



CITY OF PETALUMA

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March 22, 2023

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Via Email at: mark@acclaimcompanies.com

Mark Johnson
Acclaim Companies
125 Willow Road
Menlo Park, CA 94025

RE: Preliminary Applications Dated February 15, 2023 and February 28, 2023

Dear Mr. Johnson,

This is in response to the Preliminary Housing Development Applications (the "Preliminary Applications") from Acclaim Companies ("Applicant") dated February 15, 2023, and February 28, 2023, respectively, which were submitted to the City via its online application portal on February 15, 2023 and February 28, 2023, respectively. In accordance with the following, City staff have concluded that the Preliminary Applications do not qualify as preliminary applications pursuant to the Housing Accountability Act, Government Code section 65589.5 (the "Act") and that for the reasons described below, the projects described in the Preliminary Applications do not qualify for the prohibitions against denial and the "builder's remedy" provisions of the Act. This is primarily so because the Preliminary Applications are not actually independent. It appears that in submitting the Preliminary Applications, the Applicant has merely divided the previous pre-application dated November 11, 2022 that included both APN 136-100-025 and 007-391-005 in two, treating the development on each parcel as independent. But the projects are not independent. APN 007-391-005 must rely on APN 136-100-025 for regular and emergency access; APN 007-391-005 is not developable without primary and secondary access across APN 136-100-025. For that reason, and for the other reasons discussed below, the Applications do not qualify for the protections in the Act. Accordingly, as we previously indicated in our response of January 9, 2023 concerning your preliminary application dated November 11, 2022, all of the City's current land use and development regulations remain in full effect as regards to development of APNs 136-100-025 and 007-391-005, and no vesting or other benefits pursuant to the Act apply concerning the Preliminary Applications. In accordance with the information provided in the City's Preliminary Housing Development Application forms, we encourage the Applicant to schedule a further preliminary project discussion with City planning staff to discuss the Preliminary Applications and the City's applicable regulations.

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One of the Preliminary Applications concerns a multi-family development project referred to as Deer Creek I consisting of 559 apartment units, with 981 parking spaces comprised of garages, carports and open spaces, including leasing/club indoor amenity space, outdoor common space and open space along the Petaluma River on a parcel comprising 42 acres and identified as APN 136-100-025 in Petaluma. Deer Creek I proposes to include 84 below market rate units – 42 low-income units, and 42 very low

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income units. The other Preliminary Application concerns a multi-family development project referred to as Deer Creek 2 consisting of 80 apartment units and associated amenities and structures, including, but not limited to, parking spaces, open spaces, picnic gathering spaces, kids play area, orchard grove, and lawn play area on a parcel comprising 6.71 acres and identified as APN 007-391-005 in Petaluma. Deer Creek 2 proposes to include 16 low-income units.

The parcels underlying the Deer Creek 1 and 2 projects are on the west side of the 101 Freeway across from and adjacent to the recently-constructed 101 overpass that is generally aligned with the intersection of Rainier Avenue and North McDowell Boulevard. Currently, Rainier Avenue does not extend to or under the 101 overpass, and APNs 136-100-025 and 007-391-005 do not have City right-of-way access. Accordingly, in addition to the considerations addressed in this letter, since the Preliminary Applications' submittals indicate they will rely on Rainier Avenue for vehicular access, it appears that extension of Rainier Avenue from the East side of Highway 101 beneath the 101 overpass to the parcel's points of access would be a requirement of the projects described in the Preliminary Applications.

The General Plan land use designation for APN 136-100-025 as of the City's receipt of the application for Deer Creek 1 is RM (Medium Density Residential). The zoning designation for that parcel is R4 (Residential 4). The General Plan land use designation for APN 007-391-005 as of the City's receipt of the application for Deer Creek 2 is CC (Community Commercial). The zoning designation for that parcel is C2 (Commercial 2). As described in the Preliminary Application, for Deer Creek 2 is not a permitted use under the currently applicable Community Commercial land use designation or C2 zoning. However, C2 zoning does permit residential uses as part of a mixed-use project if the residential units are located above the ground floor. (See Chapter 4 of Petaluma's Implementing Zoning Ordinance, Table 4.4.)

It appears from the Preliminary Application for Deer Creek 1 that the Applicant believes that Preliminary Application is separate from the Preliminary Application for Deer Creek 2. In accordance with the letter dated February 28, 2023, it appears that the Applicant is relying on the "builder's remedy" provisions in the Act to overcome the fact that the Preliminary Application for Deer Creek 2 is for a project that does not comply with applicable, objective, General Plan and Zoning requirements, and to require the City to ultimately accept an application for Deer Creek 2 pursuant to the Act nonetheless. However, as noted above and discussed further below, the Deer Creek 1 and 2 Preliminary Applications are not separate, because both projects rely on APN 136-100-025 for both primary and secondary access. That is clear from the site plans submitted with the Applications. It also appears that Deer Creek 1 and Deer Creek 2 may be interdependent in other ways, such as with respect to club/leasing uses, open space uses, utility connections, storm water controls, etc. As a result, the Preliminary Applications do not reflect separate projects. In addition, we conclude, as discussed further below, that even if considered separately, the Deer Creek 1 and Deer Creek 2 Preliminary Applications do not qualify for the protections provided under the Act.

The Preliminary Application for Deer Creek 1 describes a project that includes 84 low-income units or 15% of the total of 559 units. However, for projects to qualify for protections under the Act, at least 20% of the total units must be sold or rented to lower-

income households, or 100% of the total units must be sold or rented to persons of middle income (Government Code section 65589.5(h)(3)). The project described in the Deer Creek 1 Preliminary Application satisfies neither of these requirements and, thus, even considered separately from Deer Creek 2, would not be protected by the Act.

The Preliminary Application for Deer Creek 2 describes a project that includes 16 low-income units, or 20% of the total of 80 units, and thus, considered separately, meets the Act's affordability requirements. However, as noted above, Deer Creek 2 is proposed to be located on a parcel with a commercial General Plan land use designation and commercial zoning. Accordingly, Deer Creek 2 is not a permitted use under the City's applicable, objective written General Plan and Zoning development standards (Government Code section 65589.5(f)(1)). For Deer Creek 2 to qualify for the protections of the Act, the Builder's Remedy provisions of the Act must apply to excuse the project's non-compliance with applicable, objective written development standards.

Subdivision (d) of the Act prohibits local agencies from disapproving housing development projects that meet the Act's affordability requirements, absent certain findings, specified in the subdivision, that are supported by a preponderance of the evidence in the record. The Builder's Remedy (paragraph 5 of Subdivision (d) of the Act) allows developers to propose eligible housing development projects that are inconsistent with both the applicable general plan land use designation and zoning, and obtain the protections of the Act, but only if the City has *not* adopted a housing element in substantial compliance with Article 10.6 of the Government Code. In view of the City's adoption of its housing element on March 20, 2023, the Builder's Remedy would not apply to Deer Creek 2. The Act would still allow the City to disapprove an application for Deer Creek 2 due to its non-compliance with applicable objective, written development standards based on the findings specified under paragraph (5) of Subdivision (d) of the Act. Accordingly, even considered separately, the Builder's Remedy provisions of the Act do not apply to cure the non-compliance of Deer Creek 2 with the General Plan land use designation and zoning applicable to APN 007-391-005.

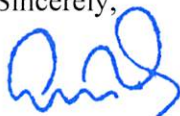
Because the Preliminary Application for Deer Creek 2 does not describe a permitted use, and its non-compliance with applicable general plan and zoning is not cured by the Builder's Remedy provisions of the Act, and because the entire application does not meet the Act's affordability requirements, Deer Creek 2 would require General Plan and zoning amendments. As noted in the City's Preliminary Housing Development Application form, projects eligible for processing under the Act must comply with existing General Plan and zoning requirements. The Act does not prohibit the City from requiring housing development projects such as Deer Creek 2 to comply with applicable, objective, written development standards. (See Government Code section 65589.5(f)(1).) Also, as discussed above, Deer Creek 2 is not a separate project, given its reliance on APN 136-100-025 for primary and secondary access, and potentially other shared features as noted above. In summary, in view of the above considerations, the Preliminary Applications for Deer Creek 1 and Deer Creek 2, as submitted, are not separable as a general matter due to shared access requirements, and potentially other shared features. As described above and as we previously indicated in our letter of January 9, 2023, the Deer Creek 1 and 2 projects are also ineligible for the protections of the Act because Deer Creek 1 does not satisfy the Act's affordability requirements, and because Deer Creek 2 is not a permitted use on APN 007-391-005.

Further, in view of the above, as of the date of this letter, City staff conclude that the Preliminary Applications have no vesting effect concerning Deer Creek 1 or Deer Creek 2. The General Plan land use designations and zoning and other City development regulations that apply are subject to change, including the development fees that would apply. (See also Government Code section 65589.5(f)(3).)

Because the projects described in the Preliminary Applications do not meet the requirements of the Act, they are not eligible for the Act's protections. The City's discretionary Site Plan and Architectural Review requirements also applies. Whether or not a later-submitted version of Deer Creek 1 and/or Deer Creek 2 complies with Act's preliminary application requirements, the applications will be subject to full CEQA review. (See section 65589.5(e).) As we have previously indicated, portions of parcels APN 136-100-025 and APN 007-391-005 are within the FEMA 100-year Flood Hazard zone and subject to applicable Floodway and Floodway District requirements in Chapter 6 of the City's Implementing Zoning Ordinance.

As noted above, we recommend that the Applicant contact City staff to schedule a further preliminary project discussion. We would be happy to meet with appropriate Applicant representatives to discuss the conclusions in this letter and the application process for the proposed projects.

Sincerely,



Eric Danly, City Attorney

cc: Brian Oh, Community Development Director
Andrew Trippel, Planning Manager