



CITY OF PETALUMA

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Mayor

Via Email at: Genna.Yarkin@hklaw.com and Tamsen.Plume@hklaw.com

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July 3, 2024

Genna Yarkin
Tamsen Plume
Holland & Knight LLP
560 Mission Street, Suite 1900
San Francisco, CA 94105

Re: Deer Creek Proposals of the Acclaim Companies

Dear Ms. Yarkin and Ms. Plume,

This letter is in response to your latest correspondence dated May 31, 2024 to Greg Powell, Principal Planner working with the Petaluma Community Development Department, concerning development applications variously referred to as Deer Creek Apartments, Deer Creek Apartments I and Deer Creek Apartments II of your client Acclaim Properties. We understand that Mr. Powell is also sending you separate correspondence addressing still-unresolved completeness issues concerning the Deer Creek II application. The purpose of this letter is to summarize portions of our prior correspondence of March 23, 2023 that remain relevant to the Deer Creek preliminary applications, and to address the issues raised in your May 31 letter to Mr. Powell to supplement his forthcoming incompleteness notice.

When we wrote to Mr. Johnson on March 22, 2023, concerning Acclaim's preliminary applications submitted on February 15 and February 28, 2023, respectively, we asserted that in our view, the preliminary application that your client originally submitted on November 11, 2022 on two parcels, APN 136-11-025 and 007-391-005, was not susceptible to being divided into two separate preliminary applications referred to as Deer Creek I and Deer Creek II. Our conclusion regarding the separability of the applications was based on the reliance of parcel 007-391-005 on parcel 136-11-025 for regular and emergency right of way access, and the inter-reliance of the parcels, based on staff review of the preliminary application materials, for club/leasing uses, open space uses, utility connections, storm water controls, etc.

In our March 22 letter, we also asserted that neither the combined preliminary application for both parcels nor the purported separate preliminary application for Deer Creek II qualified for application of the "Builder's Remedy" in Section 65589.5(d)(5) of the Housing Accountability Act. We based that assertion on the fact that the combined Deer Creek preliminary application for both parcels totaling 639 units did not meet the requirement that at least 20% percent of the units must be sold or rented to lower income households as defined, or 100% of the total units must be sold or rented to persons of middle income in accordance with Section 65589.5(h)(3) of the Act. We also noted that the applicable General Plan land use

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designation for parcel 007-391-005, the site of the purported Deer Creek II preliminary application, is Community Commercial, and the applicable zoning district is C2, and that a solely residential use such as that proposed is not a permitted land use under the applicable General Plan and Zoning Ordinance requirements. In our March 22 letter we also noted our belief that because of the failure to satisfy Housing Accountability Act affordability requirements for both APN 136-11-025 and 007-391-005, the “Builder’s Remedy” would not apply to cure the non-conformance of APN 007-391-005 with the applicable general plan and zoning ordinance requirements. We also noted that because both APN 136-11-025 and 007-391-005 lack access to City right of way, it appears that extension of Rainier Avenue from the East side of Highway 101 beneath the 101 overpass to the parcels would be a requirement of the proposed development.

City staff have provided incompleteness notices concerning the Deer Creek II proposal on November 6, 2023 and March 4, 2024. Your letter dated May 31, 2024, which the City received on June 3, 2024, included responses to the City’s incompleteness notice. The following comments in response to your letter received June 3, 2024 also proceed from the City’s position described in our March 22 letter and summarized above.

Regarding the issue of the separability of the Deer Creek application into two separate applications, we continue to believe that if the original Deer Creek application is separable into two applications, it will be because the proposed development on each parcel is in fact sufficiently independent to support the proposed uses on that parcel without relying on uses on the other parcel. To the extent the proposed use on one of the parcels relies on proposed uses on the other parcels, we believe that requires evaluating the proposed uses on both parcels together. A related issue is that we believe that the proposed uses on both parcels will need to be considered together with respect to analysis of their potential environmental impacts. Please note that the City has not conceded and does not concede that the development on parcels APN 136-11-025 and 007-391-005 is sufficiently separate so they can be processed for decision separately. The City’s current review of the application materials submitted to date does not concede or waive this point.

Regarding your comments on the Rainier plan line and request for waiver of compliance with that City police power regulation – which is not a development standard - we continue to be puzzled. First, as noted above, the Deer Creek parcels have no access to City right of way, and are undevelopable without it. Any development of the parcels would require sufficient right of way dedication to provide access. Second, the Rainier plan line does not only apply to Acclaim’s property, and not only for Acclaim’s benefit. We find insupportable the notion that Acclaim is entitled, by virtue of its development applications, to demand waiver of the long-standing and still in effect Rainier plan line, with all the resulting impacts such a waiver – effectively, a repeal of the City’s police power legislation – would have on the City’s current General Plan circulation element and related capital programs. In addition, regarding your comments on Government Code Section 65915(j)(2), the adverse health and safety impacts of such an extreme reading of the density bonus law would not be difficult for the City to substantiate.

Regarding the ongoing exchanges that have occurred regarding the potential applicability of the Builder's Remedy to the purported Deer Creek II application, which as noted does not comply with the applicable General Plan land use or zoning district requirements for parcel 007-391-005, we would like to confirm the City's position that even if development of parcel 007-391-005 was ever eligible for application of the Builder's Remedy, and we do not concede that it was, it is no longer eligible, in accordance with Government Code Section 65941.1(d)(2), which provides that

If the public agency determines that the application for the development project is not complete pursuant to Section 65943, the development proponent shall submit the specific information needed to complete the application within 90 days of receiving the agency's written identification of the necessary information. If the development proponent does not submit this information within the 90-day period, then the preliminary application shall expire and have no further force or effect.

Note also that paragraph (3) in the same subdivision provides that

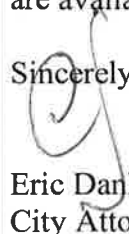
This section shall not require an affirmative determination by a city, county, or city and county regarding the completeness of a preliminary application or a development application for purposes of compliance with this section.

The City issued incompleteness letters concerning the Deer Creek preliminary applications on November 6, 2023, and again on March 4, 2024. The completeness deficiencies were not remedied within 90 days of the first incompleteness notice. Nor were the completeness deficiencies remedied within 90 days of the second incompleteness notice. Accordingly, any claim that Acclaim may have had to application of the Builder's Remedy to cure the non-compliance with applicable General Plan and zoning requirements for parcel 007-391-005 has expired in accordance with Government Code Section 65941.1(d)(2). Also, because the City adopted its housing element on March 20, 2023, and the Housing and Community Development Department certified the City's housing element on May 18, 2023, Builder's Remedy claims may no longer be brought concerning the Deer Creek applications.

Finally, an apology. In preparing this correspondence I realized that you had sent me an email at the end of March of this year proposing a meeting to discuss the Deer Creek proposals and the legal issues involved. I apologize I missed that email and

failed to respond. I would be happy to schedule a meeting for us to discuss these issues if you would still like to do that. If so, please provide some dates when you are available.

Sincerely,



Eric Darly
City Attorney

C: Greg Powell, Principal Planner
Andrew Trippel, Planning Manager
Brian Oh, Community Development Director