

Agenda Report

September 27, 2021

TO: Honorable Mayor and City Council

FROM: Planning & Community Development Department

**SUBJECT: CALL FOR REVIEW OF THE BOARD OF ZONING APPEALS'
DECISION OF ZONING ADMINISTRATOR DETERMINATION #54
141 SOUTH LAKE AVENUE**

RECOMMENDATION:

It is recommended that the City Council:

1. **Overturn** the Board of Zoning Appeals' decision and **uphold** the Zoning Administrator's Determination that an affordable housing concession or incentive cannot be granted for modifications of use restrictions; or
2. Alternatively, **uphold** the Board of Zoning Appeals' decision and **overturn** the Zoning Administrator's Determination based upon the information received in this report and the call for review discussion.

EXECUTIVE SUMMARY:

This call for review is in response to a Board of Zoning Appeals decision regarding a Zoning Administrator's determination stating that Affordable Housing Concession Permit #11907 cannot be processed because the application is requesting a concession from a use restriction which is not a development standard.

BACKGROUND:

What is before the City Council is the call for review of a Board of Zoning Appeals decision regarding a determination on the part of the Zoning Administrator that an affordable housing concession or incentive cannot be granted for a modification of a use restriction, because a use restriction is not a development standard.

On June 17, 2019, the applicant, Odyssey Development Services, submitted Affordable Housing Concession Permit (AHCP) #11907 to facilitate the construction of a new 5-story mixed-use development with 89 residential units and 9,000 square feet of commercial area. The application requests one affordable housing concession to

deviate from Zoning Code Section 17.30.030.C.2.b, which states that along Lake Avenue: *"ground-floor housing is prohibited, and housing shall not occupy more than 50 percent of total building floor area along Lake Avenue from Green Street south to California Boulevard, to maintain the commercial retail and service character of the South Lake Shopping Area. Housing is allowed on upper floors and adjacent parcels to stimulate and activate the area."* The requested concession would allow housing to occupy more than 50 percent of the project's gross floor area on the eastern portion of the site (along Lake Avenue).

On September 26, 2019, a letter was issued to the applicant stating that AHCP #11907, to deviate from Section 17.30.030.C.2.b, could not be processed since the concession was seeking to modify a use restriction located under Section 17.30.030 (CD District Land Uses and Permit Requirements); this section specifically governs land uses within the Central District. Section 17.30.040 (CD General Development Standards) specifically governs development standards applicable to projects within the Central District. The letter further explained that Section 65915 of California Government Code Section Chapter 4.3 (Density Bonus and Other Incentives) defines "concessions or incentives" as reductions in development standards or modifications of zoning code requirements related to building standards. The provisions in Section 17.30.030 of the Zoning Code are neither development standards nor are they zoning code requirements related to building standards. Therefore, the Zoning Administrator found that State law does not require that the City grant a concession or incentive to modify uses.

Lastly, the letter explained that the Pasadena Zoning Code prohibits the request of a Variance from this use restriction, as Section 17.60.080.A.2.a of the Zoning Code provides that *"the power to grant Variances does not extend to allowable land uses and the notes on the land-use tables. In no case shall a Variance be granted to allow a use of land or structure not otherwise allowed in the zoning district in which the subject property is located."*

The letter concludes that either the project must be redesigned to comply with Zoning Code Section 17.30.030.C.2.b, or the applicant must withdraw AHCP #11907.

On September 30, 2019, the applicant filed an appeal of the letter, which the applicant believed constituted a determination on the applicability of a provision of the Zoning Code and therefore eligible for appeal. In the request for appeal application, the applicant stated that the Zoning Administrator's determination was in error and violated the State Density Bonus Law.

On October 4, 2019, the City issued a refund for the fee paid for the appeal. The City stated that the letter issued on September 26, 2019 was un-appealable as it was reiterating the Zoning Code and not providing an interpretation of the Zoning Code.

On October 23, 2019, the applicant filed a lawsuit against the City in the Los Angeles County Superior Court to contest the Zoning Administrator's decision, the determination

that no appeal was possible, the City's Affordable Housing Concession Permit process, and other issues regarding the City's interpretation of State Density Bonus Law.

On March 19, 2021, the Court determined that the applicant had a right under the Municipal Code to an appeal of the Zoning Administrator's decision and issued a writ of mandate ordering the City to process the appeal of the Zoning Administrator's determination. The Court did not issue a decision on any of the other claims. On March 23, 2021, the applicant submitted an appeal from the Zoning Administrator's determination that a concession from Section 17.30.030.C.2.b is not available.

On June 17, 2021, the Board of Zoning appeals heard the appeal at a scheduled public meeting, at which time, a motion was made to overturn the Zoning Administrator's Determination that Section 17.30.030.C.2 regulates a use restriction. The Board of Zoning Appeals determined that Section 17.30.030.C.2 regulates a development standard and therefore an affordable housing concession or incentive can be requested to deviate from Section 17.30.030.C.2, and the appellant may proceed with Affordable Housing Concession Permit #11907. The motion resulted in a 3-1 vote of the members present. As a result, action was taken to overturn Zoning Administrator Determination #54.

ANALYSIS:

Density Bonus Law

State density bonus law (SDBL) (Government Code Section 65915) was first adopted in 1979, and since 2017 has been amended every year to increase the benefits provided to developers and to make denial of density bonus projects by local governments increasingly difficult. SDBL is based on the principle that absent modifications of local planning requirements, the private market will not produce units at affordability levels below market-rate. SDBL is structured such that a project is entitled to additional density beyond local regulation based on the amount of affordable housing included in the project, as well as the level of affordability of those units.

In addition to the increased density, SDBL also enables a developer to request concessions and incentives in order to offset the additional cost of providing the affordable units. These concessions typically take the form of increased height or floor area ratio beyond existing development standards, and can also include deviations from setback, open space, and parking requirements. According to SDBL, in order for a local jurisdiction to deny a request for a concession, it must demonstrate either that the requested concession does not result in identifiable cost savings to provide for affordable housing; that the concession violates federal or state law; or that the concession would have a significant adverse impact on health, safety, the physical environment, or a project listed in the California Register that cannot be mitigated.

Section 65915 of California Government Code Section Chapter 4.3 (Density Bonus and Other Incentives) defines "concessions or incentives" as either (as relevant here):

- (1) *A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).*
- (2) *Other regulatory incentives or concessions proposed by the developer or the city...that result in identifiable and actual cost reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c). (Gov't Code Section 65915(k)(1), (3))*

Furthermore, State Law defines “development standard” to include:

a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.

Zoning Code Section 17.030.040 - CD General Development Standards

Zoning Code Section 17.30.040 establishes the general development standards that subdivisions, new land uses and structures, and alterations to existing land uses and structures, are required to be designed, constructed, and established in compliance with. These requirements are listed in Table 3-2, and include standards for maximum density, setbacks, height limit, maximum floor area ratio (FAR), and parking. AHCP #11907 does not request a concession to deviate from any these development standards.

Zoning Code Section 17.030.030 - CD District Land Uses and Permit Requirements

Zoning Code Section 17.030.030 establishes the land uses allowed within the Central District and applicable land use permits. Furthermore, Section 17.030.030.C limits residential development in selected areas of the Central District, where a nonresidential character or existing shopping areas are to be emphasized and supported, or where high traffic volumes detract from housing compatibility.

Figure 3-4 (Central District Housing/Ground Floor Map) breaks down the Central District into six areas and specifies where residential development is allowed and any

limitations. Specifically, per Section 17.030.030.C2.b, on Lake Avenue, ground-floor housing is prohibited, and housing shall not occupy more than 50 percent of total building floor area for buildings located along Lake Avenue from Green Street south to California Boulevard, to maintain the commercial retail and service character of the South Lake Shopping Area. Housing is allowed on upper floors and adjacent parcels to stimulate and activate the area.

The project site consists of two parcels, 134 S. Hudson Ave and 141 S. Lake Ave, with a total site area of approximately 55,405 square feet. The site has frontages along Lake Avenue on the east and Hudson Avenue on the west, and is located between Cordova Street and Green Street, within the CD-5 (Central District Specific Plan, Lake Avenue Subdistrict) zoning district. A location map is included as Attachment F for reference.

The project site is located within two separate Central District Housing areas (Area 1 and 3) as shown in Figure 3-4 (Attachment E). The western portion, with frontage along Hudson Avenue, is located within Area 1 and allows housing without limitation. The maximum permitted density on this portion of the site is 60 dwelling units per acre. Based on the lot area of 33,181 square feet, a maximum of 46 base units is permitted within the western portion of the site.

The eastern portion, with frontage along Lake Avenue, is located within Area 3 of Figure 3-4, which does not allow any housing on the ground floor and limits housing to no more than 50 percent of the total building floor area. The maximum permitted density on this portion of the site is 48 dwelling units per acre. Based on the 22,225 square-foot lot area, a maximum of 25 base units is permitted within the eastern portion of the site. Furthermore, the maximum permitted floor area ratio on the eastern portion is 2.75, resulting in a maximum allowable building size of 61,119 square feet. Pursuant to Section 17.30.030.C.2.b, housing is limited to a maximum of 30,559 square feet (50 percent of the total gross floor area in the eastern portion) and not allowed on the ground floor.

The AHCP project proposes a building area totaling 61,118 square feet in the eastern portion, including 9,000 square feet of commercial use and 52,118 square feet of residential use (85 percent of the total gross floor area), exceeding the 50 percent housing use limit allowed by the Zoning Code.

Affordable Housing Concession Permit #11907

Affordable Housing Concession Permit (AHCP) #11907 is a request to allow the development of a new 5-story mixed-use development with 89 residential units and 9,000 square feet of commercial space. The application requests one affordable housing concession to allow residential use to occupy more than 50 percent of the project's gross floor area on the eastern portion of the site (fronting on Lake Ave).

As discussed above, the project site is located within into two separate Central District Housing areas (Area 1 and 3) pursuant to Zoning Code Section 17.030.030.C (CD

District Land Uses and Permit Requirements) and Figure 3-4 Central District Housing/Ground Floor Map). Additionally, pursuant to Zoning Code Section 17.30.040 (CD General Development Standards), the two areas are subject to different development standards as shown in the table below:

	Hudson Ave (Area 1)	Lake Ave (Area 3)
Lot Area	33,181 square feet	22,225 square feet
Density	60 du/acre= 46 units	48 du/acre= 25 units
Floor Area Ratio (FAR)	2.0	2.75
Height	50' (65')	75' (90')
Front Setback	10'	0'

Based on the density permitted for each area and their respective lot size, a maximum of 71 units are permitted for the entire site. In order to develop the site with additional residential units, a density bonus is being requested.

The density bonus section of the Zoning Code (Section 17.43.040) permits an increase in the number of units permitted on the site, without discretionary approval, provided a specified percentage are designated as affordable units. In this case, the maximum number of units permitted on the property under the base zoning is 71 dwelling units. Per Table 4-3 of the City's Zoning Code, designating 7 percent of the allowed base units (i.e., five units) as very low-income would permit a density bonus of 25 percent (i.e., 18 units), for a total of 89 dwelling units. The proposed 89 dwelling units are within the maximum permitted number of units with the provision of the five very low-income units. (The City's inclusionary ordinance will require additional affordable units.)

Zoning Code Section 17.43.050, consistent with California State Law, permits a project that is utilizing a density bonus increase to request concessions, or deviations, from an applicable development standard, provided the concessions result in identifiable and actual cost reductions to provide for affordable housing costs or for rents for the targeted units. Per Section 17.43.050 of the Zoning Code, this request is processed through the Affordable Housing Concession Permit. Since the proposed project includes at least five percent of the units for very low-income households, the project may request one concession.

The concession requested with this application is to deviate from the requirement of Section 17.030.030.C.2.b and allow residential use to occupy more than 50 percent of the project's gross floor area on the eastern portion of the site (Lake Ave). As previously discussed, it is the Zoning Administrator's determination that Section 17.030.030 of the Zoning Code establishes the land uses allowed within the Central District and applicable land use permits and not development standards.

Zoning Administrator's Determination

In response to the submittal of AHCP #11907, on September 26, 2019, a letter was sent to the applicant stating that AHCP #11907 to deviate from Section 17.30.030.C.2.b cannot be processed. Section 17.30.030 (CD District Land Uses and Permit Requirements) specifically governs land uses, such as residential versus non-residential uses, within the Central District, whereas Section 17.30.040 (CD General Development Standards) specifically governs development standards applicable to projects within the Central District, such as density, maximum floor area ratio, height limit, or parking.

In other words, the project complies with the overall maximum permitted floor area and height limitations, however it does not comply with the amount of floor area dedicated to residential use. The Zoning Code limits the amount of residential use along Lake Avenue to support Lake Avenue as a commercial corridor within the Central District Specific Plan.

The letter explains that Section 65915 of California Government Code Section Chapter 4.3 (Density Bonus and Other Incentives), as discussed above, defines "concessions or incentives" as reductions in development standards or modifications of zoning code requirements related to building standards. The provisions in Section 17.30.030 of the Zoning Code are neither development standards nor are they zoning code requirements related to building standards. Therefore, the Zoning Administrator found that State law does not require that the City grant a concession or incentive for a modification of permitted uses.

The letter further explains that the Pasadena Zoning Code prohibits the request of a Variance from this regulation, as Section 17.60.080.A.2.a of the Zoning Code provides that *"the power to grant Variances does not extend to allowable land uses and the notes on the land-use tables. In no case shall a Variance be granted to allow a use of land or structure not otherwise allowed in the zoning district in which the subject property is located."*

Appeal

The applicant has filed an appeal of the letter determining that a concession cannot be processed to allow housing use to occupy more than 50 percent of the building gross floor area. In the request for appeal application, the applicant states only that the Zoning Administrator's determination was in error and violates the State Density Bonus Law.

If the appeal is granted, AHCP #11907 would be allowed to be processed. Specifically, the applicant would be able to request a concession to include 52,118 square feet of residential use in the eastern portion of the site, where the maximum allowed residential use is 30,559 square feet.

As proposed, the concession would result in additional housing units; this would be analyzed via the AHCP application through the preparation of a pro-forma and financial analysis to determine if the additional units result in cost reductions to provide for affordable housing.

June 17, 2021 Board of Zoning Appeals Meeting

During the June 17, 2021 Board of Zoning Appeals Meeting, members of the Board of Zoning Appeals discussed at length the Zoning Administrator's determination, Section 17.30.030 (CD District Land Uses and Permit Requirements), specifically Section 17.30.030.C.2.b, and Section 17.30.040 (CD General Development Standards).

One member of Board of Zoning Appeals, provided background regarding Section 17.30.030.C.2.b and indicated that the requirement was put in place in the Central District Specific Plan (2004) to provide a 50% limitation on residential uses as a way to maintain the commercial character and use of certain areas, such as segments of Lake Avenue. It was further stated that this provision was created, with community input, to delineate the character and use of a certain area. In this commentary, Section 17.30.030.C.2.b was considered a use restriction.

Another member of the member of Board of Zoning Appeals detailed two possible interpretations of Section 17.30.030.C.2.b; a broad and narrow interpretation. The broad interpretation of the Zoning Code would be placing a housing development cap on the entirety of Area 3. The Central District Specific Plan refers to maintaining the commercial shopping character of the South Lake area, not a single parcel or building. If interpreted this way, as explained, some projects may be permitted with more housing and others with less as long as the cumulative amount is not exceeded and the ground floor restricted to pedestrian-oriented retail or service uses. The narrow interpretation of the Zoning Code, as explained by the same member of the Board of Zoning Appeals, would be placing a restriction on the amount of housing permitted on each and every parcel, as done in the Zoning Administrator's determination. However, it was further stated that to exceed the 50% square footage for housing, contrary to what was in the Zoning Administrator determination, would not require a 'land use variance'. It was stated that the determination confused the definition of a land use, which refers to a category of human activity, with a development standard, the physical modification of the environment in terms of size and location. Furthermore, it was stated that the determination failed to consider the City's own distinction between the two. Section 17.30.040 lists on Table 3-2, the Central District General *Development Standards* [emphasis added]. Under the category of "Residential uses," it calls out "Standards applicable to residential uses where allowed in nonresidential districts," which includes by reference the 50% limitation (Section 17.30.030.C.2.b), a development standard in Area 3. It was further stated that denying the project to apply for an AHCP to exceed the 50% limitation on housing is contrary to the City's and State's Density Bonus laws. That a density bonus concession serves as a type of variance in development standards 'by right,' as a performance incentive to encourage more affordable housing in California. It was also mentioned that the applicant was not proposing to change the land use (e.g.

to industrial) nor produce units on the pedestrian-oriented ground floor, but instead to increase the intensity of housing on upper floors, without exceeding other development standards. The commissioner detailed that per State law, a concession may be "modifications of zoning code requirements related to building standards." In compliance with State law, under Section 17.43.040, "Density Bonus Allowance," among concessions the number of dwelling units permitted per acre or the building height (the vertical plane) may be exceeded, which increase physical intensity. It stands to reason the percentage of square footage (the horizontal plane), a development standard per the Zoning Code correlated with the production of habitable space, would also be permitted to be increased as an incentive. Thus, if the Code section is read in the narrowest sense, then the determination was also in error and did not comply with City and State regulations. In concluding statements, the member of the Board of Zoning Appeals stated that "I cannot support the Zoning Administrator's determination that increasing the square footage dedicated to housing beyond 50% is not an admissible concession. I support what is before us this evening, that the applicant may indeed apply for an affordable housing concession permit to seek the requested concession".

One member of the Board of Zoning Appeals stated that the 50 percent limitation on residential use is a development standard, similar to a vertical height deviation or floor area ratio standard. Another member of the Board of Zoning Appeals also indicated that based on the City's definition of "use" and "development", the use of the proposed building are both commercial and residential and that the issue at hand is a site condition or construction condition and therefore a development standard. It was further stated that the applicant should be allowed to pursue an affordable housing concession permit.

At the conclusion of discussion, a motion was made to overturn the Zoning Administrator's Determination that Section 17.30.030.C.2 regulates a use restriction. The motion resulted in a 3-1 vote of the members present. As a result, action was taken to overturn Zoning Administrator Determination #54. The Board of Zoning Appeals determined that Section 17.30.030.C.2 regulates a development standard and therefore an affordable housing concession or incentive can be requested to deviate from Section 17.30.030.C.2, and the appellant may proceed with Affordable Housing Concession Permit #11097.

No public comments were received prior to or during the Board of Zoning Appeals meeting. The appellant submitted a letter to the Board of Zoning Appeals prior to the meeting, and the correspondence is attached to this staff report as Attachment B.

CONCLUSION:

It is staff's assessment, after hearing the Board of Zoning Appeals' discussion, that the deviation requested as part of Affordable Housing Concession Permit #11907 is a deviation on the use of the building, and not a deviation on the development of the

property. As such, staff is of the opinion that the Zoning Administrator's determination stands, and Affordable Housing Concession Permit #11907 cannot be processed.

RECOMMENDATION:

It is recommended that the City Council:

1. **Overturn** the Board of Zoning Appeals' decision and **uphold** the Zoning Administrator's Determination that an affordable housing concession or incentive cannot be granted for modifications of use restrictions; or
2. Alternatively, **uphold** the Board of Zoning Appeals' decision and **overturn** the Zoning Administrator's Determination based upon the information received in this report.

FISCAL IMPACT:

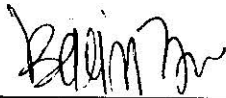
The recommended actions will have no immediate fiscal impact.

Respectfully submitted,



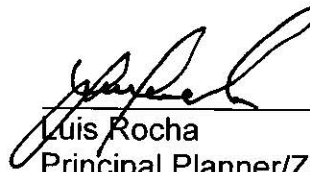
DAVID M. REYES
Director of Planning & Community
Development

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Concurred by:



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Principal Planner/Zoning Administrator

Approved by:



STEVE MERMELL
City Manager

Attachments: (6)

- Attachment A – Board of Zoning Appeals' Decision Letter dated June 21, 2021
- Attachment B – Applicant's Correspondence to Board of Zoning Appeals dated June 15, 2021
- Attachment C – Zoning Administrator's Determination dated September 26, 2019
- Attachment D – Appeal Application dated March 23, 2021
- Attachment E – Figure 3-4 - Central District Housing/Ground Floor Map
- Attachment F – Location Map