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January 29, 2025

***VIA E-MAIL***

Kristin Teiche, Principal Planner
Planning Division
City Hall, Main Floor
420 Litho Street
Sausalito, CA 94965

Re: 605-613 Bridgeway Housing Development Project (Willy's LLC)
Challenged Conduct Notice (Gov. Code § 65589.5(h)(6)(D))

Dear Ms. Teiche:

As you are aware, our office represents Willy's LLC, the applicant for the construction of a multi-unit housing development project at 605-613 Bridgeway. On November 14, 2024, the City sent a letter claiming that the application is purportedly inconsistent with various City standards, demanding that the applicant either revise the project or request a rezoning and general plan amendment. Our office responded to this letter November 27, 2024 to explain why the purported "inconsistencies" were legally invalid. On December 17, 2024, the City sent another letter that largely ignored applicable law, and our letter, and again claiming that the project is purportedly inconsistent with City standards without further explanation. The City's December 17 letter then directed the applicant to submit a costly appeal that will further delay the City's processing of this desperately needed housing project.

The Housing Accountability Act ("HAA") was recently amended to expand upon the definition of a "disapproval" of a housing development project. The HAA now defines disapproval to mean any instance in which a local agency "fails to cease a course of conduct undertaken for an improper purpose, such as to harass or to cause unnecessary delay or needless increases in the cost of the proposed housing development project, that effectively disapproves the proposed housing development without taking final administrative action . . ." (Gov. Code § 65589.5(h)(6)(D))

Pursuant to AB 1893 (effective January 1, 2025), **PLEASE TAKE NOTICE** that the City has undertaken a course of conduct that effectively disapproves the proposed housing development without taking final administrative action, as explained in more detail below. The City five working days of receiving this written notice to post the notice on the city's website, provide the notice to any person who has made a written request for notices pursuant to subdivision (f) of Section 21167 of the Public Resources Code, and file the notice with the county clerk. (Gov. Code § 65589.5(h)(6)(D)(ii).) Further, the City has 90 days of this written notice to cease the

challenged conduct, or else the City bears the burden to establish its course of conduct does not constitute a disapproval of the housing development project. (*Id*. subd. (h)(6)(D)(v).)

**The City's Demand for a Rezoning and General Plan Amendment to Utilize the Housing Element Density Effectively Disapproves the Project**

The Legislature commanded that the Housing Accountability Act ("HAA") must "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(2)(L).) With respect to determining project consistency, the HAA utilizes a "reasonable person" standard, under which the test is whether "substantial evidence . . . would allow a reasonable person to conclude that the housing development project" complies with applicable standards. (Gov. Code § 655589.5(f)(4).) The HAA also shifts the burden of proof from the applicant to the local agency, whereby the agency must demonstrate that its decision conforms with the HAA's requirements. (Gov. Code § 655589.6.)

City staff, including City Attorney Sergio Rudin, repeatedly confirmed in writing that the City would utilize the density specified in the City's most recently updated and adopted Housing Element to calculate the "base density" for this project. The applicant followed the City's guidance and spent significant time and resources development a project utilizing the 49 unit per acre density as adopted in the City's housing element. The only question the City must ask is whether a reasonable person could interpret base density in the manner proposed by the applicant. The answer to that is clearly yes, as the City's own staff informed the applicant multiple times that the base density the City would use is the 49 units per acre standard as adopted in the housing element. The City would certainly concede that its own staff and City attorney are reasonable people, and therefore this prior determination of base density is dispositive that the proposed project is consistent with respect to density.

The City has now done an about face, abandoning its prior determination and demanding that the applicant submit a general plan amendment and rezoning application to utilize the housing element density. While the law has always been clear that the City must utilize the housing element density standard, recent amendments to the HAA made this point indisputable.

HAA subdivision (f)(8) states that projects on housing inventory sites that are consistent with the density specified in the most recent housing element, but are inconsistent with current zoning or general plan standards, are subject to the provisions of paragraph (6)(A), (B), and (D). Paragraph (6)(D), in turn, states that such projects shall *not* be required to apply for legislative amendments or rezonings and are deemed consistent with all standards "for all purposes." Paragraph (6)(A) also allows an applicant to choose any standards associated within a different general plan designation or zoning classification that facilitates the project's density.

The Density Bonus Law defines "base density" to mean the greatest number of units "allowed under the zoning ordinance, specific plan, or land use element of the general plan applicable to the project." Thus, because under Paragraph (6)(D) a project that is consistent with the housing element density is deemed consistent with all zoning and general plan standards for *all* purposes,

a project that is consistent with the housing element density must also be found consistent with existing zoning, land use plan, and specific plan density. Therefore, the housing element density *is* the greatest number of units "allowed under" the existing zoning and land use plan standards.

Moreover, an applicant could instead choose a *different* zoning or land use plan designation that does permit the housing element density, and this would be the zoning/land use density that is "applicable to the project" for purposes of base density. Either way, the HAA is clear that for purposes of the Density Bonus Law (and *all* other purposes), that a project may proceed with the density allowed under the most recent housing element.

Recent case law further confirms that the City's view of base density is inconsistent with the DBL. In *W. Adams Heritage Ass'n v. City of Los Angeles* (2024) 326 Cal. Rptr. 3d 844, the court considered whether a redevelopment plan created under the Health and Safety Code should be utilized to calculate base density. (*Id.* at 877) The Court explained that the intent of the DBL is to "set density based on the 'greatest' density permitted among competing land use documents" and explained that, if there is any doubt what density to apply, the law directs the DBL to be interpreted "liberally in favor of producing the maximum number of total housing units." (*Id.*) This statement confirms that where an adopted housing element commits the City to approving a greater density than other competing land use documents, the DBL requires the base density to be calculated using the highest density applicable to the project.

The City's demand that the project seek a general plan amendment and rezoning in order utilize the housing element density for density bonus purposes is in direct violation of HAA subdivision (f)(8) that prohibits the same, and the City refusal to process the project consistent with the housing element density of 49 units per acre has caused unnecessary delay and increases costs that effectively disapproves the proposed housing development without taking final administrative action.

**The City's Demand for Additional Affordable Units and "Comparability" of Affordable Units Effectively Disapproves the Project**

The DBL states that a local government "*shall grant"* a density bonus, incentives or concessions, and waivers or reductions of development standards ratios if an applicant seeks and agrees to construct a housing development with a certain percentage of affordable housing units. (Gov. Code § 65915(b)(1).) The DBL does not impose any size or locational requirements, and is clear that the applicant is entitled to the benefits of the DBL once the project meets the state affordability requirements.

The DBL unambiguously preempts provisions in local ordinances that clash with the DBL. (See, e.g., *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 771 ("The Density Bonus Law … preempts any inconsistent local provisions."); *Latinos Unidos Del Valle De Napa Y Solano v. Cnty. of Napa* (2013) 217 Cal.App.4th 1160, 1167 (the DBL imposes a "clear and unambiguous mandatory duty on municipalities to award a density bonus when a developer agrees to dedicate a certain percentage of the overall units in a development to affordable

housing”).) Any ordinance places a greater burden on developers than is permissible under state law and is therefore void. (*Latinos Unidos*, *supra*, 217 Cal.App.4th at 1166.)

The City’s letter merely states that its inclusionary housing requirements do not conflict with the DBL without further elaboration or explanation, completely ignoring statutory language and relevant caselaw. The City suggests that the project must provide 15% of *all* units as affordable to moderate income households, including both density bonus units and base units. This is in direct violation of clear caselaw that a local agency may not place a greater burden on density bonus project than as required by state law.

Regardless, the project is *already* restricting 15% of all units as affordable, as the project proposes to restrict seven units as low income and 4 units as moderate income, which is above the City’s 15% requirement. HCD has already confirmed that when a project provides units at a deeper level of affordability than required by the local government’s inclusionary housing requirements, the jurisdiction must count the more affordable units toward the jurisdiction’s requirements.[1] HCD explained that refusing to do so raises fair housing concerns, violates the DBL that incentives deeper levels of affordability, acts as a governmental constraint on the development of housing, and jeopardizes the feasibility of housing projects. In short, HCD confirms that the City’s course of conduct that refuses to recognize the project as proposed already satisfies the City’s inclusionary housing requirements effectively disapproves the proposed housing development without taking final administrative action.

HCD has also addressed other jurisdiction’s attempt to impose a “comparability” requirement for density bonus projects.[2] HCD explained that the DBL “does *not* contain an across-the-board requirement that the design quality or attributes of the affordable units match those of the market-rate units (i.e., a comparability requirement pertaining to floor area, bedroom count, interior finishes, etc.), nor does it require that the affordable units be physically dispersed among the market-rate units (i.e., a dispersal requirement) for new and existing units. In fact, the SDBL suggests the opposite – that ‘[t]he density bonus shall be permitted in geographic areas of the housing development other than the areas where the units for the lower income households are located.’” Despite the fact that the City’s DBL ordinance includes such a “comparability” and “dispersal” requirement, there is *no* such requirement in state law. As explained above, any ordinance that places a greater burden on developers is void. (*Latinos Unidos*, *supra*, 217 Cal.App.4th at 1166.)

The City’s course of conduct that demands “comparability” and “dispersal” of affordable units needlessly delays the project and increases costs that effectively disapproves the proposed housing development without taking final administrative action.

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[1] See *8500 Santa Monica Boulevard – Letter of Technical Assistance*, available at https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/West-Hollywood-TA-090222.pdf

[2] See *145 W Renette Avenue, City of El Cajon – Letter of Technical Assistance,* available at https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/el-cajon-hau484-ta-02162024.pdf

**The City's Imposition of Development Standards That Do Not Allow the Density and Unit Type Proposed By the Applicant Effectively Disapproves the Project**

As explained above, HAA subdivision (f)(8) states that projects on housing inventory sites that are consistent with the density specified in the most recent housing element, but are inconsistent with current zoning or general plan standards, are subject to the provisions of paragraph (6)(A and (B). Paragraph (6)(A) states that a local agency "may *only* require the project to comply with the objective, quantifiable, written development standards, conditions, and policies that would have applied to the project had it been proposed on a site with a general plan designation and zoning classification *that allow the density and unit type proposed by the applicant."* Paragraph (6)(B) further elaborates that an agency is prohibited from imposing any standard or combination of objective standards that renders a project infeasible.

In violation of HAA Paragraph (6)(A), the City has insisted on imposing development standards for the R-3 and CC Zoning Districts that do not allow for the density and unit type proposed by the applicant, and which would render the project infeasible. We remind the City that the burden is on the City, not the applicant, to demonstrate that its actions comply with these requirements. (Gov. Code § 65589.6.) In other words, the City must demonstrate by a preponderance of the evidence in the record that the density and unit types proposed by the applicant are feasible with the combination of objective standards that the City is attempting to impose. We are extremely confident the City cannot carry this burden, as there is no possible way to construct the density and units proposed under the combination of R-3 and CC zoning standards the City has imposed.

The application of HAA subdivision (f)(8) to this project makes the applicant's prior requests for incentives and concessions under the density bonus unnecessary. However, the City's refusal to process and approve the prior requests further demonstrates the course of conduct the City has undertaken to unnecessarily delay and needlessly increase the costs of the Project.

The HAA makes clear that "the receipt of a density bonus, incentive, concession, waiver, or reduction of development standards pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision specified in this subdivision." (Gov. Code § 65598.5(j)(3).)

The City's letter argues that the applicant's requested concessions "requests more than one deviation from ***a*** development standard and so constitutes more than one concession." The DBL defines "concession or incentive" to mean "a reduction in site development standard***s*** or a modification of zoning code requirement***s***." (Gov. Code § 65915(k)(1).) Both a reduction in site development standard***s*** and modification of zoning code requirement***s*** are stated in the plural, meaning that each incentive or concession can request a modification to multiple code requirement***s*** at once.

As previously stated, the applicant requests one incentive/concession for a modification to the zoning code requirements for the CC zone in SMC 10.24.050 and one incentive/concession for a modification to the zoning code requirements for the R-3 zone in SMC 10.24.040. The applicant has specified the requested modifications and provided detailed project plans demonstrating precisely what is proposed. The City's own inconsistency letter details the exact floor are ratio, height, side setbacks, rear setbacks, building coverage, and impervious surfaces that are proposed by the applicant. The City's own inconsistency letter also lists precisely what City's municipal code requires. The only conceivable purpose for City's demand that the applicant submit information that the City already has, and already explained in detail in its letter, is clearly to harass and cause unnecessary delay.

The City's letter also erroneously states that the incentives allowed under subd. (d)(2)(A) and (d)(2)(C) cannot be combined, which has no basis in law. Subdivision (d)(2) clearly states that an applicant "***shall receive***" the number of incentives listed, not that an applicant must select just one of the incentive categories. This contrasts with subdivision (b), which states that a local government "shall grant *one* density bonus." The fact that subdivision (d) is not similarly limited to just one of the incentive categories confirms that, if an applicant is eligible for incentives under subd. (d)(2)(A) and (d)(2)(C), a local government must grant the requests.

**The City's Imposition of Ordinance 1022 Effectively Disapproves the Project**

The City's letter concedes that Ordinance 1022 "did not enact substantive new requirements or restrictions for the CC district." Yet the City then immediately contradicts that statement by arguing that Ordinance No. 1022 "clearly set forth standards for the CC district." The City was right the first time, Ordinance 1022 did not enact any requirements for the CC district and clearly states that its provisions do not apply to the CC district.

The plain language of Ordinance 1022 is clear, and under the HAA's reasonable person standard, the Project cannot be found inconsistent with the ordinance. While the City's letter argues that "We read Resolution No. 3407" differently, this statement is an acknowledgement that the City is imposing its own subjective interpretation of Ordinance 1022 in violation of the HAA requirement only to apply *objective* standards. (Gov. Code § 65589.5(j).)

Moreover, City staff has already discussed this issue with HCD staff and informed HCD that Ordinance 1022 did not apply to the CC district. Again, this demonstrates that even if Ordinance 1022 could be read differently, under the reasonable person standard the project must be found consistent with Ordinance 1022. The City's pattern of flip-flopping its position and misrepresenting its position not only to the applicant, but also to state agencies, further demonstrates the course of conduct the City has undertaken to unnecessarily delay and needlessly increase the costs of the Project.

**Environmental Review**

The City's December 17 letter states that the City's inconsistency determination "describes in detail the substantial evidence for the City's determinations that the buildings on the Project site

are individually listed in the California Historical Register and that the Project may cause a substantial adverse change in the significance of a historical resource." The City's inconsistency letter does no such thing and contains one paragraph that simply states its "decision is based on substantial evidence, available in the record and known to both the applicant and the City" without explanation or identifying the purported evidence. The inconsistency letter again states, without evidence or explanation, that the site "contains two historic structures listed on the California Register." The City's vague statements are not based on the law.

First, the site does not contain structures listed on the California Register. The California Register includes three mandatory categories of historic properties: (1) properties formally determined eligible for, or listed in, the National Register of Historic Places; (2) State Historical Landmark No. 770 and all consecutively numbered state historical landmarks following No. 770; and (3) Points of historical interest which have been reviewed by the office and recommended for listing by the commission for inclusion in the California Register in accordance with criteria adopted by the commission. (Pub. Resources Code § 5024.1(d).)

The structures at the Project site have not been formally determined eligible for, or listed in, the National Register of Historic Places; are not State Historical Landmarks; and are not designated points of historical interest. The only other properties on the California Register are those that have been "nominated for listing" in accordance with specified nomination procedures and "determined to be significant" by the State Historical Resources Commission. (Pub. Resources Code § 5024.1(e).) There is no evidence that the structures on the Project site have been nominated and determined significant by the Commission to be listed on the California Register.

We acknowledge that the Sausalito Historic District is listed on the California Register, as the district has been formally determined eligible for the National Register of Historic Places. The district was certified by the National Park Service for purposes of the Tax Reform Act of 1986, as substantially meeting all the requirements for listing in the National Register of Historic Places. The federal historic district certification process, however, makes clear that "Certification of statutes and districts ***does not constitute certification of significance of individual properties within the district*** or of rehabilitation projects by the Secretary." (36 CFR § 67.9(f).) In other words, the individual structures at the Project site have never been reviewed, or determined to be eligible for, the National Register of Historic Places. Thus, only the *district*, not the properties within the district, is listed in the California Register – as the City itself has recognized multiple times in the past.

The City's letter states that "reliance on a CEQA exemption at this point does not appear to be appropriate" because the project may have a substantial adverse impact on historic resources. The law defines "substantial adverse change in the significance of an historical resource" to mean the "physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings *such that the significance of an historical resource would be materially impaired*." (Pub. Resources Code § 15064.5(b)(1).) Material impairment is further defined as when a project "[d]emolishes or materially alters in an adverse manner those physical characteristics of an historical resource that convey its historical significance and that justify its

inclusion in, or eligibility for, inclusion in the California Register of Historical Resources." (*Id.* (b)(2).

In short, the City must demonstrate the project will materially impair the Sausalito Historic District such that the *district* would no longer be eligible for California Register. The applicant has already provided a report from a historic resource expert confirming that the project, which retains the existing structures and steps the upper floors of the building back away from the street, is consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties and would not cause material impairment to the Sausalito Historic District. Moreover, even if the City found that the project did not meet the Secretary's Standards, the district covers a relatively large area and includes more than fifty contributors. The City has not provided any evidence that, if this project were built, the entire district would be altered to such a degree that the district would no longer be eligible for the California Register.

As previously explained, the Project qualifies for a Class 32 Urban Infill CEQA exemption. The City's determination that the Project is ineligible for an exemption due to potential substantial adverse impacts to a historic resource is erroneous, and must be set aside. Moreover, City staff do not have the authority to unilaterally and administratively determine issues related to historic resources for purposes of CEQA. Municipal Code Sec. 10.50.080(B) states that after an application is accepted as complete, the application shall undergo public environmental review to "determine whether or not the proposed project is subject to the California Environmental Quality Act and if so whether a negative declaration or environmental impact report must be prepared." For projects within the historic district overlay, public environmental review must be conducted "consistent with SMC 10.46.060 (Property and review requirements)," which are the Certificate of Appropriateness review procedures. Section 10.50.080(B) states that the "Historic Preservation Commission shall conduct public review of such projects for advisory recommendations that are submitted to the Planning Commission for Public Hearing. The Planning Commission shall consider the recommendations of the Historic Preservation Commission."

Moreover, another potential exemption is found in CEQA Guidelines § 15183(a), which requires no additional environmental review for projects that are "consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified," except as might be necessary to determine whether there are project-specific significant effects. This exemption is authorized by Pub. Res. Code § 21083.3, which provides that a public agency need examine only those environmental effects that are "peculiar" to the project and were not addressed or were insufficiently analyzed as significant effects in a prior EIR.

This exemption works much like "tiering," which CEQA defines as the "coverage of general matters and environmental effects in an [EIR] prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIR's] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR]. (See Guidelines, § 15152.)

Courts have found that CEQA "directs agencies to 'tier' EIR's whenever feasible, in part to streamline regulatory procedures and eliminate repetitive discussions of the same issues in successive EIR's." (*Hilltop Grp. v. Cnty. of San Diego* (2024) 318 Cal. Rptr. 3d 336, 355.) Thus, although agencies have discretion which streamlining process to utilize, "they are *required* to limit their environmental review of a project when a program EIR has been certified." (*Id.*) Courts have explained that to "hold that a project-specific EIR must be prepared for all activities proposed after the certification of the program EIR . . . would be directly contrary to one of the essential purposes of program EIR's, i.e., to streamline environmental review of projects within the scope of a previously completed program EIR." (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal. App.4th 214, 239.)

As noted above, HAA subdivision (f)(8) states that projects on housing inventory sites that are consistent with the density specified in the most recent housing element, but are inconsistent with current zoning or general plan standards, are subject to the provisions of paragraph (6)(D), which states that such projects are deemed consistent with all standards "for ***all*** purposes." Thus, a project that is consistent with housing element density is therefore consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified for purposes of Pub. Res. Code § 21083.3.

The City has already certified a programmatic EIR for its 2040 General Plan Update (SCH No. 2019100322), and the proposed project must be found consistent with the density established in the general plan policies for which the 2040 General Plan Update was certified pursuant to HAA subdivision (f)(8) and paragraph (6)(D). Thus, because the project qualifies for the § 15183 exemption and there are no peculiar impacts warranting further review, the project is not subject to CEQA requirements and "may be implemented without any CEQA compliance whatsoever." (*Working Fams. of Monterey Cnty. v. King City Plan. Comm'n* (2024) 106 Cal. App. 5th 833.) Even if the City *could* make findings that there are "peculiar" impacts, the City must limit any environmental review solely to the impacts the City can demonstrate with specificity that project will have substantial and peculiar impacts as defined by Guidelines section 15183, subdivisions (b)(1). (*Hilltop Grp.*, supra, 318 Cal. Rptr. 3d at 367.)

The City's course of conduct that continues to erroneously argue that the project site is listed on the California Register, and refusal to consider that the project is exempt from CEQA based on this erroneous conclusion, needlessly delays the project and increases costs that effectively disapproves the proposed housing development without taking final administrative action.

**<u>Conclusion</u>**

The City's conduct is clearly intended to frustrate the proposed project, causing unnecessary delay and needlessly increasing the cost for the project in a manner that effectively disapproves the project. The City's conduct violates the HAA and the DBL and must immediately cease, or else the applicant may be forced to take legal action.

Very truly yours,

PATTERSON & O'NEILL, PC

Brian O'Neill