CORRESPONDENCE

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CITY CLERK

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July 17, 2019

Mayor Tornek and City Council Members
City of Pasadena
100 North Garfield Street
Pasadena, California 91101

Subject: 141 N. Madison Appeal of the BZA Decision

Dear Honorable Mayor and Council Members:

There's no denying we need more affordable housing in California, and lots of it. While Pasadena has done an excellent job producing more affordable units than most municipalities, we still need to build more.

Our firm has built a few. We had nine very low income units in our last project; we're building six more in one project and another 10 in a second project. But mainly Pasadena needs more workforce housing, which could be created by the market if we changed our downtown zoning in two simple ways: remove most parking stalls in pedestrian-zones or transit districts, accompanied by a removal of DU maximums. By keeping height and bulk restrictions in place, we could protect the agreed downtown envelope envisioned by the General Plan, while at the same time creating smaller, less expensive and more environmentally sensitive housing units. This would enable those of average incomes who work downtown or near a transit station to live in Pasadena's exciting urban core, exactly what Denver has done, for example.

But workforce housing is another matter. The real reason I write is that under misinterpretations of state law or simply fear of challenge, Pasadena is being bullied into accepting developer concessions for affordable housing at any price, without substantive analysis of legal obligations or affordable housing contributions. It seems that nearly every consultant advising staff and City Council these days is pushing unambiguously for giving developers anything they demand in return for producing a paltry number of affordable housing units.

Well, not every consultant. In the case of one of the projects you are reviewing on July 22, 141 N. Madison, the financial consultant wrote in an email to staff on August 27, 2018, that **"... the Madison project is actually borderline on whether or not it (meets) the specific concessions being requested."**

That's an understatement, understandable when a consultant is delivering bad news. The real facts are that by a considerable margin, the Madison project does not meet the financial test of whether the City must accept the developer's request for concession permits. Not could it accept it, but must it accept it. Staff could only arrive to a positive recommendation by managing the data better, or the consultant crafting a better narrative. If you look at the data objectively, you don't have to accept this project's concession permits.

At a recent Board of Zoning Appeals meeting, the attorney for the developer argued that data in these analyses is subject to interpretation anyway - that there are many ways you can look at a project to deploy a financial litmus test. But what he failed to say is that alternative interpretations don't matter. The City Council on July 22 only needs to find itself reasonably comfortable that a good analysis, a good interpretation of data, concludes that the developer doesn't need the requested concession permits to build affordable housing. As stated in the letter to the BZA from our attorney, Allen Matkins, **"The City is well within its rights to deny both AHCPs because the developer and KMA have not shown that the Project, as proposed, produces "identifiable and actual cost reductions."**

There is a highly technical financial analysis of the Madison project data in that Allen Matkins letter, dated April 1, 2019, pages 1-10, that clearly indicates the City has a right to deny these concessions (excerpt attached - the entire 48-page letter also addressing CEQA is in the BZA appeal). So why has staff persisted in recommending approval to you?

One argument would be consistency. Staff has relied on these KMA analyses to "check the box" on financial analysis. The thinking goes that the City is less vulnerable to a lawsuit from a developer or anyone if it can say to a court, "we look at all the projects the same way."

But this misses the point. The only consistency we seem to have in evaluating AHCP projects is that they should all be approved. These KMA analyses are built on developer-supplied data, and run through a KMA model. Data in, data out. KMA even gives staff bread crumbs out of the financial maze in a very important footnote on page 14 of its Madison project that says, "Data (supplied by the developer) should be verified." The data was never verified, and it is incorrect. The developer submitted inaccurate data, and even then, the KMA analyst concludes, the project "is actually borderline on whether or not it (meets) the specific concessions being requested."

Do not just blindly accept what you are being told. Pasadena deserves better - better thoughtfulness, better results. I am sorry that I am not able to attend the Council Meeting in person on July 22, but it would appear that time from community members is terribly limited anyway. I strongly support the appellants' request that these ACHPs be denied, or in fact, that the Infill Exemption being requested be denied in advance of even voting on the proposed ACHPs.

Sincerely,

Ken McCormick

Attachment

Allen Matkins

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Via Email/U.S. Mail

April 1, 2019

Board of Zoning Appeals
City of Pasadena
100 N. Garfield Avenue
Pasadena 91101

David Reyes
Director of Planning
City of Pasadena
100 N. Garfield Avenue
Pasadena 91101

Re: Affordable Housing Concession Permit # 11879
127 and 141 N. Madison Avenue

Dear Commissioners and Mr. Reyes:

I write on behalf of Mill Creek Development, LLC ("Mill Creek") with regard to the proposed 72,000 square-foot, five-story mixed use project located at 127 and 141 N. Madison Avenue (the "Project") in the City of Pasadena (the "City"). On January 16, 2019, the Hearing Officer approved Affordable Housing Concession Permit No. 11879 for the Project, with conditions. The Hearing Officer further determined that the Project was exempt from environmental review pursuant to the California Environmental Quality Act ("CEQA") exemption for in-fill development projects (the "In-Fill Exemption"). (*See* 14 Cal. Code Regs. §15332.) Erika Foy of the Madison Heights Neighborhood Association ("Foy") timely filed an appeal of the Hearing Officer's determination; that appeal is set to be heard by the Board of Zoning Appeals ("BZA") on Wednesday, April 3, 2019.

While Mill Creek is not the appellant, Mill Creek supports the Foy appeal. Mill Creek is the owner of the Olivewood Village North project located at 99-121 N. Madison Avenue ("Olivewood"). Olivewood is located in close proximity to the Project; so close, in fact, that two protected trees and six other trees within the Olivewood property have been identified in the Project's arborist report. Olivewood will be negatively impacted by the proposed Project, including impacts to the protected trees, views, and the neighborhood character. As a developer, Mill Creek understands the advantages of working with City Staff to develop a project that benefits not only the developer but also the City and surrounding community as well. This proposed Project fails in this regard.

Mill Creek believes that the evidence in the record before the Hearing Officer and the BZA does not mandate the granting of an Affordable Housing Concession Permit, and that the In-Fill

Exemption was wrongly applied. Specifically, while Mill Creek acknowledges the benefits density bonus concessions provide, there are numerous issues with the Project that were not adequately considered, or addressed at all, and accordingly the approval of the Project and the Affordable Housing Concession Permit fails to comply with Cal. Gov. Code § 65915(d)(1), CEQA Guidelines § 15332, and CEQA Guidelines § 15300.2. These deficiencies are addressed in turn.

I. The City May Deny the Concessions Under Cal. Gov. Code § 65915(d)(1).

The statute authorizing density bonus concessions, Cal. Gov. Code § 65915(d), states the following:

> (1) … The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following:
>
> (A) ***The concession or incentive does not result in identifiable and actual cost reductions***, consistent with subdivision (k), to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).
>
> (B) ***The concession or incentive would have a specific, adverse impact***, as defined in paragraph (2) of subdivision (d) of Section 65589.5, ***upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and*** for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.
>
> (C) The concession or incentive would be contrary to state or federal law.

Cal. Gov. Code § 65915(d), emphasis added.

Here, the evidence in the record supports denial of the requested concessions. First, the evidence demonstrates that the concessions do not result in identifiable and actual cost reductions as demonstrated by the Keyser Marston Associates analysis. (Cal. Gov. Code § 65915(d)(1)(A).) Second, the concessions would have a specific, adverse impact upon the physical environment and there is no feasible method to mitigate or avoid the impact without rendering the development

unaffordable to low-income and moderate-income households. (Cal. Gov. Code § 65915(d)(1)(B).) Finally, the concessions would have a specific, adverse impact upon real property that is listed in the California Register of Historical Resources, and there is no feasible method to mitigate or avoid the impact without rendering the development unaffordable to low-income and moderate-income households. (Cal. Gov. Code § 65915(d)(1)(B).)

A. The Concessions Do Not Result in Identifiable and Actual Cost Reductions as Demonstrated by the Keyser Marston Analysis.

The analysis provided by Keyser Marston Associates ("KMA") on November 20, 2018 to the City to support granting the Affordable Housing Concession Permits ("AHCPs") for 127-141 N. Madison Avenue is predicated upon data errors such that the City has the right to deny these AHCPs. Using faulty data, the KMA model provides scant evidence why the City could not reject the AHCP applications, and in fact, a proper analysis of the data fully supports the opposite conclusion: that the applications do not meet the letter or spirit of section 65915(d)(1)(A). KMA even acknowledged in an email to the City on August 27, 2018, that "... the Madison project is actually borderline on whether or not it (meets) the specific concessions being requested."

The developer is asking to substantially exceed both the City's FAR and height zoning restrictions by providing only one additional affordable housing unit above the number required by the City's affordable housing statute. The magnitude of such excess, as measured against the benefit, requires a more diligent analysis in order for the City to adopt the plan.

The KMA analysis evaluates a Base Project allowable by right and a Concession Project allowable upon the granting of the two AHCPs. The most important (but erroneous) conclusion of the report is that the Concession Project (49 units, FAR of 2.25 and a height of 62 feet) will be less expensive to build on a per-unit basis than the "as-right" or Base Project (36 units, FAR of 1.5 and a 50 foot height limit with height averaging to 65 feet), thus resulting in identifiable and actual cost reductions in the production of four affordable housing units. In construction cost terms, KMA concludes that the Concession Project will have a per-unit cost of $474,000 versus the Base Project's construction cost of $478,000 per unit, a very slight advantage found using faulty modeling data.

The report also concludes that the developer is deriving only $314,000 in benefits in excess of the net cost to provide the four affordable units. While not a reason to deny concession permits, the failure to properly analyze the magnitude of the private benefits associated from these concessions potentially misleads policymakers regarding the feasibility of the developer to achieve bonus densities without incurring the high cost of the requested AHCPs.

1. First Conclusion Error: The Concession Project Actually Produces Cost Increases, Not Cost Reductions.

KMA's first conclusion is indefensible when a proper analysis of the data is undertaken. The conclusion was derived through the use of incorrect data, thereby invalidating the results. There are two significant areas of incorrect data.

First, the model uses the same percentages to allocate the site purchase price, demolition costs and grading/landscaping costs in both the Base and Concession Projects for the residential portion and the commercial portion of this mixed use project. This is simply a modeling error. The percentage of residential and commercial should change in each project, given the respective size of each use to the whole Project as measured in gross buildable square footage. The Concession Project correctly allocates 92% residential and 8% commercial gross square footage. In the smaller Base Project, however, when the commercial square footage stays the same but the residential component of the mixed use project shrinks, the appropriate allocation is actually 87.5% and 12.5% respectively, not 92% and 8% as the model presents. The failure to account for this change results in a significant modeling error.

Case	Office Sq. Ft.	Resi Sq. Ft.	Total Sq. Ft.	% Office	% Resi
Base	6,002	41,830	47,832	12.5%	87.5%
Concession	6,002	65,998	72,000	8.3%	91.7%

The BZA Staff Report issued March 29, 2019 ("BZA Staff Report") states on page 9 that "The residential component consumed the remaining costs and therefore, was similarly held constant. KMA has provided an addendum (to be provided as a separate attachment on April 1, 2019) further explaining the rationale." As of this writing, the public has not been seen any rationale addendum from KMA provided to the City that explains this modeling error.

While such a change may seem small, these numbers flow through the model in other line items, such as direct cost contingency, indirect costs and financing costs. When proper percentages are used, the Base Project's construction costs are reduced to $472,147 per unit. Thus, a single error in calculations improperly elevated the Base Project's cost above the Concession Project's costs of $474,000. With this correction, the Base Project's construction costs per unit are lower than the Concession Project's costs. This demonstrates that the Concession Project costs actually rise above the Base Project through the granting of the concessions. (*See* **Exhibit A.**)

The second error becomes quite clear when thinking about the dynamics of the two projects. In the Concession Project, the developer is building significantly larger condo units than in the Base Project. Since construction costs are near-linear in KMA's set of assumptions (i.e. costs increase

relative to the amount of square feet built), it is highly unlikely or even impossible that the Concession Project will produce identifiable cost savings. By building larger units, construction costs on a per-unit basis must increase. In fact, this is the actual result for this Project, as explained below.

The average unit size in the Base Project is 1,096 square feet. The average unit size in the Concession Project is 1,288 square feet, or 18% larger. If all inputs stay linear or proportionate to construction square footage, as characterized by KMA, building larger units would naturally cost more to build on a per-unit basis. So how did KMA come to the opposite conclusion? It relied on erroneous data for a single line item: "Public Permits & Fees." KMA assumed, incorrectly, that the cost per square foot for the Base Project units was $45.90, while the costs for the Concession case dropped to $32. A review of all Public Permits & Fees suggests that such fees would be around $38 per foot in the Base Project and $34 per foot in the Concession Project. (*See* **Exhibit B.**) In another KMA analyses for a project around the corner, at 711 E. Walnut Street, KMA concluded that Public Permits & Fees were $31.79 per foot for the Base Project and $36 for the Concession Project which is far more accurate and consistent with the calculations shown in Exhibit B. (*See* **Exhibit C.**)

Where did the erroneous numbers come from? The KMA report notes that these were inputs provided by the developer, but the numbers literally do not add up[1]. Most municipal or public fees are based on project valuation, which is nearly proportional to a project's gross square footage – even Residential Impact Fees ("RIFs") are fairly proportionate to a project's square footage. In this specific example, the RIFs are not completely linear because the unit sizes grow from the Base project to the Concession Project, hence the number of units shrinks proportionately and the RIFs are slightly lower proportionately. Even then, the non-linearity of the RIFs does not affect the overall linearity of Public Fees.

Perhaps the developer or KMA included an affordable housing in-lieu fee in its Base case scenario for Public Fees, but this is inconsistent with KMA's stated modeling purpose and all other KMA reports submitted to the City. These "Public Permits & Fees" in base cases are intentionally analyzed exclusive of any in-lieu fee for affordable housing requirements, so that decision makers can make an apples-to-apples comparison. As KMA's own analyses correctly articulate, it would not make sense for the only circumstance for a Concession Project to produce "identifiable and actual cost reductions" to be result from the reduction of an in-lieu fee payment for affordable housing.

When this error is corrected, contingency and financing costs are decreased, and the Base Project construction cost per unit is reduced once again to $462,103. The Concession Project cost

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[1] KMA even notes on page 14 that the data provided "should be verified" – but apparently was not.

increases slightly to $476,415. (*See* **Exhibit D.**) In other words, by correcting the two errors, it is clear that no actual cost reductions are found in the Concession Project, *and in fact, the actual cost increases*.

By adding land acquisition to the analysis, unit costs slightly decrease in "Total Cost" from the Base Project to the Concession Project, from $620,169 to $598,109. But the applicable statute requires "actual" cost reductions. This property was acquired four years ago – building the Concession Project in no way reduces the actual cost for the land, a fact any developer knows well. The land acquisition is a "sunk cost" that is factored in at the beginning, whether or not the developer builds a "base" or "concession" project. It should not be considered with regard to the statute's requirement to reduce actual costs, i.e. those related to the actual, future production of housing.

The more appropriate land price to be included, if any, would be a newly calculated land cost based on a Residual Land Value calculation typically used in such circumstances, the difference between the future value of the project and the future costs of the project after including a market return on equity. Residual land "cost" would most certainly climb substantially in the Concession Project compared to the Base Project because more units create greater profitability.

As defined by one economist, "Residual land value is a method for calculating the true value of development land. This is done by subtracting from the total value of a development, all costs associated with the development, including profit but excluding the cost of the land. The amount left over is the residual land value, or the amount the developer is able to pay for the land given the assumed value of the development, the assumed project costs, and the developer's desired profit." Residual value would go up with a larger entitlement envelope and down with a smaller one, but would not affect "identifiable and actual costs" of producing housing.

When the modeling errors are accounted for, it is clear that the Project as designed does not result in actual cost reductions as required by statute.

2. Second Conclusion Error: The Developer Does Not Need Both Concessions to Build Affordable Units Under the Permissible Bonus Density.

The second conclusion is also counterintuitive when the model's data is analyzed. Unsurprisingly, it was also achieved only by KMA's acceptance developer's unverified data.

KMA concludes that the developer is scarcely making a profit by providing four affordable units in the Concession Project – a sum of $314,000, over the social value the City derives. However, KMA arrives at this number by relying on the developer's assertion that all condominium units with the same number of bedrooms will sell at the same price, regardless of square footage. This notion is totally refuted by an analysis of market data.

In this particular case, KMA's model uses prices for condo sales in the Base Project and Concession Project at exactly the same price, even though the condos in the Concession Project are 18% larger. In other KMA analyses, KMA determined that condo sales prices in this neighborhood are consistent with their square footages, which is the generally accepted valuation method realtors employ when analyzing the sale pricing of units. (*See* **Exhibit E, Exhibit F.**) The data not only shows that the developer's estimates for his Concession Project sales prices are considerably inconsistent with the market, but that other projects only anticipate a slight variation in their sales price per foot based on the square footages of the units, in fact in both directions.

In the Base Project, the developer assumes $673 as the average sales price-per-foot. In the Concession Project, which has the same proportionate number of units in each bedroom category, the average sales price-per-foot drops to $582, which is simply unrealistic: no developer would build larger units and spend more construction costs to get the same per-unit sales results. If accurate metrics were used in the Concession Project using the same per-foot sales price, upwardly adjusting the Concession Project even within $20 per foot of his Base case, KMA's model would show that the developer was making a profit of over $4 million in the Concession Project – not $314,000. While the intent of the affordable housing statute is to encourage developers to provide more affordable units through market incentives, it is not the obligation of the City to grant Concessions simply to increase a developer's profitability. The point of this metric is to determine whether the City is getting social benefit relative to the private benefits the developer is getting through the concessions. That is not demonstrated here.

The BZA Staff Report continues to compound this erroneous line of thinking by stating on page 10 that "Comparable data used by KMA in the analysis was based on a search of closed sales for condominiums located in zip codes 91101, 91105 and 91106." It goes on to say that "The average price per square foot of saleable area was identified for one-, two- and three-bedroom units," as though that responds to the issue. However, averages do not tell the story. Attached in **Exhibit F** is a more precise analysis of the data the BZA Staff Report says KMA analyzed, closed sales in Pasadena for the last six months using data provided from the MLS to Sotheby's International. Mill Creek is also a developer and seller of condominiums in the Pasadena area and has been tracking local data for the last 14 years. The data for the last decade is consistent with the data results reflected of the most recent six months of sales: sales prices track square-foot sizes of condos.

By using a correlation analysis (known as R2 or R-squared computation of regression data) to isolate what drives sales prices, it becomes clear that square footages have a vastly higher impact than simply the number of bedrooms, particularly in the same project. On a scale of 0 to 1.0, bedrooms in the analysis only account for 18% of the variance in the relationship between price and number of bedrooms, where square footage accounts for 82% of the variance between square footage and sales price. In other words, statistically, square footage drives sales price.

When the real profitability is taken into account of the Concession Project with its 18% larger units, KMA's statement on pages 17 and 18 of its report is neither reasonable nor defendable:

> ... the City does not have sufficient evidence to deny the Applicant's request for Height and FAR Concessions for the following reasons:
>
> The City may not be able to demonstrate that a project with a 35% density bonus can be physically accommodated on the Site without the requested concessions; and
>
> The value created by the proposed density bonus and the requested concessions is estimated to exceed the net cost associated with providing four Very Low income units by $314,000. However, given that this represents approximately 1.2% of the Proposed Project's estimated construction cost, the excess amount should be considered insignificant.

The second statement is completely inaccurate: the value created is over $4 million, or 18% of construction costs, which is quite significant.

Regarding the first statement, the KMA analysis presents no logical foundation to support its assertion. The City is quite easily capable of demonstrating that a 35% density bonus project could be achieved without either the Height of the FAR concession. It is possible both physically and financially.

The key design components driving this Project's concession requests are its commercial office space and its parking stalls on the ground floor (notwithstanding the fact that subterranean parking in this area is directed by the Specific Plan and generally accomplished in projects nearby). Collectively these ground floor elements elevate the building higher than need be, exceeding the 50 foot height limit or the potential use of height averaging. The commercial space is included in the calculation of the FAR of the project, and if removed, reduces the amount of the FAR density required under a concession permit. The above-grade parking is not included in the FAR of the project, but it adds to its massing and bulk, elements noted in the initial Design Review hearing that require remedying.

Without both the commercial space and the additional parking, it is unquestionable that the project would not need a concession permit for height: it could stay within the 50 foot limit with 65 foot height averaging as required under the General and Specific Plan for the neighborhood.

A Concession permit for FAR is similarly not required to achieve a 35% bonus density to 49 units. The Zoning Code allows for a 10% increase from the current level of 1.5 FAR permissible in

the neighborhood, or 1.65. This results in a 52,800 square foot project for this property. Using the developer's metrics, 49 units at an average size of 1,016 square feet would fit into such a project from an FAR standpoint, and at four stories evenly distributed would create a footprint of only 13,200 square feet, or 41% of the lot. Such a low lot coverage ratio would allow for the more interesting architectural sculpturing and massing required under the General Plan and Specific Plan, with ample room for ground floor open space.

This alternative density bonus project, at 52,800 square feet and 1,036 square feet per unit, is comparable to the developer's current Base Project of 1,096 square feet per unit. Unit sizes in the Base project are driven up by the disproportionate number of two and three-bedroom units in the project compared to the market at large and the specific neighborhood. By changing the allocation very slightly, converting two three-bedroom units to one-bedrooms and six two-bedroom units to one-bedrooms, the developer is still able to achieve the sizes per unit. The large condo sizes are highly unusual in this neighborhood, and the intent of the affordable housing law is not to guarantee developers the right to build large products with larger profits simply by producing a single additional very low income affordable unit.

For a comparison to the surrounding condo market, the two nearby projects that were granted concessions, 711 E. Walnut and 253 S. Los Robles, have average square-foot unit sizes of 565 square feet and 987 square feet respectively, suggesting that this Project is only seeking an FAR concession permit to develop larger units, not actually to provide affordable housing. As discussed earlier, the creation of larger units actually increases the identifiable and actual per-unit construction costs rather than reduces them, thus eliminating the project's eligibility for a concession permit in the first place.

It is completely erroneous to state, on page 10 of the BZA Staff Report, that this Project's average square footage of 1,288 "falls within the range in new construction projects in the area," unless the "area" is defined as all of Pasadena including its most suburban neighborhoods. The recent KMA analyses of projects at 711 E. Walnut and 253 S. Los Robles reflect condo square footages in the urban core of Pasadena for new construction; the older Barcelona Apartments on Madison, just south of this project 300 feet, average less than 700 feet per unit.

It is sometimes argued that a developer needs variances or concessions such as height and increased FAR for financial reasons, as he cannot allegedly make a profit without the exceptions. However, in this case, using the developer-supplied data in the KMA analysis, it is easy to see that a 49-unit development employing the 35% bonus density, but staying within the height and FAR constraints of the property, would still be highly profitable to the developer. Even using KMA's own model, it is estimated that the developer would make a profit of $3 million on a 49-unit bonus density project that includes three on-site affordable units and stays within the current zoning laws.

3. Conclusion.

The City is well within its rights to deny both AHCPs because the developer and KMA have not shown that the Project, as proposed, produces "identifiable and actual cost reductions." The developer is completely capable of building a project incorporating his 35% bonus density within current General Plan and zoning regulations. If the developer must build a larger project with larger units, seeking an FAR variance would be far more appropriate than using faulty data to receive AHCPs.

B. The Concession Would Have a Specific, Adverse Impact Upon the Physical Environment.

1. The Project Would Have a Specific, Adverse Impact on Protected Trees.

As stated in the City's Municipal Code, "Pasadena is graced by the presence of thousands of mature trees that contribute long-term aesthetic, environmental, and economic benefits to the city." (Pasadena Municipal Code § 8.52.015.) The City of Pasadena expressly protects mature trees, which are integral components of historic sites and contribute to the site's historic and cultural significance. (*Id.*) The Hearing Officer erred in approving the recommendation of staff for the Project at 141 N. Madison Avenue on January 16, 2019 because of the failure to consider the Project's impact on neighboring trees, several of which are protected under Section 8.52 of the City of Pasadena Municipal Code. The Staff Report for the January 16, 2019 Hearing Officer evaluation of the Project ("Planning Staff Report") fails to reference a single mitigation measure to ensure these off-site mature trees are not injured, and the Project's Arborist report itself includes no proposed mitigation measures. The Project has a high likelihood of violating the Municipal Code's express prohibition of any act that would injure a mature tree. (Pasadena Municipal Code § 8.52.085.)

The Project's subterranean garage extends from the property's north property line to its south property line for almost the entirety of the property's 200 foot depth, and abuts the property's western property line in its entirety. (*See* **Exhibit G**, p. 1.) Virtually all neighboring trees close to these property lines, and some actually straddling property lines, are under threat of destruction by the subterranean garage, as noted in the developer's report from his Arborist, Carlberg Associates, dated Revised March 5, 2018. (*See* **Exhibit G**, pp. 2-8.) Four of these 16 trees are specifically protected trees under Municipal Code section 8.52.060, but all of them are subject to protection as separate property belonging to another property owner. The Hearing Officer acted beyond its authority before addressing, or addressing at the same time, the protection of all of these trees.

The Project's Arborist specifically notes that the developer must seek the approval of the neighbors regarding these threatened trees. Yet despite multiple calls to the developer requesting a meeting to discuss this potential conflict, and despite the City and the Hearing Officer's awareness

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July 3, 2019

BY EMAIL AND COURIER

Mayor Terry Tornek and
Members of the City Council
City of Pasadena
100 N. Garfield Avenue, Rm. S249
Pasadena, CA 91109

Re: Affordable Housing Concession Pmt. No. 11879
127 and 141 North Madison Avenue
Response to Appeal
Hearing Date: July 15, 2019

Mayor Tornek and Board Members:

We and Richard McDonald represent Mike Balian and MBC Enterprises, LLC, the owner of the Property and Applicant for the approved density bonus affordable housing Project referenced above. We respond to the appeals filed by Pasadena Heritage, the Women's Club of Pasadena, and the Blinn House Foundation (collectively, the "Appeal"). As described below, the findings of the Zoning Administrator ("ZA") and the Board of Zoning Appeals ("BZA") regarding the approved Project are well-supported with substantial evidence: the Project complies fully with the applicable General Plan, Specific Plan, and zoning regulations, as modified by the City's density bonus ordinance, and the Project falls firmly within the four corners of the Infill Development (Class 32) Categorical Exemption (the "CE") from the California Environmental Quality Act ("CEQA")[1].

The Appeal mischaracterizes applicable law, disregards voluminous evidence in the record regarding the Project and approval, urges the City to disregard and reject the Project on bases that violate applicable State law, and attempts to exploit the narrow and well-worn "unusual circumstances" exception to the CE to prevent construction of an affordable housing project in an established and developed area of the City. As the Appeal falls far short of meeting its burden under State law, this Council should affirm the decisions of the ZA and BZA and reject the appeal and associated opposition in its entirety.

[1] Pub. Res. Code § 21000, *et seq.*

1. The Project Fits Squarely within the Categorical Exemption Adopted for the Project, Consistent with Similarly Situated Projects.

The Appeal must demonstrate the existence of "unusual circumstances" ***and*** that those unusual circumstances lead directly to significant and unavoidable impacts.[2] The California Supreme Court has established that "it is not enough for a challenger merely to provide substantial evidence that the project ***may*** have a significant effect on the environment,"[3] as that phrase "would give no meaning to the phrase 'due to unusual circumstances.' "[4] (*Id.* at p. 1105; emphasis in original.) This is consistent with the State Legislature's determination that categorically exempt projects may have effects that are typical of such projects, but are not considered significant for the purposes of CEQA.[5] Not only does the Appeal fail to provide such evidence, but all evidence in the record demonstrates the opposite, and the ZA and BZA properly adopted and affirmed the categorical exemption here.

(a) No Unusual Circumstance Exists Here, and the Appeal Fails to Establish Otherwise.

The appeal invokes the well-worn claim of "unusual circumstances." The Appeal urges, in essence, the mere proximity of the Project to the Ford Place and Pasadena Playhouse Historical Districts constitutes an unusual circumstance, as does the presence of mature trees on and near the Property. Neither of these is unusual, and the City has never treated them as such.

(i) Proximity to Historical Resources is Not an Unusual Circumstance, as the City has Previously and Consistently Determined.

The City's pattern and practice for the City as a whole—and for the precise historical resources cited in this case—conclusively demonstrate no unusual circumstance exists. As noted on page 7 of the April 3 BZA Staff Report, the City contains 20 historical districts and numerous other individual resources. Development near or adjacent to any of these resources is relatively common.

More particularly, two similar cases approved by the City in 2018 occurred adjacent to the Ford and Playhouse Historical Districts. Conditional use permit ("CUP") 6452, on 535 East Union Street and 95, 99, and 119 N. Madison Avenue; as well as CUP 6449 (proposed by a Project opponent and approved by the City); were developed adjacent to both historic districts. CUP 6452, like the Project, included a density bonus and a Class 32 categorical exemption. As stated in the April 3 BZA Staff Report, the site for CUP 6452 also has the same lot depth as both the historical resource and the Property, and therefore the same

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[2] *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086 (2015).
[3] 60 Cal.4th at p. 1105.
[4] 60 Cal.4th at p. 1098.
[5] *Id.*

depth of adjacency to the historical district. Consistent with the determination for this Project, the City determined the proximity of CUP 6452 to the historical district did not constitute an unusual circumstance within the meaning of CEQA.

(ii) Proximity to Trees is Not an Unusual Circumstance, as the City has Previously and Consistently Determined.

The presence of mature trees also does not constitute an unusual circumstance, consistent with prior City determinations. The Appeal letter failed to provide a scintilla of evidence to the contrary, nor could it do so.

Most significantly, prior approvals in the City have determined trees do not constitute an unusual circumstance for the purposes of a categorical exemption, and these include approvals in the immediate vicinity of the Property. The approved concessions for the approval of CUP 6452 included removal of five protected trees—one more than the four approved for this Project—and the City properly did not consider the presence and removal of those trees as an unusual circumstance and adopted a categorical exemption. This is consistent with prior City grants of tree removals in connection with density bonus projects, as well as provisions for permitting such removals in the Municipal Code.[6] Simply put, the City's determination that no unusual circumstances exist on the Property is well supported by substantial evidence, and no evidence demonstrates the contrary.

Further, the City's environmental consultant, ESA, provided a detailed analysis of the suitability of the Project for a categorical exemption, in response to the Board's request (the "CE Report"). This included detailed analyses of factors that could affect nearby resources, such as noise and vibration. The analysis also provided a detailed discussion of each of the factors that might disqualify a project from a categorical exemption. As discussed in this letter, the report concluded no unusual circumstances applied and, as discussed below, that no other disqualifying factors existed, and the categorical exemption remains applicable.

(b) No Fair Argument Exists of a Significant Impact to the Ford Place or Pasadena Playhouse Historical Districts, Consistent with Prior City Determinations.

The appeal of CUP 6452 squarely addressed the potential for significant effects of density bonus projects to occur to historical resources, and that potential was determined not to exist. On or around June 27, 2018, the BZA upheld the ZA's approval and environmental determination that a categorical exemption properly applied. As the Project here proposes a lower density and substantially lower height in comparison to CUP 6452, and therefore represents a lower scale, it also could not result in any greater effect on an adjacent historic resource than a project already determined not to have the potential to result in a significant effect.

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[6] PMC §§ 8.52.020, 8.52.075; *see also* form TR-CHK, Rev: 3/06/13.

This determination is consistent with the determination of the ESA Report that no potential existed for a significant impact to the significance of any historical resource.

(c) The City Properly Characterized the Property as an Infill Site.

The Appeal asserts the Property does not qualify as an infill site for the purposes of section 15332 of the State CEQA Guidelines[7] (the "Guidelines"). The argument is purely semantic, focusing on the word "urban" in subdivision (b), and substituting the appellants' subjective interpretations of "urban" versus "suburban" uses for the definitions actually provided in CEQA. As described below, the Property constitutes an infill site and is surrounded by urban uses, as defined by CEQA and the Guidelines.

Section 15332(b) of the Guidelines requires an infill site be "substantially surrounded by urban uses." Section 21072 defines a "qualified urban use" as "***any*** residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses" (emphasis supplied). As described in the April 3 BZA Staff Report (p. 2), the uses surrounding the Property—including those in the historic districts—include commercial, institutional, and residential, developed at various densities and heights. These clearly qualify as urban uses for the purposes of determining whether the Property constitutes an infill site.

Section 21061.3 of CEQA defines an "infill site" as one located "in an urbanized area" and meeting one of two criteria listed in subdivisions (a) and (b). The criterion in subdivision (b) is merely that "[t]he site has been previously developed for qualified urban uses." As the Property is currently used for commercial office and commercial parking, and was historically used for residential, it meets the required criteria.

Section 21071(a) of CEQA defines "urbanized area" as an incorporated city that has a population of at least 100,000 people or a city that, in combination with no more than two other contiguous cities, contains 100,000 people. According to the U.S. Census, Pasadena's population totaled 137,120 people in 2010, and currently contains an estimated 141,370 people. The Property is therefore located in an urbanized area, consistent with the Guidelines' requirement.

(d) No Evidence in the Record Supports a Finding of a Significant Impact on Historical Resources, and the Appeal Provides None.

As described in detail in the April 3 BZA Staff Report (pp. 5–8), a full historical resources report, prepared by ESA (the "ESA Report"), evaluated the historical significance of the existing Madison Office Building on-site, and evaluated the potential effects of the Project on that building and on nearby historical resources. The ESA Report was supplemented by the CE Report, which is attached to the June 5 BZA Staff Report.

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[7] Cal. Code Regs., tit. 14, § 15000, *et seq.*

(i) No Historical Resources Exist on the Property.

As described in detail in the ESA Report, the Madison Office Building located on the Property has been extensively modified over the course of its existence and does not represent an example of any particular architectural style. Further, it is not associated with significant events and has only an ephemeral connection to any significant individual at a period in time its architecture no longer reflects, and does not contain any potential for significant data regarding the past. Consequently, it does not meet the eligibility criteria for listing on either national or State registers of historical resources and is not an historic resource for the purposes of CEQA. Consequently, the Project would not have a direct effect on an historical resource on the Property.[8] The Appeal fails to provide any evidence—let alone substantial evidence—to the contrary.

Although the Appeal suggests a fair argument exists for a significant impact on an historical resource on the Property, it fails to establish even the presence of such a resource, and its attempt is based on a mischaracterization of the structure's architectural style. Further, the law is clear that the "fair argument" standard does not apply to determinations of whether a resource is historic, even within the context of a mitigated negative declaration, rather than the categorical exemption at issue here.[9]

(ii) The Project Could Not Substantially Affect the Significance of Off-Site Historical Resources, Consistent with Prior City Determinations.

The Appeal asserts the potential for significant impact on the nearby historic districts. However, for the purposes of section 15332 of the Guidelines, substantial evidence of a significant effect on the ***significance*** of a resource is a disqualifying factor, not merely an effect on any aspect of the resource. The ESA Report evaluated the potential for indirect effects of the Project on adjacent or nearby historical resources, precisely to address proximity, and determined no significant impact would occur. These resources comprised the Ford Place Historic District, the Pasadena Playhouse Historic District, and the Scottish Rite Cathedral (significant individually and also as a contributor to the Playhouse Historic District). No potential exists for the Project to have a significant indirect effect on the significance of an off-site resource.

As described on page 54 of the ESA Report, the analysis acknowledged the potential for the Project to alter the setting of the Ford Place Historic District. However, that alteration would not inhibit the ability of the resource to convey its significance, as setting is only one of seven aspects of integrity of an historical resource, and no significant direct effects would occur to any of the resources associated with that district. Further, no argument exists that the significance of the district would be affected to an extent that would threaten its listing on the National Register. Therefore, the Project could not substantially reduce the

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[8] ESA Report, p. 54.
[9] *Valley Advocates v. City of Fresno*, 160 Cal.App.4th 1039, 1068 (2008).

significance of either district, and the Appeal neither provides any substantial evidence otherwise nor even suggests either district could become ineligible. Consequently, the buildings and district would retain the ability to convey their significance.

As described above, these findings are consistent with prior determinations for larger projects that abutted the same historical resources at issue here: specifically, CUP 6449 and CUP 6452. The CUP 6452 project site contains the same lot depth as the Property here, and therefore maintains the same depth of adjacency to historical resources. As with the Project, the City determined the approvals for that development could not have a significant effect on the Ford Place and Pasadena Playhouse Historic Districts or other nearby historical resources, and therefore a categorical exemption was appropriate. Further, the potential effects on historical resources were placed squarely at issue in the appeal of CUP 6452, and on or around June 27, 2018, the BZA upheld the ZA's approval and environmental determination. As the Project here proposes a lower density bonus and a substantially reduced height in comparison to CUP 6452 (in addition to a taller initial height, certain mechanical or architectural features were approved to extend up to 20 feet higher), and a reduced height and bulk in comparison to CUP 6449, and therefore represents a lower scale with respect to both, it also could not result in a greater effect on an adjacent historic resource.

Further, as described in the CE Report, the Project design already reflects consultation with the City's Design Review Commission regarding sensitivity to the Ford Place Historic District. The Project plans submitted in May 2018 in response to the Commission reflect the Project approved by the ZA, affirmed by the BZA, and now (again) on appeal to the City Council.

At the request of the BZA, ESA supplemented its analysis with photographs of additional views of the Ford Place Historic District and Edmund Blinn house, as well as a line-of-sight analysis (Attachment B to the CE Report), to determine whether and to what extent the Project might affect views of these resources. Although the Appeal attempts to paint this additional data as evidence of the potential for a significant impact, the opposite is true: context and visibility are important for any evaluation of the potential for any effect to occur. This is particularly true where, as here, the visibility of the Property and Project from the nearby historic districts is very limited or absent. As described in the April 3, 2019 BZA Staff Report and in the CE Report, existing vegetation would visually buffer the Project from nearby resources, and the arrangement of buildings would ensure minimal visibility from the historic resources to the Project. Consequently, the original conclusion of the ESA Report remains accurate and is strengthened.

In marked contrast to the detailed evaluation provided for the Project, the Appeal offers an unsubstantiated conclusion that the Project would substantially affect the resources acknowledged in the ESA Report. For example, the Appeal asserts the ESA Report fails to consider the character of the Ford Historical District as "suburban," or lower in scale than some other surrounding development. In fact, as described above, the ESA Report specifically evaluates the effect of the Project on the historical setting of the district. The

Appeal further offers unsourced and unverified claims regarding the purported lot coverage ratios of the historical district and some nearby properties. These floor area ratios appear to have been offered to support the proposition that they are not "urban," though the opposition declines to define the term and attempts to characterize a slight increase in lot coverage—assuming the unsourced numbers are correct—as "an enormous shift," even though lot coverage may not necessarily even be observable and comparable among structures visible from the public right-of-way. The letter then claims on this basis the Project is "inconsistent with the historic character of the neighborhood" and adversely affects the historic district.

As described above, the ESA Report does not claim the Project is entirely consistent with the historical setting of the Ford Place Historical District. Rather, it claims the inconsistency does not affect the setting of the district to the extent it could substantially compromise its ability to convey its historical significance. Again, as stated in the ESA Report and provided in the California Register and National Register criteria and guidance, setting is only one of seven aspects of significance, and the only aspect potentially subject to any indirect effects from the Project. Consequently, the Project would not substantially interfere with the historical significance of nearby historical districts or their ability to convey that significance, and could not substantially affect the significance of the districts, as they remain eligible for listing on the National Register, and the Appeal neither makes nor substantiates any claim to the contrary. This is consistent with other similar determinations for larger buildings in the immediate area, relative to the same historical districts.

Ultimately, the contentions of the Appeal regarding the effects of the Project on historical resources rest only on unsubstantiated opinion of individuals with no established credentials or expertise, and on unsourced and unsubstantiated figures. But on this record, even if the authors of the Appeal were competent to render a conclusion regarding historic buildings (no such competence is evidenced), that conclusion remains unsupported by facts and misrepresents the analysis and conclusions of actual experts in the field (ESA). It therefore does not and cannot constitute substantial evidence in support of a fair argument, and it provides no basis for rejection of the categorical exemption or the AHCP on the grounds urged.

(iii) The Project Would Not Result in Vibration Impacts to Historical Resources in the Vicinity, and No Evidence Exists to the Contrary.

The Appeal speculates that vibration from construction activities associated with the Project would result in significant impacts to those resources. The letter provides no evidence of any kind for this bare assertion. In contrast, the CE Report evaluated the potential vibration from construction of the Project and its design features, and determined it would not result in damage to sensitive receptors. As described on page 13 of the CE Report and in its Attachment B (Noise Technical Report), ESA specifically evaluated vibration levels with respect to their effects on historic structures and demonstrated no such impacts could occur.

(e) No Evidence in the Record Substantiates any Claim that Other Significant Environmental Impacts Would Occur.

Any claim of a significant impact requires the support of substantial evidence. The California Environmental Quality Act defines substantial evidence as "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[10] The law is clear that "argument, speculation, unsubstantiated opinion or narrative" ***do not*** constitute substantial evidence.[11] Courts have well established that testimony, even by an expert, is not substantial when the party proffering that evidence is not qualified to render an opinion on the subject.[12] This is particularly true where, as here, the argument that a significant impact could occur is not supported by any expert testimony, and consists of nothing more than unsupported suppositions and assertions that certain things may occur.[13]

(i) No Significant Aesthetic Impact Would Occur, and State Law Precludes a Different Finding.

The Appeal attempts to impose personal notions of architectural merit, and uses the density bonus incentives—which have been approved for larger projects in the vicinity—as a purported basis for determining a significant impact would occur. This attempt does not constitute substantial evidence within the meaning of CEQA (described above), and it mischaracterizes the aesthetics review to which the Project was already subject.

As discussed above and described on page 4 of the April 3 BZA Staff Report, the Project is required to undergo three stages of design review. The first (Preliminary) stage occurred in 2017 before the City's Design Review Commission. This review necessarily focused on the relationship of the Project to its surroundings, and particularly upon its relationship with the adjacent and nearby historical resources. The Commission provided its suggested design modifications, which the applicant team incorporated into its October 2018 submittal to the City. Two additional stages of design review (Concept and Final) remain, and will continue to address the aesthetic relationship among the Project and its surroundings.

The Appeal urges that the City cannot approve a categorical exemption absent final review by the Design Review Commission. However, the City's pattern and practice consistently requires only preliminary design review during the land use permitting process, and requires the subsequent stages after, when projects are more fully developed for construction drawings and plan check. The City's treatment of aesthetics here is consistent with courts' determinations that most aesthetic concerns are, in fact, design review concerns and not environmental impacts, even within the context of the lower "fair argument"

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[10] Public Resources Code Section 21080(e)(1).
[11] *Id.* at subdiv. (e)(2); CEQA Guidelines Section 15384; *see also, Newberrry Springs Water Assn. v. County of San Bernardino*, 150 Cal. App. 3d 740 (1984).
[12] *Cathay Mortuary, Inc. v. San Francisco Planning Comm'n*, 207 Cal. App. 3d 275 (1989).
[13] *See, e.g., Apt. Assn. of Greater Los Angeles v. City of Los Angeles*, 90 Cal. App. 4th 1162, 1175-76 (2001).

standard that applies to mitigated negative declarations.[14,15] Even here, however, a detailed analysis of the Project with respect to the aesthetics of neighboring historic resources already demonstrated no such impact could occur, as the Project could not reduce the significance of either historic district to the degree that it risks losing its designation, nor does the Appeal make or substantiate such a claim. The Appeal provides no evidence otherwise, let alone substantial evidence. Nonetheless, the design review requirement is inherent to the City's review process, and City is entitled to rely upon it when making land use and environmental determinations, and further refinement of the design will occur over the course of the remaining two evaluations by the Design Review Committee.

(ii) No Substantial Evidence Establishes that a Significant Impact Would Occur to Biological Resources.

The Appeal claims the removal of protected trees constitutes a significant impact attributable to the density bonus. Not so. As determined for CUP 6452, the City has not, as a pattern and practice, considered the removal of protected trees as a significant impact for the purposes of determining whether that project qualified for a density bonus or a categorical exemption. As acknowledged by the Appeal, the City previously approved the removal of several off-site trees, as part of CUP 6449, that the Project might potentially affect. Even if subsequent design review facilitated the retention of some of those trees, their removal was approved and considered in the environmental determination for that project, and that project was approved notwithstanding the proposed removals.

Fundamentally, the Appeal fails to provide any evidence that removal of trees necessarily represents a significant environmental impact, while the CE Report actually establishes the opposite, and determined that the Property (which includes the protected trees) does not provide habitat for any sensitive species.

We also note, the record for this Project also includes arborist reports prepared by Carlberg Associates (rev'd March 5, 2018) and Jan Scow (April 17, 2019) that evaluate the trees proposed for removal as part of the AHCP. As detailed therein, the reports demonstrate the trees proposed for removal exhibit poor health and structure that cannot be corrected.[16] These defects render the trees a public health risk, and endanger pedestrians and vehicles in the vicinity, necessitating their removal in any case.[17]

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[14] *See, e.g., Bowman v. City of Berkeley*, 122 Cal.App.4th 572, 592–93 (2004) ("aesthetic issues like the one raised here are ordinarily the province of local design review, ***not*** CEQA" (emphasis supplied)).
[15] We also note that Senate Bill 743 and Assembly Bill 744 eliminate aesthetic and shade/shadow impacts from CEQA consideration within transit priority areas: as stated demonstrated herein, the Property is located in a transit priority area, and therefore aesthetics effects alone cannot not be treated as environmental effects for the purposes of CEQA analysis.
[16] Scow, pp. 1–2.
[17] *Id.*, p. 2.

(f) The Project is Consistent with the General Plan, Specific Plan, and Municipal Code.

(i) The Project is Consistent with the General Plan.

The Appeal objects to the City's pattern and practice of assessing projects' consistency with quantifiable General Plan and zoning requirements, and purports to list policies with which the Project conflicts. However, the City's approach is consistent with established law, including the HAA and CEQA, and the Appeal fails to provide substantial evidence of inconsistency with the General Plan as a whole.

A finding of consistency with the General Plan does not require strict consistency with every policy or with all aspects of a plan. Courts have consistently recognized that land use plans attempt to balance a wide range of competing interests, and a project need only be consistent with a plan overall. Even though a project may—and likely will—deviate from some particular provisions of a plan, it remains consistent with that plan on an overall basis.[18] Consistent with this established doctrine, the ZA determined, and the BZA affirmed, the Project complied with the General Plan.

Consistent with the City's action, courts have consistently distinguished between policies that are objective and mandatory and those that are not for the purpose of determining overall consistency with the plan. In *Sequoyah Hills Homeowners Assn. v. City of Oakland*[19], the Court rejected a challenge to a document based on inconsistency with policies, reiterating, "a project need not be in perfect conformity with each and every [] policy" to be consistent with the General Plan. In fact, the Court treated the idea of complete consistency as impossible, stating, "it is beyond cavil that no project could completely satisfy every policy stated in the [General Plan], and that state law does not impose such a requirement."[20] The California Attorney General has agreed in published opinions.[21] The Court further found that "none of the policies on which appellant relies is mandatory," and rejected the claim of non-conformity on that basis.[22]

Here, the policies cited by the Appeal relate to protection of historical resources, including through design. However, these policies provide general statements, preferences, and directions, but do not impose any specific, objective obligation or command any particular course of action. Therefore, the policy framework it is not mandatory, any claimed conflict does not constitute a basis for finding a conflict with the Community Plan as a whole, and even if a conflict existed with a discrete policy (as described in this letter, no conflict exists)

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[18] *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 815 (2007).
[19] 23 Cal.App.4th 704, 719 (1993).
[20] 23 Cal.App.4th at p. 719, citing *Greenebaum v. City of Los Angeles*, 153 Cal.App.3d 391, 406- 407 (1984).
[21] 59 Ops.Cal.Atty.Gen. 129, 131 (1976).
[22] 23 Cal.App.4th at p. 719.

it fails to establish error or abuse of discretion on the part of the ZA or the BZA, or to support a denial of the density bonus incentives and concessions.

Additionally, CEQA provides that applicable General Plan policies refer to those that were "adopted for the purpose of avoiding or mitigating an environmental effect."[23] But even to the extent the policies are arguably mandatory (they are not) or that were adopted for the purpose of avoiding or mitigating a significant environmental effect, the Project complies with them. As described in detail above, the ESA Report, which was prepared specifically to address whether significant impacts may occur to either of the historic districts in the vicinity, or to any historic resource on the Property. The report determined that no significant effect would occur to the nearby historic districts, and that the structure on the property did not constitute a historic resource for the purposes of CEQA, and therefore no significant impact could occur to its historic significance.

Further, even to the extent the Project could provide additional refinement of its relative to its neighbors, it remains subject to design review. As described below, the Design Review Commission has preliminarily reviewed and commented upon a prior version of the Project, the Project was modified in response, and further design review is required. Consequently, as with the design of CUP 6452, the Project design will further evolve, consistent with the General Plan and Specific Plan.

Thus, no substantial evidence demonstrates any conflict with any of the policies the Appeal cites, and the evidence in the record actually demonstrates the opposite. Because the Project would not result in significant effects to the significance of nearby historic resources, and would not damage any resources on the Property (where none exist), the Project maintains consistency with policies related to the protection and preservation of historic resources.

Ultimately, the Project would advance a range of planning policies articulated in the General Plan, as well as the quantifiable development standards listed therein. As those objective development standards ***are*** mandatory, the Project is consistent overall with the General Plan, even if other inconsistencies may exist with other particular policies.

(ii) The Project is Consistent with the Specific Plan and Municipal Code.

The Appeal also references Specific Plan guidelines—which also are not mandatory—as evidence of a disqualifying inconsistency. However, as described above, these guidelines are only relevant to CEQA to the extent they were adopted to avoid or mitigate a significant environmental effect or are mandatory. Further, although the Appeal notes the initial comments of the Design Review Commission regarding that Project, those comments concerned a version of the Project that differs from what the ZA approved and the BZA affirmed. The Project already has incorporated suggestions from the Commission, and at least two stages of subsequent review will occur. This is the same process followed for an

[23] State CEQA Guidelines, Appx. G, §10, subd. (g).

opponent's development proposal and for CUP 6452 and, as with those projects, further refinement of the design is anticipated to occur, consistent with the Specific Plan.

Further, even to the extent the policies cited by the Appeal are proposed to avoid or mitigate a significant effect on historical resources, no conflict would occur because no significant diminution of the significance of any resource could occur. As described above, the ESA Report provided a detailed discussion of the effects of the Project on nearby historical resources, and the CE Report provided additional photographic evidence requested by this Board to further substantiate its conclusions.

Ultimately, the Appeal focuses on the density bonus concessions, as its discussion of policies relating to contextual development, scale, and massing necessarily relate to the height and floor area concessions. As described in *Wollmer*,[24] the inconsistencies cannot relate to the grant of the concessions under a density bonus, and the City cannot apply development standards in manner that would have the effect of physically precluding development of the Project as proposed.

The Appeal's discussion regarding tree removal suffers from a similar flaw, as the Project includes removal of trees as part of the density bonus request. *Wollmer*[25] applies here, too, because denying a request to remove trees would have the effect of physically precluding development of the Project as proposed. Further, as with the Appeal's project, the remaining two stages of design review also could yield a design that reduces tree removals. But the April 3 BZA Staff Report correctly noted the trees were previously approved for removal in an identical process to this Project, despite subsequent design refinements that permitted their retention, and that the environmental analysis considered these removals and concluded they did not constitute significant environmental effects.

2. Substantial Evidence Supports the Grant of the Concessions, and the Appeal Offers Irrelevant and Erroneous Objections already Rejected by the Courts.

The Appeal cuts and pastes provisions of a prior opposition letter regarding various challenges to the economic and physical analysis of the concessions, and provides nothing more to support its assertions. However, as with the letter its copies, it misstates the law and mischaracterizes the need for such an analysis and its proper application.

Among other things, the Appeal asserts—contrary to the law—the City bears the burden to demonstrate the economic and physical need for the concessions. As the economic analysis provided for the Project actually demonstrates the economic and physical need to a greater degree than the law requires, this claim is neither accurate nor supportable. Further, the

[24] 193 Cal.App.4th at p. 1348.
[25] 193 Cal.App.4th at p. 1348.

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Density Bonus Law specifically disclaims the need for an economic study, and ***even the City's requirement to provide a study violates the law.***

(a) Concessions and Incentives Need Only Offset Costs Associated with the Affordable Units, *not* Reduce the Construction Costs of the Building or Render the Entire Project Economically Feasible.

The entire basis of the Appeal's economic discussion stems from a fundamental mischaracterization of the Density Bonus Law regarding costs and economic benefit. In essence, the Appeal claims that because the concessions would increase overall construction costs—a larger building is more expensive to build—these concessions necessarily fail to reduce the cost of the Project and therefore are subject to denial. The law dictates otherwise, and the Appeal's mischaracterization renders irrelevant the entirety of its objections.

The language and intent of the Density Bonus Law are plain: as described above, the purpose is to reduce the costs "to provide ***for*** affordable units,"[26] not to reduce the overall cost of construction. The law further clarifies that permissible reductions include ***offsets*** of the lower rents of affordable units.[27] The concessions and incentives referenced in the Density Bonus Law include relief from land use regulations.[28] Typically, as is the case with Pasadena, this relief takes the form of additional height, greater floor area, and reduced setbacks, but also may include zoning for mixed-use on a site not originally zoned for mixed-use.

These concessions collectively increase the building envelope of a given site or otherwise permit construction where it may not have occurred. Thus, these measures will almost always tend to increase construction costs because they necessarily result in a larger building than otherwise permitted. Within this context, the Appeal's reading is nonsensical and proves far too much: this standard would dictate that no local agency could approve most concessions or incentives, because the agency could always show greater construction costs associated with a larger building.

(b) Substantial Evidence Supports the Economic Need for the Density Bonus Incentives, Though the Law Does Not Require It.

The Appeal asserts the Project is feasible without the requested concessions and further asserts, without any substantiation, cost and profit figures that purport to show an insufficient need or a lack of need. But the Density Bonus Law does not impose such a test or require substantiation of any particular profitability level: as cited above, the ***law only***

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[26] § 65915(d)(1) (emphasis supplied).
[27] *Id.* at subds. (k)(1) and (k)(3).
[28] *Id.* at subds. (k)(1)–(2), referencing relief that includes, but is not limited to, setback requirements, square footage limitations, and parking requirements, and defining concessions or incentives to include mixed-use zoning if the additional uses will offset costs associated with providing affordable units.

***requires that concessions* offset *the costs associated with providing affordable units*.**

Notwithstanding the above, we briefly address the more egregious errors of the Appeal with respect to the economic analysis for the Project. The addenda and revisions to the economic analysis prepared by Keyser Marston Associates ("KMA") more comprehensively debunk the Appeal's claims.

(i) The Law Does Not Require That Economic Feasibility Depend upon the Requested Concessions.

The plain language of the Density Bonus Law permits only a showing that the concessions and incentives provide some offset of costs associated with providing affordable units. Section 65915(f) requires the City to grant requests for concessions unless it determines they "would not result in actual and identifiable cost reductions," as specified in subdivision (k). Subdivision (k) provides that cost reductions include "provid[ing] for affordable housing costs."

Although the law at one time provided that concessions and incentives should relate to the economic feasibility of a density bonus project as a whole, the Legislature amended the law in 2008 to eliminate any requirement for such a showing.[29] As stated in *Wollmer*, *supra*:

> "[I]t is clear that one of the effects of the 2008 amendments is to ***delete the requirement that an applicant*** for a waiver of development standards must ***show that the waiver was necessary*** to render the project economically feasible."[30]

In evaluating a challenge to a density bonus project based on the lack of need for concessions for the economic feasibility of the Project, given that the concessions in that case accommodated amenities and other project features, the court upheld the concessions, stating the approval:

> "did not violate density bonus law by accommodating project amenities in the grant of density bonus for affordable housing project, ***even if [the] waiver was not necessary to render projects economically feasible***."[31]

Here, just as in *Wollmer*, the Appeal seeks to impose upon the City and the Project a requirement that the Legislature specifically deleted over a decade ago.

Thus, the plain language of the law provides an exceedingly low bar for economic benefit, and effectively acknowledges any economic benefit as sufficient. Consequently, ***even if the***

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[29] Stats. 2008, ch. 454, § 1.
[30] 193 Cal.App.4th at p. 1346 (emphasis supplied).
[31] *Id.* (emphasis supplied).

assertions of the Appeal letter were entirely accurate (they are not), those assertions are irrelevant, as they fail to establish the density bonus and concessions fall short of the very low standard established by State law.

Mr. Balian need not demonstrate—and the City cannot base any finding on—whether the Project requires the concessions for economic feasibility of the Project as a whole. Further, just as in *Wollmer*, the concessions here need not accommodate only the bare minimum unit count: the law does not require the Project strip away amenities or features merely because it requests relief under the Density Bonus Law. The only relevant economic question is whether substantial evidence demonstrates the concessions would not offset any costs associated with providing affordable units. No such evidence existed in the record before the ZA or BZA, and the Appeal failed to provide any to the City Council. Consequently, no lawful economic basis exists for denial of the concessions.

(ii) The City's Requirement to Demonstrate a Financial Need for Concessions Violates State Law.

As described above, the Density Bonus Law prior to 2017 permitted rejection of a request on the basis that a requested incentive was not "necessary" for the provision of affordable units. However, in response to local jurisdictions' requirements for *pro forma* analyses to support a density bonus request, the State Legislature amended the law specifically to prohibit requiring an economic study.[32] Further, and as described in detail above, it provides a very low bar for the economic effect of a concession or incentive, as it permits denial of an incentive ***only*** where that incentive would not result in "identifiable and actual cost reductions . . . to provide for affordable housing costs."[33] The purpose of the reductions includes offsetting the reduced rents of affordable units.[34]

However, the City's Municipal Code contravenes the law by purporting to require an affirmative finding regarding financial need, and the City's pattern and practice demand a full economic study as part of the justification for a request.[35] The City's density bonus provisions require a finding that a requested concession or incentive "is required in order for the designated units to be affordable."[36] This literally inverts the standards established in the Density Bonus Law, as it (1) converts the negative finding provided in the Density Bonus Law as a basis for denial in limited instances, to a positive finding required for approval; (2) shifts the evidentiary burden from the agency to the applicant; and (3) raises or disregards the low bar established to permit a concession or incentive, as the law requires

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[32] Govt. Code § 65915(a)(2).Citations to State law refer to the Government Code, unless otherwise specified.)
[33] § 65915(d)(1)(A).
[34] *Id.*
[35] *See, e.g.*, KMA memorandum dated March 25, 2019; p. 4. ("The purpose of the KMA analysis is to analyze the Proposed Project's financial characteristics to determine if the specific concessions or incentives . . . ***are required*** to fulfill the Section 65915(d)(1)(A) criteria" (emphasis supplied)).
[36] PMC § 17.43.050.D.1.

approval ***unless*** even a mere offset of the reduced rents for affordable units would not occur.

Because the required findings in the Municipal Code and the City's associated demand for financial analysis violate each of these aspects of the Density Bonus Law, the City cannot lawfully apply them to this or any other request for a concession or incentive, and doing so subjects to the City to substantial liability under the Density Bonus Law and the Housing Accountability Act (discussed further below). To the extent the Municipal Code requires a developer to provide proof, the requirement for which is specifically disclaimed by section 65915, the offending provision is necessarily void.[37]

(iii) KMA Comprehensively Addressed the Economic Characteristics of the Project, Despite the Lack of a Requirement to Do So.

As described in the Determination and the BZA Staff Reports on the appeal, KMA prepared a detailed economic analysis of the density bonus request. In conducting this analysis, and consistent with the City's pattern and practice, the KMA analysis compared two alternative base-case development scenarios with the proposed Project, and compared the differences in building costs and economic benefits.[38] Briefly, as summarized in the April 3 BZA Staff Report and described in detail in a follow-up memorandum issued by KMA, and in a revised financial analysis dated March 25, 2019[39] (Attachments E and F, respectively, to the April 3 BZA Staff Report[40]), the KMA analysis concluded density bonus and incentives would render the residential component of the Project feasible, and the Project would potentially be infeasible absent those concessions and incentives.

The Appeal makes several claims regarding the methods and conclusions of the KMA analysis, each made to artificially increase the costs associated with the Project when compared to the base case, in a mistaken bid to show a lack of economic need for the requested concessions. These include: (1) the KMA analysis incorrectly accounted for differences in site/land value; (2) KMA's treatment of the City's in-lieu fee was incorrect; (3) KMA purportedly lacked evidence or qualification regarding the necessity of providing additional height to accommodate the increased floor area; and (4) KMA's purported use of inapplicable sales data as comps. Even setting aside the irrelevance of showing the economic

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[37] *See Friends of Lagoon Valley v. City of Vacaville*, 154 Cal.App.4th 897, 830 (An otherwise valid local ordinance that conflicts with the Density Bonus Law is preempted.); *Sherwin–Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993) ("If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."].)

[38] Here again, we note the intent of the Density Bonus Law to offset the costs associated with providing affordable units, not to decrease the overall cost of construction.

[39] As noted on the March 29, 2019 cover memorandum for the revised KMA report, the numerical totals and conclusions remained unchanged from the original report, as the calculations remain valid; rather, the revised report provides clarifications and responses to comments submitted by various opponents.

[40] The April 3, 2019 BZA Staff Report is included as Attachment C to the June 5, 2019 BZA Staff Report.

necessary of the concessions, these claims range from unsupported to simply erroneous. They do not constitute substantial evidence for any relevant finding for denial of the AHCP.

(iv) KMA's Allocation of Land Values was Fully Explained and Supported, and the Appeal Fails to Support its Version.

The Appeal asserts KMA incorrectly assigned the value of the residential portion of the Property, and offers an arbitrary alternative figure. The letter provides no evidentiary basis of any kind for this alternative, and no explanation of its derivation. Further, the letter does not establish any expertise that qualifies its author to make such a specialized technical determination. This omission highlighted by the letter's later claim that KMA was itself unqualified to make certain basic, common-sense assumptions regarding building form that the Density Bonus Law incorporates.

As stated in Appendix F (p. 13) to the April 3 BZA Staff Report, KMA held constant the value of the office portion of the land because the amount of office floor area did not change under either scenario: simply put, no basis existed to assign different values to the same floor area for the same use on the same land, and the Appeal fails to provide any basis for doing so.

(v) The Appeal Double-Counts the City's Inclusionary Housing Fee, But Provide No Reason for Doing So.

In a further bid to artificially inflate the costs associated with the Project, the Appeal parrots the erroneous claims of a prior opposition letter that the KMA analysis erred in failing to include the inclusionary housing fee in the financial assumptions of the proposed Project, rather than only in the base case scenarios. As explained in the April 3 BZA Staff Report and in the addendum to the KMA analysis, the fee ***only*** applies in the base case scenario, because that scenario includes no affordable units and therefore must pay the fee instead. Building the fee into the proposed Project assumptions double-counts the fee because it assumes the Project would pay the fee required of projects that do not include affordable units, and also would construct the affordable units necessary to avoid the fee. Here again, the Appeal provides no evidentiary basis for this double-counting, as the City would not apply the fee to the Project as proposed.

(c) The Project Requires the Additional Height and Floor Area, and the City Cannot Physically Preclude Development of the Project by Denying the Requested Concession.

The Appeal attempts to argue Mr. Balian must establish the absolute need for the requested additional height and floor area, and that he is not entitled to either unless he cannot construct a project with a similar number of units absent the concessions and incentives. As with the majority of Appeals' claims regarding the density bonus and incentives, this one contravenes the plain language of the statute and misstates the applicable standard, and the courts have already addressed and disposed of the Appeal's arguments.

The Density Bonus Law states that a local agency cannot:

> "apply any development standard that would have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities ***or with the concessions and incentives permitted by this section***."[41]

The phrasing of this section was deliberate and specific—the Legislature altered the language in 2008 to its current form[42]—and limits an agency's ability physically to preclude the development ***as proposed, irrespective of concessions*** or building features other than the residential units themselves.

Contrary to the Appeal, the only substantive test subdivision (e) imposes on Mr. Balian is whether the development satisfies subdivision (b), which specifies the required percentage of affordable units to qualify for the requested density bonus, parking reductions, and concessions.[43] Here, no dispute exists that the Project provides 11 percent of its base units as affordable to very-low-income households; therefore, subdivision (b)(1) provides that the Project qualifies for a 35 percent density bonus specified in subdivision (f), and for concessions specified in subdivision (d). Whether another version of the Project could theoretically accommodate the number of residential units proposed, but without the requested concessions or other building features, is irrelevant.

The courts have affirmed this reading. In *Wollmer*, *supra*, one of the bases for the challenge to the density bonus project in that case was the claim that because the project at issue included building features and amenities not strictly required to accommodate the density bonus units, the agency erred in granting those concessions. The court rejected the challenge, stating definitively,

> "[N]othing in the statute requires the applicant to strip the project of amenities, such as an interior courtyard, that would require a waiver of development standards."[44]

Further,

> "The statute does not say that what must be precluded is a project with no amenities, or that amenities may not be the reason a waiver is needed."[45]

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[41] § 65915(e)(1).
[42] Stats. 2008, ch. 454, § 1.
[43] § 65915(b)(1), addressing the percentage density bonus and referencing subds. (f) (density bonus amount), (d) (concessions), (e) (waivers or reductions in development standards), and (p) (parking reductions.
[44] 193 Cal.App.4th at p. 1346.
[45] 193 Cal.App.4th at p. 1346–47.

Simply put, ***the beginning and end of the inquiry is whether a project provides sufficient affordable units to qualify for a density bonus and concessions.***[46] The manner in which a project employs those concessions—or which project components require the concessions—is not within the City's purview, except for specific, narrow findings provided in the Density Bonus Law, which also are not met here.

Here, just as in *Wollmer*, the Appeal insists Mr. Balian and/or the City must strip the Project of all but what the Appeal deems essential components to fit within a by-right envelope, and no more. The law states the opposite is true. As the court determined in *Wollmer*, doing so would have the effect of physically precluding development of the Project ***as proposed***, which the Density Bonus Law specifically prohibits.

Further, as described above an in the KMA analysis, the additional height and floor area, as well as the Project features those concessions accommodate, help offset of the costs of providing the affordable units. The Density Bonus Law applies, by its plain language, to mixed-use projects as well as purely residential projects,[47] and the unit mix proposed here both offsets the costs of the reduced rents and affordable units, and also provides for a range of housing opportunities, consistent with the vision and Objectives 1, 3, and 5 of the Specific Plan to specify quality growth, encourage mixed-use development, and build a range of housing opportunities downtown.

Thus, KMA's determination that the requested height is necessary to accommodate the additional requested floor area is consistent with the law. Further, the City Planning Department staff—who are certainly qualified to make statements regarding building form—concluded the failure to permit additional height would preclude accommodation of the requested floor area.[48]

However, as discussed in detail above, these calculations are not required. As stated above, the density bonus law ***previously*** included the findings stated in section 17.43.050.D.1 of the Municipal Code, but eliminated those findings in 2008 and adopted a much lower standard in 2017. The Project meets that standard, as the additional height and floor area will help offset the costs associated with construction and leasing of the proposed affordable units. The need for offsets of the costs associated with providing affordable units here is particularly high, as the Project does not provide the maximum number of units permitted by the General Plan on the Property, and therefore cannot distribute construction and other costs among both base and density bonus units to the degree it otherwise might.

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[46] *Id.*
[47] § 65915(i).
[48] April 3 BZA Staff Report, p. 10.

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(d) The Project Requests Fewer Units than the Maximum, as it is Entitled to a Density Bonus Based on the General Plan Designation, Not the Specific Plan.

The Density Bonus Law provides for a bonus based on the "maximum allowable residential density" of a project site.[49] The law defines "maximum allowable residential density" as "the density allowed under the zoning ordinance ***and*** land use element of the general plan," and the two provide a range of densities, the maximum allowable under both.[50] Where an inconsistency exists, the General Plan density governs.[51]

Here, the General Plan land use designation for the Property of Medium Mixed Use permits a maximum density of 87 dwelling units ("d.u.") per acre.[52] Based on a total site area of about 32,000 s.f., the General Plan permits a maximum of 64 d.u. by right on the Property. In contrast, the Specific Plan zoning designation of CD-3 (Central District, Walnut Housing Subdistrict) permits only 48 d.u./acre, or slightly more than half of the density permitted by the General Plan. An inconsistency between the two therefore exists and, according to the plain language of the Density Bonus Law, the General Plan must govern.

This interpretation is consistent with case law, as well as the intent of the law itself. As stated in *Wollmer*, "[t]here may be inconsistencies between the density permitted under a zoning ordinance as opposed to what is permitted under the land use element of a general plan, in which case the latter prevails under the density bonus law." [53] The law also expressly commands agencies to err on the side of increased housing. As provided in subdivision (r), the Legislature required the law "be interpreted liberally in favor of producing the maximum number of total housing units." Here, the literal and liberal interpretation of the law requires the use of the higher General Plan density as the basis of the density bonus at issue.

3. The Housing Accountability Act Prohibits Disapproval of Housing Developments for Subjective Criteria.

The Appeal, in urging modifications to or denial of the Project based on aesthetic or community character standards, including tree removal, contravenes the strong State and local policy to promote development of housing and particularly affordable housing.[54] In fact, State law forbids the City from using the aesthetic effects of a density bonus or incentives to conclude the Project conflicts with the Municipal Code or Specific Plan.

The California Legislature has found that "California has a housing supply and affordability crisis of historic proportions" and that "The excessive cost of the state's housing supply is

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[49] § 65915(f).
[50] § 65915(o)(2) (emphasis supplied).
[51] *Id.*
[52] General Plan Land Use Element, p. 5.
[53] 193 Cal.App.4th at pp. 1345–46.
[54] *See* § 65915(b)(3).

partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing."[55] In response, the Legislature adopted the Housing Accountability Act ("HAA") to "significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development Projects and emergency shelters."[56] The appeal's requested outcome runs afoul of those prohibitions.

The HAA prohibits a city from disapproving a housing development project, including reducing density or imposing conditions comparable to a density reduction, unless it finds, based on a preponderance of the evidence, that the project would have a specific adverse impact on public health or safety that cannot be feasibly mitigated in any way other than rejecting the project or reducing its size.[57] The HAA specifically protects housing and mixed use projects that comply with ***objective*** general plan, zoning, and subdivision standards, regardless of whether or not they provide affordable housing.[58,59]

The HAA narrowly defines the public health and safety exception as a "specific, adverse impact" that is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete."[60] ***The findings must be supported by a* preponderance *of the evidence***, rather than the more deferential substantial evidence standard that normally governs such actions, and the City bears the burden to demonstrate that the evidence supporting its conclusion is greater than the evidence to the contrary. Moreover, the State Legislature confirmed the above with its passage of AB 3194 (Ch. 243, Stat. 2018), which modified section 65915.5(a)(3) of the Government Code to declare the Legislature's intent that specific adverse impacts to health and safety "will arise ***infrequently***" (emphasis supplied).

The HAA forbids the City from using subjective criteria to support denial of a housing development project. In *Honchariw*, the Fifth District confirmed that a finding by the County that a site is "not physically suitable" for the project is not an allowable reason for denial under the HAA. The Court stated, "[a] finding by the County, pursuant to County Code section 20.12.140 or Government Code section 66474, that a project site is 'not physically suitable' does not relieve the County from compliance with section 65589.5(j) if the threshold compliance standards of that statute are met and if the County denies approval for reasons other than compliance with 'applicable, objective general plan and zoning standards and criteria, including design review standards, in effect ....' " The Court

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[55] § 65589.5(a)(1)(B), (2)(A).
[56] *Id.*, § 65589.5(a)(2)(K).
[57] § 65589.5(k).
[58] *Honchariw v. City of Stanislaus*, 200 Cal. App. 4th 1066, 1070 (2011).
[59] *Id.*, § 65589.5(j)(1); emphasis supplied.
[60] *Id.*, § 65589.5(j)(1).

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further elaborated that "suitability" is a subjective, rather than objective criteria, and was the type of consideration that the HAA was designed to preclude local governments from using when considering housing developments.[61] Just as in *Honchariw*, the adverse findings the Appeal urge regarding community character and compatibility, tree removal, and even historical resources, do not constitute a permissible basis for denial of the Project and would subject the City to substantial financial liability.

4. The City Council Should Deny the Appeal, Affirm the ZA's BZA's Approvals, and Uphold the Categorical Exemption.

The challenger bears the burden of proof to demonstrate the inapplicability of a categorical exemption or of a density bonus, including any grant of concessions. Here, as described above, the Appeal has failed to provide any substantial evidence of unusual circumstances or of a significant impact as a result of those unusual circumstances, or of a significant unavoidable impact associated with the requested concessions or incentives. Not only has the Appeal failed to provide evidence, but the evidence in the record concerning density, concessions, and environmental impacts contradicts the claims of the Appeal. Simply put, the Appeal has again failed to meet its burden, and the record for the proposed AHCP cannot support a rejection of the categorical exemption at issue here.

Therefore, for all of the reasons discussed above, we urge the City Council to reject the unfounded and unlawful claims of the Appeal, deny the Appeal, and sustain the ZA's approval and BZA's affirmation of the Project.

Very truly yours,

BENJAMIN M. REZNIK and
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NB:neb

cc: (via email)
Talyn Mirzakhanian, Zoning Administrator

[61] *Honchariw, supra*, at pp. 1070, 1076.