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June 25, 2020

Honorable Commissioners,

Re: Representative Letter dated June 23, 2020 – 1045 Olive (CPC-2017-3251).

On June 23, 2020, the Applicant representative (“representative”) for the 1045 Olive Project (“Project”) submitted correspondence to the City Planning Commission challenging Planning Staff’s Supplemental Report. The representative raises many falsehoods, and our intent with this letter is to simply clarify the misrepresentations and misguided assertions that have been raised.

Among the many faulty claims, the representative states surprise at the contents of Planning Staff’s Supplemental Report despite a phone call and a follow up email to the representative on June 8, 2020 with the correct calculations Planning Staff would present to CPC; affirms his arbitrary and erroneous interpretation of the City’s TFAR ordinance; falsely claims that the City’s worksheet was unofficial; and requests that the Planning Department’s request for an accurate accounting of correctly calculated transfer area, Transfer Payment, and Public Benefit Payment be disregarded. Moreover, since the filing of the original application for the Project, the representative has continually modified and re-calculated the Public Benefit and Transfer Payments, with each version resulting in different numbers from the last, and in every instance undercutting the full value of what is due to the City. This demonstrates that the representative’s actions appear disingenuous. If the representative was firm in his argument that the LAMC is clear and unambiguous, he would stand by his original calculation. Instead, he has modified his calculations no fewer than three times with the same intent to undermine the City’s TFAR process. Attached to this letter is a summary of the various calculations the representative has presented over the course of the City’s processing of this case, and which further demonstrates that the representative is misguided and deliberate in his attempt to shortchange the City.

While the representative conceded the LAMC interpretation of “Lot Area” is correct in his April 30, 2020 letter, and no longer disputes the definition, he is attempting to create confusion as to the meaning and application of when the definition of Lot Area and Buildable Area is utilized in calculating the Maximum Allowable Floor Area, Transfer Payment, and Public Benefit Payment. Staff maintains that definitions have been consistently applied, and Lot Area, Buildable Area, and Floor Area Rights are consistent with the Municipal Code and the Department’s historical interpretation of these definitions.

Representative: Statutory Language of the TFAR Ordinance is Clear and Unambiguous

Staff Response:

The representative misleadingly argues that the Supreme Court's recent interpretation of Title VII of the Civil Rights Act was based on the reasonable meaning of that federal statute while City staff's interpretation of the TFAR ordinance is not. This is completely untrue. The City's interpretation of the TFAR ordinance is clear and unambiguous. ***Only the representative is confused about the plain meaning of the LAMC as it relates to the calculation of Maximum Allowable Floor Area, Transfer Payment, and Public Benefit Payment.*** The representative continues to arbitrarily and favorably parse the definitions contained in the Municipal Code to benefit their Project. The Department's current and historic implementation are consistent in interpreting definitions in LAMC Section 14.5.3, for the following:

Buildable Area: ***means the same as Lot Area, with the following exception: for the purposes of computing the maximum Floor Area Rights available*** through the approval of a Transfer Plan for a Transit area Mixed Use Project, as defined herein, the buildable area shall include the lot area plus the area between the exterior lot lines and the centerline of any abutting public right-of-way.

Floor Area Rights: means the ability to construct additional Floor Area within a project, pursuant to an approved Transfer Plan, ***in excess*** of the amount of Floor Area that the Project would be allowed based on the Lot Area, or, in the case of a Transit Area Mixed Use Project, Buildable Area.

As outlined in the Supplemental Staff Report for the Project, calculating the requested floor area involves determining the by-right floor area and maximum Floor Area Rights. The Supplemental Staff Report provided a step-by-step explanation of the calculations implicitly applying the definitions above, and explicitly detailing the process. Per the Buildable Area definition above, Buildable Area can be used in place of Lot Area, but ***only when calculating maximum Floor Area rights***. Therefore, when calculating the base floor area, or by-right floor area, ***Buildable Area means the same as Lot Area***. When determining the maximum Floor Area allowed, pursuant to the D Limitation on site, the maximum FAR would be 13:1 with TFAR, and the TFAR ordinance allows for the use of the additional public right of way in determining this ***maximum Floor Area Rights but reverts to Lot Area for other calculations***. The representative is re-interpreting LAMC definitions for the Applicant's own financial benefit, and to the direct detriment to the City, in an attempt to gain additional transferred floor area at no cost. The TFAR ordinance has not supplied a new definition for Lot Area, ***nor does the ordinance supersede the standard process for determining by-right Floor Area, as outlined in LAMC Section 12.03***, but rather its own definitions reinforce the process for by-right calculations.

Representative: City Must Give Meaning to the Clear and Plain Terms of the TFAR Ordinance

Staff Response:

As described above, and consistent with the Municipal Code, the City has made clear the process for determining the terms of the TFAR ordinance and implementing the processes. The representative, misinterprets the definitions in a way which results in a miscalculation and results in a financial advantage for the Project. As stated on page 2 of the last paragraph of the representative's June 23, 2020 letter:

"For a Transit Area Mixed Use Project, multiplying the Buildable Area by a floor area ratio ("FAR") of six calculates the maximum amount of Floor Area that can go up to 13:1 FAR with a Transfer Plan."

This is not only in conflict with the plan language of the LAMC, but also does not accurately describe the process for determining by-right floor area. In fact, if the applicant had not requested a Transfer of Floor Area Rights, the by-right floor area for this project would have been calculated without any need to use the TFAR ordinance. The TFAR ordinance does not afford the Applicant floor area from the public right-of-way within their by-right FAR. The public-right-of-way belongs to the public, not the Applicant. The Applicant is not permitted to take, nor would the City agree to give the Applicant, credit for floor area rights Applicant does not own. As a benefit for participating in the TFAR process, the City does permit the Applicant the ability to purchase additional Floor Area which considers Buildable Area, inclusive of public street areas, but does not to allow the Applicant to use Buildable Area to calculate their by-right floor area. The calculations outlined by the representative in his June 23, 2020 letter credits a private developer with floor area from the public right-of-way. The calculations and Transfer Plan in the Staff Report and Supplemental Report prepared for the Project are correct, and apply the TFAR ordinance consistent with a plain reading of the ordinance.

Representative: Supporting TFAR Ordinance Definitions (LAMC Section 14.5.3)

Staff Response:

As discussed above, the representative continues to apply a misguided interpretation of the LAMC definition, and contradicts the Buildable Area definition they cite on page 3. The plain language of the TFAR ordinance provides for Buildable Area to be used for determining maximum Floor Area Rights, or the maximum amount of area allowed above the by-right FAR, where in calculating by-right floor area, Buildable Area means the same as Lot Area.

Representative: Distinctions in the Staff Supplemental are Not Based on the Law

Staff Response:

The representative cites the Supplemental Staff Report to make an assertion on behalf of the City. This assertion is, in fact correct, that Buildable Area includes areas which the Applicant does not have the legal right to develop without a Transfer Plan. This is correct and is the basis of the TFAR ordinance and process; the requested floor area in excess of the base or by-right area is being purchased from City property. Further, this is expressly stated in the definition for Floor Area Rights listed above, which requires a Transfer Plan to grant Floor Area Rights (area greater than by-right floor area) of any kind. Further, the Buildable Area definition seeks to provide more *transferable floor area* to transit projects, not subsidize transit adjacent projects with, effectively, a shortfall in public benefit dollars by crediting those projects with floor area from areas in the public right-of-way. The representative continues to contend, without merit and in contravention of the express intent and purpose of the TFAR ordinance, that Buildable Area includes areas which the applicant is entitled to build despite being owned by the public. The representative attempts to make this point by conflating a layperson explanation of by-right or “base” floor area. The Supplemental Staff Report for the Project does use the expression “base floor area” a total of four times, but clearly describes what by-right floor area means, without using the expression. A reasonable reading of the report would conclude the term and expression are related or synonymous.

Additionally, the representative again misapplies the meaning of Buildable Area, in the bold and underlined text on page 4. Independent of the misapplication by the representative, as described above, and in the definition of Buildable Area, outside of determining the maximum floor area a Transit Mixed Use Project can build, Buildable Area is the same as Lot Area. So the contention

that there are “no Floor Area Rights for a significant portion of the area forming the basis of the maximum available Floor Area Rights” is correct in that no private developer has the right to build in the public right-of-way. In effect, and as illustrated in the Supplemental Staff Report, Buildable Area allows the developer to purchase the floor area starting at their property line and continuing to the centerline of the adjacent street, which may then be developed on their *private property*, but at no point grants a developer rights to develop the public right-of-way, nor assigns development potential to that area. The representative poses a question at the end of page 4 which posits a situation in which the City’s plain language interpretation of the Buildable Area definition precludes development in whole. This is a logical fallacy. Again, as discussed here Buildable Area is the same as Lot Area, **except** for the purposes of determining the maximum floor area in excess or taken as a difference from the by-right floor area. By-right floor area is not the maximum floor area, and therefore, Buildable Area per its definition is the same as Lot Area.

Representative: Plain Meaning of Lot Area (Prior to Any Dedication) Means What it Says

Staff Response:

As discussed above, the representative has previously conceded that Lot Area for the purposes of TFAR means the horizontal area within the lot lines prior to dedications required as part of the proposal. The representative argues in bad faith that the intent of the LAMC and City Council is to maximize the Lot Area of the Applicant’s site. As previously discussed in the Staff Report and Supplemental Staff Report, dedications made from prior actions are not eligible for inclusion in Lot Area. Further the Council has enacted similar provisions which allow for use of dedicated area, such as the 2007 Greater Downtown Housing Incentive Area, which includes no specific language as the applicant has suggested, but rather includes similar tenses and wording as the TFAR ordinance.

Representative: The TFAR Form was Not an Official Unmodifiable Publicly Available Form

Staff Response:

The representative states that the City did not have an official standard TFAR form and claims that the representative’s modifications of the form were necessary since the form did not adequately address Transit Area Mixed Use Projects. As noted by the representative, the Community Redevelopment Agency (CRA) had previously used a TFAR form in their own review of TFAR projects. This form was updated in 2012 after the City’s TFAR ordinance went into effect in order to incorporate the standards of the City’s TFAR ordinance. This updated CRA form was subsequently used widely by applicants for TFAR requests to the City.

While the City did not have its own separate TFAR form until after the dissolution of the CRA, each TFAR case processed by the City was required to submit the updated CRA application form. As evidenced in all TFAR case filings with the City, the TFAR form was consistently provided as part of the application package and filled out by applicants *without being blatantly altered* as was done by the representative. Applicants were able to directly input information into the blank spaces of the form by inserting project specific information such as appraisal value, lot area, the amount of floor area requested for transfer, and calculations for Public Benefit Payments and Transfer Payments.

However, rather than simply inputting information into the blank areas of the form, the representative modified the text of the form and the payment formulas, as they did not agree with

the calculations provided on the form. The representative falsely contends that the form was deficient since it did not address the Transit Area Mixed Use Project portion of the TFAR ordinance. However, this is not the case. Several other Transit Area Mixed Use Projects have utilized the CRA TFAR form without modifying the text and payment formulas. Transit Area Mixed Use Projects are only different from standard TFAR projects in that the maximum floor area permitted through a TFAR request is calculated based on Buildable Area rather than Lot Area. As this particular calculation is not shown on the TFAR form, there is no need to modify the form. This is clearly evidenced by the fact that several other Transit Area Mixed Use Projects were able to submit the form without modification to the payment formulas.

Rather than disclosing to the City that the form had been modified, or providing a supplemental attachment with the representative's own calculations for a Transit Area Mixed Use Project, the representative instead altered the payment formula, at a substantial financial benefit to the Applicant and which would have resulted in a loss to the City of over \$11 million dollars. Whether or not the application form had an "official" City form number is irrelevant to the fact that the representative submitted a standardized form used in common practice with the City, that the Applicant signed under penalty of perjury, and then misrepresented their request for floor area and modified the form's formula for their own benefit and to the detriment of the City.

The representative also fails to disclose that he was notified by Planning Staff regarding our awareness of the modified form in a phone call on February 21, 2020, and later admitted in a phone call with Planning Staff on April 27, 2010, that a representative for the Applicant deliberately altered the form, undercutting the full value of the floor area proposed to be purchased and intentionally shortchanging the City of the full value of public benefits intended to be generated for the City's residents.

Representative: The Applicant Clearly Identified Proposed Transfer Plan and Public Benefit Payments

Staff Response:

The representative states that there is a lack of general recognition among City staff regarding the mechanics of processing a Transit Area Mixed Use Project and that the Applicant had been transparent in their proposed Transfer Plan and Public Benefit Payment calculations. The representative references a meeting with the City in 2017, the Applicant's 2017 entitlement package (TFAR application, building plans, project description, and findings), and the Draft EIR as evidence that the Transfer Plan and Public Benefit Calculations were clearly provided to the City.

The representative points to documents that state that the project is a Transit Area Mixed Use Project and that these types of projects may utilize Buildable Area, rather than Lot Area, in determining maximum Floor Area Rights under TFAR. Many of these documents cite or directly repeat the language of the Municipal Code. The City does not dispute these facts and relies on these facts in determining the TFAR floor area to be transferred and payment calculations. These facts fail to support the representative's claim that by-right floor area should be based on Buildable Area. There is no evidence in any of the documents referenced by the representative or in the Municipal Code that it is appropriate to use Buildable Area (to the center-line of the street) in determining by-right floor area rights.

The representative is correct that a number of their submitted documents included several errors. For example, the 2017 entitlement package cites an incorrect and inflated Lot Area in each document. In addition, the representative's incorrect assertion that Buildable Area should be utilized in calculating by-right floor area is demonstrated in two places within these documents - on the cover page calculations of the submitted building plans and on page 17 of the Applicant's submitted findings. The result of this calculation error was also included in other documents. Nonetheless, this does not provide justification that the City should continue to determine by-right floor area rights or benefit calculations based on incorrect information provided by the Applicant.

The representative also references the portion of the updated CRA TFAR form where the representative modified and replaced the words "Lot Area" with "Buildable Area" in the Public Benefit Calculation, and also acknowledges that the representative has unequivocally dropped the interpretation that Buildable Area and Lot Area are interchangeable for purposes of the calculation.

Representative: City Had Many Opportunities to Review the Proposed Transfer Plan and Public Benefit Payments

Staff Response:

The representative provides a listing of various meetings between the Applicant team and City staff, as well as milestone dates for release of environmental documents, the public hearing, and scheduled City Planning Commission dates, and claims that the City has had sufficient opportunity to review the transfer plan and public benefit payment.

The representative curiously also omits several details regarding the City's correspondence with the Applicant team:

On August 15, 2017, an entitlement package for Case No. CPC-2017-3251-TDR-MCUP-SPR was filed with the Department of City Planning. The package included a TFAR application. The TFAR application included a calculation for the required Public Benefit Payment, but did not provide information regarding proposed allocations of the Public Benefit Payment. As the original application form was deficient in those details, the Department of City Planning requested that a completed and revised application be submitted.

On November 26, 2019, the Applicant provided an updated form with proposed allocations of the Public Benefit Payments. Following, on December 4, 2019, the City conducted the TFAR Early Consultation Session to discuss the Applicant's initial proposed allocation for the Public Benefit Payment.

On February 20, 2020, Department of City Planning staff found discrepancies in the Project's TFAR application with regards to the lot area square footage used to calculate the Public Benefit Payment amount and informed the Applicant. Specifically, staff discovered that the Applicant had intentionally altered the City's TFAR application form and replaced Lot Area with Buildable Area in three locations, significantly reducing the Applicant's TFAR payments to their advantage.

On February 21, 2020, Department of City Planning staff discussed the incorrect calculations based on the alterations made to the City's TFAR Form.

On April 27, 2020, Planning Staff spoke with representatives of the Applicant where the representative admitted that someone altered the form on behalf of the Applicant. Planning staff requested the submittal of a corrected TFAR form.

On April 30, 2020, the Applicant submitted a revised TFAR application form, with the correct Lot Area of 38,907 square feet identified in the application. However, City staff discovered an error in the revised TFAR form regarding the Applicant's assumptions about the by-right floor area, resulting in an undercount in the amount of floor area to be transferred.

On May 14, 2020, the City Planning Commission continued the item to June 25, 2020 at the request of City staff, to allow for staff to fully address arguments from the Applicant in the two respective March 9, 2020 and April 30, 2020 letters, and for further investigation of the TFAR calculations.

On June 8, 2020, City staff contacted the Applicant's representative regarding the second error used to calculate the amount of floor area to be transferred and notified the Applicant's representative that City staff's recommendation to CPC would represent an accurate calculation consistent with the LAMC.

As such, the City has demonstrated a good faith effort in communicating with the representative in attempts to remedy errors in the Applicant's application and calculations. Nonetheless, the representative continues to refuse to correct the errors and to comply with the objective requirements of the Municipal Code.

Representative: *Conditions of Approval and Draft Findings Require Modification*

Staff Response:

As outlined above, in the Staff Report and Supplemental Staff Report prepared for the Project, the Conditions, Findings, calculations, interpretations and definitions are consistent with the LAMC. The representative, if they wish to build to the maximum 13:1 FAR for the Project Site, would be requesting a transfer of 523,195 square feet, which would correspond to a \$21,698,509 Public Benefit Payment, and a Transfer Payment of \$2,615,976. The Findings and Conditions reflect the proper calculations. Further, Planning Staff's recommended Transfer Plan is consistent with the recommendations of the TFAR Committee, and does not include the changes requested by the Applicant. The identification of the issues with the TFAR proposal was complicated by the misrepresentation of the Project by the Applicant. However, as described above, the City has made a good faith effort in communicating the issues to the representative. The timing would not constitute "late and arbitrary" reinterpretation of the code, and no state law protects any project proponent, or places a restriction on the timing of the identification of alterations made to a local agency form by an applicant, or misrepresentation of facts provided to a local agency. Despite these issues, the City has demonstrated a good faith effort to verify the appropriateness of all applications and aspects of the project prior to making a recommendation to the Commission on the Project. Planning Staff stands by its Conditions of Approval, Findings, and Recommendations to the Commission.

Table 1: TFAR Payments

	Public Benefit Payment	Transfer Payment
City of Los Angeles Calculation	\$21,698,509	\$2,615,975
Applicant's Submittal, dated 8/15/17	\$11,060,000 <i>(shortfall: \$10,638,509)</i>	\$2,204,015 <i>(shortfall: \$411,960)</i>
Applicant's Submittal, dated 3/9/20	\$15,373,620 <i>(shortfall: \$6,324,889)</i>	\$2,204,015 <i>(shortfall: \$411,960)</i>
Applicant's Submittal, dated 4/30/20	\$16,788,428 <i>(shortfall: \$4,910,081)</i>	\$2,204,015 <i>(shortfall: \$411,960)</i>