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VIA ELECTRONIC SUBMISSION

Chair Harris-Dawson and Honorable Members of the Planning and
Land Use Management Committee
Los Angeles City Council
201 N. Spring Street, 4th Floor
Los Angeles, CA 90012

clerk.plumcommittee@lacity.org

**Re: Council File No. 23-1039, November 7, 2023 PLUM Meeting, Agenda Item No. 15
Response to Department of City Planning's Appeal Recommendation Report
Appeal Pursuant to Government Code Section 65943(c) – 7745 N. Wilbur Avenue
(Case No. ADM-2023-4428-DB-ED1-VHCA / CPC-2023-4428-DB-PHP-VHCA)**

Chair Harris-Dawson and Honorable Committee Members:

Our firm represents 7749 Wilbur Avenue Real Estate LLC and Evolve Realty and Development, the property owner and applicant, respectively, (collectively referred to as the "Applicant"), of the proposed 190-unit 100 percent affordable housing development located at 7745-7751 N. Wilbur Avenue (the "Project") in the Reseda community of the City of Los Angeles ("City"). The Project is entirely privately financed and is not seeking any public subsidies, tax credits or bond financing. The Project seeks to use the City's streamlined ministerial approval process for 100 percent affordable projects granted by the Mayor's Executive Directive No. 1 ("ED 1"), originally issued on December 16, 2022. As set forth below, the Department of City Planning ("DCP") repeatedly (and correctly) deemed the Project eligible for ED 1's streamlined processing, and the Applicant has properly complied with all relevant City and State law requirements in submitting the Project's application materials. Moreover, the Project enjoys vested rights granted by State law against subsequent changes to ED 1 as well as other City ordinances, policies, and standards. Notwithstanding these vested rights, following the Mayor's revision of ED 1 in June 2023, DCP staff informed the Applicant that the Project's application was incomplete because the Project was now deemed ineligible to be processed under ED 1. Pursuant to Government Code Section 65943(c), the Applicant has appealed DCP's incompleteness determination, and the Planning and Land Use Management ("PLUM") Committee is scheduled to hear the appeal at its November 7, 2023 meeting as agenda item 15. Consistent with the City Council's recent determination that a similarly situated 100 percent affordable project enjoys a vested right to be processed under ED 1, the PLUM Committee should grant the requested Appeal.

PROJECT APPLICATION HISTORY AND PLANNING DEPARTMENT DETERMINATIONS

As noted above, the Project is a 100 percent affordable housing development project that meets ED 1's affordability requirements. Furthermore, while the Project site is currently subject to single-family zoning designations, as authorized by ED 1 and State law, the Project is eligible to utilize the density permitted by either the applicable zoning designation or the applicable General Plan land use designation. Consistent with ED 1, the Project utilizes the site's General Plan land use designation (which permits multifamily development) as well as State density bonus law ("DBL") to achieve its proposed unit count and building envelope. As set forth in the Applicant's initial appeal documents, the Applicant communicated extensively with DCP staff regarding the applicability of ED 1 and DBL to the Project, and in the course of these communications, DCP staff repeatedly and consistently confirmed that the Project would be accepted for ED 1 processing.

Pursuant to Government Code Section 65941.1 and ED 1's implementing guidelines published by the City ("ED 1 Guidelines"), the Applicant submitted and paid for a Housing Crisis Act ("HCA") preliminary application ("HCA Preliminary Application") for the Project on April 26, 2023, thereby vesting the Project against subsequent changes in City ordinances, policies, and standards pursuant to Government Code Section 65589.5(o)(1), subject to a timely filing of the Project's application materials as required by ED 1. On June 28, 2023, the Applicant timely filed these application materials for the Project with DCP and the Project was assigned case number ADM-2023-4428-DB-ED1-VHCA ("Case Filing"). On June 12, 2023, the Mayor issued a revised version of ED 1 ("Revised ED 1")¹ that no longer permitted new 100 percent affordable projects proposed to be located on single-family zoned properties with General Plan land use designations that permit multifamily development to be eligible for streamlined ministerial processing.

On July 6, 2023, DCP issued a letter to the Applicant ("Notice of Ineligibility"), stating that, due to the issuance of the Revised ED 1, the Project was not eligible for ED 1 processing as it is located in a single family zone and "modification of entitlement requests will likely require updated and/or additional application materials." On July 18, 2023, DCP issued another letter to the Applicant titled "Status of Project Review: Application Incomplete and Case Processing on Hold" ("First Status of Project Review Letter"), which repeated the assertion that the Project was not eligible for ED 1 processing and stated that "other entitlement options" may be available. On August 4, 2023, the City issued a letter titled "Second Status of Project Review: Application Incomplete and Case Processing on Hold" ("Second Status of Project Review Letter"). In this letter, the City references the Revised ED 1 and Notice of Ineligibility to justify the conversion of the case to a "regular entitlement process" using case number CPC-2023-4428-DB-PHP-VHCA, along with an explanation that DCP considers the case to have been converted as of July 6 (the date of the Notice of Ineligibility) to a discretionary City Planning Commission

¹ Note, DCP's Appeal Recommendation Report refers to the June 12, 2023 order as "Clarified ED 1." However, the order itself states it was "Revised: June 12, 2023," so this letter refers to it as "Revised ED 1". Additional commentary on this obfuscation is included herein.

The Mayor revised ED 1 once again on July 7, 2023, following the adoption of Los Angeles Administrative Code Section 8.33. This revision did not include any changes to the language of ED 1, but substituted the authorizing code section "8.29" with "8.33".

review process based on the discretionary procedures specified in Los Angeles Municipal Code (“LAMC”) Section 12.22.A.25 for off-menu density bonus incentives and waivers.

As a matter of State law, the HCA Preliminary Application filed for the Project grants vesting protections that require the City’s continued ED 1 processing of the Case Filing, as the Project became vested prior to the issuance of the Revised ED 1. As such, an appeal was filed pursuant to Government Code Section 65943(c) on September 20, 2023 to request that the City rescind the Notice of Ineligibility, acknowledge that the Project has vested rights to utilize ED 1 based on the filing of the HCA Preliminary Application, and reinstate processing of the Project’s Case Filing under ED 1, consistent with the express provisions and intent of the HCA and the Housing Accountability Act (“HAA”).

In response to the Applicant’s appeal, DCP staff have submitted a recommendation report dated November 1, 2023 (“Appeal Recommendation Report”) to the PLUM Committee, which recommends that the City Council deny the appeal, which would have the effect of preventing the Project from being processed under the administrative procedures of ED 1. DCP’s position is that the HCA does not allow an applicant to “vest” in an emergency declared under local authority; the Appeal Recommendation Report further claims that the Mayor’s ED 1 is not an “adopted” policy or standard that can be vested under the HCA.

In advance of the PLUM Committee’s consideration of this matter, we are providing a detailed response to the Appeal Recommendation Report to further explain why the City should grant the appeal and reinstate processing of the Project’s Case Filing under ED 1. We implore the PLUM Committee to consider the Letters of Technical Assistance sent directly to the City of Los Angeles from the State’s Housing and Community Development (“HCD”) on September 14, 2023 and again on October 12, 2023, in which HCD states explicitly that the City’s ED 1 is **not** excluded from the expansive HAA definition of “ordinances, policies, and standards” and which confirms that an “Executive Directive is a “rule[,],” “requirement[,],” or “polic[y]” under Government Code section 65589.5, subdivision (o)(4)” (see attached Exhibit A - HCD Letter of Technical Assistance). **HCD’s Letter of Technical Assistance explicitly states that an applicant that submitted a complete preliminary application at a time when ED 1 did not exclude single-family or more restrictive zones may proceed under the previous ED 1 regulations throughout the entitlement process.**

Additionally, the City Council has recently taken up the exact same issue presented in the Appeal in its September 26, 2023 granting of the appeal filed for the similarly situated 100 percent affordable ED 1 project located at the single-family zoned property at 5511, 5501 N. Ethel Avenue under Council File Number 23-0835 (“Ethel Project”), thus deeming the Ethel Project to be vested under ED 1 and allowing it to resume processing under ED 1’s streamlined ministerial process. By granting the Ethel Project appeal, the City Council upheld the vesting protections provided by an HCA Preliminary Application and permitted the Ethel Project to proceed under the original ED 1 process prior to the revision to ED 1. The Ethel Project appeal and the instant appeal for the Project at 7745 N. Wilbur Avenue posit the exact same justification for appeal – that the City must acknowledge that a project which has filed a HCA Preliminary Application, timely filed a full entitlement application within 180 days, has not revised the proposed number of units or total square footage of construction by 20 percent or more, and has satisfied all requirements to maintain vested rights as of the date of the HCA Preliminary Application, may proceed with streamlined ministerial processing under ED 1. HCD noted this in its October 12, 2023 technical assistance letter stating that “[t]o the extent that the appeals for the Winnetka Project, Wilbur Project or any other ED1 projects address the same question raised by the

project located at 5501-5511 N. Ethel Avenue, the technical assistance provided in HCD's September 14, 2023 letter applies. As demonstrated in the response to the Appeal Recommendation Report below, DCP has not provided any new evidence which would distinguish the Project from the Ethel Project such that the City Council may make a different decision regarding vesting under the original ED 1. As advised by the City Attorney's office during the City Council's consideration of the Ethel Project's appeal, to reach a different conclusion regarding vesting for a similarly situated project would be arbitrary and capricious. Accordingly, we urge the PLUM Committee to heed HCD's technical guidance, recommend that the City Council grant the appeal, and allow the Project to continue to be processed under ED 1's streamlined ministerial approval process.

RESPONSE TO APPEAL RECOMMENDATION REPORT

A. DCP's Claim that Emergency Declarations are Not Subject to Vesting

Throughout the Appeal Recommendation Report, DCP states the rationale for denial of the appeal is due to an asserted distinction between local planning and zoning laws and emergency declarations for purposes of vesting under Government Code Section 65589.5(o)(4):

It is City Planning's position that the streamlined ministerial review process afforded under ED1 is enabled solely by the Mayor's temporary declaration of a State of Emergency, and there is no ability to "vest" in an emergency when declared under local charter authority. The Housing Accountability Act ("HAA") and Project Preliminary Application solely provide an ability to vest in planning and zoning ordinances, policies, and standards adopted and in effect as governed by Government Code Title 7 related to planning and zoning. An emergency exists for a limited duration and is subject to regular renewal or termination. It is also subject to, and explicitly authorized to, include modifications to respond to changing parameters and the emerging context of an emergency. A directive of this type does not carry with it the legislative intent of process, procedures, and development regulations expected to be vested under the Government Code Sections 65589.5 and 65941.1. (Appeal Recommendation Report, Page A-13)

However, a declaration of emergency status issued by the Mayor in response to a State of Emergency is not the equivalent of an ordinance, policy, standard, planning rule, or zoning rule. Further, an executive directive of this type does not carry the legislative intent of process, procedures, and development regulations expected to be vested under the Housing Crisis Act. It is the City's position that the ability to vest in a declared emergency is beyond the authorization of the Housing Crisis Act. A local declaration of emergency under the City Charter is not governed by Government Code Title 7, the rules related to local planning and zoning laws. (Appeal Recommendation Report, Page A-14)

As shown by the above excerpted language, DCP repeatedly insists that ED 1 did not include "legislative intent" of process, procedures, and development regulations. However, while it is correct that ED 1 does not establish new development regulations (such as height, setback, or floor area allowances), ED 1 is explicitly referenced as a "process" in nearly all of the City's published materials related to ED 1. As just one example, the very first provision of both ED 1 and Revised ED 1 says:

All City departments are directed to process all plans for such 100 percent affordable housing projects or Shelter using the streamlined ministerial review process currently used for projects eligible under Government Code section 65913.4, State Density Bonus law.

Furthermore, the ED 1 Guidelines are nothing if not a holistic set of processes and procedures for City departments to follow to comply with ED 1, as confirmed on the very first page of the ED 1 Guidelines:

On December 16, 2022, Mayor Karen Bass issued Executive Directive 1 (ED 1) to facilitate the expeditious processing of Shelter projects and 100 Percent Affordable Housing Projects to address the housing and homelessness crisis in Los Angeles. Effective immediately, the project review procedures in the Department of City Planning (City Planning), the Department of Building and Safety (LADBS), and the Housing Department (LAHD) are modified in response to ED 1. As directed by ED 1, City Planning shall provide guidelines on the implementation of ED 1 related to applications and permitting processes. This memorandum provides guidance for applicants seeking to file an application for projects that are eligible for the ED 1 Ministerial Approval Process—summarizing eligibility criteria and exceptions, general procedures, project review timelines, filing requirements, City Planning fees, development standards, additional tools and resources, and contact information.

To claim that the intent of ED 1 was not to establish a separate process or procedure is patently false. ED 1 (as well as the Revised ED 1) specifically modify local planning and zoning laws (specifically, the processes typically required to complete Site Plan Review [LAMC Section 16.05], Density Bonus Compliance Reviews with off-menu incentives and waivers [LAMC Section 12.22-A.25(g)(3)], and other entitlements which typically require lengthy discretionary review) in order to facilitate the streamlined processing of applications for affordable housing projects. The City's emergency authority powers authorized the Mayor to adopt these modified processes and procedures; however, there is nothing in either City law or State law that supports the proposition that an executive directive issued pursuant to an emergency declaration is somehow exempt from the HAA's broad definition of ordinances, policies and standards that are to be vested against by the filing of a Preliminary Application.

Given DCP's reliance on this claimed distinction between ED 1 and other regulations, this firm requested that HCD provide formal technical assistance on the question of whether an executive directive granted under emergency authority constitutes one of the "ordinances, policies, and standards" that vest upon submission of a complete Preliminary Application. HCD's Letter of Technical Assistance unequivocally states that such an executive directive falls within the scope of such "ordinances, policies, and standards." HCD's answer points to the statutory language of the HAA, which makes clear that "ordinances, policies, and standards" are not limited solely to planning and zoning regulations such as height and setback standards, but broadly includes "general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, **and any other rules, regulations, requirements, and policies of a local agency**, as defined in Section 66000."² HCD's Letter of Technical Assistance also rejects DCP's claim that ED 1, as an emergency declaration, is something other than a "rule, requirement, or policy," and cites the specific language of the City's emergency authority provisions giving rise to ED 1, including Los Angeles Administrative Code Section 8.29, which authorizes the Mayor to "promulgate, issue and enforce rules, regulations, orders and

² Gov. Code, § 65589.5, subd. (o)(4), emphasis added.

directives,” and Los Angeles Charter Section 231(j), which authorizes the Mayor to “establish procedures and implement policies” that “shall be binding on all departments, commissions, appointed officers and employees of the City.”

Thus, as explained in our original appeal justification and as now clearly confirmed by HCD, ED 1 is precisely such a rule, regulation, requirement, or policy that is vested through the filing of a Preliminary Application and the City should grant the appeal to allow the Project to proceed with ED 1 administrative processing.

B. Claim that the City’s Preliminary Referrals and Acceptance of Case Filing Does Not Guarantee Correctness of a Proposed Entitlement Process

DCP claims that the application process does not provide any guarantees of approval or of the appropriateness of a specific entitlement path for the Project:

Further, City Planning applications and forms make clear that the filing of a Development Project Application, a Housing Referral Form, or even a Preliminary Application, is not an approval of a proposed Project, or a guarantee about the feasibility or correctness of a proposed entitlement process. (Appeal Recommendation Report, Page A-21)

The Appeal Recommendation Report goes on to cite language from the Applicant Declaration of the Department of City Planning Form, which requires that applicants acknowledge there is no guarantee of approval of a permit and that recommendations may change from any preliminary discussions. The Appeal Recommendation Report also cites the HCA Preliminary Application Form and the Affordable Housing Referral Form, which state that by signing the referrals forms DCP has not affirmed the entitlement review path and reserves the right to request an updated form subject to changes in City or state policies or laws.

First, the point at issue is not the specific entitlements needed to process the Project, but rather the Project’s vested eligibility to use the ED 1 streamlined ministerial process as it was promulgated prior to the issuance of the Revised ED 1. The Applicant requested a Density Bonus entitlement and did not request any other entitlements which are expressly prohibited from being processed under ED 1, including a legislative action (e.g., General Plan Amendment, Zone Change, Height District Change), a deviation from development standards (e.g., adjustment, variance, specific plan exception, waiver of dedication/improvement), or a Coastal Development Permit or a subdivision. DCP’s own Appeal Recommendation Report explicitly acknowledges that “there is no change in the development standards applicable to the Project, and no change in required land use entitlements” for the Project (page A-20).

Second, DCP’s assertion that the required entitlements may be changed at any point in time subject to a change in local policy may **not** be applied to projects which have submitted a valid HCA Preliminary Application, because that is directly contrary to the HCA. Specifically, submittal of a complete HCA Preliminary Application pursuant to Government Code Section 65941.1 vests the right to develop a housing development project in accordance with the “ordinances, policies, and standards” in effect when a HCA Preliminary Application is submitted.³ The plain language of the statute makes it clear that not just ordinances or legislative actions may be vested against – other existing “policies” and

³ Government Code Section 65589.5(o)(1).

“standards” promulgated by a jurisdiction may also be vested. To ensure there is no doubt regarding the breadth of those local regulations that may be vested against, the HAA specifically, intentionally and very broadly defines “ordinances, policies, and standards” to include “general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, **and any other rules, regulations, requirements, and policies of a local agency.**” (Emphasis added). HCD’s Letter of Technical Assistance to the City provides a clear and direct explanation that ED 1 is in fact a rule, regulation, requirement, or policy that is vested through the filing of a Preliminary Application. Through this appeal, the Applicant is not seeking a guaranteed approval of the Project, but rather a determination that the Project was vested prior to the revision to ED 1 and therefore cannot be deemed incomplete through the erroneous application of a discretionary entitlement process.

C. Claim that ED 1 Was Clarified Rather Than Revised and Reissued

In the Appeal Recommendation Report, DCP makes a separate claim that ED 1 always intended to exclude projects in single family zones, but that only after a full six months did the Mayor’s office “clarify” it to explicitly exclude such projects.

The Mayor issued a clarification on ED 1 (“Clarified ED1”), to provide clarifying language that explains developments on sites” located in a single family or more restrictive zone” are not eligible for streamlined ministerial processing. (Appeal Recommendation Report, Page A-5)

The Appeal Recommendation Report’s claim regarding “clarification” is a departure from the word choices previously utilized by the City regarding the Revised ED 1. The Mayor’s own documentation, including the revised versions of ED 1 issued on June 12, 2023 and July 7, 2023, specifically state that it is a “revised” version of the same directive, not a “clarified” document. Furthermore, if ED 1 was merely being clarified, it would continue to be effective as of its original issuance date of December 16, 2022. However, DCP’s Appeal Recommendation Report cites June 27, 2023 as the date on which the Revised ED 1 cleared a mandatory 15-day period after which it became effective; this means that, up until June 27, 2023, the original ED 1 (which as explained in detail below, did not exclude projects in single family zones) was the prior effective version. Thus, as acknowledged by the Appeal Recommendation Report, the City’s intent in issuing the Revised ED 1 was to supersede and replace the original ED 1, not to “clarify” it.

In addition, in its prior correspondence with the Applicant regarding the Project, DCP staff confirmed that the Revised ED 1 represented a distinct substantive change from the original ED 1’s provisions with regard to single-family zoned properties. Specifically, in DCP’s July 6, 2023 Notice of Ineligibility letter to the Applicant, DCP staff stated the following:

Per the revised Executive Directive 1 (ED1) issued by Mayor Karen Bass on June 12, 2023, projects located in single-family or more restrictive zones cannot use the ED1 Ministerial Approval Process. This revision affects projects in the following zones: OS, A1, A2, RA, RE, RS, R1, RU, RZ, and RW1. The proposed project located at 7749 N Wilbur Avenue is in the RA-1 zone and is not eligible for ED1 processing. (Emphasis added.)

Given DCP’s prior explicit acknowledgment that the Revised ED 1 did in fact revise the processing requirements under the original ED 1, its current “clarification” claim cannot be supported.

In an effort to further advance its “clarification” argument, the Appeal Recommendation Report also claims that the original ED 1 itself intended to exclude single-family zoned properties from eligibility:

The claim is premised on alleged vesting rights under the Project’s Preliminary Application submitted during the period that the Mayor’s ED1 was not express about disqualifying multiunit projects in R1 and more restrictive zones like the RA zone. (Appeal Recommendation Report, Page A-4)

ED1 allowed for the “streamlined ministerial review” of 100 percent affordable housing projects, and at the time ED1 was issued, allowed at least 31 pending 100 percent affordable housing projects to be immediately expedited. Those projects were all located on sites that allowed multi-family housing. (Appeal Recommendation Report, Page A-5)

While the Project was initially taken in under the ADM Application, that action was not contemplated by the scope of ED1, which immediately converted only those 100% affordable projects in zones that allowed multi-family uses. (Appeal Recommendation Report, Page A-15)

However, not only did the original ED 1 not expressly exclude projects proposed in single family zones, it explicitly allowed such projects. As noted above, the original ED 1 and the ED 1 Guidelines explicitly state that a proposed project may utilize the density permitted by either the applicable zoning designation or the applicable General Plan land use designation, as well as DBL. In addition, as confirmed by the Applicant during preparation and City execution of the Project’s pre-application referral forms, the Project site’s single-family zoning designation did not preclude use of ED 1. Therefore, the Appeal Recommendation Report’s claim that ED 1 was always intended to exclude projects in single family zones ignores the plain language of the directive as well as the many instances of consultation between the Applicant and City staff to expressly confirm the Project could proceed under ED 1 as proposed.

The City previously had the opportunity to make any such “clarification” of ED 1 explicit, but declined to do so. Specifically, the ED 1 Guidelines, issued nearly two months after the original ED 1, contain an explicit list of those projects that are excluded from utilizing ED 1’s provisions, including projects requiring a legislative action (e.g., General Plan Amendment, Zone Change, Height District Change), projects seeking a deviation from development standards (e.g., adjustment, variance, specific plan exception, waiver of dedication/improvement), or projects requiring a Coastal Development Permit or a subdivision. Nowhere do the ED 1 Guidelines state or imply that only multifamily-zoned properties are to be considered eligible for ED 1 processing, nor do they state or imply anywhere that single-family zoned properties would be ineligible. In fact, the ED 1 Guidelines go one step further than the language of ED 1 (which states that a project “may” use the density permitted by zoning or the General Plan) by stating that projects “**shall** utilize the maximum allowable base density under the zoning ordinance, specific plan or zoning overlay, or General Plan land use designation.” (ED 1 Guidelines, p. 10.)

It is abundantly clear that the City had multiple earlier opportunities to seek to exclude projects in single family zones from ED 1 eligibility, as it chose to do for projects that included subdivisions, coastal development permits, and other entitlements. If this change to exclude projects in single family

zones was intended to simply be a “clarification” then it could have been added to a revised version of the ED 1 Guidelines document, and not formally issued as a Revised ED 1. Instead, the City communicated to the Applicant that the Project, on the proposed site that is zoned for single-family uses, could proceed using ED 1 for over six months. Even after the Revised ED 1 was issued on June 12, 2023 and became “effective” on June 27, 2023, the City allowed the Applicant to complete the Case Filing a day later on June 28, 2023 and specifically assigned the “ADM” case number, ADM-2023-4428-DB-ED1-VHCA, which indicates that the Project was eligible for and filed as an ED 1 project. The statements made in the DCP Appeal Recommendation Report regarding a “clarification” of ED 1 ignore these facts and attempt to obfuscate the formality of ED 1 and its subsequent revisions.

D. Claims Regarding Applicant’s Responsibility to Respond to Incomplete Letters

Throughout the Appeal Recommendation Report, DCP claims that the Applicant has failed to respond to various requests for additional information or items needed to deem the application complete. See below:

Since LADCP had not received further processing materials from Appellant to complete or convert the existing ADM Application, on August 4, 2023, the Department issued a Second Status of Project Review letter detailing the proper entitlement process for the Project, notifying Appellant that the ADM Application was being converted to the CPC Application, and that the CPC Application was incomplete for the same reasons stated in the June 30, 2023 incompleteness determination related to the ADM Application. (Appeal Recommendation Report, Page A-12)

The Project is vested under the Project Preliminary Application to the extent allowed by the requirements and timelines in Government Code Section 65941.1, which require Appellant to complete its Development Project Application 90 days from the date of the July 18, 2023 incompleteness letter. (Appeal Recommendation Report, Page A-15)

However, it is important to clarify the various correspondences that DCP has sent to the Applicant relative to the timelines and milestones set forth by the PSA and HAA, and also identify the procedural issues that have already taken place. Thus far, the City has issued three formal pieces of correspondence to the Applicant:

- After permitting the Applicant to complete and pay for the Case Filing on June 28, 2023, DCP issued a letter on July 6, 2023 to the Applicant, the Notice of Ineligibility, stating that, due to the issuance of the Revised ED 1, the Project was not eligible for ED 1 processing as it is located in a single family zone and “modification of entitlement requests will likely require updated and/or additional application materials.” This correspondence was not described as a determination of completeness, but it communicates that the Project would not be processed according to ED 1 and did not include a specific list of additional materials that would be required in order to continue processing of the case. This correspondence had the effect of putting the Project in a state of procedural limbo.
- On July 18, 2023, DCP issued a letter to the Applicant titled “Status of Project Review: Application Incomplete and Case Processing on Hold,” which listed 18 items that were required to be provided or revised to proceed with the processing of the case. This letter

repeated the assertion that the Project was not eligible for ED 1 processing and stated that “other entitlement options” may be available yet still indicated that the Project maintained the ADM case number.

- On August 4, 2023, the City issued the Second Status of Project Review Letter. In this letter, the City references the Revised ED 1 and Notice of Ineligibility to justify the conversion of the case to a “regular entitlement process” using case number CPC-2023-4428-DB-PHP-VHCA, along with an explanation that the case was considered converted as of July 6 (the date of the Notice of Ineligibility) to a discretionary City Planning Commission review process based on the procedures specified in LAMC Section 12.22.A.25 for off-menu density bonus incentives and waivers. This letter also states that the Project application remains incomplete and requires the submittal of “further materials” including “materials related to needed CEQA analysis.”

The Appeal Recommendation Report then claims that the Applicant has not made any attempts to provide documents in response to DCP’s incomplete letters, which the Appeal Recommendation Report appears to consider as the July 18, 2023 and August 4, 2023 letters. However, the City did not wait for the initial statutory 90-day period for resubmittal to end on October 16, 2023 before issuing the Second Status of Review Letter on August 4, 2023. Moreover, the City has already informed the Applicant that the original case number associated with the Project, ADM-2023-4428-DB-ED1-VHCA, no longer exists as it has already been converted, without the Applicant’s consent, to a discretionary case under case number CPC-2023-4428-DB-PHP-VHCA. Accordingly, on September 20, 2023, the Applicant submitted an appeal pursuant to Government Code Section 65943(c). This appeal right is the statutory process by which an applicant may challenge the City’s incompleteness determination. In this case since DCP terminated the ED1 case outright, the appeal challenges that termination and the conversion of the ED1 case to a discretionary one. As such, the appeal effectively suspends any obligation to respond to the City’s First Status of Project Review because until a decision is rendered on the appeal, there is no actual ED1 case on file to process.

We are aware that the City Council recently denied an appeal involving very similar issues for a project located at 8217 Winnetka Avenue⁴ (“Winnetka Project”). In testimony before the City Council on October 13, 2023, DCP staff asserted that the Applicant was required to complete the Winnetka Project’s originally filed ED 1 ministerial case (ADM-2023-4274-DB-VHCA-ED1) within 90 days of receiving an incomplete letter from DCP, despite DCP’s termination of the ED 1 ministerial case and the Applicant’s subsequent filing of an appeal to object to DCP’s determination that the Winnetka Project was ineligible for ED 1. Oddly, DCP staff’s testimony during the October 13th City Council hearing demonstrated that the City did acknowledge the HCA vesting associated with the ministerial case by continuing to uphold the statutory 90-day deadline⁵ by which the Applicant must respond, despite: 1)

⁴ The appeal for the project located on 8217 Winnetka Avenue was denied by the Los Angeles City Council on October 13, 2023 and is associated with Council File Number 23-0908.

⁵ Government Code Section 65941.1(d)(2) “If the public agency determines that the application for the development project is not complete pursuant to Section 65943, the development proponent shall submit the specific information needed to complete the application within 90 days of receiving the agency’s written identification of the necessary information. If the development proponent does not submit this information within the 90-day period, then the preliminary application shall expire and have no further force or effect.”

explicitly terminating the original ministerial case number and converting the Winnetka Project to a discretionary case, and 2) asserting repeatedly in written and verbal testimony that no such vesting could apply. In consideration of DCP staff's recent actions regarding the Winnetka Project, we submitted correspondence to Planning staff and the Council File on October 16, 2023 which clarifies that DCP never sent the Applicant a written letter properly identifying the items needed to complete the ministerial ED 1 Case Filing. Instead, DCP sent multiple pieces of correspondence claiming that the Project was not eligible to use ED 1, none of which meet the statutory requirements for a determination of incompleteness. The correspondence submitted by this firm acknowledged that October 16, 2023 marks 90 days from the issuance of the First Status of Project Review Letter on July 18, 2023 and establishes that the statutory 90-day deadline for resubmitting ED 1 application materials to DCP cannot be applied to the Project, as the City has refused to process the ED 1 ministerial application, which is the subject of the Applicant's appeal. The issuance of the August 4, 2023 Second Status of Review Letter also indicates that DCP itself did not consider the July 18, 2023 First Status of Project Review Letter to constitute a valid determination of application incompleteness, because the clear language of Government Code Section 65943(a) prohibits the City from requesting any new information beyond the initial list of items requested in such an incomplete letter.⁶

The Appeal Recommendation Report seeks to portray DCP's review of the Applicant's submitted materials as a straightforward application completeness determination process, which the Applicant has failed to fulfill. This is not the case. Without the consent of the Applicant to convert the case to a new discretionary process, the Second Status of Project Review Letter sent on August 4, 2023 states that the Applicant must both submit revised application materials reflecting a new discretionary review process for the Project, and, contrary to the requirements of Government Code Section 65943(a), must also submit new environmental review application forms and associated materials and studies, and if these materials are not provided in 30 days, DCP may terminate the case. And again, DCP did not wait for the end of the initial statutory resubmittal period to issue these letters to the Applicant. As such, the Applicant was left with no choice but to pursue this appeal to assert its right to have the Project reconverted to an ED1 case and processed under ED 1's ministerial procedures..

CONCLUSION

To summarize, the Project submitted and paid for an HCA Preliminary Application on April 26, 2023 during the effective period of the original ED 1, timely filed a full entitlement application within 180 days, has not revised the Project's number of units or total square footage of construction by 20 percent or more, and therefore has satisfied all requirements to maintain vested rights as of the date of the HCA Preliminary Application. All this effort occurred after many discussions with DCP staff and receipt of multiple approved pre-application forms for the Project – all of which confirmed and re-confirmed the Project's eligibility for ministerial processing under ED1. The Applicant's decision to

⁶ Government Code Section 65943(a) "Not later than 30 calendar days after any public agency has received an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project. If the application is determined to be incomplete, the lead agency shall provide the 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. In any subsequent review of the application determined to be incomplete, 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." (Emphasis added).

purchase the Project site and proceed with the Project was predicated on the expectation of expedited ministerial processing under ED 1, and the City's decision to abruptly deny the Project ED 1 processing has now gravely threatened the Project's feasibility and viability.

Despite these facts, the Appeal Recommendation Report now claims that ED 1 is something other than a local rule, regulation, requirement, or policy that can be vested against under the HCA and HAA. However, the City has now received two Letters of Technical Assistance from HCD, which explicitly disavow that argument. We understand the reasons behind the Mayor's decision to formally amend and revise ED 1 to *prospectively* prohibit ED 1's ministerial streamlined processing benefits from applying to projects filed on single family zoned properties *in the future*, notwithstanding the allowances and protections afforded by State DBL. The issue of this appeal is ensuring that applicants who filed timely applications under the original ED 1 (an official City regulatory order) and obtained a legal vested right under the HCA may proceed with ED 1 processing. We are hopeful that the City can resolve the discrepancy, concur with HCD's opinion that the projects which are vesting prior to the Revised ED 1 should be afforded the right to continue with administrative processing, and make a decision that is consistent with the City Council's recent granting of the appeal for the Ethel Project, which presented the exact same facts and circumstances as the instant appeal.

We respectfully request that the City grant the appeal, reinstate the processing of the Project's Case Filing, and grant approval of the Project pursuant to the streamlined review procedures of ED 1.

Sincerely,

Dave Rand

Dave Rand
Partner
of RAND PASTER & NELSON, LLP

Attachments

Exhibit A – HCD Letter of Technical Assistance

EXHIBIT A

HCD Letter of Technical Assistance Dated October 12, 2023

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



October 12, 2023

Los Angeles City Council
City of Los Angeles
200 North Spring Street, 395 Floor
Los Angeles, CA 90012

Dear City Councilmembers Eunisses Hernandez, Paul Krekorian, Bob Blumenfield, Nithya Raman, Katy Yaroslavsky, Imelda Padilla, Monica Rodriguez, Marqueece Harris-Dawson, Curren D. Price, Jr., Heather Hutt, Traci Park, John S. Lee, Hugo Soto-Martinez, Kevin de León, and Tim McOsker:

RE: Preliminary Application Vesting of ED1 Projects – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) understands that the City of Los Angeles (City) City Council will consider the Planning and Land Use Management (PLUM) Committee recommendation for denial of the appeal for the project located at 8217 North Winnetka Avenue (Winnetka Project). Additionally, HCD is aware that the PLUM Committee will consider an upcoming appeal for another project located at 7745-7751 N. Wilbur Avenue (Wilbur Project).

The purpose of this letter is to further assist the City with its decision making by providing technical assistance related to the preliminary applications as described in the Housing Accountability Act (HAA) (Gov. Code, § 65589.5) and Permit Streamlining Act (PSA) (Gov. Code, § 65941.1). HCD urges the City to apply the law consistently and to allow projects vested by the preliminary applications to be processed under the “ordinances, policies, and standards” in effect, including Executive Directive No. 1 (ED1), when the complete preliminary application was submitted.

HCD’s Prior Technical Assistance on this Matter

HCD has already issued technical assistance on this matter. The City has not presented any new information that would change HCD’s guidance. Enclosed here for the City’s convenience is a copy of HCD’s Letter of Technical Assistance dated September 14, 2023, regarding the ED1 project located at 5501-5511 N. Ethel Avenue. To reiterate, under the HAA, submission of a preliminary application that meets the requirements of the PSA at Government Code section 65941.1 vests the “ordinances, policies, and standards” in effect when the application is submitted.

(Gov. Code, § 65589.5, subd. (o)(1).) Such “ordinances, policies, and standards” include “rules, regulations, requirements, and policies of a local agency.” (Gov. Code, § 65859.5, subd. (o)(4).) HCD’s September 14, 2023, letter explains that an executive directive such as ED1 is one of the “rules, regulations, requirements, and policies” that vest upon submission of a complete preliminary application and is not excluded from the expansive HAA definition of “ordinances, policies, and standards.”

To the extent that the appeals for the Winnetka Project, Wilbur Project, or any other ED1 projects address the same question raised by the project located at 5501-5511 N. Ethel Avenue, the technical assistance provided in HCD’s September 14, 2023, letter applies. An applicant that submitted a complete preliminary application may proceed under the ED1 regulations that were in effect at the time the preliminary application was complete. The preliminary application vesting status remains in effect as long as the development application submittal occurs within the 180-day required period¹ and any revisions to the development application do not exceed a change of 20 percent of the number of residential units or square footage of construction, exclusive of any increase resulting from the density bonus, incentive, concession, waiver or similar provision.²

Conclusion

HCD found on September 14, 2023, that the preliminary application vesting rights conferred by Government Code section 65941.1 include ED1. HCD remains committed to supporting the City of Los Angeles in achieving housing objectives across all income levels and hopes the City finds this clarification helpful. HCD also reminds the City that HCD has enforcement authority over the HAA, among other state housing laws. If HCD finds that a city’s act or failure to act does not substantially comply with state law, HCD may notify the California Office of the Attorney General. (Gov. Code, § 65585, subd. (j).) If you have any questions or need additional information, please contact Gabriel A. Pena-Lora, of our staff, at gabriel.pena-lora@hcd.ca.gov.

Sincerely,



Shannan West
Housing Accountability Unit Chief

cc: Lisa M. Webber, AICP Deputy Director Los Angeles City Planning
Blake Lamb, Principal City Planner Los Angeles City Planning

Enclosure: September 14, 2023, HCD Letter of Technical Assistance

¹ Gov. Code, § 65941.1, subd. (d)(1).

² Gov. Code, § 65941.1, subd. (c).

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September 14, 2023

City Council Planning and Land Use Management Committee
City of Los Angeles
200 North Spring Street, 395 Floor
Los Angeles, CA 90012

Dear City Councilmembers Marqueece Harris-Dawson, John S. Lee, Katy Yaroslavsky,
Imelda Padilla, and Heather Hutt:

RE: 5501-5511 N. Ethel Avenue – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) understands that on September 19, 2023, the City of Los Angeles (City) City Council's Planning and Land Use Management Committee (PLUM) will consider an appeal of the City's determination that the project located at 5501-5511 N. Ethel Avenue (Project) is ineligible for ministerial processing under Executive Directive No. 1 (ED1).

The purpose of this letter is to assist the PLUM with its decision making by providing technical assistance related to the Preliminary Application as described in the Housing Accountability Act (Gov. Code, § 65589.5) and Permit Streamlining Act (Gov. Code, § 65941.1). HCD urges the City to expeditiously process all ED1 projects in accordance with the rules and regulations that were in effect at the time the preliminary applications were complete. HCD recognizes the challenge of interpreting housing and land use laws and appreciates the opportunity to provide technical assistance.

Background*ED1*

Mayor Karen Bass issued ED1 on December 16, 2022, creating a streamlined ministerial approval process for 100 percent affordable and shelter projects. The original ED1 regulations specified that the density permitted for a project site could be based on either the zoning or the general plan land use designation and that projects could utilize State Density Bonus Law (SDBL). The City revised ED1 on June 12, 2023, and explicitly prohibited ED1 ministerial processing on sites located in single-family or more restrictive zones.¹

¹ Executive Directive No. 1, Page 1, Revised June 12, 2023.

Project History

The proposed Project is a 100 percent affordable residential development that would result in a total of 200 affordable dwelling units, inclusive of one manager's unit. The Project site is zoned R1-1, One-Family Zone (single-family zone), with a General Plan land use designation of Low Residential. The Project includes a State Density Bonus Law (SDBL) request for additional density with incentives, concessions, and waivers of development standards. The City deemed the Project's preliminary application complete on March 23, 2023. The City's signed preliminary application review form indicated that the Project was eligible for ED1 and had until September 19, 2023 to file the City Planning application.² The applicant submitted the full development application on June 6, 2023. Then, on July 6, 2023, the City issued a Notice of Ineligibility (NOI) that indicated, "[p]er the revised Executive Directive 1 (ED1) issued by Mayor Karen Bass on June 12, 2023, projects located in single-family or more restrictive zones cannot use the ED1 Ministerial Approval Process."³ The NOI explicitly stated that the Project is not eligible for ED1 processing because it is in the R1-1 zone, but noted that there are other entitlement options available for the Project which do not require a legislative act (e.g. General Plan Amendment or Zone Change).

Preliminary Application Vesting Rights and the City's Executive Directive-1

The central question between the City and the Applicant is as follows:
Is an executive directive one of the rules, regulations, requirements, and policies that vest upon submission of a complete Preliminary Application?

The answer is "yes." Submission of a preliminary application that meets the requirements of Government Code section 65941.1 vests the "ordinances, policies and standards" in effect when the application is submitted. (Gov. Code § 65589.5, subd. (o)(1).) The Housing Accountability Act (HAA) makes it clear that,

"[f]or purposes of this subdivision, 'ordinances, policies, and standards' includes general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency, as defined in Section 66000, including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions."⁴

The City's ED1 is not excluded from the expansive HAA definition of "ordinances, policies, and standards." The Mayor issued the executive directive under the provisions of Los Angeles City Charter section 231(i) and section 8.29 of the Los Angeles Administrative Code, which, during a period of local emergency, deem the Mayor the

² City of Los Angeles Housing Crisis Act Vesting Preliminary Application, Page 1, Signed March 31, 2023.

³ City of Los Angeles Notice of Ineligibility dated July 6, 2023.

⁴ Gov. Code, § 65589.5, subd. (o)(4). Emphasis added.

Director of the Emergency Operations Organization and authorize the Director to “promulgate, issue and enforce rules, regulations, orders and directives which the Director considers necessary for the protection of life and property.” Charter section 231(j), meanwhile, authorizes the Mayor to “establish procedures and implement policies” to manage the Mayor’s responsibilities “through the issuance of executive directives, which, in the absence of conflicting provisions in the Charter or ordinance, and until revised or rescinded by the Mayor, shall be binding on all departments, commissions, appointed officers and employees of the City” (emphasis added). There is no doubt, then, that an Executive Directive is a “rule[],” “requirement[],” or “polic[y]” under Government Code section 65589.5, subdivision (o)(4).

Therefore, an applicant that submitted a complete preliminary application at a time when ED1 did not exclude single-family or more restrictive zones may proceed under the previous ED1 regulations throughout the entitlement process. The preliminary application vesting status remains in effect as long as the development application submittal occurs within the 180-day required period⁵ and any revisions to the development application do not exceed a change of 20 percent of the number of residential units or square footage of construction, exclusive of any increase resulting from the density bonus, incentive, concession, waiver or similar provision.⁶ However, HCD emphasizes that any incomplete preliminary applications submitted prior to the June 12, 2023 revised ED1, and any preliminary applications submitted after June 12, 2023, would not be entitled to ED1 ministerial processing in single-family or more restrictive zones, as any such applications would not have secured vesting rights under the original ED1 policy.

Conclusion

In sum, HCD finds that the preliminary application vesting rights conferred by Government Code section 65941.1 include ED1. HCD remains committed to supporting the City of Los Angeles in achieving housing objectives across all income categories and hopes the City finds this clarification helpful. If you have any questions or need additional information, please contact Gabriel A. Pena-Lora, of our staff, at gabriel.pena-lora@hcd.ca.gov.

Sincerely,



Shannan West
Housing Accountability Unit Chief

cc: Lisa M. Webber, AICP Deputy Director Los Angeles City Planning
Blake Lamb, Principal City Planner Los Angeles City Planning

⁵ Gov. Code, § 65941.1, subd. (d)(1).

⁶ Gov. Code, § 65941.1, subd. (c).