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THE PUBLIC INTEREST LAW OFFICE OF THE LOS ANGELES COUNTY AND BEVERLY HILLS BAR ASSOCIATIONS
The Southern California Affiliate of The Lawyers' Committee for Civil Rights Under Law

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VIA EMAIL

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Re: Lorena Plaza Project, Council File CF 16-0503, Case No. ENV-2014-2392-MND-1A
PLUM Committee Hearing May 16, 2017

Dear Ms. Kaufmann-Macias:

We represent A Community of Friends ("ACOF" or the "Applicant") in connection with the Lorena Plaza Project. We write specifically with regards to the California Environmental Quality Act ("CEQA") Appeal filed on April 20, 2016 (the "Rosado Appeal" or the "Appeal") by Pedro A. (Tony) Rosado and Marlene Rosado (the "Appellants" or the "Rosados"), whose parent owns a marketplace with restaurants and bars called the El Mercado de Los Angeles ("El Mercado"). The Rosado Appeal challenges the City's environmental clearance for an affordable housing development for veterans and formerly homeless individuals and families affected by mental illness[1], which ACOF intends to construct (the "Project") at the northeast corner of East 1st Street and Lorena Street (the "Project Site") in the Boyle Heights community.[2] After a delay of over one year, the City Council's Planning and Land Use Management Committee has scheduled the Rosado Appeal for hearing on May 16, 2017.

As set forth below, among other reasons, the Rosado Appeal must be denied because it does not meet even the minimum procedural requirements for a CEQA appeal under the City's own CEQA appeal form and policies. Appellants failed to appeal the Director's determination to the City Planning Commission, thereby failing to satisfy the requirement stated on the City appeal application that the determination must be "not further appealable." Further, the Rosado Appeal was not filed within the

[1] 24 of the units will be "supportive housing" as defined in Cal Gov't. Code section 65582 (g). ("Supportive housing" means housing with no limit on length of stay, that is occupied by the target population, and that is linked to an onsite or offsite service that assists the supportive housing resident in retaining the housing, improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community.)

[2] The Rosado Appeal (which was assigned Council File No. 16-0503 and Case No. ENV-2014-2392-MND-1A) challenges the Mitigated Negative Declaration (ENV-2014-2392-MND) for the Project. The MND was adopted by the Director of Planning on March 2, 2016. The property address for the Proposed Project is 3401-3415 E. 1st Street and 116-126 N. Lorena Street. The adjacent El Mercado property is located at 3425 E. 1st Street.

time period stated on the City appeal application of "within the next 5 meeting days of the City Council", and it was not filed within the applicable time period for an appeal of a density bonus determination.

Additionally, for the reasons stated below, a decision to hear and grant the Rosado Appeal could effectively impede the Project to the point where it may be infeasible. Among other reasons, granting the Rosado Appeal could effectively disapprove the Project and require ACOF to restart the environmental review process, require the City to produce a new environmental document, and push the project timeline such that essential funding might be lost for the Project.

The record is clear that the primary motivation of the Rosados in filing their Appeal is their discriminatory bias against individuals with disabilities. As described herein, given the defects of the Appeal, among other reasons, any decision by the City to hear and grant the Rosado Appeal would likely conflict with state and federal laws protecting housing for people with disabilities, including the federal Fair Housing Amendments Act (42 U.S.C. section 3601 et seq.) the California Fair Employment and Housing Act (Cal. Govt. Code section 12955 et seq.), California's Housing Accountability Act (Cal. Govt. Code section 65589.5), California's Discrimination Against Affordable Housing law (Cal. Govt. Code section 65008), and California's State Housing Element Law (Cal. Govt. Code section 65583 et seq.), among other laws. Any action to hear and grant the Rosado Appeal may also expose the City to civil rights liability (42 U.S.C. section 1983).

I. Background

A. Metro Request for Proposal Is Awarded to ACOF in March 2013

ACOF is a leading non-profit housing developer with a mission to end homelessness through the provision of quality permanent supportive housing, with a focus on building housing for persons with special needs. ACOF has developed 45 multifamily properties and now operates over 1,580 units of affordable housing in Los Angeles and Orange County. In addition to developing and managing the multifamily properties, ACOF provides comprehensive services to the tenants it serves.

In October 2005, Metro issued a Request for Proposals for the development of five Metro sites along the Gold Line, including the Project Site. Metro has owned the Project Site since before the construction of the Gold Line. As part of the Request for Proposals, Metro proposed to ground lease all of the sites to the developers selected. ACOF responded with a proposal to develop a mixed use project on the Project Site consisting of 43 units and 26,000 square feet of ground floor retail space. The ACOF proposal stated that the proposed project would be an affordable rental housing project with 22 units reserved for tenants with special needs.

In January 2007, Metro Board approved the execution of an Exclusive Negotiating Agreement (the "ENA") with ACOF to develop the Project Site. Due to various factors, including the fact that the Project Site was used as a staging area for the Gold Line construction, the ENA was not executed at that time. By the time the Project was ready to proceed, the buildable Project Site had decreased in size and the economy had experienced a downturn. As such, the Project scope was revised to 49 units and 5,000 square feet of retail with 50% of the units reserved for individuals with special needs. Staff brought the revised scope to the Metro Board to confirm approval and the Metro Board held a public hearing on March 28, 2013 regarding the staff recommendation.

At the hearing, one of the Appellants testified against the ACOF proposal and demonstrated clear discriminatory animus against people with mental disabilities.

One of the Appellants, Tony Rosado, testified to the Metro Board:

> "I'm here to share my concerns on behalf of El Mercado de Los Angeles which is located about 20 feet from the proposed project location. First of all, I'm aware that this land was taken by eminent domain to be used for transportation purposes and while mixed use housing and retail is a violation of that agreement, that's not our main concern. Our main concern is with the aspect of the housing that has to do with mentally ill people, and, while we do sympathize with the needs of mentally ill patients, we're concerned with neighbors and children and families that come to El Mercado that could be at risk with said patients in this facility."

Tony's father, Pedro Rosado, who owned El Mercado until his death in 2015, also testified against a project for people with mental disabilities, directing his comments to Los Angeles City Councilman Jose Huizar, who at the time was a member of the Metro Board of Directors:

> "I am very appalled how people are not mentioning that in this facility they are trying to bring mentally ill people to put our children at risk. Why are you hiding it? Please! El Mercado, which I run, we come about - they come about 30,000 people a week or more and no less than 30 or 40% of them are children. I am next to this proposed facility. So, our children will be at high risk with mentally ill people only 10 feet away. Why are you people hiding it and call it only affordable housing? I respectfully ask Councilman Huizar, please, take care of our children. Be responsible. Do not put our children at risk. Please!"

Despite the Rosados' opposition, the Metro Board voted to award the ENA to ACOF. The vote was 10 to 1 with Councilman Huizar casting the only vote against awarding the ENA to ACOF. Councilman Huizar's substitute motion to reissue the Request for Proposal failed by a vote of 8 to 2. Consequently, ACOF and Metro entered into the ENA, which gave ACOF exclusive negotiating rights with Metro for the development of the Project Site. The ENA provides that, as a condition to entering into the ground lease with Metro, ACOF was required to obtain all necessary land use approvals for the Project.

B. Community Outreach Culminated in Support from Neighborhood Council in July 2015

Following the award of the ENA, ACOF conducted extensive community outreach[3] to address the concerns of the community and to gain support for the Project. These outreach efforts culminated in a 15 to 1 vote in support of the Project at the Boyle Heights Neighborhood Council meeting on July 22, 2015.

C. Project Modifications

[3] 14 meetings total (three with the community, and an Open House, presentations at six other community meetings, and discussion of project at 4 neighborhood council meetings).

ACOF made substantial changes to the Project based upon community input and to respond directly to a number of concerns expressed by the Rosados. In meetings between the Rosados and ACOF, the Rosados expressed concern that a residential development next to their restaurants and bars in the El Mercado property could generate complaints that might adversely affect their ability to operate. To address those concerns, ACOF made significant modifications to the Project to minimize any impacts from El Mercado's operations. These modifications include:

(1) eliminating windows on the side of the Proposed Project facing El Mercado,

(2) increasing sound reduction throughout the building design to reduce sound levels at the interior of residential units,

(3) setting back the building at an angle to allow for customer visibility to El Mercado,

(4) widening the alleyway between the Project Site and El Mercado to give El Mercado the option of two lanes in the alleyway,

(5) committing to commercial uses in the Project that minimize parking impacts in the area (e.g. childcare, small fitness center, etc.), and

(6) agreeing to issue parking stickers for tenants with cars so El Mercado can identify and tow them if they are parked on the El Mercado property.

D. ACOF's Application for Land Use Approvals for a By Right Project Submitted in July 2014

On July 3, 2014, ACOF began the application process for the Project with the Los Angeles Department of City Planning by submitting the Initial Study (as requested by Planning) as to the environmental impacts of the Project. On May 27, 2015, ACOF submitted a Master Land Use Application to the Planning Department for the Project. The application requested approval of an approximately 90,000 square foot mixed-use building consisting of forty-nine (49) units, which will be restricted as affordable rental housing to all tenants (48 restricted affordable units of which half will be reserved for veterans, and 24 units of permanent supportive housing[4] for formerly homeless individuals and families affected by mental illness (which can include veteran households) and 1 on-site manager's unit). The Project includes approximately 10,000 square feet of ground floor commercial uses.

The Project satisfied all of the major requirements of the Zoning Code except for two minor aspects, discussed below. Part of the Project Site is zoned R-3 and another part C-2. Both zones permit residential units and Project's retail space is located in the C-2 zone. The maximum density on the Project Site (without a density bonus) is 106 units, but the Project proposed only 49 units, less than half of that maximum density. With the full density bonus, 143 units could have been developed on the Project Site. The Project provides 66 parking spaces, which exceeds the 58 parking spaces required by

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the Zoning Code (20 parking spaces for the commercial space plus 38 parking spaces for the residential units).

Because of the split zoning on the Project Site, the Project required approval of two minor exceptions to City Zoning Code requirements: first, to allow a six foot increase in height on the C-2 lots (to 70 feet instead of 64 feet) and the R-3 lots (to 51 feet instead of 45 feet). In addition, the split zoning also necessitated averaging of floor area, density parking and open space across the entire Project Site and to permit vehicle access from a less restrictive C-2 zone to a more restrictive R-3 zone. Because the Project was proposed as affordable housing with restricted rents, it was eligible to receive zoning incentives pursuant to the City's density bonus ordinance (LAMC Section 12.22.A.25) and the State's density bonus law (Cal. Govt. Code Section 69515). Accordingly, the application was submitted under the density bonus provisions of the Zoning Code and requested the two incentives. The Project did not request additional residential units as part of the density bonus request, did not request any waivers of development standards, and no further entitlements were required for the Project.

Under the City's density bonus and the State's density bonus law, the City is required to approve ACOF's requested incentives unless it makes one of two specific written findings, neither of which are applicable to the Project. Further, the fact that the development qualifies for a density bonus cannot be used to subject ACOF's project to discretionary review. (Cal. Gov't Code §§ 65915(f)(5). Similarly, granting a concession or incentive under State density bonus law cannot be interpreted to require a discretionary approval. (Cal. Gov't Code §§ 65915(j)(1)("The granting of a concession or incentive shall not require or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, study, or other discretionary approval. For purposes of this subdivision, "study" does not include reasonable documentation to establish eligibility for the concession or incentive or to demonstrate that the incentive or concession meets the definition set forth in subdivision (k). This provision is declaratory of existing law.")

Accordingly, the Project is essentially a "by right" project – one that does not require any discretionary approvals. Given these facts, it appears that ACOF's Project was subjected to a level of approval (the requirement of an MND) that is in fact prohibited by State density bonus law. Regardless, ACOF proceeded in good faith with the environmental review process.

E. The Director's Determination Issued March 2016 and Was Never Appealed.

On March 2, 2016, the Planning Director issued the determination letter approving the requested incentives and adopting the Mitigated Negative Declaration ("MND") and Mitigation Monitoring Program in accordance with the California Environmental Quality Act ("CEQA").

The determination letter commenced a 15 day period during which the owner of El Mercado could appeal the decision to the City Planning Commission. Neither the owners of the El Mercado (shown in the title records to be Pedro M. Rosado and Mercedes L. Rosado) nor the Appellants (their children Pedro A. (Tony) Rosado and his sister, Marlene Rosado) appealed the Director's determination. No other party appealed the Director's determination. Accordingly, on March 21, 2016, ACOF filed a Notice of Determination with the Los Angeles County Recorder, which started the 30 day statute of limitations period to commence a lawsuit under CEQA. However, because the Director's determination was not appealed by any person to the City Planning Commission, a lawsuit

would be barred under CEQA because any plaintiff would have failed to exhaust his or her administrative remedies.

F. No Timely Appeals Filed; Rosado Appeal Should Have Been Rejected; Instead, Hearing on the Appeal was Unjustifiably Delayed for Over a Year.

On April 20, 2016, Pedro A. Rosado (Tony Rosado) and Marlene Rosado filed a CEQA appeal on the Planning Department's Appeal Application form. The reasons stated in the Rosado Appeal consist of nothing more than 10 conclusory, general, unsubstantiated and untrue statements. For example, the Rosado Appeal states: "The project conflicts with applicable land use plans, policies and regulations" *without listing* any such contradictory plans, policies or regulations. It also states general, conclusory, and unsubstantiated and untrue statements that "The project brings too much density to an already dense area" and "The project does not encourage healthy, diverse areas".

ACOF responded to the Rosado Appeal by letter dated April 25, 2016 from its land use consultant Craig Lawson & Co., LLC to the City Clerk. The letter stated four separate reasons why the Rosado Appeal was legally deficient and should be rejected:

(1) The Appellants failed to appeal the Director's determination to the City Planning Commission, thereby failing to satisfy the requirement stated on the City appeal application that the determination must be "not further appealable."

(2) The Rosado Appeal was not filed within the time period stated on the City appeal application of "within the next 5 meeting days of the City Council" (emphasis in the original). Under CEQA, the City is permitted to establish its own procedures governing a CEQA Appeal and the 5 Council meeting day time limit is clearly established on the appeal form submitted by the Appellants. (See CEQA Guidelines Section 15074(f)). In response to a 2016 Public Records Act request submitted to the City to disclose "all written policies, directives, memoranda, . . . interpretations regarding the City's policies, procedures and practices regarding" the appeal period for CEQA appeals, the City Planning Department provided a December 5, 2005 Memorandum by then Deputy Director Robert Sutton (See Exhibit 3 of the April 25, 2016 letter from Craig Lawson). The Memorandum states that the CEQA appeal must be filed "within the next five meeting days of the City Council" and "[A]ny appeal not filed within the specified time will not be considered." Although the City's Public Records Act response referred to the Memorandum as "outdated" or "temporary", the City did not provide any information suggesting that the Memorandum has been revoked or rescinded or that the five City Council meeting period policy was formally changed by the City. Additionally, time periods for filing appeals under the LAMC are strictly construed by the City of Los Angeles. For example, appeals of density bonus determinations to the City Planning Commission are subject to LAMC Section 11.5.7.C.6(a), which provides "[A]ny appeal not filed within the [applicable] period shall not be considered by the [City] Planning Commission." In addition, appeals to the City Council of certain decisions are handled pursuant to LAMC Section 12.24.I.2, which provides "Any appeal not filed within the [applicable] period shall not be considered by the appellate body [the City Council]". Furthermore, the time periods to challenge an adopted Mitigated Negative Declaration are strictly enforced under CEQA.[5] Because the City must follow its own written policies (i.e., the time periods

[5] CA Public Resources Code Section 21167.2

established in the December 5, 2005 Memorandum and the Appeal Application form), the Rosado Appeal should have been rejected at the time it was filed.

(3) The City's Zoning Code limits appeal of Director's determinations of density bonus incentives to "any owner or tenant of a property abutting, across the street or alley from, or having a common corner with the subject property aggrieved by the Director's decision." The Rosado Appeal was filed on April 20, 2016 by Pedro A. Rosado (Tony) and Marlene Rosado in their individual capacities, and they have not provided any documentation that either of them is the "owner or tenant of a property abutting, across the street or alley from, or having a common corner with"[6] the Project.

(4) The Rosado Appeal failed to include statements as to why the Appellants were aggrieved by the Director's decision as required on the Appeal Application form.

To the extent that the Rosado's attempt to claim that the CEQA Appeal is also an appeal of the Director's determination, they could not do so because density bonus approvals must be appealed within 15 days to the City Planning Commission. (LAMC Section 12.22.A.25(g)(2)(e)). The Rosado Appeal was directed to the Council more than a month after the Director's Determination, well after the expiration of the 15 days set forth in LAMC Section 12.22.A.25(g)(2)(e)).

In addition, CEQA requires a party challenging a MND to have exhausted his or her administrative appeals. Cal. Pub. Res. Code section 21177(b). The Rosado Appeal should have been rejected by the City because the Rosados failed to exhaust their administrative remedies by appealing the Director's determination to the City Planning Commission.

And even if the Rosado Appeal was timely filed (and it was not), to the extent it is heard, it should have been heard in a timely fashion. Despite numerous requests by ACOF that the City Council's Planning and Land Use Management (PLUM) Committee hold a hearing to deny the Appeal, the PLUM Committee took no action in response to the requests. On at least five separate occasions, ACOF or its representatives requested a hearing. Only after the *Los Angeles Times* published an article on April 14, 2017 exposing the delay in hearing the Rosado Appeal and an editorial on April 23, 2017 criticizing the City for failing to expedite the Project, did the PLUM Committee schedule the Rosado appeal for a hearing on May 16, 2017 – more than one year after the Rosado Appeal was filed.

The LAMC typically calls for appeals to be heard within 30, 60 or 75 days, depending on the entitlement.[7] (See, e.g. LAMC 16.05.H.3, requiring site plan review appeals to be held within 30 days of filing; LAMC 12.22.A.25(g)(2)(i)(f), requiring density bonus appeals to be acted upon within 60 days from the last day of the appeal period; LAMC 11.5.7.C.6 (c), requiring action within 75 days after expiration of the appeal period; LAMC 12.24.I.4, requiring appellate body to act within 75 days after expiration of appeal period; LAMC 17.06.A.3, requiring tentative map appeals to be heard within 30 days of filing of appeal; LAMC 17.54.A, requiring parcel map appeals to be heard within 30 days after expiration of 15-day appeal period; and LAMC 12.32.D.3, requiring decision on legislative actions

[6] LAMC Section 12.22.A.25(g)(2)(i)(f)

[7] It should be noted that the City Council has not adopted an ordinance establishing standards of review or procedures for handling CEQA appeals. The City's 2014 draft CEQA Ordinance states that CEQA Appeals must be acted on "not later than 60 days after the filing of the CEQA Appeal", but it was never adopted. See Draft CEQA Ordinance, found at: http://clkrep.lacity.org/onlinedocs/2014/14-0090_rpt_atty_01-21-14.pdf

within 75 days after expiration of appeal period.) The Rosado Appeal was scheduled for hearing **over 385 days** after it was filed – a time period well beyond standard or reasonable as evidenced by the City's own code. Such an egregious deviation from code and practice is per se unreasonable, and evidence of delay constituting a violation of State Housing Element Law and the State Housing Accountability Act (as described in Sections V and VI of this letter).

The City's failure to act on the Appeal within any reasonable time period are cause for concern under State CEQA Guidelines as well. State CEQA Guidelines make clear that public agencies should adopt time limits to govern their implementation of CEQA, and that review of EIRs should not cause undue delay in processing applications for entitlements. (CEQA Guidelines section 15100).

Additionally, we question whether the City's failure to act on the Appeal within a reasonable amount of time effectively constitutes a denial of the Appeal. See, e.g. LAMC 11.5.7.C.6 related to Director's Determinations (failure to act "shall be deemed a denial of the appeal").

As demonstrated in letters submitted by Craig Lawson & Co., LLC to the City on April 25, 2016 and May 9, 2017, and for the additional reasons summarized above, the City should have rejected the Rosado Appeal on its procedural defects, or denied it early on. Instead, it has delayed a hearing on the Rosado Appeal for over a year, effecting extremely long delays, uncertainty and costs to ACOF's Project – a critically needed project to house veterans, people with low-incomes and individuals and families affected by mental illness. As discussed in the next section, these already long, unjustified delays, coupled with any decision in favor of the Rosado Appeal (including the decision to process the Appeal itself, given its numerous procedural defects), have the potential to render ACOF's entire project infeasible, in direct conflict with fair housing and other laws protecting affordable and supportive housing and housing for people with disabilities.

II. Any Action in Favor of the Rosado Appeal Would Inflict Numerous Severe Adverse Consequences on a Project that has Already Been Unjustly Delayed.

After delaying a hearing on the Rosado Appeal for over a year, if the City Council were to then grant the Rosado Appeal, ACOF and the Project would suffer immediate adverse consequences. Granting the Appeal could invalidate the MND and the Director's determination and ACOF would potentially be required to begin the approval process again, by preparing another MND, which would require circulation for public comment.[8] A new environmental review process could add tens of thousands of dollars of expenses to the Project, delay the City's approval of the density bonus incentives for as much as an additional 12 to 18 months, and open the Project up to several more years of approval processes that could jeopardize the viability of the Project altogether.

Furthermore, granting the Appeal would unfairly give the Rosados an opportunity to remedy the numerous legal deficiencies in their position, to the detriment of an affordable, supportive housing Project protected by state and federal laws. At this time, any CEQA lawsuit filed by the Rosados should be quickly dismissed by a court because the Rosados failed to exhaust their administrative remedies by appealing the Director's determination to the City Planning Commission.

[8] Typically, when an MND is found to be defective, the remedy is to invalidate the MND and invalidate the project approvals. See Cal. Pub. Res. Code section 21168.9(a); *Nelson v. County of Kern*, 190 Cal.App.4th 252 (2010); *Sunnyvale W. Assn. v. City of Sunnyvale City Council*, 190 Cal.App.4th 1351 (2010).

In addition, development of the Project depends on obtaining the Metro Board's approval of the ground lease and other documents under which ACOF will lease the Project Site from Metro. Metro staff and ACOF had almost completed the negotiation of the ground lease and other transaction documents when the CEQA appeal was filed. Because Metro relies on the MND as its environmental document for approving the ground lease with ACOF, Metro policy prohibits it from approving the ground lease if the MND is being challenged. The Metro staff had been prepared to schedule the ground lease with the Metro Board and recommend its approval at its June 2016 meeting, but due to the Rosado Appeal and the City's failure to dismiss the Rosado Appeal, the Metro Board has not been able to approve the ground lease and other documents.

The Exclusive Negotiating Agreement (ENA) with Metro was entered into on March 28, 2013. In order to afford ACOF the opportunity to conduct community outreach, the ENA was extended three times. After the Rosado Appeal was filed, the Metro Board extended the term of the ENA on June 27, 2016 for one year. Therefore, the current term of the ENA will expire on June 26, 2017. There is, of course, no assurance that the Metro Board will extend the ENA again, particularly if the City Council has granted the Rosado Appeal and the Project will be subject to years of additional delay in gaining approval of the Project and defending against the Rosados' opposition. Accordingly, if the City Council grants the Rosado Appeal, such action will open the Project to further risk that the Metro Board will not extend the ENA, effectively terminating the Project.

The City's delay in acting on the Rosado Appeal, coupled with any further action in favor of the Rosado Appeal, will cause ACOF to incur substantial damages from the loss of the substantial amounts that ACOF has expended in pursuing the Project with Metro and the City of Los Angeles to date as well additional amounts it will be required to spend to gain new approvals for the Project.

III. The City's Actions to Date, Coupled With A Decision to Hear and Grant the Rosado Appeal, Raise Serious Civil Rights Concerns

The ACOF Project has already suffered significant, unjustified processing delays. These actions, and/or a potential decision to grant the Rosado Appeal raise serious civil rights issues under the federal Fair Housing Amendments Act (FHAA) and California's Fair Employment and Housing Act (FEHA), which prohibit discriminatory housing practices against disabled persons. (See 42 U.S.C. § 3601 *et seq.*; Cal. Gov't Code § 12955 *et seq.*)

Under federal law, disability means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. State law adopts a broader definition in that it includes any physical or mental impairment which limits one or more major life activities. Intentional discrimination exists where disability is a motivating factor in committing a discriminatory housing practice, even if other facts motivated the practice. (Cal. Gov. Code § 12955.8(a); 42 U.S.C. § 3604(b); *United States v. Parma*, 494 F. Supp. 1049, 1054 (N.D. Ohio 1980).)

FEHA specifically prohibits discrimination through land use decisions, including denials of use permits that make housing opportunities unavailable. (Cal. Gov. Code § 12955(l).) Even a facially neutral land use practice may constitute discrimination under the FHAA, FEHA and other laws, if its effect falls disproportionately on a protected group and it is not supported by an important justification. Additionally, Title II of the Americans with Disability Act (42 U.S.C. § 12132) and §504 of the

Rehabilitation Act of 1973 (29 U.S.C. §701 et seq.) prohibit disability discrimination in land use decisions and affirmatively require localities to provide equal opportunities to persons with disabilities.

Finally, the FHAA requires local governments that receive federal funds to certify that they will take affirmative steps to address discrimination and further integration. (42 USC 3608(e)(5).) The failure to affirmatively further fair housing can result in HUD suspending or withdrawing federal funding. (*See, e.g., US ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, NY*, 668 F. Supp. 2d 548, 569 (2009). The City of Los Angeles certified in its 2013-2017 Consolidated Plan that it will comply with its obligation to affirmatively further fair housing.

The Rosados have stated on numerous occasions that their concerns with the Project relate to the Project's inclusion of residents with mental disabilities. In addition to the statements made at the Metro Board hearing on March 28, 2013 (described in Section I above), at a meeting with ACOF representatives on May 4, 2017, Tony Rosado stated that he and his sister would be willing to withdraw their Appeal and support the Lorena Plaza project (with even more units as an inducement) if ACOF were willing to change the Project to exclude any tenants with disabilities. After Ms. Gallo explained that ACOF's mission is serving formerly homeless individuals and families affected by mental illness, the Rosados' counsel asked whether ACOF would be willing to agree to lease the apartments to tenants with physical disabilities and exclude tenants with mental disabilities.

It is clear that the disability of Project residents is the Rosados' primary motivating factor in opposing the Project, and the basis for their general, unsupported, procedurally defective Appeal. As such, the Rosado Appeal is nothing more than a pretext for effecting their discriminatory intent. In this context, the City's decision to accept (rather than reject) the Rosado Appeal, and then (without justification) delay hearing on the Appeal for over a year, is extremely problematic. To the extent that the delays in processing ACOF's Project have occurred because the development is perceived as "controversial," such delay may well stem from impermissible discrimination. The Rosado's concerns related to the development raised early on were clearly related to the disabilities of the "occupants" of the proposed development. Basing land use decisions on such discriminatory concerns would amount to intentional discrimination.

Congress specifically stated in the passage of the FHAA that the Act "is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. *Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.*" (H.R. REP. 100-711 at 18 (emphasis added).) (See *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 786 (7th Cir. 2002)(finding "a denial of a variance due to public safety concerns or concerns for the safety of the residents themselves cannot be based on blanket stereotypes about disabled persons rather than particularized concerns about individual residents"), citing *Bangerter v. Orem City Corporation*, 46 F.3d 1491, 1503-1504 (10th Cir. 1995)(CUP and staff supervision requirements for home for people with developmental disabilities violated FHAA because they were based on NIMBY opposition rather than factually-supported health and safety concerns); see also *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) ("Although [a city] may consider legitimate safety concerns in its zoning decisions, it may not base its decision on the perceived harm from…stereotypes and generalized fears.").)

Likewise, the application of a zoning code or appeals process in a more rigid or incorrect manner to a development that will provide affordable and supportive housing may constitute unlawful discrimination. Such inequitable treatment disparately impacts individuals with disabilities who stand to benefit from supportive housing. See *San Pedro Hotel Co. v. City of Los Angeles* (9th Cir. 1998) 159 F.3d 470, 472 (finding plaintiff property owners alleged sufficient facts to support standing under FHAA to challenge city's interference with housing rights of people with mental disabilities.) Beyond violating the fair housing laws, any action in support of the Appeal may also give rise to City liability under 42 U.S.C. section 1983 because it would deny ACOF and people with disabilities who stand to benefit from the Project fair housing rights under the color of state law. (*Id.* at 479.)

IV. Any Action in Support of the Rosado Appeal, or Any Further Action to Delay the Project Will Conflict With Government Code Section 65008

Government Code Section 65008 provides that any action that denies to any individual or group of individuals the enjoyment of residence, tenancy, or other land uses is null and void if based on discriminatory practices. The City cannot impose different requirements on subsidized residential developments from market-rate developments, and cannot discriminate based on the intended occupancy by residents who are low-income or disabled. (See, e.g., Cal Gov't Code sections 65008(a)(1)(A) (prohibiting discrimination against a residential development based on the occupancy of the development by people with disabilities); 65008(d)(1) (prohibiting disparate treatment of assisted developments and non-assisted developments or because of occupants' disabilities); 65008(a)(2) (rendering null and void any action by a local government agency that denies to any individual or group of individuals the enjoyment of residence, tenancy or any other land use because of the method of financing).)

As demonstrated above, the Rosado Appeal lacks any merit and is a mere pretext for the Rosados' discriminatory motives against people with disabilities. The Project has already been subjected to an unreasonable level of delay – without justification – delays that other market-rate projects have not been subject to according to a recent review of the treatment of CEQA appeals on the City's website. Indeed, there are a number of conditions that ACOF's Project has apparently been held to that may not be applicable to other non-affordable residential projects in the City – including but not limited to the delay in hearing and failure to act on the Rosado Appeal for over a year, the requirement that ACOF submit to community concerns and change its project despite the fact that the zoning code did not require these changes, the number of community meetings ACOF was required to have to obtain input on the Project, again, despite the fact that the zoning code did not require these. Any action by the City in support of the Rosado Appeal in this context, or to further delay the Project, could be construed as discriminatory - based on the intended occupancy in the Project by disabled and/or low-income individuals, the method of financing for the Project, and the different treatment accorded ACOF's Project as compared to other residential developments in the City - in violation of Government Code section 65008.

V. The City's Actions May Constitute a Denial of ACOF's Project In Violation of the State's Housing Accountability Act.

California's Housing Accountability Act ("HAA") prohibits actions to reject or condition project approvals in a manner that renders affordable housing developments infeasible, unless certain

findings can be made.[9] Under the HAA, an action to reject a development project includes a failure to act within certain time periods. Gov't Code section 65589.5(h)(5). ACOF's MND was adopted on March 2, 2016. The Rosado Appeal was filed on April 20, 2016. Over a year has passed since that Appeal was filed, and the City clearly failed to act within a reasonable time period. (See Section I of this Letter, describing typical appeal periods in the City Code of between 30, 60, and 75 days, compared to the time period set for hearing of the Rosado Appeal as over 385 days). No written findings have been made to justify such inaction under the HAA, and the City's actions to date therefore may constitute an effective denial of the Project that is actionable under the HAA.

Furthermore, under the HAA, an action to "disapprove the development project" includes any instance in which a local agency "votes on a proposed housing development project application and the application is disapproved." (Gov't Code section 65589.5 (h)(5)). If the City Council grants the Rosado's Appeal, such vote will also represent a "disapproval" of ACOF's Project for HAA purposes, as such vote will effectively invalidate the MND and the Director's determination, causing ACOF to have to resubmit its land use application for the Project. See footnote 8 above. The definition of "housing development project application" in the HAA encompasses the City Council's vote on the Rosado Appeal and will constitute a vote on ACOF's Project application. Granting the Rosado Appeal, therefore, would constitute a denial of the Project under the HAA, and would not be permitted unless the City could make the written findings required by the HAA.

Granting the Rosado Appeal is also a condition that may render the Project infeasible in violation of the HAA. Among other things, as a direct result of such an action, Metro may refuse to agree to yet another extension of the ENA, or ACOF may determine that the additional cost and delay in seeking to obtain the Project approvals again and defending against the Rosados' continued opposition makes the Project infeasible. (See Cal. Gov't Code section 65589.5.) Under the HAA, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." (Cal. Gov't Code section 65589.5(h)(1)).

To date, the City's actions in failing to act on the Rosado Appeal for over a year are highly problematic and may constitute an effective denial for purposes of stating a claim under the HAA. Additionally, as described, any further action in support of the Rosado Appeal and/or to delay the Project either constitutes a denial under the HAA, or a condition that potentially renders the Project infeasible. The City has not and cannot make the findings required under the HAA to justify any such denial or condition. Approval of the Rosado Appeal conflicts with the underlying rationale of the HAA "that a local government not reject or make infeasible housing developments" that contribute to regional housing needs. (Cal. Gov't Code section 65589.5(b).)

VI. Any Action in Support of the Rosado Appeal, or Any Further Action to Delay The Project Will Conflict with the City's Housing Element and State Housing Element Law

[9] In order to disapprove or condition approval in a manner that renders a project infeasible, subsection (d) of section 65589.5 requires a city to find: (1) the jurisdiction has already met or exceeded its share of affordable housing needs; (2) the project would have a specific, adverse impact on public health or safety; (3) denial is required to comply with specific state or federal law; (4) the project is proposed for land being used for agriculture or resource preservation; or (5) the project is inconsistent with the zoning ordinance and general plan land use designation. (Cal. Gov't Code section 65589.5(d).) The City is unable to make these findings.

As described, the ACOF Project has already been subjected to an unreasonable level of delay for unjustified reasons. This delay, and any further actions in support of the procedurally defective and meritless Rosado Appeal, are in direct conflict with the City's own housing element general plan and State Housing Element Law. As the general plan is the City's "constitution" for development, all actions the City takes must be consistent with the City's housing element. Any City action in support of the Rosado Appeal that would further delay ACOF's Project (which will house low-income people, veterans, people with disabilities and people that are homeless), would conflict with numerous provisions of the City's Housing Element, including but not limited to:

Goal 4. A City committed to preventing and ending homelessness. *Granting the Appeal could make infeasible a Project that would help end homelessness.*

Policy 1.4.1. Streamline the land use entitlement, environmental review, and building permit processes, while maintaining incentives to create and preserve affordable housing. *Granting the Appeal when the City clearly has the basis to reject it is the opposite of "streamlining" affordable housing projects.*

Objective 3.1. Ensure that housing opportunities are accessible to all residents without discrimination on the basis of race, ancestry, sex, national origin, color, religion, sexual orientation, marital status, familial status, age, disability (including HIV/AIDS), and student status. *Granting the Appeal when the City clearly has the basis to reject it represents a deprivation of equal housing opportunities for people with disabilities.*

Policy 4.1.3. Provide permanent supportive housing options with services for homeless persons and persons/families at risk of homelessness to ensure that they remain housed and get the individualized help they may need. *Granting the Appeal when the City clearly has the basis to reject it may reduce available permanent supportive housing options and impact the development of future supportive housing projects.*

Policy 4.1.6. Provide housing facilities and supportive services for the homeless and special needs populations throughout the City, and reduce zoning and other regulatory barriers to their placement and operation in appropriate locations. *Granting the Appeal when the City clearly has the basis to reject it constitutes an increase (not a reduction) in regulatory barriers to supportive housing.*

In addition, the City's actions could constitute a violation of State Housing Element Law. The Housing Element law provides that each jurisdiction must make "adequate provision for the existing and projected housing needs of all economic segments of the community" (Cal. Gov't Code section 65583). Among other things, Government Code Section 65583(a)(5) requires supportive housing to be considered a residential use of property, "subject only to those restrictions that apply to other residential dwellings of the same type in the same zone." As stated earlier, there are a number of conditions that ACOF's Project – a supportive housing project – has apparently been held to that may go beyond the requirements of Section 65583(a)(5) – including, but not limited to the delay in hearing and failure to act on the Rosado Appeal for over a year, the requirement that ACOF submit to community concerns and change its project despite the fact that the zoning code did not require these changes, the number of community meetings ACOF was required to have to obtain input on the Project, again, despite the fact that the zoning code did not require these.

Further delays on the Project in this context cannot be countenanced, and would likely be in violation of the City's own Housing Element and State Housing Element Law.

VII. Conclusion

As fully demonstrated in this letter, and by letters submitted by Craig Lawson & Co., LLC dated April 25, 2016 and May 9, 2017, the City has no basis to hear or grant the Rosado Appeal. The Rosado Appeal is both procedurally and substantively defective, and the City unjustifiably failed to take action on it for over a year.

We wish to make very clear that granting the Appeal or otherwise delaying the Project at this stage could result in ACOF's inability to build affordable and supportive homes for low-income people, veterans, people that are homeless, and individuals with disabilities. Such populations would not be able to use and enjoy such units. Given the defects in the Rosado Appeal, and the underlying motivations of the Rosados evidenced by their statements in public and private meetings, any action by the City in favor of the Appeal or to further delay the Project could be construed as a discriminatory action having a disparate impact on people with disabilities, among others, in violation of the FHAA, FEHA, Title II of the ADA, 42 U.S.C. section 1983 and the Rehabilitation Act. Such actions may further constitute violations of the State Housing Accountability Act, the State Housing Element Law, and Government Code Section 65008.

On behalf of ACOF, we ask that the City Council carefully consider all of the foregoing reasons and deny the Appeal. If any other course of action is taken, ACOF will be forced to consider all legal actions that are available to it. Thank you for considering these points, and please do not hesitate to contact me at 213.385.2977 ext. 136 with any questions.

Sincerely,

Shashi Hanuman, Directing Attorney
Public Counsel
Community Development Project

cc: David Michaelson, Esq.
Dora Gallo