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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CALIFORNIA HOUSING DEFENSE FUND, a California nonprofit public benefit corporation,

Petitioner and Plaintiff,

v.

CITY OF LA CAÑADA FLINTRIDGE,

Respondent and Defendant,

600 FOOTHILL OWNER, LP, a limited partnership,

Real Party in Interest,

PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA; CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT,

Petitioners-Intervenors.

Case No.: 23STCP02614
Related Case No.: 23STCP02575

Honorable Mitchell L. Beckloff
Department: 86

RESPONDENTS' ANSWER TO PETITIONER CALIFORNIA HOUSING DEFENSE FUND'S OPENING BRIEF

Date: March 01, 2024
Time: 9:30 AM
Dept: 86

Action Filed: July 25, 2023
Trial Date: March 01, 2024

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I. INTRODUCTION

This Petition and CHDF's Opening Brief ("CHDF O.B.") represents a classic example of errors leading to "overreaching,"[1] namely misinterpreting statutory duties and obligations under the state's housing law. If that were not enough, California Housing Defense Fund ("Petitioner" or "CHDF") also misstates the factual history that gave rise to the 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. Petitioner attempts to tarnish the City and its council members in an inappropriate and unsupported way, knowing the selected statements are taken out of context and the public comments "protected" as a matter of law. These same kinds of errors infect CHDF's contentions under its unpled, factually unsupported and illegitimate "Fair Housing Act" theory and its request for this Court to order the project "approved" notwithstanding prevailing law compelling that such an order exceeds the scope of this Court's authority.

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

Under *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 243, it is up to the Court to determine whether a City's housing element complies with the Housing Element law, and if the statute

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

is clear, there is no deference to HCD's determinations and the plain meaning of the statute is adopted. 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. Among other things, the history of HCD's interaction with the City, and the minor clarifications to the "approved" Housing Element demonstrate that the City's October 2022 Housing Element did in fact substantially comply with all requirements.

Background of the City's Efforts. The City made every effort possible to and did comply with the Housing Element law in particular, even in the face of delays in 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 person on the City staff responsible for progressing the 6th Cycle General Plan Housing Element (the "Housing Element"), the City made extraordinary efforts to comply with Housing Element Law requirements in completing its Housing Element. CHDF more than any party misunderstands and mischaracterizes the basic geography, topography, and available land in the City that directly relate to the Housing Element, the Regional Housing Needs Allocation ("RHNA"), and the duty to Affirmatively Further Fair Housing ("AFFH") in an attempt to find fault where there was none (again, CHDF's apparent ignorance of the characteristics of the City are telling). The City is and was constrained by the basic nature of the City's location, lack of vacant land, the fact that the City does not own land to sell to developers, the impracticality of building multi-family housing in the City's northern heavily fire 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 Boulevard, demonstrating at least in part why 600 Foothill chose Foothill Boulevard to locate the Project. As set forth below, fundamentally, the relevant actions the City took to comply with the Housing Element Law regarding the Site Inventory were completed well before the adoption of the October 2022 Housing Element, with the input and participation of HCD, and despite the late allocation of the Sites Inventory by HCD/SCAG.

The Relevant Infrastructure and Topography of the City. The City made every effort possible to and did comply with the Housing Element law, even in the face of delays in the RHNA allocation and repetitive requests from HCD. Simply put, the fact that the Site Inventory identifies potential locations for affordable housing development closer to Foothill Boulevard, the only

throughfare through the City, 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 the Angeles National Forest 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" and has no 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 that jointly manage this land. (Id. at ¶ 9.) Half of the City land south of Foothill Boulevard is not even connected to the City's sewer system and relies on septic tanks, making such land inappropriate for multi-family housing. (Koleda Decl. ¶ 10.) To the North of Foothill Boulevard, the City ascends into the hillside of the San Gabriel mountains. It has steeply graded slopes, making such land prohibitively expensive to develop as multi-family housing as well putting any potential large scale developments at much greater risk of fire given that the City rated at the highest risk severity. (Id. at ¶ 12). These steeply graded slopes, set among hire fire risk trees, would require far greater construction costs than developing on flat land. (Id. at ¶ 12.)

By contrast, Foothill Boulevard (the extension to historic Route 66) and the local "corridor" along this main thoroughfare is the flattest land in the City. (Id. at ¶ 14.) It is also where the City's retail and other commercial services are located, including grocery stores, restaurants, medical offices and pharmacies—the essentials of local life. (Id.) 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 to Route 66 and across the County and beyond since before the 1960's. (Sheridan Decl., Exh. BB; RJN ¶ 6.) Therefore, this natural development is not unique to the City in any way. While it is common Southern California knowledge that Foothill Boulevard has run through the County in slightly different iterations with commercial development all the way to outside the State since before the 1950's, with homes extending into the foothills to the north through very many Los Angeles County towns all the

way out to the County border in Claremont, this concept required extensive explanation to the staff at HCD up in Sacramento as it related to the City's development of the 2022 Housing Element Site Inventory. (AR 005263). Apparently these basic characteristics were not considered by CHDF either, likewise based out of town. The characterization of Foothill Boulevard by CHDF as some kind of undesirable or dangerous location (despite intense interest in putting 600 Foothill's Project there) is simply empty rhetoric.

The City Met the Statutory Deadline. CHDF, like 600 Foothill, argues that the City failed to meet Section 65588's statutory bar based on an alleged failure to complete its sixth RHNA cycle rezoning by October 15, 2022 purportedly required by Section 65588(e)(4)(C)(iii). (CHDF O.B. at 12.) The City adopted a compliant Housing Element within a year, and thus this section does not apply. As an initial matter, as explained by Ms. Koleda, the City could not rezone until it had a General Plan Housing Element under Section 65860(c), HCD did not promulgate draft AFFH requirements for the 6th Cycle housing element until April 23, 2020, and did not promulgate the final version until April 2021, only six months before the then-existing deadline (within SCAG) for submitting a 6th RHNA Cycle Housing Element. 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.) "Since consistency with the general plan is required, absence 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). CHDF's fundamental demand 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 as to whether the City had a substantially compliant Housing Element in October 2022 in order to meet the conditions of, and thus extend the deadline to rezone three years (into 2025) under, section 65583.4(a). (See section III.C of the City's Opposition to the State/HCD O.B., incorporated herein by this reference.)

The City's Site Inventory Was Developed Appropriately: CHDF argues variously that the sites in the City's Site Inventory were not appropriate or were chosen for some nefarious purpose. The history of the Site Inventory belies these claims and reveals that a statistical method approved by HCD was applied in compliance with the standards set forth in *Martinez*. The hard work of City staff and consultants disproves the CHDF's insinuations that have no basis in evidence or statistics.

The City began its housing Site Inventory work in December 2020, before HCD and the Southern California Association of Governments (known as "SCAG") even released their housing allocation numbers for the City. (Koleda Decl. ¶ 17.) (See also, Assembly Bill 1398 (Chapter 358, Statutes of 2021))(AR000443). In short, the City 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. ¶ 20.) In fact, HCD and SCAG did not provide their draft allocation to the City until March 4, 2021, and only provided the "final" allocation on July 1, 2021. (Id. ¶ 20.) This was only three (3) months before the 6th Cycle Housing Element was due under the existing deadlines.

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 is the fact 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, and therefore stood to gain by greater RHNA allocations to the City. (Koleda Decl. ¶ 20.) Mr. Curtis was not the only principal of 600 Foothill able to use the Site Inventory process to his favor—Garret Weyand actively manipulated the City's efforts to contact potential Site Inventory owners to develop an accurate Site Inventory (see City Opp. Brief to 600 Foothill at III.B).

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. ¶¶ 22-33.) 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 to 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.)

CHDF contends that the City did not adequately assess the suitability of nonvacant sites in its Sites Inventory. (O.B. at 18-19.) It argues that the City did not meet the standard set forth in *Martinez* and that it did not meet the standard under Section 65583.2. CHDF is wrong on both counts. The City developed 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. ¶ 23.) 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; AR004520,4718-4728.) The City met every requirement imposed by section 65583, 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 Section 65583:

> Martinez contends the letters relied upon by the City do not analyze the factors that the statute requires be included in the methodology used to determine a nonvacant site's development potential. Those factors are set forth in the second sentence of section 65583.2, subdivision (g)(1) and include, among others, "any existing leases or other contracts that would perpetuate the existing use" and "regulatory or other incentives or standards to encourage additional residential development" on the site. 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 precise issue of the "suitability of nonvacant sites." under Section 65583. HCD was ultimately satisfied through engagement with the City, and the Site Inventory was based upon substantial evidence as required by relevant Section 65583 subsections. (Koleda Decl. ¶¶ 22-33.) In any event, the Site Inventory was ultimately deemed compliant in 2023 after these communications, further proof that the City's Site Inventory was sufficient notwithstanding (among other things) 600 Foothill's direct interference, dilatory allocations and directives from SCAG and HCD, dilatory and vague guidance from HCD, and the requirement that adoption of a Housing Element precede rezoning to implement the Housing Element. 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 under the law.

This is sufficient to show that, as discussed below, the City did not engage in discrimination of any kind when rezoning. The land that CHDF ostensibly envies to the south of Foothill Boulevard lacks appropriate sewer system connections. CHDF shows no evidence of any bias by persons associated with the development of the Site Inventory or the approval of the 2022 Housing Element in this or any other regard. The City complied with its duty to Affirmatively Further Fair Housing. Guilt by association with attenuated comments by random residents who walk into City Hall that require reference to 1980's rap music has nothing to do with the adoption of the Site Inventory, the

Housing Element, or anything else. And moreover, the most obvious explanation on any scale is the lack of vacant land and extreme topographical and infrastructure limitations set forth herein, not some nebulous bias that is belied by the years long effort to comply with HCD and legal requirements.

The October 2022 Housing Element Met the Requirements of Section 65583.2(h). Despite CHDF's contention in this regard, the City did comply. (CHDF O.B. at 20:16-21:5) The Housing Element (AR004612-4613) accommodates a surplus of 233 lower-income units, after deducting the RHNA allocation of 387 units (AR004613) from the 493 in the Site Inventory (AR004612) plus 137 units issued pending permits (AR004598-4601) and anticipated ADU's and JADU's (AR004610-12). As well, the mixed-use zone can accommodate 252 of such units (AR004607, 4612, 4625).

The City Met the AFFH Requirements. The City met its requirements to Affirmatively Further Fair Housing despite CHDF's baseless claims of discrimination and attempts to smear the City with comments by members of the public made during public comments in City Council meetings, which regardless of their content (however abhorrent) are protected by statutes and the constitution (see section III.D.) CHDF ignores (among other facts) (i) that the City undertook numerous outreach efforts to reach a variety of economic groups, including via two housing workshops with 18 different stakeholder organizations; (ii) that these workshops were publicized in multiple formats; (iii) the City engaged in focus groups with both community service providers and for-profit developers to discuss AFFH related issues; and (iv) that the foregoing was in addition to a host of other public engagements and engagement with HCD regarding the 6th Cycle Housing Element. (Koleda Decl. ¶¶ 38-46; e.g., AR004651-55.) 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 (despite their late promulgation and internal scandals, detailed more fully herein). 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.) 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 approving the City's 2023 Housing Element and rezoning until the 60th day, even though the decision to approve had already been made. (Id.)

In the end, if Foothill Boulevard is an unsuitable location for affordable housing, as CHDF seems to suggest, 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.

B. CHDF's "Fair Housing Act (FHA)" Arguments Are Unpled, Factually Unsupported, and Ignore The Law CHDF Relies On.

CHDF alleges that Respondent's May 1, 2023 determination constitutes a "prejudicial" denial and violated the federal Fair Housing Act ("FHA") (CHDF O.B. at 10:1-20.) Preliminarily, CHDF does not allege an FHA "violation" or even so much as cite to the FHA in its July 27, 2023 Petition, which as an unpled claim the Court can reject out of hand. (E.g., *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1048; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial Ch. 6-A,¶ 6:8 (June 2023).) CHDF nonetheless tries to link FHA cases and analysis to a sequence of alleged events (CHDF O.B. at 9:14-11:6, 15:20-17:26) and contends that such demonstrates discrimination in revising the Housing Element and rezoning. While CHDF cites to *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, in this argument (CHDF O.B. at 17:24-26), it has learned none of the lessons nor met any of the burdens identified in *Martinez*, or the cases on which *Martinez* relied. First, CHDF has never alleged an FHA violation, unlike the plaintiff in *Martinez*. Second, CHDF has not met its initial burden of proof of (among other things) "isolating" the specific practices "allegedly responsible for the disparate impact" (*Martinez, id*. at 258.) Third, and ignored by CHDF, in *Martinez* (i) the Court had already found a violation of the Housing Element law, obviating the Petitioner of that part of its proof, and (ii) restated the "robust proof of causality" a plaintiff must offer (quoting the US Supreme Court) as follows -- "A plaintiff who fails to …produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact" (*Id*. at 259-260). CHDF offers absolutely **ZERO** relevant statistical evidence (CHDF O.B. at 6:16-7:4) -- all it offers is what attends an entirely built-out City the population of which has not significantly changed in decades, like similar cities around it. (Sheridan Decl., Exh. HH, RJN ¶ 9 – referencing Burbank, Pasadena and Glendale as losing population.)

Any alleged "discriminatory animus" of constituents expressed in public hearings has to be

causally related to action by the City that has no explanation other than to create a discriminatory impact against a protected class (in the end, a result of the shifting burdens), backed up by statistics. When a petitioner like CHDF relies on the "direct or circumstantial evidence" approach, the court will turn to the well-known multi-factor inquiry articulated in *Arlington Heights v. Metropolitan Housing Corp*. (1977), 429 U.S. 252, 266, which focuses on (*inter alia*) "statistics demonstrating a clear pattern unexplainable on grounds other than discriminatory ones," historical background, and a "specific sequence of events leading up to the challenged decision" departing from the City's normal procedures. (*Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1158-59, *cert. denied*, 135 S. Ct. 436 (2014).) If CHDF meets that burden of proof, the burden shifts to the City to demonstrate a "legitimate, non-discriminatory reason" for its regulation. (*Budnick v. Town of Carefree* (9th Cir. 2008) 518 F.3d 1109, 1114.) If the municipality can so prove, then the burden shifts again to the petitioner to prove by a preponderance of the evidence that the proffered reasons are pretexts – "plaintiff must produce 'specific, substantial evidence of pretext.'" (*Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 (internal citations omitted).)

In its argument, Petitioner mistakenly relies heavily on a Second Circuit Court of Appeals case, *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581.[2] The court in *Mhany* applied the *Arlington Heights* factors to a case where a 25 acre site proposed for multi-family zoning for two prior years was down-zoned to single-family zoning as a result of a significant number of public comments objecting on the basis of the kind of people who would move into multi-family housing, in addition to other concerns belied by the evidence in the record. No evidence of legitimate concerns to reject the rezoning were offered. Plaintiffs provided statistical evidence of the significant discriminatory effect such had on minority communities. (*Id*. at 607.)

The facts in ***Mhany*** simply are not comparable to the process the City underwent to adopt the Housing Element, and there is no evidence to impute the discriminatory intent of some commenters

[2] CHDF cites two cases (CHDF O.B. at 17:7-12), but the distinguishing facts therein show they help not hurt the City. *US v. Yonkers Bd*. (2d Cir 1987) 837 F.2d 1181 (City's "confining of subsidized housing to areas of high minority concentration" aggravating already existing racial segregation); *Ave 6E Inv. v. City of Yuma* (9th Cir. 2016) 818 F.3d 493, 497 ("discriminatory" statements reviewed under 12(b)(6) standard, the City denied rezoning despite advice of its experts to the contrary, and application was the only one denied in the last three years or last 76 applications).

to the City Council. Here, while some unsavory comments by residents were made at some of the hearings for the adoption of the Housing Element (in a manner protected by prevailing law and from which no alleged "failure to condemn" can have any legal import – see section III.XX, *infra*), the City Council approved a Site Inventory that meets the state's RHNA requirements at all income levels, including a 52 percent buffer (HCD recommended a mere 15-30 percent buffer). (AR 3740-41; Koleda Decl. ¶¶ 51, 57.). Multi-family residential zoning increased citywide, and was not eliminated or reduced dramatically by the City Council at all, let alone as a response to the comments on which CHDF stakes its claim. The City had legitimate reasons for the reduction in density on the South side of the street which is not linked to a sewer system and the 6th Cycle Housing Element accommodates 689 units of additional housing. (AR 3741; Koleda Decl., 9-10, 12.) Telling, 600 Foothill made no such "discrimination" claim in its March 9, 2023 appeal. (AR 006282-87.) And, in the accompanying declarations of the City Council members CHDF wrongly attempts to impugn, there is evidence that the City Council was well aware of the requirements of state law, and at no point did they provide direction to staff that would cause the City to have a non-compliant Housing Element. Rather, the City Council acknowledged the need for housing, including affordable and senior housing. (Koleda Decl. ¶¶ 8-10; Walker Decl. ¶¶ 15, 29-30; Bowman Decl. ¶¶ 15, 18-23; Eich Decl. ¶¶ 8-12; Gunter Decl. ¶¶ 11, 14-18; AR 915, 3740-41, 6054.) CHDF then mistakenly relies on California Regulations title 2, section 12161(c) that presumes proof of a "public …practice [which] reflects acquiescence to the prejudices…" and here there is no such evidence. In sum, the totality of the evidence is that the legislative body was committed to meeting the City's obligations, and did so with absolutely not a hint of discriminatory intent.

C. CHDF's And Petitioner 600 Foothill's Writs Are Premature

CHDF relies on 600 Foothill's Petition as ripe for adjudication (e.g., Pet. ¶ 73), and "hitches its wagon" to the same basic contentions as does 600 Foothill – "disapproval" as required by the HAA occurred on May 1, 2023 when the City Council denied 600 Foothill's appeal. After mischaracterizing the material evidence they purport to rely on (CHDF O.B. at 9:25-10:10, 15:27-16:28), CHDF commits to the same errors 600 Foothill makes, all of which run afoul of a slew of procedural rules protecting against the piecemeal litigation 600 Foothill improvidently has chosen to

file that can be found in the City's Opposition to 600 Foothill's brief, at section III.X (which the City incorporates into this opposition by this reference as if restated herein in full). As to the particular arguments of CHDF, a few of those errors that plague their derivative petition (in this regard) should be emphasized.

First, CHDF does add one argument to this "mix" that 600 Foothill does not. CHDF turns to alleged "futility" as a way to try and dodge finality, ripeness and exhaustion rules that still survive the adoption of the HAA (explained more fully below). "Futility" is an exception to the requirement to exhaust administrative remedies and Petitioner cannot prove futility as the law requires because the whole of the application has not been disapproved. (*Coachella Valley Mosquito & Vector Control Dist. v. Calif. Pub. Emp. Rels. Bd.* (2005) 35 Cal.4th 1072, 1080-81.) CHDF relies on a series of cases (CHDF O.B. at 22:4-23:14) that undermine rather advance the notion that legally required "futility" exists here. In *Felkay v. City of Santa Barbara* (2021) 62 Cal.App.5th 30, the Court evaluated the ripeness of an inverse condemnation claim not a mandate claim (at the cited pages of 40-41) after the City rejected this bluff-side project on its third or fourth review. Here, on the contrary, 600 Foothill has never completed City review of its final application, nor does claimed "denial" of the Builder's Remedy part of 600 Foothill's application bring the entire application (seeking multiple permits) to a singular conclusion – 600 Foothill's unilateral decision to contend the project would not exist but for the Builder's Remedy is just that, a unilateral decision. The other cases cited by CHDF do not change the outcome here. (*Ogo Assoc. v. City of Torrance* (1974) 37 Cal. App. 3d 380 (Petitioner not required to seek zoning variance where City imposed two moratoria and then downzoned the property while Petitioner's application was pending); *Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1339 (City council after appeal, remand, and second review entered a "definitive ruling" against the entire Project "without prejudice" to submitting a redesigned project -- "[e]xhaustion requires 'a full presentation to the administrative agency upon all issues of the case at all prescribed stages of the administrative proceedings.").) No express "disapproval" of the entire project occurred here, unlike the three cases cited by CHDF, and certainly no "futility" can substitute for that disapproval under prevailing law.

Second, CHDF stumbles into the same problems that plague the motion of 600 Foothill.

Issues in the Writ Were Not Raised in 600 Foothill's March 9, 2023 Appeal and Cannot Be 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.) In its March 9, 2023, appeal, 600 Foothill purported to "reserve" five challenges to the "City's non-compliance" 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 (self-certification, failure to rezone, AFFH violations, Site Inventory, constraints on housing for disabled persons). (AR006286.) Accordingly, those issues are not properly before this Court.

600 Foothill's Premature Writ Also Prevented The City's Proper Application of Development Standards Consistent with the HAA. Section 65589.5(f)(1) states that "**nothing**" in the HAA (not even the mandates of section (d)) "shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards …appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need,…" The City had in November 2022, written "development standards" that were "objective" and "quantifiable" other than in the General Plan/Housing Element and zoning code, namely in the City's November 2020 Downtown Village Specific Plan (DVSP) adopted under Section 65450 (and thus not one of the "elements" of a general plan), including objective, measurable open space minimums and height limitations. (See also Koleda Decl., Exh. H, Chapter 7.) 600 Foothill's project does not comply with these limitations (e.g., AR005271, 7291-92 – 60 foot height of building), and the City timely informed Petitioner of inconsistencies with the DVSP (AR 7176-7178).

600 Foothill's Premature Writ Also Prevented The City's CEQA Review As Required By The HAA. The City cannot as a matter of law approve or disapprove a development project prior to conducting environmental review under CEQA. (Cal. Pub. Res. Code § 21002; *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848–49.) CEQA review is expressly preserved in the HAA (section 65589.5 (o)(6)) and the HAA commands that the City make "one or more of the findings" set forth in CEQA. (Section 65589.5 (e).) This review must be done before "final approval or disapproval" of a "housing development project." (*Schellinger Bros v. City of San Sebastopol* (2009) 179 Cal.App.4th 1245, 1255.) *Schellinger* reaffirmed both that it could not

circumvent CEQA 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.*) CHDF admits in its own briefs in the *Cal. Renters* case that CHDF really does agree that final "disapproval" under the HAA does not occur until CEQA review is completed (distinguishing San Mateo's review of a CEQA exemption in *Cal. Renters*, making that decision "final," and the City in *Schellinger* not reviewing any CEQA document or exemption, making that decision not "final"). (Cal. Renters Appellant's Brief, at 43-45 n.13, Sheridan Decl., Exh. EE, RJN ¶ 7.)

The City's Determination on May 1, 2023, Does Not Meet the Definition Of Disapproval Under The HAA. CEQA says a disapproval is as to the entire application, after consideration of the CEQA requirements. Consistently, the HAA "votes" requirement for disapproval can properly be read to include voting, as part of the process, to deny "any required land use approvals or entitlements necessary for the issuance of a building permit" as part of the overall disapproval. 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). (AR005285.) 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 v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012, and similar cases, the "vote" needed under the HAA has not occurred. As well, subsection (m) of 65589.5 incorporates language that there must be final action on a housing project application -- "imposing conditions on" and "disapproving" in sub(m) therefore **must** constitute final actions on a housing development project, given the very next phrase includes them in a list of "other final action on a housing development project." (emphasis added).

All Petitioners Ask the Court to Improperly Sidestep Rules that Prevent Piecemeal Litigation. Section 65589.5(m) requires that an action for a violation of section 65589.5 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 on the application, and ripeness of the claim. As broad as the HAA may be interpreted, and as many courts may repeat the "Canons of Interpretation," 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; accord *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594; *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489.) Even the Petitioners in *Cal. Renters* (relied on by CHDF at 22:16-18) exhausted all administrative remedies and brought a Petition after the City Council denied the appeal of the developer, disapproving the entire project (including proposed CEQA exemption) and declining to issue any of the entitlements pursued. *Cal Renters*, 68 Cal.App.5th at 832-833. Nothing in the HAA says that it seeks to transform the jurisdictional requirements that govern whether claims should be heard by a Court.

D. No "Bad Faith" By the City is in Evidence

CHDF seeks a finding that the City acted in bad faith when it "disapproved" 600 Foothill's housing development project under Section 65589.5(k)(1)(A)(ii). (O.B. at 24:20-24.) That section requires CHDF to initially prove that one of the three required conditions of Section 65589.5(k)(1)(A)(i) has been met, before the Court even considers the evidence of alleged "bad faith."

*The **first** condition under Section 65589.5(k)(1)(A)(i)(I) is not satisfied because the City has not violated Section 65589.5(d).* 600 Foothill's Project Application has not been disapproved. (See discussion in section III.C.) CHDF, as well as 600 Foothill, argue without evidentiary support that the project is financially infeasible (CHDF O.B. at 24:11-12), however, no "financial infeasibility" evidence apparently exists in the record, CHDF does not point to any, and 600 Foothill has refused to produce such documents. (Sheridan Decl. Exh. GG.) All CHDF offers (like 600 Foothill) is a mere conclusion – that the applicable zoning density would prevent the affordable housing from being developed, which is not true – the zoned density at 15 units per acre (applicable in 2022) (Koleda Decl., ¶ 26, AR007176) would more than accommodate the proposed 16 affordable units on this 1.29 acre parcel. This satisfies the written findings requirement of 65589.5(d)(1), which the City determined based upon a preponderance of the evidence in the record. (AR007167; Koleda Decl., ¶ 17; Walker Decl., ¶ 31.)

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*The **second** condition under Section 65589.5(k)(1)(A)(i)(II) is not met because the City has not violated Section 65589.5(j).* Again, the project application has not been disapproved. Moreover, 600 Foothill's project does not comply with the City's objective development standards and criteria (applicable under section 65589.5(f)(1)), including those in the City's November 2020 DVSP (section III.C, *supra*).

*Finally, the **third** condition of Section 65589.5(k)(1)(A)(i)(III) is not met and thus did not violate 65589.5(o).* On March 1, 2023, the City sent a letter to 600 Foothill advising that the project application would be processed in accordance with the City's 2021-2029 Housing Element that was adopted on October 4, 2022. (AR004504-004508; AR007166.) The project was being reviewed for compliance with the then-in-effect General Plan, adopted 2021-2029 Housing Element (which identified the site for DVSP-Mixed Use with a residential density of 12-15 dwelling units), and DVSP objective development and design standards. (AR007166-77.)

Nevertheless, as discussed in the following three subsections, Petitioner is unable to establish that the City acted in bad faith. As noted in CHDF's opening brief, the standard for bad faith under to Section 65589.5(k)(1)(A)(ii) is *rarely* established[3]. (O.B. at 24:6.)

"**Failed to Condemn."** CHDF claims the City acted in bad faith because City officials not only failed to condemn discriminatory statements made during City Council meetings regarding adoption of the Housing Element, and low income housing in particular, but they also said they agreed with those statements. (O.B. at 10:13, 24:6-9.) CHDF's shocking lack of basis for such an allegation is only surpassed by the lengths it goes to "cherry" pick statements and ignore long-standing law contrary to its conclusions.

Preliminarily, councilmembers are ***constitutionally prohibited*** from making any condemning statements—regardless of how reprehensible they may find the speaker's viewpoint to be. The Ralph M. Brown Act ("Brown Act"), codified as Section 54950 *et seq.*, states that the public *must* be permitted to comment on every item on the agenda. (E.g., Section 54954.3(a).) Additionally, city council meetings are limited public forums where speech may be restricted by content "to the subject

[3] It is apparently so rare that CHDF did not cite to a single case where a City was found to have acted in bad faith under Section 65589.5(k)(1)(A)(ii) as an example.

at hand," but "a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing." (*White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425; accord *Acosta v. City of Costa Mesa* (9th Cir. 2013) 718 F.3d 800, 816.) Therefore, while Councilmembers may express disagreement with a speaker's point of view or simply not openly agree, ***if they condemn comments on the basis of viewpoint, they run afoul of the viewpoint neutrality required by the First Amendment***. As the Court well knows, speech that is unpopular, offensive, or even abhorrent is protected by the First Amendment. (*Snyder v. Phelps* (2011) 562 U.S. 443, 458, citing *Texas v. Johnson* (1989) 491 U.S. 397, 414.) The City cannot be found to have acted in bad faith based on councilmembers not condemning disparaging but protected statements made by the public.

Nonetheless, the transcripts of the meetings put the lie to CHDF's mischaracterizations of what occurred. Petitioner misleadingly quotes certain comments made by a few members of the public at the City Council meeting on September 12, 2022 disparaging lower income people. (O.B. at 10:6-12.) Petitioner claims that the City Council agreed with these comments, quoting Councilmember Bowman[4], as saying, "[A] lot of what you all are thinking, what's been said tonight, I am agreement with." (O.B. at 10:21-22.) However, CHDF grossly takes his statement out of context. (Bowman Decl., at ¶ 21.) CHDF omits that the vast majority of the members of the public made comments at the meeting that were not racist or disparaging of lower-income people, as is evident in the transcript of the meeting. (Bowman Decl., at ¶ 21; AR 3428-3709). It is clear when Councilmember Bowman's statement is read as a whole, he agreed with those comments regarding the need for housing at all levels of affordability for all kinds of people, consistent with his ethos and experience serving such persons *pro bono*. (Bowman Decl., at ¶¶ 3-6, 21-22; AR003606-003608.)

Likewise, CHDF then turns to outright distortion and deception. Councilmember Eich—who was Mayor during the September 12, 2022 meeting—and Councilmember Walker spoke simple words of thanks to the public that CHDF tries to transform into expressed acceptance of disparaging

[4] In stark contrast to how he is depicted in Petitioner's brief, Councilmember Bowman, a major in the United States Air Force Reserve and member of the Judge Advocate General's Corps, practices law as Special Counsel for Neighborhood Legal Services of Los Angeles County, a nonprofit legal organization, providing free legal assistance to those harmed by natural disasters. He previously served as Executive Advisor for FUSE, a national nonprofit which seeks "a country free from the social and economic barriers to opportunities that have been perpetuated by a history of systemic and institutionalized racism." (Bowman Decl., at ¶¶3-6.)

statements. (O.B. at 10:19-24.) At the beginning of the public comment period at the September 12, 2022 meeting, there were about 40 comment cards, meaning about 40 members of the public had asked to speak. (Eich Decl., at ¶9; AR 3481.) When the transcript of the meeting is read as a whole, it is clear that neither Mayor Eich nor Councilmember Walker were directing their thanks towards a specific person or point of view. (Eich Decl., at ¶ 9; Walker Decl., at ¶ 29.)

"Reduced Density." CHDF also alleges that the City reduced the maximum density of proposed "low income" sites south of Foothill Boulevard to a level that City Councilmembers "knew" would render development financially infeasible, yet nevertheless adopted a Housing Element on October 4, 2022 that required infeasibly low densities. (O.B. at 24:9-15.) There is a reason CHDF cites no supporting evidence, because it knows the truth is to the contrary and is readily found in the Administrative Record and the City's supporting evidence. The City commissioned the Michael Baker International (MBI) Market Feasibility Study to assist in determining a minimum density at which an affordable housing project would have a similar rate of return as a commercial development. (AR004713-4714; Koleda Decl. at ¶ 22, 23.) Based on criteria set forth in state law (Section 65583.2(c)(3)), the zoning appropriate to accommodate low and very-low housing units for the City is a minimum of 20 dwelling units per acre. (AR004716; Koleda Decl. at ¶ 23.) Therefore, the City **increased** the minimum residential density for any site on the City's site inventory identified for low or very-low RHNA housing units to encourage residential over commercial development, as identified within the Housing Element adopted October 2022. (*Id.*) As discussed more fully above (see section III.A, *supra*), and given the City's topography and infrastructure, the City determined that the area surrounding Foothill Boulevard was not only adequate but the most appropriate for high density or affordable housing. (Koleda Decl. at ¶¶ 23, 27-28; Walker Decl., at ¶ 30.)

The 600 Foothill property, although initially listed at a density of 25 to 30 dwelling units per acre, was included on the site inventory as an above moderate income location as the City had sufficient sites to accommodate the lower income locations. (AR003642.) When the City Council discussed reducing the maximum density of the property during the September 12, 2022 meeting, there was no project submitted for the site. (*Id.*) The maximum density for the location was reduced to 12 to 15 dwelling units per acre when the City Council adopted the October 4, 2022 Housing

Element. (AR004440; AR004475-004476.) Even after reducing the density of certain properties on the site inventory to 12-15 dwelling units per acre, the City was still able to meet its RHNA requirements, including the necessary buffer. (AR 6054-67; Walker Decl., ¶ 31.) There is absolutely no evidence that such a reduction in the density was done in bad faith and CHDF is engaged in rank speculation because there was no pending project application at the time of the September 12, 2022 or October 4, 2023 City Council meetings. (AR005234-005246.)

"Refusal to Review." Petitioner contends that the City acted in bad faith because it claimed the project application was incomplete but refused to review the application materials the City claimed were incomplete. (CHDF O.B. 24:15-19.) CHDF is yet again wrong. On May 26, 2023, the City sent 600 Foothill a letter confirming that based on review of additional application submittals, as well as revisions to previously submitted plans and documentations, the project application was deemed complete. (AR007169.) Petitioner offers absolutely no evidence of the alleged "bizarre scheme" it claims the City "concocted" to "disapprove" the project. (CHDF O.B. at 24:15-19.)

E. The Court Cannot Order the Project "Approved"

CHDF's requested relief seeking a court order "approving" the Project exceeds the scope of this Court's judicial authority under CCP § 1094.5. Such an order runs afoul of the City's "police power." (Cal. Const., art. XI, § 7; section 65800; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89; 75 Ops.Cal.Atty.Gen. 239, 240 (1992); see, e.g., *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885-86.) This power is considered as broad as the power exercised by the Legislature, from which local governments derive their authority to regulate land through planning, zoning, and building ordinances. (*California Bldg. Indus. Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 455; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140–142; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1181.) The Planning and Zoning Law (Section 65000, *et seq.*) does not alter this constitutional principal of local control over land use matters, unless it says so expressly. (Section 65300.7; *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 533.) Indeed, the Housing Element Law (Sections 65580-65589.8), the Housing Accountability Act (section 65589.5), and Affirmatively Furthering Fair Housing law (Section 65583(c)(10)) have all been enacted and encompassed *within* the Planning and Zoning Law.

Nonetheless, when a state law is invoked by a party and alleged to grant that power to the Courts, the state law as applied is unconstitutional and no such remedy can be ordered. (Cal. Const. Art. III, § 3; *Cnty. Mobilehome Positive Action Comm., Inc. v. Cnty. of San Diego* (1998) 62 Cal.App.4th 727, 734 (citing *Ex parte Daniels* (1920) 183 Cal. 636, 641); *Tiburon Open Space Comm. v. Cnty. of Marin* (2022) 78 Cal.App.5th 700, 730-34 (draft EIR was sufficient notice and met requirements of statute).)

While the HAA may prescribe limits, the fact is that the City retains discretion over the Project. By way of example only, CEQA review is preserved in the HAA (section 65589.5(e)) and applies to projects subject to discretionary approval by the government; it does not apply to ministerial acts. (Cal. Pub. Res. Code, § 21080(a), (b)(1).) Similarly, any action brought to enforce the provisions of the HAA "shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure" (section 65589.5(m)) and the judgment under section 1094.5(f) "***shall not limit or control in any way the discretion legally vested in the respondent***." (CCP §1094.5(f), emphasis added.) These provisions recognize that the City's police power discretion cannot be compelled or overridden to approve the project under Section 65589.5(k)(1)(A)(ii). (*Orange Cnty. Emps. Assn. v. Cnty. of Orange* (1991) 234 Cal.App.3d 833, 845.) Therefore, the court may not order the project approved as it would exceed the scope of its judicial authority under CCP § 1094.5, violate CEQA and the HAA, and violate the constitutional delegation of authority over a local agency's jurisdictional land use decisions.

F. <u>Filing An SB330 Form Does Not Vest The Builder's Remedy</u>

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 <u>*as of the time that the city makes the finding in subsection (d)(5)*</u>. Whereas the first clause of (d)(5) states "as it existed on the date the application was deemed complete," the second clause does <u>not</u>, 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, CHDF's writ should be denied, and no form of relief it requests should be granted.

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