

August 27, 2019

VIA E-MAIL & VIA LACOUNCILCOMMENT.COM

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Re: Appeal of Denial by the Central Los Angeles Area Planning Commission of the Edinburgh Avenue Small Lot Subdivision Project (VTTM No. 74201-SL)

Dear Honorable Council Members:

We are writing on behalf of our client BLDG Edinburgh, LLC ( "Applicant" ) regarding the small lot subdivision for eight single-family residences plus parking and patio/yard areas (Case Nos. VTTM-74201-SL, ENV-2016-1367-EIR) (the "Project") at 750-756½ North Edinburgh Avenue on an approximately 0.27 acre site (the "Property") in the City of Los Angeles (the "City"). The Property is a designated Historic Cultural Monument ("HCM").

On April 17, 2019, the City's Advisory Agency ("AA") issued a Letter of Determination (the "AA LOD") denying the Project, which resulted in an unconstitutional taking of the Property, because, as was concluded in the City's own Environmental Impact Report ("EIR"), there is no feasible alternative to the Project that preserves the HCM. (See Exhibit A.) In addition, the AA LOD is unsupported by substantial evidence and is an abuse of discretion, and is in violation of both Federal and State law.

On April 26, 2019, Applicant timely appealed the AA LOD. On July 9, 2019, the Central Los Angeles Area Planning Commission ("APC") issued a Letter of Determination ("APC LOD") denying Applicant's appeal and upholding the decision of the AA. (See Exhibit B.) Without any significant new information or credible evidence having been introduced into the record (as was specifically stated in the APC's own LOD), the APC LOD made certain changes to the findings in the AA LOD in a

post hoc attempt to provide legal cover for inconsistencies between the facts, as analyzed in the EIR, and the AA's original findings.

The APC's actions in relation to the Project are unsupported by substantial evidence and therefore are an abuse of discretion in violation of California Environmental Quality Act<sup>1</sup> ("CEQA") and its implementing regulations<sup>2</sup> ("CEQA Guidelines"), the City's General Plan, the Subdivision Map Act, the State Planning and Zoning Law, the Housing Accountability Act, and the Federal and State Constitutions. The City's denial of the Project additionally results in an unconstitutional taking of the Property without just compensation. Even worse, despite the extensive analysis in the City's own EIR that no feasible alternative exists, the revised findings adopted by the APC LOD are based, not on any new facts or evidence, but rather on conjecture that some potentially feasible speculative alternative might exist (though the APC LOD doesn't describe any alternative based on fact or evidence).

There is no legitimate reason to deny the Project and no reasonable person could find that the Project should be denied. The only seeming rationale for the denial is that the City does not want to be demolish an HCM, even though the Los Angeles Administrative Code ("LAAC") contemplated and allows such demolition. Unfortunately, due to the poor condition of the buildings, largely due to faulty original construction and poor maintenance going back to the late 1970s, which is well documented in City records and predates Applicant's ownership of the Property, the buildings cannot be feasibly restored. The EIR analyzed 15 preservation alternatives which ranged from preservation of the existing units to partial preservation plans retaining some or all of the existing buildings and construction of low, mid or high rise buildings. At the instruction of the City's Office of Historic Resources ("OHR"), these alternatives were peer reviewed by a second preservation expert, who came to the same conclusion. The EIR conducted an extensive financial and market analysis, which was also peer reviewed, that further concluded that all of the preservation schemes would result in a loss ranging from \$1.5 million to \$11 million for for-sale units and from \$1.6 million to \$12 million for rental units. Given these numbers, if the City wishes to stand on the principle that no designated HCM should ever be demolished, then it has to pay the Applicant for its actions.

Therefore, we respectfully request that the City Council grant Applicant's appeal. Should the City Council fail to do so, Applicant will promptly exercise all available legal rights and remedies, including filing a lawsuit against the City for damages in excess of six million dollars.

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<sup>1</sup> Cal. Pub. Resources Code §§ 21000, *et seq.*

<sup>2</sup> 14 Cal. Code of Regs. §§ 15000, *et seq.*

## I. Background

Applicant has been trying to make reasonable use of the Property since 2014, and the City has illegally interfered throughout. Applicant conducted extensive due diligence in 2013 prior to purchasing the Property, including a review of all publicly available historic databases. However, unbeknownst to Applicant, the Property was listed on the yet to be published SurveyLA - a windshield survey - which claimed that the existing bungalows on the Property (the "Bungalows") were potentially historic.<sup>3</sup> No notice of the Property's inclusion on SurveyLA was given to Applicant or any other previous property owner.

Given these complications, Applicant decided to pursue a non-discretionary project at the Property. On April 13, 2015, Applicant applied to the Los Angeles Department of Building and Safety ("LADBS") for a demolition permit. Applicant complied with all applicable requirements, including public notice for demolition of a building older than 45 years, which was posted on April 13, 2015. Applicant expended significant time and money to prepare the Property for demolition, including Los Angeles Housing Department processing, tenant relocations, and the disconnection of utilities. The City issued a demolition permit to Applicant on September 9, 2015, acknowledging that all open clearances had been addressed, that no discretionary approval was pending, and that there was no legal basis to deny the permit based on historic status. (See Exhibit C.) Applicant then expended further time and money to physically prepare for demolition work.

On September 11, 2015, after being inspected by LADBS, Applicant commenced demolition at the Property. However, the approved demolition work was interrupted by the City's issuance of a Stop Work Order and Order to Comply (see Exhibit D), which were based on false accusations that Applicant had failed to comply with the conditions of the demolition permit. Shortly before the close of business on September 11, with the demolition crew already having left for the day, LADBS reinstated the improperly revoked demolition permit. Then, at 6:26 p.m., City staff (the Planning Director was out of town) nominated the Property as a HCM pursuant to LAAC Section 22.171.10(a) in a manner that gave Applicant no opportunity to protect its interests.

On March 2, 2016, the City Council designated the Property as a HCM despite overwhelming evidence in the record indicating that the Property is ineligible. After

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<sup>3</sup> The inclusion of the Bungalows within SurveyLA suggests a skewed logic. A well-preserved bungalow court on Hayworth, within a block of the Property, was not included. Another bungalow court at 729 Sweetzer, for which redevelopment plans were filed, was not included either. It was later demolished by EctoHomes, a prominent local developer.

this designation was approved, City staff explained to Applicant that demolition is still permitted under the LAAC so long as Applicant followed all applicable procedures, including preparation of an EIR.<sup>4</sup> Applicant then filed a lawsuit against the City, which resulted in a settlement where the City agreed to process the Project in good faith and prepare an EIR. Applicant reserved its rights to future litigation. Selected documents from the HCM process and lawsuit are attached as Exhibit E.

Pursuant to LAAC Section 22.171.12, the City prepared an EIR for the Project. Appendix C of the EIR, the Historic Resources Assessment (“HRA”) contained exhaustive analysis regarding potentially significant impacts to historical resources and analysis of 15 alternatives. Attached as Appendix I to the HRA is a feasibility study, which analyzed the feasibility of preservation of the Bungalows and explored potential alternatives to be analyzed fully in the EIR (“Feasibility Study”). The Feasibility Study included preparation of an extensive scope of work that would be required for construction, analysis of construction and engineering costs, and preliminary plans. Per the recommendations in the Feasibility Study, the EIR fully analyzed six Project alternatives and concluded that none of the six were feasible, including Alternative 2, Full Preservation Alternative (the “Full Preservation Alternative”). OHR reviewed and commented on all alternatives during the City’s preparation of the EIR, and directed the City to bring in Chattel, Inc. another noted preservation consultant, as a peer reviewer to expand on potential preservation and partial preservation alternatives. The Chattel Inc. peer review analyzed four partial preservation alternatives, and concluded that none of the four were financially feasible, with losses ranging from \$ 3,995,968 to \$ 6,067,246 as a rental project and \$ 3,164,769 to \$5,361,865 as a for sale project.

In addition to the Feasibility Report, the EIR incorporated numerous structural assessments, and peer reviews of such assessments, all of which concluded that the preservation of the Bungalows is infeasible without extraordinary efforts to stabilize the soils and reconstruct all elements of the buildings themselves, tantamount to a total reconstruction of the buildings. These assessment and peer reviews include:

- A geotechnical investigation in April of 2015 by Feffer Geological Consulting;
- Structural assessments by John Labib & Associates, Structural Engineers summarized in a November 2015 report;
- A structural assessment by Michael Goldberg, an experienced foundation contractor hired by community members of the neighborhood, completed in February of 2016;

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<sup>4</sup> LAAC § 22.171.14(b).

- A 2016 peer review by Nabih Yousseff Associates, Structural Engineers of John Labib & Associates' structural assessments;
- A peer review by David Cocke, S.E. from Structural Focus, who was hired by the LA Conservancy, of all previous assessments;
- A market analysis<sup>5</sup> analyzing the economic feasibility of the alternatives analyzed in the EIR by The Concord Group in August of 2017;
- A 2018 peer review by RSG, Inc. of the market analysis<sup>6</sup> prepared by The Concord Group; and
- A 2018 peer review of the scope of alternatives studied in the EIR by Chattel Inc. at the request of OHR.

On January 16, 2019, the AA held a public hearing regarding the Project ("AA Hearing"), and on April 17, 2019, the City issued the AA LOD denying the Project. The AA LOD states that the sole reason for denying the Project is its potentially significant and unavoidable impacts related to the demolition of the Bungalows, a designated HCM.<sup>7</sup> The AA "conservatively concluded" that despite mitigation measures established in the EIR that contemplate the lifting and moving of the Bungalows, the direct impacts to historical resources **could not be mitigated to a less than significant level and no other mitigation measure or alternative, including the Full Preservation Alternative, could feasibly reduce the impact.** Without any explicit analysis weighing the benefits of the Project against the potentially significant and unavoidable impacts, the AA found that it could not make the statement of overriding considerations ("SOC") required pursuant to CEQA. It also refused to adopt the Project's Mitigation Monitoring Program ("MMP"), which was prepared with the EIR. The AA did however certify the EIR and adopt the related CEQA findings (excluding the SOC).

Applicant filed a timely appeal to the APC on April 26, 2019 asserting the AA's denial of the Project and refusal to adopt a SOC and MMP in connection with the Project EIR is unsupported by substantial evidence and is an abuse of discretion, in violation of City law, the Housing Accountability Act, and CEQA, and further resulted in a taking of the Property without just compensation in violation of the Federal and State Constitutions. At the public hearing on Applicant's appeal, which was held on

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<sup>5</sup> See Appendix H of the EIR.

<sup>6</sup> See Appendix I of the EIR.

<sup>7</sup> AA LOD, Section XI, p. 50.

May 28, 2019 (“APC Hearing”), Adam Villani, City Planner, submitted into the record for the first time revised findings (“Revised Findings,” see Exhibit F) that amended the AA LOD findings regarding the feasibility of the Full Preservation Alternative, but the EIR was not revised to track the changes in the Revised Findings. Ken Bernstein, Manager of OHR and Principal City Planner, testified that the Full Preservation Alternative, is “potentially feasible,” but provided no evidence of this conclusory statement. Further, the Revised Findings explicitly state that no information submitted after the publication of the Final EIR constitutes significant new information or otherwise requires preparation of a supplemental or subsequent EIR.<sup>8</sup> If there was any evidence whatsoever to support Mr. Bernstein’s testimony that preservation of the Bungalows, a conclusion in direct contravention of the EIR, the EIR would have been revised.

The APC ultimately rejected Applicant’s appeal, affirming the AA’s denial of the Project. Despite City assurances dating back years, Applicant finds itself, again, forced to threaten litigation for the City’s failure to act in accordance with the law if the City Council does not grant the requested appeal.

## II. Arguments

### A. The City’s refusal to adopt a SOC and MMP is not supported by substantial evidence, and is therefore arbitrary and capricious in violation of CEQA.

The AA defied its own EIR, a document it certified as being a product of its own independent judgement, (and all the substantial evidence contained therein) when it refused to adopt a SOC and MMP in connection with the certification of the Project’s EIR.<sup>9</sup> Although the Revised Findings state that the Full Preservation Alternative is potentially feasible, the EIR came to the exact opposite conclusion after extensive, peer-reviewed analysis (i.e., that any alternative that preserves the Bungalows is infeasible). The AA provided no analysis whatsoever beyond what is included in the EIR about the potential feasibility of the Full Preservation Alternative. Although we acknowledge that CEQA does not compel a lead agency to approve a project, this fact does not eviscerate one of the basic purposes of CEQA, which is to promote informed decision-making and public participation when local agencies consider actions that could potentially affect the environment.<sup>10</sup>

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<sup>8</sup> AA LOD, Section X(F)(f)(iii), p. 49 (unchanged by Revised Findings).

<sup>9</sup> AA LOD, pp. 1, 50.

<sup>10</sup> See CEQA Guidelines §§ 15002, 15003. 15086-88.

While CEQA requires deference regarding a lead agency's determination of fact, this discretion is not unfettered.<sup>11</sup> When making a factual determination pursuant to CEQA, the lead agency must cite to substantial evidence in the record supporting its determination.<sup>12</sup> Further, procedural questions, such as whether a lead agency omitted essential information required by CEQA, is subject to the less deferential, de novo, standard of review.<sup>13</sup> Under the de novo standard of review, a reviewing court will determine that a lead agency committed prejudicial abuse of discretion if it failed to provide information required by CEQA, thus precluding informed decision-making and informed public participation and frustrating the statutory goals of the EIR process.<sup>14</sup>

The AA omitted essential information in the form of analysis about the feasibility of the alternatives that preserve the Bungalows and disregarded overwhelming evidence in the record that demonstrates that the benefits of providing eight new, high-quality three-bedroom housing units constructed pursuant to the most up-to-date sustainable building requirements and located in a transit-rich area far outweigh the potentially significant and unavoidable impacts resulting from the demolition of the vacant, uninhabitable Bungalows, which, although recently designated as an HCM, lack integrity in several key aspects causing them to be economically and physically infeasible to preserve. Further, the Revised Findings directly conflict with the analysis and conclusions of the EIR. Therefore, the AA's baseless refusal to adopt the SOC and MMP is arbitrary, capricious, and in violation of CEQA.

The Revised Findings were the City Planning Department's poor (and unveiled) attempt to provide a post hoc rationalization for the AA's baseless refusal to adopt a SOC and MMP.<sup>15</sup>

*1. The AA's determination that it could not adopt a SOC pursuant to CEQA Section 21081 and CEQA Guidelines Section 15093 completely fails to balance the Project's benefits against the potentially significant and*

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<sup>11</sup> Pub. Resources Code § 21168.

<sup>12</sup> "...the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record." Pub. Resources Code § 21168.

<sup>13</sup> *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935.

<sup>14</sup> *Banning Ranch Conservancy, supra*, 2 Cal.5th at 942.

<sup>15</sup> Section 2.A outlines the Advisory Agency's arbitrary and capricious actions in relation to its refusal to adopt a SOC and MMP; and Section 2.B describes how the Revised Findings, which are in and of themselves baseless and thus arbitrary and capricious, only provide ad hoc rationalization of the Advisory Agency's April 27<sup>th</sup> decision memorialized in the AA LOD, in violation of CEQA.

*unavoidable impacts and is not supported by substantial evidence in the record.*

CEQA allows individual projects to be approved in spite of one or more significant effects thereof.<sup>16</sup> A SOC specifies a lead agency's reasons supporting its approval of a project with potentially significant and unavoidable impacts, and must be supported by substantial evidence in the record.<sup>17</sup> In refusing to adopt an SOC, the AA completely failed to perform the requisite balancing of the Project's benefits against its potentially significant and unavoidable impacts related to direct impacts to historical resources. Because the EIR provides overwhelming evidence of the infeasibility of preservation (both financial and physical infeasibility) and of the benefits of the Project, the AA's refusal to adopt a SOC is not based on substantial evidence and, therefore, is arbitrary and capricious.

In the AA LOD, the AA denied the request to adopt a SOC for the Project, finding that, "*the benefits of the Project, as proposed, do not outweigh and override the significant and unavoidable impacts...*"<sup>18</sup> The AA states that this conclusion is "based on substantial evidence in the record, including but not limited to the EIR." However, it is not enough to simply state that its conclusion is based on substantial evidence, the AA must specifically show how evidence in the record supports its conclusions. Without such an explicit analysis in the record, the Applicant, and the public at-large, cannot possibly decipher the AA's reasons for refusal to adopt a SOC or know whether they are proper.

The only explanation given for the AA's refusal to adopt a SOC was the potential infeasibility of the relocation of the Bungalows pursuant to Mitigation Measure HH-HIST-2, citing to the speculative nature of the potential transaction. With no evidence in the record to support the City's conclusion that preservation is potentially feasible, preservation is no less speculative than relocation of the Bungalows. The explanation also completely fails to balance the Project's benefits against the potentially significant and unavoidable impacts, thus impermissibly ignoring the EIR's evidence that 1) preservation of the buildings on the Property is financially and physically infeasible, and 2) the local and regional benefits of the Project outweigh the potentially significant and unavoidable impacts of demolishing the Bungalows.

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<sup>16</sup> CEQA § 21002.

<sup>17</sup> CEQA Guidelines Section 15093(b).

<sup>18</sup> Section XI (STATEMENT OF OVERRIDING CONSIDERATIONS), AA LOD, p. 50.



- a) The AA completely failed to acknowledge the EIR's evidence that preservation of the Bungalows is financially and physically infeasible.

The AA refused to adopt a SOC for the Project because it would result in potentially significant and unavoidable impacts related to the demolition of the Bungalows, which, as a designated HCM, constitute historical resources pursuant to CEQA. However, this refusal completely fails to acknowledge evidence in the AA's own EIR, which it certified as reflecting its independent judgment, that the Bungalows lack physical integrity, making preservation infeasible.

The HRA (Appendix C of the EIR) evaluates historical resources that may be affected by the implementation of the Project, and provides expert opinion that the Bungalows are structurally unsound and should be demolished. The HRA acknowledges that failure of the foundation has affected the integrity of the Bungalows and their original and character-defining features explaining that, "all of the experts agree that the likelihood of the character-defining features and original materials surviving lifting or moving is non-existent because of the Bungalow Court and Garage's poor existing structural condition."<sup>19</sup>

The HRA relies on and incorporates the Feasibility Study, which analyzes the feasibility of preservation of the Bungalows and explored potential alternative options for the EIR. Key findings of the Feasibility Study that emphasize the Property's dilapidated and unsafe state are included in the HRA, noting that the Bungalows are "uninhabitable," "failing," "dangerous" and "dilapidated", thereby making their preservation physically infeasible.

A letter from Applicant addressed to Mindy Nguyen, Director of the AA, dated February 4, 2019, which is fully incorporated herein along with its attachments (see Exhibit G), provides additional evidence that the Property's current state prevents it from being feasibly preserved. In that letter Applicant cites to various Property inspections that show that the level of deterioration and structural issues create a public safety hazard. This letter, which is part of the record, shows that qualified experts have concluded that: a) the buildings are uninhabitable and likely to collapse in a future seismic event due to settlement caused by insufficient compacting of fill during construction; b) the existing foundations must be completely replaced, which would cause irreparable damage to the buildings; and c) the buildings are infested

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<sup>19</sup> EIR, Appendix C, p. 67.

with termites, wood rot, and fungus, all of which further compromise the buildings' integrity.<sup>20</sup>

Even experts hired by the Project's opponents and the LA Conservancy agree with Applicant's studies' conclusions that the Bungalows are structurally unsafe and should be demolished. Applicant made all of its studies available to the LA Conservancy and its expert, David Cocke, for review. The LA Conservancy appears to have received a peer review report from Mr. Cocke, which was never shared with Applicant. In an email sent to City staff and forwarded to Mr. Bernstein (obtained only through discovery), Adrian Fine, who appeared at the hearing on behalf of the LA Conservancy, stated that Mr. Cocke found Applicant's reports "pretty accurate and complete, in terms of their conclusions." (See Exhibit H.<sup>21</sup>) In this email Mr. Fine partially quotes Mr. Cocke's report:

**"The foundations are inadequate and settling of the soil will continue to be a problem. Although not especially life-threatening in the short term, the differential settlement could eventually result in significant damage and even develop into life safety issues in the long term . Even if the foundations are repaired and the building is adequately bolted to the foundations, they will continue to experience differential settlement and significant structural damage will continue to be a result. The only options are to jack up the building and excavate per the recommendations of the geotech report down several feet and construct a new foundation, or possibly to install a new array of deep drilled foundation piers. In either case, the work will be extensive, and the buildings should be "braced" adequately before the work is started."**

"Obviously, much of the wood framing is in bad shape due to decay or termites and should be repaired, at least in kind."

"The lateral force resisting system (LFRS) is composed of the roof diaphragms, stucco covered exterior walls and interior partition walls. The LFRS could be upgraded with the addition of new plywood sheathing on the walls and completion of a load path down to the foundations using framing hardware and foundation bolts. The stucco appears to be in poor condition, so likely the

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<sup>20</sup> See Exhibits C-M of Applicant's letter to Ms. Nguyen dated February 4, 2019.

<sup>21</sup> See email dated January 5, 2016 at 4:25 PM from A. Fine with the subject "RE: Edinburgh Bungalow Court" and forwarded to K. Bernstein on January 14, 2016 at 12:49 PM.

**best practice would be to remove the exterior stucco, add plywood sheathing to the perimeter walls, then covering again with building paper and stucco.** The perimeter stem walls would then be braced by the new plywood and the sill plates can be bolted to the foundation.”

(Emphasis added.)

The current dilapidated state of the Bungalows was also one of the explicit reasons the HRA concludes the Property is not eligible for listing under the California Register and National Register.<sup>22</sup> Notably, the Property lacks of integrity related to design, material, and workmanship. Below are excerpts of the HRA regarding the Property’s lack of integrity that highlight the dilapidated state of the Property.

- Regarding “Materials” integrity: “Half of the windows have been replaced and windows have been resized and some of the primary and rear doors replaced; ... The stucco exterior wall finish and red roof tile are original; however, in some areas the stucco has been patched. On the rear (south) elevations of 754-754 1/2 and 756-756 1/2 Edinburgh, the stucco has been poorly patched. Some of the decorative elements such as within the blind arches and groupings of barrel-tiles have been removed.”
- Regarding “Design” integrity: “Approximately half of the windows have been replaced, some of the window openings have been resized and the window frames removed, primary and rear doors replaced, and some of the medallions have been removed from the recessed blind arches, as well as the clusters of barrel vault vents. The landscape has been altered with the infill of the courtyard, the addition of a fence around the front lawn of the southwest bungalow (756), and the removal of many trees. The rear arch over the courtyard was removed after sustaining earthquake damage. In the interior, some remodeling of bathrooms and kitchens has taken place, doors have been removed and/or replaced, finishes updated, fireplace surrounding painted over, and built-ins surrounding the fireplace altered.”
- Regarding “Workmanship” integrity: “As stated above, the half of the original exterior materials have been removed, which has compromised the original workmanship from the Bungalow Court’s period of significance. Because the design of the Bungalow Court is simplistic, these alterations impact the overall workmanship. The stucco exterior has been patched, decorative items such as medallions and clusters of barrel-tiles removed, some windows replaced and resized, some doors both primary and rear replaced, the rear courtyard arch removed, and the hardscape in the courtyard has been updated. Additionally,

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<sup>22</sup> EIR, Appendix C, p. 59.

most likely as a kit-bungalow court there was not much hand craftsmanship involved besides the assemblage of parts.”

Not only does the Bungalows’ dilapidated state make them physically infeasible to preserve, but it makes them economically feasible to preserve as well. The AA completely ignored the fact that no economically feasible Project alternative would preserve the integrity of the Bungalows.<sup>23</sup> The Market Analysis contained in Appendix H to the EIR (“Market Analysis”) shows, and the peer review of that analysis contained in Appendix I to the EIR (“Market Analysis Peer Review”) confirms, that the none of the Project alternatives that would preserve the Bungalows are economically feasible:

- Alternative 2: Full Preservation Alternative, if operated as a rental project would result in a loss of \$2,298,240 (a negative 64 percent return on cost); and if sold would result in a loss of \$3,830,400 (a negative 47 percent return on cost).<sup>24</sup>
- Alternative 3: Rehabilitation Alternative if operated as a rental project would result in a loss of \$2,872,800 (a negative 58 percent return on cost); and if sold would result in a loss of \$4,788,000 (a negative 50 percent return on cost).<sup>25</sup>
- Alternative 4: Rehabilitation with Addition Alternative if operated as a rental project would result in a loss of \$2,872,800 (a negative 58 percent return on cost); and if sold would result in a loss of \$5,958,400 (a negative 41 percent return on cost).<sup>26</sup>
- Alternative 5: Rehabilitation with Partial Addition and Underground Parking Alternative if operated as a rental project would result in a loss of \$3,942,120 (a negative 61 percent return on cost); and if sold would result in a loss of \$6,570,200 (a negative 55 percent return on cost).<sup>27</sup>

Of the two alternatives studied in the EIR that would avoid potentially significant and unavoidable direct impacts to historical resources (i.e., the Full Preservation Alternative and Alternative 3: Rehabilitation Alternative), the EIR concluded that only the Full Preservation Alternative reduces overall impacts less than the Project and thus is the Environmentally Superior Alternative.<sup>28</sup> However, the Full Preservation Alternative, like the other alternatives listed above, would not meet

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<sup>23</sup> See analysis of the following alternatives presented in Chapter V, Alternatives, or the EIR: Alternative 2: Full Preservation Alternative, Alternative 3: Rehabilitation Alternative, Alternative 4: Rehabilitation with Addition Alternative, Alternative 5: Rehabilitation with Partial Addition and Underground Parking Alternative.

<sup>24</sup> See EIR, pp. V-29 to 30.

<sup>25</sup> See EIR, p. V-38.

<sup>26</sup> See EIR, pp. V-46 to 47.

<sup>27</sup> See EIR, pp. V-55 to 56.

<sup>28</sup> See EIR, pp. V-64 to 69.

most of the Project objectives according to the EIR,<sup>29</sup> and would not serve local and statewide goals of providing increased high quality, sustainable housing opportunities in transit-rich areas.<sup>30</sup>

According to the EIR, the Full Preservation Alternative would only meet one, partially meet two, and not meet three Project objectives. Notably, the Full Preservation Alternative would not implement the Project Objective of, “support[ing] sustainable design through development that would: optimize site energy efficiency, water conservation, and runoff water quality,” because the rehabilitation of the Bungalows (as opposed to constructing new buildings) would be subject to the Historic Building Code, which exempts historic buildings from certain sustainability and green standards.<sup>31</sup>

The AA defied the overwhelming and compelling evidence in the EIR that shows preservation of the Bungalows is physically and economically infeasible, despite the fact that the EIR was certified by the AA as being a product of its independent judgment. The AA does not provide any evidence, let alone substantial evidence, that the EIR’s conclusions regarding the infeasibility of preserving the Bungalows lack merit.

b) The AA completely failed to acknowledge the EIR’s evidence that the local, regional and statewide benefits of the Project outweigh the potentially significant and unavoidable impacts related to demolition of the Bungalows.

A key aspect of the balancing required by CEQA Guidelines Section 15093(a), is considering, “the specific economic, legal, social, technological, or other benefits of a proposed project.” The AA’s findings regarding its inability to adopt a SOC are completely devoid of any discussion whatsoever about the Project’s benefits. This is true despite the fact that the EIR contains substantial evidence that the Project would provide vast benefits, and, as a high-quality housing project in a transit-rich area, the Project benefits not only the surrounding community, but the City, the region and the state, more broadly.

To begin, the Project would implement local and state mandates to concentrate the development of housing units within transit-rich areas. The Project

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<sup>29</sup> See EIR, pp. V-29, 38, 46, 55.

<sup>30</sup> The Full Preservation Alternative’s inability to meet local, regional and statewide policies is discussed in the Sections of this letter to follow.

<sup>31</sup> See EIR, p. V-29.

would provide eight three-bedroom housing units within a Transit Priority Area<sup>32</sup> directly implementing the Southern California Association of Governments (“SCAG”) Regional Transportation Program (“RTP”)/ Sustainable Communities Strategy (“SCS”).<sup>33</sup> SCAG’s RTP/ SCS was adopted pursuant to Senate Bill 375, which seeks to facilitate transit-oriented projects in existing urbanized areas.<sup>34</sup> Similarly, the Housing Accountability Act promotes the construction of housing projects and limitations on local governments in denying such projects:

“It is the policy of the state that a local government not reject or make infeasible housing development projects, including emergency shelters, that contribute to meeting the need determined pursuant to this article without a thorough analysis of the economic, social, and environmental effects of the action and without complying with [the Housing Accountability Act].”<sup>35</sup>

The City has also undertaken various efforts, including the adoption of Measure JJJ, that incentivize housing near transit. Discussion of the Project’s regional benefit of providing housing in a transit-rich area was impermissibly omitted from the AA’s findings related to its refusal to adopt a SOC for the Project.

The Project also promotes the four “detailed goals,” and the policies and programs that implement these goals, contained in the Housing Element of the City’s General Plan, which relate to providing increased and diverse housing opportunities. The same cannot be said about any of the alternatives studied in the EIR that would preserve the Bungalows. Notably, one of the four detailed goals calls for, “[a] City where housing production and preservation result in an adequate supply of ownership and rental housing that is **safe, healthy and affordable to people of all income levels, races, ages, and suitable for their various needs.**”<sup>36</sup> (Emphasis added.) The Project would replace eight one-bedroom rental units with eight small lot subdivision

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<sup>32</sup> Transit Priority Areas are defined as locations where two or more high-frequency transit routes intersect. SCAG, RTP/ SCS, p. 25. The Property is located within a nexus of intersections frequented by various bus lines, including: 1) along Melrose/Fairfax Avenues, located less than 750 feet from the Project Site, Line 217/218, Rapid Line 780 and the DASH Fairfax; 2) along Crescent Heights Boulevard/Melrose Avenue, located less than 900 feet from the Property, Line 10 and Line 18; and 3) along Santa Monica Boulevard/Fairfax Avenue, less than one-half mile from the Property, a number of lines including Rapid Bus Line 704. The nearest Metro Red Line station is the Hollywood Boulevard/Vine Street Station, located approximately 1.9 miles northeast of the Property.

<sup>33</sup> See SCAG’s Transit Priority Area Map (2040), available at [http://gisdata-scac.opendata.arcgis.com/datasets/c9249b6bba0f49829b67ce104f81ef20\\_1](http://gisdata-scac.opendata.arcgis.com/datasets/c9249b6bba0f49829b67ce104f81ef20_1) (last accessed 07/08/19).

<sup>34</sup> SCAG, RTP/ SCS, p. 78.

<sup>35</sup> Gov. Code § 65589.5(b)

<sup>36</sup> Housing Element, p. 6-3, available at <https://planning.lacity.org/HousingInitiatives/HousingElement/Text/Ch6.pdf> (last accessed 07/08/19).

residences, each with three bedrooms, three full and one half bathrooms, two covered parking spaces and private patio/landscaped areas. Not only would the Project provide larger units that would accommodate families and roommate households, but as a small lot subdivision, the units are priced significantly lower when compared to traditional single-family homes in the area. As such, the Project would provide opportunities for first-time homebuyers who would be able to realize the benefits of a single-family home (and full fee-simple ownership) with the conveniences and price tag of a townhouse. Discussion of this unique Project benefit was impermissibly omitted from the AA's findings related to its refusal to adopt a SOC for the Project.

The Project will complement and improve the visual character of the area by replacing an existing deteriorating bungalow court with a well-designed small lot subdivision. The Project would implement a landscaping plan and provide open space areas for Project residents. The Property would include 1,590 square feet of landscaped area. The landscape design would provide for integration between landscape and the buildings, and allow for plants to serve as screens dividing public and private spaces. The landscaped areas would consist of the landscaped setbacks along Waring and Edinburgh Avenues consisting of ground-cover, low-lying shrubs and ornamental trees. Proposed trees would be oriented to the pedestrian scale, rather than tall palm trees. The Project would replace the six existing diseased and dead street trees along Waring and Edinburgh Avenues with nine healthy street trees; five street trees would be planted along Waring Avenue and four would be planted along Edinburgh Avenue. This landscaping will not only provide aesthetic benefits for future Project residents and the surrounding community, but it also encourages pedestrian and bicycle traffic in a transit-rich area. Discussion of the benefits resulting from the Project's upgraded landscaping was impermissibly omitted from the AA's findings related to its refusal to adopt a SOC for the Project.

The Project will incorporate various Green Building and sustainability features to enhance air quality and support Los Angeles' sustainability goals and policies, including reduction of greenhouse gasses. Because any alternative that would preserve the Bungalows would be exempt from many of the sustainable design requirements, the benefits related to sustainability are unique to the Project. Notably, the Project's design would comply with the Los Angeles Green Building Code, which builds upon the 2016 California Green Building Code, and would include the following sustainable features:

- **Solar Technology:** The rooftop of each residence would dedicate 175 square feet of roof area and be pre-wired for the future installation of solar panels. The garage/carport areas in each individual residence would also include an electrical outlet appropriate to charge an electric vehicle, so that 100 percent

of the onsite parking spaces would be providing electric-vehicle charging outlets.

- Drought-Resistant Landscaping: The Project would include drought-tolerant landscaping and water efficient irrigation systems.
- Low-Impact Design: The Project would be designed in accordance with the City's Low-Impact Development Ordinance, which requires the treatment of stormwater using Best Management Practices, including biofiltration.
- Low-Emitting Materials: The Project would use materials and finishes that emit low quantities of volatile organic compounds; HVAC systems will utilize ozone-friendly refrigerants.
- High-Efficiency Appliances: The Project would provide high-efficiency appliances.
- Natural Ventilation: The Project has been designed with a central courtyard around a central driveway to maximize daylight and natural ventilation. The individual residences are designed for cross and stack ventilation to circulate air naturally through the units, providing natural cooling in the main living spaces.

Further, the Project has implemented numerous Project Design Features, such as PDF-NOISE-1, which would reduce construction equipment noise through the proper operation of noise mufflers; PDF-TRAF-1, which would provide a construction management plan to minimize the effects of construction traffic; and PDF-TRAF-2, which would provide a pedestrian safety plan to ensure safe pedestrian passage.

Finally, and importantly, none of the Project objectives described in the EIR were discussed in the AA's findings in the AA LOD related to its refusal to adopt a SOC for the Project. The Project objectives include:

- Redevelop the Project Site with residential buildings and a site design that is consistent with the existing and proposed HCP and underlying zoning designation.
- Provide housing with high-quality architecture and landscape design that would improve and be compatible with the eclectic visual character of the neighborhood and the Hollywood Community.



- Support sustainable design through development that would: optimize site energy efficiency, water conservation, and runoff water quality.
- Provide high quality housing to help accommodate regional and Citywide housing demand in a Transit Priority Area.
- Provide a diversity of housing choices within the neighborhood relating to unit size, number of bedrooms, and ownership.
- Develop an economically viable residential project.

Accordingly, to reject the above-delineated benefits associated with approving the Project, the AA must explicitly balance them against the potentially significant and unavoidable impacts associated with demolishing the Bungalows. Given that the EIR contains overwhelming evidence that the Bungalows cannot feasibly be preserved, the AA must provide an explanation based on substantial evidence in the record for refusing to adopt a SOC for the Project.

*2. The AA's refusal to adopt the MMP prepared for the EIR is arbitrary and capricious in violation of CEQA.*

When a lead agency sets mitigation measures to reduce potentially significant impacts to the extent feasible, it must make the finding pursuant to CEQA Guidelines Section 15091(a)(1) and adopt a MMP to ensure the measures are implemented.<sup>37</sup> Although the AA denied the Project, it certified the EIR,<sup>38</sup> set mitigation measures related to the potentially significant impacts and prepared a MMP,<sup>39</sup> and made the finding pursuant to CEQA Guidelines 15091(a)(1) for potentially significant impacts related to the demolition of the Bungalows.<sup>40</sup> However, the AA did not adopt the required MMP accompanying the EIR with no explanation whatsoever. Because a lead agency's actions must be supported by substantial evidence in the record, the AA is required to provide an explanation based on substantial evidence in the record as to why it refused to adopt the MMP it prepared as part of the EIR for the Project.

B. The Revised Findings are post hoc rationalization of the City's denial of the Project and are not supported by substantial evidence; therefore the AA's

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<sup>37</sup> CEQA Guidelines § 15097(a).

<sup>38</sup> See AA LOD, p. 1.

<sup>39</sup> See EIR, Chapter IV, Mitigation Monitoring Program.

<sup>40</sup> See AA LOD, p. 29.

reliance on the Revised Findings is arbitrary and capricious in violation of CEQA.

At the APC Hearing, Mr. Villani for the first time submitted to the record (and to Applicant and the public) Revised Findings in an unveiled attempt to improperly supplement the record to provide some basis for the AA's decision to deny the Project. The fact that revisions to the AA's findings were necessary is evidence that the AA's denial of the Project was not supported by the EIR and was therefore arbitrary and capricious. Mr. Villani publicly acknowledged the glaring discrepancy between the AA's denial of the Project and the evidence contained in the record by stating that the purpose of the Revised Findings is to cause the AA's action to, "become internally consistent...more internally consistent." Further, and most germane to the City's CEQA violation, the Revised Findings themselves do not provide the substantial evidence required by CEQA to support denial of the Project.

The Revised Findings delete the AA's findings that the Bungalows are in uninhabitable condition, and that the Full Preservation Alternative is infeasible.<sup>41</sup> However, simply deleting these finding does not cure the AA's violation of CEQA. The EIR's comprehensive analysis still provides substantial evidence that the Bungalows are in fact uninhabitable and that the Full Preservation Alternative is infeasible.<sup>42</sup>

Grasping to support the conclusions of the Revised Findings, Mr. Villani presented Mr. Bernstein as an expert on the subject of preservation, who testified that the Full Preservation Alternative, is "potentially feasible." Mr. Bernstein's testimony amounted to vague musings on the potential for preservation that contradicted the extensive record prepared by the City, including the EIR which is based on years of peer-reviewed work by respected preservation architects, engineers and other professionals. Like the Revised Findings, Mr. Bernstein did not present a scintilla of evidence that the Full Preservation Alternative is actually feasible. Mr. Bernstein did not present a proposed design for a feasible alternative; he did not present a construction scope and costs; he did not present engineering or structural reports stating how an "alternative" method of preservation would work; he did not outline what work would be undertaken; and he did not even visit the Property. Given these deficiencies, and in stark contrast to the EIR, the testimony is pure speculation and cannot be relied upon.<sup>43</sup>

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<sup>41</sup> See Revised Findings, pp. 2-4.

<sup>42</sup> See discussion above under section 2.a.i. regarding the EIR's comprehensive analysis of the infeasibility of preserving the Bungalows generally, and the infeasibility of the Full Preservation Alternative specifically.

<sup>43</sup> It is not coincidence that City staff person who nominated the Property as an HCM, Mr. Bernstein, is now making every effort to claim that preservation is feasible, even without evidence.

Mr. Bernstein attempted to support the Revised Findings by casting doubt on the EIR's volumes of feasibility analysis, stating that the studies included in the EIR are flawed because they are limited to a single method of preservation, i.e., lifting and bracing, and that this method is "unusually intrusive" for preservation. As an alternative to this method, Mr. Bernstein cites to only one method of preservation that is less intrusive, i.e., micropiling. What Mr. Bernstein fails to understand is that this testimony, while meant to support the City's finding that the Full Preservation Alternative is potentially economically feasible, actually directly contravenes it as the Full Preservation Alternative contemplates the same "unusually intrusive" method of lifting the buildings. Mr. Bernstein's comments do more harm than good for the City's case that the Revised Findings are supported by substantial evidence because they directly contradict the Revised Findings, therefore, lessening the credibility of the AA and Mr. Bernstein even further. Making matters worse for Mr. Bernstein's argument is the fact that the EIR analyzed the cost difference between micropiling and other methods of stabilizing the Bungalows, and concluded that the cost was negligible.<sup>44</sup> Therefore, the EIR did in fact include analysis of alternatives to lifting and bracing, and found that none were any more feasible.

Moreover, Mr. Bernstein's testimony contradicts the Feasibility Study (Appendix I to the HRA), **which considered preservation without lifting the building if lifting could not be done.**<sup>45</sup> Such alternatives to lifting were not included in the EIR because they were rejected as infeasible for structural reasons and due to the fact that costs associated with this portion of the work are in fact negligible to the overall restoration cost.<sup>46</sup> Here again, Mr. Bernstein's attempt to sully and confuse the record without regard to fact demonstrates actionable bad faith on his part personally and to the City more generally.

Not only is Mr. Bernstein's opposition to the method of preservation contemplated in the EIR flawed, it is untimely. Mr. Bernstein did not publicly share this opposition at any point in time before the APC Hearing, despite being presented with the feasibility reports, peer reviews, and impact analysis for his review during the preparation of the EIR. In fact, at the request of the OHR (Mr. Bernstein's department), additional experts (Chattel Inc.) were brought in to peer review the EIR's preservation options and to explore additional alternative preservation options later analyzed in the certified EIR. After being presented with the conclusions of this additional peer review by an expert suggested by OHR, neither Mr. Bernstein nor OHR

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<sup>44</sup> If the buildings are not lifted, the cost difference is negligible - the cost to lift the building for the basic preservation option is \$60,960 (3% of costs). The total cost of repairing the foundations (lifting the building; excavate; new fill; new foundations) is \$218,810 (11% of the total cost). See A EIR, Appendix C (HRA), Appendix I (Feasibility Study), Attachment 3 (Cost Estimate).

<sup>45</sup> See EIR, Appendix C (HRA), Appendix I (Feasibility Study).

<sup>46</sup> See A EIR, Appendix C (HRA), Appendix I (Feasibility Study), Attachment 3 (Cost Estimate).

requested that any further alternatives be analyzed. If Mr. Bernstein's objections were genuine, as opposed to an impermissible post hoc rationalization of denial of the Project, why would he, or any City staff, not state his objections to the methodology of preservation during the two-plus year EIR preparation process? This new, unsubstantiated assertion of potential feasibility in the Revised Findings is merely an attempt to backtrack on the City's own conclusions and to sully and confuse its own record.

As further evidence of Mr. Bernstein's bad faith, he improperly accused Applicant of "demolition by neglect" even though there is no evidence he visited the Property since the HCM nomination. The APC was presented pictures of the Property that show less decay than what was presented by Applicant ("APC Hearing Pictures") as evidence of the demolition of neglect allegation. However, the APC Hearing Pictures themselves provide no indication of, and no testimony at the APC Hearing was given about, the date on which they were taken; and therefore the APC Pictures cannot be relied on to prove any action on behalf of Applicant. The APC Hearing Pictures also conveniently omit any picture of the portions of the Bungalows that are severely dilapidated, and were so long before Applicant purchased the Property. On the other hand, Elisa Paster, Applicant's counsel, presented at the APC Hearing pictures of the actual dangerous and dilapidated conditions, which predated Applicant's ownership of the Property. To the extent that the APC relied on the accusation of demolition by neglect, it is improper and irrelevant to the findings.

Contrary to Mr. Bernstein's baseless allegations that Applicant is neglecting the Property, the record is full of evidence that Applicant has done everything within its authority and means to secure and protect the integrity of the Property during the entitlement phase of the Project. Applicant has conferred with OHR, LADBS, and the City Police Department ("LAPD") on means and methods for securing the Property during the entitlement process. Accordingly, the Property is secured and maintained in the manner prescribed by Mr. Bernstein and these various City departments. Applicant is present on the Property virtually every day and does not hesitate to call LAPD when there are illegal trespassers; is in constant contact with Property neighbors; has secured all windows and doors and re-secures them when vandalized; inspects the fence daily and repairs it as needed; has added security to the Property's rear wall; has installed increased security lights; has removed all landscaping where possible to reduce places where people can hide or cause damage; clears illegally dumped debris on a regular basis; has weekly landscaping maintenance scheduled; and maintains the Property in compliance with City regulations of vacant and historic properties. On July 2, 2019, LAPD performed a "sweep" of the Property, which confirmed Applicant's attentiveness to the Property's maintenance. After finding no unauthorized person on the Property, Senior Lead Officer Ian O'Brien expressed gratitude to the Applicant for its cleanup and security efforts, and spoke with

neighbors informing them that Applicant is taking a strong approach to security.<sup>47</sup> In further point of fact, the deterioration of the Property long predated the ownership of Applicant. The City's Housing Department and LADBS have nearly 40 years of complaints and citations related to the Property's deteriorated and unsafe conditions. (See Exhibit I.) To assert that Applicant is neglecting the Property in any way, let alone "demolishing" it "by neglect" and to rely on undated, misleading pictures of the Property as proof, is to intentionally mislead the APC and the public.

Mr. Bernstein's statements, and baseless allegations of Applicant's neglect, can only be understood as a post hoc rationalization of the AA's eleventh-hour decision to deny the Project. The Revised Findings and Mr. Bernstein's comments are in direct contravention of the City's own EIR; are not based on any evidence in the record, let alone substantial evidence; and must be rejected.

C. The City's determination that the Project is inconsistent with the General Plan's Conservation Element is not supported by substantial evidence, and thus is an abuse of discretion.

The AA's decision to deny the Project was based solely on the finding that the demolition of the HCM No. 1105 would violate the following provisions of the General Plan's Conservation Element:

- "Objective: protect important cultural and historical sites and resources for historical, cultural, research, and community educational purposes."
- "Policy: continue to protect historic and cultural sites and/or resources potentially affected by proposed land development, demolition or property modification activities."

Not only does the AA's denial of the Project fail to serve these General Plan goals, but it denies the benefits of the Project, which actually implement important objectives and policies of the General Plan. Further, the General Plan actually permits demolition of HCMs through compliance with the applicable procedures in the LAAC. Thus, demolition of a HCM is not a per se violation of the General Plan, and the AA must base its decision to deny the Project in substantial evidence in the record, which it has not.

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<sup>47</sup> Phone call on July 2, 2019 between G. Penini and I. O'Brien regarding the results of the sweep performed by LAPD on the same date.

California case law has established: "A project is consistent with the general plan ' "if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." ' [Citation.] A given project need not be in perfect conformity with each and every general plan policy. [Citation.] To be consistent, a [project] must be 'compatible with' the objectives, policies, general land uses and programs specified in the general plan. [Citation.]"<sup>48</sup> Determinations regarding a project's consistency with a general plan are reviewed for an abuse of discretion, and a court will reverse a local agency's determination if, based on the evidence in the record, a reasonable person could not have reached the same conclusion.<sup>49</sup>

Approval of the Project is more "compatible" with the diverse goals of the General Plan than denial. Any reasonable person reviewing the record would conclude that the Project is not only compatible with the General Plan goals, but is important to make them a reality. The Project promotes the "four detailed goals" of the Housing Element, including the goal that the City be "[a] City where housing production and preservation result in an adequate supply of ownership and rental housing that is **safe, healthy and affordable to people of all income levels, races, ages, and suitable for their various needs.**"<sup>50</sup> (Emphasis added.) Some of the policies supporting this goal are: Expand affordable home ownership opportunities (Policy 1.1.1); Facilitate new construction and preservation of a range of different housing types that address the particular needs of the city's households (Policy 1.1.3); Expand opportunities for residential development, particularly in designated Centers, Transit Oriented Districts and along Mixed-Use Boulevards (Policy 1.1.4); Encourage and incentivize the preservation of affordable housing, including non-subsidized affordable units, to ensure that demolitions and conversions do not result in the net loss of the City's stock of decent, safe, healthy or affordable housing (Policy 1.2.2); Rehabilitate and/or replace substandard housing with housing that is decent, safe, healthy and affordable and of appropriate size to meet the City's current and future household needs (Policy 1.2.3).

As described above, the Project would replace eight rental one-bedroom units with eight small lot subdivision residences, each with three bedrooms, three full and one half bathrooms, two covered parking spaces and private patio/landscaped areas.

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<sup>48</sup> *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378, as modified (Aug. 7, 2001), as modified on denial of reh'g (Sept. 4, 2001).

<sup>49</sup> *Sacramentans for Fair Planning v. City of Sacramento* (Cal. Ct. App., July 3, 2019, No. C086182) 2019 WL 3231093, at \*3; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 514; *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243; *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1338, as modified (Apr. 8, 1998).

<sup>50</sup> Housing Element, p. 6-3, available at <https://planning.lacity.org/HousingInitiatives/HousingElement/Text/Ch6.pdf> (last accessed 07/08/19).

Not only would the Project provide larger units that would accommodate families, but as a small lot subdivision, the units are priced significantly lower when compared to traditional single-family homes in the area. The Project would therefore provide opportunities for first-time homebuyers who would be able to realize the benefits of a single-family home (and full fee-simple ownership) with the conveniences and price tag of a townhouse. Being in a transit-rich neighborhood, the Project has the added benefit of providing housing near transit.

The Project would also be consistent with policies contained in the Hollywood Community Plan, a component of the Land Use Element of the General Plan. In particular, the Project would be consistent with Objective 2 as it replaces eight one-bedroom apartments with eight three-bedroom single-family residences and helps meet the demand for new housing within a Transit Priority Area. The Project is also compatible with Objective 3 as it provides additional opportunities for home ownership that is more attainable than a traditional single-family house. The Project's design would also be harmonious with the surrounding low density single-family and multi-family development and the variety of architectural styles and building heights in the area. Moreover, the Project would be consistent with Objective 6 as it would accommodate street widening if required by the City on the northern property boundary on the south side of Waring Avenue per Mobility Plan 2035. Indeed, the City's own staff report drafted in preparation for the AA hearing for the Project held in January of 2019 even indicates that the finding that the Project was consistent with the General Plan could be made. (See the AA Staff Report attached as Exhibit J.)

On the other hand, denial of the Project results in circumstances that frustrate the major goals and policies of the General Plan referenced above. Further, denial of the Project would not protect an "important" cultural site, but would actually preserve a structurally unsound, uninhabitable bungalow court, leaving a blight upon the neighborhood and depriving the community of eight revitalized, and much larger, housing units. As described above, the evidence in the record is clear: There is no feasible way to preserve the Bungalows. The EIR prepared for the Project, which relies on several reports written by experts, concludes that there is no feasible way to preserve the Bungalows. The Market Analysis (Appendix H of the EIR) shows, and the Market Analysis Peer Review (Appendix I of the EIR) confirms, that no alternative that would preserve the Bungalows is economically feasible. In fact, the Full Preservation Alternative, which the City in its Revised Findings (baldly) concluded is potentially feasible, would result in a loss of \$2,298,240 (a negative 64 percent return on cost) if operated as a rental project, and a loss of \$3,830,400 (a negative 47 percent return on cost) if sold.<sup>51</sup> The City has admitted that any other attempts to demolish the Property would be futile, since there is no project that could be feasibly built without

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<sup>51</sup> See EIR, pp. V-29 to 30.

demolition, as found in its own EIR. The denial is therefore the classic whipsaw - demolition is prohibited, yet no feasible project exists.

The City's regulations of HCMs provide a solution to this dilemma. The General Plan authorizes, and the LAAC permits, demolition of an HCM pursuant to Section 12.171.14(b), which requires the Cultural Heritage Commission to make determinations about whether to permit demolition of HCMs.<sup>52</sup> Under this Section, the Cultural Heritage Commission must base its decision on both of the following considerations: 1) a report prepared by a licensed engineer or architect regarding the structural soundness of the building and its suitability for continued use, renovation, restoration or rehabilitation; and 2) compliance with CEQA. Pursuant to Section 12.171.14(b), an EIR was prepared for the Project, which includes several reports written by experts that opine on the structural integrity of the Bungalows and the potential for preservation. The EIR, and every one of these reports, concludes that the Bungalows are "uninhabitable," "failing," "dangerous" and "dilapidated," and the any effort to preserve them would be infeasible - not just economically but physically. Despite the fact that the Project is precisely the type of project that should qualify for demolition under Section 12.171.14(b), the AA denied the Project citing only to the demolition of the HCM as reason for denial. To deny demolition of buildings that have been found by the City to be dilapidated, structurally unsafe, and incapable of preservation based on structural reports and an EIR, renders Section 12.171.14(b) meaningless.

While the City has deference in determining consistency with its General Plan, the AA must provide some reasoning based on substantial evidence in the record supporting its conclusion that the Project is inconsistent with the policies protecting HCMs because demolition of an HCM is actually permitted by the General Plan (and therefore not a per se violation of it). Thus far, the AA LOD provides only bald conclusions regarding the Project's inconsistency with the General Plan. Without substantial evidence supporting the AA's conclusions, the denial of the Project is an abuse of discretion.

D. The City's denial of the Project violates the Subdivision Map Act and is unsupported by substantial evidence because the findings are not sustained by fact or law.

The Subdivision Map Act (Gov. Code §§ 66410 *et seq.*) requires denial of a request for a vesting tentative map when the local agency makes one of the following findings:

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<sup>52</sup> See General Plan, Conservation Element, p. II-8.



- That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.
- That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
- That the site is not physically suitable for the type of development.
- That the site is not physically suitable for the proposed density of development.
- That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
- That the design of the subdivision or type of improvements is likely to cause serious public health problems.
- That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision.<sup>53</sup>

It is important to note that the Subdivision Map Act does not require an exact match between a proposed subdivision and the applicable general plan.<sup>54</sup> Rather, the subdivision map must be “compatible” with the objectives, policies, general land uses, and programs specified in the applicable plan.<sup>55</sup> The City must base any finding made to disapprove a vesting tentative map on substantial evidence in the record.<sup>56</sup>

The AA found that the Project is inconsistent with the General Plan’s Conservation Element, and thus denied the Project.<sup>57</sup> As argued above, the evidence in the record shows that the Project is compatible with the various goals and policies of the General Plan, and that the AA’s finding of inconsistency is conclusory and not based on substantial evidence - in fact they defy the evidence. The goals and policies of the General Plan Conservation Element goals cited in the AA LOD as being inconsistent with the Project call for protection of “important cultural and historical

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<sup>53</sup> Gov. Code § 66474.

<sup>54</sup> *Sequoyah Hills Homeowners Association v. City of Oakland* (1993) 23 Cal.App.4th 704, 719.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> AA LOD, pp. 51-54.

sites.” The record for the Project definitively concludes that the Bungalows are structurally so degraded that preservation is physically infeasible.<sup>58</sup> Moreover, no potential future owner would be able to preserve the Bungalows without a minimum loss of \$2,298,240 (a negative 64 percent return on cost) if operated as a rental project or \$3,830,400 (a negative 47 percent return on cost) if sold according to the Market Analysis.<sup>59</sup> Without this investment, the Property is of no economic value and actually costs Applicants considerably to maintain given the large transient population in the area willing to do whatever it takes to trespass. Accordingly, denial of the Project actually “preserves” the vacant, dilapidated Bungalows, which will remain in that state in perpetuity unless the City permits their demolition. This outcome not only does not protect “important cultural and historical sites,” but it violates many of the General Plan goals and policies. (See discussion above.)

Further, demolition of an HCM is not a per se violation of the Conservation Element of the General Plan. The LAAC permits demolition when certain criteria are met pursuant to LAAC Section 22.171.14(b). Pursuant to that Section, structural reports were prepared that show that the buildings are uninhabitable and infeasible to preserve. An EIR was prepared for the Project pursuant to Section 22.171.14(b), which concludes that there are no feasible alternatives or mitigation measures that would preserve the Bungalows. To deny demolition of buildings that have been found by the City to be dilapidated, structurally unsafe, and incapable of preservation based on structural reports and an EIR, renders Section 12.171.14(b) meaningless.

E. The City’s denial of the Project violates the Housing Accountability Act (Government Code § 65589.5)

The AA violated the Housing Accountability Act (“HAA”) by failing to inform Applicant that the Project was not compliant with applicable provisions of the General Plan, yet using inconsistency with those provisions as the sole rationale for denial; failing to make findings required for disapproval of the Project; and requiring redesign the Project.

Under the HAA, “[w]hen a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete,” a local agency cannot disapprove the project or reduce its density, unless it finds that the project would have an unavoidable impact on public health or safety.<sup>60</sup> Under the HAA, the

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<sup>58</sup> See Exhibits C-M of Applicant’s letter to Ms. Nguyen dated February 4, 2019.

<sup>59</sup> See EIR, pp. V-29 to 30.

<sup>60</sup> Gov. Code § 65589.5(j).

question of a project's compliance with objective standards is resolved under a standard of review that is highly favorable to the applicant: "a housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, or in conformity."<sup>61</sup> Moreover, the HAA requires that a city provide the applicant with written documentation identifying any provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity within 30 days of the date that the application for the project is deemed complete.<sup>62</sup>

Finally, it's important to note that the HAA does not permit a city to reject a housing project due to impacts to historic resources, but instead limits a city's ability to reject a housing project when it would result in "a significant, quantifiable, direct, and unavoidable impact" on "**public health or safety.**"<sup>63</sup> Further, under the HAA the City can only make this finding if it is "based on objective, identified written **public health or safety standards, policies, or conditions** as they existed on the date the application was deemed complete."<sup>64</sup> To disapprove a project the City would be required to further prove that there are no feasible means of addressing such public health and safety impacts other than rejecting or reducing the size of the Project.<sup>65</sup> The Legislature has explicitly declared that conditions that would lead to such adverse impacts on public health or safety would "arise infrequently."<sup>66</sup>

The City failed to inform Applicant that the Project does not comply with the City's objective standards within the statutory timeline. The City's untimely contention, as stated by Mr. Villani at the APC Hearing, that the Project fails to comply with objective standards in the General Plan's Conservation Element is irrelevant and fails to save the City's case. Because the City failed to inform Applicant within 30 days after its application was deemed complete, the Project is deemed to be "consistent, compliant, and in conformity with the applicable plan, program, ordinance, standard, standard, requirement, or other similar provision." As such, the Project cannot legally be denied on the basis that it is inconsistent with the goals of the General Plan's Conservation Element.

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<sup>61</sup> Gov. Code § 65589.5 (f)(4).

<sup>62</sup> Gov. Code § 65589.5(j)(2).

<sup>63</sup> Gov. Code § 65589.5(j)(1)(A) (emphasis added).

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> Gov. Code § 65589.5(j)(1)(B).

<sup>66</sup> Gov. Code § 65589.5(a)(3).

Further, the General Plan goals cited by the AA as inconsistent with the Project, are not “objective” and require subjective input by the Cultural Heritage Commission and its staff. The General Plan’s Conservation Element calls for protection of HCMs, however, permits their demolition under Section 12.171.14(b), which allows the Cultural Heritage Commission to approve demolition in certain circumstances. While that Section provides criteria for the basis of the Cultural Heritage Commission’s determination to approve or deny demolition of a HCM, it affords the Commission with broad deference to approve or deny the demolition. The fact that the AA denied the Project despite several structural reports and an EIR prepared concluding that the Bungalows are structurally unsound and unfit for preservation, emphasizes the subjective nature of the General Plan’s protection of HCMs. Because the goals cited by the AA as being inconsistent with the Project are not objective, they cannot be used as a basis for denial of the Project under the HAA.

The City also failed to make findings that the Project would have any negative effects at all on public health or safety - to say nothing of a “significant,” “unavoidable” impact. On the record, no such findings could be credibly made. The AA in fact made the specific finding that the Project will not result in significant public health impacts.<sup>67</sup> Further, the Bungalows, in their current state, present a significant public health and safety risk. First, prior to Applicant’s purchase of the Property, the Bungalows presented a health and safety risk to the occupants. Currently, the Bungalows are forced to remain vacant, attracting vagrants and nefarious activities. Despite Applicant’s tireless efforts, which have been commended by the neighborhood’s Senior Lead Officer Ian O’Brien, criminal activity occurs on the Property on a regular basis. The vacant Bungalows will continue to attract trespassing and other activities that place the neighborhood at risk. Therefore, denial of the Project actually presents a significant impact on public health and safety that can only be obviated by redevelopment of the Property. (See Exhibit K<sup>68</sup>). Because preservation of the Bungalows is both financially and physically infeasible (according to the City’s own EIR), the only viable redevelopment of the Property is to demolish the Bungalows and construct new buildings. Because the AA did not, and cannot, make the required findings based on evidence in the record, it may not disapprove the Project.

Finally, it is important to note that the City has signaled to Applicant that it may consider a modified project and requested that the Applicant meet with the project opponents to discuss the design and preservation options available and provide opponents with an opportunity to preserve the property through sale to a third party buyer. (See Exhibit L.) Indeed, at the APC hearing, Aviv Kleinman,

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<sup>67</sup> AA LOD, p. 53

<sup>68</sup> See email from I. O’Brien dated June 28, 2019 at 3:58 PM with the subject “FW: Major activity at bungalows must end.”

Planning Deputy for Councilmember Koretz (the Councilmember for the district) stated:

“The cultural historic monument on this site is designed as such for the preservation and maintenance of the historic resource. We cannot support its demolition without seeing a substantial design change that exhibits the location, Spanish style, character. We asked the developer to sit back at the table with the preservationist group in order to come to a decision for design or preservation of the building that is beneficial for the entire neighborhood. Thank you.”<sup>69</sup>

This direction from the City constitutes impermissible conditions of approval prohibited by the HAA as do terms of the settlement agreement (see Exhibit L) (without which the City would not consider the modified project).<sup>70</sup>

It is important to note that in any litigation, it would be City, not the challenger, who would bear the burden of proof, and the recent reforms to the HAA heighten the City’s burden, and significantly increase the City’s monetary liability for violating the HAA. Effective January 1, 2018, any local government that disapproves a housing development project or reduces its density must now meet the more demanding “preponderance of the evidence” standard – rather than the more deferential “substantial evidence” standard.<sup>71</sup> Moreover, the Legislature has instructed courts to resolve all doubts in favor of promoting, rather than obstructing, the production of housing.<sup>72</sup> The HAA now makes attorney’s fees presumptively available to prevailing plaintiffs.<sup>73</sup> Under the revised HAA, if a local government fails to prove that it had a valid basis to reject a project, the court must issue an order compelling compliance with the HAA, and failure to comply with such an order within 60 days must be fined a **minimum of \$10,000 per housing unit** and may also may be ordered directly to approve the project.<sup>74</sup> If a local jurisdiction acts in bad faith

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<sup>69</sup> While not enshrined in the LAMC, the reality is that if the Councilmember for the district does not support a project, then the balance of the Council likely will not support it either. As a result, Owner had little choice to redesign the project should it want project approval, even though small lot subdivisions do not regulate aesthetic design.

<sup>70</sup> Mr. Kleinman’s comments violate the law because the City has no jurisdiction over the architectural style of Small Lot Subdivisions. The City only has authority over design standards (i.e. setbacks, height, density, etc.). Thus, any decision based solely on style is impermissible.

<sup>71</sup> Gov. Code § 65589.5 (j)(1).

<sup>72</sup> See Gov. Code § 65589.5(a)(2)(L) (“It is the policy of the state that. . . [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing”).

<sup>73</sup> Gov. Code § 65589.5(k)(1)(A).

<sup>74</sup> Gov. Code § 65589.5(k) (emphasis added).

when rejecting a housing development, the applicable fines must be multiplied by five.<sup>75</sup> For this small lot subdivision project of eight units, the applicable fines would be between \$80,000-\$400,000, all before considering the City's obligation to pay the attorney's fees if any plaintiff forced to bring suit to enforce the HAA.

F. The City's denial of the Project violates the City's obligation to meet its Regional Housing Needs Allocation (Government Code §§ 65580 et seq.).

Denial of this Project, which would replace eight vacant dilapidated one-bedroom housing units that have been off the market for years due to the unsafe conditions, with eight new three-bedroom units based on no substantial evidence is a violation of state housing law.

California law requires that the City implement a plan under its Housing Element that accounts for housing production that would meet the regional housing needs allocation ("RHNA") as determined by the state Department of Housing and Community Development ("HCD").<sup>76</sup> For the 2014-2021 RHNA period, HCD allocated 82,002 new residential units to the City: 10,213 Extremely low income households (≤ 30% Average Median Income ["AMI"]), 10,213 Very low income households (31-50% AMI), 12,435 Low income households (51-80% AMI), 13,728 Moderate income households (81-120% AMI), and 35,412 Above moderate income households (> 120% AMI).<sup>77</sup> This represents one-fifth of the RHNA for the SCAG region, which encompasses of Imperial, Los Angeles, Orange, Riverside, San Bernardino and Ventura counties.

Large households have special housing needs due to the lack of adequately sized, affordable housing. The City's Housing Element identifies large households (i.e., those with 5 or more persons) as having special housing needs because they face greater challenges than the general population in finding housing. While it may be expected that a larger household would generate higher income, this is not the case. For example, the Housing Element reports that the median income of a two-person household is about \$55,000, compared to \$49,000 and \$51,000 for 5-and-6-person households, respectively.<sup>78</sup> This emphasizes the affordability crisis for large families, as identified in the City's Housing Element. The City promotes infill development on smaller sites through its Small Lot Ordinance, which has been used to provide

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<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> See Gov. Code § 65583.

<sup>77</sup> City Housing Element (2013-2021), Chapter 1, Table 1.29, p. 1-79.

<sup>78</sup> City Housing Element (2013-2021), p. 1-25.

affordable home ownership. The Small Lot Ordinance allows fee-simple, structurally independent infill housing on lots as small as 600 square feet.

The Project, a small lot subdivision, would serve the City's goal of providing larger units by providing eight much larger three-bedroom units than the now vacant units. Moreover, this is not a matter of replacing eight existing units with eight units; the one-bedroom units cannot be rehabilitated or placed back on the market. Thus, if the City does not approve the Project, it would actually be condoning the loss of eight units. Accordingly, the Project would help to alleviate the housing shortage of a special needs population identified in the City's Housing Element. The Housing Element reports that even with the anticipated new constructions the City would fall short of its RHNA by 22,443 units. Denial of the Project is contrary to the goals of the Housing Element related to meeting the City's RHNA.

G. Denial of the Project is a prima facie case of the City temporarily and permanently taking Applicant's private property without just compensation.

Although the City may regulate the use of real property through its police powers, when such regulations goes "too far", as occurred here, it constitutes a taking of property without just compensation in violation of the federal and state constitutions.<sup>79</sup> Based on all of the City's actions described above and throughout the administrative record for this case and the HCM case, the City has effected a permanent and temporary taking of the Property.

Takings jurisprudence is anchored in the frequent observation of courts that the inquiry as to whether a particular restriction will be rendered a taking requiring government payment depends, "largely 'upon the particular circumstances [in that] case.'"<sup>80</sup> The United States Supreme Court has defined a takings inquiry as, "an ad hoc, factual inquiry," and has identified the following factors of particular significance. One factor is the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations; and 2) the character of the governmental action.<sup>81</sup> However, two categories of regulations have been identified as constituting a "per se" takings that requires the government to pay just compensation without a fact-based inquiry: 1) regulations that amount to a physical invasion; and 2) regulations that deny all economically beneficial or productive use of land.<sup>82</sup> The City's designation of the Property as an HCM, and subsequent refusal to permit demolition

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<sup>79</sup> U.S. Const. amend. V; C.A. Const. art. I sec. 19; *Pennsylvania Coal Company v. Mahon* (1922) 260 US 393, 415.

<sup>80</sup> *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 124.

<sup>81</sup> *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 124.

<sup>82</sup> *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015.

of the Bungalows despite substantial evidence supporting demolition pursuant to LAAC Section 12.171.14(b) has gone too far and constitutes a “per se” takings by requiring physical invasion of the Property and by depriving it of all economically beneficial and productive use.

First, given all of the discussion above about the City’s actions, the City has undoubtedly interfered with Applicant’s distinct investment-backed expectations. The United States Supreme Court has observed that a, “land use restriction on real property may constitute a taking if it has an unduly harsh impact upon the owner’s use of the property.”<sup>83</sup> There is no question that the City’s actions in relation to the Property have had an unduly harsh impact on Applicant. In fact, the City’s actions have deprived Applicant of all economically beneficial and productive use. To illustrate this point, by requiring preservation of the Bungalows, the City is requiring Applicant suffer a minimum loss of \$2,298,240 (a negative 64 percent return on cost) if operated as a rental project or \$3,830,400 (a negative 47 percent return on cost) if sold according to the Market Analysis.<sup>84</sup> Without this considerable investment, there is no viable use of the Property. The Property cannot be converted to another use; it cannot be sold without considerable loss despite a booming real estate market, solely because of the City’s designation of the Property as a HCM (which, again, took place after Applicant’s purchase of the Property and after considerable investment into the Project) and subsequent refusal to permit demolition of the Bungalows.

Not only can Applicants now make no economic use of the Property, each day the Bungalows sit vacant they cost Applicant considerably given the large transient population in the area willing to do whatever it takes to trespass. As previously stated, Applicant is present on the Property virtually every day and does not hesitate to call LAPD when there are illegal trespassers; is in constant contact with Property neighbors; has secured all windows and doors and re-secures them when vandalized; inspects the fence daily and repairs it as needed; has added security to the Property’s rear wall; has installed increased security lights; has removed all landscaping where possible to reduce places where people can hide or cause damage; clears illegally dumped debris on a regular basis; has weekly landscaping maintenance scheduled; and maintains the Property in compliance with City regulations of vacant and historic properties. These efforts cost Applicant considerably, both financially and in terms of personal commitment. Because the City’s actions eviscerate all economically beneficial and productive use of the Property, they constitute a “per se” takings and the City must compensate Applicant for preservation of the Property or alternatively approve demolition of the Bungalows.

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<sup>83</sup> *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 127.

<sup>84</sup> See EIR, pp. V-29 to 30.



Second, the City's actions cannot be described in any other way than akin to "physical invasion," and therefore constitute a "per se" takings on two separate grounds. The United States Supreme Court has held that a taking may more readily be found when the interference with property can be characterized as a physical invasion by government.<sup>85</sup> The City is requiring preservation of the dilapidated, uninhabitable Bungalows, which attract trespassers and other nefarious activities. If preservation of the Bungalows was physically and financially feasible, Applicant would not hesitate in doing so. However, as concluded in the numerous structural reports and peer reviews conducted for the Project, and the Project's HRA - all of which were reviewed and authorized by the City itself - the Bungalows cannot be preserved without substantial investment. Accordingly, Applicant, as owner of the Property, wishes to demolish the Bungalows and redevelop the Property. By denying this request, the City is essentially requiring the presence of the Bungalows on the Property without the consent of the Property owner. This is undeniably a physical invasion of the Property.

The City's refusal to permit demolition of the Bungalows pursuant to LAAC Section 12.171.14(b) results in the Bungalows physical occupation of the Property and requires that Applicant maintains the Bungalows on the Property despite economic hardship that is currently taking place and that will undeniably continue to take place. Because the City's actions amount to a physical invasion of the Property and result in deprivation of economically beneficial and productive use of the Property, they constitute an unconstitutional taking in violation requiring the City to pay just compensation for preservation of the Bungalows or to permit their demolition.

The City's continued roadblocks to the processing of any of Applicant's proposals has also resulted in a temporary taking of the Property. These delays are discussed in great detail above, and despite the City's assurances in the settlement agreement in the previous lawsuit, the City has neither processed the Project in good faith, and it has made every effort to delay the processing of the Project, costing the Applicant additional money each day. Indeed, the City did not even issue the LOD in a timely manner or in accordance with its own code (much less the permit streamlining act). The LAMC requires that a letter of determination be issued within "within 50 calendar days after the filing of the Map with the City." (LAMC 17.06.) The application post HCM designation was filed on April 18, 2016. The City published the Final EIR on January 4, 2019 (i.e. it took the City almost 3 years to complete an EIR for an eight unit project). The AA hearing occurred on January 16, 2019. The City issued its LOD on April 17, 2019. By any account, the City failed to comply with its own timelines, and given the history of this Property and the City's constant

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<sup>85</sup> *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 124.

roadblocks, the delay is anything but purposeful and effected a taking of the Property.

The City's findings that the sole reason for the denial of the project is that the Project is inconsistent with the General Plan's Conservation Element make clear that no project that involved demolition of the existing structures would ever be approved. As discussed above, the City is prioritizing "preservation" at any cost, even though preservation is not feasible. Thus, it would be futile for Applicant to seek approval of a different project, and its takings claim is ripe for adjudication.

H. The City's denial of the Project is a violation of Applicant's substantive and procedural due process rights under the federal and state constitutions.

The United States Supreme Court has explained, "[t]he touchstone of due process is protection of the individual against arbitrary action of government."<sup>86</sup> Generally, land use decisions are subject to rational basis review, under which substantive due process requirements are met if the government action is rationally related to a legitimate governmental purpose.<sup>87</sup>

As discussed in great detail above, the evidence in the record supports demolition of the Bungalows as they are dilapidated and cannot be feasibly preserved. Numerous reports prepared by experts show the severe structural issues with the Bungalows and conclude that the Bungalows cannot be physically or financially preserved. These reports have been validated through peer review prompted by the LA Conservancy and Project opponents. The City had confidence enough in these reports to incorporate them into the City's own EIR for the Project, which concludes that there are no Project alternatives or mitigation measures that could cause the preservation of the Bungalows to become feasible.

Based on the evidence in the record, all of which has been reviewed and validated by the City, there is no way to feasibly preserve the Bungalows. Accordingly, denial of the Project will result in preservation of a dilapidated, structurally unsound, vacant bungalow court that attracts trespassers and other illegal activities, the prevention of which costs both Applicant and the City valuable resources. Because the Bungalows cannot be feasibly preserved, there is no conceivable relation between the City's goal of preserving HCMs and its prohibition of demolishing the Bungalows. Therefore, the denial of the Project is a violation of

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<sup>86</sup> *County of Sacramento v. Lewis* (1998) 523 US 833, 845, (quoting *Wolff v. McDonnell* (1974) 418 US 539, 558).

<sup>87</sup> *Kawaoka v. City of Arroyo Grande* (9th Cir 1994) 17 F.3d 1227, 1234.

Applicant's substantive and procedural due process rights protected by the federal and state constitution.

I. The City's denial of the Project is a violation of Applicant's equal protection rights under the federal and state constitutions because, without limitation, every similarly situated small lot subdivision has been approved.

The City has treated the Project differently than other similarly situated projects that involve demolition of bungalow courts, or that involve SLS tract map cases. (See Exhibit M.) When economic regulations are involved, as is the case with most land use regulations, legislative determinations of classification will be upheld as long as they have a rational basis.<sup>88</sup>

The City has approved the following demolitions of bungalow courts:

- 728 N. Sweetzer Avenue: Bungalow court demolished and replaced with condominium development.
- 424 N. Norton Avenue: Bungalow court demolished and replaced with by-right apartment building.
- 412 N. Norton Avenue: Bungalow court demolished and replaced with by-right apartment building.
- 858 N. Sycamore Avenue: Bungalow court (Spanish Revival) demolished and replaced with multi-parcel luxury complex.
- 1304 N. Mansfield Avenue: Bungalow court demolished and replaced with small lot subdivision.
- 1621 N. Gower Street: Bungalow court demolished and replaced with parking lot.

The City's position is that the designation of the Bungalows as an HCM distinguishes the Project from those listed above. However, as discussed previously at length, the City's refusal to allow demolition of the Bungalows is contrary to the evidence set forth in the record for the Project and is not rationally related to the

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<sup>88</sup> *Russ Bldg. Partnership v. City & County of San Francisco* (1987) 199 Cal.App.3d 1496, rev'd on other grounds (1988) 44 Cal.3d 839.

preservation of HCMs as the Bungalows cannot be feasibly preserved. Accordingly, the arbitrary classification of the Project is a violation of Applicant's right to equal protection under the federal and state constitutions.

### III. PRA Requests

Applicant has made numerous requests for public records related to the Project under the Public Records Act ("PRA"), including requests dated December 11, 2018 to the Department of Neighborhood Empowerment (see Exhibit N); May 3, 2019 to Planning (see Exhibit O); May 29, 2019 to Planning (see Exhibit P); and two dated June 27, 2019, one to Planning (see Exhibit Q) and one to LADBS (see Exhibit R).<sup>89</sup>

In response to our robust May 29 request regarding the Revised Findings and the Full Preservation Alternative, the City produced a mere two records: 1) an email sent by Mr. Villani, to the APC and the APC Clerk on the day of the APC Hearing for the Project with the attached report with the revised findings; and 2) a quick email exchange between Ms. Paster and Mr. Villani the day after the APC Hearing for the Project regarding her request for a copy of the revised findings.

The stated reason for omitting virtually all records covered by our request, was that: "...some of the records are being withheld due to being exempt from production under California Government Code section 6254(k) because they are protected attorney-client communication and/or attorney work-product." However, this reasoning certainly could not cover the withholding of all the missing records. We know for a fact that records withheld within the scope of our requests cannot be covered by either the attorney-client or the work-product privilege. We know for a fact that responsive records were improperly withheld because there are numerous email and text communications to and/or from City staff that include Applicant and members of its team, including Guy Penini, Matthew Jacobs and Ms. Paster, that are not included in the records provided. Because these communications were not work product and were not limited to an attorney and his/her client, they could not possibly be protected by the stated reason.

With this letter, we renew our May 29 and June 27 requests, pursuant to the PRA, for public records created by, retained by or in the custody of the City Department of City Planning, including but not limited to all records described above and in our initial May 29 requests and subsequent June 27 request. Should it be determined that additional documents exist but are exempt from production, please

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<sup>89</sup> Government Code §§ 6250 *et seq.*

provide a record of the exempted documents, identifying the reason for their exemption.

Applicant now requests access to the following records from Council District 5 be provided and be included in the record for this case:

- Any and all records, including, without limitation, documents, communications, emails, text messages<sup>90</sup> and phone messages, relating to or references the Project, the Applicant, the Updated Findings and/or the Alternative 2.

Applicant further requests that the following records are included in the administrative record for the Project: 1) records responsive to the instant request in this letter; 2) all records responsive to previous requests made on May 29 and June 27, including those that were improperly excluded from the City's previous responses; and 3) the entire record for the HCM proceeding for the Bungalows be included in the record.

Note that some of the City's communication related to the Project was conducted through private phone numbers and private email addresses, none of which was included in the City's previous responses. As such, we reiterate that our requests covers any email or text messages in the City's possession, or which should have been kept in the normal course of business by the City, to or from a private device or email address, relating to City business, per *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1320-22 and *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625. Definitions of the terms "documents", "communications", and "emails and texts" is provided below.

#### IV. Additional Requests for the Record

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<sup>90</sup> Note that some of the City's communication related to the Project was conducted through private phone numbers and private email addresses, none of which was included in the City's previous responses. As such, we reiterate that our requests covers any email or text messages in the City's possession, or which should have been kept in the normal course of business by the City, to or from a private device or email address, relating to City business, per *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1320-22 and *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625. Definitions of the terms "documents", "communications", and "emails and texts" is provided below.

In addition to the information already in the record for this matter, we also request that any and all documents<sup>91</sup>, communications<sup>92</sup>, and emails and texts<sup>93</sup> related to CHC-2015-3386-HCM/ ENV-2015-3387-CE and VTT-73442-SL/ENV-2015-1246-EAF be included in the record for this case.

**V. Conclusion**

For all of the foregoing reasons, this appeal should be granted. If the City fails to do so, Applicant will pursue any and all legal remedies afforded to it under law, including a lawsuit against the City. We will also pursue the claims stayed in the previous litigation between the Applicant and the City of Los Angeles. We reserve any and all rights related to this appeal and future lawsuits.

Sincerely yours,



ELISA L. PASTER  
of GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP

ELP:sd  
Enclosures

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<sup>91</sup> For purposes of this request for the record, the term "documents" includes all documents, electronically stored information, and tangible things, including without limitation all writings (as defined in Section 250 of the California Evidence Code) and all other means of recording information, whether written, transcribed, or in any other way produced, reproduced, or recorded, and including but not limited to computer-sorted and computer-retrievable information, and any copies and duplicates that are marked with any notation or annotation or otherwise differ in any way from the original. Each draft, annotated, or otherwise non-identical copy is a separate "document" within the meaning of the term.

<sup>92</sup> For purposes of this request for the record, the term "communications" includes any act, action, oral speech, written correspondence, contact, expression of words, thoughts, ideas, transmission or exchange of data or other information to another person, whether orally, person-to-person, in a group, by telephone, letter, personal delivery, telex, email, facsimile, text message, instant message, recorded message or any other process -electronic or otherwise. All such communications in writing shall include, without limitation, printed, typewritten, handwritten, electronic, or other "documents."

<sup>93</sup> For purposes of this request, the term "emails" and "text messages" includes any email or text messages in the Board's or the Port's possession, custody, or control, or which should have been kept in the normal course of business by the City, to or from a private device or email address, relating to Board or Port business, per *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal.App.4th 1306, 1 320-22 and *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 625.

List of Exhibits

- **Exhibit A** - AA LOD dated April 17, 2019
- **Exhibit B** - APC LOD dated July 9, 2019
- **Exhibit C** - Demolition permit issued by City to Applicant on September 9, 2015
- **Exhibit D** - Orders to comply issued on September 11, 2015 and associated fines
- **Exhibit E** - Selected documents from the HCM process and lawsuit
- **Exhibit F** - Revised Findings presented at the May 28, 2019 APC Hearing
- **Exhibit G** - Letter from Applicant to Mindy Nguyen, Director of the AA, dated February 4, 2019, including attachments
- **Exhibit H** - Email dated January 5, 2016 at 4:25 PM from A. Fine with the subject "RE: Edinburgh Bungalow Court" and forwarded to K. Bernstein on January 14, 2016 at 12:49 PM
- **Exhibit I** - Forty years' worth of complaints from Housing Department and LADBS, and citations related to the Property's deteriorated and unsafe conditions
- **Exhibit J** - AA staff report for January 16, 2019 AA hearing
- **Exhibit K** - Email from I. O'Brien dated June 28, 2019 at 3:58 PM with the subject "FW: Major activity at bungalows must end"
- **Exhibit L** - Settlement agreement and related emails
- **Exhibit M** - List of all SLS tract map cases
- **Exhibit N** - PRA request to the Department of Neighborhood Empowerment by Applicant dated December 11, 2018
- **Exhibit O** - PRA request to Planning by Applicant dated May 3, 2019, and response dated May 17, 2019
- **Exhibit P** - PRA request to Planning by Applicant dated May 29, 2019, and responses dated June 19, 2019
- **Exhibit Q** - PRA request to Planning by Applicant dated June 27, 2019, and response dated July 12, 2019
- **Exhibit R** - PRA request to LADBS by Applicant dated June 27, 2019, and responses dated July 9, 2019 and July 11, 2019