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Matthew Glesne
City of Los Angeles
Department of City Planning
200 N. Spring Street
Los Angeles, CA 90012

Re: Draft Value Capture Ordinance and Impact on Care-Based Eldercare Facilities

Dear Mr. Glesne:

This law firm represents Sunrise Senior Living ("Sunrise"), a national provider of senior assisted living services with five (5) locations in the City of Los Angeles ("City")¹. We are writing to provide input about the nature of senior residential care-based facilities known in the City as "Eldercare Facilities," and in particular, explain why such facilities are not appropriate for inclusion within the Draft Value Capture Ordinance ("Draft Ordinance"). Please consider the following:

- The overwhelming majority of Eldercare Facilities are not the same as retirement communities or luxury age-restricted housing developments that contain "dwelling units." Rather, Eldercare Facilities are State licensed integrated care-based residential facilities that contain for-rent guest rooms, and that focus on providing seniors with critical services that may include personalized elderly care and supportive 24-hour assistance for activities of daily living ("ADLs"), Alzheimer's and memory care, skilled nursing and rehabilitation care, respite care, dining/meals, and other personal care needs.
- While the City has conducted economic feasibility studies of traditional residential Density Bonus programs such as those offered pursuant to SB 1818, no such analyses have been performed for care-based Eldercare Facilities. Given the entirely different economics between a residential care-based facility (which has sizable costs created by the typical use of Type II construction and significant overhead resulting from the provision of numerous costly and labor-intensive services) and a multi-family residential housing development, any studies that may have been prepared to date relative to SB 1818 Density Bonuses are inapplicable to care-based Eldercare Facilities.
- The Eldercare Facility Unified Permit Process ("Eldercare Permit Process"), which provides a streamlined approval process for Eldercare Facilities in certain zones, does

¹ Currently, Sunrise operates facilities in Mar Vista, Studio City, Playa Vista, Woodland Hills and West Hills.

not grant such facilities a "Density Bonus" as that term is used in either the State's Density Bonus law (SB 1818) or the City's Density Bonus law implementing SB 1818. Rather, the Eldercare Permit Process allows a use that would not otherwise be permitted in the underlying zone, provided that appropriate findings can be made. This is not a Density Bonus.

- The law does not allow the City to require inclusionary for-rent housing, unless the development receives a Density Bonus pursuant to SB 1818. In a 2009 case, the California Court of Appeal held that the City cannot require housing developments to provide a certain number of affordable rental units, unless an exemption for projects receiving a Density Bonus applies. Because the Eldercare Permit Process does not grant a Density Bonus, the City cannot require Eldercare Facilities to provide inclusionary for-rent housing. Thus, the Draft Ordinance's effort to impose for-rent inclusionary housing in the absence of a Density Bonus is likely unlawful.
- The City is legally precluded from requiring Eldercare Facilities qualifying as "senior citizen housing developments" to provide affordable units, because such a requirement would directly conflict with SB 1818. Under SB 1818 and the City's Density Bonus program implementing SB 1818, a "senior citizen housing development"² shall be granted a minimum Density Bonus of 20%, **even if none of the units are affordable.** Eldercare Facilities that qualify as "senior citizen housing developments" are entitled to receive such additional density under existing law. For the City to now require facilities qualifying for this 20% Density Bonus to also provide affordable housing would impermissibly conflict with SB 1818. This is because the City would be placing additional prerequisites on senior citizen housing developments that are not contemplated or permitted by SB 1818.
- From a policy perspective, the goal of the Eldercare Permit Process is to encourage the development of Eldercare Facilities throughout the City by eliminating the onerous, time consuming and costly regulatory permitting process so that such services are more readily available to the City's aging population. There is no question that making such services affordable and accessible to a broad range of residents is also an important goal. Nevertheless, while the purpose of the Draft Ordinance is laudable, it would have the practical effect of undermining the original legislative intent leading to the City's adoption of the Eldercare Permit Process, as well as the legislative intent behind the State inclusion of a 20% Density Bonus for senior citizen housing developments.

Each of these concepts is discussed in detail further below.

* * * *

²A "Senior citizen housing development" means a residential development developed, substantially rehabilitated, or substantially renovated for, senior citizens that has at least 35 dwelling units. Any senior citizen housing development which is required to obtain a public report under Section 11010 of the Business and Professions Code and which submits its application for a public report after July 1, 2001, shall be required to have been issued a public report as a senior citizen housing development under Section 11010.05 of the Business and Professions Code." (Civil Code Section 51.3.)

A. State Licensed Care-Based Residential Facilities.

The Los Angeles Municipal Code ("LAMC") defines an "Eldercare Facility" as "[o]ne functionally operated facility, which provides residential housing for persons 62 years of age and older, **and which combines in one facility, two or more of the following housing types:** Senior Independent Housing³, Assisted Living Care Housing⁴, Skilled Nursing Care Housing⁵, and/or Alzheimer's/Dementia Care Housing.⁶ A minimum of 75 percent of the floor area, exclusive of common areas, shall consist of Senior Independent Housing and/or Assisted Living Care Housing." (LAMC § 12.03 [emphasis added].)

Consistent with this definition, and unlike master-planned single- and multi-family housing for seniors, the overwhelming majority of Eldercare Facilities:

- (1) Are licensed by the State of California;
- (2) Provide a menu of critical care-based services and amenities;
- (3) Provide common dining rooms and other areas, and do not contain in-room kitchens;
- (4) Consist of guest rooms, not dwelling units⁷; and
- (5) Charge a rental fee based on each resident's individualized service plan and room type (identified by the amount of time needed to assist a resident with their ADLs).

These features impact the construction, development and operational costs of Eldercare Facilities. For example:

- Obtaining and maintaining State licensure means that each Eldercare Facility must comply with a rigorous regulatory approval and compliance process that imposes a myriad of requirements in areas such as staff qualifications, emergency services, building and construction type, fire and life safety measures, health services and food services, among many others.
- The rent for a guest room in an Eldercare Facility includes – in addition to the room – utilities, maintenance, laundry service, housekeeping, cable/wi-fi, three (3) meals per day plus snacks, transportation, exercise classes, daily activities and on-call staff.

³ "SENIOR INDEPENDENT HOUSING. Residential housing that consists of dwelling units for persons 62 years of age and older and may include common dining areas or other community rooms. Full time medical services shall not be provided on the premises. It may be a component of an Eldercare Facility." (LAMC § 12.03.)

⁴ "ASSISTED LIVING CARE HOUSING. Residential housing that is licensed by the California Department of Social Services and provides assistance to people 62 years of age or older who require assistance with two or more non-medical activities of daily living as defined in the Department of Social Services licensing requirements. The residential units may consist either of dwelling units or guest rooms. Full time medical services shall not be provided on the premises. The housing may be a component of an Eldercare Facility." (LAMC § 12.03.)

⁵ "SKILLED NURSING CARE HOUSING. Residential housing that is licensed by the California Department of Health and provides acute, intermediate, or long-term skilled nursing care and consists only of guest rooms for its residents. Full time medical services may be provided on the premises. It may be a component of an Eldercare Facility." (LAMC § 12.03.)

⁶ "ALZHEIMER'S/DEMENTIA CARE HOUSING. Residential housing that is licensed by the California Department of Social Services and provides 24-hour care for people suffering from Alzheimer's disease or other disorders resulting in dementia. The residential units shall be guest rooms only. The housing may be a component of an Eldercare Facility." (LAMC § 12.03.)

⁷ As distinguished in the LAMC, a "Dwelling Unit" is a "group of two or more rooms, one of which is a kitchen, designed for occupancy by one family for living and sleeping purposes." On the other hand, a "Guest Room" is any habitable room except a kitchen, designed or used for occupancy by one or more persons and not in a dwelling unit." (LAMC § 12.03.)

- The care component provided in an Eldercare Facility includes attending to the individuals needs of residents, who may require nurses, assistants and medication or other care managers, to assist with their ADLs, including mobility, transferring, grooming, dressing, dining and nutrition, bathing, continence, wound care, pain care, cardiac and respiratory care, as well as medication distribution and reminders. Care is also provided for those with dementia and/or Alzheimer's disease.

Ensuring and enhancing the quality of life for seniors, many of whom need help performing ADLs in a nurturing and attentive environment, is the hallmark of Sunrise's mission and philosophy. This translates into construction, labor and operating costs not found in traditional residential housing developments.

Thus, it bears repeating: most Eldercare Facilities are not comprised of conventional residential dwelling units for seniors, such as "age-restricted housing" developments or "retirement communities," which are simply traditional housing developments restricted to individuals 55 or 62 years of age or older. The Draft Ordinance fails to recognize this important distinction.

B. Because Care-Based Eldercare Facilities do not Provide Traditional "Dwelling Units," They Cannot Provide "Restricted Affordable Units," as Required by the Draft Ordinance.

The Draft Ordinance would require all Eldercare Facilities seeking the Eldercare Permit Process to: (1) designate a percentage of units as "Restricted Affordable Units set forth in Section 12.24.U.26(a)(1) through (5)⁸ based on the "density increase" over existing zoning received; (2) file an affordable housing covenant ensuring the affordability restriction for 55 years; and (3) pay covenant fees for enforcement of the affordable housing covenant. (Draft Ordinance, dated May 25, 2017.) This is not possible.

As defined in the LAMC, "Restricted Affordable Units" are residential dwelling units occupied by Very Low, Low or Moderate Income households. As noted above, care-based Eldercare Facilities consist of guest rooms as part of an integrated care-based facility. As such, they do not provide traditional residential dwelling units, and thus cannot provide "Restricted Affordable Units." This is not simply a matter of semantics; it is a matter of the differences between a care-based model and a traditional housing model. The definition of Restricted Affordable Units does not translate into Eldercare Facilities, where rent is paid for a living space, food, other living expenses, as well as for the cost of care and services.

C. There Is no Evidence that the Affordability levels for Very-Low, Low and Moderate Income Households are Feasible for Care-Based Eldercare Facilities.

⁸ "Restricted Affordable Unit - a residential unit for which rental or mortgage amounts are restricted so as to be affordable to and occupied by Very Low, Low or Moderate Income households, as determined by the Housing and Community Investment Department." A "Residential Unit is a "dwelling unit or joint living and work quarters; a mobilehome, as defined in California Health and Safety Code Section 18008; a mobile home lot in a mobilehome park, as defined in California Health and Safety Code Section 18214; or a Guest Room or Efficiency Dwelling Unit in a Residential Hotel." (LAMC §12.22A.25.)

The "Value Capture Ordinance Background and Quick Guide" (sometimes referred to as the "FAQ") dated May 25, 2017, suggests that economic data exists which has proven certain inclusionary housing requirements in exchange for Density Bonuses are feasible. Specifically, the FAQ states: "Projects subject to the new requirements are all receiving significant density increases over that allowed by zoning and the requirements are designed to be in line with a proportional formula that has proven to be economically feasible under the [D]ensity [B]onus program." (Page 2 [discussing the impact of the proposed Ordinance].)

This statement, however, again ignores the distinction between traditional residential housing developments and care-based Eldercare Facilities, and is therefore inaccurate. There have been no studies or proportional formulas assessing economic feasibility for care-based Eldercare Facilities. The Los Angeles City Housing Department's maximum rents established for affordable units pertain to conventional residential dwelling units with typical amenities. Such maximum rents are wholly inapplicable to a care-based Eldercare Facility, where costs and rental prices are largely determined by the services provided and by the other requirements imposed by the State licensure regulatory process. Moreover, and as discussed further below, the Eldercare Permit Process does not grant "Density Bonuses," and thus, any proportional formula based on an increase of a certain percentage of housing units would not be applicable or translatable here.

D. The Eldercare Permit Process Does not Grant "Density Bonuses" to Eldercare Facilities.

A letter dated May 27, 2016 from the Planning Director to members of the Planning and Land Use Management Committee ("PLUM") explains the Planning Department's reasoning for including Eldercare Facilities in an earlier version of the Draft Ordinance. The letter explains that the Eldercare Permit Process "allows for increases in density, height and floor area ratios..." and thus allows for the approval of "larger multifamily projects" in single-family or other low-density zoned property." (Page 6-7.)

This statement contains several inaccuracies. For one, as explained throughout this letter, Eldercare Facilities are not "multi-family projects." For another, they are not receiving Density Bonuses pursuant to the State Density Bonus law under SB 1818 or the City's Density Bonus provisions implementing SB 1818 (Govt. Code Section 65915) under LAMC Sections 12.22.A.25 or 12.24.U.26. The Eldercare Permit Process permits a use (care-based Eldercare Facilities) that would not otherwise be permitted in the underlying zone, and allows for the location, height, size and operations of that use to be determined based on considerations of citywide need, neighborhood compatibility, health/safety/welfare and conformance with the General Plan and any applicable community or specific plan. This is not a Density Bonus.

To the extent the City takes the position that the Eldercare Permit Process grants Eldercare Facilities a "Density Bonus" under the State's Density Bonus law, requiring an inclusionary housing component would impermissibly conflict with SB 1818. Specifically, under SB 1818 and the City's Density Bonus program implementing SB 1818, a "senior citizen housing development" shall be granted a minimum density bonus of 20%, **even if none of the units are affordable**. Eldercare Facilities that qualify as "senior citizen housing developments" are entitled to receive such additional density under existing law. For the City to now require facilities qualifying for this 20% Density Bonus to also provide affordable housing would impermissibly conflict with SB 1818. This is because the City would be placing additional

prerequisites on senior citizen housing developments that are not contemplated or permitted by SB 1818.

E. The Draft Ordinance is Potentially Illegal, Running Afoul of Recent Case Law that Precludes Inclusionary Zoning on Rental Housing.

The law is clear that inclusionary housing ordinances that require developments to offer a portion of rental units as low-income units (or pay an in-lieu fee) are illegal because they conflict with and are preempted by California's Costa-Hawkins Rental Housing Act.⁹ (*Palmer/Sixth Street Properties v. City of Los Angeles* 175 Cal.App.4th 1396 (2009).) That case established that the City cannot require housing developments to provide a certain number of affordable rental units. There is, however, an exception for those housing developments that receive a Density Bonus, pursuant to the State's Density Bonus program. Specifically, the Costa-Hawkins Rental Housing Act includes an exception for projects where the owner has "agreed by contract with a public entity [to build affordable housing] in consideration for a direct financial contribution or any other forms of assistance specified in [the State Density Bonus law]." (Civ. Code § 1954.53(a)(2).)

Based on this law, the City cannot require Eldercare Facilities to provide affordable rental units. First, to the extent Eldercare Facilities are considered to be "housing development projects," Costa-Hawkins would preclude the City from requiring an inclusionary rental component because such projects are not receiving a Density Bonus pursuant to the SB 1818 or the City's program implementing SB 1818. Second, should the City instead take the position that the Eldercare Permit Process grants Eldercare Facilities a "Density Bonus" under the State's Density Bonus law, requiring an inclusionary housing component for Eldercare Facilities qualifying as "senior citizen housing developments" would impermissibly conflict with SB 1818, as previously described.

F. The Eldercare Permit Process was Adopted to Facilitate the Provision of this Unique Type of Residential Care Product to Accommodate the City's Rapidly Growing Aging Population.

In passing the ordinance establishing the Eldercare Permit Process, the City recognized the need to provide for the City's rapidly growing aging population, anticipated to more than double between 2000 and 2030. Accordingly, the City understood that a unified process was necessary to eliminate the "confusing and incomplete zoning regulations" that resulted in an "often complicated and time consuming [process], thereby delaying construction of much needed housing." Motion 13-13-25 (October 4, 2013, PLUM). To ensure that such facilities were constructed at a scale compatible to their surroundings, the City adopted additional further "objective guidelines and standards," mandating the preparation of environmental review and shade/shadow analyses, the incorporation of design guidelines, and the completion of various findings and other materials. Together, these regulations encourage the development of additional Eldercare Facilities, while balancing the protection of community character.

The Planning Department's May 27, 2016 letter to PLUM stated that Eldercare Facilities receive additional density without "the specific provision of community benefits." This statement misses an important fact recognized by the passage of the Eldercare Permit Process: the provision of

⁹ Section 1954.53 of the Costa-Hawkins Act provides that "[n]otwithstanding any other provision of law, an owner of residential real property may establish the initial rental rate for a dwelling unit."

care-based housing established pursuant to the requirements of the Eldercare Permit Process is itself a community benefit. It is also why SB 1818 grants an automatic 20% Density Bonus to "senior citizen housing developments," even in the absence of any affordable component: the State considers the provision of senior citizen housing a sufficient public benefit.

The Eldercare Permit Process helps to achieve the City's goal of providing a unique type of housing to service the City's growing senior population. And while ensuring an adequate supply of affordable housing for seniors is also an important goal, adding such a requirement into the Draft Ordinance in connection with the Eldercare Permit Process may well have the effect of ensuring that neither goal is achieved.

* * * *

We are concerned that the Draft Ordinance is technically unsound, practically infeasible and potentially illegal as applied to care-based Eldercare Facilities in the City, and request that such facilities be exempted from the Draft Ordinance. We would be happy to discuss our thoughts with you in greater detail at your request.

In the meantime, thank you for your consideration of these comments.

Sincerely,



Ellen Berkowitz
Partner

cc: Honorable Members of the Planning and Land Use Management Committee
Honorable Councilman Mitch O'Farrell
Honorable Members of the Los Angeles City Planning Commission
Mr. Vincent P. Bertoni, AICP
Mr. Philip Kroskin