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CITY OF INDUSTRY

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March 7, 2024

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**VIA E-MAIL AND HAND DELIVERY**

Bing H. Hyun  
Assistant City Manager  
City of Industry  
25625 Mayor Dave Way  
City of Industry, CA 91744  
[bhyun@cityofindustry.org](mailto:bhyun@cityofindustry.org)

Re: Legacy Point LLC: Response to Notice of Incomplete Application

Dear Mr. Hyun,

This office represents Legacy Point LLC (“Legacy Point”) with respect to the above-referenced, mixed-use, affordable housing development proposed at 17201-17301 Gale Avenue (“Project”) in the City of Industry (“City”).

This letter responds to your December 14, 2023, correspondence regarding the status of the Project’s formal application submittal on November 15, 2023, (“Notice of Incomplete Application”). As you are aware, the November 15, 2023, formal application submittal (“Formal Application”) followed the May 22, 2023, submittal of a preliminary application for the Project (“Preliminary Application”), in accordance with what is colloquially referred to as the “Builders Remedy” (Gov. Code, § 65589.5, subd. (d)).

Your Notice of Incomplete Application was accompanied by a “courtesy” notice concerning purported inconsistencies between the Project and the land use and zoning at the site (“Inconsistency Notice”). The Inconsistency Notice observed that the Project is not consistent with the underlying “Commercial” land use or the “Automotive” zoning district at the site. The Inconsistency Notice also presented a contention that the Preliminary Application was not properly submitted, as it was incomplete. These points will be addressed in reverse order.

**1. The City Has No Authority to Deem a Preliminary Application Incomplete; It Must Only Accept It.**

Regarding the City’s contention that the Preliminary Application was not properly submitted, that determination is the functional equivalent of a notice of incomplete application. The City does not have statutory authority to determine whether a

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preliminary application is complete; it must only accept it. (Gov. Code, §§ 65941.1; 65589.5.) A local government's authority to make a completeness determination is limited to **formal applications**, which follow the preliminary application as part of the project application process under SB330's amendments to the Permit Streamlining Act and the Housing Accountability Act. (*Id.*, §§ 65941.1, 65943.)

In fact, the Preliminary Application was sufficient to meet the requirements of section 65941.1, because it provided information responsive to each line item; the fact that some information may have been subject to later correction upon further review or that additional information may be required to supplement responses cannot serve as a legitimate ground for a determination that an application is complete **even if** the City had the authority to make such a decision for a preliminary application (it does not). (See, e.g., Gov. Code, 65944, subd. (a) [matters requiring correction, explanation or supplementation to occur **after** formal application is deemed complete].) In this case, specifically, the three items identified in the Inconsistency Notice are subject to easy correction, supplementation and/or explanation in the context of the Formal Application completeness review. Legacy Point reserves its rights and objects to the City's purported grounds for determining otherwise.

## 2. The Builder's Remedy Mandates Approval of Affordable Housing Projects Even If They Are Inconsistent with Local Zoning.

As for the identified inconsistencies with the land use and zoning district, Legacy Point is not required to seek a zoning text or general plan amendment for the Project. That is the very "remedy" afforded by the Builder's Remedy, codified at Government Code section 65589.5 subdivision (d).

The Builder's Remedy is contained within the Housing Accountability Act (Gov. Code, § 65589.5) ("HAA"). It establishes a stringent burden to justify a local government's denial of an affordable housing project while the local government's housing element remains non-compliant with the State Housing Element Law. (*Id.*, § 65589.5, subd. (d)(5).) The State Legislature enacted the HAA in 1982, but despite efforts to expand its provisions "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects," the statute recognizes such intent has "not been fulfilled." (*Id.*, § 65589.5, subd. (a)(2)(K).) It is therefore the State's policy to interpret the HAA "in a manner to afford the **fullest possible weight** to the interest of, and the approval and provision of, housing." (*Id.*, § 65589.5, subd. (a)(2)(L), emphasis added.)

Under the Builder's Remedy, "a local agency **shall not disapprove**" or condition approval in a manner which renders infeasible, a "housing development project . . . for

very low, low-, or moderate-income households<sup>1</sup> . . . unless it makes written findings, based upon a preponderance of the evidence in the record” of one of five exceptions: (1) the local jurisdiction has adopted a substantially compliant housing element [discussed below in more detail] **and** has satisfied its regional housing need allocation; (2) the proposed housing development would have a specific, adverse impact on the public health or safety that cannot be feasibly mitigated without rendering the project unaffordable or infeasible; (3) denial of the project is required to comply with specific state or federal law, and there is no feasible method to comply without rendering the project unaffordable or infeasible; (4) the proposed land for the project is zoned for, and surrounded on at least two sides by, agriculture or resource preservation purposes; and

(5) The housing development project or emergency shelter is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article.

(Gov. Code, § 65589.5 , subd. (d)(1) – (5).) All of this means that a qualifying affordable housing project must be approved even if it is facially inconsistent with the local zoning and land use designation where the local government’s housing element is not in substantial compliance with the State Housing Element Law and the other narrowly tailored findings cannot be made.

A local government cannot overcome the mandatory duty to approve without written findings of an unmitigable “specific, adverse impact,” to the public health and safety, based on a preponderance of the evidence. “Specific, adverse impact,” means “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.” (Gov. Code § 65589.5, subd. (d)(2).) Notably, “[i]nconsistency with the zoning ordinance or general plan land use designation” does not constitute a specific, adverse impact. (*Id.*, § 65589.5, subd. (d)(2)(A).) Further, the Legislature clearly intends for these findings to be taxing, stringent and difficult to make:

It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health

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<sup>1</sup> A housing development project qualifies under the HAA as "housing for very low, low-, or moderate-income households" if at least 20 percent of the units in the project shall be sold or rented to lower income individuals. (Gov. Code, § 65589.5, subd. (h)(3)).

and safety, as described in paragraph (2) of subdivision (d) .  
. . . arise **infrequently**.

(*Id.*, § 65589.5 subd. (a)(3), emphasis added.) Subdivision (d) further requires that each of the five subdivision (d) exceptions must be supported by “written findings, based upon a preponderance of the evidence in the record . . . .” (*Id.*, § 65589.5, subd. (d).)

In this case, the pivot point for presenting a Builder’s Remedy application is the that the City’s housing element was not in substantial compliance with the State Housing Element Law at the time of the submittal of the Preliminary Application. The date of the submittal of the preliminary application is important. That is because an application for a housing development shall be subject only “to the ordinances, policies, and standard adopted and in effect” when the preliminary application is submitted. (Gov. Code, §§§ 65589.5 , subd. (o)(1).) The freezing in place of the regulatory state of affairs at the time of preliminary application submittal is a central feature of the HAA. (See *id.*, subds. (d)(2), (d)(5), (j)(1) [fixing regulatory scheme based on “deemed complete” date].) The vesting afforded by the HAA ensures the development community’s ability to rely on the state of the regulatory regime in place when vesting is effected so that it can safely and confidently commit resources to development. Accordingly, in the HAA context, “the private sector should be able to rely” on a preliminary application “prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency . . . .” (*Kaufman & Broad Central Valley, Inc. v. City of Modesto* (1994) 25 Cal.App.4th 1577, 1588, citing Gov. Code, § 66498.9, subd. (b).) It is a matter of record that the City’s housing element was not submitted to the State Department of Housing and Community Development (“HCD”) until July 13, 2023, and that the HCD did not deem it substantially compliant until September 11, 2023, almost four months after the Preliminary Application was submitted. The Builder’s Remedy therefore facially applies.

**3. Legacy Point Seeks to Supply Requested Information in Good Faith, as Long as It Is Not in Derogation of Its Rights under State Law.**

As a preliminary note, the Project application was deemed complete by operation of law upon submittal of the Preliminary Application. (See Gov. Code, § 65589.5, subd. (h)(5).) Legacy Point nevertheless determined to respond in good faith to your Notice of Incomplete Application by supplying those elements listed as incomplete in a manner that still preserves its rights under the Builder’s Remedy, pursuant to Government Code section 65491.1 subdivision (d). Legacy Point’s responds to each element of the Notice of Incomplete Application and the Inconsistency Notice as follows:

**(a) Property Owner Consent Affidavit**

The Inconsistency Notice contends that Kimberly Yu did not adequately demonstrate that she is authorized to sign the application on behalf of the Property

Owner. In fact, multiple documents were provided to establish the authority of Kimberly Yu to sign the application on behalf of the Property Owner, including the Grant Deed, Statement of Information and relevant excerpts from the Legacy Point Operating Agreement. The Statement of Information and the Legacy Point Operating Agreement establish that Kimberly Yu is a manager of Pacific Summit Properties, LLC, Legacy Point's sole management entity and that Kimberly Yu also serves as a manager of Legacy Point. The Grant Deed establishes that Legacy Point holds title to the Property, and that Kimberly Yu signed the Grant Deed as manager of Pacific Summit Properties. As manager of Legacy Point's sole manager, Kimberly Yu was legally vested with authority to sign an entitlement application on behalf of Legacy Point. (See, e.g., Corp. Code, § 17703.01.) In any event, and as noted above, the City has no statutory authority to deem a preliminary application incomplete. Even in the context of a standard development application the City's contention that the documents supplied were not sufficient does not qualify as a lawful basis for determining an application to be incomplete. That is because matters requiring correction, explanation or supplementation are to occur **after** formal application is deemed complete, and cannot be used as a ground for determining the completeness of the application. (See, e.g., Gov. Code, 65944, subd. (a).) Legacy Point is willing to comply with any additional, reasonable information requests, as long as the City does not condition a determination of completeness of the application upon such compliance.

(b) **Hazardous Waste Site**

It is a matter of record that numerous sites listed on the Cortese List and/or designated by the Department of Toxic Substances Control as hazardous waste sites are scattered throughout the City. Legacy Point's response focuses on site-specific conditions in the context of the current baseline throughout the City of Industry. In this case, a Phase I environmental site assessment establishes that the site does not feature any environmental contamination issues. (See, Phase I Environmental Assessment Report (Partner Engineering and Science, Inc., Aug. 3, 2015) ("Site Phase I", enclosed herewith.) In any event, and as noted above, the City has no statutory authority to deem a preliminary application incomplete based on purportedly inaccurate information. Even in the context of a standard development application matters requiring correction, explanation or supplementation are to occur **after** formal application is deemed complete, and cannot be used as a ground for determining the completeness of the application. (See, e.g., Gov. Code, 65944, subd. (a).) Legacy Point is willing to comply with any additional, reasonable information requests, as long as the City does not condition a determination of completeness of the application upon such compliance.

(c) **Additional Site Plan Information**

The Notice of Incomplete Application seeks fully dimensional site plans to scale, showing "all property lines," "dimensions for all landscaping areas and medians,"

“dimensions for all parking stalls, ADA parking and paths of travel, driveways/aisles/fire lanes,” “turning radius of all curved driveways, turning templates to demonstrate maximize vehicle size for ingress/egress, and width of interior driveways,” “all building wall dimensions for all proposed structures,” “dimensions for all other site improvements, including, but not limited to, common open space areas, swimming pool(s), child play areas and equipment, trash enclosures, perimeter walls/fences, and utility boxes.”

The submitted Site Plans contain all of the information required on the “Development Plan Application - Long Form” checklist. Other items of information identified in the Notice of Incomplete Application, such as ADA paths of travel, turning templates, trash enclosures, child play areas and building wall dimensions are not included as part of the application requirements for the Long Form Development Plan Application. While the City may request that an applicant “clarify, amplify, correct, or otherwise supplement” information already submitted, it may not request information not included on its pre-existing application checklist, nor may it base a determination of incompleteness on information that is not part of that checklist. (Gov. Code, §§ 65944, subd. (a); 65943, subd. (a).) Regarding site plans for the commercial areas, such details can be provided only in conceptual form as details are not available until a commercial user is later identified.

Notwithstanding the above, Legacy Point hereby submits revised, fully dimensioned site plans featuring all of the requested information. (See The Villages at Gale Ave., Revised Site Plans (LCRA Architects, Feb. 23, 2024) pp. A-0.0 – A-1.2, concurrently submitted herewith.) Legacy Point is willing to provide further information, but only to “clarify, amplify, correct, or otherwise supplement” information already submitted. Legacy Point otherwise objects to any assertion that such information is necessary for the application to be deemed complete.

**(d) Additional Elevations**

The Notice of Incomplete Application requests “scaled representation of all sides of parking structures,” with exterior façade and architectural features and “scaled representation of all sides of all residential buildings.” It also requests “fully dimensioned elevations for the commercial structure.”

While the City may request that an applicant “clarify, amplify, correct, or otherwise supplement” information already submitted, it may not request information not included on its pre-existing application checklist, nor may it base a determination of incompleteness on information that is not part of that checklist. (Gov. Code, §§ 65944, subd. (a); 65943, subd. (a).) In this case, the Development Plan Application – Long Form checklist does not require submittal of four-sided elevations. Legacy Point nevertheless concurrently submits supplemental, fully dimensioned floor plans providing all of the requested information, including elevations of all sides of the parking structures. (See The Villages at Gale Ave., Revised Elevation (LCRA Architects, Feb.

23, 2024) pp. A-3.0 – A-4.5, concurrently submitted herewith.) Legacy Point is willing to provide additional information but only to “clarify, amplify, correct, or otherwise supplement” information already submitted. Legacy Point otherwise objects to any assertion that such information is necessary for the application to be deemed complete.

**(e) Additional Floor Plan Information**

The Notice of Incomplete Application requests fully dimensioned floor plans for each level of residential development, including, but not limited to, “dimensions of lobby, gym, multi-purpose room, mail room, leasing office, trash, elevators, corridors, balconies” and “fully dimensioned floor plans for the commercial structures were not provided and must be submitted for review.”

While the City may request that an applicant “clarify, amplify, correct, or otherwise supplement” information already submitted, it may not request information not included on its pre-existing application checklist, nor may it base a determination of incompleteness on information that is not part of that checklist. (Gov. Code, §§ 65944, subd. (a); 65943, subd. (a).) In this case, the Development Plan Application – Long Form checklist only requires floor plans identifying “the use of each room/area.” As for the floor plans for the commercial structures, such details are not available until a commercial user is later identified. It is the commercial user -- and the future commercial use -- that determine the layout and floor plan of the commercial space. Legacy Point nevertheless concurrently submits supplemental, fully dimensioned floor plans providing all of the requested information, including conceptual floor plans of the commercial spaces. (See The Villages at Gale Ave., Revised Elevation (LCRA Architects, Feb. 23, 2024) pp. A-5.0 – A-6.1, concurrently submitted herewith.) Legacy Point is willing to provide additional information but only to “clarify, amplify, correct, or otherwise supplement” information already submitted. Legacy Point otherwise objects to any assertion that such information is necessary for the application to be deemed complete.

**(f) Information Regarding Future Commercial Operations**

The Notice of Incomplete Application requests information related to the “type of commercial or office, whether neighborhood, city or regionally oriented, square footage, anticipated hours of operation, estimated employees per shift and number of shifts, and location of loading facilities and anticipated hours of loading/delivery operations ... .” Such detailed information concerning future commercial tenants is rarely -- if ever -- available at the threshold stage of submittal of the planning/zoning entitlement application. Identity of potentially viable and willing commercial operators is not known until after planning approvals, as the project progresses to building permits and certificates of occupancy. That is partly because the planning approval process generally is lengthy, and feasible commercial operations that might be appropriate for tenancy are driven by fluctuating economic dynamics that are not predictable early in the project approval process. In short, Legacy Point is not able to provide information



responsive to this request because it is not currently available; any provision of information responsive to this request would constitute nothing more than surmise at this stage of the Project approval process. Matters requiring correction, explanation or supplementation are to occur **after** formal application is deemed complete, and cannot be used as a ground for determining the completeness of the application. (See, e.g., Gov. Code, 65944, subd. (a).) Legacy Point is willing to comply with any additional, reasonable information requests within its power, as long as the City does not condition a determination of completeness of the application upon such compliance.

**(g) Information Regarding Environmental Information Form**

The Notice of Incomplete Application also requests “additional supporting documentation to assist in the environmental analysis of your project to ensure compliance with CEQA.” It goes on to list several items it requires for determining the application to be complete, including a sewer study, noise report, soils study, rail vibration impact assessment, air quality studies, human health risk assessment, etc. While Legacy Point submits the Site Phase I responsive to this request, the other requested reports require engagement of third-party expert consultants and are proper to the preparation of an environmental impact report or mitigated negative declaration. Such reports are not appropriate for the threshold determination of whether a complete application was submitted, however. Under the Permit Streamlining Act, the City “shall not require the applicant to submit the informational equivalent of an environmental impact report as part of a complete application, or to otherwise require proof of compliance with that act as a prerequisite to a permit application being deemed complete.” (Gov. Code, § 65941, subd. (b).) Legacy Point is willing to supply information required to make the appropriate environmental review pursuant to the California Environmental Quality Act (Pub. Resources Code §§ 21000, et seq.) -- if warranted and necessary -- but only at the appropriate time. Legacy Point otherwise objects to any requirement requiring such information as the basis for a determination of completeness of the application.

**(h) Waste Management Plan Form/Construction and Demolition Waste and Recycling Service Form**

The Notice of Incomplete Application states that “[t]he CWMP was not provided and must be completed and submitted for review.” It also requests pages three and four of the Construction and Demolition Waste and Recycling Services Form. Both forms require the approval of a third party, Valley Vista Services (“VVS”). Legacy Point has been attempting to obtain approval of those forms from VVS since November 2023, when Legacy Point first attempted to initiate contact with VVS. VVS has not responded to any of Legacy Point’s attempts to schedule discussions with VVS, let alone approve any element of the application.

It is a fundamental principle of land use law that an applicant for development cannot lawfully be compelled to comply with requirements that are wholly within the



control of a third party. (See, e.g., *Munns v. Stenman* (1957) 152 Cal.App.2d 543.) Legacy Point cannot even obtain a response from VVS, let alone the approvals necessary to complete the requested forms. This application requirement is outside the power and control of Legacy Point, as applicant, to complete. It therefore cannot serve as a valid basis for determining the completeness of the application. Legacy Point continues to object to the City's request for this information as necessary to make a determination of completeness.

(i) **Deposit Reimbursement Agreement**

The Notice of Incomplete Application also requires a fully executed reimbursement agreement. Such a requirement requires approval of the City after a full-fledged negotiation of the agreement's terms. It is a fundamental principle of land use law that an applicant for development cannot lawfully be compelled to comply with requirements that are wholly within the control of a third party. (See, e.g., *Munns v. Stenman* (1957) 152 Cal.App.2d 543.) Legacy Point cannot control any element of the timing of negotiations, the agreement terms or the City's ultimate discretion to agree to such an agreement. This requirement is facially unreasonable and impossible to perform. Legacy Point continues to object to the City's request for a fully executed reimbursement agreement as necessary to make a determination of completeness.

(j) **Housing Affordability Information**

The Notice of Incomplete Application requests information concerning the number of units at each plan to be designated for occupancy at very low, low, moderate, and/or above moderate income categories. As a preliminary note, Legacy Point appreciates the City's outreach on the residential features of the Project as both parties work to process the Project to the proper City decision-maker. Legacy Point further notes that this information was provided with the SB330 Preliminary Application, which noted that the Project would dedicate 20 percent of its units for "lower income households." That said, the information requested is not identified on the Long Form Development Plan Application. While the City may request that an applicant "clarify, amplify, correct, or otherwise supplement" information already submitted, it may not request information not included on its pre-existing application checklist, nor may it base a determination of incompleteness on information that is not part of that checklist. (Gov. Code, §§ 65944, subd. (a); 65943, subd. (a).) As noted in the Preliminary Application and above, Legacy Point will set aside 20 percent of the units (120 units) for lower income households, in accordance with the definitions set forth at Government Code section 65589.5 subdivision (h)(3) and Health & Safety Code section 50079.5 ("Affordable Units"). Legacy Point intends to distribute the Affordable Units throughout the Project in a manner that complies with state law and the City's requirements. Legacy Point determines to identify the location of each of the Affordable Units after collaboration with City staff.

#### 4. CONCLUSION AND REQUEST FOR CONFIRMATION OF PROCESSING.

The City is bound by the Permit Streamlining Act, the HAA -- and by theories established by case law -- to process applications for housing development projects like this. (See, e.g., *Building Industry Legal Defense Foundation v. City of San Juan Capistrano* (1999) 72 Cal.App.4th 1410 [mandatory duty to process submitted applications].) Legacy Point therefore requests that the City seriously consider the principles set forth in this letter and accept and process the Formal Application as a complete Builder's Remedy project so that it is properly disposed for presentation to the decision-maker capable of making findings based on a written record.

Because time is of the essence, Legacy Point requests an affirmative representation, in writing to the undersigned, that the City will accept and process the Formal Application as a Builder's Remedy project, without requiring any legislative action to amend the City's Zoning Code and/or General Plan. We also request that the City provide the undersigned with notice as to the proper administrative process to appeal the City's determination, if one exists. We request this response by ***no later than close-of-business Friday, April 5, 2024***. We will be compelled to consider a statement of refusal to accept the Project or a failure to respond as an official decision of the City and invoke further administrative and legal recourse including, but not limited to mandamus and declaratory relief, as necessary.

If you have any questions about this letter, please do not hesitate to call me.

Very truly yours,



Michael W. Shonafelt

MWS

cc: Kimberly Yu, Legacy Point