MEMORANDUM

TO:	City of Albany Planning Board
CC:	Zach Powell, AICP, Senior Planner, Department of Planning & Development
FROM:	Martha Mahoney, Esq., Assistant Corporation Counsel, Department of Law
RE:	Applicability of affordable housing requirements to private developer applicant seeking to construct a new dormitory at 1415 Washington Avenue
DATE:	October 22, 2021

Inquiry

Provide Planning Board members with a memorandum outlining the City of Albany's affordable housing requirements and discussing how the requirements may apply to a developer's proposed project to construct a new private dormitory and considerations for permitting a developer to subcontract such requirements to a third party, if applicable.

Governing Authority: Affordable Housing Requirements

In 2017, the City of Albany ("City" or "City of Albany") adopted the Unified Sustainable Development Ordinance ("USDO") to regulate land use and development within the City and promote sustainable and equitable economic development.

USDO § 375-401(4)(b) establishes affordable housing requirements for certain projects (hereinafter "Affordable Housing Statute" or "Statutory Requirements").[1] Specifically, § 375-401(4)(b) requires that "each new residential or mixed-use development or redevelopment containing 50 or more new dwelling units shall sell or rent at least 5% of its new dwelling units at sales or prices affordable to persons earning no more than 100% of the area median household income for the City of Albany, as determined by affordability methods used by the United States Department of Housing and Urban Development."[2]

Subsequent to the 2017 enactment of § 375-401(4)(b), the City adopted the USDO Affordable Housing Guidelines ("Affordable Housing Guidelines" or "Guidelines") for the purpose of implementing the Affordable Housing Statute.[3] The Guidelines state that § 375-401(4)(b) "established the City's policy for inclusionary housing, but it did not include detailed instructions for administration."[4] As a result, the Guidelines were adopted. The Guidelines

[1] The "Affordable Housing Statute," codified at Albany City Code § 375-401(4)(b), is affixed hereto as "Exhibit A."
[2] Albany City Code § 375-401(4)(b).
[3] The "Affordable Housing Guidelines" are affixed hereto as "Exhibit B."
[4] USDO Affordable Housing Guidelines § 2.

discuss compliance standards, income and occupancy requirements, administration, enforcement and penalties, and other practical considerations for implementation.

In addition to the Statutory Requirement and implementing Guidelines, the City created an Affordable Housing Compliance Plan ("Affordable Housing Compliance Plan" or "Compliance Plan").[5] The purpose of the Compliance Plan is for the owner or developer of a project that includes fifty or more dwelling units to acknowledge the applicability of the Statutory Requirements and Guidelines and to set forth detailed plans for compliance. The Compliance Plan states that affordable housing units created pursuant to 375-401(4)(b) shall be "provided in proportion to the sizes of market rate units included in the development; [and] physically integrated with the rest of the development . . . [with] no visible exterior indications that units are affordable housing units, such as an alternate entrance."[6]

Thus, there are three instructive sources for analyzing the City's Affordable Housing requirements: the plain language of the Affordable Housing Statute under § 375-401(4)(b), the implementing Guidelines, and the Compliance Plan (collectively referred to as the "Affordable Housing Requirements").

Analysis: Affordable Housing Requirements Applicability to 1415 Washington Ave.

The issue is whether the City's Affordable Housing Requirements apply to the 1415 Washington Ave. project, currently pending Development Plan Review before the Planning Board.

The City's Affordable Housing Statute under § 375-401(4)(b) applies to "new residential or mixed-use development or redevelopment containing 50 or more new dwelling units." Here, the Master Application submitted by the 1415 Washington Ave. applicant described the proposed project as including demolishing an existing 95-room hotel in a MU-CU district to construct a new dormitory with "240+/- dwelling units being a mixture of 1, 2 & 4 bedroom units. The total number of beds would be 560 +/- beds." On the face of both the statutory language and the language contained in the applicant's proposed project description, it would appear that the applicant's proposed "240 +/- dwelling units" triggers the City's Affordable Housing Requirement by exceeding the threshold for 50 or more new dwelling units in a new residential or mixed-use development. However, the September 28, 2021, Memorandum submitted by the City's Director of Planning, Bradley Glass, provides an analysis of the diverging definitions of "living units" and "dwelling units," articulating that the definition of "dormitories" under the USDO, which defines the term as being comprised of "living units," and not "dwelling units," among other factors, distinguishes *dormitories* (comprised of living units)

[5] The "Affordable Housing Compliance Plan," is affixed hereto as "Exhibit C."
[6] Affordable Housing Compliance Plan, Part 1: Policy Guidelines.

from *structures* (comprised of dwelling units), the latter of which is subject to the Affordable Housing Statutory Requirements under the USDO.[7]

Under principles of statutory construction employed by state and federal courts, absent express statutory language that confers certain rights or exempts parties from certain obligations under the law, more conservative courts have employed jurisprudence that does not recognize implied rights or exemptions absent any express provision providing for such under the statute at issue. However, other courts similarly take a more liberal approach by finding implied rights and exemptions under certain circumstances, based on the particularity of the matter and the statute at hand. Here, the governing statute under the USDO, § 375-401(4)(b), does not contain a provision for "exemptions" or "exceptions" to the affordable housing requirements. In contrast, the subsequent subdivision, § 375-401(5), while unrelated in subject matter to inclusionary housing requirements, clearly states applicable "exceptions" to certain dimensional standards. It could be inferred that if there were particular exceptions to the Affordable Housing Requirements under § 375-401(4)(b), the provision itself, the adopted Guidelines, or the Compliance Plan would clearly provide for such exceptions.

Taking into consideration other sources, the Fair Housing Act Design Manual Guidelines define "dwelling unit" as including dormitory rooms.[8] However, the U.S. Census Bureau does not recognize "dormitory units" as meeting the definition of "housing units."[9]

Therefore, there's a great deal of ambiguity as to whether the City's Affordable Housing Requirements apply to the construction of a new, private dormitory. Thus, absent an articulable requirement or exception to the Affordable Housing Requirements in the USDO, it is uncertain whether the City's Affordable Housing Requirements apply to the 1415 Washington Ave. project. Out of an abundance of caution, the Board may want to act as if the Affordable Housing Requirements apply.

Analysis: Ability to Subcontract Affordable Housing Requirements

Assuming that the City's Affordable Housing Requirements apply to the 1415 Washington Ave. proposed project, the issue is whether an applicant seeking to construct a new

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[7] For purposes of consistency, this memorandum does not contradict or further assess the analysis provided by Mr. Glass in the Sept. 28, 2021 memorandum. Mr. Glass' memorandum is affixed hereto as "Exhibit D."
[8] *See* "Fair Housing Act Design Manual," p.16, https://www.huduser.gov/portal/publications/PDF/FAIRHOUSING/fairfull.pdf (last accessed 22 Oct. 2021).
[9] *See* "U.S. Census Bureau, Population Estimates Program," https://www.census.gov/quickfacts/fact/note/US/HSG010219 (last accessed 22 Oct. 2021); *see also Bd. of Trustees of Leland Stanford Jr. Univ. v County of Santa Clara*, 2019 US Dist LEXIS 176612 (ND Cal Oct. 10, 2019, No. 18-cv-07650-BLF) ("The affordable housing units described above do not include the hundreds of dormitory-style units that Stanford has built for its undergraduate students. The dormitory units are not counted toward the County's Regional Housing Needs Allocation because they do not technically meet the Census Bureau definition of a 'housing unit.'").

private dormitory may subcontract their affordable housing requirement to an appropriate third-party, given the particular set of circumstances involved.

This situation is not expressly provided for under the implementing Guidelines nor the Compliance Plan. While the Guidelines provide for some flexibility in that § 2 provides that the owner or developer of an applicable project must submit a Compliance Plan with "any other information required by the Chief Planning Official relative to § 375-401(4)(b)," there are other practical concerns presented when considering developer or owner requirements in a subcontractor setting.

For instance, Guidelines § 3 and Part 1 of the Compliance Plan require the affordable housing units created pursuant to § 375-401(4)(b) be "physically integrated with the rest of the development . . . [with] no visible exterior indications that units are affordable." Here, the developer's proposed offer to subcontract its obligations under the City's Affordable Housing Requirements to a non-profit organization for the purpose of constructing new affordable homes in the City for eligible parties would inherently contradict the "physical integration" requirement for affordable housing units associated with applicable projects.

Further, in a subcontracting situation, the owner or developer of the project would not be able to meet their administrative obligations under Guidelines § 5. Section 5 of the Guidelines requires the owner or developer to certify the income of tenants or buyers to the City's Albany Community Development Agency ("ACDA") at the time of the initial rental or sale, and annually thereafter. The developer would not be in "privity of contract" with the buyers who purchase affordable homes from Habitat For Humanity, and therefore, the developer would not be in a position to know such details about the buyers nor be able to satisfy their administrative obligation under the Guidelines. Moreover, the City would not be in privity with Habitat For Humanity, and therefore, the City would not be able to enforce the subcontract instrument (e.g., the Memorandum of Understanding between the developer and Habitat for Humanity), should Habitat For Humanity fail to meet requirements. As a result, the City may not be able to exercise its enforcement powers under Guidelines § 6.

Lastly, Guidelines § 5 requires the owner or developer to file an annual report to ACDA providing information on affordable housing rate vacancies, waitlists, household turnover, household size, and other relevant information. In proposing to subcontract their affordable housing requirement, the developer/applicant proposed making a one-time payment of $300,000 to Habitat For Humanity to construct twelve affordable homes, and, therefore, would not have an annual report to provide to ACDA given the one-time payment.

These are practical concerns for the Planning Board to take into consideration in accepting the applicant's proposed plan to subcontract their affordable housing requirement. The biggest area of concern that has been identified at this time is the privity of contract issue, and

the City's inability to enforce any applicable requirements against the subcontracted entity, which, here, is Habitat For Humanity.

Suggested Recommendations

a) Absent certainty, assume the Affordable Housing Requirements apply.

Out of an abundance of caution, the Board may want to act as if the Affordable Housing Requirements apply, particularly since the applicant has shown a willingness to comply and reach a workable solution.

b) Seek an official interpretation.

If the Planning Board would like unequivocal assurance on whether or not the Affordable Housing Requirements under USDO § 375-401(4)(b) apply to a private dormitory, I would advise that the Planning Board requests that the applicant seeks a formal interpretation from the Chief Planning Official, appealable to the Board of Zoning Appeals. This would provide the applicant with the ability to seek administrative recourse, should the official interpretation adversely impact the developer's proposed project at 1415 Washington Ave. Please note, however, that taking such route may further delay the Planning Board's action on this project.

c) Draft a three-party MOU in a subcontract situation.

If the Planning Board conditionally approves the applicant's Development Plan Review on the condition that the Affordable Housing Requirements apply, and permits the applicant to subcontract their Affordable Housing Requirements to Habitat For Humanity, I would advise that the Planning Board requests that the applicant revises the MOU to include all three parties involved: the City, the developer, and Habitat For Humanity. This would provide the City with the ability to enforce its affordable housing obligations against Habitat For Humanity directly, should that be an instructive consideration for the City in accepting applicant's offer to subcontract their requirements by donating $300,000 to Habitat For Humanity to construct twelve affordable homes for qualifying parties.

§ 375-401. Dimensional standards.

(1) Applicability.

(a) Unless otherwise stated in this USDO, the requirements in this § 375-401 shall apply to all buildings, lots, and land in all zoning districts.

(b) If the provisions of this § 375-401 conflict with the provisions of § 375-402 (Form-based zoning standards) applicable to the MU-FW, MU-FC, MU-FS, or MU-FM Zone District, the provisions of § 375-402 shall apply.

(c) No development plan shall be approved and no permit shall be issued for the erection or occupancy of a building or structure unless the development conforms to the dimensional standards of this § 375-401.

(d) No part of a yard or other open space required to comply with the provisions of this § 375-401 shall be counted towards meeting the yard or open space requirements of another building.

(e) Any encroachments into the public right-of-way shall require approval by the City and an agreement with the City that the property owner(s) shall accept any and all liability for accidents or damage occurring in the public right-of-way due to the encroachment or related activity.

(f) In the R-1L, R-1M, R-2, R-T, and R-M Districts, only one principal structure is permitted on a platted lot. In other zone districts, more than one principal structure is permitted on a platted lot if each primary structure complies with all applicable dimensional standards or with the provisions of an approved district plan.

(2) General.

(a) Setback and yard requirements.

(i) In all zone districts except the MU-FM, MU-FC, MU-FS, and MU-FM Zones, minimum building setbacks shall apply to all portions of each building, except for encroachments and exceptions permitted by § 375-401(5).

(ii) The building setback areas required under this Article IV shall be unobstructed from their lowest point to the sky, except for fences, landscaping, and other building features specified in this Article IV.

(iii) Accessory structures shall comply with required front setbacks for the principal building to which they are accessory.

(iv) Accessory structures shall be set back a minimum of two feet from side and rear lot lines, excepting the following circumstances:

A. Where § 375-401(5) (Encroachments and exceptions) permits a smaller exception; and

B. In the R-T District, side and rear setbacks shall not apply.

(v) In addition to the dimensional standards in this article, landscaped buffers may be required per § 375-406.

(b) Impervious surface. Because some areas of the City are subject to combined sewer overflows and to surface stormwater flooding, it is important that the maximum amount of impervious surface on each lot is carefully regulated. Each dimensional table in Subsection (3) below contains maximum impervious surface limits designed to reduce off-site flows into the City's stormwater system by allowing a significant percentage of rainfall to infiltrate into the soil on individual lots and parcels. Section 375-401(4)(a)(ii) (Low-impact development) provides incentives for those developments that further reduce the amount of off-site stormwater flows through the use of low-impact development.

(c) Emergency vehicle access. All buildings or groups of buildings in all zoning districts shall be constructed with an approved emergency vehicle access. Access to any building or structure that does not abut a public right-of-way shall have a width of at least 20 feet and vehicle clearance of 14 feet.

(3) Dimensional Standards Summary Tables.

(a) Residential districts.

(i) General standards. Dimensional standards for residential zoning districts are shown in Table 375.401.1 below.

Table 375.401.1

Residential District Dimensional Standards

Zone District	R-1L	R-1M	R-2	R-T	R-M	R-V
Development Type	**Detached**	**Detached**	**Single- or Two-Family**	**Town-house**	**Multi-Family**	**Multi-Family**
Lot Standards						
Minimum lot area	6,500 square feet	3,500 square feet	2,250 square feet	1,150 square feet	N/A	N/A
Minimum lot depth	110 feet	100 feet	90 feet	55 feet	N/A	N/A
Minimum lot width						
Infill on lots platted before June 1, 2017	55 feet	30 feet	25 feet	18 feet	20 feet	100 feet
Infill on lots platted after June 1, 2017	Contextual[1]					
General	70 feet	40 feet	25 feet	18 feet	22 feet	100 feet

Table 375.401.1

Residential District Dimensional Standards

Zone District	R-1L	R-1M	R-2	R-T	R-M	R-V
Development Type	**Detached**	**Detached**	**Single- or Two-Family**	**Town-house**	**Multi-Family**	**Multi-Family**
Maximum impervious lot coverage	30%	40%	70%	80%	80%	50%
Setbacks						
Minimum front						
Infill	Contextual[2]					
General	25 feet	15 feet	10 feet	0 feet	0 feet	10 feet
Minimum and maximum, side						
Minimum 1 side						
Infill	5 feet	3 feet from principal building on abutting lot	3 feet from principal building on abutting lot	0 feet	Contextual [3]	15 feet
General					0 feet	
Minimum 2 sides						
Infill	20 feet	10 feet	10% of lot width	0 feet	Contextual [3]	40 feet
General					0 feet	
Maximum each side	N/A	N/A	N/A	3 feet 6 inches	N/A	N/A
Minimum rear	40 feet	25 feet	20% of lot depth	10% of lot depth	15 feet	20 feet
Building Standards						
Maximum height, principal building	2 1/2 stories	2 1/2 stories	2 1/2 stories	3 1/2 stories	4 stories[4]	5 stories[5]
Maximum height, accessory buildings	1 1/2 stories	1 1/2 stories	1 1/2 stories	1 1/2 stories	1 1/2 stories	1 1/2 stories
Maximum number of dwelling units						
Fewer than 3 stories	1	1	2	1 per non-commercial floor, up to 2	1 per 750 square feet of gross floor area	Per building code
3 stories or more	N/A	N/A	2	1 per non-commercial floor up to 3		

NOTES:

[1] See § 375-401(3)(a)(ii) (Contextual lot widths).

[2] See § 375-401(3)(a)(iii) (Contextual front yards).

[3] See § 375-401(3)(a)(iv) (Contextual side setback in R-M District).

[4] Where a building abuts the R-1L or R-1M Districts on a side or rear lot line, maximum height is three stories within 50 feet of those lot lines.

[5] Where a building abuts the R-1L or R-1M Districts on a side or rear lot line, maximum height is 3 stories within 500 feet of those lot lines.

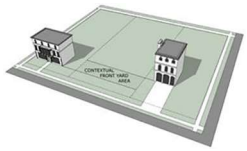
(ii) Contextual lot widths.

A. Where lots are platted or replatted on or after June 1, 2017, and more than 50% of the lots on the same block are occupied by primary structures, each new lot shall have a minimum width equal to no less than 75% and no more than 125% of the average lot widths of platted lots on the block.

B. Where the conditions in Subsection (3)(a)(ii)A do not apply, the minimum general lot widths in Table 375.401.1 shall apply.

(iii) Contextual front yards. Minimum front yard setbacks for infill development in all residential districts shall be calculated as follows:

A. When the subject lot is located between two lots facing the same street with primary buildings located within 25 feet of the side lot line of the subject lot, the required front setback shall be no closer to the street nor further back from the street than either of the structures on adjacent lots.



B. Where the subject lot has only one adjacent lot facing the same street that has a primary building located within 25 feet of the side lot line of a lot with a primary structure, the required front setback shall match that of the adjacent structure.

C. Where the subject lot has no adjacent lots that are improved with a primary building that are facing the same street, the required front setback shall match that of the adjacent structure.

(iv) Contextual side setback in R-M District. Where the subject lot is located in an R-M District and has one or more adjacent lots facing the same street with a primary building between one and five feet from the side lot line, the required side setback on the subject lot shall not be closer than the side setback on the adjacent improved lot.

(v) Residential cluster subdivisions. As an alternative to complying with the standards contained in Table 375.401.1 and Subsection (3)(a)(ii) above, a residential subdivision containing only single-family detached, two-

family detached, or townhouse dwellings may be designed as a residential cluster subdivision with lots and parcels that comply with the standards in § 375-404(7) (Residential cluster subdivision).

(b) Mixed-use districts.

(i) General standards. The dimensional standards for the mixed-use districts other than the MU-FW, MU-FC, MU-FS, and MU-FM Districts are shown in Table 375.401.2. The dimensional standards for the MU-FW, MU-FC, MU-FS, and MU-FM districts are shown in § 375-402 (Form-based zoning standards).

Table 375.401.2

Mixed-Use Dimensional Standards

Zone District	MU-NE	MU-NC	MU-CU	MU-CH	MU-DT	MU-CI
Lot Standards						
Minimum lot width	22 feet	20 feet	20 feet	50 feet	20 feet	80 feet
Maximum impervious lot coverage	70%	90%	90%	80%	100%	60%
Setbacks						
Minimum front						
Infill	Contextual [1]	N/A	N/A	N/A	N/A	N/A
General	0 feet					
Maximum front						
Infill	Contextual [1]	10 feet	10 feet	100 feet	10 feet	20 feet
General	10 feet					
Minimum side						
1 side						
Infill	Contextual [1]	0 feet	0 feet	10 feet	0 feet	0 feet
General	3 feet					
2 sides						
Infill	Contextual [1]	0 feet	0 feet	20 feet	0 feet	0 feet
General	8 feet					
Minimum rear	0 feet[5]	0 feet[6]	0 feet[5]	20 feet	0 feet	0 feet[5]
Building Standards						
Maximum height, principal building	3 stories	3 1/2 stories	5 stories [2]	5 1/2 stories [2]	N/A [3]	8 1/2 stories [4]
Maximum height, accessory buildings	1 1/2 stories					
Maximum number of dwelling units	1 per 750 square feet of gross floor area	Per building code				

NOTES:

[1] See § 375-401(3)(b)(ii).

[2] For lots more than 200 feet deep, any portion of a building located within 100 feet of an abutting an R-1L or R-1M District is limited to three stories.

[3] Buildings over 10 stories require design review; see § 375-505(20).

[4] Any portion of a building located with 50 feet of any abutting R-1L or R-1M District is limited to three stories. Any portion of a building located within 50 feet of an R-2 or R-T District is limited to five stories.

[5] Where the site abuts a residential zone district, the required rear yard setback is 15 feet.

[6] Where the site abuts a residential zone district, the required rear yard setback is 10 feet.

(ii) Contextual setbacks in MU-NE District. Development in the MU-NE District shall comply with the provisions of § 375-401(3)(a)(ii) and (iii) where the conditions of those two subsections regarding adjacent lots are applicable to the subject lot in the MU-NE District.

(iii) Contextual lot widths.

A. Where lots are platted or replatted on or after June 1, 2017, and more than 50% of the lots on the same block are occupied by primary structures, each new lot shall have a minimum width equal to no less than 75% and no more than 125% of the existing lot widths of platted lots on the block.

B. Where the conditions in Subsection (3)(b)(iii)A do not apply, the minimum general lot widths in Table 375.401.2 shall apply.

(c) Special purpose districts. The dimensional standards for special purpose districts are shown in Table 375.401.3 below.

Table 375.401.3

Special Purpose Dimensional Standards

Zone District	I-1	I-2	LC
Lot Standards			
Minimum lot width	25 feet	50 feet	N/A
Maximum impervious lot coverage	N/A	N/A	10%
Setbacks			
Minimum front	0 feet	10 feet	N/A
Minimum side	10 feet	15 feet	N/A

Table 375.401.3 Special Purpose Dimensional Standards			
Zone District	**I-1**	**I-2**	**LC**
Minimum rear	20 feet[1]	40 feet[2]	N/A[3]

Table 375.401.3 Special Purpose Dimensional Standards			
Zone District	**I-1**	**I-2**	**LC**
Building Standards			
Maximum height, principal building	2 stories	6 stories	2 stories
Maximum height, accessory buildings	N/A	N/A	1 1/2 stories

NOTES:

[1] Where the site abuts a residential zone district and the use is not completely enclosed within a building, the required rear yard setback is 100 feet.

[2] Where the site abuts a residential zone district and the use is not completely enclosed within a building, the required rear yard setback is 200 feet.

[3] Where the site abuts a residential zone district, the required rear yard setback is 20 feet.

(4) Incentives and affordable housing requirements. The following incentives apply to new development and redevelopment in the R-M, mixed-use, and special purpose zone districts.

(a) Incentives. Inclusion of the following types of building or site features will enable the applicant to vary the dimensional standards otherwise applicable to the project as described in this § 375-401(4). Only one of these incentives may be used on a single lot or parcel.

(i) Energy efficient development. New development or redevelopment of a primary building that is registered, designed, and documented for a LEED Platinum or LEED Gold certification, or equivalent, shall receive the following benefits, regardless of whether the final structure receives a LEED Platinum or LEED Gold certification, or equivalent. The Chief Planning Official shall determine whether a proposed alternative energy efficiency system or facility is equivalent.

A. The project may increase the maximum impervious lot coverage by 20%; and

B. The project may increase the maximum height of any primary building (or part of a primary building) located more than 100 feet from a residential zoning district other than the R-M District by one story.

(ii) Low-impact development. New development or redevelopment of a site that incorporates a green (vegetated) roof designed so that off-site flow of the first one inch of rainfall during the first 24 hours after rainfall ends is

reduced by at least 50% shall receive the following benefits:

A. The project may reduce any required building setback from any zoning district other than a residential zoning district by 20% (provided that the required reduction in off-site water flow is still achieved); and

B. The project may increase the maximum height of any primary building (or part of a primary building) located more than 100 feet from a residential zoning district other than the R-M District by one story.

C. The low-impact development incentives detailed above shall be suspended and not available for new development or redevelopment applications submitted between June 30, 2019 and June 30, 2021.

(iii) Affordable housing. New residential or mixed-use development or redevelopment of a site in which at least 20% of all new dwelling units are rent or deed restricted so that they are affordable to households earning no more than 80% of the area median household income for the City of Albany shall receive the following benefits:

A. The minimum number of off-street parking required by § 375-405 shall be reduced by 20%.

B. The project may increase the maximum height of any primary building (or part of a primary building) located more than 100 feet from a residential zoning district other than the R-M District, by one story.

(b) Affordable housing requirements. After December 1, 2017, each new residential or mixed-use development or redevelopment containing 50 or more new dwelling units shall sell or rent at least 5% of its new dwelling units at sales or prices affordable to persons earning no more than 100% of the area median household income for the City of Albany, as determined by affordability methods used by the United States Department of Housing and Urban Development.

(5) Encroachments and exceptions. The encroachments into required setbacks and exceptions to height limits shown in Table 375.401.4 are permitted.

Table 375.401.4 Exceptions and Encroachments	
Structure or Feature	**Conditions or Limits**
Encroachments Into Required Setbacks, Unless Prohibited by Chapter 323 (Streets and Sidewalks)	
Accessory clotheslines, play equipment, and rainwater harvesting barrels	May encroach into the side or rear setback
Accessory rain garden or rain barrel	May encroach into front, side and rear setbacks
Architectural features (sills, belt courses, eaves, cornices, chimneys, bay windows)	May project up to 3 feet into setbacks
Alternative energy equipment or facility, geothermal	May encroach into front, side, or rear setbacks
Alternative energy equipment or facility, solar	May encroach into side and rear setbacks but no closer than 2 feet from side lot line and no closer than 5 feet from rear lot line
Alternative energy equipment or facility, wind	May encroach into required rear yards but no closer than 2 feet from side lot line and not closer than 5 feet from rear lot line
Awnings and canopies	May project up to 4 feet into setbacks
Composting bin	May encroach into side and rear setback to within 2 feet of lot line
Little library or little pantry	If no more than 4 cubic feet in enclosed area, may encroach into front setback but not closer than 1 foot from front lot line
Minor residential structure that is less than 18 inches above grade	Except as listed for specific accessory structures, minor residential structure may be located in any of the following areas that are not within an easement: (a) Not more than 6 feet into front yard from the facade; or (b) No closer than 5 feet to any rear lot line; or (c) No closer than 2 feet to any side lot line.
Minor residential structure, temporary placement less than 10 consecutive workdays	Except as listed for specific accessory structures, may be located in any front, side, or rear setback

Table 375.401.4 Exceptions and Encroachments	
Structure or Feature	**Conditions or Limits**
Porch, unenclosed	May project up to 10 feet into a required front or rear setback or 50% of the required front setback distance, whichever is less May project up to 6 feet into a street side or interior side setback on a corner lot, or 50% of the side yard setback distance, whichever is less When a porch encroaches into any required setback, no side of the porch that is not adjacent to the primary structure may be more than 50% enclosed by opaque walls, windows, or screens Porch railings up to 36 inches in height are permitted on all sides
Satellite dish antenna	May encroach into side or rear setbacks but no closer than 2 feet of side lot line and not closer than 5 feet of rear lot line unless necessary for compliance with Federal Telecommunications Act, as amended
Secondary means of escape, unenclosed or lattice-enclosed stairs, fire escapes	May encroach no more than 5 feet into any side or rear yard setback, except as required to comply with fire code or Americans with Disabilities Act, as amended
Walls and fences meeting the standards of § 375-406(8)	May project into front, side, and rear setbacks
Exceptions to Building Height Limits	
Chimneys, flagpoles; ornamental towers; religious institution spires; towers; belfries; monuments; television and radio antennas	May not extend more than 25 feet above the roof plane of a flat roof or the highest point on a pitched roof. If freestanding may not extend more than 25 feet above the maximum height for primary buildings
Unoccupied roof structures for the housing of elevators, stairways, air-conditioning apparatus, cooling towers, ventilating fans, skylights, or similar equipment to operate and maintain the structure	May not extend more than 10 feet above the roof plane of a flat roof or the highest point on a pitched roof
Alternative energy equipment or facility, solar	May not extend more than 18 inches above the maximum building height

Table 375.401.4

Exceptions and Encroachments

Structure or Feature	Conditions or Limits
Alternative energy equipment or facility, wind	In residential districts, may not exceed maximum height for primary buildings in the district; In mixed-use and special purpose districts, may not extend more than 30 feet above the maximum height for primary buildings
Parapets	May not extend more than 4 feet above the maximum height for primary buildings

USDO Affordable Housing Guidelines

1. Introduction

In 2017, the City of Albany adopted the Unified Sustainable Development Ordinance (USDO) to regulate land use and development within the City and promote sustainable and equitable economic development. As part of the USDO, Section 375-4(A)(4)(b) states that: "each new residential or mixed-use development or redevelopment containing 50 or more new dwelling units shall sell or rent at least five percent of its new dwelling units at sales or prices affordable to persons earning no more than 100 percent of the area median household income for the City of Albany, as determined by affordability methods used by the U.S. Department of Housing and Urban Development."

Section 375-4(A)(4)(b) established the City's policy for inclusionary housing, but it did not include detailed instructions for administration. As a result, these Guidelines have been adopted by the Department of Planning and Development to implement Section 375-4(A)(4)(b).

2. Affordable Housing Compliance Plan

The owner or developer of a project that includes fifty or more new dwelling units shall submit an Affordable Housing Compliance Plan to the Chief Planning Official as part of its application for development. This Affordable Housing Compliance Plan shall acknowledge the applicability of Section 375-4(A)(4)(b) and these implementation guidelines, and shall set forth detailed plans for compliance. The Affordable Housing Compliance Plan shall thereafter be incorporated as a condition of approval in any Development Plan issued by the Planning Board or Chief Planning Official.

The Affordable Housing Compliance Plan shall indicate: the number of ownership and/or rental units; the number and size of affordable units; unit floor plans, schematics, and details of phasing of the project as a whole, including the affordable housing units; the name and address of the entity expected to develop the project; and any other information required by the Chief Planning Official relative to Section 375-4(A)(4)(b).

3. Affordable Housing Units

In determining the number of affordable housing units required under Section 375-4(A)(4)(b), any fractional requirement shall be rounded pursuant to 375-6(A)(3).

The sizes of affordable housing units shall be provided in proportion to the sizes of market rate units included in the development. Affordable housing units shall not be physically separated from

the rest of the development or use a separate entrance, and there shall be no visible exterior indications that units are affordable housing units.

Affordable housing units shall be comparable in infrastructure (including sewer, water and other utilities), construction quality, and exterior design to the market rate units.

4. Income and occupancy requirements.

Affordable housing units created pursuant to Section 375-4(A)(4)(b) must, at initial occupancy, be affordable to households earning no more than 100 percent of the area median household income for the City of Albany, and must be rented to households that consist of the minimum number of people as specified below:

Bedroom Size	Minimum Number of People
0	1
1	1
2	2
3	4

Affordable housing sale and rental limits shall be established by the Albany Community Development Agency and based on affordability limits provided by the U.S. Department of Housing and Urban Development.

Affordable housing units shall be restricted to principal residences. Any person who occupies an affordable housing unit shall certify to the owner or developer that they are income-eligible and meet all other requirements of Section 375-4(A)(4)(b) and these guidelines.

All owners or developers of affordable housing units shall engage in good faith marketing and public advertising efforts each time an affordable housing unit is rented or sold such that members of the public who are qualified to rent or purchase such units have a fair chance to become informed of their availability.

5. Administration

The affordable housing requirement in Section 375-4(A)(4)(b) shall be administered by the City of Albany Department of Planning of Development and the Albany Community Development Agency.

The owner or developer of affordable housing units shall be responsible for certifying the income of tenants or buyers to the Albany Community Development Agency at the time of initial rental or sale and annually thereafter, with such information to be submitted on forms provided by the Albany Community Development Agency. The owner or developer of affordable housing units shall also file an annual report to the Albany Community Development Agency within 60 days of the end of each calendar year providing information related to affordable housing unit vacancies, waitlists, household turnover, household size, household income, market rate rents, and any other relevant information.

6. Enforcement and Penalties.

No project-specific development approval, building permit, or certificate of occupancy shall be issued for projects subject to Section 375-4(A)(4)(b) unless an Affordable Housing Compliance Plan has been submitted pursuant to subsection 2 above. If the owner or developer violates Section 375-4(A)(4)(b), including not constructing the required affordable housing units, the City may deny, suspend, or revoke any and all development approvals and pursue penalties as provided for in Section 375-5(G) of the USDO. Any decision of the Chief Planning Official may be appealed according to the appeals procedures set forth in Section 375-5(D)(12).

Income and Rent Schedule (as of June 2019)

MAXIMUM RENT CAPS

1. The maximum rent (including utilities) in the inclusionary housing is set by ACDA and determined using the U.S. Department of Housing and Urban Development figures.

2. Rent per unit cannot exceed 30% of the tenant's adjusted monthly household income. Effective June 28, 2019, the rent caps listed below will apply to the inclusionary housing units. If 30% of the tenant's household income is higher than the corresponding rent cap, the lower of the two amounts must be used.

# of Bedrooms	Rent
0	$768.00
1	$904.00
2	$1,115.00
3	$1,397.00
4	$1,507.00
5	$1,733.00

3. If the tenant pays utilities, the rent will be reduced by the Section 8 utility allowance. For multi-family units, the utility allowance is as follows:

# of Bedrooms	Gas	Electric
0	$70.00	$99.00
1	$91.00	$128.00
2	$120.00	$169.00
3	$148.00	$210.00
4	$180.00	$253.00
5	$201.00	$281.00

INCOME CERTIFICATION

Household Size	1	2	3	4	5	6	7	8
100% City median income	$44,066	$50,400	$56,700	$62,930	$67,970	$73,010	$78,050	$83,090

Signed income certification forms will be required as follows:

1. All initial occupants as well as existing occupants of inclusionary housing units at the time of application are required to provide proof of income (i.e. current pay stub, most recent tax return) as well as a signed income certification form. Subsequent annual accountings certifications must be submitted with updated proof of income. ACDA staff will determine the income for the occupants based on the information provided and will determine if the tenant is eligible.

2. All new tenants at turnover of units.
   It is the responsibility of the landlord to get a signed certification form from each new tenant selected and forward it to ACDA Compliance Monitoring staff.

3. It is the responsibility of the owner to get a signed certification form from each inclusionary housing unit on the anniversary date of the completion of the project and forward them to ACDA Compliance Monitoring staff for the period of affordability.

CHANGE OF INCOME AFTER INITIAL ELIGIBILITY

Income will be re-certified on an annual basis. At this time, the certified income of tenant household may change and the rents will be changed accordingly.

1. A tenant whose household income increases after initial eligibility determination and exceeds 100% of the median adjusted for household size will be allowed to remain in the inclusionary housing unit.

   (a) New Income exceeding 100% median

   The rent (including utilities) on that unit will be adjusted so that the tenant is not paying more than 30% of the household's annual adjusted income. If the tenant pays utilities, the rent will be reduced by the utility allowance.

   When the unit becomes vacant, the rent will be reduced back to the maximum cap even if it was increased due to the increased income of the previous occupant.

TENANTS WITH SECTION 8 CERTIFICATES AND VOUCHERS

(a) Tenants in place with Section 8 Certificates and Vouchers are income eligible for inclusionary housing because both programs require an annual household income under 50% of the median.

(b) The above rent caps will apply to the unit.

Owners may not discriminate against applicants for inclusionary housing unit because they have a Section 8 Certificate or Voucher.

CITY OF ALBANY
NEW YORK
DEPARTMENT OF PLANNING AND DEVELOPMENT
200 HENRY JOHNSON BOULEVARD | ALBANY, NEW YORK 12210

AFFORDABLE HOUSING COMPLIANCE PLAN

Part 1. Policy Guidelines

In 2017, the City of Albany adopted the Unified Sustainable Development Ordinance (USDO) to regulate land use and development within the City and promote sustainable and equitable economic development.

As part of the USDO, Section 375-4(A)(4)(b) states that: "each new residential or mixed-use development or redevelopment containing 50 or more new dwelling units shall sell or rent at least five percent of its new dwelling units at sales or prices affordable to persons earning no more than 100 percent of the area median household income for the City of Albany, as determined by affordability methods used by the U.S. Department of Housing and Urban Development."

Affordable housing units created pursuant to 375-4(A)(4)(b) shall be:

1. Affordable to households earning no more than 100 percent of the median household income for the City of Albany, pursuant to the Income and Rent Limits set by the Albany Community Development Agency (ACDA) on an annual basis;
2. Rented to households that consist of the minimum number of people as specified within the adopted guidelines;
3. Provided in proportion to the sizes of market rate units included in the development;
4. Comparable in infrastructure (including sewer, water and other utilities), construction quality, and exterior design to the market rate units;
5. Physically integrated with the rest of the development and there shall be no visible exterior indications that units are affordable housing units, such as an alternate entrance;
6. Restricted to principal residences.

Part 2. General Information

Project #:	Project Name:
Tax Identification #:	Property Address:

Part 3. Developer Information

Developer Name:	
Mailing Address:	
Phone No.:	E-mail:

Part 4. Unit Information

Total # of Units Proposed:	# of Affordable Units Required*^:
# of Units for Rent:	# of Units for Sale
Type of Units Proposed	
# of Studio Units:	Avg. Size of Studio Unit (SF):
# of 1 Bedroom Units:	Average Size of 1 Bedroom Unit (SF):
# of 2 Bedroom Units:	Average Size of 2 Bedroom Unit (SF):
# of 3 Bedroom Units	Average Size of 3 Bedroom Unit (SF):
*5% of total units proposed; ^Fractions of 0.5 or greater shall be rounded up to the next whole number	

Part 5. Affordable Unit Itemization

(If more than 10 units, continue unit information on a supplemental page)

No.	Building Address	Unit Number	# of Bedrooms	Square Feet	Tenure (Sale/Rental)
1					

2					
3					
4					
5					
6					
7					
8					
9					
10					

Part 6. Property Owner Consent

Initial	
Initial	I hereby acknowledge the applicability of Section 375-4(A)(4)(b) of the Albany City Code and the corresponding affordable housing guidelines, and attest as follows:
	I shall ensure that designated affordable units are rented to households that consist of the minimum number of persons specified for the type of unit.
	I shall engage in good faith marketing and public advertising efforts each time an affordable housing unit is rented or sold such that members of the public who are qualified to rent or purchase such units have a fair chance to become informed of their availability.
	I shall certify that any person who occupies an affordable housing unit is income-eligible and meets the requirements of the guidelines.
	I shall be responsible for certifying the income of tenants or buyers to the Albany Community Development Agency at the time of initial rental or sale and annually thereafter, with such information to be submitted on forms provided by the Albany Community Development Agency.
	I shall be responsible for filing an annual report to the Albany Community Development Agency within 60 days of the end of each calendar year providing information related to affordable housing unit vacancies, waitlists, household turnover, household size, household income, market rate rents, and other relevant information as requested.
	All statements of fact herein are true and correct to the best of my knowledge and reflect the intent of the Applicant(s).

Print Owner Name(s):	***Owner(s) Signature:***	***Date:***

Part 6. Submittal Requirement Checklist

	Required Document	Hard Copies	Electronic Copies	Electronic Submission (.pdf) (Required Document Name)
	A. Required for All Housing Compliance Plan Submissions			
	Affordable Housing Compliance Plan Form	0	1	Affordable Housing Compliance Plan
	Project Site Plan	0	1	Site Plan
	Building Floor Plan Identifying Affordable Units	0	1	Floor Plans
	Implementation Phasing Plan (where applicable)	0	1	Phasing Plan
	B. Voluntary or Upon Request			
	Any additional information determined to be necessary by the Chief Planning Official	1	1	[Document Name]

Electronic document submissions shall be sent via email to dpd@albanyny.gov, USB Flash Drive, or by another medium approved by the City of Albany Planning Staff. CD and DVD submissions are not accepted.

Memo

To: City of Albany Planning Board
From: Bradley Glass, Director of Planning
Re: 1415 Washington Avenue, Compliance with 375-401(4)(b)
Date: September 28, 2021

This memorandum is intended to convey general information and sentiments regarding the application of USDO section 375-401(4)(b) with respect to the application under consideration at 1415 Washington Avenue.

375-401(4)(b) states:

Affordable housing requirements. After December 1, 2017, each new residential or mixed-use development or redevelopment containing 50 or more new dwelling units shall sell or rent at least 5% of its new dwelling units at sales or prices affordable to persons earning no more than 100% of the area median household income for the City of Albany, as determined by affordability methods used by the United States Department of Housing and Urban Development.

The application for 1415 Washington Avenue indicates that "the new building will have 240+/- dwelling units being a mixture of 1, 2 & 4 bedroom units. The total number of beds would be 560 +/- beds."

Relevant to these considerations are the definitions of dormitory,[1] dwelling unit,[2] and family.[3] A dormitoty is devoted exclusively to living facilities for duly registered students in accredited schools, colleges, universitites, medical or technical institutions, with some accomodations for management employees and the spouses of students. The definition references "living units" because the living configurations within a dormitory do not adhere to the traditional requirements constituting a "dwelling unit," which among other considerations is subject to occupancy by a "family." At least some of the units within most modern dormitories, including this one, provide units that de-facto exceed the unrelated occupancy allowances under the "family" definition, including the preslusion of more than three

[1] DORMITORY — A publicly or privately owned and operated building devoted exclusively to living facilities and associated programming, in which each person residing in each living unit shall be a duly registered student in any accredited school, college, or university, the spouse of such student, or a management employee, or an employee or trainee of a medical or technical institution. The facilities may contain sleeping rooms for use of one or more persons, provided that there is at least 150 square feet of floor space for the first occupant and at least 100 additional square feet of floor space for every additional occupant, the floor space to be calculated on the basis of total habitable room area. Accessory uses may include food preparation facilities, exercise facilities, and meeting rooms.
[2] DWELLING UNIT — One or more rooms, including a kitchen or kitchenette, and sanitary facilities in a dwelling structure, designed as a unit for occupancy by not more than one family for living and sleeping purposes.
[3] FAMILY — (1) Shall mean: (a) One, two or three persons occupying a dwelling unit (related or unrelated); or (b) Four or more persons occupying a dwelling unit and living together as a traditional family or the functional equivalent of a traditional family. (c) Four or more persons occupying a dwelling unit whose right to live together is protected by the Federal Fair Housing Act, as amended and interpreted by the courts. (2) It shall be presumptive evidence that four or more unrelated persons living in a single dwelling unit do not constitute the functional equivalent of a traditional "family."

unrelated persons occupying a unit that do not consitute the functional equivalent of a “family,” pursuant to the USDO definition. Based upon the terminology employed in the dormitory definition (“living unit”) and my involvement in the drafting and development of the USDO, it is my belief that the the USDO was intentially authored to exclude units within dormitories from the traditional categorization of dwelling units.

That said, it would also be reasonable to conclude that the intent to characterize dormitories differently for the purposes of unit characterisation was not intended to result in an exclusion from the affordable housing requirements set forth within the USDO for large development projects (greater than 50 units). However, implementation in this instances would likely be fraught with complications and not achieve the core intent of creating affordable housing units available to the general populace. Such units would, by definition, be relegated principally to students, many or all of whom may meet the income qualifications for the afforable units. The practical consideration associated with residency amongst a student population may also discourage prospective occupnats of the afforable units.

The applicant has therefore proposed compliance with the affordable housing requirement through an alternate means, namely by providing gap finacing to allow for the construction of homes for sale by a local developer of affordable homes. I encourage the Planning Board to strongly consider such an arrangement in light of the circumstances at hand. The Planning Staff would also welcome the Board’s feedback about how such arrangements and considerations should be handled moving forward.

Bd. of Trs. of Leland Stanford Junior Univ. v. Cty. of Santa Clara

United States District Court for the Northern District of California, San Jose Division

October 10, 2019, Decided; October 10, 2019, Filed

Case No. 18-cv-07650-BLF

Reporter
2019 U.S. Dist. LEXIS 176612 *; 2019 WL 5087593

BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, Plaintiff, v. COUNTY OF SANTA CLARA, and SANTA CLARA COUNTY BOARD OF SUPERVISORS, Defendants.

Core Terms

Stanford, Ordinance, affordable housing, equal protection claim, allegations, housing, similarly situated, motion to dismiss, rational basis, class-of-one, countywide, argues, zoned, judicial notice, leave to amend, asserts, district court, unincorporated, incremental, prong, staff, summary judgment, property owner, documents, shortage, residential development, residential, Regional, no rational basis, landowners

Counsel: **[*1]** For Board of Trustees of Leland Stanford Junior University, Plaintiff: Geoffrey Laurence Robinson, LEAD ATTORNEY, Alan Henderson Murphy, Barbara J. Schussman, Christian William Termyn, Jacob Edward Aronson, Perkins Coie LLP, San Francisco, CA; Bradley H. Oliphant, Perkins Coie LLP, Denver, CO; Marc Richard Bruner, Perkins Coie LLP, SF, CA.

For County of Santa Clara -California, County of Santa Clara Board of Supervisors, Defendants: Anthony J LoPresti, LEAD ATTORNEY, Office of the County Counsel, San Jose, CA; Elizabeth Gianna Pianca, Office of the County Counsel, County of Santa Clara, San Jose, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT; AND DISMISSING ALL CLAIMS WITH LEAVE TO AMEND

Plaintiff Board of Trustees of Leland Stanford Junior University ("Stanford") brings suit against Defendants County of Santa Clara and the Santa Clara County Board of Supervisors (collectively, "the County") to challenge the County's Ordinance No. NS-1200.368 ("the Ordinance") adopted on September 25, 2018. The Ordinance, which applies solely to residential development on Stanford's property, requires that 16% of **[*2]** dwelling units in any new rental or for-sale residential development with three or more units meet certain affordable housing requirements. Stanford claims that it has been singled out to bear the burden of addressing a countywide shortage of affordable housing, despite the fact that Stanford's property comprises less than half of one percent of the land zoned for residential development in the unincorporated County. The operative first amended complaint ("FAC") asserts a class-of-one equal protection claim under *42 U.S.C. § 1983*, and state law claims for writ of mandate and declaratory relief.

The County moves to dismiss the FAC under *Federal Rule of Civil Procedure 12(b)(6)*. Having considered the briefing and the oral arguments presented at the hearing on August 8, 2019, the Court GRANTS the motion in part, and DISMISSES ALL CLAIMS WITH LEAVE TO AMEND.

I. BACKGROUND[1]

[1] The background facts are drawn from the allegations of the complaint, which are accepted as true for purposes of the motion to dismiss, *see* *Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 690 (9th Cir. 2011)*, and from documents incorporated into the complaint by reference and matters which are subject to judicial notice, *see* *Louisiana Mun. Police Employees' Ret. Sys. v. Wynn, 829 F.3d 1048, 1063 (9th Cir.*

The supply and affordability of housing have been longstanding issues in the County, particularly since the early 1960s when the area started transitioning from an agricultural center to a center for technology, innovation, and employment. FAC ¶ 4, ECF 26. The County repeatedly and consistently has recognized that the need for affordable housing is a regional problem **[*3]** affecting the entire County. FAC ¶ 39. The County's Zoning Code allows residential development on approximately 600,000 acres of unincorporated area in the County, including approximately 1,747 acres of land owned by Stanford ("Stanford Lands") and approximately 596,022 acres of land not owned by Stanford ("Non-Stanford Lands"). *Id.*

Development on Stanford Lands is governed by a General Use Permit ("GUP") issued by the County. The County approved a GUP in December 2000, allowing residential and academic development on the Stanford University campus. FAC ¶ 64. In November 2016, Stanford applied for a modified GUP, seeking approval for "the development of 2,275,000 net new square feet of academic space, and 3,150 net new housing units and student beds (with up to 550 of those units to be housing for Stanford faculty and staff) over an approximately 17-year build-out horizon." FAC ¶ 76. Stanford currently has a 2018 GUP Application pending. *See* 2018 GUP Applic., Defs.' RJN Exh. G, ECF 43.

Over the past two cycles for the County's Regional Housing Needs Allocation pursuant to state housing law (the 1999-2006 cycle and the 2007-2014 cycle), Stanford produced 1,324 affordable housing units, **[*4]** which was 75% of the total amount of affordable housing developed within the County's jurisdiction during that time frame. FAC ¶ 5. In the current cycle (the 2015-2022 cycle), Stanford is developing at least another 1,400 affordable housing units in the County's jurisdiction. *Id.* The affordable housing units described above do not include the hundreds of dormitory-style units that Stanford has built for its undergraduate students. FAC ¶¶ 68, 69. The dormitory units are not counted toward the County's Regional Housing Needs Allocation because they do not technically meet the Census Bureau definition of a "housing unit." FAC ¶ 69. The County nonetheless has recognized that Stanford's dormitory units make an important contribution to the housing supply at Stanford University. *Id.* In 2018, the County Director of Planning and Development recognized that Stanford has "singlehandedly satisfied most of our Regional Housing Needs Allocation for affordable housing." FAC ¶ 74.

Stanford claims that despite its significant contributions to the development of affordable housing, the County recently decided to single out Stanford "to bear the burden of the County's efforts to remedy its affordable **[*5]** housing problems." FAC ¶ 59. The County enacted two ordinances that exclusively target Stanford's property and do not apply to any other property in the unincorporated County. FAC ¶ 34. The Ordinance at issue in this lawsuit "applies to any development of non-student housing within the area covered by the Stanford Community Plan, for which the development application is deemed complete on or after July 1, 2019, that would create three or more new, additional, or modified dwelling units by any of the following means, or combination thereof: (a) construction of new dwelling units; (b) conversion of a use to residential from another use; (c) conversion of a use to for-sale residential from rental residential; and (d) subdivision of land to develop residential dwelling units." FAC ¶ 16. Stanford owns the entire area covered by the Stanford Community Plan, except for two public elementary school sites and other property that has been condemned for public use, such as public rights-of-way. FAC ¶ 17. Under the Ordinance, 16% of qualifying residential units developed within the area covered by the Stanford Community Plan must meet specified affordable housing requirements. FAC ¶ 34.

The other **[*6]** ordinance, not at issue in this lawsuit, requires Stanford to pay an affordable housing impact fee of $68.50 for each net new square foot of academic space Stanford develops on campus after July 1, 2020. FAC ¶ 35. The impact fee ordinance is being challenged in separate proceedings. FAC ¶ 36.

According to Stanford, "[t]here is no rational basis for singling out Stanford to address a problem that the County recognizes occurs throughout the County." FAC ¶ 59. Stanford asserts that the County's conduct is particularly irrational given that Stanford has constructed more than three-quarters of the affordable housing built in the entire unincorporated County since 1999. FAC ¶ 61. The County has not adopted a countywide ordinance addressing affordable housing, and no such proposed countywide ordinance is under consideration. FAC ¶ 80.

The Ordinance at issue contains a preface articulating a number of findings made by the County Board of Supervisors. *See* Ordinance, Defs.' RJN Exh. C, ECF 43. The Ordinance discusses the shortage of affordable

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2016).

housing in the County, the imbalance between jobs and housing in the County, data showing that significant numbers of people who work in the County live **[*7]** outside the County, and the impact of resulting commuter traffic on traffic congestion. *See id.* at 1-4. After several pages spent addressing the effect of these issues on the County in general, the Ordinance jumps to the specific, stating that "[t]he housing supply and affordability concerns that are experienced countywide are particularly acute at and around Stanford University due to the high housing prices in the area around Stanford that result in a small supply of affordable housing." *See id.* at 4. The Ordinance also states as follows:

> The housing supply and affordability concerns that are experienced countywide have a particularly strong effect at and around Stanford University due to the high housing prices in the area and the employment opportunities generated by Stanford. New residents of market-rate housing, including faculty and staff housing within the Stanford Community Plan Area, creates demand for new public and private sector workers. Some of these new workers earn incomes that are only adequate to pay for affordable housing. Because affordable housing is in short supply in the Stanford Community Plan Area and environs, such new workers may be forced to live in less than adequate housing **[*8]** in the area, pay a disproportionate share of their incomes for housing, or commute long distances to their jobs from housing located in more affordable parts of the county or outside of the region entirely.

Ordinance at 5. The Board determined that these concerns would be alleviated by the Ordinance. *Id.* at 5-6.

Stanford alleges that the countywide issues addressed in the Ordinance are not felt more acutely at and around Stanford than elsewhere in the County. *See* FAC ¶¶ 39-59. Stanford suggests that the County actually passed the two Stanford-only ordinances to obtain leverage in negotiations regarding Stanford's pending GUP application. FAC ¶¶ 76, 84. In May 2018, the County Board of Supervisors announced that the County was considering affordable housing ordinances specific to Stanford. FAC ¶ 79. Stanford objected in written correspondence to multiple County officials and agencies. FAC ¶ 81. Stanford alleges that "County officials and decision-makers expressed a clear intention to get the two Stanford-only ordinances 'on the books' quickly, in order to give the County negotiating leverage to impose still greater requirements on Stanford during the process of considering its pending permit application." FAC **[*9]** ¶ 84. Although the County Planning Commission unanimously recommended that the County Board of Supervisors *not* adopt the Ordinance at issue in this lawsuit, the County Board of Supervisors adopted both ordinances directed toward Stanford Lands at its September 25, 2018 public meeting. FAC ¶¶ 87-88. One Supervisor commented that having the Ordinance "in your pocket" would help with negotiations with Stanford, and another commented that the Ordinance could lead to "something more attractive" down the road." FAC ¶ 88. Negotiations on Stanford's GUP Application are ongoing. FAC ¶ 89.

Stanford filed this action on December 20, 2018. *See* Compl., ECF 1. The County's *Rule 12(b)(6)* motion to dismiss the original complaint was mooted when Stanford filed the operative FAC. *See* Motion to Dismiss, ECF 21; FAC, ECF 26. The FAC alleges the following claims: (1) a *§ 1983* class-of-one equal protection claim brought under the *equal protection clauses of the United States Constitution* and the California Constitution; (2) a claim for writ of mandate under *California Code of Civil Procedure § 1085*; and (3) a claim for declaratory relief under *California Code of Civil Procedure § 1060*. The County seeks dismissal of all claims under *Rule 12(b)(6)*.

II. LEGAL STANDARD

"A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to **[*10]** state a claim upon which relief can be granted tests the legal sufficiency of a claim." *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (internal quotation marks and citation omitted). While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

The County seeks dismissal of Stanford's *§ 1983* class-

of-one equal protection claim (Claim 1), as well as Stanford's state law claims for writ of mandate (Claim 2) and declaratory relief (Claim 3). Stanford asserts that all three claims are adequately pled.

Before discussing the parties' arguments regarding Stanford's claims, the Court addresses the County's request for judicial notice. The Court then takes up the class-of-one equal protection claim and the state law claims.

A. County's Request for Judicial Notice

The County has filed a request for judicial notice ("RJN") of the following documents, attached to the RJN as Exhibits A-I : (A) excerpts of the 2000 Stanford Community Plan, which the Santa **[*11]** Clara County Board of Supervisors adopted as an amendment to the 1995 Santa Clara County General Plan; (B) the Staff Report for the Ordinance, which was made available to the public as part of the agenda packet prior to the September 25, 2018 Board of Supervisors meeting at which the Ordinance was adopted; (C) the Ordinance at issue in this suit, which was adopted on September 25, 2018; (D) excerpts of the Zoning Ordinance of the County of Santa Clara; (E) the 1985 Land Use Policy Agreement, signed by the Board of Trustees of Leland Stanford Junior University and the County of Santa Clara; (F) a screenshot of a portion of Stanford's publicly facing web page at <https://stanfordcareers.stanford.edu/our-community>; (G) an excerpt of Stanford's 2018 General Use Permit ("GUP") Application, which Stanford has submitted to the County for approval; (H) excerpts from the Certified Transcript of the County of Santa Clara Board of Supervisor's September 25, 2018 public hearing regarding the Ordinance at issue in this lawsuit; and (I) County staff's April 18, 2018 report to the County of Santa Clara's Housing, Land Use, Environment, and Transportation Committee regarding the possibility of introducing **[*12]** a countywide ordinance. The County argues that all of these documents are judicially noticeable, and that some of the documents also may be considered under the incorporation by reference doctrine because they are referenced in the FAC.

Stanford opposes the RJN, arguing that the County improperly asks the Court to take judicial notice not only of the existence of the documents in question, but also of the truth of their contents. In particular, Stanford objects to the County's reliance on statements in the documents regarding the impact of Stanford's housing development under its GUP. Stanford cites Ninth Circuit authority for the proposition that "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018)*. In reply, the County argues that it "cited these documents to demonstrate the facial plausibility of several rationales for applying the Ordinance to the Plan area," not for the truth of the facts therein. Defs.' Reply at 3, ECF 49.

The Court concludes that judicial notice is appropriate with respect to the existence and contents of all of the proffered exhibits, although **[*13]** not as to the truth of the facts therein. Exhibits A, C, D, E, and G are public records reflecting applications to the County and/or the County's official actions, *see Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1025 n.2 (9th Cir. 2006)* (taking judicial notice of city ordinances, event permit application, and indemnity agreement); Exhibits B and I are government staff reports, *see Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency, 311 F. Supp. 2d 972, 1000 (D. Nev. 2004)* (taking judicial notice of government staff memoranda and reports); Exhibit H is a certified transcript of a public hearing, *see Epona, LLC, et al. v. Cty. of Ventura, No. CV 16-6372 DMG (PLAx), 2019 U.S. Dist. LEXIS 169950, 2019 WL 4187393, at *3 n. 4 (C.D. Cal. Apr. 12, 2019)* (taking judicial notice of transcript of County Board meeting); and Exhibit F is a screenshot of Stanford's publicly accessible website, *see Perkins v. LinkedIn Corp., 53 F. Supp. 3d 1190, 1204 (N.D. Cal. 2014)* (taking judicial notice of publicly accessible website). The Court also may consider the Ordinance under the incorporation by reference doctrine, as it is referred to throughout the FAC. *See Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)* (on a *Rule 12(b)(6)* motion, the court may consider documents referenced in and central to the complaint, where there is not dispute as to the authenticity of the copies attached to the motion).

With the limitations set forth above, the County's RJN is GRANTED.

B. Class-of-One Equal Protection Claim (Claim 1)

In Claim 1, Stanford asserts a class-of-one equal protection claim under *§ 1983*, based **[*14]** on asserted violations of the *equal protection clauses of the United States Constitution* and the California Constitution. The

same legal standards apply to claims brought under the equal protection clauses of the federal and state constitutions. *See* Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 987, 1010 (E.D. Cal. 2006); *see also* RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1154 (9th Cir. 2004) ("The equal protection analysis under the California Constitution is 'substantially similar' to analysis under the federal Equal Protection Clause.").

The Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). To succeed on a class-of-one claim, the plaintiff must show that the defendant "(1) intentionally (2) treated [the plaintiff] differently than other similarly situated property owners, (3) without a rational basis." Gerhart v. Lake Cty., Mont., 637 F.3d 1013, 1022 (9th Cir. 2011).

The County contends that Stanford's class-of-one claim is subject to dismissal because Stanford has not identified any similarly situated property owner that was treated differently by the County; Stanford has not alleged facts showing that there is no rational basis for the County's adoption of the Ordinance; and the Ordinance does not target Stanford specifically but rather applies neutrally **[*15]** to the Stanford Community Plan area. Stanford argues that it has alleged facts sufficient to make out a class-of-one equal protection claim.

1. Similarly Situated

The County contends that Stanford has not pled facts sufficient to satisfy the similarly situated prong. The Ninth Circuit cases cited by the parties do not offer substantial guidance on what types of facts are needed to satisfy the similarly situated requirement. *See, e.g.,* Gerhart, 637 F.3d at 1022-24; RUI One, 371 F.3d at 1154-56. However, several district courts within the Ninth Circuit have followed the Second Circuit in concluding that "[c]lass-of-one plaintiffs 'must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves.'" Warkentine v. Soria, 152 F. Supp. 3d 1269, 1294 (E.D. Cal. 2016) (quoting Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006)); *see also* Jardine-Byrne v. Santa Cruz Cty., No. 5:16-CV-03253-EJD, 2017 U.S. Dist. LEXIS 190816, 2017 WL 5525900, at *4 (N.D. Cal. Nov. 17, 2017) (same); Scocca v. Smith, No. C-11-1318 EMC, 2012 U.S. Dist. LEXIS 87025, 2012 WL 2375203, at *5 (N.D. Cal. June 22, 2012) (same). "To be considered similarly situated, the plaintiff and her comparators must be *prima facie* identical in all relevant respects or directly comparable in all material respects." Jardine-Byrne, 2017 U.S. Dist. LEXIS 190816, 2017 WL 5525900, at *4 (internal quotation marks and citation omitted). "Strict enforcement of the similarly-situated requirement is a vital way of minimizing the risk that, **[*16]** unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors." Warkentine, 152 F. Supp. 3d at 1294 (internal quotation marks and citation omitted).

The County correctly asserts that the FAC does not identify a single similarly situated comparator as required under the standards set forth above. Instead, the FAC contains general allegations such as the following: "Non-Stanford Lands where housing may be built are similarly situated to Stanford Lands where housing may be built," FAC ¶ 18; "Non-Stanford Lands are zoned for the same types of housing allowed on Stanford Lands," FAC ¶ 18; "For affordable housing purposes, no relevant differences exist between this allowable multi-family residential development on Stanford Lands and on Non-Stanford Lands, FAC ¶ 24; "Non-Stanford Lands where housing development may occur includes properties that are adjacent to and near Stanford University," FAC ¶ 25. Stanford also describes 860 acres located immediately adjacent to Stanford University, alleging that those lands are zoned for single-family residential development. ***[*17]*** *See* FAC ¶¶ 26-29. While these allegations indicate that housing development *could* occur on properties adjacent to Stanford University, they do not indicate that any property owner intends to undertake such development. "It is inadequate merely to point to nearby parcels in a vacuum and leave it to the municipality to disprove conclusory allegations that the owners of those parcels are similarly situated." Cordi-Allen v. Conlon, 494 F.3d 245, 251 (1st Cir. 2007).

Stanford points to allegations in the FAC that the County's Housing Element contains data indicating that 512 units will be built on Non-Stanford Lands for the 2015-2022 period, including 416 single family dwellings. *See* FAC ¶ 31. Stanford alleges that it has proposed development of approximately the same number of units (550 units) as part of its pending application. *See* FAC ¶

32. According to Stanford, that these allegations show that numerous landowners comparable to Stanford exist. *See* Pl.'s Opp. at 12 (citing ¶¶ 30-32 in support of assertion that "[t]he FAC further alleges that the County's land use regulations and its General Plan Housing Element show that numerous such landowners exist."). However, Stanford has not alleged any facts indicating whether the 512 housing units **[*18]** on Non-Stanford lands will be developed by a single developer or hundreds of different developers. Stanford has not cited, and the Court has not discovered, any case suggesting that Stanford may satisfy the similarly situated prong by pointing to an amalgam of all planned construction on Non-Stanford Lands rather than by identifying "other similarly situated property owners." *Gerhart, 637 F.3d at 1022*.

Stanford argues that it need not identify any particular comparator to satisfy the similarly situated prong at the pleading stage, asserting that *Warkentine* and *Cordi-Allen* do not apply because they were decided on summary judgment, not on a motion to dismiss. *See Cordi-Allen, 494 F.3d at 255* (holding that "the district court did not err in entering summary judgment for the Town on the equal protection claim"); *Warkentine, 152 F. Supp. 3d at 1294* (finding that "no reasonable trier of fact would find that Plaintiffs are similarly-situated to the Towing Defendants in the necessary material respects"). While Stanford's statement regarding the procedural posture of *Warkentine* and *Cordi-Allen* is accurate, both *Jardine-Byrne* and *Scocca* were decided at the pleading stage by courts in this district which required specific, non-conclusory allegations identifying a comparator in order **[*19]** to defeat a motion to dismiss. *See Jardine-Byrne, 2017 U.S. Dist. LEXIS 190816, 2017 WL 5525900, at *4* (dismissing a library patron's class-of-one equal protection claim based on conclusion that her allegations "are conclusory and fail to establish that the other Library patrons were identical in all relevant respects to Plaintiff or directly comparable in all material respects."); *Scocca, 2012 U.S. Dist. LEXIS 87025, 2012 WL 2375203, at *6* ("Mr. Scocca has failed to state a plausible equal protection claim because he has simply stated in conclusory terms that he is similarly situated with the seventy persons who have been licensed."). Other district courts within the Ninth Circuit likewise have required identification of a comparator at the pleading stage. *See, e.g., Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist., 935 F. Supp. 2d 968, 984 (E.D. Cal. 2013)* ("Instead of asserting generally that they were treated differently, plaintiffs have described two other operators who were treated differently as to the salient characteristics. This is sufficient.").

Stanford relies on Seventh Circuit cases holding that "Plaintiffs alleging class-of-one equal protection claims do not need to identify specific examples of similarly situated persons in their complaints." *Capra v. Cook Cty. Bd. of Review, 733 F.3d 705, 717 (7th Cir. 2013)*; *Geinosky v. City of Chicago, 675 F.3d 743, 748 n.3 (7th Cir. 2012)* ("Even in a case where a plaintiff would need to identify a similarly situated person to prove his case . . . we see no basis for requiring **[*20]** the plaintiff to identify the person *in the complaint*."). The Seventh Circuit cases relied on by Stanford is at odds with the approach taken by district courts within the Ninth Circuit, as discussed above. This Court therefore declines to follow the Seventh Circuit decisions.

Stanford's reliance on *Fry v. City of Hayward, 701 F. Supp. 179 (N.D. Cal. 1988)*, is misplaced. In *Fry*, the owner of property zoned as "open space" brought an equal protection suit against the City of Hayward after voters enacted a measure restricting her ability to re-zone her property absent voter approval. *Id. at 180*. No other property within the City was subject to the requirement of voter approval to change its zoning designation. *Id.* The district court granted summary judgment for the plaintiff after concluding that the City had "failed to offer even a theoretical reason" for treating the plaintiff's property differently and that the measure was "not rationally related to a legitimate interest." *Id. at 182*. The court did not engage in any substantive discussion of the similarly situated prong, and it appears that the City conceded that issue. *See id.* ("The City concedes, and the record reflects, that Hayward contains many other parcels of open space property."). Stanford's argument **[*21]** that *Fry* stands for the proposition that the similarly situated prong may be satisfied by allegations comparing land parcels is not persuasive given the lack of substantive discussion addressing that issue.

After reviewing the authorities cited by the parties, the Court concludes that Stanford must plead facts showing the existence of one or more comparators in order to defeat a motion to dismiss. The County asserts that Stanford cannot do so on the facts of this case, because no other entity is developing housing at the pace and scope of Stanford, and it requests that Stanford's equal protection claim be dismissed without leave to amend. In response, Stanford argues that differences between its size and development impacts and those of other property owners are immaterial. Stanford's counsel also indicated at the hearing that if given leave to amend,

Stanford may be able to break down its broader development plan into smaller construction projects for which it could identify comparators on Non-Stanford Lands. *See* Hrg. Tr. 24:7-25, ECF 55. The Court cannot evaluate the adequacy of any potential comparator unless and until Stanford identifies one in its pleading. Given that this is the **[*22]** first opportunity the Court has had to evaluate Stanford's allegations, the Court concludes that leave to amend is appropriate to give Stanford the opportunity to allege the existence of a similarly situated comparator.

Accordingly, the motion to dismiss Claim 1 is GRANTED WITH LEAVE TO AMEND on this basis.

2. Rational Basis

The County also contends that Stanford has not pled facts sufficient to satisfy the rational basis prong of a class-of-one claim. "[O]n rational basis review, the burden is on plaintiffs to negate 'every conceivable basis' which might have supported the distinction between exempt and nonexempt entities." *Angelotti Chiropractic, Inc. v. Baker, 791 F.3d 1075, 1086 (9th Cir. 2015)*. Thus, "to survive a motion to dismiss, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *A.J. California Mini Bus, Inc. v. Airport Comm'n of the City & Cty. of San Francisco, 148 F. Supp. 3d 904, 918 (N.D. Cal. 2015)*.

The County argues that the FAC does not negate the plausible rationales for the Ordinance that appear on its face, let alone 'every conceivable basis' which might have supported treating Stanford differently. As discussed above, the Ordinance contains the Board of Supervisors' findings regarding the countywide affordable housing shortage, followed by the Board's finding that "[t]he housing supply **[*23]** and affordability concerns that are experienced countywide have a particularly strong effect at and around Stanford University." *See* Ordinance at 1-5, Defs.' RJN Exh. C, ECF 43. The Board determined that these concerns would be alleviated by the Ordinance. *Id.* The County asserts that additional rationales for the Ordinance are apparent from the documents attached to its RJN. For example, the County cites to statements made at the September 25, 2018 Board of Supervisors hearing that the Stanford Community Plan Area is the largest job-generating area in the County, and that Stanford is the root of the job-housing imbalance in the County. *See* Sept. 25, 2018 Hrg. Tr. at 8-9, 41-42, Defs.' RJN Exh. H, ECF 43. The County also relies on a statement in the Stanford Community Plan that "Stanford lands represent one of the most important opportunities in the County to improve the balance between jobs and housing, due to the potential to provide housing on Stanford lands." Stanford Community Plan at 38, Defs.' RJN Exh. A. Additionally, the County directs the Court's attention to the staff report that accompanied the Ordinance, which stated that the Ordinance is necessary to mitigate Stanford's planned growth. *See* Staff Report at 4, Defs. **[*24]** RJN Exh. B.

In opposition to the motion, Stanford correctly argues that the Court cannot take judicial notice of the truth of these statements. See *Khoja, 899 F.3d at 999*. Stanford also contends that it has alleged facts which, if accepted as true, negate the County's proffered rationales. Stanford points to allegations in the FAC citing the County's findings regarding the countywide nature of the affordable housing shortage. *See* FAC ¶¶ 39-47. For example, a November 2015 County staff report indicated that newly constructed housing units in the unincorporated County represent net new households in the County, which represent new disposable income that will be devoted to new consumption, which in turn will generate new local jobs at lower compensation levels, which will lead to a need for more affordable housing. FAC ¶ 47. The County hired a consultant, Keyser Marston Associates, Inc. ("KMA"), which completed a countywide affordable housing study in 2016 linking the development of new residential units in the unincorporated County with increased need for affordable housing. *See* FAC ¶¶ 45-46. A second countywide study linked the development of new commercial and industrial building space with the need for **[*25]** affordable housing. *See* FAC ¶ 48. A report published by the Civil Grand Jury of Santa Clara County in June 2018 concluded that Santa Clara County has a critical need for affordable housing, characterizing that need as a region-wide problem. *See* FAC ¶ 49. The Ordinance at issue in this suit recognizes the longstanding and regionwide nature of the County's affordable housing need. *See* FAC 50. Stanford points out that none of these sources suggest or support the notion that the affordable housing shortage is specific to Stanford, more critical at Stanford, or caused by Stanford.

Stanford emphasizes that the question presented by its class-of-one claim is not whether the County had a rational basis for attempting to address affordable housing issues through an ordinance, but whether the County had a rational basis for singling out Stanford.

See Gerhart, 637 F.3d at 1023 ("We have recognized that the rational basis prong of a 'class of one' claim turns on whether there is a rational basis for the *distinction*, rather than the underlying government action."). Stanford contends that the allegations of the FAC establish that the factors causing increased need for affordable housing exist throughout the unincorporated **[*26]** County and are not specific to Stanford. *See* FAC ¶ 58-59. As a result, Stanford claims, "[t]here is no rational basis for singling out Stanford to address a problem that the County recognizes occurs throughout the County." FAC ¶ 59. The FAC alleges that burdening Stanford Lands, but not other lands within the unincorporated County, is particularly irrational given that Stanford Lands comprise less than 0.5% of the acreage on which residential development can occur under the County's Zoning Code, yet Stanford has constructed more than 75% of all affordable housing units in the County since 1999. *See* FAC ¶¶ 5, 13, 61. The FAC also asserts that the irrationality of the Ordinance is demonstrated by the fact that the County's own Planning Commission unanimously recommended that the County Board of Supervisors *not* adopt the Ordinance, and the FAC suggests that the County nonetheless did so to gain leverage in negotiations with Stanford. *See* FAC ¶¶ 84, 87-89.

The Court concludes that the facts alleged in the FAC, if proved, would establish that the need for affordable housing is not more acute at or around Stanford than in other parts of the unincorporated County, and that the factors causing **[*27]** increased need for affordable housing are not more prevalent at or around Stanford than in other parts of the unincorporated County. Stanford argues that, like the plaintiffs in Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1509 (9th Cir. 1990), it should be permitted to go forward on its claim that the County irrationally singled it out to bear the burden of remedying a regional problem. In *Del Monte Dunes*, the plaintiff landowners sued the City of Monterey after the City denied their application to develop ocean-front property. The City required as a condition of development that the plaintiffs meet certain environmental and access conditions that had not been imposed with respect to development of surrounding properties. *See* id. at 1508. The plaintiffs alleged that the City's intent was to limit use and development of the plaintiffs' property so as to create a "butterfly park" that might bring back the Smith's Blue Butterfly to the area. Id. at 1509. The Ninth Circuit reversed the district court's grant of summary judgment for the City on the plaintiffs' equal protection claim, holding that "Although the objective of preserving a habitat for the Smith's Blue Butterfly is rational, it may not be rational to single out this parcel to provide it." *Id.* The Ninth Circuit **[*28]** concluded that genuine issues of material fact remained to be determined and remanded to the district court. *See id.*

The County argues that Stanford's reliance on *Del Monte Dunes* is misplaced, as the Ninth Circuit later clarified that its holding in that case was based on the City's failure to offer a rationale for distinguishing between the plaintiffs and other landowners. Specifically, the Ninth Circuit observed that "*Del Monte* did not hold that the City violated the equal protection clause, but rather that summary judgment in favor of the City was improper because it never offered a rationale for the regulation." Bd. of Nat. Res. of State of Wash. v. Brown, 992 F.2d 937, 944 (9th Cir. 1993). The Ninth Circuit went on to state that "[a]t most, *Del Monte* stands for the unremarkable proposition that a municipal land use regulation might violate the equal protection clause if there exists no rational basis to justify the regulation." *Id.* The County argues that *Del Monte* has no application here, because the County has proffered numerous rational bases for the Ordinance. The Court is not persuaded that the factual distinction identified by the County renders *Del Monte* irrelevant. In *Del Monte*, as here, the contention was that local government required one landowner among many to shoulder the burden of solving **[*29]** a broader regional problem when there was no rational basis for the differential treatment. While the County in the present case has proffered bases for the differential treatment — for example, that the housing shortage issues are more acute at and around Stanford or that the Ordinance will mitigate Stanford's own planned growth — Stanford has alleged facts disputing the County's proffered bases. The Court cannot resolve those factual disputes on a motion to dismiss.

The County asserts that it nonetheless is entitled to dismissal of Stanford's equal protection claim based on its incremental approach to the affordable housing shortage. The County points out that "Stanford does not dispute the existence of a countywide housing crisis." Defs.' Reply at 13, ECF 49. The County argues that "[r]egardless of whether it is worse in the Plan area or not, the County is allowed to respond, as it has here, to just one part of that crisis while deferring a countywide response." *Id.* This is perhaps the most difficult hurdle for Stanford to overcome with respect to its equal protection claim. The County is correct that both the Supreme Court and the Ninth Circuit have made clear

that "the legislature **[*30]** must be allowed leeway to approach a perceived problem incrementally." Beach Commc'ns, 508 U.S. at 316; *see also* RUI One, 371 F.3d at 1155. The County argues that the present case is analogous to others in which the courts held that the rational basis requirement was met by legislation addressing only part of the perceived problem.

For example, in *RUI One*, an employer sued the City of Berkeley to challenge the constitutionality of an amendment to the City's living wage ordinance to cover certain employers in the Berkeley Marina ("Marina Amendment"). *See* RUI One, 371 F.3d at 1145. The Marina Amendment added "[e]ntities within the boundaries of the Marina Zone which employ six (6) or more employees and generate $350,000 or more in annual gross receipts, to the list of employers required to comply with the minimum wage, leave, and health benefit provisions of the living wage ordinance." *Id.* (internal quotation marks and citation omitted). RUI One, an employer covered under the Marina Amendment, claimed that the amendment effectively targeted only a handful of employers — between one and five — in violation of its equal protection rights. Id. at 1154. The district court granted summary judgment for the City, which was affirmed by the Ninth Circuit. *See* id. at 1156.

In addressing the rational basis prong of the equal protection claim, the Ninth **[*31]** Circuit quoted extensively from the "Findings" section of the Marina Amendment, articulating the City's determinations that the privilege of using Public Trust tidelands should not be extended to businesses that will exacerbate problems associated with inadequate compensation for workers; employers who operate on Public Trust land enjoy a unique location and amenities affording them significant financial benefits, which should be used to provide employees with a living wage and health care benefits; and the public interest is served by ensuring that people are not deterred from visiting the Public Trust tidelands because they do not wish to patronize businesses that do not pay their employees a living wage or provide them with health care benefits. *See* RUI One, 371 F.3d at 1154-55. The Ninth Circuit held that those reasons provided a rational basis "for the City to treat larger Marina businesses differently from their competitors outside the Marina." Id. at 1156.

The Ninth Circuit also found that the City's decision to differentiate between Marina businesses and similar businesses elsewhere in the City was permissible under Supreme Court authority that "[s]uch legislative decisions are 'virtually unreviewable, since the legislature must **[*32]** be allowed leeway to approach a perceived problem incrementally.'" Id. at 1155 (quoting Beach Commc'ns, 508 U.S. at 316). The Ninth Circuit stated that "[r]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Id.* (internal quotation marks and citation omitted).

In another case cited by the County, *Angelotti*, medical providers and vendors challenged a state law imposing an activation fee for each pending workers' compensation lien they had filed. It was undisputed that California's workers' compensation system was overwhelmed by a substantial backlog of such liens, as workers' compensation courts lacked the capacity to handle all lien disputes. *See* Angelotti, 791 F.3d at 1079. California addressed the "lien crisis" by enacting a statute imposing a $100 activation fee for all pending liens filed prior to January 1, 2013, and a $150 filing fee for all liens filed on or after January 1, 2013. *Id.* Any lien for which the activation fee was not paid was subject to dismissal by operation of law. *Id.* The stated purpose of the statute was to provide a disincentive to file frivolous liens. **[*33]** *Id.* The plaintiffs asserted an equal protection claim based on the statute's exemption of certain entities other than the plaintiffs from having to pay the lien activation fee. Id. at 1085. The district court denied the defendants' motion to dismiss the equal protection claim and granted the plaintiffs' motion for preliminary injunction on the claim. Id. at 1087-88. The Ninth Circuit reversed the ruling on the motion to dismiss and vacated the preliminary injunction. Id. at 1088.

The Ninth Circuit found that "[t]he Legislature's approach [ ] is consistent with the principle that the legislature must be allowed leeway to approach a perceived problem incrementally." Angelotti, 791 F.3d at 1085. The Ninth Circuit reasoned that "[t]argeting the biggest contributors to the backlog — an approach that is both incremental, and focused on the group that 'most frequently' files liens — is certainly rationally related to a legitimate policy goal." Id. at 1086. Rejecting the district court's reasoning that a statute aimed at clearing only part of the backlog made "little sense," the Ninth Circuit found that such reasoning "denies the Legislature the leeway to tackle the lien backlog piecemeal, focusing first on a source of liens that it could have rationally viewed as **[*34]** the biggest contributor to the backlog." *Id.*

Stanford points out that both *RUI One* and *Angelotti* appear to have been decided on a more developed factual record than exists here. *RUI One* was decided on summary judgment and in *Angelotti* a motion for preliminary injunction was before the district court as well as a motion to dismiss. *Beach Commc'ns*, also cited by the County, similarly appears to have been decided on a developed record following proceedings before the Federal Communication Commission. *See Beach Commc'ns, 508 U.S. at 311-313* (discussing agency proceedings, including proceedings on remand for development of additional legislative facts). Stanford argues that it would not be appropriate for this Court to make the same kind of rational basis determination regarding the incremental approach in the present case, which is at only the motion to dismiss stage.

While the Court agrees with Stanford that *RUI One, Angelotti*, and *Beach Commc'ns* were decided on more developed factual records, that does not speak to Stanford's pleading burden to allege that the County lacked a rational basis for the differential treatment. The Ninth Circuit has made clear that "[t]he burden is on the one attacking the legislative arrangement **[*35]** to negative every conceivable basis which might support it," and that where a plaintiff fails to meet that burden at the pleading stage the complaint is subject to dismissal under *Rule 12(b)(6)*. *Aleman v. Glickman, 217 F.3d 1191, 1201 (9th Cir. 2000)* (internal quotation marks and citation omitted) (affirming *Rule 12(b)(6)* dismissal of equal protection claim based on plaintiff's failure to show lack of rational basis for statutory classification). Under the authorities discussed above, the County has discretion to take an incremental approach to a perceived problem, and an incremental approach can constitute a rational basis for an ordinance that targets some but not all contributors to the problem. Stanford's FAC does not address the County's discretion to take an incremental approach to the countywide affordable housing shortage or offer any explanation why it was not rational for the County to take such an approach in this case with passage of the Ordinance. Consequently, while further development of the factual record may be necessary to resolve the rational basis inquiry if and when Stanford meets its pleading burden, Stanford's FAC as presently framed does not meet that burden.

Accordingly, the motion to dismiss Claim 1 based on the rational basis prong is **[*36]** GRANTED WITH LEAVE TO AMEND.

3. Neutral Application of Ordinance in Stanford Community Plan Area

The County argues that Stanford's equal protection claim is fatally flawed for an additional reason, namely, because the Ordinance does not target Stanford as an entity but rather applies neutrally to the Stanford Community Plan Area. The cases cited for this proposition are distinguishable.

In *Oxford Bank & Tr. & Fifth Ave. Prop. Mgmt. v. Vill. of La Grange, 879 F. Supp. 2d 954, 968 (N.D. Ill. 2012)*, the defendant village amended its zoning ordinance to prohibit pawn shops in the area encompassing the village's central business district. The plaintiffs were landowners who had leased property within the central business district to an individual who planned to open a pawn shop there. *Id. at 961*. The district court granted summary judgment for the village on the plaintiff's class-of-one claim, in part because "the zoning amendment did not apply only to the plaintiffs, but equally to all property owners in the Village." *Id. at 968*. In contrast, the Ordinance in the present case does not apply to all property owners in the County, but only to property owned by Stanford. The fact that the Ordinance would apply equally to anyone who purchased lands within the Stanford Community Plan Area does not render the Ordinance "neutral," **[*37]** as there is no indication on this record that Stanford intends to sell any appreciable portion of those lands. In *Flying J Inc. v. City of New Haven, 549 F.3d 538, 541 (7th Cir. 2008)*, the challenged ordinance applied to all large-scale service stations within a particular zone, and was not targeted at and limited to lands owned by a particular entity.

As neither of the cited cases supports dismissal of Stanford's equal protection claim on the basis that the Ordinance is "neutral," the motion to dismiss Claim 1 on that basis is DENIED.

C. State Law Claims for Writ of Mandate and Declaratory Relief (Claims 2, 3)

In Claim 2, Stanford seeks a writ of mandate vacating and setting aside the Ordinance based on Stanford's contention that it is arbitrary, capricious, and lacking in evidentiary support. In Claim 3, Stanford seeks declaratory relief regarding its contention that the Ordinance is invalid and unlawful. Both claims appear to be grounded entirely in Stanford's equal protection claim, Claim 1, and neither party suggests differently. Accordingly, because Claim 1 is subject to dismissal with leave to amend, Claims 2 and 3 are as well.

The motion to dismiss Claims 2 and 3 is GRANTED WITH LEAVE TO AMEND.

IV. ORDER

(1) The County's motion to dismiss is GRANTED **[*38]** IN PART AND DENIED IN PART, as discussed above, and all claims are DISMISSED WITH LEAVE TO AMEND;
(2) Any amended pleading shall be filed on or before October 31, 2019; and
(3) Leave to amend is limited to the deficiencies addressed herein, and Stanford may not add new parties or claims without obtaining express leave of Court.

Dated: October 10, 2019

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

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