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February 2, 2024

Greg Powell - Principal Planner
Community Development Department
11 English Street
Petaluma, CA 94952

Re: **Deer Creek Apartments II - SPAR Resubmission and State Density Bonus Law Application**

Dear Greg:

This firm represents Acclaim Companies (the "Applicant") in connection with its housing development project called "Deer Creek Apartments II" (the "Project") to be located on the approximately 6.71-acre property at APN 007-391-005 (the "Project Site").

Resubmittal and the "Builder's Remedy"

Enclosed please find updated materials and responses to the City's November 6, 2023 comments on the Project's Major Site Plan and Architectural Review ("SPAR") application. The Applicant has incorporated much of the City's input into the enclosed materials, but we note that as originally explained in the Applicant's February 28, 2023 letter submitted with its SB 330 preliminary application, the Project is entitled to rely on the "Builder's Remedy" provision of the Housing Accountability Act, by virtue of providing 20% low income units and having submitted its preliminary application prior to the City achieving certification of its Housing Element.

Under the HAA, a local agency cannot deny a housing development project "for very low, low-, or moderate-income households," unless the local agency can make one of five findings in Government Code Section 65589.5, subdivision (d). Ordinarily, a jurisdiction is permitted to disapprove a project for being noncompliant with local General Plan or zoning requirements.[1] However "[i]f a locality has not adopted a housing element in substantial compliance with state

[1] See Gov. Code Section 65589.5(d)(5).

law, developers may propose eligible housing development projects that do not comply with either the zoning or the general plan."[2] This is informally known as the Builder's Remedy.[3]

Housing projects "for very low, low-, or moderate-income households" are eligible for use of the Builder's Remedy. These include projects in which at least 20% of the units are sold or rented at affordable rents to lower-income households, and projects in which 100% of units are sold or rented to "middle-income" households.[4] Here, the Project reserve 20% of its units to low income households. Accordingly, the Project qualifies as a housing development project "for very low, low-, or moderate-income households."

HCD is the state agency delegated by the Legislature with "primary responsibility for development and implementation of housing policy," (Health & Saf. Code § 50152), and has confirmed that vested rights for a project's development can include a right to proceed under the Housing Element compliance status in effect at the time of preliminary application submittal. When a preliminary application submittal "occurs at a time when the jurisdiction does not have a compliant housing element, any potential benefits afforded to the applicant as a result of the jurisdiction's noncompliant status . . . remain throughout the entitlement process even if the jurisdiction subsequently achieves compliance during the entitlement process."[5]

Accordingly, by submitting its SB 330 preliminary application prior to the City receiving its Housing Element certification, and by submitting its formal application within 180 days of the preliminary application and the enclosed submission within 90 days of the City's November 6, 2023 comments, the Applicant has maintained its vested right to proceed under the Builder's Remedy provision of the HAA.

The City asserted in a March 22, 2023 letter, and again in its November 6, 2023 comments that the Project is not subject to the protections of the Builder's Remedy because the City believes this

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[2] Association of Bay Area Governments, The "Builder's Remedy" and Housing Elements (Nov. 2022), at 2. *Available at* https://abag.ca.gov/sites/default/files/documents/2022-11/Builders-Remedy-and-Housing-Elements-Nov-2022.pdf.

[3] The other four potential findings under Gov. Code Section 65589.5, subd. (d) do not apply either. Subd. (d)(1), like (d)(5), cannot be invoked if a jurisdiction lacks a compliant housing element. Subds. (d)(3) and (d)(4) do not apply because denial of the Project is not required to comply with state or federal law, and the Project is not "proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project." Subd. (d)(2) only applies if a city can make findings based on a preponderance of the evidence that a project will cause "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," and further find there are no feasible measures available to mitigate such an "impact." The Legislature has emphasized that these circumstances will "arise infrequently," Gov. Code § 65589.5(a)(3), and that General Plan and zoning inconsistency does not qualify. Gov. Code Section 65589.5(d)(2)(A).

[4] Gov. Code Section 65589.5(h)(3).

[5] HCD, "3030 Nebraska Avenue, Santa Monica – Letter of Technical Assistance" (Oct. 5, 2022), at 2 (available at https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/santa-monica-TA-100522.pdf).

Project must be combined with the Deer Creek I application (File No. PLSR 2023-0009) into a single project. However, we first note that the City has effectively abandoned this position already. In a subsequent letter dated May 8, 2023, the City noted that without abandoning its argument, it was accepting Deer Creek I and Deer Creek II as two separate preliminary application pursuant to SB 330. Thereafter, the City did not raise this issue again, but rather accepted two separate SPAR applications for Deer Creek I and Deer Creek II. The City has effectively agreed to process the projects separately.

Even if the City had not effectively abandoned its argument, its argument is incorrect. The City notes that one of the sites must rely on the other for vehicular access. However, this is not an unusual circumstance, and either project could proceed without the other, by virtue of providing an access easement and constructing off-site improvements. The City asserts that the projects "may be interdependent in other ways" such as with respect to amenities and utilities. However, this is not the case. Each project is entirely separate and may be developed without the other being developed.

State Density Bonus Law Application

This letter also serves as a State Density Bonus Law application for the Project. By virtue of providing 20% lower income units, the Project qualifies for the following four separate categories of benefits: (1) a density bonus of up to 35%;[6] (2) two concessions/incentives;[7] (3) waivers;[8] and (4) a parking reduction.[9]

Further details are provided below for each category:

1. Density Bonus – Right reserved

The Project includes 20% lower income units and is therefore eligible for a 35% density bonus.[10] The Project does not need a density bonus at this time, but reserves the right to apply for one at a later time if needed. We note that the Applicant is not required to take a density bonus in units, in order to qualify for the below, separate categories of benefits to which it is entitled by virtue of providing 20% affordable units.

2. Two concessions/Incentives – Right reserved

The Project is entitled to two concessions/incentives. A concession is defined to include, among other things, a "reduction in site development standards or a modification of zoning code

[6] Govt. Code Section 65915(f)(1).
[7] Govt. Code Section 65915(d)(2)(B).
[8] Govt. Code Section 65915(e).
[9] Govt. Code Section 65915(p)(1).
[10] Govt. Code Section 65915(f)(1).

requirements or architectural design requirements," including a reduction in setbacks and square footage requirements, and "[o]ther regulatory incentives or concessions proposed by the developer…that result in identifiable and actual cost reductions to provide for affordable housing costs."[11] Based on the enclosed application, the Applicant has not yet identified a specific need for a concession, but hereby reserves the right to identify them at a later time.

3. Waivers – Two identified, right reserved

In addition to a limited number of concessions/incentives, the State Density Bonus Law specifies that a project is entitled to a waiver from "*any* development standard that will have the effect of physically precluding the construction of a development… at the densities or with the concessions or incentives permitted by this section."[12] Waivers are separate from and additional to concessions/incentives, are unlimited, and approval is mandatory if the standard would preclude development of the Project at its permitted density, except in a very narrow set of circumstances that do not apply to this Project. Based on the enclosed application, the Applicant has identified the need for two waivers at this time, and hereby reserves the right to identify further waivers as needed.

1) Waive Dedication Requirement for On/Off Ramps for the Rainier Cross Town Connector and Interchange

Pursuant to Petaluma Zoning Code Section 4.050, the Project would typically be required to dedicate the right-of-way determined by the plan lines established in Chapter 13.20 of the Petaluma Municipal Code for the Rainier Cross Town Connector and Interchange, including to accommodate potential On/Off ramps for Highway 101. However, we note that as explained above, the Project is subject to the protection of the Builder's Remedy, and the City is therefore prohibited from denying the Project for noncompliance with this requirement.

Further, we understand that the Rainier Cross Town Connector and Interchange project is unlikely to proceed. On April 3, 2023, The Petaluma Argus-Courier reported that "the project is dead," and that the City has decided "to instead build a second connector project extending Caulfield Avenue onto a drawbridge over the river to Petaluma Boulevard South."[13] In the Existing Conditions report regarding transportation[14] for the pending General Plan Update, the city acknowledges that it "has not identified complete funding sources nor a timeline and would need to acquire additional property for construction of the Rainier Crosstown Connector. There is significant community and

[11] Govt. Code Section 65915(k).
[12] Gov. Code Section 65915(e)(1).
[13] See https://www.petaluma360.com/article/opinion/community-matters-rainier-crosstown-connector-project-is-dead/.
[14] Existing Conditions Report – Transportation, September 2022, available at: PGPU_Transportation_ExistingConditions_Sept2022.pdf (squarespace.com).

leadership desire to reconsider the desirability of this project, therefore, likelihood of this project being completed or included in the General Plan update is unknown."

To the extent the City does not plan to proceed with the Rainier Cross Town Connector and Interchange project and both the dedication and avoidance of the plan line area would therefore be unnecessary, we would appreciate confirmation.

However, we note that in the alternative, the Project is eligible for a waiver of this requirement. Being required to comply with this requirement would substantially impact the developable area of the Project Site, keeping the Project from being built at its permitted and proposed density. Finally, we note that the City may also grant an exception or variance from this requirement for the Project, pursuant to Zoning Code Section 4.050.5 and Municipal Code Section 13.20.190. The Applicant may include a request for an exception and/or variance in a further submittal. We would appreciate the City's feedback on this item.

2) Waive Maximum Building Heights

The Project includes buildings at a maximum height of 45', exceeding the City's maximum. As noted above, the Project is subject to the Builder's Remedy provision of the HAA, and the City is therefore unable to deny the Project for noncompliance with maximum Zoning Code building heights.

However, we note that in the alternative, the Project is eligible for a waiver of this requirement. Being required to comply with this requirement would reduce the number of units in the Project, keeping the Project from being built at its permitted and proposed density.

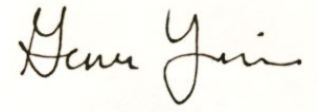
4. Parking Maximums – Right Reserved

Finally, the State Density Bonus Law provides for maximum applicable parking requirements that are often lower than those required by jurisdictions. In this case, the Project's parking exceeds what is required by the Zoning Code. Accordingly, the Project does not need to apply the State Density Bonus Law requirement, but reserves the right to do so at a later time if needed.

We appreciate your attention to this matter and look forward to working with the City to bring this Project to fruition.

Sincerely yours,

HOLLAND & KNIGHT LLP



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