented to reach its final conclusion. See Leage of California Cities, The Planning Commissioner Handbook, Section 2, Meetings and Procedures, page 22.

2 See THE PLANNING COMMISSIONER'S BOOK, issued by the State of California, Governor's Office of Planning and Research, Part Two, The Legal Side of Planning, page 8.

6. The city council should render the decision made by the planning commission on February 19, 2025 for agenda item #4 under File No. 25-018 as null and void until such time as the planning commission issues findings of facts explaining the factual reasons for its decision. Should the city council choose not to instruct the planning commission to administer its duties in accordance with the requirements of Section 20.23.150(A)(4), the appellant requests upon receipt of this appeal request, the city council shall set the matter for hearing. The hearing shall be held within sixty days following the filing of the appeal request or the next regularly scheduled city council meeting thereafter per Section 20.23.150(B)(4).

7. A second appeal request will be submitted separately to the city council. The separate request will be submitted to avoid any possible conflict with the 10 day limit to file an appeal as set forth in Section 20.23.105(B)(1). Appellant deems the two issues to be distinct from each other. The failure to state findings of fact under Section 20.23.150(B)(4) is an administrative and procedural violation that is not founded on the actual questions of fact. The second and separate appeal will be to resolve the questions of fact and the arbitrary and capricious manner in which the Development Services Director issued his decision concerning FAR calculations. Without the benefit of knowing what the factual basis and underlying rationale for the decision of the planning commission, appellant is at a great disadvantage to appeal its decision without knowing what factual evidence was used by the planning commission it issuing its decision. The lack of transparency in the decision making process is why the citizens view our city leaders as being out of touch with the concerns of its voters.

Sincerely,

Robert Nigg, appellant

Development Services Department
Planning Division
13220 Central Avenue
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CITY *of* CHINO

Appeal Application

Appeal Process

The applicant or any interested aggrieved person may appeal the determination of the Development Services Director or Planning Commission within ten (10) calendar days from the date of such determination. The appeal must be in writing in accordance with Section 20.23.150 of the City of Chino Zoning Ordinance. The required appeal fee as adopted by the City Council must accompany an appeal to the Planning Commission of a decision of the Development Services Director or an appeal to the City Council of a decision of the Planning Commission or it will be considered incomplete and the appeal will not be considered. A building permit will not be issued until after the 10-day appeal period is complete. If an action of the Commission is appealed, the City Council will hear the appeal and render a final decision.

General Information (Print of Type)

Appellant's Name: ROBERT NIGG Phone Number: [redacted]

Mailing Address: [redacted]

Email Address: [redacted] Fax Number:

Contact Name: SAME Phone Number: SAME

Type of Appeal Requested

☐ An appeal to the Planning Commission of an administrative action or determination

☒ An appeal to the City Council of a Planning Commission action or determination

☐ An appeal to the City Council of an environmental action or determination

Project number(s):

Project address or location:

Specific action or decision which is being appealed: 25-018
FEBRUARY 19 2025 DECISION OF PLANNING COMMISSION

Specific grounds for the appeal, and the relief requested is as follows:

SEE ATTACHED LETTER

Staff Use Only

File No.	*Date Received*	*Filing Fee* ☐ *Resident* ☐ *Non-Resident*	*Received By*
Related Files	*Time Received*	*Receipt No.*	*Supervisor Authorization*

Rev. 04/16/2020

Appellant's Affidavit

I hereby certify that the statements and information contained herein are in all respects true and correct to the best of my knowledge and belief.

Appellant's Signature: Robert Nigg Date: 2/26/2025

Print Name: Robert Nigg

Relationship to Subject Appeal:

- ☐ Property Owner
- ☐ Business Owner
- ☒ Resident
- ☐ Other: _____

Rev. 04/16/2020

APPEAL No. 2 - Decision of Planning Commission on February 19, 2025

This appeal being made under City of Chino, Zoning Code Section 20.23.150(B)

1. The specifics of this appeal to the City Council concern the appeal of Robert J. Nigg ("appellant") heard as agenda item No. 4 before the Planning Commission on February 19, 2025 under File No.25-018. An appeal was submitted on December 13, 2025 to the planning commission. The appeal under File 25-018 relates to a decision and interpretation by the Director of Development Services for the calculation and enforcement of Floor Area Ratio ("FAR") in the Mixed Use Overlay Districts ("MUO").

2. This is the second appeal to the city council concerning the decision made on February 19, 2025 by the planning commission. Appeal No. 1 concerned what is deemed to be a procedural error when the planning commission did not articulate findings of fact. This second appeal involves substantive deficiencies concerning relevant questions of fact in the decision made by the planning commission.

3. Lacking the planning commission explaining the factual reasons for its decision, the appellant can only speculate on what facts, if any, were used by the planning commission in issuing its decision. It appears many of the commissioners may not have fully read or spoke to the factual concerns raised in my February 19, 2025 submission of a 5 page narrative letter ("narrative") citing additional specific grounds on why the appeal should be upheld. Appellant explicitly requested that the February 19, 2025 narrative be made part of the official record.

4. The relevant question that was before the planning commission is how Floor Area Ratio is used to control the scale of development in the City of Chino and how to ensure that new construction is compatible with the community. The purpose of the Floor Area Ratio (FAR) is to help determine if a building's scale and mass are compatible with the surrounding neighborhood. FAR is a measurement that controls the intensity of building coverage by comparing the total floor area of a building to the size of the lot it's located on.

5. The underlining question of this appeal is if our city government is going to allow developers to dictate our development standards and destroy our neighborhoods or is the city going to listen to the voice of its citizens. It is appellant's opinion that the Zoning Code, under Section 20.09.090 for mixed use overlay developments was ill-conceived and poorly written and is thus subject to arbitrary and capricious interpretations. It is allowing unscrupulous developers to manipulate the zoning code to enhance their profits to the determent of the citizens of Chino. These extremely high density developments will destroy our residential neighborhoods and the small-town feel of our city. It also appears that the planning division is no more than a rubber stamp for the demands of the developers.

6. Appellant disputes and challenges the decision made by the planning division by referencing the specific questions of fact and arguments as cited in the February 19, 2025 narrative and appellant's original letter appeal dated December 13, 2024. Both letters are still intended to part of the official record and to be used by the city council in issuing its findings of fact and decision for this appeal. To assist in clarifying the grounds for this appeal, appellant will reference by Paragraph Number from the February 19 narrative to facilitate a better understanding of the dispute and reasons for the appeal.

7. Paragraph No. 8 – *City staff proclaims without any factual basis that Section 20.09.090 is "**explicit**" in applying a FAR limitation to only non-residential uses.* This was not an accurate assertion. A thoughtful and rigorous review will find it vague, ambiguous and contradictory. Appellant acknowledges that Table 20.09-7 of the zoning code does state that the "*Maximum Floor Area Ratio (non-residential space)*. However, "Note 1" also states "*Additional FAR is allowed up to 1.25 in mixed use development with affordable rental units*." Thus, the foundation that FAR increases when the mixed use development includes residential rental units is based upon the inclusion of the residential housing units. Note 1 does not define that FAR is to only include non-residential use buildings when increasing the allowable FAR. Rather the increase in FAR is based on residential uses being included in the development. The decision by the planning commission did not resolve or explain how an increase in FAR based upon a density bonus for residential usage (affordable rental units) is not subject to FAR. It would be an arbitrary and capricious decision as to why an increase in FAR resulting the inclusion of residential units would not include the floor area of the residential apartment units, which are incorporated in all the buildings on the lot.

8. Paragraph No. 9 - *The use of the density bonus related to residential rental units in Note 1 is undefined and ambiguous. This lack of clarity results in a vague and unclear methodology to calculate FAR and the allowable density. Contrary to the arguments made by the planning staff, that its interpretation of FAR for mixed use overlay developments is consistent with HCD approval of the Housing Element is a mischaracterization of HCD approval*. This assertion is not supported by any documented evidence that HCD in approving the Housing Element made any reference to residential usage being included or excluded from FAR calculations. The city attorney did appear to make an inaccurate statement advocating to the planning commission that HCD had approved the Housing Element therefore inferring the FAR methodology was approved by HCD. The Housing Element certified by the HCD contained the following definition of FAR:

> Site Coverage and **FAR** Floor Area Ratio (FAR) is defined in the City of Chino Municipal Code as the ratio of the **total gross floor area of all buildings on a site**,

excluding structured parking areas, divided by the total site area. FAR is regulated to maintain and limit the massing of buildings in relation to the property.

Appellant again asserts no factual foundation was presented to the planning commission that HCD certified anything other than FAR was to include **the total floor area of all buildings on a site**. The city staff provided no evidence and the planning commission provided no findings of fact as to the validity of the planning divisions unsupported ascertains. This question of fact remained unresolved, however strong factual evidence supports Appellant's argument that all buildings on a site should be included in the FAR calculations as defined in the certified HCD Housing Element.

9. Paragraph No. 10 - The appellant argued *"The use of FAR in mixed use projects is an acceptable method to control the density, scale and mass of affordable housing projects. See attached HCD Letters dated October 8, 2019 and August 31, 2022 (Attachments 1 and 2). Of great significance is the HCD stated in the October 8, 2019 letter that* ***"In fact, 2019 legislation encourages use of a density bonus in the context of a FAR density for certain affordable projects associated with commercial development near transit. (See Gov. Code § 65915.7; see also Gov. Code § 65917.2).***" The planning commission in reaching its decision failed to address this important and critical issue of fact. Again, contrary to the arguments made by the planning division and the conjecture made by the city attorney, appellant has provided verifiable evidence that HCD supports the use of FAR in mixed use projects that includes both residential and non-residential buildings. The city council must issue a decision based upon findings of fact. The appellant asserts the factual evidence supports the foundation that the appeal should be upheld and not denied.

10. Paragraph No. 11 – Appellant explicitly cited Government Code § 65917.2 in support of his appeal. The planning commission when issuing its decision failed to speak to and had ignored this important and critical issue. California law undeniably provides for the use of FAR in an eligible housing development with commercial development. It would be illogical and disingenuous for city staff to argue that developments under 20.09.090 are not housing developments that can be subject to FAR. Also, Section 65917.2(b)(2) provides for an FAR for up to a 20-percent increase in maximum allowable **floor area ratio** for the inclusion of affordable housing projects. This important factual evidence and cited state law undermines the validity of the planning division's assertion that HCD validated the Director of Development Services interpretation that calculations for residences uses could not be included in the FAR for mixed use developments. No findings of fact was made by the planning commission regarding this evidence. The city council in reaching a decision on this appeal is mandated under zoning code Section 20.23.150(B)(5) that its decision shall include all findings of fact.

11. Paragraph No. 12 - *Using the planning staff's interpretation of FAR does not express any common sense or have a rational basis. As example, if the FAR was increased to 1.25 on a ten acre parcel, this would require 544,500 square feet of gross floor area (43,560 x 10 x 1.25). By excluding the residential rental units in the FAR calculation, there could be 544,500 square feet of commercial uses on the site. What becomes illogical, based upon state law (see Gov. Code, Section 65583.2(h)) is that 50% of the gross floor area shall be reserved for residential use (also see revised Section 20.09.090(D) as required by HCD in Ordinance 2024-003). If FAR was deemed for only non-residential use, then an additional 544,500 gross floor space of residential use would be required. This would result in a gross floor area of 1,089,000 square feet being required be built on the 10 acre parcel. This amount of scale and mass is absurd and is not compatible in any neighborhood in Chino with surrounding residential use.* In deciding this appeal, the city council must decide on a factual basis if the meaning of Note 1 of Table 20.23-7 was adopted by the city council with the deliberate and willful intent to allow the floor area of buildings on a lot that would result in FAR of 2.50 density level for all buildings on a lot. No where in the residential neighborhoods of the city has such massive and highly dense development ever been allowed. No record of any public notices issued by the city in advocating the passage of Measure Y did our city council inform the public the passage of Measure Y would create such extremes in density.

12. Paragraph No. 13 - *Additionally, it should be noted that in the Chino Zoning Code for residential developments, a maximum FAR is used in combination with DU/AC. See Zoning Code Tables 20.04-3, 20.05-2 and 20.09-3. It is contradictory for city staff to argue that residential use cannot be included in the FAR calculation, when it is a common practice in the city to do so.* [See Attachment 3 for FAR inclusion for site standards in residential zoning.] The assertion made by the planning commission (and the city attorney during the appeal hearing) that the zoning code did not provide for FAR calculations for residential use is in direct conflict with the documental evidence provided by the appellant. The city council must determine as a question of fact if maximum FAR for residential use is included in the zoning code. Upon this finding of fact, the Director of Development Service's interpretation that FAR is not used for residential use should be determined to be erroneous and that an arbitrary and capricious decision was made.

13. Paragraph No. 14 - *Additionally, the FAR maximum specified in Table 20.05-3 for MU30 designations can include both residential and non-residential uses in the FAR calculations. This would be in conflict and is logically outside the explanation cited by city staff referencing page LU-9 that only non-residential uses are included in FAR calculations for Mixed-Use Designations (see LU-12 thru LU-13 per staff's submission). Furthermore, a capricious and arbitrary interpretation would need to be made to determine how FAR is to be calculated for a vertical building containing both residential and non-residential uses. It should also be noted that Table 20.09-7 for MUO*

developments does not even contain a reference to the units per acre (DU/AC) designation for residential uses. The city council must determine as a finding of fact if under Table 20.03-5 for mixed use (MU30) does contain a maximum FAR limitation which includes residential use. The city council must also determine as a finding of fact how mixed used FAR calculations are to be determined if a mixture of residential and non-residential is combined in constructed in the same vertical building in a MUO site. Additionally, a finding of fact must be made if Table 20.09-7 Density, Maximum (DU/AC) and FAR as contained in Tables 20.04-3, 20.05-2 and 20.09-3, is how the density and FAR to be calculated on lots with residential use. Lacking a definitive clarification to these questions, appellant asserts that the zoning code allows for arbitrary and capricious interpretations of zoning code standards.

14. Paragraph No. 15 - *Contradictions can also be found in Zoning Code Sections 20.09.090(B), (F) and (G), which allows for only non-residential uses or no housing use in overlay developments. These provisions would be in conflict with state law that require residential development be built in the proposed affordable housing overlays. The HCD necessitated that the city have a minimum of 26 units per acre in order for the City's Housing Element to be certified.* ***Furthermore, Section 20.09.090([G]) is vague and uncertain as it only states "Non-residential development shall comply with the standards of the base zoning district with which the MUO district is combined and the commercial design standards in Section 20.17.070."*** *A reading of Section (G), finds that it does not require "only non-residential uses" or "no housing" use to be considered. Thus a literal reading of 20.09.090(G) would require any "non-residential development" on a site to be developed under different standards and not the FAR standards for the MUO district.* As a finding of fact, the city council must determine the approved method to be used by the Director Development Service to determine when the standards of zoning code for FAR are to be used when only non-residential use is prohibited by amendments to the zoning code under Ordinance 24-003. Per HCD, the city cannot allow only non-residential use in a AHO and MUO districts. The current zoning code is a hodgepodge of different standards that has resulted in conflicting standards and arbitrary and capricious interpretations of zoning code standards.

15. Paragraph No. 16 - *It is asserted that the planning staff failed to do their due diligence in making the recommendations to the planning commission and city council for the adoption of Ordinances 23-008 and 24-003 for Section 20.09.090 of the zoning code.* A finding of fact should be determined by the city council if the current zoning code standards are not in conflict within different provisions of the code. Appellant asserts that conflicting standards resulting in confusion and uncertainty, causing the zoning code to be subject to different interpretation.

16. Paragraph No. 17 - *One of the most significant contradictions occurred on April 6, 2023, when the then Director Development Services, Nicholas Liguori went before the City Council to recommend the adoption of Ordinance 23-008 which contained Section*

20.09.090 of the Zoning Code. Included in Ordinance 23-008 was the insertion of Section 20.09.090(E)(4), which provided for the inclusion of storage facilities in MUO districts. During Mr. Liguori presentation to the City Council, he discussed how the use of the Floor Area Ratio related to the maximum floor area in the development containing a storage facility. At approximately one hour and 21 minutes into the video recording of the council meeting Mr. Liguori stated "that the storage [facility] have a maximum ***floor area ratio*** *of 25% of* ***all the residential/non-residential uses*** *on the site". (emphasis added, also see Attachment* [4] *for screenshot of the PowerPoint presentation at the April 6, 2023 council meeting). Thus when Ordinance 23-008 was adopted, it was based upon the interpretation and statement by the then Director Development Services that the FAR for MUO sites could include both residential and non-residential uses in the development, particularly when the project included a storage facility. It is asserted that the Planning Commission must apply this interpretation, since that was the explanation presented to the City Council in approving and adopting Ordinance 23-008 and the language and standards of 20.09.090.* The city council must issue a finding of fact if the current Director Development Services is using a different interpretation than what was used by the prior Director of Development Services before the city council during the public meeting on April 6, 2023. There is substantial documented evidence that the city council voted for and adopted Section 20.09.090 with the perception and understanding that public/mini storage facilities would be included in the FAR calculation for all **residential/**non-residential uses onsite.

17. Paragraph No. 18 – It was argued that "*The Planning Commission should also take into account that the vagueness and lack of clarity in the MUO standards would allow for unscrupulous developers to manipulate the zoning code that creates unintended, objectionable and unwanted high density developments. As example, using a 10 acre parcel, an unprincipled developer could subdivide the parcel into five individual lots. One lot being 5 acres, another lot being 1.5 acres, and the other 3 lots being of different sizes totally 3.5 acres. Upon subdividing the 10 acres, the developer could claim the entire 10 acres at 26 housing units per acre totaling 260 units. The developer could then build all 260 units on only the one subdivided lot of 5 acres, resulting in a density of 52 units per acre. The passage of Measure Y never provided for affordable housing to be over 50 units per acre, wherein the public was only informed the density would be up to 30 units per acre. The City of Chino and its Planning Commission should never allow for a DU/AC of over 50 units per acre in a residential single family neighborhood having an estimated FAR of over 2.25. The same devious developer could also build a 4 story monstruous storage facility on the subdivided 1.5 acre lot with a FAR of over 2.1. avoiding any reasonable FAR restrictions. It is requested that the Planning Commission in issuing its decision of fact for this appeal, explain and resolve the inequities in the lack of clarification in the allowable densities and FAR within Section 20.09.090 for MUO developments, particularly when a developer chooses to subdivide the parcel into 5 individual lots. When analyzing the Zoning Code, including Table 20.09-7, the site standards are based*

upon the lot. It should be noted that in California a "parcel" refers to any defined area of land with a legal ownership, often used for tax purposes, while a "lot" is a specific parcel that has been officially subdivided and is considered ready for development, meaning it has a legal description and is recognized as a building site within a planned subdivision. The Planning Commission in defining the FAR methodology should provide the factual basis for the determination of how floor area for all buildings on a lot is used to determine the FAR. The city council must issue a finding of fact how the calculation of FAR should be determined when a parcel is subdivided into smaller lots. There is an inconsistency since the zoning code standards explicitly uses the term “lot” (see Attachment 5) for the site requirements within a mixed use overlay district. The arbitrary interpretation being used by the Director Development Services creates random, subjective and illogically contradictions in how development is permitted MUO districts. There MUO districts were created to allow for affordable housing and not extremely high density non-residential projects that are incompatible with the surrounding neighborhoods.

18. The appellant has provided substantial factual evidence citing the inconsistencies in interpretation of the Director Development Services and to the February 19, 2025 decision by the planning commission. Appellant requests that in accordance with Zoning Code Section 20.23.150(B)(5), that the city council’s decision shall include all required findings of fact. Appellant has provided at least 11 questions of fact that should be used by the city council in reaching its decision. Appellant asserts any fair and logical decision of even one of the questions of fact should result in the planning commission’s decision being overturned. However, when considering in totality all questions of fact, appellant deems there is a preponderance of evidence that the interpretation of the Director Development Services on the methodology to determine FAR was flawed, illogical and inconsistent with the city’s advocating the passage of Measure Y.

Sincerely,

Robert Nigg, appellant.

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
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October 8, 2021

Mathew D. Francois
Rutan & Tucker, LLP
455 Market Street, Suite 1870
San Francisco, CA 94105

Dear Mathew D. Francois:

RE: Mountain View State Density Bonus Law Ordinance – Letter of Technical Assistance

The purpose of this letter is to provide technical assistance on the application of State Density Bonus Law (SDBL). (Gov. Code, § 65915.) The California Department of Housing and Community Development (HCD) has reviewed the recently updated density bonus ordinance adopted by the City of Mountain View (City) to evaluate the request for technical assistance set out in your letter dated June 21, 2021. HCD did not attempt a comprehensive review of the City's ordinance, including its compliance with recent changes to SDBL made in AB 2345 (Chapter 197, Statutes of 2021, § 2, eff. Jan. 1, 2021), and thus this letter ought not be interpreted as an endorsement of the ordinance in its entirety.

Your letter raises concerns about two specific provisions in the ordinance that you believe to be inconsistent with SDBL. You have requested that HCD review the ordinance and provide technical assistance. After reviewing your letter and the City's ordinance, HCD finds that the two provisions in the City's ordinance identified in your letter are not inconsistent with the SDBL. HCD's rationale and conclusions are described below.

Issue 1: Density Expressed Only in Floor Area Ratio (FAR)

In your letter, you assert that state law prohibits a local agency from regulating density purely via FAR. Rather, you state that local agencies must express density only in terms of dwelling units per acre. HCD disagrees with this interpretation for the following reasons.

First, this interpretation would unduly hamstring planning efforts by local agencies. FAR is a tool used by planning agencies to increase flexibility for applicants. HCD cannot

state categorically that FAR is not permitted as a measurement of density as well as intensity, so long as a city's regulatory scheme makes adequate explanation for each. Used appropriately, FAR offers flexibility in some cases, and actually fosters the development of certain kinds of housing, such as more, smaller units on a property, as opposed to a standard of dwelling units per acre.

Second, SDBL nowhere uses the phrase dwelling units per acre. It does speak of allowing a density bonus over the maximum allowable gross residential density. (Gov. Code, § 65915, subd. (f).) As you know, "Maximum allowable residential density" means:

> the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail.

(Gov. Code, § 65915, subd. (o)(4).) Often residential density is expressed in dwelling units per acre, and in other areas, such as commercial areas, FAR is utilized. There is nothing in law that mandates that a city adopt one or the other. In fact, 2019 legislation encourages use of a density bonus in the context of a FAR density for certain affordable projects associated with commercial development near transit. (See Gov. Code, § 65915.7; see also Gov. Code, § 65917.2.)

Twain Harte Associates, Ltd. v. County of Tuolumne (1982) 138 Cal.App.3d 664 does not appear to be contrary or even relevant. The court there did note that Government Code section 65302 requires that a general plan's land use element "shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." Notably; however, these terms are not contained in density bonus law. Further, there is nothing that precludes a city from adopting either dwelling units per acre or FAR-based zoning and complying with section 65302.[1]

[1] The general plan at issue there was so very spare that it provided no statement of population density for most of the areas, rendering it impossible for the county to properly plan for services. In some areas dwelling units per acre were provided, in other areas merely categories of land use provided. The court found this to be inadequate. The court concluded that the term population density and building density were not synonymous, but the court also held that the terms population density and dwelling units per acre were also not synonymous. The point of "population density" in this context was not so much a measure of land use control as a measure of people who might utilize an area of the city to allow appropriate planning. Dwelling units per acre might suffice if a "basis for correlation between the measure of dwelling units per acre and numbers of people is set forth explicitly in the plan" (*Twain Harte Associates, supra*, at pp. 698–699), but then FAR might suffice in the same circumstances. (See also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 511 (same, clarifying that the population density requirement in section 65302 is descriptive, not prescriptive or regulatory as might be utilized to control land use).

HCD considers that a local agency can utilize FAR or dwelling units per acre as a base measurement for setting out the maximum allowable gross residential density. Neither measure; however, can be utilized to avoid compliance with SDBL.

Issue 2: Floor Area Ratio (FAR) Waiver in the Context of the City's Floor Area Ratio (FAR) Bonus

In your letter you assert that—because SDBL explicitly includes FAR within the definition of the term "development standard" (Gov. Code, § 65915, subd. (o)(1))—a project must remain eligible for a FAR waiver even when an applicant is pursuing a FAR density bonus. HCD disagrees with this interpretation for the following reasons.

First, Mountain View's Density Bonus Law ordinance provides procedures for applying the SDBL in zones in which density is expressed in dwelling units per acre and in zones in which density is expressed only in FAR. The processes are nearly identical in each, except regarding the calculation of base density (Mount. View Mun. Code, § 36.48.75.j) and the consideration of FAR as a development standard. Per the local definition of development standard, FAR is considered a development standard "except in zones where floor area ratio defines the maximum allowable residential density…." (*Id.,* § 36.48.70.d.) By defining the development standard in this way, the City is eliminating the potential for an applicant to obtain a development standard waiver for FAR in a zone where density is expressed only in terms of FAR. Were the City to allow FAR waivers in these zones (i.e., within the San Antonio, El Camino Real, North Bayshore, or East Whisman Precise Plan Areas), the City would in effect be allowing unlimited FAR. Additionally, interpreting the law as you propose would result in FAR being both used as the measure of underlying density, a yardstick for determining how many affordable units and bonus units would be required, and a standard that is waived, resulting in confusion and absurdity. (Gov. Code, §§ 65915, 65917.) The City's approach is not inconsistent with SDBL in defining development standards this way for the purpose of a FAR bonus.

Second, while the SDLB does not address this potential scenario directly, the legislative intent of the original law and subsequent amendments do not express an intent to permit unlimited FARs in all zones in which density is expressed solely in terms of FAR. Development standard waivers (Gov. Code, § 65915, subd. (e)) are intended to facilitate the development of housing by waiving development standards that would preclude the construction of the development. They are intended to allow just enough relief from development standards to facilitate a development inclusive of the bonus units (regardless of the underlying expression of density in du/ac or FAR) but no more. Where the density of a site, as well as bonuses, are expressed in FAR, there is no need to waive FAR to get to the permitted density. In other words, even if FAR were a development standard in such as case, FAR by definition in such a case could not impede a development with bonus.

Finally, the base density formula described in Mountain View's Municipal Code provides a formula for calculating a density bonus in zones in which density is expressed in FAR. To perform the calculation, your client would need to submit a desired project floor area and desired number of residential units. From this, a base density can be established, and eligibility determined for up to a 50% density bonus pursuant to Government Code section 65915 subdivision (f). Alternatively, and pursuant to the same subdivision, your client may choose not to pursue a density bonus and instead request incentives/concessions and development standard waivers (excluding an FAR waiver) based on the percentage of affordable units to be included in the development.

If you have questions or need additional information, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,

Shannan West
Land Use & Planning Unit Chief

cc: Sandra Lee, City of Mountain View
Aarti Shrivastra, City of Mountain View

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
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August 31, 2022

David Martin
Community Development Director
City of Santa Monica
1685 Main Street
Santa Monica, CA 90401

Dear David Martin:

RE: 1101 Wilshire Boulevard – Letter of Technical Assistance

The purpose of this letter is to provide technical assistance to the City of Santa Monica (City) regarding the mixed-used infill project to be located at 1101 Wilshire Boulevard. The proposed project would result in the construction of a six-story, 93-unit mixed-use building containing ground floor restaurant/retail space and upper story market-rate and affordable housing units. The project would provide 11 units that would be affordable to very low-income (VLI) households and 82 market-rate units. The proposed project utilizes the State Density Bonus Law (SDBL) (Gov. Code, § 65915) to achieve a density bonus.

The City requested technical assistance from the California Department of Housing and Community Development (HCD) regarding the interpretation of the SDBL in the context of the proposed project. Specifically, the City seeks guidance on how to appropriately do the following:

- Calculate a density bonus for a project located in an area for which there is no associated residential density expressed in dwelling units per acre (du/ac).
- Consider a SDBL incentive/concession or development standard waiver that would increase a project's allowable floor area ratio (FAR) if the density bonus itself was granted in the form of additional FAR.

The project site is zoned Mixed-Use Boulevard (MUB), a zone which does not prescribe a density standard in terms of du/ac. Instead, development is regulated only through development standards – including, notably, FAR. This approach is commonly employed in downtown and mixed-used areas throughout the state where the community's primary concern is the height, bulk, and design of buildings rather than the absolute number of homes allowed on a given site.

The SDBL; however, only contemplates density bonus calculations in situations where the density standard is expressed in du/ac. This creates an implementation challenge

for local agencies that must devise a method for calculating a density bonus without detailed statutory guidance. Further complicating matters, downstream issues relating to incentives/concessions and waivers often arise depending on the method of calculation employed by the local agency.

The challenge of granting a density bonus in zones that do not express density in du/ac is particularly pressing because, as noted in the case of *Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1166 [159 Cal.Rptr.3d 284, 288], the SDBL "imposes a clear and unambiguous duty on municipalities to award a density bonus when a developer agrees to dedicate a certain percentage of the overall units in a development to affordable housing." HCD hopes that the content of this letter will help the City and other local agencies make informed decisions when carrying out their obligations under the SDBL.

Calculating Base Density for the Purposes of Granting a Density Bonus

The core of the SDBL intends for calculations to be made based on units, as evidenced by the numerous references to units throughout this section. Specifically, Government Code section 65915, subdivisions (b) and (f), rely on units to establish eligibility for a density bonus and in determining the density bonus owed. Therefore, regardless of the method used to calculate a project's base density, it should ultimately result in an exact number of base density units. This approach results in the most minor departure possible from the typical implementation of the SDBL.

The SDBL is currently silent on what methodology a local agency should use to establish base density absent a du/ac-based density standard. One approach observed by HCD involves the local agency utilizing a hypothetical base project, prepared by the applicant, that meets all objective development standards to determine the base density (i.e., the precise number of units). Once the base density is established, the density bonus (in units) can be determined as it normally would. Correspondingly, the local agency's consideration of incentives/concessions and development standard waivers can occur as normal. Note that applications made pursuant to Government Code section 65917.2, which provide for a FAR bonus in lieu of a density bonus, are discussed below.

Incentives/Concessions and Development Standard Waivers to Increase FAR in Circumstances where Density Bonus is Granted in the Form of Additional FAR

A common occurrence when a local agency grants a "density bonus" in the form of increased FAR is that the applicant will then request an incentive/concession or development standard waiver to further increase the project's FAR. The complication that this creates is one of the fundamental reasons why HCD recommends that local agencies avoid this practice. By utilizing du/acre-based density bonuses instead of FAR-based "density bonuses", a local agency can avoid the "unlimited FAR" conundrum

examined in HCD's October 2021 letter to Mountain View.[1] This approach renders moot the question of whether a project is eligible for a concession or waiver to increase FAR because using du/ac instead of FAR for density bonuses limits the role of FAR solely to that of a development standard. Regarding the pending subject project, HCD recommends that the local agency carefully evaluate and accommodate the request for additional FAR, as an incentive/concession or waiver, if doing so would facilitate the successful development of the project.

FAR Bonus in Lieu of Density Bonus (Gov. Code, § 65917.2)

Government Code section 65917.2 allows a local agency to grant a FAR bonus in lieu of a density bonus awarded on the basis of du/ac.[2] This action is legally distinct from the granting of a density bonus pursuant to Government Code section 65915. The contents of this letter pertain only to projects proposed under Government Code section 65915. Often confused, these two sections have fundamentally different purposes and functions. First, whereas section 65915 applies in all jurisdictions (regardless of whether the local agency has adopted an implementing ordinance), section 65917.2 applies only in jurisdictions where the local agency has chosen to adopt an implementing ordinance. Second, section 65917.2 contains unique eligibility and other requirements that are not found in section 65915. Finally, the application of section 65915 results in additional units whereas the application of section 65917.2 results in additional floor area (which may or may not be used to construct more units). It should be noted that HCD is not aware of any local agencies that have adopted an ordinance to implement section 65917.2, though local community benefit zoning strategies that allow a project to receive increased FAR in exchange for public amenities are relatively common.

Santa Monica Housing Element Site Inventory

While the City continues to process the proposed project application, HCD reminds the City that the 93-unit proposed project appears in the City's draft 6th Cycle Housing Element (adopted October 12, 2021) in the "Approved and Pending Housing Projects" table[3], which states that the project contains 82 market-rate units and 11 VLI units.

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[1] HCD's October 2021 letter to Mountain View addressed two specific issues:
1. Whether state law prohibits a local agency from regulating density purely via FAR. (It does not. In this letter to the City of Santa Monica, HCD's technical assistance is more specifically about how to calculate a density bonus in such a zone.)
2. An FAR waiver in the context of the City of Mountain View's FAR Bonus.

The letter is available at https://www.hcd.ca.gov/community-development/housing-element/docs/sclmountainview-TA-100821.pdf.

[2] Section 65917.2 provides a formula to calculate an FAR bonus, but it requires as an input a du/ac figure (Gov. Code, § 65917.2, subd. (b)(2)).

[3] Page F-36 of Appendix F

The project is also listed in the "FAR and Size of Sites for Past and Current Housing Projects" table[4], where the project is described as a six-story 93-unit project. This suggests that the City is prepared to permit the project as proposed.

Conclusion

HCD respects the challenges inherent in infill development and applauds the construction of a mixed-income development on a site currently without any residential uses. Regarding other currently pending SDBL projects, HCD advises that the contents of this letter not be used to delay or otherwise unnecessarily complicate a project currently moving through the entitlement process. Local agencies should be pragmatic in their considerations of SDBL applications that provide much needed affordable and market-rate housing throughout California. "Although application of the statute can be complicated, its aim is fairly simple: When a developer agrees to construct a certain percentage of the units… for low or very low-income households… the city or county must grant the developer [concessions and a bonus]."[5]

If you have questions or need additional information, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,

Shannan West
Housing Accountability Unit Chief

[4] Page F-38 of Appendix F
[5] *Friends of Lagoon Valley v. Vacaville* (2007) 154 Cal.App.4th 807, 824 [65 Cal.Rptr.3d 251, 264].

4. Duplexes shall only be permitted in the RD 8 zone on lots with a lot area of ten thousand square feet or greater.

C. *Transitional and Supportive Housing.* Transitional and Supportive Housing shall be permitted in all residential zones subject to the same development standards as the same type of housing in that zone.

(Ord. 2010-05, § 1(exh. A), 2010; Ord. 2011-06, §§ 1, 2, 2011; Ord. 2013-003, §§ 2, 3, 2013; Ord. 2016-001, §§ 4, 5, 2016; Ord. 2017-009, § 1, 2017; Ord. 2019-013, § 1—4, 2019; Ord. 2020-006, §§ 1—3, 2020; Ord. 2021-001, § 2, 2021; Ord. 2022-010, §§ 4—6, 7-19-2022; Ord. 2023-001, §§ 1, 2, 2023.)

20.04.040 - Development standards.

A. *General standards.* Table 20.04-3 identifies development standards that apply to all lots and structures located in single-family residential zoning district. Table 20.04-4 identifies development standards that apply to all lots and structures located in multifamily residential zoning district.

B. *Additional development standards.* The following additional standards apply to lots and structures located in residential zoning districts:

TABLE 20.04-3 DEVELOPMENT STANDARDS FOR SINGLE-FAMILY RESIDENTIAL ZONING DISTRICTS

EXPAND

Item	Zoning Districts				Additional Standards
	RD 1	RD 2	RD 4.5	RD 8	
Site Requirements					
Lot Area, Minimum	1 acre	20,000 sq. ft.	7,200 sq. ft.	4,500 sq. ft.	
Lot Width, Minimum	100 feet	100 feet	60 feet	50 feet	Section 20.04.040.B.1, 2 and 3
Lot Depth, Minimum	100 feet	100 feet	100 feet	90 feet	Section 20.04.040.B.1
Density, Maximum	1 du/acre	2 du/acre	4.5 du/acre	8 du/acre	
Lot Coverage, Maximum	25%	25%	60%	60%	
Floor Area Ratio, Maximum	.20	.30	.50	.55	

TABLE 20.05-2

EXPAND

Item	Zoning District		Additional Standards
	MU 20	MU 30	
Site Requirements			
Lot Area, Minimum	10,000 sq. ft.		
Lot Width, Minimum	80 feet		Section 20.05.040.B.2
Density , Maximum	20 DU/AC	30 DU/AC	
Off-Street Parking and Loading	See Chapter 20.18 (Parking)		
Building Requirements			
Building Setbacks, Minimum			
Front	0 feet		Section 20.05.040.B.5
Street Side	0 feet		Section 20.05.040.B.3 and 5
Maximum Lot Coverage	80%		
Floor Area Ratio (FAR)	1.0	1.5	
Building Height, Maximum			
Stories	3	4	
Feet	45 feet	55 feet	Section 20.05.040.B.1

B. *Additional development standards.* The following additional standards apply to lots and structures located in mixed use zoning districts:

1. All commercial floor space provided on the ground floor of a mixed use building must have a minimum floor-to-ceiling height of eleven feet.
2. All commercial floor space provided on the ground floor of a mixed use building must contain the following minimum floor area:

   a.

1. Development standards. Residentially zoned properties within the downtown overlay district shall comply with the development standards in Table 20.09-3.
2. General regulations. The design and development of residentially zoned property shall comply with the requirements of Table 20.09-3, Development Relations for Residentially Zoned Properties in Downtown Overlay District.
3. Siting and Orientation. New street curb cuts on lots with alley access are discouraged and shall require approval by the director of community development and the city engineer.

TABLE 20.09-3 DEVELOPMENT REGULATIONS FOR RESIDENTIALLY ZONED PROPERTIES IN DOWNTOWN OVERLAY DISTRICT

EXPAND

Feature	Standard	Additional Regulations
Site Requirements		
Minimum Lot Area:	4,500 sq. ft.	
Minimum Lot Width:	50 ft.	
Minimum Lot Depth:	90 ft.	
Maximum Density (Dwelling Units Per Adjusted Gross Acre):	8 DU/AC	
Maximum Lot Coverage:	45%	
Maximum Floor Area Ratio:	0.55	
Minimum Front Yard Landscape Coverage:	50%	Chapter 20.19
Off-Street Parking and Loading:		
Primary Dwelling Unit	2 Garage Spaces	Chapter 20.18 and Note 1
Accessory Dwelling Unit	Per Chapter 20.18	Section 20.11.020
Refuse Storage and Recycling:	Per Chapter 20.10.060	
Building Requirements		

CITY COUNCIL MEETING April 6, 2023

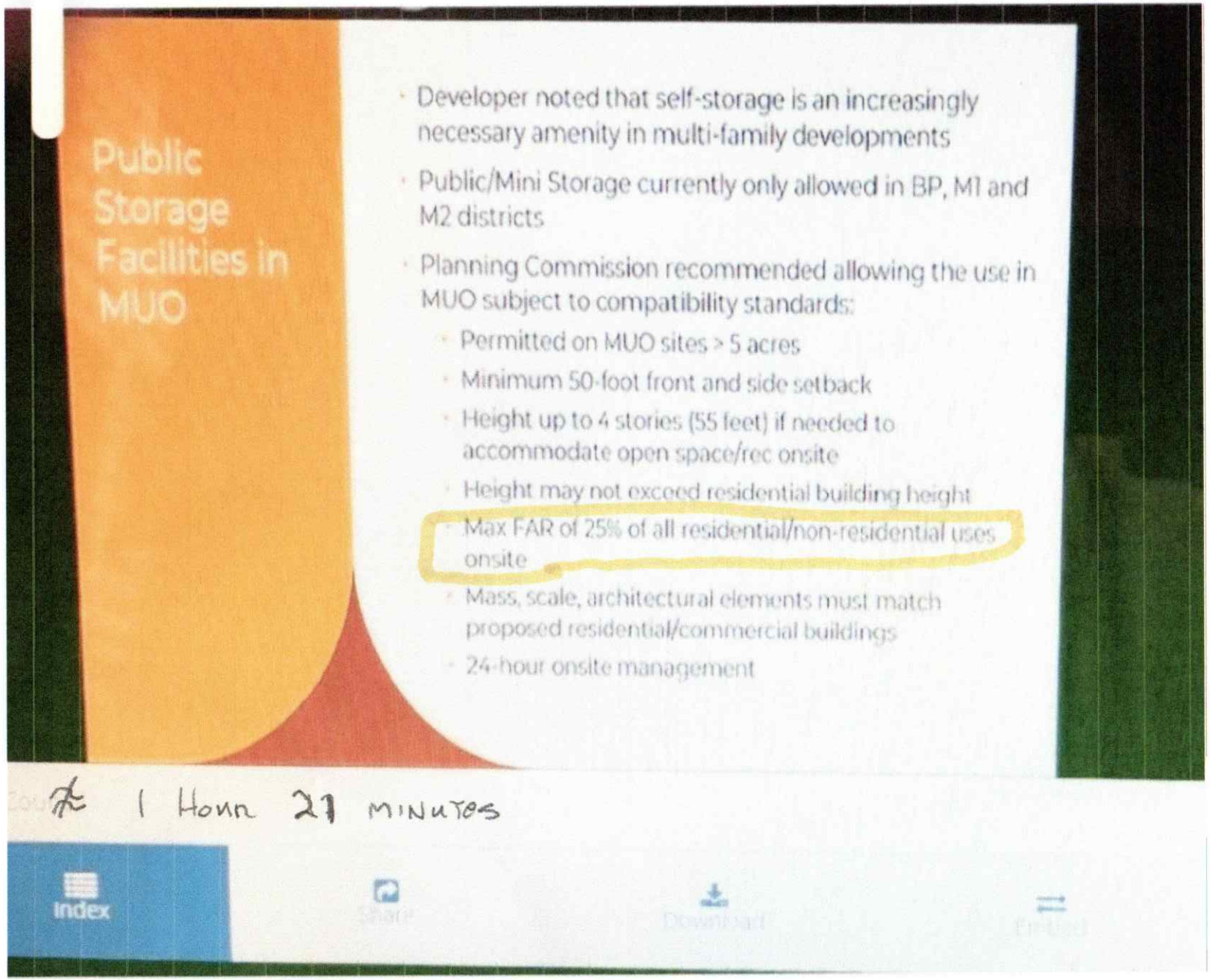

TABLE 20.09-7

Feature	Standard	Additional Regulations
Site Requirements		
Minimum Lot Area	10,000 sq. ft.	
Minimum Lot Width	100 feet	
Maximum Lot Coverage	80%	
Maximum Floor Area Ratio (non-residential space)	1.0	Note 1
Minimum Landscape Coverage	15%	See Chapter 20.19
Refuse Storage and Recycling		See Chapter 20.10.060
Building Form and Location		
Maximum Building Height	50 feet	Note 2
Minimum Setbacks (ft.):		
Front	10 feet; 15 feet if ground floor is residential	Notes 3 and 5
Rear	10 feet; 15 feet adjacent to a Residential District	See also subsection (G)(1).
Interior Side	0 feet; 10 feet adjacent to a Residential district	
Street Side	10 feet	Notes 3, 4, and 5
Minimum Building Separations	15 feet	
Other Requirements		
Off-street parking and loading for non-residential uses		See Chapter 20.18
Street curb cuts		Note 6

Notes:

[1] Additional FAR is allowed up to 1.25 in mixed use development with affordable rental units. The amount of additional FAR shall be calculated based on the increase in density allowed for qualifying projects meeting affordable housing criteria. For example, if a project receives a one unit per acre increase in density, then it receives a 0.0625 increase in allowable FAR.

[2] Additional height is allowed up to 55 feet for lots with 100 feet of street frontage to enable provision of sloped roofs and common open space for recreational facilities. The upper story above 40 feet shall be setback back an additional seven feet from the interior property line if the project is adjacent to a Residential zoning district.

[3] A minimum 15 feet of front and street side setback shall be provided along primary and secondary arterial streets. A reduced front setback may be allowed on the following streets: Riverside, Central, and Euclid.

[4] A minimum 20-foot setback must be provided for garages and carports facing a street.

[5] Open or covered porches may be constructed in the front and street side setbacks to encroach no closer
than 12 feet to the front property line and 5 feet to the street side property line.

[6] New street curb cuts are not allowed on lots with alley access unless approved by the director of development services and the city engineer to accommodate for affordable housing units.

1. *Required side and rear yards for residential uses.* In order to provide light and air for residential units and additional separation for rooms that contain areas that require additional privacy considerations, the following minimum setbacks shall apply to any building wall containing windows and facing an interior side or rear yard. The required setbacks apply to that portion of the building wall containing and extending three feet on either side of any window.
    a. For any wall containing living room or other primary room windows, a setback of at least fifteen feet shall be provided.
    b. For any wall containing sleeping room windows, a setback of at least ten feet shall be provided.
    c. For all other walls containing windows, a setback of at least five feet shall be provided.
2. *Required building wall on designated streets.* Along Riverside Drive and Central Avenue south of Highway 60, building walls shall be constructed along or within ten feet of the front property line for a minimum of seventy percent of the primary street frontage and forty percent on secondary street frontages. This requirement may be waived by the director of development services upon finding that:
    a. Ground-floor residential uses are proposed, a minimum fifteen-foot setback is proposed, and substantial landscaping will be located between the build-to and ground-floor residential units as a buffer;
    b.