

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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August 22, 2024

Michael Forbes
Director of Community Development
City of Beverly Hills
Via: mforbes@beverlyhills.org
455 N Rexford Drive
Beverly Hills, CA 90210

Dear Michael Forbes:

RE: 125-129 Linden Drive, Beverly Hills – Notice of Violation

On June 26, 2024, the California Department of Housing and Community Development (HCD) issued a Letter of Support and Technical Assistance (incorporated by reference) to the City of Beverly Hills (City) regarding compliance with Government Code section 65589.5, subdivision (d)(5), also known colloquially as the “Builder’s Remedy.” In the June 26, 2024 letter, HCD instructed the City that it may not require applicants of projects protected by the Builder’s Remedy to seek amendments to the City’s general plan or zoning code as a condition for processing a Builder’s Remedy application. However, on June 27, 2024, the Beverly Hills City Council denied an applicant’s appeal of the City’s incompleteness finding regarding the proposed development at 125-129 Linden Drive (Project), based on the finding that a General Plan Amendment and Zoning Change (GPA/ZC) are required for the submittal. As a result, and consistent with HCD’s June 26, 2024 letter to the City, HCD hereby notifies the City that its failure to accept the application for processing is in violation of state housing law.

Background

HCD understands that the Project proposes to construct 165 units on the site, of which 33 units (20 percent of the overall unit count) will be restricted to low-income households. HCD also understands the applicant submitted a preliminary application for the Project pursuant to Government Code section 65941.1 on October 24, 2022. HCD did not certify that the City’s housing element was substantially compliant with state law until May 1, 2024. Therefore, at the time the Project’s preliminary application was filed, the City would not have been able to make the finding in Government Code section 65589.5, subdivision (d)(5), to deny the Project. The preliminary application vested the City’s noncompliant status at the time of submittal in October 2022.

HCD understands the applicant then filed a full Development Plan Review application for the Project on April 14, 2023, which was within the six-month statutory time period required by Government Code section 65941.1, subdivision (d), to maintain the vested rights conferred by the preliminary application. The City issued an incomplete letter on May 12, 2023, instructing the applicant to pursue a GPA/ZC. On August 9, 2023, the applicant submitted a response to comments contained in the incomplete letter, and on October 13, 2023, the City restated that the Project must submit for a GPA/ZC.¹ The applicant provided a second response letter on January 10, 2024, before eventually requesting an appeal of the City's incompleteness letter on January 11, 2024. An incomplete letter for the January response letter was provided on February 9, 2024. A third resubmittal was received on May 9, 2024, with the incompleteness letter sent on June 7, 2024. On June 27, 2024, the appeal was heard and denied by the City Council, stating that a GPA/GZ would be required.

General Plan Amendment and/or Zone Change Requirements and the Housing Accountability Act's Builder's Remedy

As outlined in the June 26 letter to the City, the HAA is clear that a project protected by the Builder's Remedy may not be disapproved for inconsistency with a jurisdiction's general plan land use designation and zoning ordinance.² Accordingly, a jurisdiction that refuses to process or approve a project subject to the Builder's Remedy due to the applicant's refusal to submit a GPA/ZC (requested or required by the jurisdiction to resolve such an inconsistency) violates the HAA.

Determining Application Completeness under the Permit Streamlining Act

Additionally, under the Permit Streamlining Act (PSA)³ the City cannot determine that an application is incomplete on the basis that it does not include a request for a GPA/ZC unless the submittal requirement checklist included a requirement for the applicant to submit a GPA/ZC.

In determining what constitutes a complete application, the City is subject to the limitations imposed by the PSA. When the City receives an application for a discretionary housing development project, it is required to process the application in compliance with the procedures and timelines stated in the PSA. The PSA states that "[e]ach public agency shall compile one or more lists that shall specify in detail the

¹ Note: The Applicant submitted the materials via email to the City on August 9, 2023, but the City later claimed that it never received the August 9, 2023 submittal because it had been blocked by its email security system. At the request of the City, the Applicant then provided another electronic submission on September 18, 2023, which the City received. The City started the 30-day review clock from this date.

² Gov. Code, § 65589.5, subd. (d)(5).

³ Gov. Code, § 65920 et seq.

information that will be required from any applicant for a development project,”⁴ and furthermore, that “[t]he information compiled pursuant to [Government Code] Section 65940 shall also indicate the criteria which the agency will apply in order to determine the completeness of any application submitted to it for a development project.”⁵ For a completeness determination, the City shall provide a list of items that were not complete and “[t]hat list shall be limited to those items actually required on the lead agency’s submittal requirement checklist.”⁶

In this case, the City’s submittal checklist did not include a requirement for a GPA/ZC at the time of submittal, and therefore, the City cannot require it as part of the application.⁷

Vesting under Government Code Section 65941.1

HCD would also like to inform the City of other obligations under Government Code section 65941.1 that were discussed at the June 27, 2024 hearing:

1. If the City determines that the application for the development project is not complete pursuant to Government Code section 65943, the development proponent is required to submit the specific information needed to complete the application within 90 days of receiving the agency’s written identification of the necessary information.⁸ HCD reminds the City, however, that the 90-day deadline resets after each incompleteness determination. A project with multiple incompleteness letters and responses may have multiple 90-day periods.
2. The preliminary application shall remain vested unless the number of residential units or square footage of construction changes by 20 percent or more (subject to certain conditions as listed in the statute).⁹ Other changes to the application falling outside these circumstances do not void vested rights under the preliminary application.

⁴ Gov. Code, § 65940, subd. (a)(1).

⁵ Gov. Code, § 65941, subd. (a).

⁶ Gov. Code, § 65943, subd. (a).

⁷ Requiring a GPA/ZC as part of the project application inherently requires a determination of whether the project is consistent with the general plan and zoning code. However, the HAA suggests that a determination of *consistency* may not be permitted during the application *completeness* determination phase but must instead occur *after* the application completeness determination. (Gov. Code, § 65589.5, subds. (j)(2)(A), (h)(10).) Therefore, it may be inappropriate to require a GPA/ZC as part of a determination of application completeness. Please note this is applicable to any project application, and not just those subject to the Builder’s Remedy.

⁸ Gov. Code, § 65941.1, subd. (d)(2).

⁹ Gov. Code, § 65941.1, subd. (c).

Conclusion

The City's failure to accept the application for processing due to the lack of a GPA/ZC is in violation of the HAA and PSA. The City Council should reverse its decision and direct City staff to process the Project without further delay and without imposing a requirement for a GPA/ZC. The City should also consider its obligations under Government Code section 65941.1 that retain the Project's vested rights.

Under Government Code section 65585, HCD must notify a local government when that local government takes actions that violate the HAA and the PSA and may notify the California Office of the Attorney General.¹⁰

The City has until September 20, 2024, to provide a written response to this letter. HCD will consider any written response before taking further action authorized by Government Code section 65585, subdivision (j), including, but not limited to, referral to the California Office of the Attorney General.

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Bentley Regehr at bentley.regehr@hcd.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a long horizontal stroke extending to the right.

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

Enclosure: 125-129 Linden Drive, Beverly Hills – Letter of Support and Technical Assistance (June 26, 2024)

¹⁰ Gov. Code, § 65585, subs. (i)(1), (j).

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June 26, 2024

Michael Forbes
Director of Community Development
City of Beverly Hills
Via: mforbes@beverlyhills.org
455 N Rexford Drive
Beverly Hills, CA 90210

Dear Michael Forbes:

RE: 125-129 Linden Drive, Beverly Hills – Letter of Support and Technical Assistance

This letter provides technical assistance to the City of Beverly Hills (City) regarding the proposed development at 125-129 Linden Drive (Project). This assistance is based upon an inquiry submitted through the California Department of Housing and Community Development's (HCD) Housing Accountability Unit (HAU) online portal by the Project applicant regarding the ability of the City to require a general plan amendment for the Project. The Project has vested the protections of Government Code section 65589.5, subdivision (d)(5), also known colloquially as the "Builder's Remedy" under the Housing Accountability Act (HAA).

Background

HCD understands that the Project proposes to construct 165 units on the site, of which 33 units (20 percent of the overall unit count) will be restricted to low-income households. HCD also understands the applicant submitted a preliminary application for the Project pursuant to Government Code section 65941.1 on October 24, 2022. HCD did not certify that the City's housing element was substantially compliant with state law until May 1, 2024. Therefore, at the time the Project's preliminary application was filed, the City would not have been able to make the finding in Government Code section 65589.5, subdivision (d)(5), to deny the Project. The Project vested the noncompliant status of the housing element at the time of submittal in October 2022.¹

¹ This assumes that the preliminary application has not expired and that the Project has not been changed beyond what is permitted in Government Code section 65941.1, subdivision (c).

HCD understands the applicant then filed a full Development Plan Review application for the Project on April 14, 2023, which was within the six-month statutory time period required by Government Code section 65941.1, subdivision (d), to maintain the vested rights conferred by the preliminary application. The City issued an incomplete letter on May 12, 2023, instructing the applicant to pursue a general plan amendment and zone change (GPA/ZC). On August 9, 2023, the applicant submitted a response to comments contained in the incomplete letter, and on October 13, 2023, the City restated that the Project must submit for a GPA/ZC.² The applicant provided a second response letter on January 10, 2024, before eventually requesting an appeal of the City's incompleteness letter on January 11, 2024. An incomplete letter for the January response letter was provided on February 9, 2024. A third resubmittal was received on May 9, 2024, with the incompleteness letter sent on June 7, 2024. The appeal is scheduled to be heard by the City Council on June 27, 2024.

General Plan Amendment and/or Zone Change Requirements and the Housing Accountability Act's Builder's Remedy

HCD issued a related letter to the City of Compton on March 28, 2024 that answered the question: Does the HAA prevent a city from requiring that a project application include a request to amend the general plan/zoning code in order to avoid a legal non-conformity if/when the project is approved? In short, HCD answered that no provision in the HAA prevents a local government from requesting a general plan/zoning code amendment to avoid a legal non-conformity, and the letter went on to warn that such a requirement may lead to a violation of the HAA.

While it remains true that the statutory language in the HAA does not *expressly prevent* the City from requesting or requiring legislative actions (e.g., a GPA/ZC) that would be required for similar projects where the Builder's Remedy does not apply, requiring such action where the Builder's Remedy *does* apply leads to an absurd outcome. As a result, HCD wishes to provide clarification on this topic.

The HAA is clear that a project protected by the Builder's Remedy may not be disapproved for inconsistency with a jurisdiction's general plan and zoning ordinance.³ Accordingly, a jurisdiction that refuses to process or approve a project subject to the Builder's Remedy due to the applicant's refusal to submit a GPA/ZC requested or required by the jurisdiction to resolve such an inconsistency violates the intent of the HAA.

² Note: The Applicant submitted the materials via email to the City on August 9, 2023, but the City later responded claiming they never received the August 9, 2023 submittal because it had been blocked by its email security system. At the request of the City, the Applicant then provided another electronic submission on September 18, 2023, which the City received. The City started the 30-day review clock from this date.

³ Gov. Code, § 65589.5, subd. (d)(5).

Indeed, where a jurisdiction cannot lawfully disapprove a project for inconsistency with the general plan or zoning ordinance, it would be illogical if the jurisdiction could lawfully disapprove a project for failing to resolve that very inconsistency. In other words, the requirement for a GPA/ZC is essentially a requirement for consistency, and disapproving the project for failure to resolve that inconsistency is effectively a disapproval on the grounds of inconsistency. The HAA prohibits such a disapproval.⁴

Determining Application Completeness under the Permit Streamlining Act

Even if a GPA/ZC were permitted under the HAA, the Permit Streamlining Act (PSA)⁵ prohibits the City from using the absence of the GPA/ZC application as a reason to determine a project application is incomplete, if the requirement was not on the submittal requirement checklist. The City cannot determine that an application is incomplete on the basis that it does not include a request for a GPA/ZC unless the submittal requirement checklist included a requirement for the applicant to submit a GPA/ZC.

In determining what constitutes a complete application, the City is subject to the limitations imposed by the PSA. When the City receives an application for a discretionary housing development project, it is required to process the application in compliance with the procedures and timelines stated in the PSA. The PSA states that “[e]ach public agency shall compile one or more lists that shall specify in detail the information that will be required from any applicant for a development project,”⁶ and furthermore, that “[t]he information compiled pursuant to Government Code section 65940 shall also indicate the criteria which the agency will apply in order to determine the completeness of any application submitted to it for a development project.”⁷ For a completeness determination, the City shall provide a list of items that were not complete and “[t]hat list shall be limited to those items actually required on the lead agency’s submittal requirement checklist.”⁸

⁴ HCD understands the desire to have development consistent with general plans and zoning, and to that end, jurisdictions may undertake a GPA/ZC independently from a development application. Jurisdictions should be advised that it may not be possible to process a project-specific GPA/ZC concurrently with project review, even when a jurisdiction is initiating the GPA/ZC itself. For a jurisdiction in which there may be multiple applications for projects subject to the Builder’s Remedy, and the jurisdiction wishes to achieve general plan and/or zoning consistency, it may choose to “batch” amendments after project development applications are approved to ensure housing development projects are not unduly delayed or otherwise impacted.

⁵ Gov. Code, § 65920 et seq.

⁶ Gov. Code, § 65940, subd. (a)(1).

⁷ Gov. Code, § 65941, subd. (a).

⁸ Gov. Code, § 65943, subd. (a).

In this case, the City's submittal checklist did not include a requirement for a GPA/ZC at the time of submittal, and therefore, the City cannot require either as part of the application.⁹

Conclusion

Under the HAA, the City should not require applicants of projects protected by the Builder's Remedy to seek amendments to the City's general plan or zoning code. Even if such amendments could somehow be required without violating the intent of the HAA, the PSA prohibits the City from using the absence of the GPA/ZC application as a reason to determine a project application is incomplete, if the requirement was not on the submittal requirement checklist.

For the proposed Project on Linden Drive, the City Council should grant the appeal and direct City staff to process the Project without further delay and without imposing a requirement for a GPA/ZC.

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Bentley Regehr at bentley.regehr@hcd.ca.gov.

Sincerely,



Shannan West
Housing Accountability Unit Chief

⁹ Requiring a GPA/ZC as part of the project application inherently requires a determination of whether the project is consistent with the general plan and zoning code. However, the HAA suggests that a determination of consistency may not be permitted during the application completeness determination phase but must instead occur *after* the application completeness determination. (Gov. Code, § 65589.5, subs. (j)(2)(A), (h)(10).) Therefore, it may be inappropriate to require a GPA/ZC as part of a determination of application completeness.