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August 30, 2021

VIA E-MAIL

Planning and Land Use Management Committee
John Ferraro Council Chamber
Room 340, City Hall
200 North Spring St.
Los Angeles, CA 90012 Los Angeles, California 90012

Re: 5353 Del Moreno Drive
Permit Application Incompleteness Determination Appeal (Council File 21-0808)

Dear Planning and Land Use Management Committee Members:

Our office represents Yes In My Back Yard (YIMBY) and its project YIMBY Law, California nonprofits dedicated to increasing the accessibility and affordability of housing in California by enforcing state housing laws, and Sonja Trauss, Executive Director of YIMBY LAW. YIMBY Law supports Akhilesh Jha's appeal of the Planning Department's determination that the project application for 5353 Del Moreno Drive is incomplete. The Department failed to issue a completeness determination within 30 days after the project application was submitted and, therefore, the application was deemed complete as a matter of law.

Moreover, the Department erroneously determined that the project application is incomplete because the applicant must submit a request for a Zone Change or Vesting Zone Change. However, the project is consistent with the property's "limited commercial" General Plan designation and state law the HAA prohibits a City from requiring a rezoning when, as here, a proposed project's density is permitted in the General Plan but not permitted by the zoning. In this case, the zoning is clearly inconsistent with the General Plan designation: the General Plan designation explicitly includes specific commercial and residential zoning categories – *but it does not include the subject property's RA-1 zoning category*.

The applicant has already submitted the materials necessary to process the application at the proposed density and the City is required by law to approve the project at the proposed density unless the City finds that the project will have a specific, adverse impact upon public

health or safety. The HAA prohibits the City from requiring a zoning change and therefore cannot refuse to deem the application incomplete for not submitting a request for a Zone Change.

1. Permit Streamlining Act

The Permit Streamlining Act (PSA) provides precise time limits for agencies to act on development project applications. Once an application has been submitted, Gov. Code section 65943(a) requires an agency to make a written completeness determination within 30 calendar days. If the application is determined to be incomplete within that 30-day period, the agency must provide the applicant with "an exhaustive list of items that were not complete." If the agency fails to make a written completeness determination within that 30-day period, Gov. Code section 65943(b) states that "the application together with the submitted materials shall be deemed complete."

Here, the City failed to notify the applicant of any incomplete items within the required timeframe. The Department did send a letter stating that the application was incomplete a day after the 30-day deadline had passed, but the City's belated letter is irrelevant. Courts are clear that agencies have "30 days, and 30 days only" to notify an applicant that his or her application is incomplete. (*See Orsi v. City Council of Salinas* (1990) 219 Cal. App. 3d 1576, 1584.) The City failed to respond to the submitted application in a timely manner and thus, as a matter of law, the application was deemed complete pursuant to Gov. Code section 65943(b).

2. Housing Accountability Act

The City has asserted that the project application is incomplete because the proposed project requires the submission of an application for a Zone Change or Vesting Zone Change. The Department states that although the project is consistent with the property's "limited commercial" General Plan designation, the proposed density is not permitted by the property's zoning. However, the HAA prohibits a City from requiring rezoning and mandates how to proceed when, as here, a proposed project's density is permitted in the General Plan but not permitted by the zoning. Section (j)(4) states:

> *For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, and* ***shall not require a rezoning****, if the housing development project is consistent with the objective General Plan standards and criteria but the zoning for the project site is inconsistent with the General Plan. If the local agency has complied with paragraph (2), the local agency may require the*

> *proposed housing development project to comply with the objective standards and criteria of the zoning which is consistent with the General Plan, however, the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the General Plan and proposed by the proposed housing development project.*

The California Supreme Court has recognized that the General Plan is a city's constitution for future development. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.) In addition, the Housing Element of the General Plan is heavily regulated and relied on by the California Department of Housing and Community Development to determine whether localities have the planned capacity to accommodate their Regional Housing Need Allocation. Therefore, when a General Plan permits a higher density project than is permitted by the corresponding zoning, the General Plan is at best misleading, and potentially outright fraudulent. The legislature, therefore, in an effort to provide clarity and predictability to property owners and also to ensure that the claims made by cities in their Housing Elements are accurate, has provided language in HAA § 65589.5(j)(4) that prescribes how to process a project whose density is permitted by the General Plan but not permitted by the Zoning, under two scenarios: when the General Plan and zoning for a site are consistent, and when the General Plan and zoning for a site are inconsistent.

'Consistency' is not explicitly defined in the law. The definition of consistency advanced by the Department is that any zoning that is "less intensive" than the subset of uses allowed by the General Plan is consistent with the General Plan. This is called "hierarchy of uses." For instance, if the General Plan designates an area as Neighborhood Commercial (permitting office, housing not more dense than 1 unit per 400 sq. ft., and neighborhood serving retail) or Auto Dealership Retail, and the zoning is for Auto Dealership Retail, then the zoning would be consistent with the General Plan. Consistency is also achieved, under this theory, when the local zoning allows a less intense use of what is allowed in any one of the zones specifically listed in the General Plan. For example, if the corresponding zone was single-family residential housing not more dense than 1 unit per 4,000 sq. ft., the zoning would also be considered consistent with a General Plan designation that allows 1 unit per 400 sq. ft., because the zoning is less intense than the General Plan. This approach is incorrect.

The Governor's Office of Planning and Research describes consistent zoning as when "considering all its aspects, it will further the objectives and policies of the General Plan and will not inhibit or obstruct their attainment." The City's definition of consistency does not comport with this definition; that consistent zoning must further the objectives and policies of the General Plan. Quite the opposite. The "hierarchy of uses" theory would allow the City to intentionally inhibit and obstruct the housing goals of the General Plan by maintaining zoning at significantly lower densities. For example, the objective of the Neighborhood Commercial designation is to identify appropriate areas to meet the City's need for more intensive development and, as such, the General Plan Neighborhood Commercial policies allow for multi-family housing and commercial development. How would a lower intensity zoning, such as single-family residential, further the Neighborhood Commercial objectives and policies when this zone completely prohibits multi-family housing and commercial uses? No reasonable person would conclude that this zoning scheme furthers the objectives and policies of the General Plan designation. Any reasonable person would conclude that the only way zoning can truly further the objectives and policies of the General Plan is to actually allow for the full range of densities and uses the General Plan designation permits.

The "hierarchy of uses" definition of consistency also contradicts the ordinary English language meaning of consistency, which is "compatible or in agreement with something." Developers and community members would be surprised and confused by the notion that a proposed project can be found consistent with the General Plan, yet inconsistent with the zoning, but somehow the zoning and General Plan can be found consistent with one another. It seems like a paradox. How can it be that a proposed project would be "compatible or in agreement with" the General Plan, and in addition the General Plan is "compatible or in agreement" with the Zoning, but the project is somehow not "compatible or in agreement" with the Zoning? In ordinary English usage, we expect compatibility, agreement and therefore consistency to have this transitive property.

In addition, judges do not agree that this definition of consistency is the one intended by legislators. In *Warner Ridge Associates v. City of Los Angeles* (1991) 2 Cal.App.4th 238, the City made the same "hierarchy of uses" consistency argument that the Department is making here. The court in *Warner Ridge* issued a final judgment specifically rejecting this argument.

In *Warner Ridge*, a parcel in the Canoga Park–Winnetka–Woodland Hills District Plan was designated as "neighborhood and office," which allowed for CR, C1, C1.5, C4 and P zones, but the property remained zoned RA-1 (rural residential). The property owner argued that the City was in violation of Government Code section 65860, which requires consistency between zoning and the General Plan. The City argued that the rural residential zoning was "less intensive" than the commercial designation and under the "hierarchy of uses" theory the more intense General Plan neighborhood and office designation incorporated all less intense zones, including rural residential.

The court found that, although the term consistency is not precisely defined, residential zoning is not consistent with a commercial designation: "[n]o reasonable person can seriously believe that a zoning ordinance which prohibits all commercial uses in an area designated in the General Plan for commercial uses is 'consistent' with the General Plan." The Court of Appeal explicitly rejected the 'hierarchy of uses' theory, stating that a "General Plan which designates property for intense development with the contemplation that designation may thereafter be prohibited through zoning is, in effect, no General Plan . . . The hierarchy theory, in essence, repeals the consistency requirement." As a result, the Court of Appeal upheld the trial court's order for the City to rezone the property to one of the zones allowed under the General Plan (i.e. CR, C1, C1.5, C4 or P).

According to the applicable community plan for the area, the Canoga Park - Winnetka - Woodland Hills - West Hills Community Plan, which is part of the Land Use Element of the General Plan, the land use designation for 5353 Del Moreno Drive is "Limited Commercial." The accompanying community plan map, as well as the city's online property records, confirm that the subject property is designated in the General Plan as "Limited Commercial."

The Limited Commercial designation encompasses three different types of commercial zones: CR, CR1.5, and CR1. Though these different types of Limited Commercial zones share many similarities, there are several important differences and distinctions. For the purposes of this project, the most relevant differences are those relating to the permitted density of residential development.

- CR and C1.5 zones permit residential uses that are in compliance with R4 residential zone standards. This means that residential projects in these zones may not exceed a density of one unit per 400 square feet.
- C1 zones permit residential uses in compliance with R3 residential zone standards, allowing for a maximum density of one unit per 800 square feet.

Therefore, Limited Commercial zones in the city of Los Angeles allow for a range of maximum densities from one unit per 800 square feet to one unit per 400 square feet. Side yard, rear yard, and front setback requirements remain relatively similar across all of these zones. The HAA prohibits local governments from reducing density in cases where a range of densities are allowed for a given project site unless a finding can be made that the project with have a specific, adverse impact upon the public health or safety. In this case, the high end of the density range is one unit per 400 square feet. We elaborate on this later in this letter.

The zoning at 5353 Del Moreno Drive is RA-1, which only allows for one-family dwelling per lot, with a maximum of two family dwellings on lots adjoining a commercial or industrial one with a minimum of 40,000 square-feet. Side yard, rear yard, and front setback requirements are all larger in the RA-1 zone commercial zones.

The Department has taken the position that the proposed density of 1 unit per 400 sq. ft. at 5353 Del Moreno Drive is not consistent with the zoning for that site, and also that the zoning is consistent with the General Plan, and therefore the proposed project requires a zone change. The Department's position inhibits and obstructs the objectives of the General Plan's commercial designation, defies common sense, and contradicts the final and valid judgement on the consistency issue in *Warner Ridge*. The zoning at 5353 Del Moreno is clearly inconsistent with the General Plan's commercial designation for the site, and the Department's insistence on requiring a zone change is in violation of Housing Accountability Act § 65589.5(j)(4).

Additionally, HAA § 65589.5(j)(4) also limits cities' ability to enforce zoning standards and criteria in the case that the zoning is consistent with the General Plan, as the Department claims it the case here. If the City of LA has complied with § 65589.5(j)(2), then the City may enforce the objective standards and criteria of the RA-1 zoning, but these standards ***must be applied to facilitate the density allowed on the site by the General Plan and proposed by the project.*** In this case, that density is one unit per 400 square feet. The notice required by (j)(2)

provides an opportunity for the project to come into compliance with the criteria that do not interfere with the density proposed by the developer and allowed in the General Plan, and ensures the City can apply at least some of the local zoning.

There is no evidence that the Department complied with §65589.5(j)(2). Thus project has been automatically deemed consistent with the zoning for the purpose of the Housing Accountability Act.

Even if the Department had complied with §65589.5(j)(2), then only the criteria and standards of the zoning applicable to 5353 Del Moreno Drive that facilitate and accommodate development at the density allowed on the site by the General Plan and proposed by the developer may be applied, such as the setback requirements, so long as they did not prohibit development at a density of one unit per 400 square feet. These are the criteria that LA is permitted to apply.

It is not clear why the Department has not acknowledged the process described in §65589.5(j)(4) for projects that comply with the General Plan but not the zoning when the zoning *is* consistent with the General Plan. The HAA is clear that in such situations the zoning must facilitate the density allowed under the General Plan. Any other interpretation would be contrary to the Legislature's direction in § 65589.5(l), which states that it "is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."

It is possible that the Department believes that § 65589.5(j)(4) refers only to situations where the zoning is inconsistent with the General Plan, but there is nothing in the text to support this interpretation, and this interpretation implies an illogical requirement for cities. If § 65589.5(j)(4) refers only to situations where the zoning is inconsistent with the General Plan, then the condition that "the local agency compl[y] with paragraph (2)," is rendered incoherent. § 65589.5(j)(2) requires that localities notify project sponsors that their proposed project is zoning or General Plan non-compliant within a certain number of days; however, in the situation where §65589.5(j)(4) applies, this notification would be false or impossible. This paragraph tells us that where the General Plan & Zoning are inconsistent and the project complies with the General Plan, then the project is consistent with the zoning. It's not coherent to interpret this paragraph as both making the determination that projects that meet certain criteria are zoning compliant, and

also encouraging localities to notify project sponsors that those same projects are zoning non-compliant.

Alternatively, if the second sentence in § 65589.5(j)(4) refers to the situation where the General Plan and zoning are consistent, then "If the local agency has complied with paragraph (2), ..." serves a purpose and makes sense. In this case, there is a zoning code with which it is possible to be inconsistent. In addition, there is an actual purpose being served by encouraging cities to articulate the list of ways that the proposed project is out of compliance with the local zoning code. This notice provides an opportunity for the project to get into compliance with the criteria that do not interfere with the density proposed by the developer and allowed in the General Plan. The purpose of this seems to be to ensure that at least some of the local zoning does apply to the project. If the city Complies with (j)(2), it gets to apply some of its zoning, but if it doesn't comply, then it does not get to apply any of its zoning.

3. <u>Density Bonus Law</u>

The California State Density Bonus law is designed to apply to a wide variety of projects and also includes provisions to deal with cases where a city or county's zoning ordinance or General Plan is unclear on the density permitted for a particular site. The law mandates that the density bonus be granted to a project based on the "maximum allowable density" for the site. Government Code § 65915(o)(2) defines "maximum allowable density" as follows:

> *Maximum allowable residential density" means the density allowed under the zoning ordinance and land use element of the General Plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the General Plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the General Plan, the General Plan density shall prevail.*

The Density Bonus Law is unambiguous in its assertion that the General Plan takes a primary role while the zoning ordinance takes a secondary role, particularly with respect to residential density. The legislature has clearly shown its intent that local governments cannot avoid compliance with state housing law and policy by maintaining local zoning that is below the range allowed under the General Plan.

Additionally, because the existence of multiple types of Limited Commercial zoning creates a range of possible densities, the applicant is entitled to build at the high end of that

range. As we have described above, the project may achieve a maximum density of one unit per 400 square feet *before* the addition of any density bonus units. We note that HAA § 65589.5(j)(3) makes clear that receipt of a density bonus "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."

The HAA and Density Bonus Law are clearly designed to work in tandem and only make sense if density is calculated in the same manner across both laws. Otherwise, a project that calculates its density bonus and affordable unit requirement utilizing the General Plan designation for purposes of the Density Bonus law would be thwarted and found inconsistent if the project were to be forced to build at a lower density under "less intensive" zoning standards under the HAA. These two housing laws, when construed together, show a clear intent on behalf of the legislature to require local governments to approve projects at the maximum density allowed under the General Plan, in addition to any density bonus.

Conclusion

The project application has already been deemed complete as a matter of law because the Department failed to issue a completeness determination within 30 days as required by the PSA. Additionally, the zoning at 5353 Del Moreno is clearly inconsistent with the General Plan's commercial designation for the site, and the Department's insistence on requiring a zone change is in violation of HAA § 65589.5(j)(4). The City must allow for projects that comply with the density in the City's General Plan in cases where the zoning is inconsistent with the General Plan, as is the case here. Zoning can be used to extend a General Plan, adding more specificity and elaborating on certain goals and requirements, but it must be used to facilitate the density allowed by the General Plan. The Department's refusal to move forward with the project application until the site is rezoned is contrary to the HAA. We request that you move forward with the housing development project application at the density allowed under the General Plan and as proposed by the developer, or we will be forced to take legal action to enforce the state housing law.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

/s/ Ryan J. Patterson

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Ryan J. Patterson