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600 FOOTHILL OWNER, LP

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

600 FOOTHILL OWNER, LP, a California limited partnership,

Petitioner and Plaintiff,

v.

CITY OF LA CAÑADA FLINTRIDGE; THE CITY OF LA CAÑADA FLINTRIDGE COMMUNITY DEVELOPMENT DEPARTMENT; AND THE CITY OF LA CAÑADA FLINTRIDGE CITY COUNCIL,

Respondents and Defendants.

Case No.: 23STCP02575

Assigned to: Hon. Mitchell L. Beckloff
Dept.: 86

PETITIONER'S REPLY BRIEF

Hearing Date: March 1, 2024
Time: 9:30 a.m.
Dept: 86

Petition Filed: July 21, 2023

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Rather than demonstrating that Respondents timely produced a substantially compliant Housing Element, Respondents blame their failure to do so on HCD and on the protected conduct of Petitioner's principals, and then invite the Court to disregard the plain text of the Housing Accountability Act ("HAA"), Housing Element Law (Gov. Code §§ 65580 et seq.), and the Permit Streamlining Act ("PSA").[1] For the reasons that follow, Respondents' complaints are both legally irrelevant and factually unsupported. Because Respondents have failed to meet their burden of demonstrating that they acted lawfully with respect to the Project, the requested relief is appropriate.

I. The October 2022 Housing Element Was Not Substantially Compliant

As explained in the Brief, Respondents cannot rely on the October 2022 Housing Element to disapprove the Project because (i) Section 65588 precludes a finding of substantial compliance; (ii) the October 2022 Housing Element was not lawfully adopted; (iii) HCD did not certify the October 2022 Housing Element; and (iv) the record reflects that HCD was correct.

Respondents' Complaints About HCD and State Law. Respondents frame their failure to timely secure a compliant Housing Element as a consequence of unfair treatment from HCD, and unfair expectations imposed by Housing Element Law. Opp. at 3-5. Respondents provide no legal authority (nor credible evidence, aside from City staff opinions) for the proposition that alleged unfair treatment by the state excuses their violation of Petitioner's rights with respect to Petitioner's Project.

Respondents emphasize their "extraordinary efforts to comply with all applicable requirements in completing [the] Housing Element." Opp. at 4. This characterization ignores both the timing and substance of Respondents' submissions. Respondents submitted their first draft Housing Element mere days before the October 15, 2021 statutory deadline. AR 443. Then, inexplicably, they waited an additional ten months to produce a revised draft. AR 4504-08. If Respondents wanted to exercise a prerogative that the HAA reserves for jurisdictions that timely secure compliant Housing Elements, they simply needed to move faster. Nor do Respondents explain why they were unable to timely produce a Housing Element that satisfied statutory requirements. For instance, Section 65583 is crystal clear that all Housing Elements must analyze the relationship between the sites inventory and the jurisdiction's fair housing obligations. Gov. Code § 65583(a)(3). Respondents did finally

[1] Unless otherwise indicated, defined terms herein shall have the meanings ascribed in Petitioner's Opening Brief.

include a three-page analysis of these issues in the February 2023 Housing Element. AR 6090-92. Respondents do not identify circumstances preventing them from including this plainly-required analysis in the initial draft Housing Element. In any event, Respondents fail to explain why their efforts excuse their violation of Petitioner's HAA rights.

The City's Topography. Respondents digress on the City's topography (Opp. at 5-6), the thrust of which is that Foothill Boulevard is the only practical location for new housing. Even accepting this as true (which is not a given; the City offers no reason why it cannot upzone its hyper-wealthy and segregated single family neighborhoods (AR 2433)), it is irrelevant. All of these issues are accounted for in Housing Element Law, which sets forth the requirements for relying on nonvacant sites generally (§ 65583.2(g)(1)); provides additional requirements when jurisdictions rely primarily on nonvacant sites (§ 65583.2(g)(2)); and requires an analysis of whether the sites inventory implicates any affirmatively furthering fair housing obligations (§ 65583(a)(3)) and a commitment to programs to mitigate any discriminatory impacts (§§ 65583(c)(5), (c)(10)). Respondents were not precluded from relying mostly on nonvacant sites, or from clustering new housing along Foothill Boulevard. But to do so, they first needed to provide the requisite fair housing analysis, to adopt programs mitigating any discriminatory impact, and to produce substantial evidence that existing uses on nonvacant sites would likely cease. These are not insurmountable requirements; Respondents performed them to HCD's satisfaction in the February 2023 Housing Element.

Section 65588's statutory bar. When Respondents disapproved the Project on May 1, 2023, they had failed to secure HCD certification within one year of the statutory deadline. In such instances, Section 65588(e)(4)(C) categorically precludes a finding of substantial compliance until the jurisdiction has completed any required rezoning. Unlike HAA subdivision (d)(5) itself, Section 65588(e)(4)(C) expressly incorporates a requirement that HCD certify the Housing Element. Br. at 12-13. The Opposition refuses to engage with this distinction, except to say that "this Court (not HCD) should be the decision-maker on substantial compliance in order to meet the conditions of, and thus extend the deadline to rezone three years under section 65583.4(a)." Opp. at 6-7 (emphasis added). Regardless of what Respondents think the law "should be," the Legislature has adopted a different approach with Section 65588(e)(4)(C). *See* Br. at 12-13, n.8.

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Respondents argue that these rezoning timelines "conflict with fundamental principles of zoning as well as related zoning regulations." Opp. at 6. It is unclear whether Respondents are challenging the constitutionality of Section 65588's rezoning requirements, or simply asking the Court to excuse Respondents' noncompliance; they have offered no authority for either result. Nor do Respondents explain why Section 65588 would require them to "take actions in the wrong order." Opp. at 6. Respondents could, *e.g.*, update their zoning simultaneously with the adoption of their Housing Element, as many jurisdictions do. *See* Coy Decl., ¶ 10. Or, following the Section 65588(e)(4)(C) one year deadline, Respondents could adopt a Housing Element that was provisionally certified by HCD and then subsequently complete the rezoning. Indeed, this is precisely what happened: HCD approved the substance of the February 2023 Housing Element, but explained that it could not be certified until Respondents completed the required rezoning. AR 6297-6300. Respondents then adopted the required rezoning, and HCD confirmed certification on November 17, 2023. Coy Decl., ¶ 9, Ex. C. This process was plainly not a "legal impossibility." Opp. at 6. Indeed, if the Respondents' Opposition is correct, and the City's 2023 rezoning measures are "void" (Opp. at 6), then Respondents still have not satisfied Section 65588(e)(4)(C), and the February 2023 Housing Element is still subject to the statutory bar, because the City has not lawfully rezoned.[2]

Violations of Section 65585. As detailed in the Brief, the October 2022 Housing Element also failed to comply with Housing Element Law because its adoption flouted the requirements of Section 65585. Br. at 14. Respondents dismiss these issues as "a hodgepodge of minor violations of Section 65585," thus conceding that violations occurred. Opp. at 7. Respondents fail to show that Section 65585's requirements may be disregarded, or that their violations were "minor." To the contrary, Respondents comprehensively violated the law. Section 65585(b)(1) requires that an amended Housing Element be submitted to HCD 60 days before adoption. Respondents adopted the October 2022 Housing Element before it was submitted. AR 4504. Section 65585(f)(2) requires that jurisdictions disputing HCD's findings must either (1) make changes in response to HCD's comments; or (2) adopt the draft "without changes [, but with] written findings which explain the

[2] Respondents' purported incorporation of additional arguments in a brief filed in a different litigation (*see* Opp. at 7) is improper and affords Petitioner no opportunity or space to respond. *See Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 295.

reasons why the legislative body believes that the draft … substantially complies with this article despite the findings of the department." Respondents instead adopted the draft after making some changes in response to HCD's comments, and disputing the remainder. AR 6274-6279.

Respondents argue that "[m]inor language changes can be and are the 'written findings which explain the reasons why the legislative body'" disagrees with HCD. Opp. at 7. That is not true. Section 65585(f)(2) requires adoption "without changes" when a jurisdiction disputes HCD's findings. It does not permit "minor language changes," nor do Respondents demonstrate that the changes were minor. To the contrary, virtually all of the post-October 2022 changes were substantive. *See, e.g.*, AR 5577-78 (adding new program to mitigate air quality impacts); AR 6090-6092 (adding required fair housing analysis); AR 6129-6120 (adding significant additional information regarding nonvacant sites). In view of the total disregard of Section 65585, Respondents cannot meet their burden of demonstrating that the October 2022 Housing Element was lawfully adopted.

Deference to HCD. On the question of HCD deference, Respondents attribute fabricated language to Petitioner: "600 Foothill even suggests that HCD is … 'more qualified than the courts to analyze the relevant statutes.'" Opp. at 3-4 (purporting to cite Br. at 15, n.10). This language appears nowhere in Petitioner's Brief. Rather, Petitioner noted that HCD "is specifically designed and uniquely situated to" determine whether Housing Elements substantially comply with state law, and is staffed to make these decisions for the 482 cities and 58 counties in the state. Br. at 15, n.10.

Petitioner has *never* asserted that courts cannot overrule HCD's substantial compliance determinations; plainly, they can. *See Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 243 (overruling HCD's certification of Housing Element because it was "clearly erroneous"). Rather, the Court's review should reflect the fact that HCD is uniquely charged with making these determinations (§ 65585(d) ("the department shall determine whether the draft element or draft amendment substantially complies with this article")), and that the law establishes a comprehensive process to facilitate HCD's conclusions. While HCD's determinations are not *binding* on the courts, they are entitled to deference. *See Martinez*, 90 Cal.App.5th at 243; *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113 n.13.[3] Deference is appropriate here, because as shown in the Brief,

[3] Respondents note that *Hoffmaster* dealt specifically with deference to the HCD's guidelines for the Housing Element sites inventory, rather than its substantial compliance determinations. Opp. at

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HCD's rejection of the October 2022 Housing Element was well-supported – the Housing Element failed to affirmatively further fair housing, and lacked an adequate nonvacant sites analysis. Br. at 15-19.[4] Further, Respondents' complaints regarding delegation to HCD (Opp. at 8) are unfounded because that review is expressly authorized and reasonably necessary to HCD's purpose.

Fair housing analysis. The October 2022 Housing Element failed to analyze "the relationship of the sites identified in the land inventory to the jurisdiction's duty to affirmatively further fair housing," which is required by Section 65583(a)(3). The Opposition does not address this missing analysis, conceding the issue. Opp. at 8-10. And while Respondents explain to the Court why they clustered all affordable housing near the highway (*id*.), Section 65583 requires that this analysis be provided to HCD, so that HCD can determine whether additional efforts to affirmatively further fair housing are necessary. §§ 65583(a)(3), (c)(5), (c)(10); *see* AR 5263-64. Indeed, this is precisely what Respondents subsequently did: the February 2023 Housing Element added this analysis, and committed to a new program to mitigate the identified impacts.[5] AR 5577-78, 6091. Respondents could have satisfied Section 65583 by including this material in the October 2022 Housing Element; having failed to do so, HCD was right to reject the October 2022 Housing Element. And as discussed (Br. at 21), these failures constitute an independent violation of Section 8899.50 as well.

Nonvacant sites analysis. Second, HCD correctly determined that the October 2022 Housing Element's nonvacant sites analysis was deficient, because it failed to meet the heightened evidentiary requirements of Section 65583.2(g)(2). Br. at 16-19. Respondents argue that they were prejudiced

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7. While true, this misses the larger point: *Hoffmaster* affirmed deference to HCD's determinations under general principles of agency deference. *See Hoffmaster*, 55 Cal.App.4th at 1113, n.13. Those principles are equally applicable to HCD's substantial compliance determinations, as indicated by the *Martinez* Court's reference to *Hoffmaster* in that context. *See Martinez*, 90 Cal.App.5th at 243.

[4] As discussed in the Brief, the Court need not decide this issue in this case, because a substantial compliance finding is barred by Section 65585(e)(4)(C), which is expressly tied to HCD certification, rather than substantial compliance more broadly. Br. at 15, n.11.

[5] Respondents protest that new Program 24 mirrored an earlier policy adopted in 2013. Opp. at 9. Regardless of whether the substance of that program was already instituted, neither the program itself nor the requisite analysis that necessitated its inclusion were in the October 2022 Housing Element. This is not a mere formality: the program's inclusion in the Housing Element has actionable consequences that would not have existed otherwise. *See, e.g.*, § 65585(i) (requiring HCD to investigate a "failure to implement any program actions included in the housing element pursuant to Section 65583.") (emphasis added). Moreover, new Program 24 is not duplicative of the earlier-adopted Air Quality Policy 1.1.6. *Compare* AR 5577 (specifically adopting "required" mitigation measures for "new residential development that is in proximity to the … freeways") *with* Koleda Decl., ¶ 33, n.15 (far shorter and more general policy without mandatory language).

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because the Southern California Association of Governments ("SCAG") revised the City's RHNA allocation in July 2021. Opp. at 10. This is a silly complaint, given that the revision increased Respondents' allocation by a mere two (2) units. Koleda Decl., ¶ 20. Respondents also suggest that they were prejudiced by delays in the RHNA allocation. Opp. at 10. But the Legislature addressed these concerns with Section 65583.4, adopted in 2022, which significantly eased the Housing Element deadlines for SCAG jurisdictions. Respondents failed to qualify for Section 65583.4's grace period because of their extreme delay. In any event, Respondents fail to show that any delay prevented its compliance with Section 65583.2(b); in fact, the Opposition contradicts this notion, acknowledging that the City began working on the sites inventory in December 2020. Opp. at 10. Nor do Respondents show that any perceived unfairness excuses compliance with the HAA.

Substantively, Respondents fail to show substantial evidence supporting reliance on the twenty-six nonvacant lower income sites identified in Petitioner's Brief. Br. at 18 (referencing sites 19, 59, 75, 78-90, 98-99, and 114-116). Instead, Respondents defend the methodology employed in the October 2022 Housing Element. Opp. at 10-11. This is neither here nor there; to satisfy Section 65583.2(g)(2), Respondents were required to make "findings based on substantial evidence" that an existing use "is likely to be discontinued," and thereby overcome the presumption that "an existing use" will "impede additional residential development[.]" While Respondents' methodology may be sufficient for Section 65583.2(g)(1), it does not and cannot supply the additional "findings based on substantial evidence" required to satisfy the more-stringent Section 65583.2(g)(2). Indeed, this methodology was plainly inadequate, since it apparently led Respondents to include nonvacant sites despite evidence that the owners had no interest in redevelopment. AR 5114, 5115, 5116.[6]

Respondents rely on *Martinez* to defend their analysis, arguing (1) that they "made reasonable inferences using more information than the city in *Martinez* did"; and (2) that, per *Martinez*, said information was not required to be included in the Housing Element itself. Opp. at 11-12. But *Martinez* dealt with the City of Clovis' nonvacant sites analysis under Section 65583.2(g)(1). *See*

[6] Respondents explain that these properties were redesignated as "'buffer sites' in the Site Inventory." Opp. at 12. But Section 65583.2(g)(2) does not adopt a lower standard for so-called "buffer sites." Rather, all nonvacant sites must be supported by substantial evidence that the existing use will discontinue. These sites should have been removed from the sites inventory altogether. Moreover, the subsequent redesignation of certain sites as "buffer sites" is irrelevant, because it concerns the February 2023 Housing Element, not the October 2022 Housing Element.

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Martinez v. City of Clovis (2023) 90 Cal.App.5th 193, 247. The heightened requirements of Section 65583.2(g)(2) were not at issue in *Martinez*. *See id.*, n.19 (parties agreed that § 65583.2(g)(2) was not in play). Further, *Martinez* held only that material required by Section 65583.2(g)(1) need not appear in the Housing Element itself, *id.* at 248, not that jurisdictions were absolved from producing such material altogether. Respondents must show HCD (and now, the Court) that it possessed substantial evidence that the existing uses on its nonvacant sites were likely to cease; their failure to point to any evidence specific to nonvacant sites 19, 59, 75, 78-90, 98-99, and 114-116 is dispositive.

II. Petitioner's Claims are not Premature.

Failure to Raise Issues. Respondents claim that Petitioner has run afoul of a "slew of procedural rules" (Opp. at 15), but fail to explain or support this claim. Respondents contend Petitioner merely "reserved" the right to challenge certain topics, as opposed to presenting the exact issues to the City Council during the administrative process. The record dictates otherwise. *See, e.g.*, AR 6284-85 (Petitioner's March 9, 2022 appeal letter stating that decision to "self-certify" the October 2022 Housing Element was unlawful, and that the October 2022 Housing Element failed to AFFH, lacked an assessment of fair housing, and lacked a sufficient sites inventory); AR 6307-08 (Petitioner's April 30, 2023 supplemental letter citing HCD letter rejecting October 2022 Housing Element on these same bases). Far from raising "general" objections, Petitioner put the City Council on notice of the "exact issues" now before the Court. *See, e.g.*, *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594 (exhaustion satisfied when parties raise all issues before body with final responsibility to take action on project). Petitioner's comments on the City's deficient Housing Element span back to February 2022 (Weyand Decl. at ¶ 9), and numerous other commenters raised similar concerns about the violations Petitioner now seeks to address.[7]

Subdivision (f). Respondents argue this litigation has prevented it "from addressing the proper interpretation and application of section (f) of the HAA." Opp. at 15-16. First, Respondents' quotation of HAA subdivision (f) omits critical language. Rather than permitting unfettered discretion to apply objective standards, subdivision (f): (i) forbids the application of standards that were not

[7] *See, e.g.*, AR 6515-16, 6975-84, 7000-01; *Friends of Mammoth v Board of Supervisors* (1972) 8 Cal.3d 247, 268, rev'd on other grounds, *Evans v. San Jose* (2005) 128 Cal.App.4th 1123 (individual need not personally raise each issue at administrative level but may rely on issues raised by others, even though they do not later join the lawsuit, as long as agency had opportunity to respond).

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"adopted and in effect" at the time of the preliminary application through its incorporation of subdivision (o); (ii) clarifies that only standards "consistent with" meeting the RHNA may be applied; and (iii) requires that such application must "facilitate and accommodate development at the density … proposed by the development." Respondents' application of the Downtown Village Specific Plan height limit, for example, would not facilitate and accommodate the Project at its proposed density. In any event, Respondents' reference to subdivision (f) is irrelevant, because Respondents violated subdivisions (d) and (j) by disapproving the Project. Whether they could have instead approved the Project but required it to comply with certain objective standards per subdivision (f) is academic.

Ripeness. Next, Respondents argue that HAA disapproval cannot occur until CEQA review is complete. Opp. at 16-18. (citing *Schellinger Bros. v. City of Sebastopol* (2009) 179 Cal.App.4th 1245 for the proposition that "a claim under the HAA [is] not ripe until CEQA discretionary review [is] complete[.]"). As the Court noted in its Order on Respondents' Demurrers, however, "*Schellinger* ... did not hold that claims under the HAA or other housing laws are unripe or cannot be filed until CEQA review is completed[.]" Order at 6. Nor would such a result be workable, because a suit to enforce the HAA must be filed "no later than 90 days from" project disapproval, § 65589.5(m), and CEQA review routinely takes far longer. Indeed, the City did not even *begin* the CEQA process here until September 2023 (Opp. at 18), after the 90-day limitations period had run.

Further, Respondents' read of *Schellinger* (suggesting that project disapproval, by definition, cannot happen until CEQA review is complete) is inconsistent with both CEQA itself and subsequent precedent. First, project disapproval is a CEQA-exempt act, meaning that agencies wishing to disapprove projects never need to perform CEQA review. Pub. Res. Code § 21080(b)(5) ("This division does not apply to … Projects which a public agency rejects or disapproves."). Second, as discussed (Br. at 11), subsequent precedent – namely, *Cal. Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820 – indicates that project disapproval can occur without CEQA review. While Respondents purport to reference portions of a brief filed in that case (Opp. at 17-18 (citing Sheridan Decl., Ex. EE, pages 23-26, 24, and 47)), those pages were not included in Respondents' exhibit. In any event, assuming Respondents' characterizations of *CaRLA* are correct, at best they indicate the applicant's position that the project at issue was CEQA-exempt.

Nothing cited by Respondents indicates that San Mateo actually made such a determination, nor that it was a prerequisite for HAA ripeness. Indeed, San Mateo's briefing indicates its position that further CEQA review was required. *See* RJN, Ex. AA, at 63 (arguing that the City needed "to evaluate the Project once again under CEQA" and that "it is possible that further CEQA review could result in required changes to the Project") (citing *Schellinger*). Finally, Respondents' "no HAA until CEQA is done" interpretation would violate both the maxim that courts should "avoid an interpretation that would effectively nullify a portion of [a] statute…" *Elder v. Carlisle Ins. Co.* (1987) 193 Cal.App.3d 1313, 1319, and the Legislature's mandate to apply the HAA to afford "the fullest possible weight to the interest of, and the approval and provision of, housing." § 65589.5(a)(2)(L).

Disapproval. As explained (Br. at 7-8), the May 1, 2023 denial constitutes a "disapproval" within the meaning of HAA subdivision (h)(6)(A). In its Order on Respondents' Demurrers, the Court explained that "[t]he label used by the City on its decision to deny the application (that is, Project) as proposed, is not determinative." Order at 9. Respondents, which bear the burden of proof on this issue (§ 65589.5(i); § 65589.6), have given the Court no reason to depart from this ruling.

Respondents' May 1, 2023 denial fell well within the HAA's broad definition. A "vote" occurred, addressing both the Project application and, inherently, the approvals and entitlements sought by that application. AR 7161. Respondents ask the Court to read this definition narrowly (Opp. at 19), but this approach is misguided, both because the HAA must be interpreted to afford the "fullest possible weight" to housing (§ 65589.5(a)(2)(L)), and because the definition of "disapprove" employs open-ended language specifically to preclude a hypertextual approach. § 65589.5(h)(6). And, while the denial may not have been styled as a formal project disapproval, the accompanying resolution indicates that it operated as such. The resolution first offered a lengthy defense of the October 2022 Housing Element – a discussion that would not have been necessary if Respondents genuinely believed they were not "disapproving" the Project. AR 7164-7166. Then, it concluded: "Based on the above findings" concerning the City's supposedly-compliant October 2022 Housing Element, "[the City] denies the appeal … on the basis that the 'builder's remedy' under the Housing Accountability Act does not apply and is not available for the Project[.]" AR 7167. Respondents cannot credibly

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assert that no HAA subdivision (d) disapproval occurred, when the very document memorializing that disapproval addresses subdivision (d)'s applicability at length.

Respondents also dispute that the denial violated HAA subdivision (d)'s prohibition on "condition[ing] approval in a manner that renders the housing development project infeasible for development for [affordable] households." Opp. at 20; *See* Br. at 8-9 (explaining that application of a 12-15 du/acre density would require shrinking the Project by 75%). Respondents specifically contend that Petitioner has failed to adduce evidence of infeasibility. Opp. at 20. This argument improperly shifts the burden; Respondents bear the burden of demonstrating that their conduct conformed to the HAA's requirements, and specifically that their findings regarding "the imposition of conditions on the development" are "supported by a preponderance of the evidence in the record[.]" §§ 65589.5(i), 65589.6. Respondents have offered no evidence on this front, nor can they, because (i) the infeasibility of a 62 du/acre project under a 12-15 du/acre standard is plain (AR 6280; AR 7176), and (ii) their own Housing Element concedes that such density is inadequate for affordable housing. AR 3405-08 (concluding "even 30" du/acre is infeasible for 20% affordable project).

Final action. Respondents invoke the concept of "final action," the implication being that an HAA violation cannot occur unless the challenged action fully disposes of the project at issue. Opp. at 20-21. But the HAA prohibits a wide swath of actions that do not end the administrative process. §§ 65589.5(h)(6)(A) (encompassing both formal project disapproval and other votes on items necessary for the issuance of a building permit), (h)(6)(B-C) (encompassing failure to observe post-entitlement deadlines); (d) (prohibiting conditions that render affordable project infeasible); (j) (prohibiting conditions that reduce a project's density); (o) prohibiting conditions that are not "adopted and in effect" when application is submitted). None of these prohibited actions is "final" in the sense that they resolve all outstanding issues with respect to a particular project, but all are actionable HAA violations. Further, because suits under the HAA must be filed "no later than 90 days from" the prohibited action's occurrence (§ 65589.5(m)), Respondents' "final action" interpretation would make numerous HAA-defined violations impossible to redress within the limitations period. Put another way, these HAA-defined violations are "final actions" for purposes of administrative mandamus because the HAA makes them immediately actionable. § 65589.5(k).

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III. Petitioner's Exercise of Constitutional Right Does Not Constitute "Unclean Hands"

Respondents dedicate significant page length discussing the reasonable conduct of two principals of Petitioner, alleging such conduct leaves Petitioner with unclean hands. Respondents ask this court to find that citizens commenting on a local agency's actions somehow insulates that agency from liability for clear violations of state law — an assertion that is antithetical to the First Amendment and informed participation in local government.

The doctrine of unclean hands requires unconscionable, bad faith, or inequitable conduct by the plaintiff in connection with the matter in controversy. *General Elec. Co. v. Superior Court* (1955) 45 Cal.2d 897, 899-900. Whether alleged misconduct constitutes unclean hands depends on (i) analogous case law, (ii) the nature of the misconduct, and (iii) the relationship to the claimed injuries. *Peregrine Funding, Inc. v. Sheppard Mullin* (2005) 133 Cal.App.4th 658, 680–681. The alleged misconduct must relate directly to the transaction at issue; relief is not appropriate if the alleged misconduct indirectly affects the problem before the court. *Fibreboard Paper Prod. Corp. v. E. Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728-29. Whether to apply the unclean hands defense is a matter within the trial court's discretion. *Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 447. Respondents bear the burden of demonstrating the affirmative defense of unclean hands. *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 54.

With respect to Mr. Jon Curtis, Respondents simply observe that he participated in SCAG's deliberations regarding RHNA allocations, and owned property in the City. Opp. at 10. Respondents make no effort to demonstrate that these activities constitute unclean hands. Regarding Mr. Garret Weyand's participation in the Housing Element update process, putting aside the fact that this defense concedes Respondents' failure to adopt a substantially compliant Housing Element, at no point did Mr. Weyand demonstrate unconscionable, bad faith, or inequitable conduct towards the City. Rather, in his personal and professional capacities, Mr. Weyand monitored and commented on the City's Housing Element update process as early as May 2021. Weyand Decl. at ¶ 6-7. After reviewing the City's October 2021 draft, Mr. Weyand became (reasonably) concerned that the sites inventory was deficient. *Id*. at ¶ 8. Between February 2022 and February 2023, Mr. Weyand submitted at least five (5) written comment letters and delivered oral comments in at least five (5) City meetings on the

Housing Element and site inventory. *Id*. at ¶¶ 7 to 21. These activities apprised City staff and decisionmakers of a key issue that, because unaddressed, led to HCD's rejection of the October 2022 Housing Element. *Id*. at ¶ 19. Respondents harp on Mr. Weyand's hand delivery of letters signed by property owners who wished to have their properties removed from the site inventory, but fail to demonstrate that this conduct violates any law, or how his actions "subverted" the City's Housing Element update. Rather, had Respondents listened to Mr. Weyand, the City could have addressed fatal deficiencies with the October 2022 Housing Element. Simply put, Mr. Weyand's public advocacy was not conducted in bad faith, but done to urge the City to "pass a legitimate site inventory *for the benefit of all residents*." *Id*. at ¶ 14; emphasis added.

Respondents cite no analogous case law where a Petitioner exhibited "misconduct" in the form of protected public advocacy, but simply observe that "[u]nclean hands is an appropriate defense to a writ of mandate" in highly distinguishable cases. Opp. at 13; citing *Allen v. Los Angeles Cnty. Dist. Council of Carpenters* (1959) 51 Cal. 2d 805, 807 (petitioner's membership in local union rescinded due to false testimony); *Elliott v. Contractors' State License Bd*. (1990) 224 Cal.App.3d 1048, 1055 (state license board's revocation of contractor's license due to unchallenged allegations of fraud in petitioner's license application). Nor have Respondents demonstrated that Mr. Weyand's purported "misconduct" (*i.e.*, exercising his First Amendment rights via public comments) *directly* relates to Respondents' failures to comply with the HAA, Housing Element Law, and the PSA. *Fibreboard*, 227 Cal.App.2d at 728-29. The City, not Mr. Weyand, produced a deficient Housing Element and then disapproved the Project in circumvention of the protections afforded by the HAA.

IV. The City Violated the Permit Streamlining Act

As discussed (Br. at 19-20), Respondents' Second Incompleteness Determination violated the PSA in four respects. Respondents' argument that "[t]he two [incompleteness] letters contained the 'exhaustive list' of items that were not complete" (Opp. at 21-22) runs contrary to the plain language of the PSA, which both requires a single "exhaustive" list and precludes agencies from requiring "any new information … not stated in the initial list[.]" § 65943(a). Regarding their violation of the 30-day deadline, Respondents rely on a website disclaimer, but offer no authority showing that a disclaimer can alter Respondents' obligations under the PSA's plain language. While Respondents

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are correct that the PSA allows processing fees (§ 65943(e)), that provision is not linked to the 30-day deadline (§ 65943(a)). Further, Respondents do not respond to Petitioner's alleged second violation of the PSA: that the Second Incompleteness Determination was based solely on the Project's purported inconsistency with zoning and General Plan standards, a criterion not included on Respondents' application checklist (Br. at 15), and have thus waived that issue.

Lastly, Respondents claim (Opp. at 22) that Petitioner was not prejudiced by their non-compliance with the PSA, because they subsequently purported to issue the Completeness Determination. Respondents again fail to explain why City staff issued that (apparently unlawful) determination in contravention of the City Council's May 1, 2023 determination that the application remained incomplete, further evidencing Respondents' bad-faith conduct, nor do respondents demonstrate that PSA violations are excused by a supposed lack of prejudice. Nor do Respondents cite any authority for the proposition that PSA violations are excused by a purported lack of prejudice. In any event, Petitioner is prejudiced by the numerous PSA violations, by which Respondents purported to impose unlawful conditions on the Project and thus gave rise to this lawsuit.

V. The City Violated State Density Bonus Law and the Subdivision Map Act

Respondents' sole defense to the SDBL and SMA violations detailed in the Brief (Br. at 22) is that "the City has not disapproved the [Project]" within the meaning of the HAA, and "thus there has not been a denial of Petitioner's requested entitlements." Opp. at 22. As discussed above, Respondents' positions on disapproval and finality are unsupported. Respondents' duplicative defenses to Petitioner's SDBL and SMA claims fail for the same reason, and their processing of entitlements for an unlawfully-conditioned Project sans-Builder's Remedy is immaterial.

VI. Respondents' Appeal Does Not Stay Unaffected Causes of Action

Respondents' appeal of the Court's ruling on the Anti-SLAPP Motion stays only the Ninth Cause of Action. Code Civ. Proc. § 916; *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, n.8.

VII. The City Disapproved the Project Before Securing a Compliant Housing Element

Respondents argue that a preliminary application does not "vest the Builder's Remedy," because it is not an "ordinance, policy, or standard" per HAA subdivision (o)(4). Opp. at 22-23. This argument is not responsive to any of Petitioner's positions; Petitioner has identified a disapproval

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date (May 1, 2023) that occurred well before Housing Element certification (November 17, 2023). Because Respondents were subject to Section 65588's statutory bar from October 16, 2022 until November 17, 2023, there is no material distinction between the May 1, 2023 disapproval date and the November 10, 2022 vesting date. Thus, the Court need not decide this question. Respondents are also incorrect: Subdivision (o)(4) defines "ordinances, policies," and standards" as the "general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency…." The Housing Element is a mandatory element of the General Plan. § 65582(f). Until November 17, 2023, Respondents lacked a compliant Housing Element. HAA subdivision (o) precludes Respondents from retroactively applying a subsequently-certified Housing Element. § 65589.5(o)(1); *see also* § 65589.5(o)(5) ("subdivision shall not be construed [to] lessen the restrictions imposed on a local agency [or the] protections afforded to a housing development project[.]"

VIII. The Court Should Order the City to Approve the Project

HAA subdivision (k)(1)(A)(ii) outlines the relief afforded for an HAA violation. Pursuant to this provision, given the plain HAA violations discussed herein, Petitioner requests that the Court issue an order directing the City to act on the Project within 60 days. § 65589.5(k)(1)(A)(ii) (Court "shall issue an order … compelling compliance with this section within 60 days"). Petitioner also requests that the Court retain jurisdiction through the pendency of the Project, to ensure that its order is carried out. *Id.* (Court "shall retain jurisdiction to ensure that its order or judgment is carried out"). Petitioner also requests that the Court award attorney's fees and costs of suit to Petitioner, given that such a result plainly furthers the HAA's purpose to "afford the fullest possible weight to the … approval and provision of housing." §§ 65589.5(a)(2)(L); (k)(1)(A)(ii) (Court "shall award reasonable attorney's fees and costs of suit to the … petitioner," except where the Court finds, "under extraordinary circumstances, that awarding fees would not further the purposes of this section.").

Further, Petitioner requests that the Court order Project approval. *Id.* (upon finding that agency acted in bad faith, Court "may issue an order directing the local agency to approve" the project). This outcome is appropriate given the City's demonstrated bad faith conduct: amending the October 2022 Housing Element to reduce the Project's density despite the need for greater density to accommodate

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the RHNA (*compare* AR 3840 (listing Project site for 47 units) *with* AR 4321 (16 units)); purporting to self-certify the October 2022 Housing Element despite the City Attorney's contrary guidance (AR 6209-10); issuing an unlawful Second Incompleteness Determination (AR 6280-81); denying Petitioner's appeal of that determination based on meritless positions regarding its Housing Element, the HAA, and the PSA, and violating the HAA in the process (AR 7161-68); issuing an unexplained Completeness Determination, contrary to the City Council's resolution, in an apparent effort to evade judicial review (AR 7169); and knowingly retaining nonvacant sites notwithstanding evidence indicating no owner interest in redevelopment (AR 5114, 5115, 5116).

Additionally, while Respondents assert that they cannot be ordered to approve the Project before CEQA review is completed, that is not the law. *See, e.g., Tiburon Open Space v. County of Marin* (2022) 78 Cal.App.5th 700, 734 ("a lead agency can commit to a project before completing a thorough environmental review."). Indeed, because CEQA only applies to "discretionary" actions (Pub. Res. Code § 21080(a)), and because a bad faith finding and order would remove Respondents' discretion to disapprove the Project, CEQA review is not required for the Project at all. *Id.* at 723 ("Where a lead agency's discretion already is limited by legal obligations … the scope of environmental review adjusts in relation to the amount of discretion."); *Hilltop Grp. v. San Diego* (Feb. 16, 2024, No. D081124) 2024 Cal.App. LEXIS 99, at *65 (unnecessary CEQA review would improperly subject applicants to "an indefinite review process without judicial recourse so long as the project application is not formally denied."). To the extent that the Court does not dispense with CEQA review altogether, it should expressly require that any review be narrowly tailored in relation to the City's discretion, and quickly completed, to ensure that Respondents do not abuse the CEQA process. *See Tiburon*, 78 Cal.App.5th at 782 (CEQA has been "manipulated to be a formidable tool of obstruction[.]").

IX. CONCLUSION

For the foregoing reasons and those set forth in the Brief, Petitioner requests that the Court grant the Petition and award Petitioners the relief requested therein.

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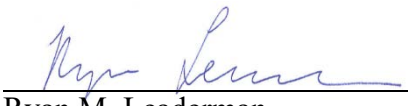
Dated: February 20, 2024

Respectfully submitted,

HOLLAND & KNIGHT LLP



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PROOF OF SERVICE

I, the undersigned, hereby declare that I am over the age of 18 years and not a party to the above-captioned action; that my business address is 560 Mission Street, Suite 1900, San Francisco, CA 94105. On February 20, 2024, the following document(s) were served:

- **PETITIONER'S REPLY BRIEF**

on the interested parties in this action addressed as follows:

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☒ **(BY UNITED STATES MAIL)** I placed a true copy in a sealed envelope or package addressed to the persons as indicated above, on the above-mentioned date, and placed the envelope for collection and mailing, following our ordinary business practices.

☒ **(BY ELECTRONIC MAIL)** I caused a true and correct scanned image (.PDF file) copy to be transmitted via the electronic mail transfer system in place at Holland & Knight, LLP, originating from the undersigned at 560 Mission Street, Suite 1900, San Francisco, CA 94105, to the address(es) indicated above.

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

Executed February 20, 2024, at New York, New York.

Reena Kaur