

**CITY COUNCIL
CLOSED SESSION SPECIAL MEETING
NOTICE AND AGENDA**

**Tuesday, May 21, 2024
4:30 p.m.**

**City Council Conference Room
200 Old Bernal Ave
Pleasanton, CA 94566**

NOTICE IS HEREBY GIVEN, pursuant to section 54956 of the California Government Code, that a special meeting of the City Council of the City of Pleasanton is hereby called.

CALL TO ORDER / ROLL CALL

- 1. PUBLIC COMMENT** – *Comments are limited to three minutes and to only those items listed on the agenda.*
- 2. ADJOURN TO CLOSED SESSION**
CONFERENCE WITH LEGAL COUNSEL—ANTICIPATED LITIGATION
Significant exposure to litigation pursuant to paragraph (2) (d) of Section 54956.9:
One potential case: See April 23, 2024 letter from Bryan W. Wenter (attached)

ADJOURNMENT

Notice

Under Government Code §54957.5, any writings/documents regarding an open session item on this agenda and items received by the City Clerk's Office by 12:00 p.m. on the day of the meeting provided to a majority of the City Council after distribution of the agenda packet will be available for public inspection on the City's website <https://www.cityofpleasantonca.gov/> and also at the Pleasanton Library located at 400 Old Bernal Ave., Pleasanton, CA 94566.

Accessible Public Meetings

The City of Pleasanton can provide special assistance for persons with disabilities to participate in public meetings. To make a request for a disability-related modification or accommodation, please contact the City Clerk's Office at 123 Main Street, Pleasanton, CA 94566 or (925) 931-5027 at the earliest possible time. If you need sign language assistance, please provide at least two working days' notice prior to the meeting date.



**MILLER STARR
REGALIA**

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APR 24 2024

CITY CLERK OFFICE

Bryan W. Wenter, AICP
Direct Dial: 925 941 3268
bryan.wenter@msrlgal.com

April 23, 2024

VIA E-MAIL

Karla Brown, Mayor
City of Pleasanton
123 Main Street
P.O. Box 520
Pleasanton, CA 94566-0802
KBrown@cityofpleasantonca.gov

Jocelyn Kwong, City Clerk
City of Pleasanton
123 Main Street
P.O. Box 520
Pleasanton, CA 94566
pleasantoncityclerk@cityofpleasanton.ca.gov

**Re: Appeal of Planning Commission's Decision on P23-0599
Housing Development Project at 5976-5994 W. Las Positas Boulevard
APN: 941-2760-5**

Dear Mayor Brown and Clerk Kwong:

We hereby appeal the Planning Commission's April 10, 2024 decision to disapprove the above-referenced project—without making the findings required by law—by denying the applications for Tentative Tract Map and Design Review, filed as P23-0599, pursuant to Chapters 19.56 and 18.144 of the Pleasanton Municipal Code. This appeal includes the refundable appeal fee of \$347 established in the City's current master fee schedule.

In brief, the project consists of an application for a Vesting Tentative Map and Design Review for a housing development project that includes the demolition of two existing commercial buildings and construction of 146 multi-family residential units with 38 accessory dwelling units ("Project"), and with associated site improvements located at 5976 & 5994 West Las Positas Boulevard (APN 941-2760-5) in Pleasanton's Hacienda Business Park ("Project Site"). The Planning Commission disapproved the Project, on recommendation from City staff, on the grounds that the Project is allegedly not consistent with the applicable General Plan land use designation and zoning for the Project Site and the Project is not seeking a Planned Unit Development rezoning.

For the reasons we have explained many times—in detailed correspondence to staff and at the Planning Commission's hearing—staff's recommendation and the Planning Commission's decision are incorrect on the facts, the law, and state housing policy.

As the Planning Commission staff report correctly notes, the Project Site's land use designation is Mixed Use/Business Park (Pleasanton General Plan Land Use Map 2005-2025) and the zoning is Planned Unit Development - Industrial/Commercial-

Offices ("PUD-I/C-O") (Pleasanton Zoning Map), which designates the Project Site as Garden Office District ("OGPD"). But the staff report fails to acknowledge that the General Plan land use designation objectively allows residential development at 20 or more units per acre (General Plan Table 2-3), and despite that objectively allowed density the staff report claims the planning designation "defers" to the existing PUD zoning, which does not allow residential land uses (i.e., housing) at any density.

The underlying PUD and OGPD zoning are basic office classifications and they do not allow residential uses. While the OGPD states that it conditionally allows nursing homes and assisted living facilities, and it organizes those uses in a chart under a "residential" heading, nothing in the City's land use regulations substantively treats such uses as residential or housing (see, e.g., Land Use Element at p. 2-23 [explaining that residential uses include detached and attached single-family homes, duplexes, townhouses, condominiums, and apartments] and Land Use Element Table 2-5 (explaining the amount of land in the City designated for various land uses)). This is consistent with other jurisdictions in California and even with the state itself, which treats uses like nursing homes and assisted living facilities as institutional and not as residential or housing. We are unaware of any jurisdiction, including Pleasanton, that treats nursing homes and assisted living facilities as residential land uses such as housing and the "residential" heading in the City's chart does not change this fact.

The Planning Commission staff report and the underlying recommendation and decision are thus incorrect on the facts, as the General Plan land use designation for the Project Site plainly allows housing and the zoning classification does not. But the staff report, recommendation, and decision are also incorrect on the law.

Even without the benefit of state housing law, which will be addressed in more detail below, longstanding and controlling principles of basic California land use law make clear that the plan is the constitution for development and the zoning must follow the plan. The state's Planning and Zoning Laws expressly require the land use element to affirmatively designate the proposed general distribution and general location and extent of the uses of the land *for housing* and other categories of public and private uses of land. Moreover, the land use element itself must provide for the standards of population density and building intensity for the various districts and other territory covered by the plan. (Gov. Code § 65302(a)). State housing law does not allow general plan land use elements to "defer" to zoning ordinances on these critical and mandatory issues.

This is simple blackletter law, and it is reinforced by a long line of cases such as *Leshner v. Walnut Creek*, 52 Cal.3d 531, 540-41 (1992), which make clear that the zoning must conform to the plan and thus that "[t]he tail does not wag the dog." Again, nothing in California law allows a city's general plan land use element to "defer" to the zoning or for the zoning to otherwise direct the plan, particularly with respect to the mandatory contents of a city's land use element requiring the

provision of housing at densities provided *in the land use element*. Under traditional land use consistency doctrine the zoning does not trump the plan.

Moreover, beyond that unassailable and controlling doctrine, as set forth in the Housing Accountability Act (Gov. Code § 65589.5; "HAA")—the state's premier housing production law—the City may not lawfully disapprove a project that meets applicable and objective land use standards and criteria without making the difficult-to-make health and safety findings mandated by law. Subdivision (j)(1) of the HAA directs that a decision to disapprove or reduce the density of a project that complies with "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards" must be based on written findings supported by a preponderance of the evidence in the record that (1) the project would have "a specific, adverse impact upon the public health or safety" and (2) that there is no feasible method to satisfactorily mitigate or avoid this adverse impact. (Gov't Code § 65589.5(j)(1)). The HAA defines a "specific, adverse impact" 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." (Gov't Code § 65589.5(j)(1)(A)).

Section 65589.5(j) thus requires cities to determine whether a project complies with the applicable, *objective* general plan, zoning, subdivision, and design standards. The HAA defines the term "objective" to mean standards that involve no personal or subjective judgment by a public official and that are also uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official. (Gov. Code § 65589.5(h)(9)). Cities must make this determination based on a "reasonable person" standard. (Gov. Code § 65589.5(f)(4)).

Accordingly, if a housing project complies with applicable, objective general plan, zoning, subdivision, and design standards in the eyes of a reasonable person, the project cannot be disapproved or conditioned on a lower density unless, based on a preponderance of the evidence in the record, it would have a "specific, adverse impact" upon public health or safety and there is no feasible way to mitigate that impact without disapproving the project or requiring that it be built at a lower density. If a city's disapproval or conditional approval is challenged in court, the burden is on the City to prove its decision conformed to all the conditions specified in the HAA. (Gov. Code § 65589.6).

The courts have explained that the HAA's findings constitute the "only" grounds for a lawful disapproval of a housing development project. (*North Pacifica, LLC v. City of Pacifica* (N.D.Cal. 2002) 234 F.Supp.2d 1053, 1059-60, disapproved on other grounds in *North Pacifica LLC v. City of Pacifica* (2008) 526 F.3d 478; see also *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715-16). Moreover, the HAA creates such a "substantial limitation" on the government's discretion to deny a permit that it amounts to a constitutionally

protected property interest. (*North Pacifica, LLC v. City of Pacifica, supra*, 234 F.Supp.2d at 1059).

The City has not made these required findings and there is no evidence to support such findings based on any standard of review, including the HAA's required preponderance of the evidence standard.

In addition to the foregoing, subdivision (j)(4) of the HAA provides as follows:

For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan . . . [T]he local agency may require the proposed housing development project to comply with the objective standards and criteria of the zoning which is consistent with the general plan, however, the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project.
(Gov. Code § 65589.5(j)(4)).

Thus, under the first sentence of subdivision (j)(4), if the zoning is inconsistent with the plan—and the zoning here is inconsistent because the General Plan allows housing at 20 or more units per acre while the zoning does not allow any housing at all (and nursing homes and assisted living facilities are not housing under the City's regulations or state law)—then the City cannot lawfully require a rezoning. Moreover, under the second sentence of subdivision (j)(4), which City staff have never acknowledged and was not addressed in the Planning Commission's staff report, the City is required to facilitate and accommodate the Project at its proposed and allowed general plan density. Instead of doing so here, City staff recommended and the Planning Commission decided the Project should be disapproved based on an incomplete and inaccurate description of the facts and the law, contrary to the pro-housing requirements and intent of the HAA.

As noted above, the General Plan objectively allows residential development (i.e., detached and attached single-family homes, duplexes, townhouses, condominiums, and apartments) on the Project Site at a density of at least 20 units per acre (the Project proposes approximately 22 units per acre and thus meets this objective requirement) and the OGPD zoning does not allow any housing at all. Thus, the zoning is indeed inconsistent with the Plan, at least for purposes of the HAA as mandated by subdivision (j)(4). Moreover, under the second sentence of subdivision (j)(4) of the HAA, the City has a legal obligation to facilitate and accommodate the Project at its proposed and allowed general plan density.

Even if the law on these issues was unclear—and we believe it is indeed clear—the HAA establishes statewide policy applicable to every city and county in California mandating that “this section be interpreted and implemented in a manner to afford

Karla Brown, Mayor
Jocelyn Kwong, City Clerk
April 23, 2024
Page 5

the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(2)(L)). Staff's recommendation, predicated on the false notion that the General Plan "defers" to a zoning ordinance that does not allow housing and where the General Plan itself objectively does allow housing, and the Planning Commission's decision to disapprove this Project based on that recommendation are deeply contrary to this pro-housing policy mandate.

For the foregoing reasons and other reasons provided in the administrative record, we hereby appeal the Planning Commission's decision, which is incorrect on the facts, the law, and state housing policy, and which did not make and could not have made the mandatory health and safety findings required by the HAA. We respectfully request that the City Council grant our appeal, allowing this Project to proceed without a discretionary legislative PUD rezoning, which will allow this unopposed Project to seek and obtain the required Tentative Map and Design Review approvals.

We regret the need to say this, but we must note that there are serious consequences for the City should it improperly disapprove this Project, as staff's recommendation and the Planning Commission's decision would have it. Those consequences include tight mandatory deadlines and costs for preparing an administrative record (Gov. Code § 65589.5(m)(1)), mandatory attorney's fees and costs to a prevailing plaintiff (Gov. Code § 65589.5(k)(1)), and mandatory fines of \$10,000 per unit (Gov. Code § 65589.5(k)(1)) with a mandatory five times multiplier (Gov. Code § 65589.5(l)). There is no known opposition to this Project, the laws squarely favor it, and these potential consequences are all easily avoidable.

We have endeavored to work with staff to understand these issues and thus to process this unopposed Project without a discretionary legislative rezoning via PUD and thus without this underlying disagreement. We find it unfortunate that this appeal is necessary, and we hope the City Council will understand and agree that a PUD cannot lawfully be required here and that this appeal must be granted. By granting this appeal, TTLC's Preliminary Application would remain valid and in effect and staff would be required to commence to undertake the required CEQA analysis for the Project. We look forward to discussing these issues in an appeal hearing no later than 40 days from the date of this letter. (PMC § 18.44.130).

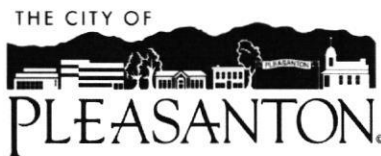
Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP
BWW/kli

cc: Kelley Rutchena, Director of Entitlements, Bay Area and Sacramento Regions



Community Development Department | Planning Division
200 Old Bernal Avenue | P.O. Box 520, Pleasanton, CA 94566
925-931-5600 | pod@cityofpleasantonca.gov

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2024 APPLICATION FOR DEVELOPMENT REVIEW

Application No(s): P23-0599 Date Filed: APR 24 2024

I. CHECK TYPE OF APPLICATION(S):

CITY CLERK OFFICE

☐ Administrative Design Review (\$347)
☒ Appeal (of Case P23-0599) (\$347)

☐ Beekeeping (\$208)
☐ Condominium Conversion (\$3,828)

Design Review

☐ Minor up to \$25,000 value (\$347)
☐ Major over \$25,000 value (\$2,289)

Environmental (CEQA) Fees

☐ Staff review of Consultant Work
(25% of consultant costs)
☐ EIR (\$4,051.25)
☐ Env. Doc - CRP (\$1,377.25)
☐ Mit./Negative Declaration (\$2,916.75)
☐ County Clerk Processing Fee (\$50)

☐ General Plan Amendment (\$20,626)

☐ Growth Management (\$1,109)

Home Occupation/Cottage Foods

☐ Non-exempt - no hearing (\$139)
☐ Non-exempt - with hearing (\$347)

Housing Site Compliance Review

☐ 50 units or less (\$9,519)
☐ 51 units or more (\$10,475)
☐ Lot-Line Adjustment (\$596)
☐ Outdoor Dining/Display (\$194)

☐ Over-height Fence Permit (\$35)
☐ PC Determination (\$2,081)

Preliminary Review

☐ No Hearing (\$0)
☐ SB 330 (\$1,527)
☐ With Hearing (\$2,011)

PUD (Planned Unit Development)

Residential

☐ 1 unit (\$4,161)
☐ 2-5 units (\$10,403)
☐ 6-15 units (\$20,807)
☐ 16+ units (\$27,742)

Commercial

☐ 0-20,000 sq ft (\$4,161)
☐ 20,001-60,000 sq ft (\$10,403)
☐ 60,001-100,000 sq ft (\$20,807)
☐ 100,001+ sq ft (\$27,742)

PUD Modifications

☐ Minor existing residential (\$139)
☐ Minor (\$694)
☐ Major (\$2,774)

Rezoning

☐ without PUD (\$17,048)
☐ with PUD (\$2,774)

☐ Sign Design Review (\$485)

☐ Specific Plan/Specific Plan Amend.
(25% of consultant costs - min. \$2,649)

Small Wireless Facility

☐ Public ROW (\$3,779)
☐ Private Property (\$3,552)
☐ Pole Lic. Agreement (\$295)

Subdivision Map

☐ Tentative Tract Map (\$6,436)
☐ Minor Subdivision (\$694)

☐ Traffic Study Review (\$902)

Use Permits

☐ Conditional (\$1,040)
☐ Minor Conditional (\$694)
☐ Pets (\$277)
☐ Temporary Conditional (\$194)
☐ Administrative Temporary (\$35)

Variance

☐ General (\$3,135)
☐ Developed Residential Lot (\$694)
☐ Williamson Act (\$2,440)
☐ Other _____

II. GENERAL DATA REQUIRED

A. Name of Applicant (Please Print): TTLC Pleasanton - Las Positas, LLC

B. Address or Location of Property: 5976 & 5994 W. Las Positas Blvd.

C. Assessor's Parcel Number(s): 941-2760-5

D. Site Area (acres/sq. ft.): 7.29

E. Current Zoning: GP-Mixed Use Z-PUD F. Proposed Zoning: _____

G. Existing Use of Property: Commercial/Office Building

H. Description of Proposal: Redevelopment of existing commercial to residential community comprised of 146 three story townhomes each with two car garages.

(Continue on separate sheet if necessary)

(Refer to the appropriate "Informational Handouts" for required submittal information that must accompany this application.)

(Continued on reverse)

(12/26/2023)

III. AUTHORIZATION OF PROPERTY OWNER AND OWNERS ASSOCIATION

- J. **PROPERTY OWNER:** In signing this application, I, as the property owner, have full legal capacity to, and hereby do, authorize the filing of this application. I understand that conditions of approval are binding and agree to be bound by those conditions, subject only to the right to object at the hearings or during the appeal period. I certify that the information and exhibits submitted are true and correct.

Name: Tony Bullock Telephone: _____
Company: BMP LPOP LLC E-mail: tony@blackmountainproperties.com
Address: _____
Signature: _____ Date: _____

- K. **OWNERS ASSOCIATION:** Is the property subject to the rules or guidelines of a homeowners association (HOA) or a business owners association?

- ☐ Yes (attach a copy of the associations response).
☐ No
☐ The HOA/business owners association does not review any proposed construction projects or use changes.

Association Contact: James Paxson Telephone: 925-734-6500
Association Name: Hacienda Business Park Owners Association Email: james@hacienda.org
Address: _____

- L. **APPLICANT OTHER THAN PROPERTY OWNER:** In signing this application, I, as the applicant, represent to have obtained authorization from the property owner to file this application. I agree to be bound by conditions of approval, subject only to the right to object at the hearings on the application or during the appeal period. If this application has not been signed by the property owner, I have attached separate documentation of full legal capacity to file the application. I certify that the information and exhibits submitted are true and correct.

Name: Kelley Rutchena Telephone: 925-786-0770
Company: TTLC Pleasanton - Las Positas, LLC E-mail: krutchena@thetruelifecompanies.com
Address: _____
Signature: Kelley Rutchena Date: 4/23/2024

- M. **NOTE ANY OTHER PARTY(IES) WHO SHOULD RECEIVE STAFF REPORTS AND NOTICE OF APPLICATION ON A SEPARATE SHEET AND ATTACH TO APPLICATION.**

Name: _____ Name: _____
Address: _____ Address: _____
Email: _____ Email: _____

I, the copyright owner, consent to allow proposed plans and/or documents to be digitally shared with members of the public upon inquiry. Signature: _____

IV. SCHOOL FEE AGREEMENT (If a residential project, answer the question below)

Have you signed a School Fee Agreement with the Pleasanton Unified School District? ☐ Yes ☐ No
If yes, please attach a copy of the signed agreement.