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LITIGATION THREAT: PAGE 8

Via E-mail and FedEx

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Re: Appeal of City Staff's "Incompleteness" Determination for the 1250 Oakmead Parkway Project

Dear Ms. Moon and Ms. Bagley

We represent 1230 Oakmead Parkway, LLC ("Applicant") in connection with application File No. PLNG-2024-0175 for development at 1230-1250-1270-1290 Oakmead Parkway (APN 216-44-124) in Sunnyvale, California (the "City"). The purpose of this letter is to respond to the City's November 6, 2024 letter regarding the status of the Project's application. In addition, with this letter and the enclosed supporting materials, and on behalf of the Applicant, we hereby appeal the City Staff's determination, made on November 6, 2024 ("Third Incompleteness Letter"), that the formal application remains incomplete for processing under the Permit Streamlining Act (the "PSA"), Government Code Section 65943. As required by the City, this appeal is made within 15 days of the decision.[1]

PROCEDURAL AND LEGAL BACKGROUND

As detailed in our cover letter dated July 29, 2024 ("Third Submittal Cover Letter"), the Applicant submitted a qualifying preliminary application for the Project pursuant to the Housing Crisis Act

[1] Sunnyvale Municipal Code ("SMC"), § 19.98.075.

of 2019 ("SB 330") on November 20, 2023. The preliminary application froze then-applicable City requirements, including then-effective policies for processing of planning development applications, such as the then-existing application checklist requirements.[2] The Applicant thereafter submitted a formal application for development on March 15, 2024. The Applicant and City have since exchanged rounds of resubmissions and incompleteness comments. The Project is a housing development project that is protected by the Housing Accountability Act ("HAA"), including as amended by SB 330 and is more specifically submitted pursuant to the provision of the HAA known as the "Builder's Remedy."[3] For a complete processing history of the Project, please see the Third Submittal Cover Letter (Attachment B).

The Applicant is bringing this appeal because Staff's determination in the Third Incompleteness Letter violates the law. First, the application is complete as a matter of law for two distinct reasons; and second, in any case, the City may not legally base a determination of completeness on the provision of the type of items the City has highlighted as examples of outstanding completeness items – *e.g.* floor plans for all of the unit types in the proposed project or exterior wall dimensions including insets/offsets in wall planes.

GROUNDS FOR APPEAL

Although the Applicant will provide more detailed materials in support of this appeal prior to a hearing on the matter, at this time we provide the following clear identification of the grounds for the appeal of the determination made in the Third Incompleteness Letter.

1. The Application is Complete As A Matter of Law Because the City's Determination of Incompleteness Is Untimely.

Under the PSA, a city must determine whether a formal application submission is complete within 30 days of receipt of the application.[4] If a written determination is not provided within 30 days of receipt of the application, "the application together with the submitted materials shall be deemed complete for purposes of . . . [the PSA]."[5]

On July 29, 2024, the Applicant resubmitted the Project's application materials in response to the City's second incompleteness determination, dated June 10, 2024. The resubmission included a matrix detailing how the application provided all materials required by the City's submittal checklist. Please see Attachment C. The City did not respond to this submittal within 30 days. Rather, the City issued the Third Incompleteness Letter, the subject of this appeal, **over 90 days later**. See Attachment A (Third Incompleteness Determination). Therefore, because the City

[2] "[A] housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application including all of the information required by subdivision (a) of Section 65941.1 was submitted." Govt. Code § 65589.5(o)(1).
[3] Govt. Code § 65589.5(d)(5).
[4] Govt. Code § 65943(a).
[5] Govt. Code §§ 65943(a); 65943(b).

notified that Applicant long after the 30 day deadline provided in the PSA, the application and the submittal materials **are deemed complete as a matter of law**.[6]

And, given the regular communications between the Applicant representatives and City staff regarding the application and scoping, contracting and initiation of the CEQA documentation, we find this late timing and lack of any prior notice or discussion of the City's position both surprising and disappointing.

2. **The Application is Complete As A Matter of Law Because the Application Provided All Materials Required By the City's Submittal Checklist.**

As explained in our prior letters, please see Attachment B, the City is required to provide applicants with a publicly available list(s) "specify[ing] in detail the information that will be required from any applicant for a development project."[7] The list must "indicate the criteria" that the City "will apply in order to determine the completeness of any application submitted to it for a development project."[8] If an application is determined to be incomplete, the City must provide an "applicant with an exhaustive list of items that were not complete. That list shall be limited to those *items actually required on the lead agency's submittal requirement checklist*."[9] In "subsequent review[s] of an application," the City may "not request the applicant to provide any new information that was not stated in the initial list of items that were not complete."[10] Review of a resubmission for completeness "is limited to determining whether the application as supplemented or amended includes the information required by the list" of items that were not complete "and a thorough description of the specific information needed to complete the application . . .."[11] The goal of these requirements are to ensure applicants can know, objectively, what information is required to complete the application without the subjective interpretation of local officials to help streamline and reduce the costs and time required for housing development projects.

The City's first incomplete letter issued in April 2024 provides the City's "initial list of items that were not complete" for purposes of completeness under the PSA.[12] As discussed below, the City's initial list of incompleteness items includes items unrelated to completeness. The Applicant has provided all of the information "actually required" for completeness by the City's submittal checklist and in response to the City's "initial list of items that were not complete."[13] Please see Attachments B, C, and E.

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[6] Govt. Code § 65943(b).
[7] Govt. Code § 65940(a)(1).
[8] Govt. Code § 65941(a).
[9] Govt. Code § 65943(a) (emphasis added); Department of Housing and Community Development ("HCD"), Letter to Berkeley re: City's Application Intake and Processing – Letter of Technical Assistance ("HCD Letter to Berkeley"), (Dec. 7, 2023), at 2, https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/berkeley-ta-hau331-120723.pdf.
[10] Govt. Code § 65943(a).
[11] Govt. Code § 65943(b).
[12] Govt. Code § 65943(a).
[13] *Id.*

Even if the City had responded timely (which it did not), the City has not identified any information omitted from what is "actually required" by the City's formal application checklists, and, therefore, the application **was complete as a matter of law for purposes of the PSA as of May 16, 2024.**

3. The City May Not Use The Initial List of Incompleteness Items to Expand the City's Submittal Checklist.

Notwithstanding the fact that the application is complete as a matter of law, the City may not, in any case, legally base a determination of completeness on the types of items in the two cited items. First, the City argues "the Applicant failed to submit floor plans for all of the unit types." The City's Third Incompleteness Letter states that this "is a clear requirement" of the City's submittal checklist because "[t]he City's application submittal requirements for multi-family residential and mixed-use projects clearly identifies the need to submit 'Floor Plans' that include 'dimensions for both existing and proposed' units."[14] Additionally, the Third Incompleteness Letter states that "[i]n the City's first incompleteness letter, the City requested that the Applicant submit the following: 'Square footage and plate heights for all the floor plans and unit types' and 'Square footage and bedrooms for each of the units (or provide a separate floor plan for each apartment type).'"[15]

The City's Multi-Family & Mixed Use Submittal Checklist states that the plans must include "Floor Plans – Provide dimensions for both the existing and proposed."[16]

Figure 1 – Detail of City's Multi-Family Submittal Checklist Floor Plan Requirement

- **Floor Plans** - Provide dimensions for both existing and proposed.

The City did not identify existing floor plans as information needed for completeness in the City's completeness comments. Therefore, the City has waived the right to base a determination of completeness on the provision of existing floor plans. The City's submittal checklist also does not specify that "'Square footage and plate heights for all the floor plans and unit types' and 'Square footage and bedrooms for each of the units (or provide a separate floor plan for each apartment type)'" are required for completeness. These details were first requested as part of the City's first round of completeness comments, citing requirements in the City's submittal checklist as well as Sunnyvale's municipal code and objective design standards. Please see Figure 2. If the City would like this level of detail, then the City is required to update the City's applicable submittal checklist to clarify the precise information the City is seeking. The City may not cite other sources not cited in the submittal checklist as reference for items needed for completeness.

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[14] City of Sunnyvale, 1250 Oakmead Parkway – Status of Application ("Third Incompleteness Letter"), (Nov. 6, 2024), at 3.
[15] *Id.*
[16] City of Sunnyvale, Multi-Family & Mixed Use, (rev. 12/2022), at 2.

Figure 2 – Detail of City's First Round of Incompleteness Comments

PL-21	Apartments Floor Plans (A1-1.0 through A1-1.5) - Provide the following information: - Where possible make the scale of the drawings larger for better readability - Exterior wall dimensions including insets/offsets in wall planes - Square footage and plate heights for all the floor plans and unit types - Square footage and bedrooms for each of the units (or provide a separate floor plan for each apartment type) - Label all units, rooms, elevators, access points, etc. - Show the front entry barriers	Submittal Checklist; SMC 19.98.020
PL-22	Apartments Elevations and Section Plans (A1-2.0 through A1-3.0) - Provide the following information: - Where possible make the scale of the drawings larger for better readability. - Provide dimensions for roof lines, insets/offsets in wall planes, building length, etc. - The door to the building next to the garage structure is not shown (A1-2.1).	Submittal Checklist, SMC 19.98.020, Objective Design Guidelines
PL-23	Townhomes Floor Plans (A2-1.0 to A2-1.1), (A3-1.0), and (A4-1.0). - Where possible make the scale of the drawings larger for better readability. - Add the Type A or B to the title of the sheet. - Show the screening for the proposed mechanical equipment and provide details. - Provide exterior wall dimensions including insets/offsets in wall planes. - A2-1.1: The floor plan labeled as Level 1 should be revised and relabeled as Level 3. - Square footage and plate heights for all the floor plans and unit types. - Square footage for bedrooms. - Square footage and clearance spaces for two parked cars. - Make sure floor plans and elevations are consistent (see marked-up drawings). - Show the front porch concrete wall.	Submittal Checklist, SMC 19.98.020, Objective Design Guidelines

The application does provide overall building floor plan dimensions on sheets A1-1.0 through A1-1.5. Although not required by the City's Multi-Family & Mixed Use Submittal Checklist, the Applicant voluntarily provided representative unit floor plans for the multi-family building. Please see Sheets A0-0.3 and A1-3.0. Townhome dimensions were also provided. Please see Sheets A2-4.0 through A2-4.7 for floor plan and bedroom square footages. Additionally, plate height dimensions are provided on the elevation sheets for each building. These elevations would not vary from unit-to-unit and are not specified as being required on a per-unit basis on the City's Multi-Family Submittal Checklist. Therefore, the Applicant has provided all information required regarding floor plans per the City's applicable submittal checklist. Again, the City may not expand the requirements as part of the initial list of incomplete items by citing to other standards not referenced in the submittal checklist because those requirements are not "actually required" for completeness.[17] If those items were required, they would be cited in the applicable checklist.

Second, the City states that the application has failed to provide "'[e]xterior wall dimensions including insets/offsets in wall planes' for the Project, which are part of the 'dimensions' required to be identified for the Project."[18] The City's Third Incompleteness Letter states that because "the City's submittal checklist clearly requires that lot dimensions, the location of the building(s), setbacks, and dimensions of floor plans" be provided, exterior wall dimensions and insets/offsets in wall planes are also required. The Applicant agrees the submittal checklist does require lot dimensions as well as setbacks and floor plans. However, the submittal checklist does not include requests for exterior wall dimensions or insets/offsets in wall planes as demonstrated in Figure 3.

[17] Govt. Code § 65943(a).
[18] Third Incompleteness Letter, at 3.

Figure 3 – Detail of City's Multi-Family Submittal Checklist Regarding Dimensions

- **Site Plan -** Including lot dimensions and the location of the building(s), required storage, property lines, easements (access and utility), adjacent right-of-way, driveways, vision triangle, utility connections, parking, solid waste facilities, spot elevations, transformer location, setbacks, and buildings and uses on adjacent properties.
- **Parking and Circulation -** Provide a fully-dimensioned parking (auto and bicycle) and circulation plan (auto and pedestrian), including emergency vehicle access road providing 150-foot hose reach around first floor and 26-foot unobstructed width fire apparatus access road if exceeding 30 feet in height. Display all fire hydrants within 300 feet of the site.
- **Landscape and Irrigation -** Provide the locations of existing landscaping, protected trees, proposed landscaping, trees proposed to be removed, site fencing (include elevations with dimensions) for areas affected by the proposed addition or changes. Indicate which water-efficiency design option is selected and label each hydrozone with size of the area, plantings, water use type, and irrigation type. Provide an area calculation diagram that shows areas counted towards landscaping and usable open space.
- **Preliminary Stormwater Management Plan**
- **Solid Waste -** Refer to "Design Requirements for Recycling, Organics and Garbage Services".
- **Architectural Elevations -** Provide both existing and proposed. Elevations should include the roof pitch, exterior materials and exterior mechanical equipment.
- **Floor Plans -** Provide dimensions for both existing and proposed.

These items were again first requested in the City's first round of completeness comments and were requested with reference to the Sunnyvale municipal code and objective design guidelines. Please see Figure 2 above. Although not required for completeness, these items are provided on Sheets A2-4.0 through A2-4.7. Because the items are not "actually required" by the City's Multi-Family Submittal Checklist, the items may not form the bases of a determination that the application is incomplete. Rather, the matrices included in the Project's application package provide the facts and grounds upon which the Planning Commission may make a determination of completeness.[19]

As stated above, the City is required to update the City's applicable submittal checklists to reflect the level of detail required for completeness. The City may not expand the list of required items through reference to other sources in the City's initial list of incompleteness items, without those references being cited in the submittal checklist, because those items must be "actually required" by the publicly available submittal checklist. HCD, the state agency with "primary responsibility for development and implementation of state housing law,"[20] explains that:

> "[t]he intent of the PSA is to ensure that applicants are provided clear instructions and that local jurisdictions are processing projects in accordance with the specific timelines outlined in the statute to streamline development. Notably, the PSA requires that local jurisdictions determine in writing whether an application is complete within 30 days of application submittal. Considering the current housing crisis in California, delays in permitting processes and approval times add constraints to the cost of residential construction. Therefore, compliance with the

[19] SMC § 19.98.075(e).
[20] Health & Saf. Code § 50102.

> PSA is even more pertinent today to meet the urgent housing needs across California."[21]

The application has provided all information required by the City's submittal checklist and the City's initial list of incomplete items that are required by the City's submittal checklist. Therefore, as stated in the Third Submittal Cover Letter, the Project was and is complete for purposes of the PSA as of May 16, 2024. Additionally, because the City responded to the application's third submittal package over three months after it was submitted, the application and the submitted materials are deemed complete as a matter of law. Because the application is complete as a matter of law, the Project's SB 330 vesting has not expired and remains valid. The City must continue to process the Project's application.

4. The City May Not Require A General Plan Amendment or Rezoning for the Project.

Because the Project is protected by the HAA, the City may not require a general plan amendment or rezoning for the Project.[22] The City must process the Project's application and may not disapprove the Project based on inconsistency with the City's "zoning ordinance and general plan land use designation."[23] "Accordingly, a jurisdiction that refuses to process or approve a project subject to the Builder's Remedy due to the applicant's refusal to submit a GPA/ZC (requested or required by the jurisdiction to resolve such an inconsistency) violates the HAA."[24]

5. California's Housing Laws Must Be Liberally Construed.

Given California's housing supply crisis, the Legislature declared that "[i]t is the policy of the state that . . . [the HAA] be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[25] Furthermore, "[i]t is the policy of the state that a local government not reject or make infeasible housing development projects, . . ., that contribute to meeting" the jurisdiction's RHNA "without a thorough analysis of the economic, social, and environmental effects of the action and without complying with subdivision (d)."[26] Although the Project site is not within the City's Housing Element's site inventory, the Project will contribute 318 new homes, twenty percent of which will be affordable to low income households, toward the City's 6th Cycle RHNA target of 11,966 units.[27] It is the City's burden to prove the City's decision on an HAA protected Project conformed to the requirements of the HAA,

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[21] HCD Letter to Berkeley, at 2.
[22] HCD, 125-129 Linden Drive, Beverly Hills – Notice of Violation ("Beverly Hills NOV"), (Aug. 22, 2024), at 2.
[23] Govt. Code § 65589.5(d)(5); *California Housing Defense Fund v. City of La Cañada Flintridge*, Los Angeles County Superior Court Case No. 23STCP02614, Order on Petitions For Writ of Mandate and Complaints for Declaratory Relief, (Mar. 4, 2024), at 1; HCD, City of Santa Clara – 4220 Network Circle – Letter of Technical Assistance, (Aug. 9, 2024), at 3; Beverly Hills NOV, at 2.
[24] Beverly Hills NOV, at 2.
[25] Govt. Code § 65589.5(a)(2)(L); *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 836.
[26] Govt. Code § 65589.5(b).
[27] City of Sunnyvale, 2023-2031 Housing Element, (adopted Dec. 12, 2023), at 5-1, https://www.sunnyvale.ca.gov/home/showpublisheddocument/4964/638380668142030000.

and the City may be subject to attorney's fees if a court finds the City acted in violation of those requirements.[28]

LITIGATION THREAT

The Applicant has no interest in litigation; however, the Applicant may be forced to, if necessary to preserve the Applicant's rights under the state housing laws. Concurrent with this appeal, the Applicant will be submitting a compliance case with HCD, with a copy to the HCD staff that reviewed the City's Housing Element, and will be notifying housing advocates authorized to challenge City decisions under the HAA.

CONCLUSION

The Project proposes 318 much needed homes, including twenty percent (20%) affordable homes. The Project is protected by the HAA and the Project's vesting remains valid because the application is complete as a matter of law. The Applicant provided all materials "actually required" by the City's Multi-Family Submittal Checklist.[29] The City's request for additional detail in the initial list of incomplete items does not pertain to the application's completeness because the Multi-Family Submittal Checklist does not cite to the City's municipal code or objective design guidelines. Any initial list of incomplete items must only request items actually required by the City's formal submittal checklist and the City may not expand the requirements applicable to the application after the fact by including items provided for in standards first cited in the City's initial list of incomplete items. Therefore, the Applicant appeals the City's third incompleteness determination.

Sincerely yours,

HOLLAND & KNIGHT LLP

TAMSEN PLUME

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[28] Govt. Code § 65589.6; Govt. Code § 65589.5(k)(1)(A)(ii).
[29] Govt. Code § 65943.