

# PATTERSON & O'NEILL, PC

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www.pattersononeill.com August 29, 2024

## VIA EMAIL

City of San Rafael  
Margaret Kavanaugh-Lynch, Planning Manager  
Planning Division  
1400 Fifth Avenue  
San Rafael, CA 94901  
margaret.kavanaugh-lynch@cityofsanrafael.org

Re: Notice of Appeal  
File No: CDR23-002, ED23-062, TS23-001 (PLAN23-081) and (PLAN 24-048)

Dear Ms. Kavanaugh-Lynch:

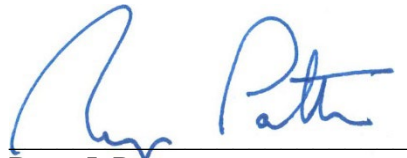
As you know, our office represents the property owner/project applicant. We hereby respectfully appeal the attached incompleteness determination to the Planning Commission and City Council. A check for \$5,000 will be hand-delivered shortly.

The basis for the appeal includes, but is not limited to, the reasons articulated in the attached letter dated July 23, 2024.

Please kindly notify us immediately via email and phone if anything further is required to process the appeal.

Very truly yours,

PATTERSON & O'NEILL, PC



Ryan J. Patterson

Encl.



August 23, 2024

Ray Cassidy  
Dominican Valley LLC  
PO Box 150173  
San Rafael, CA 94915

**Re: File No: CDR23-002, ED23-062, TS23-001 (PLAN23-081) and (PLAN 24-048) Review of July 25, 2024 Resubmittal**

**Development Application for Dominican Valley Housing Development including Conceptual Design Review, Environmental and Design Review, Tentative Subdivision Map Application and Density Bonus Application (APN 015-163-03)**

Dear Applicant,

The Community Development Department is in receipt of your second resubmittal package submitted on July 25, 2024 for the proposed housing development project at Magnolia Avenue and Deer Park Avenue (APN 015-163-03) in San Rafael for a major subdivision and residential development of a 20.79-acre site. The proposed project involves subdividing the property into 50 parcels and constructing 64 residential dwelling units, including 27 single-family homes, 17 townhomes, 14 Junior Accessory Dwelling Units (JADUs) attached to the townhomes, and 6 Duplex units.

Pursuant to Government Code Section 65943 et seq., this letter informs you that the project is incomplete. The elements needed to make the application complete are detailed in the following sections of this letter. To facilitate the development review process, please include a detailed response letter with your resubmittal that addresses all items contained in this letter. Similarly, please provide written responses to the items identified as incomplete by other reviewers.

State law requires that within 30 days of an applicant's filing of a development application, the City must review the application and determine whether it is complete. Once the City determines your application is complete, we will begin a formal analysis of the application, including preparing a California Environmental Quality Act (CEQA) determination for the project, identifying any outstanding issues, and scheduling the project for an action.



## **A. Completeness Comments**

Please provide the following information in order to complete your application:

- I. **General Application.** The General Application for the proposed project indicates that the applicant and property owner are separate people/entities. The application lists “Dominican Valley LLC” as the property owner and “Ray Cassidy” as the applicant. The application form is signed by Ray Cassidy. Please provide documentation verifying that Ray Cassidy is authorized to sign on behalf of Dominican Valley LLC or provide authorization from someone authorized to sign on behalf of Dominican Valley LLC.
- II. **Fees.** The project currently has outstanding fees and requires additional tentative subdivision and security deposits. A total of **\$72,952.90** is due at this time in order to continue processing the application. Nonpayment of this deposit by September 22, 2024, (30 days after the date of this letter) shall be deemed a withdrawal of the application, consistent with the Cost Based Fee System outlined in the General Application Form (See Attachment 1).

In signing the General Application form, the applicant agreed to pay to the City all incurred costs, both direct and indirect, including State-mandated costs, associated with review and processing of the accompanying application for land use approval(s), even if the application is withdrawn or not approved. Reimbursable costs include all staff and overhead costs as established in the City’s adopted Cost Recovery Fee Program Master Fee Schedule, as well as the cost of required professional consultants to assist in environmental, engineering or legal review.

Fees Due	Fee
Balance Due	\$30,364.90
Additional Tentative Subdivision Deposit	\$17,588.00
Security Deposit**	\$25,000.00
<b>Total Due</b>	<b>\$72,952.90</b>

**Outstanding Fees:** Outstanding fees total \$30,364.90, including fees for both Planning Division and Department of Public Works Review (see Attachment 2).

**Additional Deposit for Tentative Subdivision Map:** Additional deposit is required for the Tentative Subdivision Map application as the expenditures exceed 75% of the deposit amount required by the Cost Recovery Fee Program (See Attachment 1 and 3).

- III. **Required Entitlements:** Below is a list of entitlements required to process the project. After each entitlement, staff has noted what completeness items need to be submitted in order to determine the project is complete.

1. **MAJOR ENVIRONMENTAL AND DESIGN REVIEW PERMIT**

Per the General Planning Permit Submittal Requirements found on the City’s



website, please provide the following plans **for each proposed building and lot.**

**A. Provide a site plan that identifies the structure, parking lot and any potential site improvements. For each proposed lot provide:**

- i. Property lines and lot dimensions
- ii. Setbacks – note required setbacks for zoning district
- iii. Proposed Site Conditions - show proposed roadway and frontage improvements, outdoor improvements, accessory structures, fences and retaining walls, hillside natural state, tree and vegetation removal or addition, pools/spas, A/C units/generators, any other mechanical equipment, and any other proposed site features.
- iv. Site Work - extent of grading, including filling and cutting or excavation.
- v. Project Data. Show proposed site size, building floor areas, parking supply, landscape and natural state, required yard areas and other relevant zoning district development standards.

**B. Roof Plan.** Show property lines, outline of building footprint, direction and slope of drainage, location of drainage collectors, rooftop structures (i.e., vents, equipment, screening, access), material, ridge elevations, roof levels and slopes for each building.

**C. Landscape Plan.** Show proposed landscape improvements for each lot, including the types of plant and landscape materials proposed, soils characteristics, and plant/landscape amenities cut sheets or illustrations for each lot.

## **2. AFFORDABLE HOUSING**

1. **Inclusionary Housing:** Pursuant to San Rafael Municipal Code Section 14.16.030, residential development projects shall provide affordable housing units as described in the policies and procedures specified in the San Rafael City Council's Guidelines for the Administration of the Affordable Housing Trust Fund (Resolution 14890; see Attachment 5). Per Section C: Location and Type of Affordable Housing Units: Affordable housing units shall be dispersed throughout the residential development project. Units may be clustered within the residential project when the city determines that such clustering furthers affordable housing opportunities. The affordable housing



units shall be of a similar mix and type to that of the residential development project as a whole, including, but not limited to:

- a. The same or substantially similar mix of unit size (e.g., number of bedrooms, square footage);
- b. Compatibility with the design, materials, amenities, and appearance of the other developed units.

The proposed application does not clearly describe the affordable housing component; however, it seems to indicate that the project proposes for 14 JADUs located in the lower level of townhomes on Lots 15-22, 25-28 and 30-31 to satisfy the requirements under SRMC Section 14.16.030. The JADUs appear to total approximately 230 sf each.

A Junior accessory dwelling unit ("JADU") means an accessory dwelling unit that is no more than five hundred (500) square feet in size and contained entirely within the walls of a proposed or existing single-family residential space and meets the additional standards provided in section 14.16.285 C.2.

The proposed JADUs do not appear to meet the criteria for the affordable housing units pursuant to SRMC Section 14.16.030. Specifically, the JADUs are not the "same or substantially similar mix of unit size (e.g., number of bedrooms, square footage)". JADUs cannot be sold separately from the primary residence and the City cannot force a property owner to rent a portion of their property for the purposes of affordable housing.

### 3. **DENSITY BONUS**

RESOLUTION NO. 14891 notes the items that are required to be submitted for the Density Bonus application. Although some items were included in the last submittal, additional items are still outstanding:

- A. Clarification on Accessory Dwelling units and Junior Accessory Dwelling Units. In this submittal, there are inconsistencies in the identification of Accessory Dwelling Units and Junior Accessory Dwelling Units. Please state how many of each type of these units are proposed, and show the location of each one of these units on a plan set. Sheet A 001 indicates ADUs, as does the Density Bonus Statement. However, Project Description (dated December 6, 2023) indicates the units would be Junior ADUs. The floor plans note the units are ADUs, however, the plans don't clearly demonstrate that the units meet the required criteria.
- B. Any requested waivers or modifications of development



standards necessary to physically accommodate “density bonus” units (e.g., increased height, reduced setbacks or parking, etc.) e. If the project is requesting an incentive or concession, describe each incentive or concession being requested in addition to (or instead of) waivers or modifications necessary to accommodate density bonus.

- C. **Density Bonus Base Project Plans.** Provide plans showing a “base project” that complies with all applicable Zoning Ordinance requirements, without any waivers or modification to development standards.

#### 4. **ZONING AMENDMENT (REZONING)**

The site is zoned as Planned Development (PD). The current application requests changes in the existing PD zoning and development plan and shall be treated as a zoning amendment (rezoning).

Pursuant to [Section 14.07.060 - Required plans and materials](#), in addition to the requisite fee, the following items are necessary to complete the application process for a rezoning.

- A. Provide a map showing proposed district boundaries and the relationship of the district to uses and structures within a three hundred foot (300') radius of the district boundaries.
- B. Provide a map or aerial photo of the proposed district and three hundred feet (300') beyond its boundary showing sufficient topographic data to indicate clearly the character of the terrain; ridgelines and creeks; the type, location and condition of mature trees and other natural vegetation; and the location of existing development.
- C. The proposed pattern of land use, with acreage, residential density or commercial intensity calculations. This shall include the total square footage of each type of nonresidential use proposed in order to assess parking and traffic impacts.
- D. A site plan showing proposed street and lot patterns, and the location of all proposed buildings, structures, and other general site improvements.
- E. Clearly provide proposed setbacks, yard areas and height limits for each proposed lot.
- F. Provide plans showing location, grades, and widths of all



streets; location and size of all utilities; drainage structures; parking areas; walkways; and other improvements.

- G. Provide a parking plan showing proposed parking layout and provisions for bicycle parking/storage.
- H. A topographical map with average site slopes, or slopes of proposed lots, if applicable, and slopes of proposed streets.
- I. Geotechnical data (preliminary geologic report, geotechnical investigation report, and/or hazardous waste investigation report, as per general plan appendices, geotechnical review matrix).
- J. Submit a Traffic Study per the requirements noted in the chapter referenced above.
- K. Submit a description of all open space and/or undeveloped areas and a statement indicating their intended disposition (i.e., deeded to property owners, dedicated to city, etc.), if applicable.
- L. Submit an enumeration of deviations between typical zoning ordinance standards for such uses and the proposed plan; if applicable.
- M. Submit a Phasing Plan, if applicable.

## 5. **GENERAL PLAN AMENDMENT**

As the project does not meet the applicable maximum height and density limit set by the General Plan, an Amendment is required. Please submit the following items:

- A. A metes and bounds description of the property.
- B. Copies of a map (minimum scale 1" = 20' and including a north arrow) showing:
  - i. Outline of the property to be rezoned/amended.
  - ii. All existing improvements (structures, fences, parking, driveways, etc.)
  - iii. Designation of existing land use (residence, commercial building, etc.)
  - iv. Designation(s) of present zoning and/or general plan.
  - v. Small scale location map with present zoning and use of all immediately adjacent properties.
- C. Statement of reasons for requesting a General Plan Amendment.
- D. List of proposed General Plan modifications.



#### **IV. Additional Requirements**

##### **1. TRANSPORTATION IMPACT ANALYSIS.**

The draft TIS dated March 29, 2024 has not been updated per the changes noted in Response to City Comments on the Draft Transportation Impact Study for the Dominican Valley Subdivision Project (WTrans, July 18, 2024). Please provide a revised Transportation Assessment that addresses the comments in the attached memorandum from Fehr & Peers, dated April 5, 2024 and as identified in the April 26, 2024 notice of incompleteness (see DPW memorandum dated April 16, 2024 item 10).

I have included contact information for each commenter. If you would like to speak with any of these parties, please let me know and I will facilitate a meeting.

**Department of Public Works** – Sarah Teplitsky, P.E. - Associate Civil Engineer  
[sarah.teplitsky@cityofsanrafael.org](mailto:sarah.teplitsky@cityofsanrafael.org) (415) 725-0176

**Building Department** – Don Jeppson – Assistant Director and Chief Building Official  
[don.jeppson@cityofsanrafael.org](mailto:don.jeppson@cityofsanrafael.org) (415) 485-3357

**Fire Department** – Bob Sinnott – Deputy Fire Chief [Robert.sinnott@cityofsanrafael.org](mailto:Robert.sinnott@cityofsanrafael.org) (415) 485-5067

**San Rafael Sanitary District** – Tim Tran – Associate Civil Engineer (415) 451-2441  
[tim.tran@cityofsanrafael.org](mailto:tim.tran@cityofsanrafael.org)

#### **B. Courtesy Comments**

The following comments are courtesy comments. Although not required for the application to be deemed complete, we strongly recommend addressing these comments because the following information will be required for environmental review and entitlements.

##### **Planning Division:**

**Cost Recovery Agreement:** The City now uses a cost recovery agreement to memorialize cost recovery obligations. Although not germane to application completeness, please sign and return the attached cost recovery agreement (Attachment 4). Note that additional fees and studies may be required as the project progresses through the planning process. Note that 25 percent is charged on consultant costs to cover contract administration and review of consultant work product.





## Project Narrative

- a. Include an adequate number of photos to show entire project site and all adjacent buildings for context. Where possible, take wide-angle shots showing project site and adjacent buildings together. Include captions or a key indicating the location (perspective) of each photo.
  - b. Include project data table
  - c. Include a parking analysis demonstrating how the project meets requirements of SRMC Chapter 14.18 (Parking Standards).
  - d. Include a written description of how the project satisfies the findings required by the Zoning Ordinance, as well as any request to waive a submittal requirement with accompanying reason
2. **Parkland Dedication and In Lieu Fees.** Note that pursuant to SRMC Chapter 15.09 (Park Dedication and In-Lieu Fees), park land dedication or in-lieu fees shall be imposed as a condition of approval on the tentative map. Consistent with the provisions of 66477 of the Subdivision Map Act, if the proposed subdivision contains fifty (50) or fewer parcels or lots, the subdivider shall be required to pay a fee in an amount determined in accordance with the provisions of Section 15.09.040.

### Department of Public Works:

3. **Transportation Impact Analysis:** Please either (1) revise the proposed plan so that there would be no significant VMT impacts (either on its own, or after mitigation) or (2) state clearly that the currently proposed plan would result in significant and unavoidable impacts. Additionally, the following items should be addressed:

Update LOS calculations to include proposed JADUs and include intersection of Grand/Linden.

- a. Based on the information presented, the TIS should conclude that there is a secondary impact due to the loss of existing parking at the trailhead due to the project and provide a mitigation measure or conclude there is not a feasible mitigation.
- b. Include parking occupancy data at the trailhead for weekday and weekend conditions.
- c. Address offsite pedestrian assessment of Magnolia Avenue, Palm Avenue, and Highland Avenue.
- d. Address potential impacts to open space trail access as a result of the proposed project.
- e. Note that an offsite off-site multi-modal assessment for narrow streets may be required.
- f. Address emergency access for Magnolia Avenue, Palm Avenue, and



Highland Avenue.

- g. Include an analysis of the Class I Smart Trail.
  - h. A quantitative VMT analysis will be required.
4. Prior to issuance of a building permit, the applicant shall pay traffic mitigation fee for net new AM and PM peak-hour trips. The rate per peak-hour trip and the corresponding amount of the traffic mitigation fee will be determined based on the rate in effect on the date of building permit issuance. For reference, the current rate is \$6,397 per peak-hour trip. The current rate is valid until January 1, 2025. The rate is adjusted annually in accordance with Resolution No. 14983 which includes built-in increases for base fee and construction index adjustments.
  5. Per S.R.M.C section 15.06.070.b, the Private Street serving lots 41 through 44 shall intersect Margarita Drive at an angle as near to a right angle. DPW understands that topographic constraints make meeting this requirement difficult; however, similar acute angles of streets at intersections in existing hillside developments in the City have led to maneuvering difficulties for residents. The applicant shall demonstrate that passenger vehicles and delivery vehicles (e.g. typical Amazon, UPS, etc. vehicles) can successfully maneuver through the proposed acute angle at this intersection by providing a vehicular maneuvering exhibit prepared in Autoturn or a similar program. The vehicular maneuvering exhibit shall include the four possible turning movements (left turn out, right turn out, left turn in, and right turn in).
  6. A construction management plan will be required to be submitted for City review prior to issuance of building permits. Construction staging shall be onsite unless negotiated otherwise with DPW.
  7. Per Section S-2 (Geotechnical Review) and Appendix F of the San Rafael General Plan, a third-party geotechnical peer review of the project geotechnical report will be required prior to planning approval.
  8. A construction vehicle impact fee shall be required at the time of building permit issuance, which is calculated at 1% of the valuation, with the first \$10,000 of valuation exempt.

**Fire Department:** The Fire Department has the following comments and will require additional information to determine code compliance.

9. Verify roadway dimensions in all clusters to conform with the requirements set forth in the 2022 edition of the California Fire Code section 503 & Appendix D and San Rafael Fire Department fire engine & ladder truck turning radius. Site Plan page A 001 on the July 23, 2024 version do not appear to meet code requirements.



10. Verify that width and turning radius of cul-de-sac roadway meets California Fire Code section 503, Appendix D and the San Rafael Fire Department fire engine and ladder truck turning radius. (Ladder truck dimensions required if the highest roof surface of any structure located adjacent to road exceeds 30 feet.)
11. Provide hydraulic flow reports from Marin Water District validating that hydrants in the project area will be capable of flowing 1,500 gallons per minute at a 100-psi static (hydrants locations and type to be approved by Fire Marshal).
12. **Fire Emergency Vehicle Access Plan.** A fire apparatus access plan shall be prepared for this project. Fire apparatus plan shall show the location the following:
  - a. Designated fire apparatus access roads.
  - b. Red curbs and no parking fire lane signs.
  - c. Fire hydrants.
  - d. Fire Department Connection (FDC).
  - e. Double detector check valve.
  - f. Street address sign.
  - g. Recessed Knox Box
  - h. Fire Alarm annunciator panel.
  - i. NFPA 704 placards.
  - j. Provide a note on the plan, as follows: The designated fire apparatus access roads and fire hydrant shall be installed and approved by the Fire Prevention Bureau prior construction of the building.
13. **Wildland Urban Interface Technical Evaluation.** A wildland urban interface fire technical evaluation is required to determine the scope of vegetation management required to ensure the safety of the proposed construction as well as surrounding properties and evacuation routes. This report to be submitted as an attached to 3(f).
14. **Vegetation Management Plan.** Provide a written Vegetation Management Plan (VMP) submitted to the San Rafael Fire Department. This VMP must be completed and verified prior to final approval. Refer to City of San Rafael Ordinance 1856 that may be viewed at <https://www.cityofsanrafael.org/vmp-san-rafael-fd/> or you may contact the Fire Department at (415) 485-3304 to schedule a time to meet with a vegetation management inspector. Requirement of continued compliance with the approved VMP must be placed within CC&R's.

## Right to Appeal

Pursuant to Government Code section 65943(c), you may appeal this incompleteness decision in writing to the City Council or the planning commission, or both, by filing a written notice of appeal to Margaret Kavanaugh-Lynch at [margaret.kavanaugh-lynch@cityofsanrafael.org](mailto:margaret.kavanaugh-lynch@cityofsanrafael.org). Said notice of appeal shall be received within ten (10) days of the date of this letter. Appeals shall be accompanied by the required \$5,000 filing fee.

Should you have any questions regarding this list of planning division items, please do not hesitate to contact me at [Kristina.Estudillo@cityofsanrafael.org](mailto:Kristina.Estudillo@cityofsanrafael.org).



Sincerely,

*Kristina Estudillo*

Kristina Estudillo, Project Planner

cc: Margaret Kavanaugh-Lynch, Planning Manager

Attachments:

1. Dominican General Application
2. Project Invoice, dated August 13, 2024
3. City of San Rafael Fee Schedule
4. Dominican Valley Project Cost Recovery Agreement
5. Resolution 14890 – City of San Rafael Guidelines for the Administration of the Affordable Housing Trust Fund
6. San Rafael Fire Department letter, dated July 25, 2024
7. San Rafael Sanitation District letter, dated August 8, 2024
8. San Rafael Department of Public Works letter, dated August 13, 2024



# PATTERSON & O'NEILL, PC

235 Montgomery Street, Suite 950  
San Francisco, CA 94104  
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July 23, 2024

## **VIA E-MAIL**

Kavitha Kumar, Project Planner  
Planning Division  
1400 Fifth Avenue  
San Rafael, CA 94901

Re: Dominican Valley Housing Development Application  
File No: CDR23-002, ED23-062, TS23-001 (PLAN23-081) and PLAN24-048

Dear Ms. Kumar:

Our office represents Dominican Valley, LLC, owner of the vacant parcel at Magnolia Avenue and Deer Park Avenue (APN 015-163-03) in San Rafael. Our client submitted a housing development project application on December 6, 2023 for the construction of a 50-unit housing development project with 14 accessory dwelling units. The project proposes to reserve twenty percent of the units for low-income households, and therefore the project meets the definition of “housing for very low, low-, or moderate-income households” under the Housing Accountability Act. (Gov. Code § 65589.5(h)(3).) As such, the City is required to approve the project unless the City can make one of the five findings in Gov. Code § 65589.5(d), and support those findings by a preponderance of the evidence in the record.

On January 4, 2023, the City sent a letter stating that the application submittal was incomplete. Our client provided a comprehensive response addressing each one of the purported incomplete items on March 29, 2023. The City send a second letter on April 26, 2024, once again claiming that the application submittal was incomplete. As explained in more detail below, the City’s incompleteness determination does not contain any valid information requests, and as such the City is required to accept the application as complete. If the City fails to do so, our client may be forced to appeal the City’s incompleteness determination.

### **The City’s Letter Impermissibly Added Incomplete Items**

Under the Permit Streamlining Act (“PSA”), an agency is required to “provide an applicant with an exhaustive list of items that were not complete” within 30 days, and the *exhaustive* list of items “shall be limited to those items actually required on the lead agency's submittal requirement checklist.” (Gov. Code § 65943.) In any subsequent review of the application, “the local agency shall not request the applicant to provide any new information that was not stated in the initial list of items that were not complete.” (*Id.*)

The City's second incompleteness letter impermissibly added incomplete items that were not identified in the City's first incompleteness letter. These requests are invalid, as the City is prohibited from requesting any new information not stated in the initial list of incomplete items. Specifically, the City's second incompleteness letter demanded that the applicant submit individual site plans, roof plans, landscape plans, and elevations for each individual lot. This is entirely inconsistent with the City's first incompleteness letter, which only requested information for "each unit *type*," not each individual lot.

Not only does the City's second incompleteness letter impermissibly demand information that was not identified in the first letter, but the City's demand for separate plans for each individual lot is completely unnecessary and goes well beyond what the information that would be needed for planning to review the project. The City is clearly attempting to weaponize the PSA process in order to delay and stall this much needed housing project. Regardless, our client has gone above and beyond what is legally required for the application to be deemed complete, and has included in this submittal individual plans for each lot. Please be advised that because the City's request for these plans was invalid, the City cannot utilize any purported deficiencies in the submitted plans to once again deem the application incomplete.

### **The City's Requests for a General Plan Amendment and Rezoning are Beyond the Scope of the PSA**

The Department of Housing and Community Development ("HCD") has confirmed that a code-compliance comment "cannot be used as a basis for determining the completeness of the application" and that when "a local jurisdiction improperly characterizes comments as incomplete items, the jurisdiction impermissibly raises the bar to achieving a complete application, in violation of the PSA."<sup>1</sup> If a local agency wishes to provide code-compliance comments in an application completeness letter, an agency must "properly differentiate[ ] between these separate components of the review process" to ensure that "consistency review does not become a barrier to achieving an otherwise complete application." (*Id.*)

The City's second incompleteness letter demand a rezoning and general plan amendment, stating that the project "does not meet the applicable maximum height and density limit." The City's demand for these "applications" is necessarily predicated on the City's determination regarding whether the project complies with the current zoning and general plan designation. As HCD has emphatically stated, a code-compliance determination is not a valid basis for determining the completeness of an application.

Moreover, the PSA only applies to "development projects," which is defined as "any activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Gov. Code § 65931.) Rezonings and general plan amendments on the other hand, are clearly not development projects involving the issuance of an

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<sup>1</sup> HCD, *Fillmore Terrace Project – Letter of Technical Assistance*, dated August 24, 2022, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/fillmore-attachments-TA-082422.pdf>.

permit. “California precedent has settled the principle” that rezonings and general plan amendments are legislative acts. (*Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal. 3d 511, 514.) Courts have confirmed that the PSA “cannot be used to compel legislative changes to a zoning ordinance or a general plan because the act is limited to projects that are adjudicatory in nature.” (*Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 959; *see also Landi v. County of Monterey* (1983) 139 Cal.App.3d 934, 935-937.) In short, legislative actions such as rezonings and general plan amendments fall entirely outside the scope of the PSA.

Legislative acts are governed by Chapter 3 of the Planning and Zoning Law, while the review and approval of development projects are governed by Chapter 4.5 (including the PSA). Courts have also already determined that legislative changes are not “housing development projects.” (*Chandis Securities Co. v. City of Dana Point* (1996) 52 Cal.App.4th 475, 485.) In other words, the PSA and HAA apply to *projects*. General plan amendments and rezonings, on the other hand, apply to *properties*. Our client does not want, or need, to change the zoning or general plan designation of the property. Our client only asks for the City to process the application for the proposed housing development project.

HCD has recently confirmed that requiring a general plan amendment is “essentially a requirement for consistency,” and when a project cannot be disapproved for inconsistency, “it would be illogical if the jurisdiction could lawfully disapprove a project for failing to resolve that very inconsistency.” (See Exhibit A.) HCD also noted that requiring a general plan amendment “inherently requires a determination of whether the project is consistent with the general plan and zoning code” and that “a determination of consistency may not be permitted during the application completeness determination phase.” (*Id.*) In short, HCD agrees that an agency cannot deem an application incomplete based on a demand for a general plan amendment or rezoning.

### **Density Bonus Determinations are Outside the Scope of the PSA**

The State Density Bonus Law (DBL) allows a developer who agrees to build a certain percentage of low-income housing the opportunity to build more residences than would otherwise be permitted under the applicable local regulations. The DBL also entitles applicants to a number of regulatory incentives/concessions that would “result in identifiable and actual cost reductions” to provide for affordable housing costs and also prohibits the City from subjecting a proposed project to “any development standard that will have the effect of physically precluding the construction of a development” at the density proposed and with the permitted incentives/concessions. (Gov. Code § 65915(k); (e).)

An applicant may seek a “density bonus,” but makes clear a developer may elect “a lesser percentage of density increase, including, but not limited to, no increase in density.” (*Id.* § subd. (f).) Thus, even if an applicant voluntarily elects not to seek any density bonus, a project is still entitled to incentives/concessions and waivers. The refusal to grant incentives/concessions is a violation of the DBL, and the local government specifically bears the burden of proof for the denial of incentives/concessions. (*Id.* subd. (d); (e).) A City may only refuse a proposed incentive/concession or waiver if the request would have a specific, adverse impact upon public



health or safety or a property listed in the California Register of Historical Resources or is contrary to state or federal law. (Gov. Code, § 65915(e)(1).)

The DBL very clearly states that a determination regarding the amount of density bonus or the adequacy of information as to any requested incentives/concessions/waivers must occur *after* an application is accepted as complete. The DBL states that “*If the local government notifies the applicant that the application is deemed complete,*” the agency shall then provide the applicant with determinations regarding the “amount of density bonus, calculated pursuant to subdivision (f), for which the applicant is eligible” and “whether the applicant has provided adequate information for the local government to make a determination as to those incentives, concessions, waivers, or reductions of development standards.” (Gov. Code, § 65915(a)(3)(D).) For extra measure, subd. (a)(3)(D)(ii) also states that “[a]ny determination required by this subparagraph *shall be based on the development project at the time the application is deemed complete.*”

In short, the DBL requires that the City accept the application as complete, and *then* make a determination on the density bonus amount and any requested incentives/concessions/waivers. Therefore, insufficient information regarding whether a project qualifies for a requested incentive/concession/waiver is not a valid reason to refuse to accept an application as complete. The City’s second incompleteness letter demands various information relating to the DBL. While our client has provided information in response to this request, determinations regarding eligibility for any DBL incentives/concessions/waivers are not a valid basis to determine that the application is incomplete.

### **PSA Appeal Process**

Gov. Code § 65943(c) states that if an application is determined to be incomplete, the agency “shall provide a process for the applicant to appeal that decision in writing to the governing body of the agency or, if there is no governing body, to the director of the agency, as provided by that agency.” The PSA further requires that a final written determination on the appeal be issued within 60 calendar days or else the application is deemed complete. (*Id.*)

Our client has once again provided a comprehensive response to address the City’s incompleteness determination, even though the City’s second letter does not contain any valid information requests. If the City still refuses to accept the application as complete, please be advised that the applicant will have no choice but to appeal the City’s incompleteness determination.

### **Conclusion**

The City’s processing of this much needed housing development project is inconsistent with the City’s duties under the PSA. We respectfully demand that the City accept the application as complete and process the application according to the law. Thank you for your attention to this matter, and please contact us if you would like to discuss this matter further.

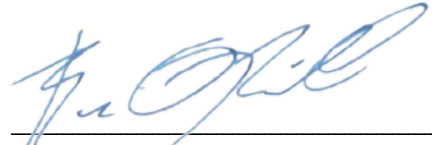
Kavitha Kumar, Project Planner

July 23, 2024

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Very truly yours,

PATTERSON & O'NEILL, PC

A handwritten signature in blue ink, appearing to read "B. O'Neill", written over a horizontal line.

Brian O'Neill