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[Exempt From Filing Fee Government Code § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

600 FOOTHILL OWNER, LP, a California limited partnership,

Petitioner,

v.

CITY OF LA CAÑADA FLINTRIDGE; THE CITY OF LA CAÑADA FLINTRIDGE COMMUNITY DEVELOPMENT DEPARTMENT; AND THE CITY OF LA CAÑADA FLINTRIDGE CITY COUNCIL, AND DOES 1-50,

Respondents.

Case No. 23STCP02575
Related Case: 23STCP02614

Honorable Mitchell L. Beckloff
Department: 86

RESPONDENTS' ANSWER TO PETITIONER'S OPENING BRIEF

Date: March 1, 2024
Time: 9:30 AM
Dept: 86

Action Filed: July 21, 2023
Trial Date: March 01, 2024

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I. INTRODUCTION

This Petition represents a classic example of statutory "overreaching,"[1] namely misinterpreting statutory duties and obligations under the state's housing law. 600 Foothill Owner, LP ("Petitioner" or "600 Foothill") also omits in its Opening Brief ("600 Foothill O.B.") the complete factual history that gave rise to City's adoption of its Housing Element by ignoring pertinent facts detailing the City's herculean and successful efforts to adopt a substantially compliant Housing Element in October 2022. Moreover, Petitioner attempts to tarnish the City and its council members in an unsupported way only to be confronted with evidence of its own unclean hands establishing a complete defense – 600 Foothill (among other things) interfered with the City's site inventory and adoption of a Housing Element. This disingenuous challenge to the City's Housing Element, on which all other claims depend, should fail, and the writ should be denied.

II. LEGAL BACKGROUND

"In an action to determine whether a housing element complied with the requirements of the Housing Element Law, the court's review 'shall extend to whether the housing element ... substantially complies with the requirements' of the law. … Courts have defined substantial compliance as '"actual compliance in respect to the substance essential to every reasonable objective of the statute,' as distinguished from 'mere technical imperfections of form."'…Such a review is limited to whether the housing element satisfies the statutory requirements, 'not to reach the merits of the element or to interfere with the exercise of the locality's discretion in making substantive determinations and conclusions about local housing issues, needs, and concerns." (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 237 (internal citations omitted).)

III. ARGUMENT

A. THE CITY ADOPTED A COMPLIANT HOUSING ELEMENT IN 2022

600 Foothill's primary argument regarding the City's compliance with the Housing Element law is that HCD's determination that the City's October 2022 Housing Element need not even be reviewed by the Court because "HCD got this one right." (600 Foothill O.B. at 15.) 600 Foothill

[1] All statutory citations are to the Government Code unless otherwise stated.

even suggests that HCD is "far more equipped" and "more qualified than the courts" to analyze the relevant statutes. (*Id*. at fn. 10.) 600 Foothill pays only begrudging lip service to the holding in *Martinez,* 90 Cal.App.5th at 243 (any deference due to HCD's determination is overcome by the plain meaning of the statute and the ultimate responsibility for statutory interpretation is for the courts, not HCD). If the City's October 2022 Housing Element was in substantial compliance with the plain meaning of the Housing Element law, no deference is required. Even if HCD's "determination" is entitled to some level of deference by the Court (and it is not, see p. 6, *infra*), (i) the minor clarifications to the "approved" Housing Element from October 2022 onward and HCD's determinations in that regard (see Koleda Decl. ¶¶ 54-55, 56, pages 23-29), and (ii) the history of HCD's interaction with the City, demonstrate that the City's October 2022 Housing Element did in fact substantially comply with the HAA requirement to Affirmatively Further Fair Housing and all other HAA requirements.

The relevant facts ignored by 600 Foothill demonstrate that the City made every effort possible to and did comply with the HAA and the Housing Element law, despite delays with the RHNA allocation and repetitive requests from HCD. As set forth in the Declaration of Susan Koleda ("Koleda"), the City's Director of Community Development and the staff person responsible for the 6th Cycle General Plan Housing Element (the "Housing Element"), the City made extraordinary efforts to comply with all applicable requirements in completing its Housing Element. 600 Foothill misunderstands and mischaracterizes the basic geography, topography, and available land in the City that directly relates to the Housing Element, the Site Inventory and the duty to Affirmatively Further Fair Housing ("AFFH") in an attempt to find fault where there was none. The relevant actions the City took to comply with the Regional Housing Needs Allocation ("RHNA") and AFFH requirements were completed well before the adoption of the October 2022 Housing Element, with the input and participation of HCD, and despite the dilatory RHNA allocation by HCD and the Southern California Association of Governments ("SCAG"). The February 2023 Housing Element clarified minor points regarding the City's efforts on these issues. After HCD kept going back to Ms. Koleda to seek clarification regarding work that had already been done, like adding another of the 35 labels on a modern appliance, the City added immaterial descriptions to a finished product.

This is all borne out by the long and arduous process that the City undertook to achieve the 2022 Housing Element. Such efforts were heavily constrained by the basic nature of the City's location, lack of vacant land, the fact that the City does not own land, the impracticality of building multi-family housing in the City's northern high fire-risk rated steep and wooded hills, and the well-known (to 600 Foothill, at the very least) lack of a sewer system to the south of Foothill, demonstrating at least in part why 600 Foothill chose Foothill Boulevard to locate the Project.

The Relevant Infrastructure and Topography of the City: In order to address a recurring theme by 600 Foothill (and Petitioners in the related case, who apparently both love and hate Foothill Boulevard, Sheridan Decl. Exh. II), the fact that the Site Inventory identifies potential locations for affordable housing development closer to Foothill Boulevard is not by some nefarious design by the City, but is the natural result of the City's local infrastructure and topography.

The City is a small suburban city of 20,000 residents located primarily in the foothills of the San Gabriel mountains, and abuts Angeles National Forrest to the north. (Koleda Decl. ¶ 8.) The City has long been home to parts of Jet Propulsion Laboratory, which existed before the City was incorporated. The City is almost entirely "built-out" with no usable vacant land generally, has no industrial property, and has residential and commercial rental vacancy rates of less than 5%. (Id. at ¶ 9.) Even the City's notable parks are not owned by the City but owned by State and County entities. (Id. at ¶ 9.) Nearly all the land (within City limits) south of Foothill is not even connected to the City's sewer system and relies on septic tanks, making such land inherently inappropriate for multi-family housing. (Koleda Decl. ¶ 10; AR000907-908.) To the north of Foothill Boulevard, the City ascends into steep hillsides, making such land prohibitively more expensive to develop as multi-family housing and at greater risk of fire (the City is rated at the highest risk severity). (Id. at ¶¶ 9, 12; AR005171.) By contrast, Foothill Boulevard (fundamentally an offshoot of historic Route 66 through the City until it ends in Newhall Pass) and the local "corridor" along this main thoroughfare (really, the only thoroughfare through the City) is the flattest land in the City. (Id. at ¶ 14; AR004558-59.) It is also where the City's retail and other commercial services are located (the Downtown Village), including grocery stores, restaurants, medical offices and pharmacies—the essentials of local life. (Id. at ¶ 14.) The convenience and practicality of building larger scale projects on Foothill

Boulevard is evidenced by the free market choice of thousands of developers across many decades to build along this same road system not just in the City but, as it is well known in Los Angeles, ongoing commercial development has existed along Foothill Boulevard across the County (Foothill Boulevard in its various basic iterations starts in Newhall Pass and extends to the old Route 66 connection in Azusa and beyond since various portions were known as Route 66). (Sheridan Decl. Exh. BB.) While the foregoing is common knowledge, with homes extending into the foothills along its route, this concept required extensive explanation to the staff at HCD as the City developed its Site Inventory (Koleda Decl. ¶¶ 52-53).

The City Did Not Improperly Fail to Rezone: 600 Foothill's primary argument is that the City failed to complete its sixth RHNA cycle rezoning by October 15, 2022, an act it alleges is required by Section 65588(e)(4)(C)(iii). (600 Foothill O.B. at 12.) The City had a complaint housing element "with in one year" and thus this subsection does not apply. Any purported requirement, moreover, that a City complete its RHNA Cycle rezoning prior to or at the time of having a substantially compliant housing element conflicts with fundamental principles of zoning as well as related zoning regulations. The zoning ordinance of a general law city must be consistent with its general plan. (Section 65860; *Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586, 593.) "[A]bsence of a valid general plan, or valid relevant elements or components thereof, precludes enactment of zoning ordinances and the like." (*Res. Def. Fund v. Cnty of Santa Cruz* (1982) 133 Cal.App.3d 800, 806); cited in *Buena Vista Gardens Assn. v. City of San Diego Plan. Dep't* (1985) 175 Cal.App.3d 289, 310.) The "Housing Element" is one of the nine required elements of a general plan. (Section 65302.) The City could not rezone until it had a General Plan (including an adopted Housing Element) under Section 65860(c), HCD did not promulgate new draft housing element requirements until April 23, 2020, and did not promulgate the final version until April 2021, only six months before the then-existing deadline for submitting a 6th RHNA Cycle Housing Element. (Koleda Decl. ¶ 36.) 600 Foothill's demand that the Court punish the City for following the laws on rezoning would require cities to take actions in the wrong order, would create a legal impossibility, and would render any such rezoning void ab initio. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544.) In any event, this Court (not HCD) should be the decision-maker on substantial compliance

in order to meet the conditions of, and thus extend the deadline to rezone three years under section 65583.4(a). (See also section III.B, City's Answer to the State/HCD O.B., incorporated herein by this reference.)

***The October 2022 Housing Element Was Lawfully Adopted*:** 600 Foothill argues a hodgepodge of minor violations of Section 65585 that are contradicted by HCD correspondence in the administrative record. 600 Foothill claims that the City did not submit a draft housing element at least 90 days before the adoption of the draft housing element. On December 3, 2021, HCD acknowledged receipt of the City's draft housing element adopted on October 4, 2021 and referenced extensive discussions with City staff. (AR003933, AR004504.) 600 Foothill somehow claims that the City's adoption of the October 2022 Housing Element did not comply with a requirement to submit a draft housing element despite the fact that such a submission occurred and feedback from HCD was received, and that the City had previously submitted a draft Housing Element in October 2021 to which HCD responded (AR000600). 600 Foothill blurs the lines again by (i) referencing Section 65585(f)(2)'s requirements, and (ii) alleging that subsequent to a rejection by HCD (of the October 2022 Housing Element) the City improperly changed its "draft element." That allegation merely assumes its conclusion. Minor language changes can be and are the "written findings which explain the reasons the legislative body believes that the draft … substantially complies with this article despite the findings of the department" contrary to what 600 Foothill alleges. 600 Foothill argues that the City "blended" these approaches without explaining how.

The Lack of Certification by HCD is Not Binding or Dispositive: 600 Foothill again improperly argues that the Court should not exercise its authority to determine the City's compliance with the HAA and Housing Element law, that it should defer (entirely, or mostly) to HCD on this issue, and in support 600 Foothill misapplies *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, and *Martinez*. (600 Foothill O.B. at 15.) *Hoffmaster* says no such thing – judicial deference may be due to HCD's broader regulatory "guidelines" for the Housing Element site inventory, but there is no mention of deference to HCD's determinations of a City's compliance. (*Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113 n.13.) As to *Martinez*, that case restates statutory law, namely HCD's finding of compliance was entitled to a "rebuttable presumption" of validity

(under section 65589.3), which the Petitioner effectively rebutted. (*Martinez*, 90 Cal.App.5th at 243 (citing *Fonseca*, 148 Cal.App.4th at 1193; *Kaanaana v. Barret Bus. Serv.* (2021) 11 Cal.5th 158, 178.)

As the Court well knows, under prevailing law HCD cannot ultimately determine "substantial compliance" in any respect – for invocation of any bar or limit on what the City may or must do, nor as to the whole of a housing element. Individualized fact-finding delegated to a regulatory agency, so-called delegation of adjudicatory power, *if it occurs lawfully*, must be accompanied by two constraints establishing limits on that power: (i) the adjudicatory power must be expressly authorized by legislation and be "reasonably necessary" to effectuate the agency's "primary, legitimate regulatory purposes," and (ii) the agency's adjudication must be subject to judicial review. *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372-374. Any "factual" and purportedly binding determination by HCD that is asserted by Petitioners runs afoul of (at the very least) the judicial review "check" rule of *McHugh*. (*Id.* at 372; accord *Communities for a Better Environment v. Energy Resources Conservation & Develop. Comm'n* (2020) 57 Cal.App.5th 786, 813-814.) The City responds to the more fulsome State/HCD arguments in this regard in its brief in opposition to the State/HCD Opening Brief at section III.C.

The City Met the AFFH Requirements: 600 Foothill combines complaints about the Site Inventory and throws various AFFH arguments against the wall to see what sticks, while avoiding the factual record demonstrating that HCD accepted the City's reasonable explanations regarding certain issues HCD took with the October 2022 Housing Element. 600 Foothill first complains that the site inventory did not identify "vacant sites" for potential affordable housing development. As set forth herein and in the Koleda Declaration and related Administrative Record, the City has no such vacant sites (Koleda Decl. ¶ 9; e.g., AR003788).

Then, 600 Foothill returns to the refrain that too many sites on the Site Inventory are near Foothill Boulevard. As set forth herein, Foothill Boulevard is the only flat land in the City with access to the sewer system (and the exact location 600 Foothill wants to build on). If Foothill Boulevard is an unsuitable location for affordable housing, 600 Foothill has engaged in a horribly misguided years-long quest to add 16 units of affordable housing to this very thoroughfare as part of its seven story office, hotel, housing and affordable housing Project. The practical reasons for not building large

multi-family complexes in wooded, heavily graded, fire-prone hillside areas are detailed herein. And despite 600 Foothill's argument that the placement of housing near Foothill Boulevard is somehow presumptively discriminatory, correspondence with HCD satisfied HCD's concerns regarding this placement and the 2022 Housing Element details these reasons as well. (AR001741; AR005203). 600 Foothill also claims that the 2023 Housing Element added new measures to mitigate air quality for housing units located closer to the Freeway. (600 Foothill O.B. at 17.) 600 Foothill fails to realize that those air quality mitigation measures were adopted in 2013 and the 2023 Housing Element merely added a heading regarding these existing measures. (Koleda Decl. ¶ 33; AR004515.) No news there.

The factual record, which 600 Foothill eschews, demonstrates that the City took affirmative measures to comply with AFFH requirements. The City undertook numerous outreach efforts to reach a variety of economic groups, including via two housing workshops with 18 different stakeholder organizations. (Koleda Decl. ¶¶ 38-44); e.g., AR003896-3900.) These workshops were publicized in multiple formats. The City engaged in focus groups with both community service providers and for-profit developers to discuss AFFH related issues. (Id.) This was in addition to a host of other public engagements and engagement with HCD regarding the Housing Element. (Koleda Decl. ¶¶ 38-46); (AR004651.) The City undertook these efforts and engagement with HCD in the face of "changing goal posts" and what appeared to be intentional obstructive behavior by HCD. (Id. ¶¶ 49-50.) By way of example only, Melinda Coy informed Ms. Koleda that it was a directive from within HCD not to issue the final November 17, 2023 letter "certifying" the City's 2023 Housing Element and rezoning until the 60th day, even though the decision to approve had already been made. (Koleda Decl. ¶ 49.)

600 Foothill then restates its conclusory AFFH arguments regarding compliance at page 20 of the Opening Brief, simply saying again that the City did not comply with its AFFH requirements. As set forth herein and in Ms. Koleda's declaration in greater detail, the City complied with HCD's "requirements" regarding AFFH and undertook extensive efforts to reach diverse economic communities and met its obligations regarding HCD/SCAG allocation requirements as well (despite their late promulgation and internal scandals, detailed more fully herein). Again, regarding the purported requirement to engage in zoning, as argued above, the Housing Element does not rezone

the City, but by necessity, zoning follows the adoption of the Housing Element, and the City (with a substantially compliant Housing Element in October 2022) was entitled to three years to rezone. In short, the City upheld its obligations regarding AFFH.

The City Developed a Compliant Site Inventory: The City began its housing Site Inventory work in December 2020, before HCD and SCAG even released their housing allocation numbers for the City. (Koleda Decl. ¶ 17; AR000443.) (See also, Assembly Bill 1398 (Chapter 358, Statutes of 2021)). In short, City staff did not know how many affordable units they would need to allocate, and with what number of "buffer" units, but they set about the task in earnest with the existing deadline in mind. The then-existing deadline for submission of the City's Housing Element was October 15, 2021. (Id. ¶ 19.) In fact, HCD and SCAG did not provide their draft allocation to the City until March 4, 2021, and only provided the "final" allocation three (3) months before the Housing Element was due. (Id. ¶ 20.)

This manifest delay appeared to be the result of significant controversy within SCAG, an internal audit of HCD was commenced in October 2021, and the audit found that HCD had made data calculation errors and lacked a sufficient management review process. (Id. ¶. 17-19). Compounding this scandal and late deadlines are the facts that, (i) John Curtis (a principal of 600 Foothill) sat on SCAG's Regional Council during the adoption of the methodology for allocating affordable housing units to the City, and (ii) as a principal of 600 Foothill LP, purchased the property for the 600 Foothill Project at issue in this case in 2019 (Koleda Decl. ¶ 20; Exhs. J-K), and therefore stood to gain by greater RHNA allocations to the City. As set forth below (see section III.B, *infra*), Mr. Curtis was not the only principal of 600 Foothill able to use the Site Inventory to his favor—Garret Weyand actively manipulated the City's efforts to develop an accurate Site Inventory.

Meanwhile, the City and Ms. Koleda and her team of consultants were hard at work developing the Site Inventory, using in part the Improvement to Land Ratio ("ILR") approach to identifying sites for the Site Inventory. (Koleda Decl. ¶¶ 21-33.) For the 6th Cycle Housing Element, the City did not "rollover" existing sites from the 5th Housing Element, but started a fresh data-driven approach similar to a model developed at the Terner Center at U.C. Berkeley and following HCD guidance for locating non-vacant land (given the lack of vacant land in the City). While the full background of this

methodology and subsequent real life engagement with land owners is too voluminous to recite here, it followed HCD's example for San Diego County by identifying sites that met three criteria: "(1) The value of the improvements was less than the land value; (2) The existing structure was more than 30 years old; and (3) The potential yield is at least three times greater than the existing number of units." (Koleda Decl. ¶ 24.)

600 Foothill contends that this methodology does not meet HCD criteria for a compliant Site Inventory. (600 Foothill O.B. at 18.) It argues that the City violated various provisions of Sections 65583 by failing to make findings based upon substantial evidence that the existing use of identified Site Inventory locations is likely to be discontinued in the relevant time frame. (*Id*.) The City, however, adopted a Site Inventory using both a data-driven model endorsed by HCD, *supra*, and along with that gathered "substantial evidence" by sending TWO mailings to each commercial and religious property owner in the City to determine potential inclusion on the Site Inventory. (Koleda Decl. ¶ 29.) In the absence of non-vacant land, the City's efforts and results were detailed in the 2022 Housing Element, the same Housing Element that was approved with minor data clarification by HCD in 2023 (including the Site Inventory). (Koleda Decl. ¶¶ 54-56; AR004601-4603.) The City met every requirement imposed by section 65833, requiring entry of findings for nonvacant sites, as a result of ongoing communication with ALL commercial and religious land owners and adduced by "additional evidence" of their feasibility under the standard set by *Martinez*, 90 Cal.App.5th at 244. *Martinez* addressed letters to nonvacant site owners and found that mere imperfections as to form (letters seeking far less information than sought and obtained by the City here) did not render a non-vacant site out of compliance with Sections 65583.2 or 65583:

> "While the City's letters did not explicitly address existing leases and contracts, it was reasonable for HCD to infer from the combined correspondence that there were no such leases or contracts. Therefore, requiring the City to explicitly state no such agreements existed would not provide substantive information essential to the Housing Element Law's objectives and, at most, would address only a technical imperfection of form…. Also, the HCD could reasonably conclude the general plan's land use designation for the site and the rezoning of the site were the regulatory standards that encouraged residential development and no other incentives or standards applied. The absence of an explicit statement about the absence of other incentives or standards was not, in our view, a substantial failure to comply with the Housing Element Law." *Martinez* 90 Cal.App.5th 193, 250.

HCD raised similar concerns in a letter to Ms. Koleda dated December 6, 2022 regarding the

October 2022 Housing Element and the identical issue of the "suitability of nonvacant sites" under Section 65583. HCD was ultimately satisfied through engagement with the City (Koleda Decl. ¶ 50.), and as set forth below, sites that were manipulated by Mr. Weyand were considered to be "buffer sites" in the Site Inventory. In fact, as set forth below (in section III.B), 600 Foothill cannot fault the City for confusion with HCD that it caused through illicit means, and moreover, the Site Inventory was based upon substantial evidence as required by relevant Section 65583 subsections. (Koleda Decl. ¶¶ 27-33.) In any event, the Site Inventory was ultimately deemed compliant in 2023 after these communications, further proof that the City's October 2022 Site Inventory was sufficient notwithstanding (among other things) 600 Foothill's direct interference, dilatory allocations and directives from SCAG and HCD, dilatory "guidance" from HCD, and the requirement that adoption of a Housing Element precede rezoning. Under *Martinez*, the City met its requirement to identify sites for the Site Inventory, and was permitted to make the inferences it did regarding non-vacant sites, and was not required to specify the development potential for each site at issue. (*Martinez*, 90 Cal.App.5th at 248.) *Martinez* also allowed the City there to rely upon letters with site owners and between itself and HCD not included specifically in its Housing Element. (*Id*.) The City here made reasonable inferences using more information than the city in *Martinez* did and therefore the City's October 2022 Housing Element was sufficient to comply with Section 65589.5(d)(5) contrary to 600 Foothill's assertion that it did not. (600 Foothill O.B. at 9.) As set forth above, the City corresponded extensively with non-vacant site owners, and communicated with HCD regarding specific sites. The City was not required to include these letters in its housing Housing Element. Separate from other reasons why the City's arguments regarding 65589.5(j) and (o) (600 Foothill O.B. at 9-10) are not well taken, the City has met its burden to show the information set forth in the 2022 Housing Element constituted an adequate Site Inventory supported by legally cognizable methodologies.

B. <u>600 FOOTHILL'S "UNCLEAN HANDS" BAR ITS CLAIMS</u>

600 Foothill actively interfered with the City's ability to complete the Site Inventory for the Housing Element, triggering application of the affirmative defense of unclean hands (see City's Answer to Petn. at Aff. Def. No. 8, p. 29).

If a plaintiff comes to court with "unclean hands" the relief it requests should be denied,

regardless of the merits of the claim. (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.) The doctrine provides a complete defense to both legal and equitable causes of action. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 446, 447; *Kendall-Jackson*, 76 Cal.App.4th at 978, 986.) Application of the defense hinges on proof of three elements: (1) analogous case law (see *Padideh v. Moradi* (2023) 89 Cal.App.5th 418, 441), (2) the nature of the misconduct, and (3) the relationship of the misconduct to the claimed injuries. (*Dickson, Carlson & Campillo*, 83 Cal.App.4th at 447.) Unclean hands is an appropriate defense to a writ of mandate. (See *Allen v. Los Angeles County District Council of Carpenters* (1959) 51 Cal.2d 805, 811-812; *Elliot v. Contractors' State License Bd.* (1990) 224 Cal.App.3d 1048, 1050-1051 (denial of a writ of mandate to review an administrative decision pursuant to CCP §1094.5).) Courts have applied the unclean hands doctrine to fact patterns involving plaintiffs who intentionally interfere with the defendant's ability to meet its legal obligations. (See, e.g., *Aguayo v. Amaro* (2013) Cal.App.4th 1102; in re *Marriage of Boswell* (2014) 225 Cal.App.4th 1172.) A plaintiff's actions "that violates good conscience, or good faith, or other equitable standard of conduct is sufficient to invoke the doctrine." (*Kendall-Jackson*, 76 Cal.App.4th at 979, 987.) The alleged conduct must relate directly to the cause of action involved. (*Kendall-Jackson*, 76 Cal.App.4th at 984.)

600 Foothill's condemnable actions relate to the site inventory in the Housing Element, the very portion of the Housing Element on which it focuses its contentions that the City did not comply with applicable law. As discussed in more detail in section III.A, HCD agreed to allow the City to use in its Site Inventory identified non-vacant commercial and religious sites, including after the City explained to HCD that response letters indicating an objection from a property owner should not automatically disqualify the property from inclusion on the Site Inventory. (Koleda Decl., ¶ 46, 50.) Then, after the City had finalized the sites, Petitioner, via one of its principals, Garret Weyand, personally came into City Hall on September 9, 2022 and October 4, 2022, and submitted letters regarding the City's 6th Cycle Housing Element and Site Inventory, not signed by him, but rather allegedly signed by different property owners, residents, or businesses within the City, contesting their property's inclusion in the site inventory. (Id., at ¶ 46; Hernandez Decl., ¶¶ 4, 5; AR007081-007083.) The key language of declination, that each owner had "no intent of discontinuing [its existing] use"

during the Housing Element Cycle (2021-2029), is identical in each of these letters, and is substantial evidence that the content of the letters was suggested or written by 600 Foothill. (*Id.*) Plainly, the only reasonable inference to draw is that on the eve of final review and approval of the Housing Element containing the Site Inventory, 600 Foothill's principal was running around town attempting to manipulate owners to "decline" inclusion on the inventory and derail the process.

In response, the City inquired of HCD and HCD initially advised the City that it should only list the declined sites as "buffer" sites but then oddly reversed course and said not to include them at all. (Koleda Decl., ¶ 46.) As a result of Petitioner's principal's direct interference with the City's 6th Cycle Housing Element approval process, HCD did not count those sites toward the sites inventory. (*Id.*, at ¶ 47.) Petitioner should not be allowed to enjoy the fruits of this manipulative conduct and reap the reward of thwarting the City's efforts to comply with its statutory obligations. The City was already facing an uphill battle in preparing the site inventory in light of being a built out city with literally no vacant property. Knowing that it had to rely on non-vacant sites, Petitioner's principal purposely orchestrated declination letters.

Petitioner's manipulations were revealed, moreover, when members of a community organization (opposed to the project) interviewed a person who had signed a letter, and learned that 600 Foothill's principal had called her "many times to sign his tailored letter against the Project [sic] and she reluctantly signed. After we described the reason for his call (to remove other eligible sites for RHNA numbers therefore building support for his project at 600 Foothill) and that she can continue her preschool as long as she wants, she wishes to rescind the letter." (AR007085.) In fact, the site remained included on the Site Inventory (it was, as measured by all objective standards, underutilized) (AR005233) and she did rescind the letter. (Sheridan Decl., Exh. DD.) 600 Foothill was actively attempting to subvert the City's efforts to comply with what HCD was saying to the City it was required to do to complete the Housing Element approval process. There would have been a six week delay given the time it took to discuss the Site Inventory with HCD, a re-run of the Site Inventory, and another noticed hearing if the sites were removed. (Id., at ¶¶ 47, 51.) Not coincidentally, 600 Foothill's SB 330 application was filed a mere five weeks after the City adopted its Housing Element, within the targeted delay 600 Foothill no doubt was attempting to secure.

Mr. Weyand's deliberate attempts to manipulate the Site Inventory are directly related to Petitioner's First, Second, Third, Fourth, and Fifth Causes of Action centered around its allegation that the City violated the Housing Element law regarding (among other things) the Site Inventory, and based thereon violated the Housing Accountability Act. All five causes of action are directly "infected" by Petitioner's attempts to manipulate the City's Site Inventory, and therefore relief thereunder should be denied.

C. PETITIONER 600 FOOTHILL'S WRIT IS PREMATURE

600 Foothill's Petition is revealed, in its opening brief and otherwise, to have run afoul of a slew of procedural rules protecting against the piecemeal litigation 600 Foothill improvidently has chosen to file based on its March 9, 2023 appeal of the March 1, 2023 Incompleteness Letter and the City's May 1, 2023 decision thereon.

1. 600 Foothill's Appeal Did Not Raise Issues Now Improperly Pursued Here.

Interested parties "must present the exact issue to the administrative agency that is later asserted during litigation." (*Hagopian v. State* (2014) 223 Cal.App.4th 349, 371; see also Section 65009(b)(1); *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 632; *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447.) 600 Foothill's appeal purported to "reserve" certain challenges to the "City's non-compliance" (AR 6294), admitting that these other "challenges" were neither the subject of its appeal nor something that had been resolved by the City adversely as to 600 Foothill. 600 Foothill purported to "reserve the right to challenge" (AR 6286) (i) so-called "self-certification"(ii) "failure to re-zone"; (iii) that "the Housing Element does not 'affirmatively further fair housing'"; (iv) site inventory issues; and (v) removal of "constraints" to housing for persons with disabilities. Consequently, at a minimum these issues on which 600 Foothill purported to have reserved its rights are not ripe for adjudication here (e.g., *Selby Realty Co. v. City of Buenaventura* (1973) 10 Cal.3d 110, 117), nor has the required "finality" of the City's action occurred, nor has 600 Foothill exhausted its administrative remedies as to each.

2. The Appeal/Writ Prevented Application of Section 65589.5(f) of the HAA.

The premature filing of 600 Foothill's writ also prevented the City from addressing the proper interpretation and application of section (f) of the HAA. In particular, section 65589.5(f)(1) states

that "nothing" in the HAA "shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards…." The City has, and had at the time of the SB 330 application in November 2022, written "development standards" that were "objective" and "quantifiable" other than in the General Plan and zoning code. By way of example only, the City's Downtown Village Specific Plan (DVSP) contains objective and quantifiable development standards that would be applicable to this Project. The City's November 2020 DVSP (in effect in November 2022), adopted under Section 65450 (and thus not one of the "elements" of a general plan), sets forth objective standards including but not limited to height and common area space (Koleda Decl., Exh. H, Ch. 7 "Development Standards and Design Guidelines") 600 Foothill's project does not comply with these limitations applicable under the HAA (project frontage height is 66 feet – AR005271 and AR007291-92), the City informed Petitioner of inconsistencies with the DVSP (AR007176-7178), and thus this writ should be denied and the Project sent back for proper City action in this regard.

3. 600 Foothill's Premature Writ Preempted Required CEQA Review.

The City cannot as a matter of law approve or disapprove a development project, including a project under the Builder's Remedy, prior to conducting environmental review under CEQA, which **requires** a City to consider the environmental impacts of proposed projects and to mitigate or avoid significant impacts as feasible. (Cal. Pub. Res. Code § 21002; *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848–49 (CEQA process must be complete by City "prior to its approval or disapproval of a project.").) This definition of "disapproval" from CEQA is an apt one, and helps inform what the drafters of the HAA meant as well. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Indeed, CEQA review is expressly preserved in the HAA (sections 65589.5(e) and (o)(6)).

There is no room in the language of the HAA (600 Foothill O.B. at 10:23-11:7), to allow the Court to order the City to accommodate CEQA review after a possible finding by the Court of a violation of the HAA. The decision in *Schellinger Bros v. City of San Sebastopol* (2009) 179 Cal.App.4th 1245, instructs that Petitioners are wrong in this regard. Schellinger alleged that the City had engaged in prolonged delay, and the City filed a demurrer to Schellinger's HAA claim,

contending that "Schellinger had no cause of action under [the HAA] because: (1) 'no decision has been made by the City on the Project'; …and (3) Schellinger 'failed to exhaust its administrative remedies.'" (*Id.* at 1254-55.) In discussing the interplay of CEQA and the HAA, and in light of Schellinger's pursuit of an order that the City approve the Project absent final CEQA review, the Court in *Schellinger* reaffirmed both that it could not do that and that a claim under the HAA was not ripe until CEQA discretionary review was complete, because prior to that there was no "approval, denial or conditional approval of a 'housing development project' which .. can occur *only after the EIR is certified*." (*Id*. at 1262.) 600 Foothill says (600 Foothill O.B. 11:1-2) that *Schellinger* is based on the HAA "as it existed 14 years ago," but provides no proof of any material change.

Petitioner also gets it wrong by citing the *Cal Renters* decision in this regard (600 Foothill O.B. at 11:5-7, citing *Cal. Renters v. City San Mateo* (2021) 60 Cal.App.5th 820). 600 Foothill argues, citing *Cal. Renters*, that one can sue under the HAA without final CEQA review since that case proceeded without CEQA review before a finding was entered by the Court under the HAA. That is grossly inaccurate; the application in *Cal Renters* proceeded under a CEQA exemption as determined by City staff after review and as such was presented to the City Council when the Council disapproved the project in its entirety (Sheridan Decl., Exh. EE at 23-26.) CHDF and Petitioner's Counsel Holland & Knight knows this fact since Holland & Knight represented CHDF under its former name Cal. Renters in that case. (Sheridan Decl. Exh. FF.) Indeed, what follows is a quote from the CHDF/Holland & Knight opening (and successful) brief to the Court of Appeal in *Cal. Renters*:

> In *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1262, this Court rejected a petitioner's attempt to argue that the HAA "imposes a self-executing deadline within which an EIR must be certified." This rationale does not apply here: the Project is exempt from CEQA (AR/872-73), **and San Mateo, unlike Sebastopol, took final action to disapprove the Project**.

(Id. at 43-44 n.13 – emphasis added.) Thus, as Petitioners admit, the Court in *Schellinger* found that because no CEQA decision was rendered the City did not take final action. In juxtaposition, in *Cal. Renters*, a final decision was made because the CEQA exemption was not contested and admitted by the City. (*Id.* at 24, 47.) The comparison helps reveal the false premise to what Petitioners are arguing

here.

600 Foothill then turns to the usual slippery-slope-type argument, contending that if the Court in *Schellinger* was right and the City is right, and CEQA review is in fact needed before an HAA claim is ripe, then "even the most blatant" HAA violations would never be ripe because "project disapproval is itself a CEQA-exempt act (Pub. Res. Code § [sic] 210080(b)(5))…" (600 Foothill O.B. at 11:8-14.)[2] 600 Foothill, however, forgets about *Cal. Renters*, and also mixes up its "disapprovals," since a City that is pursuing CEQA review of a project has in fact not formally "disapproved" that Project under CEQA or the HAA. Nor is that some endless process; CEQA itself (Pub. Res. Code § 21151.5) requires an end to the process within one year of the date the application is deemed complete, and on May 26, 2023, the City deemed 600 Foothill's application complete (but for the items not submitted because 600 Foothill lays claim to the "Builder's Remedy"). (AR 7169.) As well, the City's CEQA process continued in September 2023, as it sought RFPs from consulting firms to do the necessary work and passed a resolution on December 5, 2023 to pay for that work. (Sheridan Decl. Exh. JJ.)

Accordingly, the City is not "shielding" itself from the HAA but rather affirming that disapproval cannot occur under the HAA until CEQA review is finished. (See Elmendorf and Duncheon, *When Super-Statutes Collide*, 45 ECGLQ 655, 685 (2022) on WESTLAW).)

4. <u>No HAA-Defined "Disapproval" Occurred on May 1, 2023</u>

Petitioner spends numerous paragraphs in its Petition (Pet. ¶¶ 59-63, 127, 142, 156, 166-168, 171, 184, 191) and two pages in its brief (600 Foothill O.B. at 7:3-9:10) alleging that the decision of May 1, 2023, is in fact a "Final" <u>denial of the Housing Development Project</u> and thus properly before the Court. The HAA suffers from a circular definition. Section 65589.5(h)(6) states "'disapprove the housing development project' <u>includes</u> any instance in which a local agency does any of the following: (A)Votes on a proposed housing development project application and the application is disapproved, <u>including</u> any required land use approvals or entitlements necessary for the issuance of a building permit . . . ." This use of two lists, one that <u>includes</u> "instances" of City action but does not truly

[2] This identical argument was made by the unsuccessful appellant in *Schellinger*. 2009 WL 872310 (Appellant's Opening Brief at 21)(Sheridan Decl., Exh. KK).

define what those may be, and one which defines what a City must "vote" on before it is included in the second "list," provides no endpoint for what is not included, and thus the rule from *Rea* (600 Foothill O.B. at 8:8-9) does not solve the problem. Solving the problem is simple, and with reference to companion statutes and basic rules of interpretation – CEQA says a disapproval is as to the entire application (*Schellinger*, 179 Cal.App.4th at 1258), after consideration of the CEQA requirements, which the HAA preserves, and which did not happen here before 600 Foothill filed its writ. As well, the legislature intended that challenged City action must be "final" because "imposing conditions on" and "disapproving" must constitute **final actions** on a housing development project, given the very next phrase (in section 65589.5(m)(1)) includes them in a list of "**other final action** on a housing development project." Such finality is required by the HAA, and it did not occur here.

600 Foothill appears to be guilty of a misreading of this provision. "[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.] In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would make the item markedly dissimilar to the other items in the list." (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012.) The first *list* "includes" what it says are instances of disapproval of a "housing development project," yet the second *list* states there must be a vote, it must be on a "proposed housing development project application," the application must be "disapproved," and that disapproval may include a disapproving vote on "any **required land use approval or entitlement** necessary for the issuance of a building permit (emphasis added)." Here, 600 Foothill defined the "approvals" and "entitlements" it sought in its application – namely, a Conditional Use Permit (USE-2023-0016), Tentative Tract Map 83375 (LAND-2023-0001), and Tree Removal Permit (DEV-2023-0003). (AR 5285.) There was no vote on May 1, 2023, on any of these "required land use approvals" or "entitlements" and, thus, when read properly under *Moore* and like cases the "vote" needed under the HAA has not occurred. The "Builder's Remedy," moreover, the only "vote" the City cast on May 1, 2023 (denying it was such), is not a "required land use approval" or an "entitlement" -- it is, under *Moore* and similar law,

"markedly dissimilar" to the "list" in the statute.

In addition, 600 Foothill contends that without the Builder's Remedy, it would not have a project. That may be 600 Foothill's unilateral decision but it is not a decision of the City. 600 Foothill also contends the City's action "unlawfully conditioned" the Project so as to make it "infeasible" as the HAA defines it in Section 65589.5(h)(1) (600 Foothill O.B. at 8:20-9:3.) 600 Foothill, however, assumes its conclusion, and has unilaterally elected to offer no proof at all, from the finances of its ownership or anywhere in the Administrative Record, to support that statement. 600 Foothill had its many opportunities to present that evidence but declined, for whatever reason, including refusing to produce those documents in response to the City's RFPs. (Sheridan Decl., Exh. GG) All 600 Foothill offers is a mere conclusion –zoning would prevent development of its affordable housing, which is not true – the zoned density at 15 units per acre (AR007176) would more than accommodate the proposed 16 affordable units on this 1.29 acre parcel.

5. <u>600 Foothill Has Violated Rules that Prevent Piecemeal Litigation</u>

600 Foothill's Petition defines what it believes the acts of disapproval under the HAA were. (Pet.¶ ¶ 127, 142, 156.) However, and restating well known rules require finality in administrative proceedings, Section 65589.5(m) also requires that such an action be brought "pursuant to section 1094.5 of the Code of Civil Procedure," adopting all the prevailing law under that section which includes standards for the evaluation of exhaustion of administrative remedies, finality of the application, and ripeness of the claim. As many courts may repeat the "Canons of Interpretation" announced by the legislature, one rule remains immutable – a final decision disapproving the "housing development project" must be rendered in order for a claim to arise – the HAA's inclusion of 1094.5 as the enforcement/remedy provision expressly invokes those rules. (See *McAllister v County of Monterey* (2007) 147 Cal.App.4th 253, 274 (an agency action under analogous CEQA rules is ordinarily not sufficiently ripe for judicial review until all administrative proceedings have been completed and the agency has reached a final decision in the matter); accord *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594 (Petitioner must "<u>raise all issues</u> before the administrative body" to achieve required exhaustion -- emphasis added); *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489.) Even the Petitioners in

Cal. Renters exhausted all administrative remedies and brought a Petition after the City Council disapproved the entire project (including proposed CEQA exemption) and declined to issue any of the entitlements pursued. *Cal Renters*, 68 Cal.App.5th at 832-833. The HAA makes no changes to these rules, indeed it preserves them.

D. THE CITY DID NOT VIOLATE THE PERMIT STREAMLINING ACT

Under the well-known process (15 CCR Section 15004(a); sections 65901- 65905), when a developer submits a development application, the Permit Streamlining Act is triggered ("PSA") (Section 65920 *et seq.*), under which the City has to determine if the application is "complete" within 30 days of submittal of the application and payment of fees, and if incomplete then the City notifies the applicant, the applicant can submit additional information, and this process continues until the application is determined to be complete or the applicant refuses to supplement and appeals. (Section 65943 and subd.(c).) .)

Petitioner says the City violated these rules by issuing two letters of incompleteness on February 10, 2023 (AR005276-005279) and March 1, 2023 (AR006280-006281). The two letters contained the "exhaustive list" of items that were not complete, and the March 1 letter was issued within the 30 day statutory deadline from payment of the fees. The 30 days to send the "exhaustive list" ran from payment of fees – the City website requires every applicant to agree (when e-filing an application) that "*I also understand the 30-day time limit to determine completeness of a development application per Government Code Section 65943 does not begin until all invoiced fees have been paid*." (AR007161-7162.) Petitioner submitted its "final" application for a Conditional Use Permit, Tentative Tract Map, and Tree Removal Permit on Friday, January 13, 2023, was invoiced for all three applications on January 17, 2023 (the next business day after the holiday weekend), and paid its fees on January 31, 2023. (Id.) The February 10 letter also advised the 30 day review period began on January 31, 2023 (AR005276) and Petitioner did not dispute this timeline until it appealed the March 1 letter. (AR006283.) Indeed, key PSA provisions recognize the importance of paying fees to its timelines. (See sections 65940.1(a)(1)(A)(i)), 65941.5, 65943(e), all referencing and approving the charging of fees.) The March 1 letter was a supplement to the "exhaustive list" and sent within the 30 day time limit. (AR006280-006281.) There is no statutory requirement that the list be contained

within one written communication.

Petitioner then contends that the applicability of the Builder's Remedy to the Project was not on the City's submittal checklist, however, it is a common practice for the City to provide information to a developer regarding ways that the development does not meet applicable development standards, beyond the checklist. (Koleda Decl. ¶ 29.) In fact, state law *requires* cities to provide this information to applicants for housing projects. (*See* Section 65589.5(j)(2)(A).) Regardless, alleged errors under the PSA, which the City denies occurred, did not prejudice Petitioner because the Application was deemed complete on May 26, 2023 (AR007169).

E. THE CITY DID NOT VIOLATE STATE DENSITY BONUS LAW OR THE SUBDIVISION MAP ACT

Petitioner alleges that the City's "denial" under the HAA had the effect of denying the Petitioner's requested entitlements under the State Density Bonus Law ("SDBL") and the Subdivision Map Act ("SMA"). As discussed in more detail above in section III.B.4, the City has not disapproved the housing development project as required under Section 65589.5 (k)(1)(A)(i)(I), thus there has not been a denial of Petitioner's requested entitlements. With respect to the SDBL, Petitioner ignores the City's June 24, 2023 letter (AR007176-007178) acknowledging its request for a bonus density and waivers for the 35-foot height standard and parking space dimension requirements. The letter clearly outlined the process by which the requested concessions would be analyzed and submitted for review by the Planning Commission. (AR007178). As to the SMA, Petitioner's application for a Tentative Tract Map was deemed complete on May 26, 2023 and the Project was moved along to the next step of the approval process. (AR007169; AR007176-007178.)

F. PETITIONER'S "FAIR HEARING" CAUSE OF ACTION IS STAYED

Petitioner's Ninth Cause of Action was the focus of the City's November 22, 2023 CCP 425.16 motion to strike, the City the adverse ruling on January 18, 2024, and thus this cause of action is stayed. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189.)

G. FILING AN SB330 FORM DOES NOT VEST THE BUILDER'S REMEDY

A preliminary application ("PA") vests "ordinances, policies, and standards" in effect when the preliminary application is filed. (Section 65589.5(o)(1).) However, the so-called "Builder's Remedy"

is not an "ordinance, policy, [or] standard" as defined in subsection (o)(4), but is rather a stand-alone provision of state law. Section 65589.5(d)(5) provides that a city may deny an application it if finds that: "The housing development project …is inconsistent with both the …zoning ordinance and general plan … as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article." The clear meaning of "has adopted" is has adopted *as of the time that the city makes the finding in subsection (d)(5)*. Whereas the first clause of (d)(5) states "as it existed on the date the application was deemed complete," the second clause does not, thus evincing a lack of intent to freeze the Housing Element requirement at an earlier time. An important distinction must therefore be made: When a city determines what development standards to apply, it can only look to standards that were in place when the preliminary application was filed. *But*, when a city is determining whether it can make the finding in subsection (d)(5), it considers the status of its Housing Element *as of the date the finding is made*. Therefore, if the court determines that the City had a substantially compliant Housing Element at any time before the City allegedly denied the project, then the City was within its rights to make such a denial.

IV. CONCLUSION

For all the foregoing reasons, 600 Foothill's writ should be denied, and no form of relief it requests should be granted.

DATED: February 5, 2024

GLASER WEIL FINK HOWARD JORDAN & SHAPIRO LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 10250 Constellation Boulevard, 19th Floor, Los Angeles, California 90067.

On February 5, 2024, I served the foregoing document(s) described as **RESPONDENTS' ANSWER TO PETITIONER'S OPENING BRIEF** on the interested parties to this action by:
SEE ATTACHED LIST

☒ **(BY E-MAIL SERVICE)** I caused such document to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth in the attached service list.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 5, 2024, at Los Angeles, California.

Jenna Farruggia

GlaserWeil

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