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VIA E-MAIL

Planning Commission
City of Claremont
207 Harvard Avenue
Claremont, CA 91711

Re: 840 S. Indian Hill Boulevard - Housing Accountability Act and Density Bonus Law

Dear Planning Commissioners:

This firm represents Claremont 2 Inv, LLC ("Claremont 2") in connection with the proposed 70-unit townhome project located at 840 S. Indian Hill Boulevard. This letter provides an overview of the project, along with a discussion of relevant state housing laws that apply to the project – (a) Density Bonus Law ("DBL") and (b) Housing Accountability Act ("HAA").

The project satisfies the City's Inclusionary Housing requirements. Furthermore, the project's reservation of 10% of the base density (66) units) for moderate-income households (or seven units) entitles the project to the benefits of the Density Bonus Law, including (a) a 5% density bonus, (b) one (1) incentive/concession, (c) an unlimited number of waivers of development standards, and (d) reduced statutory parking rates.

Importantly, the project site is identified in the City's Housing Element's Site Inventory as an "Opportunity Site" for infill housing aiding in meeting the City's Regional Housing Needs Assessment ("RHNA") allocation. (Housing Element Opportunity Mapbook – Site 40.) The City's failure to approve the project – which is consistent with *applicable* objective development standards and would not result in specific, adverse impacts to health and safety – would certainly call into question the validity of the City's Housing Element and its commitment to implement the programs, policies, and representations in that document. The Department of Housing and Community Development's ("HCD") conclusion that the Housing Element was in "substantial compliance" with the Housing Element Law was based significantly on those commitments, and the City's failure to abide by such commitments may result in HCD de-certifying the Housing Element. A de-certified Housing Element opens the door to more extreme development scenarios, including the Builder's Remedy.

The project is also a "housing development project" under the Housing Accountability Act ("HAA"), which greatly limits an agency's discretion to deny a project which complies with applicable objective development standards. The HAA restricts "the ability of local governments

to deny an application to build housing if the proposed project complies with general plan, zoning, and design review standards that are objective." (*Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842, 831.)

This letter is not intended to suggest or imply that Claremont 2 expects the Planning Commission will violate state housing laws. In fact, quite the opposite. However, because these laws are complex, we provide this letter as a summary of relevant state housing laws, including the legal and practical results from failing to adhere to state law.

I. Density Bonus Law

A developer that agrees to construct affordable housing consistent with the DBL is entitled to, if requested, (a) a density bonus, (b) one or more itemized concessions, and (c) waiver or reduction of development standards that would have the effect of physically precluding the construction of the project at the density, or with the requested incentives, permitted by the DBL. (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 763 ["a local government is ***obligated*** to permit increased building density, grant incentives, and waive any conflicting local development standards unless certain limited exceptions apply"].)

a. Density Bonus

The project reserves 10% of the base units for moderate-income households. Therefore, it is entitled to a 5% density bonus, which increases the total number of permitted units to the requested 70 units. (Govt. Code §§ 65915(b)(1)(B) and (f)(4).)

b. Incentive/Concession

A project that provides the requisite number of affordable units is entitled to one or more incentives/concessions, depending on the number and level of affordability included. The DBL defines incentive/concession broadly to include reductions or modification of development or zoning requirements, as well as any other "regulatory incentives or concessions proposed by the developer…." (Govt. Code § 65915(k).) A requested incentive/concession may be refused only in very limited circumstances – (1) the agency can establish that it would not result in identifiable and actual cost reductions to provide for affordable housing or (2) the agency finds, based on substantial evidence, that it would have a specific adverse impact on public health and safety, a historic resource, or contrary to state or federal law. A requested incentive/concession is *presumed* to result in cost reductions and a city bears the burden of demonstrating otherwise if it intends to deny the requested incentive/concession. (*Bankers Hill 150, supra,* 74 Cal.App.5th at 770.)

A "specific, adverse" impact is defined narrowly to mean "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (Govt. Code § 65589.5(d)(2) (as adopted by § 65915(d)(1)(B).) However, specific,

adverse impacts are a rarity, a fact the California Legislature expressly recognized. (Govt. Code § 65589.5(a)(3) ["the conditions that would have a specific, adverse impact upon the public health and safety … arise infrequently"].)

The project requests an incentive/concession to deviate from the requirement to underground utilities along American Avenue. The request is clearly within the scope of the DBL's broad definition of incentives/concessions. The cost-reducing nature of the request is obvious, and the applicant estimates that the incentive/concession would result in actual and identifiable cost reductions of approximately $319,000. The incentive/concessions also would not cause a "specific, adverse" impact to health and safety as above-ground utilities are commonplace in urban environments.

c. Waivers

The project is also entitled to waiver or reduction of development standards, as defined above, that "have the effect of physically precluding the construction of a development at the density permitted by the" DBL. (*Bankers Hill 150, supra,* 74 Cal.App.5th at 770.) There are no financial criteria for granting a waiver and the number of waivers is unlimited. (*Id*.)

An agency is not permitted to second-guess the design of a project, even if it requires waivers. If a developer proposes a project that qualifies under the DBL, "the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards." (*Id.* at 774.) "The statute does not say that what must be precluded is a project with no amenities, or that amenities may not be the reason a waiver is needed." (*Id*.) If the project is a DBL project, "a city may not apply any development standard that would physically preclude construction of that project as designed…." (*Id*.)

The project requests the following waivers, neither of which would result in a specific, adverse impact to public health and safety:

i. A waiver of the 75-foot setback requirement from single-family zones.
ii. A waiver of the 20-foot front setback requirement.
iii. Waivers to deviate from both (a) common and (b) private open space requirements.

Without the requested waivers, the project could not be constructed as proposed. Therefore, the Planning Commission cannot deny the waivers.

II. Housing Accountability Act

The project is a "housing development project" and subject to the protections of the HAA. The California Legislature enacted (and strengthened) the HAA with the goal of "meaningfully and effectively curbing the capability of local governments to deny, reduce the

density for, or render infeasible housing development projects." (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* ("*CaRLA*") (2021) 68 Cal.App.5th 820, 844 [the HAA "cabins the discretion of a local agency to reject proposals for new housing"].) To accomplish its stated purpose, the HAA provides that if housing development project complies with applicable *objective* standards, an agency may only deny or reduce the density of the proposed project if it finds that (1) the project would have a specific, adverse impact on the public health or safety, and (2) that there is no feasible method to satisfactorily mitigate or avoid the adverse impact identified other than denial or approval of the project at a lower density. (Govt. Code § 65589.5(j)(1)(A); *Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842, 850.) The term "lower density" is defined broadly as including "***any conditions that have the same effect or impact on the ability of the project to provide housing***." (§ 65589.5(h)(7).)

The project would not result in a specific, adverse impact, as that term is narrowly defined in the HAA. A "specific, adverse" impact is defined to mean "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (*Id*.) The Legislature has declared that the "conditions that would have a specific, adverse impact upon the public health and safety … arise infrequently." There is simply no evidence whatsoever that an in-fill housing project on a Housing Element site and in an extremely urbanized area would result in a specific, adverse impact.

The project is also consistent with all applicable, objective standards, and the City cannot deny or condition that the project be developed at a "lower density" because of an alleged inconsistency with a subjective development standard. (*CaRLA, supra,* 68 Cal.App.5th at 831 [HAA restricts "the ability of local governments to deny an application to build housing if the proposed project complies with general plan, zoning, and design review standards that are objective"].) A standard is subjective, as opposed to objective, if it cannot be applied without personal interpretation or subjective judgment. (*Bankers Hill 150, supra,* 74 Cal.App.5th at 778.) Also, when dealing with questions of consistency with objective standards, ***the HAA and DBL function together*** and a project's waiver of objective standards "shall not constitute a valid basis on which to find a proposed housing development project" inconsistent with an objective standard. (Govt. Code § 65589.5(j)(3).) Therefore, to the extent a DBL compliant project is proposed, inconsistencies with otherwise applicable objective development standards that are waived pursuant to the DBL are not valid basis for disapproval of the project. A standard that is subject to waiver is only applicable to the extent waived.

Claremont 2 very much appreciates the Planning Commission's time and attention to this project, which provides much needed housing on a site specifically identified in the Housing Element to accommodate housing. The Claremont 2 team looks forward to presenting the project to the Planning Commission.

Sincerely,

Cox, Castle & Nicholson LLP

Christopher Burt

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