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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

RESPONDENT'S ANSWER TO PETITIONERS-INTERVENORS' 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

The State and its agency HCD should be held to a high standard of candor and fairness. On every page, these "petitioners in intervention" in the opening brief ("State/HCD O.B.") omit facts they know should be presented to the Court for a fair adjudication, and otherwise mix and match statutes, ignore statutory conflicts, and seem to want mostly to "make an example" out of Respondent the City of La Canada Flintridge ("City") regardless of the validity of the arguments necessary to do so. The State/HCD even go so far as to assert that HCD **alone** has authority to determine whether a City's Housing Element substantially complies with the law. (State/HCD O.B. at 15:3-5.) Such a statement ignores prevailing law, and ignores a proper reading of the entirety of the Planning and Land Use code (Article 10.6 of the Government Code). What follows herein sets forth the facts concerning the October 2022 Housing Element, its genesis, the careful efforts the City took to make its Housing Element substantially compliant, and otherwise employs the law to confront HCD and its too-expansive view of what the applicable law in this state is regarding Housing Element compliance and rezoning.

II. 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

Preliminarily, as set forth more fully herein, HCD's patronizing approach to certification of housing elements (essentially arguing, "how could HCD be wrong") is utterly contrary to the holding

in *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 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). HCD also seems to want to have it both ways, arguing the Court should bind the City to casual comments by staff members regarding the status of changes or superficial modifications to the October 2022 Housing Element, when it is the Court's job to decide if this housing element was in substantial compliance. If the City's October 2022 Housing Element was in substantial compliance with the plain meaning of the Housing Element Law, no deference to HCD is warranted. And even if (*arguendo*) HCD's "determination" is entitled to some level of deference by the Court, (i) the history of HCD's interaction with the City, and (ii) 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 of applicable law.

The relevant facts ignored by HCD demonstrate that 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. 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 Housing Element (the "Housing Element"), the City made extraordinary efforts to comply with HAA requirements in completing its Housing Element. HCD misunderstands the basic geography, topography, and available land in the City that directly relate 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 Site Inventory and AFFH requirements were completed well before the adoption of the October 2022 Housing Element, with the input and participation of HCD after the City's initial October 2021 draft. After HCD kept going back to Koleda to seek clarification regarding work that had already been done, like adding another of the 35 labels on a modern appliance, the City effectively 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, and the relevant background frames the City's compliance.

The Relevant Infrastructure and Topography of the City: In order to address a recurring theme by Petitioners in the related case, 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 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" and has with 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. (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; Exh. D.) 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 ¶ 14.) The State/HCD ignore these facts.

By contrast, Foothill Boulevard (the extension of historic Route 66 to 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.) 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. 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 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 and beyond since it was Route 66. (Sheridan Decl., Exh. BB, RJN ¶ 6.) While such is common knowledge, this concept required extensive explanation to the staff at HCD as the City's developed its Site Inventory.

The City Met the AFFH Requirements: With regard to its primary responsibilities in adopting the October 2022 Housing Element, the City met its obligation to Affirmatively Further Fair Housing. HCD gives great weight to its own letters, despite their inability to articulate precisely what

a city must do to comply in this regard. On December 3, 2021, HCD wrote to the City regarding its Summary of Fair Housing Issues: "The analysis shall result in strategic approaches to inform and connect goals and actions to mitigate contributing factors to affordable housing." (AR 000446.) This type of facially meaningless prose is strewn throughout HCD correspondence and explains in part why the City had to keep coming back to HCD for some meaningful guidance. Nevertheless, even when confronted with the fact that the "Department of Housing and Community Development" creates neither "Housing" nor does it develop communities, but rather creates guidelines that lead to "Programs" that lead to directives that then outsource the task of ostensibly making it ultimately more attractive for private developers to build affordable housing, the City undertook what it believed to be its legal obligations with great diligence.

The factual record, which 600 Foothill eschews, demonstrates that the City took affirmative measures to comply with AFFH requirements. The City engaged in numerous types of outreach efforts with significant connections to different economic groups, including via housing workshops with 18 different stakeholder organizations. (Koleda Decl. ¶¶ 38-41.) 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. (Koleda Decl. ¶¶ 40-41.) This was in addition to a host of other public engagements and engagement with HCD regarding the 6th Cycle Housing Element. (Id. ¶¶43-46.) (AR004651.) The City undertook these efforts and engagement with HCD in the face of "changing goal posts." (Id. ¶¶ 48-49.) 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. In short, the City upheld its obligations regarding AFFH. Moreover, the City more than satisfied its obligation to remove fees that might "constrain housing for persons with disabilities" (State/HCD O.B. at 5) as described by Ms. Koleda (Koleda Decl., ¶¶ 46-47) and in the Housing Element (e.g. AR004540-4542; 4579; 4581-4583; 4620; 46233; 4632; 4635; 4637-38; 4644; 5118).

The City Developed a Compliant Site Inventory: 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. ¶ 17.) 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. ¶¶ 17, 20.) This was only three (3) months before the 6th Cycle Housing Element was due under the existing deadlines.

This 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.)

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). (Koleda Decl. ¶ 27.) 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.)

Despite HCD's various contentions that the City failed to develop a substantially compliant

Housing Element in 2022, the City, long before HCD denied certification of the October 2022 Housing Element, 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. ¶ 23.) In the absence of non-vacant land, and despite Mr. Weyand's monkeying with the Site Inventory, *infra*, 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. ¶ 23, 54.) Particularly in the context of creating a Site Inventory without available vacant land, 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:

> 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 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 in the accompanying City brief in opposition to 600 Foothill (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. ¶¶ 21-33.) 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.

Under *Martinez,* the City met its requirement to identify sites for the Sites 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 to rely upon letters with site owners and between itself and HCD not included specifically in its Housing Element. *Id*. The City made reasonable inferences using more information than the city in *Martinez* did and therefore the City's October 2022 Housing Element was sufficient. The City corresponded extensively with non-vacant site owners, and communicated with HCD regarding specific sites. (See page 6, *supra*.) The City was not required to include these in its Housing Element. 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.

Ms. Koleda's Selected Comments Are Not Dispositive of Anything: HCD tries to "shoot the messenger" by faulting Ms. Koleda for commenting that HCD purported to direct the City to make changes to its 2022 Housing Element. (State/HCD O.B. at 13-14.) Ms. Koleda would not have had to make any comments about the Housing Element if HCD had deemed it compliant, as it should have in 2022, but when HCD argues that only it and not the Court should be the arbiter of housing element compliance, of what import can out of context comments by City staff be? In any event, Ms. Koleda's extensive dealings with HCD are set forth in the administrative record and referenced by the City and to a certain extent by HCD and all they amount to is that Ms. Koleda recognized the importance of making changes to satisfy HCD, not that such were required to make the October 2022 Housing Element substantially compliant (see section III.E, *infra*); if anything, her persistence in the face of HCD's vague directives and inconsistent guidance is impressive.

There is No Such Thing as Backdating or Self-Certification: As discussed further in section III.D, below, there is no dispute that a local government cannot "certify" a housing element compliant, whether at the time of a City Council resolution on its own housing element or commenting on a

previously approved housing element. These inartful phrases cherry picked from hundreds of pages of City Council papers are merely distractions from the question before the Court: was the October 2022 Housing Element substantially compliant with the law or not? The City certainly believes in its position, and its ability at times to act on its beliefs regarding compliance with the law, but it has never asserted in this litigation that any concept close to "backdating" or "self-certification" are concepts that have legal significance. This does not cede any position to HCD or its ability to make a final determination regarding substantial compliance with the Housing Element law, and as set forth below, it is HCD who is guilty of overreach in this regard.

B. Employing Well-Known Rules of Interpretation to Conflicting Statutes Reveals the City Housing Element was Validly Adopted and Substantially Compliant; Section 65588(c)(4)(C)(iii)'s Rezoning Requirement Is Unenforceable

The legislature has created directly conflicting duties for the City, namely the section 65860 duty to wait until a General Plan (including the Housing Element) is adopted before rezoning, and the section 65588(c)(4)(C)(iii)'s duty to rezone within the same one year extended period the legislature granted to the City to approve a Housing Element. Alternatively, the Legislature has made compliance with one statute impossible by reason of the proper application of another, such that section 65588(c)(4)(C)(iii)'s penalty, that a Housing Element cannot be found to be substantially compliant until a City has completed rezoning, is illegal, unconstitutional, and unenforceable.

The rules available to resolve any statutory conflict are well known. Examine the words first to determine intent; give them their ordinary meaning; chose the construction "that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Redondo Beach Waterfront, LLC v. City of Redondo Beach* (2020) 51 Cal.App.5th 982 – internal quotations and citations omitted.) Then in "the event of statutory conflict, a specific provision will control over a general provision"; the "referent of 'general' and 'specific' is subject matter"; and this rule "trumps" the rule that later-enacted statutes have precedence. (*Arterberry v. County of San Diego* (2010) 182 Cal.App.4th 1528, 1536; *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960.)

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As to a statute imposing a duty impossible to comply with, proper statutory interpretation should revolve around the "absurdity" rule -- courts should "avoid any construction that would produce absurd consequences." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 578.)

Here, the specific rule is the set of long-governing rules regarding the sequence of enactment of General Plans and elements thereof, followed by zoning laws. While time frame to rezone consistent with an adopted Housing Element may be accelerated via Housing Element law, the procedure remains the same, governed by section 65860. The zoning ordinance of a general law city must be consistent with its general plan. (Section 65860; *Hawkins v County of Marin* (1976) 54 CA3d 586, 593.) Section 65860(a) provides that a zoning ordinance is consistent with a city's general plan only if the following conditions are met: (1) The city or county has officially adopted such a plan; and (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan. The only permissible time in which a zoning ordinance may temporarily differ from the general plan is following a general plan amendment. "In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance ***shall be amended within a reasonable time*** so that it is consistent with the general plan as amended." (Section 65860(c)) (emphasis added).)

"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 by *Buena Vista Gardens Apartments Assn. v. City of San Diego Plan. Dep't* (1985) 175 Cal.App.3d 289, 310.) This requirement is "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*Gonzalez v. Cnty. of Tulare* (1998) 65 Cal.App. 4th 777, 785.) However, it is an unresolved question of law whether "substantial compliance" for purposes of complying with Housing Element Law means "valid" for purposes of adopting a zoning ordinance. "Substantial Compliance" is not defined in Housing Element law in terms of validity and invalidity. 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.'" (*Martinez, supra,* at 237.) If, "substantial compliance" under Housing

Element Law means that a city must adopt a ***valid*** housing element, meaning the City has actually complied with the requirements of the law, ***before*** rezoning, any imposition of a requirement that local governments must complete the adoption of the housing element (a mandatory element of the general plan) and zoning ordinance concurrently or, in this case, complete rezoning before a housing element can be deemed legally "valid," requires local governments to take actions in the wrong order, creates a legal impossibility, and renders any rezoning void *ab initio*. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544; *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704; *deBottari v. City Council* (1985) 171 Cal. App. 3d 1204, 1212, disapproved of by *City of Morgan Hill v. Bushey* (2018) 5 Cal. 5th 1068.)

If a local government's housing element must be "valid" or "substantially compliant" before rezoning can occur, section 65588(c)(4)(C)(iii)'s penalty, compelling rezoning before a housing element can be found to be substantially compliant, creates a catch 22. A city's Housing Element will never be substantially compliant because it didn't rezone, and any rezoning to obtain substantial compliance would be invalid at the time of its adoption, This approach is at odds with long-standing statutory and case law, let alone basic planning principals as set forth in the Government Code. (Koleda Dec., ¶ 33.) As the rules above plainly state, while a given general plan is in effect, a local government cannot enact a zoning ordinance inconsistent with it. (*Res. Def. Fund v. Cnty. of Santa Cruz*, supra, at 806; cited by *Buena Vista Gardens Apartments Assn. v. City of San Diego Plan. Dep't*, supra, at 310.) Therefore, as HCD contends section 65588(c)(4)(C)(iii) should be implemented, the penalty effectively renders any rezoning "invalid when passed," and precludes a Housing Element from ever being deemed substantially compliant. Because section 65860(c) governs in circumstances where the zoning ordinance "becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan," in such circumstances, "the zoning ordinance shall [is required to] be amended within a reasonable time [i.e. after adoption of the amendment] so that it is consistent with the general plan as amended." (*Id.*) The Government Code specifically contemplates that rezoning will occur <u>*after*</u> adoption of an amendment to a General Plan, including Housing Elements, and this amendment must be adopted first, before rezoning can occur. (*Id*.) Neither the Housing Element Law nor the HAA changed this process.

The State's argument, which ignores the foregoing long-standing structure and sequence, is circular with no end in sight, and would, in essence, preclude any finding that the City's adopted Housing Element is substantially compliant, because HCD's refusal to certify the City's Housing Element as substantially compliant with the law effectively prevents it from being legally valid or enforceable, and the City could never rezone under Government Code 65860(c). As the State argues, the City's Housing Element was not certified as substantially compliant by HCD even though it "met 'most of the statutory requirements of State Housing Law', [but] was nevertheless not in substantial compliance…until it completed all required rezones" (State/HCD O.B. at 7), but this approach has already been held invalid by the court in *Buena Vista* at 310: "Absence of relevant elements in a general plan precludes enactment of zoning ordinances and the like.... If a plan does not reflect substantial compliance with the mandatory elements the responsible agency has failed to perform an act which the law specially enjoins." (internal citations omitted).

There is no way to square section 65588(c)(4)(C)(iii) with section 65860, without determining that a "substantial compliance" finding by HCD has no effect on the validity of a city's adopted Housing Element, like the City's October 4, 2022 Housing Element. Under section 65589.3, there is no presumption of *invalidity* on the basis of the Department's finding of noncompliance. (*Fonseca*, at 1184.) This is supported by the fact that HCD's determinations are informal, and not binding on the Court (*Fonseca,* 148 Cal.App.4th at 1194; accord *Martinez,* 90 Cal.App.5th at 237), and is underscored by the fact that HCD has no authority to unilaterally sanction the illegal rezoning of property under section 65588(c)(4)(C)(iii), void when adopted and in violation of Government Code section 65860(a) and (c). HCD's "substantial compliance" determination cannot, via a non-binding certification of a Housing Element, turn a void zoning ordinance into a legal one, as a matter of law. Surely, the Legislature did not intend such an absurd result: that HCD could unilaterally override the "linchpin of California's land use and development laws." Section 65588(c)(4)(C)(iii)'s "substantial compliance" requirement, and HCD's implementation of it, is in direct conflict with Section 65860, and is it is therefore illegal, unconstitutional, and unenforceable. (See section III.C, *infra*.) This legal impossibility provides HCD unchecked authority to withhold a substantial compliance finding (as it has done here), and a mechanism to preclude local governments from ever legally rezoning and

obtaining substantial compliance. While the City maintains that its October 4, 2022, Housing Element was substantially compliant with Housing Element Law, and it was therefore entitled to 3-years to rezone (Koleda Dec., ¶ 33, 34), the City's Housing Element was nonetheless at a minimum substantially compliant on February 21, 2023, when it adopted the Housing Element Update, because it admittedly "met most of the requirements of State Housing Law," but for the illegal rezoning requirement. (Opening Brief, p. 7.)

Moreover, the time to rezone for cities within the SCAG region was extended, due to HCD's delays. (Koleda dec., ¶¶ 33, 34.) The deadline for any rezoning required to implement the 6th Cycle Housing Element for those jurisdictions whose Housing Element was due in 2021 remained at three-years after adoption if the Housing Element was substantially compliant by October 15, 2022 (one year after the statutory due date), because of the AFFH late promulgation when many jurisdictions within SCAG had or were close to completing the first draft of their Housing Elements and HCD's guidelines required new analysis that took additional time. This extension rendered the intervening year useless for zoning because the City was completing these requirements in accordance with HCD's guidance document and therefore could not begin rezoning until there was some level of certainty that HCD would find the Housing Element compliant with state law. (Koleda Dec, ¶ 34.) HCD's delay should not be rewarded at the expense of the City, and Housing Element Law cannot be evaluated in a vacuum with such a disregard for the linchpin of California planning principles as set forth by other statutes within the Government Code.

In the end, if this Court decides that the City's October 2022 Housing Element substantially complied with applicable law, the City therefore "adopted" a Housing Element within the "one year" period specified by section 65588(e)(4)(c)(iii), and is entitled to three years to complete its rezoning under 65583.4(a).

C. No "Deference" Is Owed to HCD and this Court Must "Check" any Effort by HCD To Unilaterally Affect the Rights of the City

Starting with *Buena Vista Gardens Apts. Assoc. v. City of San Diego* (1985) 175 Cal.App.3d 289, then through *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, and on most recently to *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, the rule has been and is that Trial and Appellate

Courts "independently ascertain as a question of law whether the housing element at issue substantially complies with the requirements of the Housing Element Law." (*Fonseca,* 148 Cal.App.4th at 1194; accord *Martinez,* 90 Cal.App.5th at 237.) Any position argued by Petitioners that would require this Court to ignore its role and allow HCD to make final "substantial compliance" determinations violates these long-standing principles.

The State/HCD alleges HCD "**alone**" has authority to determine whether a City's Housing Element substantially complies with the law. (AG Mot. 15:3-5.) The State/HCD mistakenly relies on *Boling, Martinez,* and *Hoffmaster* (State/HCD O.B. at 12:17-13:2) wrongly, to argue that a Court should (i) entirely defer to individualized findings by HCD of compliance or non-compliance of Housing Elements, or alternately (depending on the page one is reading) (ii) substantially defer to its "interpretations." The State/HCD assert that *Hoffmaster* (in a footnote) stands for the proposition (in part) that the Court should rely on HCD findings of Housing Element non-compliance. *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.) *Boling v. PERB* (2018) 5 Cal.5th 898, 911 (State/HCD O.B. at 12:20-21) merely dealt with an agency's "construction of a controlling statute" which, the Court was willing to defer to the PERB in significant part (subject ultimately to judicial review) because PERB regularly adjudicates claims in adversarial proceedings that hone the expertise of the agency (*id.* at 911-912), unlike HCD which adjudicates nothing (in an adversarial forum or otherwise). As to *Martinez* (State/HCD O.B. 13:1-2) 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.)

HCD cannot finally determine "substantial compliance" under the California Constitution 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. In its governing and creation statutes (Cal. H&S Code §§ 50000 et. seq. and 50400-50709), there is no power delegated to HCD to hold hearings OR admit evidence concerning

"substantial compliance."[1] 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 fails this test – any such finding that Petitioners assert that this Court cannot alter runs afoul of (at the very least) the judicial review "check" rule of *McHugh*. (*Id.* at 372; see also *Floystrup v. City of Berkeley Rent Stabilization Bd.* (1990) 219 Cal.App.3d 1309, 1316; accord *Communities for a Better Environment v. Energy Resources Conservation & Develop. Comm'n* (2020) 57 Cal.App.5th 786, 813-814.)

What these Petitioners assert is that the legislature can lawfully delegate to HCD authority to review individual Housing Elements and adjudicate substantial compliance in a way that binds the City and, indeed, the Court. They say this by (among other things) invoking two statutes that appear to sanction this notion – Sections 65583.4(a)(2) and 65588(e)(4)(c). Section 65583.4(a)(3) says that a City has three years and 120 days from the section 65588 deadline to adopt rezoning as long as (among other things) the City "adopts a sixth revision of the housing element and the department [HCD] finds the adopted element to be in substantial compliance with this article within one year of the statutory deadline established pursuant to Section 65888 for adoption of the housing element" (emphasis added). Similarly, Section 65588(e)(4)(C) states that if a city fails the foregoing "test" it "shall comply with subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 and subdivision (c) of Section 65583.2 [**mandating rezoning**] within one year of the statutory deadline

[1] State/HCD cites and relies on Health & Saf. Code sections 50152, 50456, 50459, and 50464 for its assertion that the Legislature "specifically delegated authority to HCD to review and determine whether housing elements comply with the Housing Element Law," indeed the State/HCD allege HCD "alone" has authority to make such determinations. (State/HCD at 13:3-6, 15:3-5.) The State/HCD are wrong. Section 50152 is a general grant regarding housing policy and implementation, with no specific "determination" delegation; section 50456 addresses a duty to "make available to the public" information about "state, and local laws [and statistics] regarding housing…"; section 50459, with cross reference to Section 65585 of the Gov. Code, requires HCD to "review housing elements" and report its findings regarding substantial compliance to the local agency; section 50464 says nothing at all about "housing elements"; and none of these sections say or even imply that HCD "**alone**" has authority to determine whether a City's Housing Element substantially complies with the law, nor could they under the rule from *McHugh*.

to revise the housing element." Both statutes purport to rely on HCD's unilateral and ostensibly unchecked "finding." The unchecked authority arises because HCD (as contemplated by these statutes) finds a Housing Element to not be substantially compliant with the Housing Element law and refuses to certify the HE, causing an alteration of the rights of the City. HCD does not have that unchecked power. (See also, e.g., section § 65585(f); 600 Foothill Mot. 14:26-27 ("an HAA disapproval could not be premised on the October 2022 Housing Element, because it was not certified by HCD.").)

Such an unchecked adverse determination by HCD in turn triggers the potential for imposition of penalties on cities, which (for example) do not concurrently obtain HCD certification of their Housing Element and rezone, and thus is violative of long-standing rules. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-381.) The Court should not enforce a statute which purports to delegate to HCD any such authority to issue findings that bind a City.

D. The City Did Not Back Date Or Self-Certify Its Housing Element

Petitioners wrongly accuse the City of "back-dating" and "self-certifying" its Housing Element(s) and incorrectly base their contention on the premise that HCD is the sole determiner of a housing element's substantial compliance. (State/HCD O.B. at 14:5-8.) Petitioners' contention is incorrect in that (1) the City did not back-date or self-certify the February 2023 Housing Element update because when the City adopted Resolution No. 22-35 on October 4, 2022 (AR004504-004507), (2) the City Council reasonably and in good faith believed that the October 2022 Housing Element was in substantial compliance with state law and said so in that Resolution; and (3) the court is the ultimate determiner of whether the Housing Element was in substantial compliance.

When the City passed Resolution No. 22-35 on October 4, 2022, approving General Plan Amendment Plan-2022-0003 adopting the 2021-2029 Housing Element, the City Council found and reasonably believed, based upon all facts, that the 2021-2029 Housing Element as adopted was done so in accordance with the terms and provisions of the Government Code, after consideration and review by the City of La Cañada Flintridge Planning Commission and HCD. (AR004506.) The City Council reaffirmed this on February 21, 2023 in Resolution No. 23-08 (AR006274-006279) when it stated that the City's Housing Element was substantially complaint with Housing Element law as of

October 4, 2022, because there were no substantive changes or new data or policy decisions between the October 2022 and February 2023 versions, only clarifications of existing information. (AR006277; Koleda Decl., at ¶ 50 and Exhs. A & B.)

The City Council's good faith belief that its October 2022 Housing Element was substantially complaint with state law is further supported by the fact that there were ultimately no substantial changes to the City's Housing Element between the February 2023 update that was ultimately "certified" by HCD and the October 2022 Housing Element Petitioners claim to not be compliant. (Koleda Decl., at ¶¶ 50-55.) HCD's contention that the City's October 2022 Housing Element "required critical revisions" to comply with state law (State/HCD O.B. at 5:15) is easily discredited when the alleged "required" or "critical" changes between the October 2022 Housing Element and February 2023 update are reviewed in comparison side by side. (Koleda Decl., ¶ 55, and Exh. A.) By way of example only, the changes the City was instructed to incorporate included identifying the Housing Element as "Third HCD Submittal, Adopted October 2022, Revised February 2023" and amending the dates in all headers to state "Adopted October 2023, Revised February 2023." (*Id.*) The City was also instructed to add language to clarify and identify in Table C-1 how the acreage of certain sites on the site inventory was derived, which did not change either the identified sites or acreages. (*Id.*) Furthermore, the new language did not change any parcels on the site inventory and all verified sites were eligible for inclusion. (*Id.*) Additional new language identified ordinance amendments that had been reviewed by the Planning Commission in 2021 and implemented well in advance of ordinance adoption in furtherance of compliance with state law. (*Id.*) Slight changes in language between the October 2022 Housing Element and the February 2023 update, which received final approval from HCD, did not amount to material changes that would warrant a finding against the City. (*Id.*, at ¶¶ 51, 55; AR006297; AR005438 et seq.; a redlined version of the Housing Element is found at AR003747-3900.)

Although there is a provision in Section 65585(f)(2) which allows a city to "self-certify" by adopting its draft element without changes, the City specifically acknowledged during the February 21, 2023 City Council meeting that it was not going to "self-certify." (AR006207-006209.) The City

now requests this court to affirm, as is within its judicial power to do so, that the October 2022 Housing Element was substantially compliant with state law as of October 4, 2022.

E. The State/HCD Can Stand In No Better Stead Than 600 Foothill, And Petitioner 600 Foothill's Writ Is Premature

The State/HCD "hitch their wagon" to the same basic contentions as does 600 Foothill and CHDF – "disapproval" as required by the HAA occurred on May 1, 2023 when the City Council denied 600 Foothill's appeal. After mistakenly characterizing the material evidence they purport to rely on (State/HCD O.B. at 9:25-10:10, 15:27-16:28), the State/HCD commit 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. The complete set of errors by 600 Foothill, dooming this derivative writ as well, can be found in the City's Opposition to 600 Foothill's brief, at section III.C, which the City incorporates into this opposition by this reference as if restated herein in full. As to the particular arguments of the State/HCD, a few of those errors that plague their derivative petition (in this regard) should be emphasized.

First, the State/HCD mischaracterize the "evidence" on which they purport to rely. The State/HCD offer up the "concessions and acknowledgements" of the City's Director of Planning, Ms. Koleda. The State/HCD cite to AR 7098-7099 (statement of Ms. Koleda), 7135-7136 (roll call vote at May 1 meeting) and 7161-7168 (resolution 23-14 dated May 1, 2023) to support their conclusion that the October 2022 was not substantially compliant because that and the February 2023 Housing Element were "different versions," and that the City made "very limited revisions, that were required to address HCD's" letter of December 6, 2022 in the City's February 2023 Housing Element. (State/HCD O.B. at 10:1-4.) Other than the vote (5-0) and the resolution (which addresses all that Petitioners assert here), the only other evidence the State/HCD offer is a snippet of the May 1, 2023 hearing transcript (AR 7098-99), which omits multiple salient points made by Ms. Koleda concurrently – including but not limited to that the substantial compliance in October 2022 was demonstrated in a "matrix" based on HCD's "Housing Element compliance checklist" including "a quick reference of statutory requirements for Housing Element updates," found in the City Council package (AR006475-6495; Koleda Decl. ¶ 56.) Saying something is a "version" of a prior thing does

not imply that there is any material change, nor does "acknowledging" that changes HCD wanted were made, since those changes may be considered immaterial, and should be, upon critical review.

Second, the State/HCD stumble 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; see also Section 65009(b)(1) and *Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 632.) In its March 9, 2023, appeal, 600 Foothill 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. 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 "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," which "shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development." 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, 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 but not limited to the following with direct effect on the Project: open space minimums and height limitations (see, e.g., sections 7.2.3.1, 7.5.3, 7.7.1). (See also Koleda Decl ¶13., Exh. H, Ch. 7 "Development Standards and Design Guidelines") 600 Foothill's project does not comply with these limitations applicable under the HAA, 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, 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 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 regarding certain environmental impacts. (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. In discussing the interplay of CEQA and the HAA, the *Schellinger* Court reaffirmed both that it could not order the Project approved 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*.)

The City's Determination on May 1, 2023, Does Not Meet the Definition Of Disapproval Under The HAA. Solving the meaning of this circular definition of "disapproval" is simple, and with reference to companion statutes and basic rules of interpretation – CEQA says a disapproval is as to the entire application, after consideration of the CEQA requirements, which the HAA preserves, and which did not happen here before 600 Foothill filed its writ. Consistently, the "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). (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 v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011-1012, 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 a statutory short-cut (if warranted) to City approval of a project. 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 <u>final action</u>** on a housing development project." Such finality is required by the HAA, and it did not occur here.

<u>All Petitioners Expressly or Implicitly Ask the Court to Improperly Sidestep the Still-Applicable Rules that Prevent Piecemeal Litigation</u>. Section 65589.5(m) requires that an action to enforce 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" 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; 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. Nothing in the HAA says that it seeks to transform the critical and jurisdictional finality, exhaustion and ripeness requirements that govern whether claims should be heard by a Court.

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, the State/HCD writ "in intervention" should be denied, and no form of relief it requests should be granted.

DATED: February 5, 2024

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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 **RESPONDENT'S ANSWER TO PETITIONERS-INTERVENORS' 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.

XXXXX

GlaserWeil

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