FOR OFFICE USE ONLY Received by:_____

Appeal Filed By:
☐ Applicant
☐ Non-Applicant

Decision of:
☐ Development Services Director
☐ Zoning Administrator
☐ Planning Commission

Date Stamp

Fee Received:_____ ☐ Cash** ☐ Credit/Debit** ☐ Check #_____
(see below for applicable fees) **Attach receipt from Cashier*

Request for Appeal

OF DECISIONS MADE PURSUANT TO EGMC TITLE 23

City of Elk Grove, Office of the City Clerk
8401 Laguna Palms Way, Elk Grove, CA 95758
Telephone: (916) 478-3635; Fax: (916) 627-4400

Name of Appellant: Oak Rose LP

Mailing Address: c/o DLA Piper LLP (US), 550 South Hope Street, Suite 2400, Los Angeles, CA 90071

Email: karen.hallock@us.dlapiper.com Phone Number: (213) 694-3154

Project Reference # PLNG22-015 Date of Decision: June 2, 2022

APN # 134-0072-011 Action being Appealed PC's SB 35 Denial

***ALL APPEALS**: Requests to Appeal decisions made pursuant to Elk Grove Municipal Code Section 23.14.060 (Planning Commission, Zoning Administrator, Development Services Director) must be filed with the City Clerk **within 10 days of the date of the action taken.** Pursuant to Resolution No. 2016-110, third-party (non-Applicant) appeals shall be submitted with a filing fee of $2,500 (flat fee); Applicant appeals of decisions made by the Development Services Director or Zoning Administrator shall be submitted with a filing fee of $3,000 (Deposit with time and materials); Applicant appeals of decisions made by the Planning Commission shall be submitted with a filing fee of $5,000 (Deposit with time and materials).*

Statement specifying in detail the grounds for the appeal (attach all supporting documentation):

See attached June 10, 2022 letter from Karen L. Hallock, Esq. of DLA Piper LLP (US) addressed to the City of Elk Grove City Council, with receipt reflecting payment of the $5,000.00 filing fee.

APPELLANT'S SIGNATURE — Karen L. Hallock on behalf of Appellant, Oak Rose LP

June 10, 2022
DATE FILED

Note: Fee must be paid at time request for appeal is filed.

***Notice*:**
This form and the information provided by the requesting party is a public record subject to public disclosure.

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June 10, 2022

VIA E-MAIL: CITYCLERK@ELKGROVECITY.ORG

City of Elk Grove City Council
c/o City Clerk
Elk Grove City Council Chambers
8400 Laguna Palms Way
Elk Grove, California 95758

Re: Appeal Justification Letter re: Applicant Appeal of Planning Commission Determination re: SB 35 Streamlined Review for the Oak Rose Apartments Project (PLNG22-015)

Dear Honorable City Council Members:

This law firm represents Oak Rose LP ("Applicant"), the applicant for the mixed-use permanent supportive housing project known as the Oak Rose Apartments (the "Project"). The Project is located at 9252 Elk Grove Boulevard ("Property") in the City of Elk Grove ("City"). The Project proposes to construct a mixed-use, 100 percent affordable permanent supportive housing project, including 67 dwelling units and approximately 3,600 square feet of ground-floor resident and community-serving office uses.

This letter is provided in support of the Applicant's appeal of the City Planning Commission's ("Commission") denial of a ministerial SB 35 review approval for the Project. On June 2, 2022, the Commission improperly determined the Project is not eligible for Senate Bill 35's ("SB 35") streamlined ministerial approval process. This decision was issued in violation of various state statutory and state and federal constitutional requirements and must be reversed by the City Council.

I. The Commission's Improper June 2, 2022 Decision

The Commission assessed the Project's SB 35 consistency under twelve eligibility criteria, as set out in the June 2, 2022 Planning Staff Report ("Staff Report"). The Staff Report ultimately concluded that the Project is consistent with all such criteria, with two alleged exceptions: (1) the Project's proposed lighting was inconsistent with the standards of Elk Grove Municipal Code ("EGMC") Chapter 23.56, and (2) a mixed-use zoning standard under Old Town Elk Grove Special Planning Area ("OTSPA") Table 2, Footnote 3 that prohibits ground floor residential uses at the Site, only allowing residential uses on the second and third floors.

At the June 2nd Commission hearing, Planning staff confirmed to the Commission that the Applicant had resolved the lighting issue, and that the Project, as revised, complied with the applicable standard under EGMC Chapter 23.56. However, staff asserted that the Project – which provides 19 ground floor

residential units in addition to 3,600 square feet of ground-floor resident and community-serving office uses – remained inconsistent with the OTSPA's Table 2, Footnote 3 standard, and thus remained ineligible for SB 35 due to an alleged inconsistency with that objective zoning standard.

Following a full public hearing on what is supposed to be a ministerial process, the Commission voted to adopt staff's recommendation and denied the Project's application for SB 35 ministerial review. Formally, this denial was based only on the Project's alleged inconsistency with the OTSPA Table 2, Footnote 3 prohibition on ground floor residential uses within a mixed-use project. This determination is inconsistent with state law and must be reversed.

II. The Commission's SB 35 Denial Was Invalid: The Project is Consistent with Objective City Zoning Standards per Code and as a Matter of State Law

The Commission's determination that the Project is inconsistent with the OTSPA's prohibition on ground floor residential uses, and is thus ineligible for SB 35, is invalid under two separate state housing statutes. **First**, under AB 2162, Government Code Section 65583, supportive housing projects such as the Project "shall be a use by right in all zones where multifamily and mixed uses are permitted, as provided in Article 11 (commencing with Section 65650)." Under Government Code Section 65651, "supportive housing shall be a use by right in zones where multifamily ***and mixed uses*** are permitted" if certain conditions are met. (Emphasis added.)

The Staff Report adopted by the Commission explicitly found the Project is consistent with and meets all the conditions under Government Code Section 65651. (Staff Report, at pp. 3-5.) Yet, the Commission also made the contradictory determination that the Project was not allowed by right in the OSTPA mixed-use zone, despite the clear mandate of AB 2162. As a matter of state law, because, as fully analyzed and conceded in the Staff Report adopted by the Commission, the Project is consistent with and meets all applicable criteria under AB 2162, Government Code Sections 65583 and 65650 et seq., it is allowed by right in the mixed-use zone in which it is located. Finding that the Project was inconsistent with an applicable OTSPA mixed-use zoning standard impermissibly contradicts this state law mandate and is internally inconsistent given the Staff Report's findings adopted by the Commission. The Commission's decision must be reversed for this reason, alone.

Second, under SB 35, an agency cannot find a project inconsistent with a zoning standard that is subject to a valid waiver request under the State Density Bonus law, Government Code Section 65915(e)(1). (Gov't Code, § 65913.4(A)(5).) The Applicant is entitled to a waiver of the OTSPA development standard prohibiting ground floor residential uses under Government Code Section 65915(e)(1) because, as set forth in the Applicant's original Project application and clarified in subsequent communications with the City, without the waiver, the Project could not be constructed to its full allowed density under the City's Zoning Code and the state Density Bonus Law.

Under Government Code Section 65915(e)(1), "[i]n no case may a city . . . apply any development standard that will have the effect of physically precluding the construction of a development" that provides at least the minimum amount and type of required affordable housing units from being constructed at its allowed density unless substantial evidence supports the conclusion that the granting of the waiver would have a specific, adverse effect on public health or safety. (Gov't Code, § 65915(e)(1).)

First, a waiver of the standard set out in Table 2, Footnote 3 of the OTSPA is necessary because it would physically preclude the construction of the Project at the density permitted under the Density Bonus Law. Specifically, as a 100 percent permanent supportive housing development with one manager's unit, the Project is entitled to 67 units (66 studio units and one 2-bedroom manager's unit). The Project includes 19 units on the ground floor, 25 units on the second floor and 23 units on third floor. If the OTSPA Table 2, Footnote 3 development standard is not waived it would be physically impossible to build 67 residential units on the second and third floors given the three-story height limitation applicable to the property under OTSPA Table 2. All but one of the proposed units are studio units and thus there is no flexibility to reduce the size of the units – certainly not in a manner that would enable 19 units to be added on the second and third floors only. Further, there is simply no option for the Project to expand outward given the size of the Site, the Project's lot coverage, and its applicable setbacks. Accordingly, Table 2, Footnote 3 of the OTSPA would physically preclude the construction of the Project at its allowed density.

Second, as a 100 percent affordable permanent supportive housing development, the Project far exceeds the minimum amount of covenanted low income housing needed to qualify for a Density Bonus. Third, the health and safety findings required to deny a waiver could not reasonably be made here regarding a request to allow ground floor residential uses in a residential building in a residential zone allowed by right under City zoning and state law. Neither the Staff Report nor the Commission attempted to assert otherwise. Therefore, the Commission lacked a valid basis to deny the Project's eligibility for an SB 35 streamlined approval on the basis of Table 2, Footnote 3 of the OTSPA in light of the valid Density Bonus waiver request regarding that development standard. For this additional reason, the Commission's decision must be reversed.

As a matter of state law, the Project is consistent with the City's objective zoning standards. Because the Project meets all the other applicable criteria for SB 35 compliance as set out in the Staff Report adopted by the Commission, the City Council should grant this appeal and determine the Project is consistent with SB 35 and subject to streamlined ministerial review.

III. The Commission Considered Improper Discretionary Factors In Making Its Determination

Pursuant to California Government Code Section 65913.4(c) of SB 35:

> [a]ny design review or public oversight of the development may be conducted by the local government's planning commission or any equivalent board or commission responsible for review

> and approval of development projects, or the city council or board of supervisors, as appropriate. That **design review or public oversight shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects**, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction. That design review or public oversight … **shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect** . . . ." (emphasis added.)

"Ministerial" review "involve[es] little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies legal or code requirements to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (14 C.C.R., § 15369.) On the other hand, a "discretionary project" is a project "the approval or disapproval of which requires the exercise of judgment or deliberation on the part of the lead agency." (14 C.C.R., § 15357.)

Though the Commission ultimately *formally* denied the Project's SB 35 approval on limited grounds related to alleged non-compliance with an objective standard under Table 2, Footnote 3 of the OTSPA at the direction of the City Attorney, the statements made by Commissioners in deliberations unmistakably indicate that they considered improper discretionary factors in making their determination.

In particular, Commissioners made repeated comments questioning the wisdom and propriety of locating the proposed permanent supportive housing Project near Elk Grove Boulevard, residences, businesses, and the Elk Grove Library. One Commissioner stated on the record that, "[b]ased on the objectivity standards, I don't think that this is the right place, I don't think there is enough parking." Another stated, "I do agree on the merits that this is not the proper location."

However, a by right permanent supportive housing project's proximity to a major thoroughfare, market rate housing residences and a public library is not relevant to any applicable objective zoning standard. Rather, the Commissioners' deliberations reveal that their ultimate decision was improperly motivated by discretionary "neighborhood compatibility" factors not relevant to the ministerial SB 35 approval before them. The Commissioners' unlawful and improper consideration of such irrelevant discretionary factors violates SB 35 and warrants reversal of the Commission's decision on this additional ground.

IV. The Commission's Denial of the Project Violates Federal and State Fair Housing Law

If allowed to stand, the Commission's SB 35 denial would violate federal and state fair housing law. The federal Fair Housing Act ("FHA") and its state counterpart, the Fair Housing and Employment Act

("FEHA"), prohibit discriminatory housing practices on the basis of, among other protected categories, race. In 2015, the U.S. Supreme Court held that "disparate impact" claims are cognizable under the Fair Housing Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* (2015) 135 S.Ct. 2507. Disparate impact claims challenge facially neutral policies and practices that have a disparate impact on members of a protected class. (Id., at p. 2513.)

Recent U.S. Census data indicates the majority of the City's population are not members of a racial "protected class" under the FHA and FEHA; over 60 percent of the City's residents identify as either White or Asian American. (See U.S. Census Bureau, Quick Facts, Elk Grove city, California.) The Black population in the City is 11 percent, which is less than Sacramento County overall, which is 13 percent Black. (Id.) On the other hand, the unhoused population in Sacramento County that would be served by the Project is significantly overrepresented by Black citizens, who are approximately 34 percent of the County's total unhoused population per the County's 2019 Point-in-Time count. (See California State University, Sacramento Institute for Social Research and Sacramento Steps Forward, *Homelessness in Sacramento County: Results from the 2019 Point-in-Time Count*, June 2019, at p. 23.) Under these demographic facts, a denial of the Project by the City would result in an unlawful disparate impact on the Black unhoused population, causing a discriminatory effect by denying housing opportunities to persons from a federally and state protected racial class. (See, e.g., *Mhany Mgmt., Inc. v. Cnty. of Nassau* (2d Cir. 2016) 819 F.3d 581; *Avenue 6E Investments, LLC v. City of Yuma, Ariz*. (9th Cir. 2016) 818 F.3d 493, 503; *United States. v. City of Black Jack, Missouri* (8th Cir. 1974) 508 F. 2d 1179, 1184-86.)

V. The Commission's Decision Violates SB 330

The Housing Crisis Act of 2019 ("SB 330") was signed into law on October 19, 2019 to combat the housing shortage in California. (Gov't Code § 65589.5(a)(2)(B).) As one means of achieving the state's goal of boosting housing development opportunities, SB 330 limits a local government agency's ability to disapprove qualifying "Housing Development Projects." The law applies broadly to "any required land use approvals or entitlements necessary for the issuance of a building permit," and thus applies to the SB 35 approval at issue here. (Gov't Code § 65589.5(h)(6)(A).) The "Housing Development Projects" to which the statute applies also explicitly include transitional or supportive housing. (Gov Code § 65589.5(h)(2).)

If a Housing Development Project does not warrant certain "public health or safety findings" and "complies with applicable, objective general plan and zoning criteria in effect at the time that the application was deemed complete," the project cannot be denied by the applicable agency. (Gov't Code §65589.5(j)(1).) As stated above, the Project is consistent with objective City General Plan and zoning standards by their own terms and as a matter of state law. Moreover, the Commission had no basis to and did not attempt to find that the Project would "have a specific, adverse impact upon public health or safety, and that there is no feasible method to satisfactorily mitigate or avoid such impacts." (Gov. Code § 65589.5(d)(2).) Accordingly, the Commission's denial of the Project's SB 35 violates SB 330 and must be reversed for this additional reason.

VI. The Commission's Decision Violated the Applicant's Due Process Rights

The Commission's determination that the Project's SB 35 approval can be denied due to an alleged failure to comply with "objective zoning standards" as a result of the Project's non-compliance with Table 2, Footnote 3 of the OTSPA – decided without considering the Applicant's Density Bonus waiver request –violated the Applicant's fundamental due process right to a fair hearing.

As stated above, SB 35, states clearly that objective zoning standards do not include, for the purposes of assessing SB 35 compliance, those for which a Density Bonus waiver is granted. (Gov't Code, 65913.4(a)(5).) As also noted above, the Project's application includes a valid request for a waiver from Table 2, Footnote 3 of the OTSPA under the Density Bonus statute. The request for a waiver meets the standards of Government Code Section 65915(e)(1) because the application of Table 2, Footnote 3 of the OTSPA would prevent the Project from being constructed at its allowed, by right density and none of the grounds for denial under Government Code Section 65915(e) exist.

It was improper and denied the Applicant's due process rights for the Commission to issue an SB 35 denial based on an alleged failure to comply with a zoning standard for which there is a valid Density Bonus waiver request pending before the City which the Commission did not and, in accordance with current City code requirements, could not consider. By denying the Project's SB 35 application based on alleged inconsistency with a zoning standard for which there was a pending, valid waiver request without consideration of that request, the Commission engaged an unfair, sham process that did not afford the Applicant its constitutional due process right to a fair hearing.

VII. Conclusion

The Commission's denial of the Project's SB 35 approval application violates various state and federal laws and must be reversed.

Very truly yours,

Karen L. Hallock

Enclosure: Appeal Fee Receipt

cc: Jonathan P. Hobbs, Esq., City Attorney, City of Elk Grove
(Via Email: *jhobbs@elkgrovecity.org*)

Andrew Brady, Esq.