Fox Rothschild

101 S. Tryon Street
17th Floor
Charlotte, NC 28202
704.384.2600 704.384.2800
www.foxrothschild.com

345 California Street
Suite 2200
San Francisco, CA 94104
415.364.5540 415.391.4436

LEIGH PRINCE
Direct No: 704.384.2617
Email: LPrince@Foxrothschild.com

February 27, 2024

Via Email: citycouncil@brentwoodca.gov

City Council
City of Brentwood
150 City Park Way
Brentwood, CA 94513

Re: City Council Meeting February 27, 2024 Agenda Item G.1. Opposition to Mitigated Negative Declaration and Vesting Tentative Subdivision Map for the Lone Tree Way Residential Project

Dear Honorable Mayor and Councilmembers:

Enclosed is a letter written on behalf of Discovery Builders, Inc. (DBI), for your consideration regarding Item G.1. of the February 27th City Council Meeting.

As detailed in the enclosed letter, the environmental analysis and the land use analysis are legally inadequate and DBI respectfully requests the City **not** adopt the MND and **deny** the Project.

Sincerely,

Leigh Prince

cc: Interim City Attorney (kwisinski@brentwoodca.gov)
City Manager (togden@brentwoodca.gov)
Director of Community Development (amorris@brentwoodca.gov)
Associate Planner (mcontreras@brentwood.gov)
City Clerk (cityclerk@brentwoodca.gov)
Client

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Re: Opposition to Mitigated Negative Declaration and Vesting Tentative Subdivision Map for the Lone Tree Way Residential Project

Dear Honorable Mayor and Councilmembers:

This letter is written on behalf of Discovery Builders, Inc. ("DBI") a home builder with an interest in ensuring that the City of Brentwood's laws are applied fairly and equitably on all projects. DBI urges the City Council **not** to adopt the Mitigated Negative Declaration (SCH #20231003390) and to **deny** the Vesting Tentative Subdivision Map (VTSM 9597) and the Design Review application (DR 22-005) for the Lone Tree Residential Project ("Project"). As set forth in this letter, the Project must be denied for the following reasons:

1. The analysis in the Mitigated Negative Declaration is inadequate.
2. The Project does not comply with the State Density Bonus Law; the requested waivers are not necessary to physically construct the Project.
3. The Project neither complies with the City's objective standards in the Zoning Ordinance nor provides adequate affordable housing.

As will be discussed in detail in this letter, the Project cannot be approved as proposed (or any version thereof) without completing the legally appropriate analysis and ensuring the Project complies with all applicable environmental and land use laws. Therefore, DBI respectfully requests the City Council deny the Project as proposed.

Project

The description of the Project, and its various versions, lacks clarity relative to the number of lots and dwelling units proposed. Clarity is critical not only to compliance with the City's inclusionary housing ordinance and the application of State Density Bonus Law, but also the environmental analysis that requires a stable and accurate project description.

1. Original Project. The Original Project is described as including 34 single family homes and one duet with two units for a total of 36 units, including two lots with "wings" to satisfy the City's density transition policy.[1] The site plan for the Original Project depicts 35 single-family lots.
2. Revised Project #1. Revised Project #1 is described as 40 total units consisting of 34 single-family units, one duet with two units and one shared housing building with five units. Adding these numbers together equates to a total of 41 units. The site plan, however, shows only 36 units consisting of 34 single-family units and one duet with two units. Revised Project #1 proposed to qualify for State Density Bonus Law (Government Code Section 65915) using a shared housing concept and eliminate the "wings" using a waiver. As will be discussed below, shared housing does not comply with the City's Zoning Ordinance and is not mandated by State Density Bonus Law and the Project does not qualify for waivers.
3. PC Recommended Project. The PC Recommended Project is described as 37 total units including 35 single-family units and two duets. As duets each have two units, this version of the project would have a total of 39 housing units. The site plan, however, shows 33 single-family homes and two duets for a total of 37 units.
4. Revised Project #3. Revised Project #3 is described as 40 total units including 37 single-family units and two duets each with two units. Adding these numbers together results in a total project of 41 units. The site plan shows 36 single-family units and two duets (4 units) for a total of 40 units.

As can be seen from the above discussion, the description regarding number of units and the site plans do not match and it is unclear exactly the number and type of units proposed or that would be approved if the City Council acted.

[1] Similar to a duplex, a duet will share a common wall; however, these are single-family attached homes that are sold separately.

Mitigated Negative Declaration

The following provides a list of deficiencies in the Mitigated Negative Declaration ("MND"), all of which are valid reasons not to adopt the MND:

1. Where an agency fails to provide an accurate project description or fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate. An accurate and complete project description is necessary to fully evaluate the project's potential environmental effects. *Nelson v. City of Kern* (2010) 190 Cal.App.4th 252, 276; *Lighthouse Field Beach Rescue v, City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1202. As described above, the project description is confusing; the number and size of units is unclear and inconsistent. Without a clear picture of the Project, the environmental analysis is inappropriate.
2. As a residential project, the Project is required to include affordable units. Pursuant to Municipal Code Chapter 17.725, Affordable Housing, the Project is required to set aside a certain percentage of the units as affordable to moderate, low and very-low income households. To comply with Municipal Code Section 17.725.005(B), the list of requested entitlements on page 6 should include an affordable housing agreement.
3. The MND concludes that there is no impact to agricultural resources; in other words, this issue is "not relevant" to the project (MND, page 17). However, as described in the Archaeological Survey Report, this area and the project site have historically been used for farming and agriculture. Although not currently productive, it is relevant that the proposed Project is converting what has historically been agriculture land to residential use. Thus, there should be a more robust consideration of the impact on the loss of agricultural land.
4. The air quality section fails to undertake an adequate analysis and suffers from several deficiencies making the MND inappropriate:
    a. The MND concludes that the Project will have no impact and will not conflict with or obstruct implementation of an applicable air quality plan. In reaching that conclusion, the MND provides neither a quantitative analysis showing that the Project emissions fall within plan parameters nor a qualitative analysis discussing which plan measures will be included in the Project to comply with or further the goals of the applicable air quality plans. Instead, the only basis for the no impact conclusion is that the 2017 Clean Air Plan incorporated population and employment projections from the City's 2014 General Plan.
    b. The analysis concluding there is a less than significant air quality impact seems to minimize the impact by narrowly defining operational emissions as resulting from electricity use at night and visitor vehicles.

This ignores a broad range of operational emissions, including daytime electricity use, resident trips and deliveries, to name a few.

c. The screening criteria for carbon monoxide emissions is identified as consistency with applicable congestion management programs; however, there is no discussion of how the project complies with any such programs.

d. There is a concerning discussion of Valley Fever and the health risk is not adequately mitigated. AIR-3 provides: "During periods of high dust in the grading phase, crews must use…N95 masks or better…." Without a definition of "periods of high dust" there is no guidance as to when the additional protective measures are necessary and as such the mitigation is impermissibly vague, ineffective and unenforceable in violation of Public Resources Code Section 21081.6. Additionally, there are no mitigations/protections for nearby residents who would also potentially be affected by air borne contaminants.

5. The project site is large and mostly vacant, which provides opportunities for special status plants and animals to be present on-site. The biological resources section suffers from several deficiencies:

   a. The discussion of the Project's compliance with East Contra Costa County Habitat Conservation Plan/Natural Community Conservation Plan is limited to the payment of a fee, which does not eliminate the potential for the Project to impact biological resources. The MND should provide a more robust discussion of any programs, policies or measures in the conservation plan that should be incorporated into the Project.

   b. The MND minimizes the potential for special status plant species to be located on site. Even if the site is routinely mowed because special status plant species are known to be in the area, a survey should have been completed as part of the MND and a mitigation measure included for a preconstruction survey to ensure there would be no take of special status plants.

   c. The MND identifies several off-site trees that need protection. The MND inappropriately focuses on not damaging those trees "beyond what is needed for the proposed project." The mitigation measure identified, which is supposedly included to protect the trees, allows encroachment into the tree protection zone if needed. Thus, the mitigation is ineffective in violation of Public Resources Code Section 21081.6.

6. The energy analysis provides information (amount of natural gas and electricity usage, vehicle miles travelled, and fuel used during construction), but no analysis to understand why the report concludes it is not wasteful, inefficient or

unnecessary. There should be a discussion or comparison to a standard that would allow an informed determination.

7. The MND inappropriately defers analysis and mitigation of hazards. Deferring environmental assessment to a future date runs counter to the policy of the California Environmental Quality Act, which requires environmental review at the earliest feasible stage in the planning process. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.

    a. The project site has historical agricultural land use activities. Rather than including an evaluation of the soil quality, the MND concludes that such analysis should be done prior to development (Mitigation Measure HAZ-1). The soil analysis must be completed now and should be included as part of the MND, and the environmental impact of any needed remediation must also be included and considered.

    b. The evaluation is limited to the soil immediately surrounding building footprints. This is a residential development where children will play in (and even eat) the dirt in the backyard more than 10 feet from the house or in the park. Therefore, the soil evaluation area should be expanded.

    c. The survey for underground storage tanks and wells or septic systems (HAZ-2 and HAZ-3) must be completed now, and any necessary removal and remediation analyzed in the MND and not impermissibly deferred to the permit stage.

8. A Health Risk Assessment is a tool used to estimate the adverse health effects caused by exposure to environmental pollutants in a variety of media such as air, water and soil. As noted above, the Project has potential health impacts as a result of contaminants in the air and the soil, at a minimum. Therefore, a Health Risk Assessment must be completed and included in the MND.

9. The vehicle miles travelled ("VMT") analysis, which has ripple effects on the greenhouse gas and energy sections, fails to provide an actual calculation of the VMT with the Project. The transportation zone in which the project site is located currently has a VMT per capita of 23.60 for the year 2021. Without any analysis, the MND summarily concludes the Project will not have a significant impact on VMT, and therefore, does not exceed the threshold of 23.63 for citywide VMT. The delta between the current VMT without the Project and the citywide VMT threshold is 0.03, a very small difference. Without a quantitative analysis, it is impossible to accurately and adequately determine if VMT with the Project would exceed the threshold. Failure to provide an adequate analysis renders the negative declaration inappropriate. *Lighthouse Field Beach Rescue v, City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1202.

10. Best practice, even for smaller projects, is a net zero threshold for greenhouse gas emissions. A net zero threshold aligns with the California Air Resources Board 2022 Scoping Plan and furthers the statewide objective to reduce emissions, not simply keep emissions at current levels. Each project should do its "fair share" to reduce greenhouse gas emissions. The MND finds that there would be a less than significant impact from the Project by reliance on State standards that affect vehicle and building energy efficiency. Instead, the MND instead should focus on what measures this Project could implement to do its fair share in reducing greenhouse gas emissions.

State Density Bonus Law

The Project seeks to use State Density Bonus Law (Government Code Section 65915) to obtain waivers that would allow the Project to avoid compliance with objective City design standards. To qualify for a density bonus, incentives, waivers and parking modifications, a project must provide a certain percentage of affordable units. To qualify, the applicant is proposing to provide five percent of the units for very-low income households. Government Code Section 65915(b)(1)(B). The site plans for the various versions of the Project include between 35 and 37 housing units, which would require two very-low income units, which the applicant is proposing to provide. If, however, the Project included 41 units, three very-low income units would be required. [2]

Simply providing the requisite number of affordable units does not entitle the applicant to waivers. A waiver is defined as a modification to design requirements necessary to physically construct the project at the allowed density and with the allowed concessions. Government Code Section 65915(e)(1).[3] Courts have only upheld a waiver where a density bonus or concessions are part of the project. *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 764 and *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329. Here, the Project includes neither a density bonus nor a concession.

Design standards are developed to accommodate the maximum allowable density. Therefore, to physically construct a project with more density than allowed or with a concession, a modification of design standards would be necessary. Many cities approach this quantitatively and provide a similar percentage change to design standards as the density bonus utilized by the project. This makes sense because a project that, for example, increases density by 10 percent would need a commensurate waiver to

[2] State Density Bonus Law calculations focus on the number of housing units. Projects with a larger number of units need to provide more affordable units. The law requires that fractional units be rounded up to the next whole number. Government Code Section 65915(q). If the project included 41 units, five percent would round up to a requirement of three very-low income units and the required number of total affordable units would increase from four to five.

[3] Economic feasibility is irrelevant to a waiver. *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329.

increase floor area or decrease open space to physically construct the project at the increased density. This Project, however, is not increasing the density beyond that allowed by the General Plan and Zoning and is also not requesting any concessions. Because the proposed density is within allowable parameters, there is no need to modify design standards to physically construct the Project and the City can and should deny the requested waivers.

Nothing in State Density Bonus Law mandates allowing dwelling units that are inconsistent with the City's Zoning Ordinance. State Density Bonus Law must cover a variety of housing products that are addressed in zoning codes from very-low density residential to high density multi-family, to senior housing and student housing. State law allows an increase in density over the allowable base density provided for in zoning; it does not mandate any particular type of unit be allowed, or that shared housing be allowed in any zone. The code section referenced to support the position that the City must allow shared housing, Government Code Section 65915(o)(7)(A)(i), is simply a definition of shared housing. There is no language making it mandatory for the City to allow shared housing in a zone where it is not permitted. Reliance on a definition to conclude the City must allow shared housing is legally inappropriate and the City should not approve a version of the Project that includes shared housing.

Housing Accountability Act

To qualify under the provisions of the Housing Accountability Act (Government Code Section 65589.5), a housing project must be consistent with the Zoning Ordinance and General Plan. Nothing prohibits the City from requiring compliance with objective standards.

The Project does not comply with objective City standards. As discussed above, if shared housing is included in the Project, the Project would not be consistent with the Zoning Ordinance and there is nothing in State Density Bonus law which would apply to argue consistency. Revised Project #2 would also not comply with objective standards. The applicant has proposed lots that do not comply with the minimum lot size, minimum lot width, maximum lot depth, minimum front yard setback, minimum side yard setback and minimum rear yard setback. Without a waiver, which as discussed above is not necessary for physical construction, the Project is not consistent with the City's objective standards.

If a project does not comply with objective standards, the Housing Accountability Act protections, including applying the ordinances, policies, and standards in place when the complete preliminary application was submitted, would not apply. Thus, a non-compliant project would not be able to take advantage of the older inclusionary requirements and the current higher requirements would apply.

The City's inclusionary ordinance currently requires six percent moderate, four percent low and three percent very-low income. Municipal Code Section 17.725.003(D). With a

37-unit project, this would be two moderate, one low and one very-low income unit for a total of four affordable units. Then, to qualify for State Density Bonus Law, the Project would need one or two more very-low income units for a total of five or six affordable units.

Reliance on the Housing Accountability Act or the State Density Bonus to approve a project that failed to meet objective standards or provide adequate affordable housing would be legally inappropriate. It would also undermine the very purpose of these State laws to generate more affordable housing to address the State's housing crisis.

Affordable Housing Ordinance

Assuming as provided in the staff report that the Project is subject to the Housing Accountability Act, the Project would need to provide one very-low income unit, one low-income unit and one moderate income unit. Then, to take advantage of State Density Bonus Law, the Project would need to provide two very-low income units. In total, the Project would need to provide two very-low income units, one low income unit and one moderate income unit for a total of four affordable units.

Affordable units are generally required to be comparable to the market-rate units in exterior design, quality, materials, architectural elements and overall construction quality, as well as number and proportion of bedroom types. Municipal Code Section 17.725.003(F). An applicant may request an exception through the design review approval process to permit a reduced front, side and backyard landscaping and smaller square footage for bedrooms. Notwithstanding these requirements, the applicant has not proposed any single-family units that are comparable to the market-rate single-family units.

Instead, the applicant has proposed to take advantage of Municipal Code Section 17.725.003(F)(1) and provide all affordable units as duets. To provide massing and lot proportions consistent with the residential development, the Municipal Code provides a duet unit will satisfy the city's affordable housing requirement. Additionally, the applicant has proposed to provide only three affordable units, or one less affordable than required, by double counting the unit it proposes to dedicate to the City.

Despite the applicant's claim, there is no requirement that the City accept a dedication and fewer total affordable units. Municipal Code Section 17.725.004, Alternative Equivalent Proposal, allows a developer to propose an alternative. A proposal is, by definition, a plan put forward for consideration or discussion by others. Accordingly, Section 17.725.004 requires the applicant to submit in writing a proposal demonstrating that the equivalent alternative will provide as much or more affordable housing in the city as would be achieved through the construction of required on-site affordable units, be consistent with the city's housing element, and not increase residential segregation. Additionally, for ownership developments, an alternative equivalent proposal must result in an approximately equal geographic distribution of affordable units throughout the city.

The proposal is processed in accordance with Section 17.725.005, which requires City Council approval, meaning that the City has discretion to accept or reject the alternative proposal. By dedicating one unit and providing only three affordable units instead of four provides less affordable housing, not more or even an equivalent alternative. Therefore, the City should reject the dedication and require four affordable units in compliance with the City's code.

As described above, the environmental analysis and the land use analysis are legally inadequate and DBI respectfully requests the City **not** adopt the MND and **deny** the Project.

Sincerely,

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