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November 11, 2022

Mayor Victor M. Gordo,
Vice-Mayor Andy Wilson,
Councilmembers T. Hampton, J. Jones, S. Madison, G. Masuda, J. Rivas, and F. Williams
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, and Honorable Councilmembers Hampton, Jones, Madison, Masuda, Rivas, and Williams:

This letter is filed on behalf of the applicant DC Lake Holdings, LLC ("Applicant" or "DC Lake") for Item 23 on your November 14, 2022 Agenda, which is its appeal of the August 18, 2022 Board of Zoning Appeals ("BZA") decision upholding the staff's deemed incomplete letter attached as Exhibit A to your staff report.

Contrary to the arguments presented in the staff report, this appeal is not limited to the payment of the application fees, and/or the filing of the notification packet and density bonus concessions and incentives information. Rather, as the August 29, 2022 Appeal Application attached as Exhibit E to your staff report clearly states, the fees were paid and the notification packet filed.

What remains to be decided by you are: (1) can the City of Pasadena (the "City") request financial documentation showing the requested concession will result in actual and identifiable cost reductions; and (2) can the City require the proposed project's density and floor area ratio ("FAR") calculations to be revised to comply with the lower densities set forth in the Central District Specific Plan ("CDSP") and Zoning Code ("ZC") rather than the higher density permitted under the General Plan ("GP").

Although staff acknowledges on page 3 of the staff report that its deemed incomplete letter provided a separate list of corrections that they require to be made before they will process the application, including an attachment on ZC requirements "that the project did not comply with," the staff report claims that (1) neither "were a basis for determining the application to be incomplete;" and (2) the items on the list of corrections are not before you for consideration.

The latter claim is simply incorrect, as the Superior Court found when staff previously said that the Applicant could not appeal its September 26, 2019 decision rejecting the use of a density bonus concession.[1] As the Court explained, Section 17. 72.030 of the ZC is entitled "Eligibility" and provides:

> An appeal may be filed by any person affected by ***a determination, decision, or action*** rendered by the Director, Zoning Administrator, Hearing Officer, Board of Zoning Appeals, Environmental Administrator, Design Commission, Arts and Culture Commission, Historic Preservation Commission, Advisory Agency or Commission.

Further, Section 17.72.040 of the ZC is entitled "Scope of Appeals" and provides:

> A. The following determinations of the Director, Zoning Administrator, Hearing Officer, Film Liaison, and Environmental Administrator may be appealed to the Board of Zoning Appeals:
>
> 1. Interpretations of the meaning and determinations on the applicability of the provisions of this Zoning Code that are believed to be in error.

The Court relied on these two sections of the City's own ZC to rule that the prior decision was eligible for appeal under Sections 17.72.030 and 17.72.040. "Based on the foregoing, the court finds the City failed to perform its mandatory duty under the [Pasadena Municipal Code] of processing [DC Lake's] appeal…" *See* March 19, 2021 Order Granting Petition for Writ of Mandate, at 5, *DC Lake Holdings, LLC v. City of Pasadena*, Los Angeles Superior Court Case No. 19STCP04588.

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1 . In so ruling, the Court even whimsically quoted from one email exchange – "What is it then, friendly advice?" – thus showing how arbitrary and unreasonable the staff's position is. Indeed, staff would prefer to avoid the issue today, impose the same requirements set forth in the deemed incomplete letter, and force a whole new appeal simply to unreasonably delay the approval of the requested concession.

The City Council thus has a mandatory duty under its own ZC to hear the appeal as filed by the Applicant and set forth in Exhibit E to your staff report. The failure to do so will be a breach of that duty.

Accordingly, this appeal – and the current lawsuit against the City in Los Angeles County Superior Court – is about the City's ongoing policy, pattern, process, and practice of routinely and intentionally violating the California State Density Bonus Law ("SDBL"), the Housing Accountability Act ("HAA"), and its own ZC in general, as to all housing development projects involving a density bonus, and in this specific case by refusing to approve DC Lake's application for a single concession under the SDBL, which it needs for its housing development project at 141 South Lake Avenue (the "Property").

This appeal is the third appeal in this case and the second to reach you to present these issues. Like the first two, it is based upon the City repeatedly interpreting the SDBL, HAA, and ZC in an arbitrary, capricious, and unreasonable manner. For years, the City has been intentionally thwarting the California Legislature's goal of building more affordable housing to address the State's housing crisis, and continues to do so. You are again being presented with the opportunity to decide otherwise.

I. BACKGROUND – ROUND 1

By way of background, in March 2018, DC Lake proposed building a housing development project at the Property (the "Project"). The Property is located in the City's Central District, and the Project complied with all of the applicable development standards in the GP, CDSP, and ZC.

Nonetheless, in August 2018, the City Planning Department said that Section 17.50.160 of the ZC, 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 the Applicant that Section 17.30.030.C.2.b of the ZC, 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. Instead, the Applicant was told that it could apply for a variance from that requirement.

To avoid further delay, rather than apply for a variance, in March and June 2019, the Applicant filed an application for an Affordable Housing Concession Permit ("AHCP") for a

density bonus concession, as provided under the SDBL. In so doing, the Applicant requested only one concession, *i.e.*, to provide less than 50% of the floor area as commercial space along Lake Avenue, even though it was entitled to two. In all other respects, the Project complied with the GP, CDSP, and ZC.

On July 15, 2019, the AHCP application was deemed incomplete. On September 20, 2019, the Applicant filed the necessary documents to address the issues raised in the City's incomplete letter and expected the application to be deemed complete and granted as required under the SDBL.

Instead, however, the Zoning Administrator (the "ZA") refused to process the AHCP application. According to the ZA, the 50% of floor area requirement in Section 17.30.030.C.2.b of the ZC constituted a "use restriction" that is not subject to – nor allowed as a concession under – the SDBL. As such, the Project did not comply with the Section 17.30.030.C.2.b of the ZC, which "governs land uses," and the ZC prohibited DC Lake from requesting a concession for it.

After receiving the ZA's decision, on September 30, 2019, DC Lake filed its first appeal for the Project. However, the ZA refused to process it. Instead, the ZA said that its September 26, 2019 letter was not "a determination or interpretation subject to appeal under Section 17.72.040 of the Zoning Code."

On October 23, 2019, therefore, DC Lake filed a Verified Petition and Complaint for Writ of Mandate, Declaratory Relief, Inverse Condemnation, and Violation of Civil Rights to contest the City's September 26, 2019 determination and the City's policies, practices, procedures and processes under the SDBL, which it contends willfully violate state law.

On March 19, 2021, the Superior Court granted the writ, ordered the Applicant's appeal to be processed, and transferred the remaining non-writ causes of action to Department 1, which assigned them to Department 17.

On March 23, 2021, DC Lake filed an appeal that presented two issues, which the BZA heard on June 17, 2021. The first issue was whether it was entitled to proceed with its Project under the City's Municipal Code and the SDBL. The second issue was whether the City's practices and procedures for processing density bonus concessions do ***not*** comply with the SDBL and, instead, show a pattern and practice of intentionally violating it. Both issues were presented and briefed for the BZA.

By a three to one vote, the BZA agreed with DC Lake that the ZA's interpretation of the ZC as a "use restriction" was incorrect, arbitrary, unreasonable and not supported by the express language of the Municipal Code or SDBL. The BZA held that the Applicant was entitled to apply for a concession under the SDBL and reversed the ZA's September 26, 2019 determination accordingly. However, the BZA expressly decided not to address the second issue on appeal.

On July 12, 2021, the City Council unanimously called for review of the BZA's June 17, 2021 decision. On September 27, 2021, the City Council heard the matter. By a 7-1 vote, the City Council upheld the BZA's decision on the first issue on appeal. Like the BZA, the City Council expressly decided not to address the second issue despite it being fully presented and briefed by the Applicant.

Given the City Council's vote, the request in the June 9, 2022 deemed incomplete letter for the Applicant to identify and explain the concession it is seeking is thus patently absurd. The single, only, and same concession has been sought since March 2019. At the time of the AHCP application, all of the required financial information was provided since it was required with that AHCP application.[2]

II. BACKGROUND – ROUND 2

Following the City Council's decision, on December 2, 2021, DC Lake re-filed its AHCP application, *i.e.*, AHCP #11907, and a SB 330 application.[3]

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2. DC Lake's position then and now is that the City's use of a discretionary AHCP application and process knowingly, intentionally and directly violated the express language of the SDBL.

3. The SB 330 Application was filed pursuant to the HAA, which provides that, "[i]f the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity … [w]ithin 30 days of the date that the application for the housing development project is determined to be complete . . . . If the local agency fails to provide the required documentation pursuant to subparagraph (A), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.
Cal. Gov't Code § 65589.5(j)(2).

Again, however, the City refused to process it. This time it said that it had given the AHCP a new number (*i.e.*, AHCP #11949), and that it cannot "process two applications for the same site." Despite the Applicant's objections to the use of a new number for its application, and the importance of keeping the same number for the court action pending in Los Angeles Superior Court, staff insisted that the first application be withdrawn.

On December 30, 2021, the City then deemed the application incomplete (yet again).

On January 4, 2022, DC Lake filed its second appeal, which like its first, specifically challenged the City's ongoing pattern and practice of violating the SDBL, HAA, and its own ZC in general, as to all housing development projects seeking a density bonus, and in this specific case by refusing to process DC Lake's application for a single concession.

The hearing on the second appeal was scheduled for March 16, 2022. However, on March 10, 2022, as a result of the Applicant's lawsuit and communications with the State Housing & Community Development Department ("HCD") about the City's ongoing violations of state law, the Applicant was told, "the BZA Hearing scheduled for next Wednesday regarding 141 S. Lake is being cancelled. We will be following up with you on our process for AHCP applications soon."

Shortly thereafter, on April 4, 2022, the Applicant was told that an "Affordable Housing Concession Permit will no longer be required for density bonus projects that request concessions. Therefore, ***staff will be administratively withdrawing Affordable Housing Concession Permit #11907, thereby rendering the issued incomplete letter and subsequent appeal, moot points.*** Attached is a refund request form – please complete and return to me at your earliest opportunity. [¶] A permitted use, such as the proposed mixed-use project at 141 S Lake, can go directly to the Design Review process; assuming no other zoning entitlements are needed (e.g.,

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Further, under the HAA, an applicant's SB330 application is deemed complete upon submission, which in this case was December 2, 2021. This "deemed complete" triggers the "freeze date" for applicable development standards, criteria, or conditions that can be applied to a project. Cal. Gov't Code § 65589.5(j)(1). In this case, the City did not send any notice of any inconsistency, non-compliance, or non-conformity within 30-days of the December 2, 2021 date as required under the HAA, thus making the Project deemed consistent and compliant with all of the City's codes and regulations. Rather, the City only sent a deemed incomplete letter under the Permit Streamlining Act ("PSA") on December 30, 2021, which is a different statutory requirement.

MCUP for tandem parking, shared parking, variances…etc.). Via the Design Review process, the Current Planning Section will review for compliance with the development standards in the Zoning Code and will evaluate any requests proposed under California Government Code § 65915. Nothing in this letter constitutes any decision or finding regarding the proposed project or your appeal."

Requiring a concession under the SDBL to be approved by the Design Commission after a public hearing on it, however, is yet another direct violation of the SDBL by the City because it involves a discretionary review. Similarly, should staff raise it, requiring the Applicant to seek a ZA interpretation on the "density issue" violates the SDBL by invoking the purely discretionary and subjective interpretations of a single person. That violates the HAA by not being objective either, as explained below.

III. BACKGROUND – ROUND 3

On May 10, 2022, following staff's administrative withdrawal of DC Lake's AHCP application, DC Lake filed its application for concept design review and another SB 330 application. On June 9, 2022, staff deemed the application incomplete for the third time for ***all*** of the reasons set forth in its June 9, 2022 letter ("June 9 Letter"), which mirrors the reasons in the December 30, 2021 letter.

Specifically, like its previous two incomplete letters, the June 9 Letter expressly states that the Project "shall be revised," instructs Applicant to "revise the project," and otherwise dictates how the Project must comply with staff's interpretation of the density, FAR and other development standards under the ZC, all of which directly, intentionally and continually violate the SDBL and HAA. Further, the letter directly calls for a response to its entire contents within 120 days, otherwise staff will deem the application "withdrawn."

On June 14, 2022, the Applicant, therefore, was forced to file its third appeal for the Project. Like its first two appeals, this appeal specifically challenges the City's ongoing pattern and practices of violating the SDBL, HAA and its own ZC in general, as to all housing development projects, and in this specific case by refusing to process DC Lake's application for a concession it is entitled to as a matter of law.

On August 18, 2022, the BZA denied the appeal and upheld staff's decision.

On August 29, 2022, the Applicant filed this appeal.

IV. THE ISSUES ON APPEAL

The June 9 Letter calls for more information on the requested concession and a complete overhaul of the Project to comply with the density, FAR, and other development standards in the CDSP. However, since 2019, the only concession requested by the Applicant has been to use a different FAR for the percentage of commercial square footage in its proposed housing development project. That the deemed incomplete letter asks for more documentation on that request is disingenuous at best, and directly violates state law.[4] As the Court of Appeal explained in *Bankers Hill 150 v City of San Diego*,74 Cal. App. 5th 755, 770 (2022): "The applicant is not required to prove the requested incentives will lead to cost reductions; the incentive is presumed to result in cost reductions and the city bears the burden to demonstrate otherwise if it intends to deny the incentive." *See also Schreiber v. City of Los Angeles*, 69 Cal. App. 5th 549, 555 (2021); 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).[5]

In addition, the quote from *Schreiber* on page 3 of the staff report (which provides only half the relevant quote) also relates to ***the City's*** burden of proof should it want to deny a concession. Nevertheless, the City's checklist asks for documentation showing that the

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4. On August 26, 2022, the Applicant was informed that housing development projects that use the City's concession menu pursuant to ZC § 17.43.055, rather than concessions or waivers under the SDBL, are not required to submit the financial information being requested from the Applicant. This disparate, discriminatory decision and double standard is yet another violation of the SDBL, the HAA, and, in all likelihood, the anti-discrimination provision of the Planning and Zoning Law, Cal. Gov't Code § 65000 *et. seq.*

5. Staff's point that the SDBL allows it to request "reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions" is irrelevant and not the issue. Under the SDBL, "eligibility" is determined based upon whether the developer is willing to provide on-site affordable housing. If it is, then the City must grant the concession. As the Court explained in *Schreiber*: "Appellants do not contend that the city erred in granting the *density bonus*. The city was required to grant it because the developer agreed to dedicate the required percentage of units to affordable housing. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 825, 65 Cal.Rptr.3d 251.) Section 65915 does not require an applicant to provide financial information to support an application for a density bonus."

concession "will result in identifiable and actual cost reductions to provide for affordable housing costs and rents." In other words, staff is requiring the Applicant to prove – via an economic analysis much like that done for years by Keyser Marston – that identifiable and actual costs reductions will result, thus improperly shifting the burden of proof to ***the Applicant***. That is a violation of the SDBL as the Court of Appeal explained in *Bankers Hill 150*. The economic analysis requested from the Applicant is also the exact type of financial feasibility analysis *Schreiber* held is not permitted under the SDBL.[6]

Further, 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." In examining an analogous requirement, the HCD 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. . .' " Mar. 25, 2021 Letter from HCD to City of Encinitas, at 3. The HCD 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 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 examined this issue and stated that 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***

6. At no point has staff ever specified what "documentation" it wants or expects to satisfy its request.

demonstrating that a concession or incentive would not generate cost savings." City of Santa Rosa – Density Bonus Ordinance Update Policy White Paper, at 8. The City thus has violated 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.

In addition, the June 9 Letter's request for clarifications of a variety of technical points, plus the provision of a Climate Action plan, similarly violates state law. Government Code § 65944(b) expressly states: "The provisions of subdivision (a) shall not be construed as requiring an applicant to submit with his or her initial application the entirety of the information which a public agency may require in order to take final action on the application. Prior to accepting an application, each public agency shall inform the applicant of any information included in the list prepared pursuant to Section 65940 which will subsequently be required from the applicant in order to complete final action on the application."[7] Nothing on the City's checklist calls for such information.

Last, the June 9 Letter directs the Applicant to revise its Project to be consistent with the CDSP densities and various development standards, as more fully set-forth in Exhibit E to the letter. For example, on page 3 of the June 9 Letter and in its attached Exhibit E, it states that the site on Hudson is subject to a maximum of 60 units per acre while the site on Lake is subject to a limit of 48 units per acre. It then states: "The proposed project would otherwise require approval of a text amendment of the Zoning Code and text amendment of the Specific Plan to change the base density to 87 dwelling units per acre. These amendments can only be initiated by Council Action, Commission Action or by the City Manager pursuant to Zoning Code Section 17.74.030 (Initiation of Amendments)." It then states the Project is required to comply with the City's 20% inclusionary housing ordinance. However, both of these requirements, along with the requirements set forth in Exhibit E, violate State law as explained below.

7. As explained in Section VI below, the request for more information also conflicts with and violates the HAA by invoking subjective analysis of it.

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

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 & Ellsworth v. City of Berkeley*, 63 Cal. App. 5th 277, 295 (2021).

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).)
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> ***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).

Since its enactment, the SDBL also has been amended to require more concessions, to make it easier to get concessions, and to incentivize the development of affordable housing. For example, 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.* Similarly, in September 2021, SB 290 was passed requiring units designated to satisfy local inclusionary zoning requirements to be included in the base density for the calculation of a density bonus. In September 1, 2022, the California Legislature further enrolled AB 2334, which codified the definition of the "maximum allowable residential density" under the SDBL to include specific plan densities and made clear that "the greater of" density in either a specific plan, general plan, or zoning ordinance shall be used as the base density for the calculation of a density bonus. All of these statutory amendments since the SDBL's initial enactment make clear that the City does not have the discretion to deny the requested concession or require a lower density than set-forth in its General Plan.

B. The City Routinely and Intentionally Violates the SDBL By Requiring Applicants To Use The More Restrictive Density in the Specific Plan Instead of the Density Limits in the General Plan.

Having raised this issue twice before, the Applicant will address them for the third time so you can make the decision to follow the law. Specifically, the June 9 Letter requires the Applicant to revise its Project to comply with the lower density in the CDSP. Further, the City's position has always been to require density bonus projects to comply with the lower Specific Plan densities rather than the higher General Plan densities, as was explained to the Planning Commission on February 10, 2021, and the City Council in October 2021.

However, as explained above, the SDBL requires the City to use the "maximum allowable residential density" in the Land Use Element of City's General Plan, not the more restrictive density in the CDSP. 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 somehow consistent with the General Plan. As the SDBL expressly states, the General Plan "prevails." *See* July 29, 2022 Decision on Petition for Writ of Mandate, at 41, *Yes in My Backyard v City of Los Angeles*, Los Angeles County Superior Court Case No. 21STCP03883.

As such, the June 9 Letter's command to revise the Project to comply with the lower densities in the CDSP violates state law, as does the City's ongoing, routine pattern and practice of applying the lower density. Simply put, the City has purposefully failed to interpret the SDBL liberally to produce the maximum number of housing units, repeatedly and intentionally erred in its density calculations, and thus willfully violated the SDBL for years. 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.").

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

The City also 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 the Applicant to dedicate a larger percentage of the units in the Project to affordable housing than required by the SDBL.

In particular, 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 applies Municipal Code § 17.42.040 to require the higher, more restrictive percentage of affordable units than the percentages required under Gov't Code § 65915(f), the City violates 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 "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.

Moreover, the City's Inclusionary Housing Ordinance 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.

In sum, 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).

VI. THE HOUSING ACCOUNTABILITY ACT

The HAA, codified in Government Code § 65589.5 ("Section 65589.5"), was originally enacted in 1982, as part of a statutory scheme to address a critical statewide housing shortage and to facilitate the development of housing adequate for the needs of all economic segments of the population. *Honchariw v. Cnty. of Stanislaus*, 200 Cal. App. 4th 1066, 1074 (2011); Cal. Gov't Code § 65580.

The HAA provides that "[t]he lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California. Cal. Gov't Code § 65589.5(a)(1)(A). Indeed, "California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is 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." Cal. Gov't Code § 65589.5(a)(1)(B). "Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration." Cal. Gov't Code § 65589.5(a)(1)(C). "Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects." Cal. Gov't Code § 65589.5(a)(1)(D).

The purpose of the HAA is thus "to limit the ability of local governments to 'reject or make infeasible housing developments . . . without a thorough analysis of the economic, social, and environmental effects of the action.' " *Honchariw*, 200 Cal. App. 4th at 1068-69; Cal. Gov't Code § 65589.5(b). The statute's purpose was also to "assure that local governments did not ignore their own housing development policies and general plans when reviewing housing development proposals." *Honchariw*, 200 Cal. App. 4th at 1075.

Under the HAA, Section 66589.5(j)(2)(A) provides, "If the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows: (i) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units."

Section 66589.5(j)(B) then provides, "If the local agency fails to provide the required documentation pursuant to subparagraph (A), the housing development project ***shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance,*** standard, requirement, or other similar provision." (Emphasis added). "It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." Cal. Gov't Code § 65589.5(a)(2)(L). ***The HAA thus significantly limits the ability of a local government to deny an affordable or market-rate housing project, including ones that request a concession under the SDBL.***

Last, recent case law confirms the statutory scheme under the HAA, Cal. Gov't Code § 65589.5, that the City must follow: "[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*, 68 Cal. App. 5th 820, 835 (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 839-43. 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 842. 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 843-45 (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. April 27, 2020 Order Granting Consolidated Petitions for Writ of Mandate, at 26-27, *40*

Main Street Offices, LLC v. City of Los Altos, Superior Court of California, County of Santa Clara, Case No. 19CV349845.

In this case, the HAA applies because it defines a "housing development project" to mean: "a use consisting of any of the following: . . . (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use." Cal Gov't. Code § 65589.5(h)(2). Here, the Project is a single mixed-use building where "at least two-thirds of the square footage [is] designated for residential use." It thus falls under this definition.

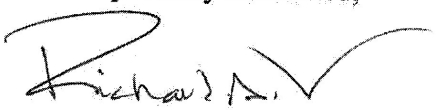
Further, the SB 330 application for the Project was deemed complete on the date it was filed. Thereafter, the City did ***not*** notify the Applicant under the HAA that its Project was inconsistent with the General Plan, ZC, or any other "applicable plan, program, policy, ordinance, standard, requirement, or other similar provision." To the contrary, the June 9 Letter was sent under the Permit Streamlining Act without any mention or regard to the SB 330 application filed under the HAA. The City's failure to do so means the Project "shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision." Cal Gov't. Code § 65589.5(j)(B). This conclusion applies to all design standards too. *See, e.g., Cal. Renters Legal Advocacy*, 68 Cal. App. 5th at 843-45 (overruling City's use of subjective standards): *Bankers Hill 150*, 74 Cal. App. 5th at 777-78 (same).

This conclusion directly contradicts the statements in the City's June 9 Letter and renders it a nullity and void. This deemed incomplete letter thus violates state law.

Accordingly, DC Lake respectfully requests that its appeal be granted and that the City start complying with the SDBL, the HAA, and its own ZC by accepting and approving its concession for DC Lake's proposed project at 141 S. Lake Avenue with the maximum allowable residential density under the City's Land Use Element of its General Plan (i.e., 87 units per acre), the percentage of affordable very low-income units required under the SDBL, and without any additional reports or discretionary hearings.

Thank you for your consideration.

Respectfully Submitted,



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