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**Re: The Collection by Trumark Homes – Eligibility of Accessory Dwelling Units to Count Toward RHNA Affordable Housing Allocation**

Dear Rob:

The Collection by Trumark Homes, a residential project proposed at 2550 Camino Tassajara in Danville, proposes to include as part of the development at least eight accessory dwelling units (ADUs) that will be deed restricted for affordable rent levels. We have been asked to confirm that when a new development constructs deed-restricted ADUs such units may be counted towards a jurisdiction's Regional Housing Needs Allocation (RHNA) and reported to the California Department of Housing and Community Development (HCD) as part of its Housing Element Annual Progress Report.

The answer to this question is yes. Attached and detached accessory dwelling units are defined in the Government Code as a type of residential dwelling unit so long as independent living facilities for one or more persons are provided. (Gov't Code § 65852.2(i)(4).)

Government Code section 65400 requires each city to prepare an annual report of the status of the housing element to document its progress in implementing the housing element, including the satisfaction of its RHNA. HCD has published instructions and regulations (see, e.g., 25 Cal.Code Regs. § 6200-6203) relating to completing such progress reports. These instructions and regulations clearly count ADUs (also known as "second units") in the total residential units produced. (See 25 Cal.Code Regs. § 6202(g)&(h).) For example, the regulations state that for each housing development affordable to moderate- or lower-income households for which building permits were issued during the reporting period, certain information shall be listed including the unit category which includes, among other types, "second-unit." (25 Cal.Code Regs. § 6203(c)(2), see also 25 Cal.Code Regs. § 6203(d) [including second-unit for potential listing of total number of units affordable to moderate and above moderate-income households].)

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HCD's Annual Housing Element Progress Report instructions clearly state that second units are considered development that can count toward satisfaction of RHNA.

“Project” or “Development” refers to a housing related activity where new construction of a unit(s) has had a building permit issued during the reporting calendar year. This may include single family, mixed use, multifamily, **second unit**, or any other developments where housing units as defined by the US Census Bureau and the California Department of Finance are a component of the project.

(HCD Draft Annual Progress Report Instructions – October 2018 [emphasis added]; see also HCD Annual Progress Report Instructions at p. 2 [including “second units” within unit category codes to be reported as part of annual building activity report summary for new construction of very low- and low-income units in Table A of the Report].) Moreover, table B of the annual progress report form requires jurisdictions to report the number of residential units included in Table A (which include second units) to demonstrate progress of meeting its RHNA. (HCD Annual Progress Report Instructions at p. 8.)

ADUs may be classified as affordable (and used towards satisfying affordable housing RHNA), especially where such units are covered by a deed restriction regarding affordable rents. HCD publishes a Frequently Asked Questions document regarding Housing Element Annual Progress Reports. In response to the question of whether ADUs can “automatically” be counted as low income because of their small size, HCD responded as follows:

Accessory Dwelling Units or Second Units are not automatically considered affordable to Low income households. Just like other housing types, the affordability of Accessory Dwelling Units (ADU) can be demonstrated by a deed restriction, proposed rents or sales prices, or a survey of comparable units that show what income level the ADU would be affordable to, for example, Very-Low, Low, Moderate, or Above-Moderate income households.

(HCD Housing Element Progress Report Frequently Asked Questions at p. 4 [updated 7/13/18].)<sup>1</sup> Here, Trumark proposes that the ADUs will include a deed restriction. In addition, the Town's Housing Element includes a justification for why small ADUs should be considered affordable to lower-income households. (See Town 2014-2022 Housing Element pp. 92-95 [containing

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<sup>1</sup> The same document also specifies that an ADU is the same as a second unit for the purposes of the annual report. (HCD Housing Element Progress Report Frequently Asked Questions at p. 5.)

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determination that ADUs  $\leq$ 550 square feet command a market value that would make them appropriate for low income one- or two-person households].)<sup>2</sup>

Very truly yours,

WENDEL, ROSEN, BLACK & DEAN LLP

Patricia E. Curtin

PEC/TAW

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<sup>2</sup> Other HCD-certified housing elements have specified that affordable housing RHNA may be satisfied through the development and permitting of ADUs (aka “second units”). For example, the City of Monte Sereno’s current certified housing element specifies that that city’s RHNA obligation for lower and moderate income units would be satisfied through the development of second units as well as other sources such as multifamily. (Monte Sereno 2015-2023 Housing Element at p. 44.)