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September 23, 2021

Mayor Victor M. Gordo,
Vice-Mayor and Councilmember Andy Wilson,
Councilmembers Tyron Hampton, Felicia Williams,
John J. Kennedy, Gene Masuda, Jess Rivas, Steve Madison
City Council, City of Pasadena
100 North Garfield Avenue
Pasadena, California 91101

Re: AHCP #11907 (PLN2019-00310) – 141 South Lake Avenue, Pasadena.

Dear Mayor Gordo, Vice-Mayor Wilson, Councilmembers Hampton, Williams, Kennedy, Masuda, Rivas, and Madison:

This letter is being submitted for your September 27, 2021 Agenda, which includes a call for review of the Board of Zoning Appeals' ("BZA") June 17, 2021 decision to overturn the Zoning Administrator's ("ZA") September 26, 2019 decision and to allow the processing of DC Lake Holding, LLC's Affordable Housing Concession Permit ("AHCP") application.

I. INTRODUCTION

To date, the City of Pasadena ("City") has violated the California State Density Bonus Law ("SDBL"), the Housing Accountability Act ("HAA"), and its own Zoning Code by refusing to process DC Lake Holding, LLC's AHCP application, and by repeatedly interpreting the SDBL, HAA, and Zoning Code in an arbitrary and capricious manner to prevent the proposed housing development project from being built. In so doing, the City has thwarted the California Legislature's goal of building more affordable housing to address the State's housing crisis.

In particular, in March 2018, DC Lake Holding, LLC ("Applicant," "DC Lake," or "Appellant") proposed building a mixed-use housing development project (the "Initial Project") at 141 South Lake Avenue, Pasadena, California (the "Property"). The Property is located in the City's Central District, and the Initial Project complied with all of the applicable development standards in the General Plan, Central District Specific Plan, and Zoning Code.

Nevertheless, in August 2018, the City told Applicant that Section 17.50.160 of the Zoning Code, which requires the depth of commercial uses along street frontages such as Lake Avenue to be a minimum of 50 feet, did not apply. No reason was given why. The City also told Applicant that Section 17.30.030.C.2.b of the Zoning Code, which states that "housing shall not occupy more than 50 percent of total building floor area along Lake Avenue," applied to the entire proposed building, not just that portion "along Lake Avenue." No reason was given why, but the City told Applicant that it could apply for a variance from this requirement.

To avoid further delay, rather than apply for a variance, Applicant changed the Initial Project to a density bonus project under the SDBL with 5 very low-income units as provided under the SDBL (the "Density Bonus Project"). Further, Applicant requested only one concession even though it was entitled to two, *i.e.*, to provide less than 50% of the floor area as commercial space along Lake Avenue. In all other respects, the Density Bonus Project complied with the General Plan, Central District Specific Plan, and Zoning Code.

The City, however, refused to process Applicant's Density Bonus Project/AHCP application. According to the City, the 50% of floor area requirement in Section 17.30.030.C.2.b of the Zoning Code constitutes a "use restriction" that is not subject to – nor allowed as a concession under – the SDBL, as opposed to a "development standard" or "building standard." As such, the Density Bonus Project "does not comply with the Code requirements of Section 17.30.030.C.2.b of the Zoning Code," which "governs land uses," and the Zoning Code prohibited Applicant from requesting a concession or a variance. No explanation was given as to why Applicant had been told it could apply for a variance previously, but now could not.

II. PROCEDURAL POSTURE

As explained in your Staff Report, after receiving the ZA's decision, on September 30, 2019, Applicant filed a Request for Appeal, which the City refused to process. On October 23, 2019, therefore, DC Lake filed a Petition for Writ of Mandate with other civil claims in Los Angeles County Superior Court to contest the ZA's determinations and the City's AHCP processes. On March 19, 2021, the Court granted the writ and ordered the appeal processed. Per Staff's instruction, Applicant therefore filed the Request for Appeal on March 23, 2021. As stated therein, "Appellant believes the ZA determination of September 26, 2019, and the City's AHCP processes are in error and violate the State Density Bonus Law (Government Code Section 65915, et. seq.)." On June 17, 2021, the BZA voted 3-1 to overturn the ZA's decision. On July 12, 2021, Councilmember Williams called the matter up for review.

This call for review, therefore, presents two issues for you to decide, not one; and, Applicant addresses all of the issues in this letter so that the City Council can rectify, resolve, and rule on all of them administratively without the need for further court intervention.

Specifically, the first issue is whether Applicant is entitled to proceed with its Density Bonus Project under the City's Municipal Code and the SDBL. The second issue is whether the

City's practices and procedures for processing density bonus projects comply with State law. The answer to the first question is yes. The answer to the second question is no.

More specifically, as explained below, the concession requested by Applicant for its Density Bonus Project is a permissible concession from a development standard pursuant to the City's Municipal Code and the SDBL.[1] Further, the City's practices and procedures for processing density bonus projects do ***not*** comply with the SDBL and show a pattern and practice of intentionally violating it. They must be amended immediately.[2] Applicant, therefore, asks you to uphold the BZA's decision to overturn the ZA's September 26, 2019 determination and require the Density Bonus Project to be processed in accordance with the mandates of the SDBL. *See, e.g., Ruegg & Ellsworth v. City of Berkeley*, 63 Cal. App. 5th 277, 313-14 (2021) (reaffirming the State's ability to pass housing legislation limiting local governments' discretion to deny housing projects).

III. FACTUAL BACKGROUND[3]

A. The Initial Project and the City's Position on a Variance.

On March 21, 2018, Applicant filed a Predevelopment Plan Review ("PPR") application and a Preliminary Consultation application to develop the Property as a mixed-use housing development project, *i.e.*, the Initial Project. Ex. A, at 669-70. The Initial Project called for the demolition of the existing building on the Property, and the construction of a new, five-story, mixed-use development project with 70 residential market rate units, 7,258 sq. ft. of indoor restaurant floor area, 1,589 sq. ft. of outdoor restaurant area, 5,536 sq. ft. of second floor office space, and 205 parking spaces. Ex. A, at 669, 676, 687. The Property is located within the Central District, has a zoning designation of CD-5, and a General Plan designation of High Mixed-Use. Ex. A, at 669, 690. The commercial space was to run ***along*** Lake Avenue to a depth of 50 feet (Ex. A, at 696) as permitted under Municipal Code § 17.50.160.E.1. The residential component was located above and behind the commercial component (Ex. A, at 696), consistent with the mixed-use definition under Municipal Code § 17.50.160.

On June 12, 2018, the Design Commission reviewed the Initial Project through the Preliminary Consultation process and provided its initial comments. Ex. A, at 556-57, 666-67. In its presentation to the Design Commission, City Staff expressly stated that it was the City's position that a variance was needed to provide less than 50% of commercial floor area. Ex. A, at 567, 571 (lines 13-18), 588 (lines 16-18) ("So they could request affordable housing concession permits, variances, density variances, etc.").

On July 13, 2018, the City provided its PPR Comments to Applicant (Ex. A, at 687), which stated that the percentage of nonresidential floor area was not in compliance with the Specific Plan's restrictions on residential use fronting Lake Avenue: "No more than 50 percent of the portion of the building facing Lake Avenue can be comprised of residential use, and 79 percent is currently proposed." Ex. A, at 440. The PPR Comments also stated that "no more than 50% of the total Floor Area of the Lake side shall be comprised of residential floor area." Ex. A, at 441.

On August 15, 2018, Applicant met with Staff to discuss the City's PPR Comments, including the City's interpretation of the words "along Lake Avenue" in Municipal Code § 17.30.030.C.2.b being applied to the entire floor area of the proposed building on Lake Avenue, not just the portion "along Lake Avenue." *See* Ex. A, at 697 (Paragraph 7 addressing "Residential Density"), 776-77, 780. Applicant believed the City's position was unsupported by the express language of the Zoning Code because the limit on housing to 50 percent of the "floor area ***along*** Lake Avenue" under Municipal Code § 17.30.030.C.2.b (emphasis added) could easily be met by using the mixed-use standards in Municipal Code § 17.50.160, which requires the depth of commercial uses along street frontages such as Lake Avenue to be a minimum of 50 feet. Further, the Zoning Code definition for "Frontage, Building" is "[t]he side or face of the building which is parallel to or is at an angle of 45 degrees or less to a public street or a public parking area." Municipal Code § 17.80.020. It thus does not include the entire building's square footage, as Staff asserted.

On October 1, 2018, the PPR for the Initial Project was presented to the City Council as an information item as required under Municipal Code § 17.60.040.C.1.g. Ex. A, at 411, 417, 553. The Agenda Report for the City Council (Ex. A, at 420) expressly stated that a variance "to permit less than 50% of the floor area in the portion fronting on Lake Avenue as Nonresidential uses" was needed for the Initial Project because it was "inconsistent with the existing ***development regulations*** for the CD-5 (Lake Avenue subdistrict)." Ex. A, at 426 (emphasis added). *See also* Ex. A, at 511 (variance needed for the percent of nonresidential floor area in portion fronting Lake Avenue). It further stated that:

> Mixed-use projects consisting of residential and nonresidential uses (restaurants, retail, office) are permitted by right at the subject site. ***It's anticipated that any discretionary entitlements filed by the applicant would apply specifically to development standards and the overall project design, and not the use of the property***. The proposal currently includes characteristics that do not comply with ***applicable development standards*** and subject the project ***to a discretionary review through the Variance process with review and approval by the Hearing Officer***."

Ex. A, at 426 (emphasis added). Last, it stated that the General Plan designation for the Property is High Mixed Use with a density of 87 units per acre, and the Initial Project was "generally ***consistent*** with the intent of the ***General Plan's High Mixed-Use designation***." Ex. A, at 427, 434 (emphasis added).

B. <u>Applicant's Density Bonus Project and AHCP Application</u>.

On March 18, 2019, Applicant filed an application for a revised project under the SDBL with 5 very low-income units, *i.e.,* the Density Bonus Project. Ex. A, at 728. On May 1, 2019, the application was deemed complete. *Id*.

On June 17, 2019, therefore, Applicant filed an AHCP application (Ex. A, at 172-174), seeking one concession from the requirements of Municipal Code § 17.30.030.C.2.b. This

section ***only*** prohibits "[g]round-floor housing," and provides that "housing shall not occupy more than 50 percent of total building floor area ***along*** Lake Avenue from Green Street south to California Boulevard, to maintain the commercial retail and service character of the South Lake Shopping Area. ***Housing is allowed on upper floors and adjacent parcels***. . ." Municipal Code § 17.30.030.C.2.b (emphasis added). The AHCP application explained that the concession was needed to facilitate the construction of the affordable housing and density bonus units by allowing the upper floors along Lake Avenue to be occupied with housing rather than commercial offices. *See* Ex. A, at 194, 196, 255. The concession thus only changed the internal square footage calculations on the upper floors of the building along Lake Avenue (Ex. A, at 255, 282), while respecting the ban on ground floor housing.

Relying on the General Plan density of 87 units per acre, as permitted under the SDBL, and applying the SDBL percentage for very low-income affordable units, Applicant proposed 89 units with 5 of its units as very low-income units. Ex. A, at 29.

The City, however, said, "The portion of the property along Lake Avenue has a residential density of 48 units per acre yielding a base density of 25 units and provides 25% density bonus for 32 units with 7% very low-income units, 2 very low-income units. The Hudson Avenue portion allows 60 units per acre, yields a base density of 46 units with a 22.5% increase in the base density requiring 6% very low- income units, 3 very low-income units." Ex. A, at 194, 309.

The Property has street frontage along South Lake Avenue and South Hudson Avenue. Ex. A, at 332. Part of the Property is thus located in Housing Area 3 (Lake Avenue), and part of it is located in Housing Area 1 (Hudson Avenue). Ex. A, at 258. In Housing Area 3, housing is permitted except on the ground floor, and the residential density is limited to 48 units per acre. Municipal Code § 17.30.030, Figures 3-4 & 3-6. In Housing Area 1, however, housing is permitted on the ground floor, and the residential density is limited to 60 units per acre. *Id.*

Under the City's General Plan, however, the maximum allowable residential density for Applicant's Density Bonus Project is 87 units per acre. Ex. A, at 256, 339. This maximum thus allows more affordable units to be built than the maximum allowed under the City's Central District Specific Plan ("CDSP") (48 units in Housing Area 3, and 60 units in Housing Area 1). Ex. A, at 424, 441, 507; Municipal Code § 17.30.030, Figures 3-4 & 3-6.

On June 25, 2019, the City's Design Commission reviewed the Density Bonus Project through the Preliminary Consultation process. Ex. A, at 330. The City's Planning & Community Development Department submitted a Staff Report for the Project (Ex. A, at 332), and subsequently notified Applicant of the Design Commission's comments and suggested revisions to the submitted plans (Ex. A, at 404-05).

For the third time, the City again said that Applicant needed to get a variance for providing "less than the required percentage of required nonresidential Floor Area in Area 3." Ex. A, at 334, 339.

On July 15, 2019, the AHCP application was deemed incomplete. Ex. A, at 735. The City's incomplete letter, however, did not reference Section 17.30.030 of the Zoning Code, nor Section 17.30.030.C.2.b. Ex. A, at 735-741.

C. <u>The City's Refusal to Process Applicant's AHCP Application</u>.

On September 18, 2019, Applicant filed the necessary documents to address the issues raised in the City's July 15, 2019 incomplete letter. *See* Ex. A, at 8-9.

On September 26, 2019, the ZA responded by acknowledging that Applicant was "requesting a concession from the requirements of Section 17.30.030.C.2.b of the Zoning Code." Ex. A, at 765 (emphasis omitted). However, for the first time, the ZA asserted that Section 17.30.030 of the City's Zoning Code "specifically governs ***land uses*** within the Central District" whereas Section 17.30.040 "specifically governs ***development standards*** applicable to projects within the Central District." *Id.* (emphasis added). The City stated that "the regulations in Section 17.30.030.C.2.b, for which [Applicant is] requesting a concession, are classified as <u>use</u> regulations and not development/building standards." *Id*. (emphasis in original). The ZA found that the proposed Density Bonus Project, therefore, "does not comply with . . . Section 17.30.030.C.2.b of the Zoning Code" (Ex. A, at 766) on the following grounds:

> Section 65915 of California Government Code Section Chapter 4.3 (Density Bonus and Other Incentives) defines "concessions or incentives" as reductions in ***development standards or modifications of zoning code requirements*** related to building standards. ***The provisions in Section 17.30.030 of the Zoning Code are neither development standards nor are they zoning code requirements related to building standards***. Therefore, state law does not require that the City grant a ***use concession or incentive***, and further the ***Pasadena Zoning Code prohibits [Applicant] from requesting a concession from the use regulations in Section 17.30.030.C.2.b***. ***Nor may [Applicant] seek a Variance*** from this regulation, as Section 17.60.080.A.2.a of the Zoning Code provides that "the power to grant Variances does not extend to allowable land uses and the notes on the land-use tables. In no case shall a Variance be granted to allow a use of land or structure not otherwise allowed in the zoning district in which the subject property is located."

(Ex. A, at 765 (emphasis added)). The ZA concluded that Applicant could revise the proposed Density Bonus Project "to comply with the use regulations in Section 17.30.030.C.2.b of the Zoning Code or [Applicant] may withdraw [its] application and seek a refund of fees." Ex. A, at 766.

D. <u>The City's Refusal to Process Applicant's Appeal</u>.

On September 30, 2019, Applicant filed a Request for Appeal, explaining that the ZA's September 26, 2019 letter constituted: (1) an appealable "decision, or action rendered by the . . . Zoning Administrator" within the meaning of the City's Zoning Code Section 17.72.030; and (2)

an appealable determination on the "applicability of the provisions of this Zoning Code" that are believed to be in error within the meaning of the City's Zoning Code Section 17.72.040. Ex. A, at 167.

However, the City refused to process the Request for Appeal. The City said that the September 26, 2019 letter was not "a determination or interpretation subject to appeal under Section 17.72.040 of the Zoning Code." Ex. A, at 759, 761.

The Superior Court soundly rejected the City's position on the appealability of its decision and ordered the City to process Applicant's appeal. Staff then asked Applicant to file it, which it did on March 23, 2021.

E. <u>The BZA Hearing and Decision to Overturn the ZA's September 26, 2019 Decision</u>.

At the June 17, 2021 BZA hearing on the appeal, Staff informed the BZA that because the September 26, 2019 letter did not address the City's AHCP process, the hearing would ***only*** address DC Lake's ability to request a concession from Section 17.30.030.C.2.b of the Zoning Code. Ex. B, at 7:7-20. Staff recommended that the BZA uphold the ZA's determination. *Id.* at 17:24-18:8.

In response, DC Lake pointed out that the appeal really raised two separate issues: (1) whether DC Lake was entitled to the requested concession under the SDBL; and (2) how the AHCP application will be processed. *Id.* at 32:6-10. DC Lake emphasized that the SDBL's definition of a concession expressly contemplates a reduction of square footage requirements. *Id.* at 33:11-34:13.

During the BZA hearing, Commissioner Delgado stated that Section 17.30.030.C.2.b of the Zoning Code was "vague and is open to interpretation" and that the section of the CDSP which implements it is "equally vague." *Id.* at 43:24-44:3. Commissioner Delgado considered two possible ways the section could be interpreted – "broadly and narrowly" (*id.* at 44:4-5) – and questioned whether "this limitation on housing development appl[ied] cumulatively to the entire area or does it apply to any given parcel. Is it the intent of the Central District Specific Plan referenced in the code to establish a cap on housing within the Lake Avenue subdistrict or is it intended to limit housing on a single site. The distinction is abundantly unclear." (*id.* at 44:16-23).

Notably, Commissioner Delgado concluded that the ZA erred in concluding that Section 17.30.030.C.2.b of the Zoning Code barred the AHCP from being processed – irrespective of whether it was interpreted broadly or narrowly. Under a broad interpretation, Commissioner Delgado observed that "the code's restriction in its vagueness could be read as cumulative and applicable to Area 3 as a whole" (*id.* at 45:7-9) and "implies that some parcels may be permitted to have a greater percentage of square footage to housing and others less as long as the cumulative percentage along Lake from Green to California is not exceeded and no housing is

constructed on the ground floor" (*id.* at 45:16-21). Thus, "based on a broad cumulative interpretation of the code and the equally vague language of the Specific Plan upon which it rests and implements, the zoning administrator's determination is an error because the application as proposed will not result in exceeding the limitation on Area 3." *Id.* at 46:23-47:3. Under a narrow interpretation that reads Section 17.30.030.C.2.b of the Zoning Code to apply "in a strict per-parcel basis" (*id.* at 47:7-10), Commissioner Delgado noted that the "zoning administrator's determination based on this narrowest reading that a land-use variance is required to exceed square footage is again in error because it is misapplied. It does not meet the intent of the City's or State's density bonus regulations" (*id.* at 47:10-15).

Ultimately, Commissioner Delgado interpreted Section 17.30.030.C.2.b of the Zoning Code as a "development standard[] which is the physical modification of the environment in terms of size and location. It is the development standard used to determine the amount of housing, the capacity, or intensity. It is the percentage of built space, a requirement much like the percentage of open space or required parking that may be modified other development standards as an incentive to produce more affordable housing." *Id.* at 47:19-48:2. Furthermore, "[s]tate law says a concession may be modifications, zoning code requirements related to building standards and building standards are physical." *Id.* at 48:13-15. Thus, "[i]t stands to reason then that an increase in the physical correlate, the square footage needed for those units would also be permitted as an incentive." *Id.* at 49:5-7.

Commissioner Nanney noted that Section 17.30.030.C.2.b of the Zoning Code is a "pretty unintelligible code section, and it's pretty difficult . . . to understand what the 50 percent is talking about" and found that the 50 percent limitation seemed to be "both use and development." *Id.* at 23:14-25. He further commented that he did not "see any principled way to try the distinction between a vertical, you know, height restriction that seems to be admittedly a development standard and a lateral percent of area restriction. I see no difference between the two. And if one if a development standard, the other has to be, as well." *Id.* at 57: 11-16. He ultimately concluded that the code section is "just too vague." *Id.* at 52:20-21.

Commissioner Lyon focused on the definition of "development standard," expressed the belief that the code section was a development standard, and stated "I don't see any way in which – in which they are not entitled to pursue an affordable housing concession permit." *Id.* at 54:6-18. Commissioner Lyon closed by commenting "in a time where we are looking to build housing and we are trying to figure out how to address affordable housing. . . I'm not sure I really understand the wisdom of this particular restriction on housing." *Id.* at 55:9-13.

At the end of the meeting, the BZA voted 3-1 to overturn the ZA's determination and to allow DC Lake to apply for the AHCP. *Id.* at 58:3-59:1.

IV. THE CITY VIOLATED THE SDBL BY PURPOSELY MISINTERPRETING IT TO UNREASONABLY DELAY THE PROJECT

A. Enactment of the SDBL to Address Affordable Housing Shortage.

In 1979, the California Legislature added several provisions to the Planning and Zoning Law, Cal. Gov't Code § 65000 *et seq.*, and enacted the SDBL, Cal. Gov't Code § 65915 *et seq.*, to address the shortage of affordable housing in California. *See Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 823 (2007); *Latinos Unidos Del Valle De Napa Y Solano v. Cnty. of Napa*, 217 Cal. App. 4th 1160, 1164 (2013). "One of these statutes, Section 65915, offers incentives to developers to include low-income housing in new construction projects." *Friends of Lagoon Valley*, 154 Cal. App. 4th at 824. The SDBL is just one of the "number of measures the California Legislature has adopted to address the crisis of insufficient housing in the state. Declarations of the statewide importance of housing in general, and affordable housing in particular, have appeared in legislation for decades." *Ruegg*, 63 Cal. App. 5th at 295.

The Court of Appeal in *Wollmer v. City of Berkeley* described the statutory scheme as follows:

> The Legislature has declared that "[t]he availability of housing is of vital statewide importance," and has determined that state and local governments have a responsibility to "make adequate provision for the housing needs of all economic segments of the community." (§ 65580, subds. (a), (d).) ***Achieving the goal of providing housing affordable to low-and moderate-income households thus requires the cooperation of all levels of government.*** (*Id.,* subd. (c).) The Legislature has also declared that "there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income, including the elderly and handicapped, can afford." (Health & Saf. Code § 50003, subd. (a).)
>
> ***The state density bonus law is a powerful tool for enabling developers to include very-low-, low-and moderate-income housing units in their new developments. . .. The purpose of this law is to encourage municipalities to offer incentives to housing developers that will "contribute significantly to the economic feasibility of lower income housing in proposed housing developments***." (§ 65917.)

Wollmer v. City of Berkeley, 193 Cal. App. 4th 1329, 1339 (2011) (emphasis added). "Although application of the statute can be complicated, its aim is fairly simple: ***When a developer agrees to construct a certain percentage of the units*** in a housing development ***for low or very low-income households***, . . . ***the city or county must grant*** the developer ***one or more itemized concessions and a 'density bonus***,' which allows the developer to increase the density of the development by a certain percentage above the maximum allowable limits under local zoning law." *Friends of Lagoon Valley*, 154 Cal. App. 4th at 824 (emphasis added); *Latinos Unidos*, 217 Cal. App. 4th at 1164 (emphasis added). The concessions may include a reduction in site

development standards, ***such as "square footage requirements"*** and approval of mixed-use zoning. Cal. Gov't Code § 65915(k). *See* Cal. Gov't Code § 65915(b) & (d) (emphasis added). In short, the SDBL rewards a "developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations." *Friends of Lagoon Valley*, 154 Cal. App. 4th at 824 (*citing to Shea Homes Ltd. P'ship v. Cnty. of Alameda*, 110 Cal. App. 4th 1246, 1263 (2003)); *Latinos Unidos*, 217 Cal. App. 4th at 1164. "In its specifics, section 65915 establishes a progressive scale in which the density bonus percentage available to an applicant increases based on the nature of the applicant's offer of below market-rate housing." *Wollmer*, 193 Cal. App. 4th at 1339-40.

The SDBL "shall be interpreted liberally in favor of producing the maximum number of total housing units." Cal. Gov't Code § 65915(r). And, since its enactment, the SDBL has been amended to require more concessions, to make it easier to get concessions, and to incentivize the development of affordable housing. Ex. C, at 1.

Most recently, on September 28, 2020, Governor Newsom signed into law Assembly Bill ("AB 2345"), which made significant changes to the SDBL with an effective date of January 1, 2021. *Id.* at 2. AB 2345 includes an increased density bonus, and reduces the threshold required to qualify for concessions and incentives. *Id.*

Under the SDBL, cities are required to adopt an ordinance that specifies how compliance with the SDBL will be implemented. Cal. Gov't Code § 65915(a)(1). Through its Density Bonus Ordinance, the City has adopted procedures to implement the SDBL. *See* Municipal Code § 17.43.010 *et seq.* There, the City permits an applicant to use a density bonus increase and request concessions (or waivers) from the applicable development standards. Municipal Code § 17.43.050. The request is processed via an AHCP application. Municipal Code § 17.43.050.A.4.

B. The City's Interpretation of Permissible Concessions Is Unsupported by the Express Language of the SDBL.

The City argues that Government Code § 65915(k)(1) ("Section 65915(k)(1)") only gives as examples development regulations that affect the physical form of a structure, such as setbacks and vehicular parking ratios. But, in so doing, it intentionally ignores the language that says concessions are "not limited to" those examples and omits that part of the statute that expressly acknowledges that "square footage requirements" are encompassed by the definition of "concession." Cal. Gov't Code § 65915(k)(1). Here, Applicant requested a concession from the City's "square footage requirements," *i.e.*, the requirement that not more than 50 percent of the floor area along Lake Avenue be housing. As a result, the requested concession is squarely within the definition of an allowable concession under the SDBL.

Similarly, when it asserts that concessions are limited to "zoning code requirements related to building standards" (Ex. A, at 765), the City is intentionally misinterpreting the phrase "zoning code requirements" in Section 65915(k)(1) as being limited and/or modified by the

phrase "that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code." In doing so, the City purposefully violates the doctrine of *ejusdem generis*, which is a rule of construction that states where general words follow the enumeration of particular classes of things, the general words will be construed as applicable only to the things of the same general nature or class as those enumerated. *Lawrence v. Walzer & Gabrielson*, 207 Cal. App. 3d 1501, 1506-07 (1989). The general words "that exceed the minimum building standards approved by the California Building Standards Commission" follow the description of a particular requirement, *i.e.,* "architectural design requirements." Cal. Gov't Code § 65915(k)(1). Those general words thus only modify "architectural design requirements," and cannot be construed as modifying "zoning code requirements." The use of the disjunctive word "or" between "zoning code requirements" and "architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission. . ." in Section 65915(k)(1) further argues against the City's statutory interpretation, because the use of "or" further demonstrates that the general words are not applicable to "zoning code requirements."

Last, the error in the City's position is easily shown by a quick review of Health & Safety Code § 18901, which sets forth the State's minimum construction codes such as the building, electrical, mechanical, plumbing, fire, and green codes. The standards in these codes relate to the actual construction of a building (*i.e*., how to build it) (Cal. Health & Safety Code § 18909(a)), not undefined building standards (as the ZA asserts without support).

C. The 50% Limitation on Floor Area Established in Section 17.30.030.C.2.b of the Zoning Code Falls Under Both the SDBL's and the Municipal Code's Definition of "Development Standard" From Which a Concession Can Be Obtained.

Under the SDBL, a "development standard" is defined as "***a site or construction condition, including, but not limited to***, a height limitation, a setback requirement, ***a floor area ratio***, an onsite open-space requirement, or a parking ratio ***that applies to a residential development pursuant to any ordinance, general plan element, specific plan***, charter, **or** ***other local condition, law, policy, resolution, or regulation***." Cal. Gov't Code 65915(o)(1) (emphasis added). Similarly, under Chapter 17.43 (Density Bonus, Waivers and Incentives) of the Municipal Code, which incorporates the SDBL, a "development standard" is "***a site or construction condition*** that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter amendment, ***or other local condition, law, policy, resolution, or regulation.***" Municipal Code § 17.80.020 (emphasis added).

These definitions are very broad and clearly encompass internal building square footage requirements, such as the one requiring 50 percent residential square footage along Lake Avenue at issue here, *i.e*., it is a "site or construction condition," or "floor area ratio" like the other examples of development standards, arising from a "specific plan." This interpretation is particularly true given the statutory requirement that the SDBL "be

interpreted liberally in favor of producing the maximum number of total housing units." Cal. Gov't Code § 65915(r).

Concessions or incentives under the SDBL, as incorporated by the City under Municipal Code Chapter 17.43, expressly include a "reduction in site development standards," including but not limited to, a reduction in "square footage requirements," and "[o]ther regulatory incentives or concessions proposed by the developer." Cal. Gov't Code § 65915(k). *See also* Cal. Gov't Code § 65915(b) & (d). The very "use restriction" identified by the ZA is thus expressly defined as a development standard for which a concession under the SDBL can be requested. The fact the City's September 26, 2019 letter completely ignores this statutory provision shows how arbitrary and capricious it is.

D. <u>The ZA's Position Conflicts with the City's Prior Position that a Variance from Developmental Standards Was Needed for the 50% Limitation on Floor Area Established in Section 17.30.030.C.2.b of the Zoning Code</u>.

The ZA's September 26, 2019 letter conflicts with the City's prior representations pertaining to the Initial Project that a variance "to permit less than 50% of the floor area in the portion fronting on Lake Avenue as Nonresidential uses" was needed due to "***developmental standards***" that were "inconsistent with the existing development regulations for the CD-5 (Lake Avenue subdistrict)." Ex. A, at 426 (emphasis added). *See also* Ex. A, at 511 (variance needed)). Indeed, the City Staff publicly represented to the Design Commission and City Council that "***any discretionary entitlements*** filed by the applicant ***would apply specifically to development standards*** and the overall project design, and not the use of the property. The proposal currently includes characteristics that do not comply with ***applicable development standards*** and subject the project ***to a discretionary review through the Variance process*** with review and approval by the Hearing Officer." Ex. A, at 426 (emphasis added). The position taken by the ZA on September 26, 2019 thus expressly contradicts what was previously represented to Applicant, the Design Commission, and the City Council.

E. <u>The City's Subjective Interpretation of Municipal Code § 17.30.030.C.2.b Demonstrates that the City Is Not Using Objective Criteria in Processing AHCP Applications and Is In Violation of the SDBL</u>.

With regard to the City's position that the words "along Lake Avenue" in Municipal Code § 17.30.030.C.2.b refers to the entire Area 3 designated on the map depicted at Figure 3-4 of the Municipal Code (not just a narrow slice of street frontage on Lake Avenue), there is nothing in the Municipal Code that defines "along Lake Avenue" as the area depicted in Figure 3-4 of the Municipal Code. There also is nothing that expands the prohibition on ground floor housing to the upper floors, which is the consequence of such an interpretation. To the contrary, the Code expressly allows housing on the upper floors and adjacent parcels.

Moreover, the Zoning Code defines "Frontage, Building" as "[t]he side or face of the building which is parallel to or is at an angle of 45 degrees or less to a public street or a public

parking area." Municipal Code § 17.80.020. It thus does not include the entire building's square footage as Staff asserted. Applicant urges that the proper interpretation of this language, therefore, must give meaning to all the words used in Municipal Code § 17.30.030.C.2.b, and apply the 50% housing limitation only to the portion of a building that is actually runs "along Lake Avenue."

The City's CDSP further confirms this interpretation when it states: "Housing may not occupy the ground floor, nor occupy more than 50% of the floor area ***along Lake Avenue from Green Street south to California Boulevard***," thus giving geographic and directional guidance. Ex. D (emphasis added). This interpretation also is consistent with Municipal Code § 17.50.160.E.1, which provides that commercial space shall have a depth of 50 feet.[4] And, there is no reason to apply the 50 percent restriction on housing in Area 3 to the entire building floor area for Applicant's Density Bonus Project, especially because it is undisputed that the Property lies in both Area 1 (where there is no percentage restriction on housing) and Area 3 (where housing "shall not exceed 50%" of the total floor area). There is nothing in the Municipal Code that states that the housing provisions governing Area 3 apply to Area 1 when a building is located in two areas of Figure 3-4. Such an interpretation would conflict with the express language of the Municipal Code and apply it to building areas beyond the geographic area where it might apply.

Recent case law confirms the statutory scheme under the HAA, Cal. Gov't Code § 65589.5: "[w]hen a proposed housing development project complies with applicable, *objective* general plan and zoning *standards and criteria*, the project cannot be denied or reduced in density without the specified health and safety findings. *Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo*, Nos. A159320, A159658, 2021 WL 4129452, at *4 (Cal. Ct. App. Sept. 10, 2021) (emphasis in original) (analyzing objective standards in the context of the HAA, and finding that the city's design guideline was not "objective" and could not support the decision to reject the project). Where a city's ordinances and guidelines require "personal interpretation or subjective judgment that may vary from one situation to the next," the city does not rely on objective criteria. *Id.* at **7-9. However, the California Legislature "insists on objective criteria so as to ensure 'reasonable certainty . . . to all stakeholders' about the constraints a municipality will impose." *Id.* at *9. Indeed, "where a standard is truly objective, in that it is "uniformly verifiable by reference to an external and uniform benchmark" (§ 65589.5, subd. (h)(8), italics added), there is little to no room for reasonable persons to differ on whether a project complies with such a benchmark." *Id.* at *10 (refusing to defer to the city's interpretation of the guidelines because the criteria were neither objective or quantifiable).

In another case examining whether the City of Los Altos utilized "objective planning standards" when processing a development application, the Superior Court found that the City of Los Altos did not rely on "permissible, objective standards for parking" because it could not adequately identify the standards it was relying on, and failed to identify "a uniformly verifiable, knowable standard" for adequate ingress and egress. Ex. E (*40 Main Street Offices, LLC v. City of Los Altos*, Superior Court of California, County of Santa Clara, Case No. 19CV349845, Order Granting Consolidated Petitions for Writ of Mandate, Apr. 27, 2020 (developer alleged that the

City violated the SDBL and the HAA in denying developer's proposal for a mixed-use building)), at 26-27. As a result, the City of Los Altos thereby "impermissibly relied on a subjective standard in its denial letter." *Id.* at 27.

To the extent that the City Council chooses to adopt the Staff position, that position constitutes a subjective interpretation that demonstrates that the words "along Lake Avenue" in Municipal Code § 17.30.030.C.2.b fails to establish objective criteria for determining whether the entire building's square footage or whether only a smaller portion of the building's square footage should be examined in ascertaining compliance with the Municipal Code section. Such an interpretation cannot be permissibly used to deny Applicant's project under the HAA.

F. <u>The City's Refusal to Grant the Requested Concession without the Requisite Statutory Findings Violate the SDBL</u>.

Under the SDBL, an applicant for a density bonus may submit to a city a proposal for the specific concessions that the applicant requests. The City "***shall grant*** the concession . . . requested by the applicant ***unless*** the city . . . makes a written finding, based upon substantial evidence, 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 . . .
>
> (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 . . . 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't Code § 65915(d)(1) (emphasis added). *See also* Municipal Code § 17.43.050.A ("An applicant who utilizes the density bonus provisions of this chapter may request one or more concessions or other incentives as follows. . ."). Accordingly, Government Code § 65915 "imposes a clear and unambiguous mandatory duty on municipalities to award a density bonus when a developer agrees to dedicate a certain percentage of the overall units in a development to affordable housing." *Latinos Unidos*, 217 Cal. App. 4th at 1167; Cal. Gov't Code § 65915(d) ("A city, county, or city and county ***shall*** grant one density bonus . . .") (emphasis added).

Here, Applicant agreed to dedicate a percentage of the units for affordable housing and requested a single concession as permitted under the SDBL. Pursuant to the express language of Government Code § 65915(d)(1), the City was required either to grant the requested concession or make the required written findings based upon substantial evidence.

The City, however, did not make the written findings, and refused to process the AHCP application. Ex. A, at 765-66. It thus did neither and violated the SDBL.

V. THE CITY HAS A PATTERN AND PRACTICE OF VIOLATING THE SDBL

A. The City's Inclusionary Housing Ordinance Conflicts with the SDBL and Is Preempted by the SDBL.

The City violates the SDBL by interpreting its Density Bonus Ordinance (Municipal Code Chapter 17.43) to incorporate the requirements of its Inclusionary Housing Ordinance (Municipal Code Chapter 17.42) to require Applicant to dedicate a larger percentage of the units in the Density Bonus Project to affordable housing than required by the SDBL.

Specifically, the Inclusionary Housing Ordinance requires a "minimum of 20 percent of the total number of dwelling units in a residential project" to be offered as affordable housing. Municipal Code § 17.42.040.A. If the units are rental units, a minimum of five percent of the units shall be rented to very low-income households, five percent of the units to very low or low-income households, and 10 percent of the units to very low, low, or moderate-income households. Municipal Code § 17.42.040.A.2.

However, the City's Density Bonus Ordinance requires a request for a density bonus/concession to be granted if the applicant agrees to only one of the following: (a) at least 5 percent of the units dedicated to very low-income households; (b) at least 10 percent of the units dedicated to low-income or very low-income households; (c) at least 10 percent of the units dedicated to moderate-income householders, among other things. Municipal Code § 17.43.040. Further, the SDBL requires as little as 5-10 percent to be offered as affordable housing, depending on how many concessions or incentives are sought. Cal. Gov't Code § 65915(d)(2)(A).

When the City thus applied Municipal Code § 17.42.040 to the Density Bonus Project (Ex. A, at 735-737, 744-745)) to require the higher, more restrictive percentage of affordable units than the percentages required under Gov't Code § 65915(f), the City violated the SDBL. California law is clear that an otherwise valid local ordinance that conflicts with the SDBL is preempted and void. *See Latinos Unidos*, 217 Cal. App. 4th at 1169 (*citing to Friends of Lagoon Valley*, 154 Cal. App. 4th at 830 and *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993)). Therefore, the City's Inclusionary Housing Ordinance, as applied by the City to Applicant's project, "requires a developer to dedicate a larger percentage of its units to affordable housing than required" by the SDBL, and the ordinance is void. *Latinos Unidos*, 217 Cal. App. 4th at 1169.

The City's Inclusionary Housing Ordinance also does not provide any additional concessions for the additional affordable housing units required above and beyond what the SDBL requires. Municipal Code § 17.42.040.A. In contrast, the SDBL offers additional concessions when a greater percentage of the total units is provided for affordable housing. Cal.

Gov't Code § 65915(d)(2). As a result, through the implementation of the Inclusionary Housing Ordinance, the City fails to incentivize the provision of lower income housing beyond what the SDBL requires and thus disincentivizes the production of such units, which again is contrary to liberally construing the statute.

B. The City's Processing of Applicant's AHCP Application as a Discretionary Application Violated the SDBL.

The City violated the SDBL by telling Applicant that its AHCP application would be processed like an application for a minor variance. *See* Municipal Code § 17.43.050.C ("The procedure for an Affordable Housing Concession Permit shall be the same as for a Minor Variance (Section 17.61.080.C.3). Affordable Housing Concession Permits may be granted with approval by the Hearing Officer."). However, by requiring Applicant's AHCP application to be a discretionary application subject to appeals and multiple review hearings (Municipal Code § 17.61.080.F and 17.61.080.L), the City acted in contravention of Government Code § 65915(j)(1), which expressly states that the "***granting of a concession or incentive shall not require*** or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, study, ***or other discretionary approval***." Cal. Gov't Code § 65915(j)(1) (emphasis added). The Zoning Code itself provides that a request for a density bonus "shall not require any discretionary approval by the City. Municipal Code § 17.43.040.A.

C. The Municipal Code Attempts to Shift the Burden of Proof onto Applicant in Violation of the SDBL.

The City's Municipal Code violates the SDBL by shifting its burden of proof on to Applicant. More specifically, while the SDBL ***mandates approval unless*** certain written findings are made (Cal. Gov't Code § 65915(d)(1)), the City's Zoning Code ***makes approval contingent*** upon certain findings proven by the applicant when it states: "A concession or other incentive ***shall be approved*** upon making the following findings.

1. The concession or incentive is required in order for the designated units to be affordable.

2. The concession or incentive would not have a specific adverse impact on public health, public safety, or the physical environment, . . ., and for which there is no feasible method to satisfactorily mitigated or avoid the specific adverse impact, or adverse impact, without rendering the development unaffordable to low- and moderate-income households. A specific adverse impact 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."

Municipal Code § 17.43.050.D (emphasis added). Shifting the City's burden of proof to Applicant thus violates the SDBL because the SDBL preempts the City's Municipal Code. "A

local government may not adopt ordinances that conflict with the State Planning and Zoning Law." *Shea Homes*, 110 Cal. App. 4th at 1259. "It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates [such ordinances]." *See, e.g., Bldg. Indus. Ass'n of San Diego, Inc. v. City of Oceanside*, 27 Cal. App. 4th 744, 763 (1994).

D. <u>The City Has Violated the SDBL Because It Applied the More Restrictive Density Limits in the Central District Specific Plan Instead of the Limits in the General Plan</u>.

The SDBL requires the City to use the "maximum allowable residential density" set forth in the City's General Plan, not the more restrictive density set forth in the CDSP. All of the City's calculations, however, applied the more restrictive CDSP, not the General Plan. Ex. A, at 309. *See* Ex. F, at Slides 8-10. As explained above, the City applied the more restrictive 48 units per acre in Housing Area 3, and the 60 units per acre in Housing Area 1, rather than the General Plan maximum of 87 units per acre. Ex. A, at 424, 441. In doing so, the City failed to interpret the SDBL liberally to produce the maximum number of housing units, erred in its density calculations, and violated the SDBL. Cal. Gov't Code § 65915(o)(2); Cal. Gov't Code § 65915(r) ("This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units.").

This is important because the SDBL seeks to increase the production of affordable housing by requiring local agencies to grant an increase to the maximum allowable residential density for eligible projects, and to support the development of eligible projects at greater residential densities by granting incentives, concessions, waivers, and/or reductions to applicable development regulations. The intent of the SDBL is to provide developers with more market rate units to offset the cost of subsidizing the affordable units on-site. Specifically,

> [t]he density increase allowed under the density bonus law is an increase "over the otherwise maximum allowable residential density" (§ 65915, subd. (f).) "***Maximum allowable residential density'" in turn means "the density allowed under*** the zoning ordinance and ***land use element of the general plan***, or if a range of density is permitted, means ***the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project***. ***Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail***." (*Id.,* subd. (*o*)(2), italics added.) ***This statute recognizes that there 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***.

Wollmer, 193 Cal. App. 4th at 1344 (the project, and its density bonus, was in compliance with the general plan density standard and consistent with Section 65915) (emphasis added).

There is no legal authority for the proposition that the City's specific plans may lawfully impose more restrictive densities than the General Plan's density limits under the SDBL, or for

the position that as long as permitted densities do not exceed those in the Land Use Element, they are consistent with the General Plan.

E. <u>The City's Demand for Financial Justifications for the Requested Concession Violates the SDBL by Increasing Costs on the Applicant, Disregarding the Presumption that Concessions Provide Cost Reductions and Impermissibly Shifting the Burden to Applicant</u>.

The City violated the SDBL by requiring Applicant to file an application with the "information identified in the Department handout for the Affordable Housing Concession application, including the specific economic information described in the handout." Municipal Code § 17.43.050.B. The "Specific Entitlement Requirements" include, but are not limited to, the submission of a "Cost Pro-Forma" detailing "[f]inancial justification for EACH specific development concession requested. . . and a "cost comparison of the project without the requested concession versus with the concession." Ex. A, at 11, 176 (emphasis in original).

This information, and the requested financial "justification" and "cost comparison," are not required by the SDBL, and are actually prohibited by it. Cal. Gov't Code § 65915(a)(2) ("***A local government shall not condition*** the submission, review, or approval of an application pursuant to this chapter on the preparation ***of an additional report or study that is not otherwise required by state law, including this section***." (emphasis added)). Assembly Bill No. 2501 (approved by the Governor on September 28, 2016) prohibited "a local government from requiring additional reports or studies to be prepared as a condition of an application."

Indeed, in examining an analogous requirement, the State of California Department of Housing and Community Development ("CDHCD") recently found that the City of Encinitas's density bonus ordinance contravenes the SDBL by increasing the costs and burdens on applicants through its mandate that the applicant "provide a financial analysis or report to show that the 'requested concessions and incentives will: 1) result in identifiable and actual cost reductions; and 2) are required in order to provide for affordable housing costs . . . or for rents for the affordable units to be set. . .' " Ex. G, at 3. The CDHCD found that the City of Encinitas' mandate exceeded the "reasonable documentation" standard set forth in the SDBL, and explained that the overall intent of AB 2501 "is to create a ***presumption that incentives and concessions provide cost reductions***, and therefore contribute to affordable housing development. ***A municipality has the burden of proof of demonstrating that a concession or incentive would not generate cost savings***." *Id.* at 3-4 (emphasis added). It further noted that "[c]ost reductions resulting from incentives or concessions should be apparent from the project application, thus negating any need for a 'financial analysis or report.' " *Id.* at 5.

Similarly, the City of Santa Rosa has also examined this issue and stated:

> while "[s]ome local governments interpret this language [of Government Code § 65915(a)(2)] to require developers to submit pro formas showing the amount of profit they will make on a project," "***amendments adopted through AB 2501 are intended to***

> ***presume that incentives and concessions provide cost reductions, and therefore contribute to affordable housing development. A municipality has the burden of proof of demonstrating that a concession or incentive would not generate cost savings***."

Ex. H, at 20 (emphasis added). The City of Santa Rosa concluded that it should not require a pro forma in conjunction with applications for concessions and incentives unless the City furnishes in writing a rationale for questioning the financial support that the concession or incentive will provide toward the production of affordable housing. *Id.* at 54.

As a result, here, the additional City-imposed "Specific Entitlement Requirements" increase the applicant's costs and burdens, and disincentivize the construction of affordable housing in violation of the SDBL. Ex. C, at 4. It also violates the SDBL by ignoring the presumption that incentives and concessions provide cost reductions and placing the burden on the applicant to demonstrate that the concession generates cost savings as opposed to acknowledging its own burden to demonstrate that a concession would not generate cost savings.

VI. CONCLUSION

In sum, there is no basis for the City's interpretation of the Municipal Code or the SDBL under the express language of either, or California law. Accordingly, Applicant asks the City Council to uphold the BZA's decision to reverse the ZA's September 26, 2019 determination and to require the concession be processed in accordance with the mandates of the SDBL as explained above. *See, e.g., Ruegg*, 63 Cal. App. 5th at 314 ("the ministerial approval statute was intended to decrease delays and local resistance to such [affordable housing] developments, and does so by removing local governments' discretion to deny applications for affordable housing developments meeting specified *objective* criteria") (emphasis in original).

Thank you for your consideration.

Respectfully Submitted,

//S//

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1. As to the first issue, the Staff Report to the BZA simply stated that, "The provisions in Section 17.30.030 of the Zoning Code are neither development standards nor are they zoning code requirements related to building standards." However, there is no analysis of the relevant State statutory language and it appears as though the Staff Report relies solely on Staff's interpretation of the Municipal Zoning Code. The Municipal Code, however, is preempted by the SDBL as a matter of law, and thus is not relevant to whether the 50% ratio between

commercial and residential floor area inside the proposed project is a "development standard" under the SDBL.

2. The Staff Report to the BZA does not address the second issue. Regardless, given its inclusion in Applicant's Request for Appeal, the issue is now squarely before the City Council.

3. The facts stated herein are supported by the Administrative Record ("AR") in Los Angeles Superior Court Case No. 19STCP04588, relevant excerpts of which are attached to this letter as Exhibit A.

4. There is no dispute that the commercial space in the proposed project was to run ***along*** Lake Avenue to a depth of 50 feet as permitted under Municipal Code § 17.50.160.E.1; or, that the residential component was located above and behind the commercial component consistent with the mixed-use definition under Municipal Code § 17.50.160.