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July 25, 2022

via e-mail

David Zisser
Assistant Deputy Director
Department of Housing and
Community Development
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Email: David.Zisser@hcd.ca.gov

Re: May 24, 2022 Notice of Violation; City of Burbank

Dear Mr. Zisser:

We represent the City of Burbank (the City) with respect to the Pickwick Gardens housing project (Pickwick) and HCD's May 24, 2022 Notice of Violation. The City is providing the following initial comments in response to the Notice. It would like to stress its desire to work collaboratively with HCD in resolving outstanding issues related to Pickwick.

Burbank's Support for Housing Development

For context, it is important to recognize that the City of Burbank strongly supports the development of additional housing within the City. It has a very good record in this regard. For example, in 2019 the City recognized that there were more jobs than housing units in the City, and so adopted the ambitious goal of developing 12,000 new units. Since then, it has initiated two specific plans that support housing development: the Golden State Specific Plan, for properties near the airport; and a plan for transit-oriented development in the Downtown. As well, with the City Council's renewed focus on housing, the volume of residential construction has substantially increased: 1,845 units have entitlements and another 961 units are proposed. As reflected in the Housing Element, the City has capacity for over 7,500 additional units and will undertake rezonings to create the capacity for over 10,000 units, exceeding its regional housing needs allocation of 8,772 units. Nearly all housing proposed in the City has been approved.

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Pickwick Gardens--Eligibility for Review under SB 35 (Government Code Section 65913.4)

The following are initial comments addressing the specific points raised in the Notice of Violation. We look forward to discussing the issues touched upon below with you at your convenience.

A. Relevant General Plan Provisions: The Pickwick property is designated Rancho Commercial in the City's General Plan, and is zoned Commercial Recreation. The General Plan contains a very broad statement which describes the Rancho Commercial zone and the Rancho Neighborhood generally:

> RANCHO COMMERCIAL
> (Maximum .60 FAR, 20 units per acre with discretionary approval)
>
> The Rancho Commercial designation is located in the unique Rancho Neighborhood that allows for the keeping of horses on single-family residential properties, and a variety of low-intensity multi-family residential and commercial uses. The neighborhood is located close to the Los Angeles Equestrian Center and a vast regional trails network. The FAR for Rancho Commercial anticipates that some properties will recycle and that the intensity of new development will be comparable to what exists today. Supplemental land use goals and policies are provided in the Rancho Master Plan.

(Burbank2035 General Plan p. 3-16.)

The above provision is intended to be a general description of uses permitted in various separately zoned portions of the Rancho Neighborhood, and is not intended to describe permitted uses in the area zoned as Commercial Recreation. The reference to residential uses is included in the general description of the Rancho Neighborhood, which is a much broader area than the area zoned as Commercial Recreation, and includes several zones that have different permitted uses.

In any case, the General Plan itself states that the actual uses permitted <u>are as shown in the zoning ordinance:</u>

> Burbank2035 provides a vision for how Burbank will look and function in decades to come. *The Zoning Ordinance (Title 10 of the Burbank Municipal Code) establishes requirements for how land can be developed and used today.* By requiring land to be used and developed in ways that are consistent with Burbank2035, the Zoning Ordinance implements Burbank2035 over time. *Land use designations establish broad policy and intent for how land should be used and developed. Zones allow or prohibit specific uses*, and establish

> setbacks, minimum parking requirements, and other development requirements. One or more zones specify detailed use and development standards for each land use designation. (Emphasis added.)

(General Plan p. 3-7.)

In the General Plan, the Rancho Commercial area was not projected to include any residential development through 2035. (Table LU-2, Burbank2035 Development Capacity, page 3-25.) Further, the Rancho Master Plan, which is stated to be part of the General Plan's Land Use Element, does not allow residences in the Commercial Recreation zone. Although at one point the Pickwick site was listed in the draft Sixth Cycle Housing Element as a site for which an application had been made for residential development, it is not so listed in the current draft version of the Housing Element.

HCD has also noted that the General Plan states that 20 units per acre are permitted *with discretionary approval,* as does the City's zoning ordinance. As discussed below, under HCD's own SB 35 Guidelines, in the City's view the "discretionary approval" clause disqualifies the site for SB 35 approval.

B: Relevant Zoning Code Provisions:

1993 Provisions: Ordinance 3343, enacted in 1993, created the Rancho Master Plan area and added the Rancho Commercial designation to the City's zoning ordinances. Ordinance 31-2432 stated that residential use is not permitted in the Rancho Commercial area (that area includes the smaller Commercial Recreation Zone, where the Pickwick property is located.) With respect to the Commercial Recreation zone specifically, Ordinance 31-2436 stated: "The Commercial Recreation zone is intended for recreational uses which are privately operated for commercial purposes."

Ordinance 31-2440 listed residential uses as prohibited in the Commercial Recreation zone.

2013 Provisions: Comprehensive amendments to the City's zoning ordinances took place in 2013, in connection with the adoption of the Burbank2035 General Plan. The purpose of the Commercial Recreation zone remains almost identical to that adopted in 1993: "The Commercial Recreation (CR) zone is intended for recreational uses which are privately owned and operated for commercial purposes." (Burbank Municipal Code (BMC) Section 10-1-2436.)

We do not believe there is any conflict between the relevant General Plan and zoning provisions. As acknowledged in the Notice of Violation, under section 10-1-502 of the zoning code, residential use is not an allowed use in the Commercial Recreation zone. (Notice of Violation at p. 4.) HCD has taken the position that residential use is allowed in the Rancho Commercial area in the General Plan, relying upon the SB 35 provision

stating that if objective standards in the General Plan are mutually inconsistent with objective standards in the zoning code, then the General Plan standards control. (Gov't. Code § 65913.4(a)(5)(B).)

The General Plan and zoning ordinance, however, are not mutually inconsistent. Both contain identical provisions allowing densities of 20 units per acre in the Rancho Commercial designation *with discretionary approval.* (Burbank General Plan p. 3-7; Burbank Municipal Code §10-1-2436.5.) Yet for a project to qualify for streamlined review under SB 35, it must be "zoned for residential use or residential mixed-use development, or [have] a general plan designation that allows residential use or a mix of residential and nonresidential uses." (Government Code §65913.4(a)(2)(C).) HCD's SB 35 Guidelines (§401(a)(3)(A)) have interpreted that provision as follows:

> To qualify for [SB 35], the site's zoning designation, applicable specific plan, or master plan designation, or general plan designation, must permit residential or a mix of residential and nonresidential uses bv right or with a use permit.

(Emphasis added.)

Residential use by right is not permitted in the Commercial Recreation zone. Nor is residential use allowed with a use permit because residences are not listed as conditional uses in the Commercial Recreation Zone. Consequently, under HCD's Guidelines, the site is not considered to be zoned for, nor does it have a general plan designation for, residential use.

Notably, the footnote that refers to certain residential densities "with discretionary approval" appears in connection with almost every zone in the City, no matter whether residential is a listed permitted use or not. In the City's view, the existence of the footnote is insufficient evidence of intent to allow residential use in every zone that has a maximum residential density "with discretionary approval" listed. Interpreting the footnote that way would lead to the absurd result that an SB 35 project could be built almost anywhere in the City—even if residential use is specifically prohibited in the zoning code.

The Notice of Violation also cites a separate provision of the Guidelines, which states that:

> "A standard that requires a general plan amendment, the adoption of a specific plan, planned development zoning, or another discretionary permit or approval does not constitute an objective standard. A locality shall not require a development proponent to meet any standard for which the locality exercises subjective discretion, on a case-by-case basis." (Guidelines §300(c)(2).)

This provision seemingly contradicts the statement in Guidelines Section 401(a)(3)(A) that a site is considered to allow residential use only where the use is permitted or allowed through a use permit—and effectively nullifies the statutory requirement that the site be zoned or designated for residential use. If a requirement for a general plan amendment to allow housing cannot be enforced, that would lead to the illogical result that residential development would be considered to be permitted anywhere, not only in Burbank but in all cities.

We stress that these are initial thoughts about the points discussed in the Notice of Violation. We look forward to a continuing dialogue with HCD about these issues.

Very truly yours,



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DBD:ll

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