

# PATTERSON & O'NEILL, PC

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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