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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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

CALHDF'S REPLY IN SUPPORT OF MOTION TO ISSUE WRIT OF MANDATE

Judge: Hon. Mitchell L. Beckloff
Dept: 86
Trial Date: March 1, 2024

Action Filed: July 25, 2023

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The City of La Cañada Flintridge's Opposition (hereafter "Opp.") constructs multiple strawmen to knock down instead of responding to what Petitioner California Housing Defense Fund ("CalHDF") actually argued in its Memorandum of Points and Authorities ("MPA" or "opening brief"). These strawman arguments rely on inadmissible declarations from City officials that are contradicted by the record in any event. The Court should grant CalHDF's Motion to Issue Writ of Mandate in full.

I. THE CITY'S OCTOBER 2022 HOUSING ELEMENT DID NOT SUBSTANTIALLY COMPLY WITH STATE LAW.

A. The City Does Not Dispute that it Failed to Assess the Realistic Development Capacity of *Any* Sites in its Inventory.

The Housing Element Law requires that municipalities "specify for each site [in its inventory] the number of units that can *realistically* be accommodated on that site." (Gov. Code, § 65583.2, subd. (c), emphasis added.) To this end, it states that "the number of units calculated" for each site "shall be adjusted" to account for, among other things, any "land use controls and site improvements" identified as "potential and actual governmental constraints" on development." (*Id.*, § 65583.2, subd. (c)(2); § 65583, subd. (c)(5).) CalHDF's opening brief argued that La Cañada Flintridge's October 2022 Housing Element did not substantially comply with these statutory requirements because the City did not "adjust" the number of units it calculated for each site, even though the City had identified numerous land-use controls that constrain residential development. (MPA at 19-20.)

The City does not dispute that its October 2022 Housing Element did not adjust the number of units it projected for each site in its inventory, and thus failed to comply with the Housing Element Law. Nor does the City dispute that this failure "resulted in a sites inventory that wildly overestimated the number of new housing units that are likely to be constructed during the planning period, and wildly *under*estimated the number of parcels that needed to be rezoned in order for the City to accommodate its fair share of new housing development." (*Id.* at 20; see *St. Vincent's School for Boys v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1012 ["[A] city is not in substantial compliance [with the Housing Element Law] … simply because it identifies suitable sites to meet an identified housing need, if it then places planning

and zoning restrictions in the way of any actual development of those sites to meet the identified housing need."].)[1] La Cañada Flintridge undisputedly failed to adjust the unit projections in its sites inventory to account for the significant governmental constraints identified elsewhere in the October 2022 Housing Element. That deficiency alone is sufficient to establish that the City did not substantially comply with the Housing Element Law, even if the Court does not reach any of the other inadequacies CalHDF identified in its opening brief.

B. The City Did Not Meet the Statutory Rezoning Deadline, Did Not Assess the Suitability of Non-Vacant Sites in its Inventory, and Did Not Ensure that at Least Half its Designated "Low Income" Sites Were Zoned Exclusively For Residential Use.

The City offers only nominal opposition to three more of the fatal deficiencies CalHDF identified in the October 2022 Housing Element. (See MPA at 17-19, 20-21.) The City cites no evidence or legal authority whatsoever to support the bare assertion that the statutory rezoning deadline of October 15, 2022 "does not apply" to the City, and it rehashes the same convoluted argument about general-plan-consistency from the City's demurrer that this Court already concluded "fails to persuasively address Government Code section 65588, subdivision (e)(4)(C)(iii)." (Opp. at 8; Order Overruling Demurrer and Denying Mot. to Strike, filed Nov. 22, 2023, at 6-7.) The City asserts that it complied with its statutory obligation to prove that the existing uses on each of the nonvacant sites in its inventory will not impede residential development on those sites (Opp. at 10-11; see Gov. Code, § 65583.2, subds. (g)(1)-(2)), but the City does not address *any* of CalHDF's evidence that it neither conducted individualized assessments of these sites nor considered factors that the Housing Element Law expressly requires cities to consider (MPA at 18-19).[2] And the claim that the City complied with

[1] See also Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 Pepperdine L. Rev. 719, 724 (2023) [current chair of the U.S. Advisory Council on Historic Preservation warning that "zoning is more complex than the number-of-units [aka 'density'] measure alone," and that "substantive requirements involving lot configuration, building size, and occupancy" frequently "kill housing by a thousand cuts"].)

[2] CalHDF's evidence does not show mere "imperfections as to [the] form" of the City's analysis, as the City implies. (Opp. at 10.) Rather, it shows that the City did not conduct the required analysis *at all* and therefore included sites in its inventory that have essentially no chance of being redeveloped into housing. (See MPA at 18-19.) *Martinez v. City of Clovis* does not support the City's position because CalHDF's argument is not that the City merely

Government Code § 65583.2, subdivision (h) because its inventory purportedly included "a surplus of 233 lower income units" (Opp. at 11) is both unsupported by the cited evidence and irrelevant as a matter of law. As CalHDF's opening brief explained, subdivision (h) requires the City to accommodate at least 50 percent of its assigned low-income units on sites that are either zoned exclusively for residential use or require residential uses to occupy at least 50 percent of the total floor area. (MPA at 20-21.) The City does not dispute that only 45 of the 483 low-income units in its inventory were located on sites that complied with these requirements. (*Id.*; Opp. at 12.) It is irrelevant that the City's projections show a "surplus" of low-income units because the units they are projecting are illusory as a matter of law.

C. The City Did Not Affirmatively Further Fair Housing When it Selected Sites for Rezoning.

The Housing Element Law required the City to "affirmatively further fair housing" (AFFH) when selecting the sites it would rezone to accommodate its fair share of the regional housing need. (See, e.g., Gov. Code, § 65583, subd. (c)(1) ["Sites shall be identified as needed to affirmatively further fair housing and to facilitate and encourage the development of a variety of types of housing for all income levels"].)[3] As CalHDF explained in its opening brief, the City did not comply with this requirement because, shortly before the City adopted the October 2022 Housing Element, City officials capitulated to public outcry about "low income" people moving to La Cañada Flintridge by eliminating or sharply reducing the allowable residential density on several sites the City had previously included in a draft of its inventory and housing element rezoning program. (*See* MPA at 14-17.) All of the sites in

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failed to include the required evidence and analysis in the Housing Element itself—it is that no such evidence exists, (See *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 248-51.) *Martinez* also does not help the City because, unlike in this case, HCD had certified Clovis's housing element as compliant; this triggered a rebuttable presumption of the housing element's validity that the Court relied on heavily in its analysis of the non-vacant sites issue. (See *id.* at 251; Gov. Code, § 65589.3.)

[3] See also Gov. Code, § 65583, subd. (c)(5) [housing element programs must "promote and affirmatively further fair housing opportunities and promote housing throughout the community … for all persons"]; *id.*, § 65583, subd. (c)(10)(A) [housing element programs must "[a]ffirmatively further fair housing in accordance with [Gov. Code, §§ 8899.50, et seq.]".

question were located on the south side of Foothill Boulevard, in close proximity to a residential area where the City's zoning code prohibits any new housing development other than single family homes on lots of at least one acre. (MPA at 8-9, 15-16.)

The City argues that it "met its requirements to Affirmatively Further Fair Housing" because it engaged in "outreach efforts" and held "focus groups" to "discuss AFFH related issues." (Opp. at 12.) But the City does not explain why this "outreach" alone is sufficient to meet the Housing Element Law's AFFH requirements. The Government Code defines "affirmatively furthering fair housing" as "taking meaningful actions that," among other things, "foster[] and maintain[] compliance with civil rights and fair housing laws." (Gov. Code, § 8899.50, subd. (a)(1).) California fair housing law prohibits "discriminat[ion]" in zoning and other land-use actions because of race or the "intended … occupancy" of residential developments "by persons and families of very low, low, or moderate income." (Gov. Code, § 65008, subds. (b)(1)(A), (b)(1)(C); *Martinez*, *supra*, 90 Cal.App.5th at pp. 274-75.) Federal fair housing law prohibits zoning and other land-use actions that "make unavailable or deny" housing "to any person because of race," among other protected categories. (42 U.S.C. § 3604(a); *Avenue 6E Investments, LLC v. City of Yuma* (9th Cir. 2016) 818 F.3d 493, 502.) Under state and federal fair housing laws alike, intentional discrimination in the land-use context can be proven with evidence that municipal officials "acquiesce[d]" to the animus, biases, prejudices, or stereotypes expressed by members of the public—regardless of whether the officials personally shared those discriminatory attitudes. (Cal. Code Regs., tit. 2, § 12161, subd. (c); *Mhany Mgmt., Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 611.) CalHDF's opening brief demonstrated that this is exactly what happened in this case. (MPA at 15-17.)

The City blithely dismisses the evidence of its acquiescence to the explicitly discriminatory attitudes of City residents as "[g]uilt by association" and "cherry picking." (Opp. at 11, 20.) But that evidence is both more voluminous and less ambiguous than in other cases where courts have found that city officials' acquiescence constituted proof of intentional housing

discrimination.[4] Here, residents of La Cañada Flintridge repeatedly urged City officials to resist adoption of a housing element that would rezone sites on the south side of Foothill Boulevard for higher densities because, inter alia: "We all know that higher densities are more likely to create availability for low, moderate, and above moderate housing" (AR 2164); "if we must comply with the State's plans," the "[o]nly appropriate area [for higher density sites] "is the 'Island' surrounded by the freeway and North of Foothill Bl" (AR 2170-71); "the south side of Foothill is qualitatively different from the north side" because "[t]here isn't a freeway buffer like there is on the north side" (AR 2593-94); "if [the Housing Element Law] requires fair and affordable housing," the City should "fight" it (AR 2598-99); because "low income housing does bring a different quality of life", the City "shouldn't just necessarily roll over" and accommodate "people with a different kind of lifestyle" (AR 2602-03); City officials should do what they can to address residents' " concern[] about who comes into our town" and "determine as citizens who is going to be living in your backyard" (AR 3539-41); "I want as low a density as possible" because otherwise "I [will] have to dust off my shotgun" to "protect [my wife]" from "low income" residents (AR 3543-45); "if we let low, low income come in … it comes along with higher crime….Why don't we all just move to Compton or something, right? Let's just move to Compton." (AR 3492-93.)

The evidence of City officials' acquiescence to these sentiments is also unusually clear in this case. The chair of the Planning Commission told residents who had expressed their opposition to the rezoning of sites for apartments that "I don't think multifamily housing is appropriate for City of La Cañada." (AR 2665.) Another planning commissioner assured those

[4] The City asserts that *Mhany Management, Inc. v. County of Nassau* is not analogous to this case because the defendant "downzoned" the site in question "to single-family zoning" without offering any "legitimate concerns" to justify its decision. (Opp. at 14.) The City does not explain why the *Mhany* defendant's rejection of higher density zoning in favor of "single-family" development is a relevant distinction. Just like in this case, the *Mhany* defendant decided not to enact a zoning change that would have permitted higher density apartments because of neighbors' vocal opposition to "affordable" or "multi-family housing" and the assumed characteristics of the people who would live there. (See *Mhany*, *supra*, 819 F.3d at p. 607.) And the City is simply wrong about the *Mhany* defendant's purported lack of "legitimate concerns" for its decision—the defendant claimed it acted because of concerns about "traffic" and "school crowding," but the court concluded that the discriminatory animus of city residents *also* motivated city officials' decision. (*Id.* at 612-16.)

residents that she had moved to the City "for its schools" and "for its peace," and that she and the other planning commissioners would "like to keep it that way." (AR 2664.) Multiple city councilmembers stated that the public's comments at the September 12 hearing were "compelling and thoughtful" (AR 3584), that they "agree[d] with" "a lot of" the public comments (AR 3605-06), that those comments had persuaded them to reduce the allowable density of "everything south of Foothill Boulevard" to a level that the City's own consultant had concluded would render residential development financially infeasible (AR 3604-05, 3595, 5207), and that, by adopting a housing element with these reduced densities on the south side of Foothill Boulevard, the City Council would "be the community's voice at the State" and convey to HCD that "this is how [the City's residents] think we can best work [the Housing Element Law's requirements] into our community," (AR 4468-69). Not a single City official criticized, condemned, expressed disagreement with, or even attempted to distinguish the public comments with which they agreed from the numerous inflammatory comments expressing animus toward racial minorities and persons with low or moderate incomes.

The City now urges the Court to ignore all this evidence of intentional discrimination because CalHDF did not cite the (federal) Fair Housing Act in its Petition. (Opp. at 13.) But CalHDF's argument is not that the City violated the FHA as a stand-alone theory of liability; it is that evidence of the City's discriminatory site-selection practices demonstrates the City did not substantially comply with the Housing Element Law's requirements to affirmatively further fair housing. (See MPA at 15-17.) That is what CalHDF alleged in its Petition (See Petition, filed July 25, 2023, ¶¶ 22, 26, 29-30), and this Court has already held that those allegations were sufficient to overcome the City's demurrer. (See Order Overruling Demurrer and Denying Motion to Strike, filed Nov. 22, 2023, at 9.) *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1048, does not support the City's position —in that case the Court of Appeal held that the plaintiff's post-trial motion for judgment notwithstanding the verdict was procedurally infirm because her complaint included no relevant allegations whatsoever *and* she neither presented evidence to support the motion's theory of liability at trial nor submitted that theory to the jury. Here, by contrast, CalHDF both alleged that the City's site-selection

practices failed to affirmatively further fair housing and offered extensive evidence in support of this claim in its motion to issue the writ.

The City argues that CalHDF has not satisfied the standard for disparate *impact* claims under the Fair Housing Act because it purportedly failed to adduce "relevant statistical evidence" of a disparate impact. (Opp. at 13.) This would be irrelevant even if true (which it is not)[5]—disparate impact is a "second distinct" theory of liability under the Fair Housing Act that provides a remedy in certain "situations that disparate treatment may not reach." (*Avenue 6E Investments*, *supra*, 818 F.3d at pp. 502-03.) A party who proves intentional land-use discrimination based on city officials' acquiescence to the discriminatory motives of their constituents need not *also* prove liability under a disparate impact theory. (See, e.g., *Valentin v. Town of Natick* (D. Mass., Dec. 20, 2023) — F.Supp.3d —, No. 21-cv-10830, 2023 WL 8815167, *6-7 [triable issue of fact involving acquiescence theory unaccompanied by disparate impact theory or statistical evidence].) And *Martinez v. City of Clovis* does not support the City's position—it clearly states that liability under the relevant federal and state fair housing laws can be premised on evidence of disparate impact *or* intentional discrimination. (See *Martinez*, *supra*, 90 Cal.App.5th at pp. 263, 269, 281.)

The City also argues that it had "legitimate reasons for the reduction in density on the South side of the street" because those parcels purportedly are "not linked to a sewer system." (Opp. at 15.) This assertion is squarely at odds with the City's representations in the October 2022 Housing Element itself. (See AR 4596 [noting the City installed a sewer under Foothill Boulevard in 1998 precisely "to support intensified development" there—including "multi-family development"]; see also AR 3731 [no "significant difference" in sewer access between

[5] CalHDF's opening brief cites evidence showing, *inter alia*, that only 1.1 percent of the City's residents are Black and only 9.8 percent are Hispanic or Latino (far lower in both cases than Los Angeles County as a whole); that the City's median household income is approximately $210,000 per year (nearly triple that of Los Angeles County as a whole); that the median price of a home in the City is approximately $2 million; and that there is no deed-restricted or publicly subsidized affordable housing anywhere in the City. (See MPA at 7, 16, 16 fn. 8.) This would be more than sufficient to prove disparate impact liability as well as disparate treatment liability, and it is certainly enough to show that the City's decision to reduce the number of low-income sites in its inventory because of public opposition is inconsistent with its obligations under the Housing Element Law to affirmatively further fair housing.

north and south sides of Foothill Boulevard, according to City staff].) And none of the City's evidence supports its claim either. The cited page from the October 4, 2022 agenda report says nothing at all about sewer access. (See AR 3741.) And the Declaration of Susan Koleda—which is, as an initial matter, inadmissible for the reasons stated in CalHDF's objections thereto—says the *exact opposite* of what the City claims. According to Ms. Koleda, "the first row of residential and other parcels south of Foothill Boulevard have City sewer system access." (Koleda Decl. ¶ 10.) Eight of the nine inventory sites the City Council eliminated or reduced in density in response to public outcry at the September 12, 2022 hearing have addresses on the south side of Foothill Boulevard—that is, they are located in the "first row" of parcels that *do* have access to the City's sewer system, according to Ms. Koleda. (Compare AR 3321-26 [draft inventory as of September 12, 2022] with AR 5124-29[final inventory adopted on October 4, 2022].)[6] The City's asserted non-discriminatory rationale is clearly a pretext.

II. CALHDF's PETITION IS NOT "PREMATURE."

A. The City's Issue Exhaustion Argument is Meritless.

The City claims that CalHDF's Petition is "premature" because 600 Foothill purportedly did not "present the exact issue[s]" raised in CalHDF's opening brief to the City in its March 9, 2023 appeal of the City's incompleteness determination. (Opp. at 17.) The Court should summarily reject this claim because the City has not shown that it satisfied the statutory prerequisite to an issue-exhaustion defense—i.e., that it provided the written notice required by Government Code section 65009, subdivision (b)(2). Even if the City had provided such notice, moreover, its issue-exhaustion argument would still be meritless because each issue in CalHDF's opening brief was raised multiple times during the administrative process, thus

[6] A comparison of the September 12 and October 4 inventories shows that the "proposed zoning" of sites 53 and 97 was changed from "DV-MU25" to "DV-MU12"—meaning the "density range" on these sites was reduced from 25-30 units per acre to 12-15 units per acre—and that sites 77, 100, 101, 110, 111, 112, and 113 were entirely removed from the inventory. (AR 3321-26, 5124-29.) With the exception of Site No. 110, all of these sites have an address on Foothill Boulevard. (*Id.*) The address of site No. 110 is listed as 4467 Commonwealth Ave,, which is immediately behind the first row of parcels on the south side of Foothill Boulevard. (See AR 3326.)

"appris[ing]" the City "of the relevant facts and issues." (*McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 191 ["Although an issue must first have been raised during the administrative process to be preserved for judicial review, it may be argued in court by a different person."]; see Declaration of Dylan Casey, filed Dec. 29, 2023, ¶¶ 8-9 & Ex. A; AR 443-53, 1991-92, 2058, 2092-93, 2175, 2205-09, 3504-06, 4444-47, 5263-66, 6282-86, 6293-95, 6301-03, 6304-26, 7157.)

B. The City Already Applied its "Development Standards."

The City raises a similarly meritless argument that CalHDF's Petition is "premature" because it supposedly prevented the City from "appl[ying]" certain "development standards" to 600 Foothill's builder's remedy project. (Opp. at 17.) This argument makes no sense. The City *did* apply its development standards to the project—those development standards were the basis for its conclusion that the project did not comply with the City's zoning and its suggestion that 600 Foothill submit a different project that *does* comply. (AR 6280-81, 7176-78.)

Insofar as the City is arguing that the project must comply with those standards in spite of the project's eligibility for the builder's remedy, the City ignores the opening sentence of subdivision (f)(1), which begins with the phrase "*Except as provided in subdivision (o)* …." (Gov. Code, § 65589.5, subd. (f)(1), emphasis added.) Subdivision (o)(1) prevents the City from applying its "development standards" here because the City's non-compliance with the Housing Element Law means the standards the City now seeks to impose were not "in effect" with regard to qualifying affordable housing projects at the time 600 Foothill submitted its preliminary application. Nor has the City satisfied its burden of showing that the DVSP standards it seeks to impose are "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need." (Gov. Code, § 65589.5, subd. (f)(1).) The City does not even say what those standards require. (See Opp. at 17.)[7]

[7] Even if the City *had* identified the requirements, moreover, it still could not satisfy its burden pursuant to Government Code section 65589.6 because its undisputed failure to adjust the

C. CEQA Does Not Apply to "Disapprovals."

The City's next timing argument—that CalHDF's claims are unripe because "the City cannot as a matter of law approve *or disapprove* a development project prior to conducting environmental review under CEQA" (Opp. at 17, emphasis added) —is also incorrect. CEQA states that it "does not apply" to "[p]rojects which a public agency rejects or disapproves." (Pub. Res. Code, § 21080, subd. (b)(5).) This clearly implies a project can be "reject[ed]" or "disapprove[d]" *before* the project has undergone environmental review.

The City's argument to the contrary is premised on an obvious misreading of dictum in *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245.[8] That case considered whether either CEQA or the HAA "constitute[s] a categorical or jurisdictional bar to preparation and certification of an EIR taking more than 365 days." (*Id.* at 1262.) The court of appeal held that neither statute imposed a "self-executing" deadline for the preparation of an EIR; as a result, a city that takes no action at all on a housing development project within 365 days cannot be deemed to have *approved* the project by operation of law. (*Id*.) The court's holding did not depend at all on the question of whether a city that *does* reject a project without completing environmental review has "disapproved" that project within the meaning of the HAA. This question was not before the court because Sebastopol had not taken any action that could be construed as a disapproval under the law as it existed at the time. Nevertheless, the court of appeal stated in passing that the HAA "pegs its applicability to the approval, denial or conditional approval of a 'housing development project,'" and that each of these actions "can occur only after the EIR is certified." (*Id*.)

Here, the City has latched onto this language in *Schellinger Brothers* as a way of indefinitely evading judicial review under the HAA. According to the City, its rejection of 600

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number of projected units in its site inventory makes it impossible to determine whether enforcement of the development standards would be appropriate to, and consistent with, meeting the City's share of the regional housing need.

[8] The City also cites *Las Lomas Land Co., LLC v. City of Los Angeles*, but that case clearly says the opposite of what the City suggests. (See *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 848 [holding that a city "had no duty under CEQA to complete an EIR *after rejecting the project*"], emphasis added.)

Foothill's builder's remedy application cannot be a "disapproval" within the meaning of the HAA until it completes an EIR, and it need not complete an EIR because CEQA does not apply to disapprovals. Nothing requires this Court to adopt this absurd, circular logic. The language the City takes from *Schellinger Brothers* is pure dictum, and its suggestion that CEQA categorically precludes a "denial" of a housing development project until an EIR is certified is squarely at odds with the plain text of the statute. (See Pub. Res. Code, § 21080, subd. (b)(5) [CEQA "does not apply" to "[p]rojects which a public agency rejects or disapproves"].) The Court should reject the City's disingenuous argument that CalHDF's Petition is "premature" simply because the City has not completed environmental review.[9]

D. The City Unlawfully "Disapproved" the Project Within HAA's Meaning.

The City next rehashes its failed arguments from the demurrer stage of this litigation, claiming that it did not "disapprove" 600 Foothill's builder's remedy project because city officials labeled their decision a "completeness determination" rather than a "disapproval." (See Opp. at 18-19; AR 6280-81.) This Court properly rejected the City's disingenuous characterization of its decision last fall, and CalHDF's opening brief explains why the Court must do so again based on the evidence in the record. (See MPA at 21-23.) The City presents nothing new warranting revisiting this settled issue.

III. THE COURT CAN AND SHOULD ORDER THE CITY TO APPROVE 600 FOOTHILL'S PROJECT BECAUSE THE CITY ACTED—AND CONTINUES TO ACT—IN BAD FAITH.

The default remedy under the HAA is "an order or judgment compelling compliance with [the HAA] within 60 days, including, but not limited to, an order that the local agency take action on the housing development project or emergency shelter." (Gov. Code,

[9] The City suggests CalHDF previously agreed with its interpretation of *Schellinger Brothers* by arguing in another case that there can never be a "disapproval" under the HAA "until CEQA review is completed." (Opp. at 18). The City is incorrect. In the case referenced by the City, CalHDF accurately described *Schellinger Brothers* as holding that the HAA does not "impose[] a self-executing deadline within which an EIR must be certified," and then distinguished *Schellinger Brothers* from its case against the San Mateo on the grounds that *Schellinger Brothers* did not involve any action that could be construed as a disapproval under the HAA. (See Sheridan Decl. ISO City's RJN, Ex. EE at 43-44 fn. 8,) CalHDF did not argue that claims under the HAA are categorically unripe until a City completes CEQA review, as the City now asserts.

§ 65589.5, subd. (k)(1)(A)(ii).) Where a court finds that a city "acted in bad faith when it disapproved or conditionally approved [the project] in violation of [the HAA]," however, "[t]he court may issue an order or judgment directing the local agency to approve the housing development project or emergency shelter." (*Id.*) CalHDF's opening brief marshals extensive evidence that this is one of the rare HAA cases where the standard for bad faith is satisfied. (MPA at 23-24.) None of the City's opposition arguments should persuade the Court otherwise.

A. Neither the Brown Act Nor the First Amendment Insulate Public Comments from Criticism, and Certainly Do Not Require Public Officials to Enact the Discriminatory Policy Preferences of the Commenters.

The City first argues that the Court cannot rest a finding of bad faith on City officials' failure to "condemn" the numerous public comments from City residents who expressed race- and income-based stereotypes and prejudices. According to the City, both the Brown Act and the First Amendment prohibit City councilmembers "from making any condemning statements" about comments made at public hearings. (Opp. at 20.) Both strands of the City's argument conflate statements of disapproval or disagreement with actions that literally prevent public commenters from speaking. This is an obvious strawman—CalHDF never argued that the City should have removed any speaker from the hearings or otherwise prevented them from expressing their views. The City concedes that "Councilmembers may express disagreement with a speaker's point of view." (Opp. at 21.) But it does not point to any evidence that City officials expressed any such "disagreement" with the constituents' discriminatory comments. (*Id.* at 21-22.) Neither the Brown Act nor the First Amendment pose any barriers to a finding of bad faith that rests in part on City officials' knowing acquiescence to the discriminatory preferences of their constituents.

The City next claims that CalHDF cited "no supporting evidence" that City officials "knew" the reductions in density they enacted would render development financially infeasible. (Opp. at 20.) The City is wrong—CalHDF did, in fact, cite evidence of City officials' knowledge. (See MPA at 10-11 [citing AR 3595, 5207]; MPA at 16 [citing AR 3595, 5206-09]; *see also* AR 3441, 3450-51.) The City's September 12, 2022 hearing on the

draft housing element, for example, was attended by Mayor Keith Eich, Mayor Pro Tem Rick Gunter, Councilmember Teresa Walker, Councilmember Kim Bowman, and Councilmember Michael Davitt, along with five members of the Planning Commission and several other city staff members. (AR 3429.) During that hearing, Mayor Pro Tem Gunter described the City's decision earlier that year to hire a "consultant" whom the City tasked with studying the following question: "What is the minimum density that we have to show … [that] someone could actually build an apartment here[?]" (AR 3595.) According to Mr. Gunter, "We said, 'On your own, using what you know how to do, what's the plausible number?' And that number came back as 26 units an acre was a plausible number." (*Id*.) "So we opted for doing the part of town as 25 to 30, right? And that's 25 minimum, 30 maximum." (*Id.*) The full City Council then voted to adopt the October 2022 Housing Element, which itself contained a portion of the consultant's "Market Feasibility Analysis." (See AR 5206-09.) Consistent with Mr. Gunter's recollection at the September 12 hearing, this study states that "26 units per acre is reasonably close to market feasibility" for projects without any deed-restricted affordable units. (AR 5207.) "As would be expected," the City-solicited study continued, "the inclusion of affordable units significantly diminishes the feasibility of the projects … where the market-rate analysis showed feasibility." (AR 5208.) The City Council *knew* what their expert's findings were and they voted to reduce the allowable density on multiple sites in the City's inventory to 12-15 units per acre anyway—including the 600 Foothill Boulevard site at issue here. To this day they have offered nothing but pretextual explanations for this decision. (See Section I.C, *supra*.) That is textbook bad faith. (See MPA at 23-24.)

B. The City's March 1 and May 1 "Incompleteness Determinations" Were Deliberate Attempts to Evade Judicial Review.

Even if this were not enough, the evidence of the City's bad faith is compounded by its subsequent attempts to disguise their disapproval 600 Foothill's builder's remedy project as an "incompleteness determination." CalHDF described these attempts in its opening brief (see MPA at 21-23.) and need not recount them again here because the City cites no evidence that calls CalHDF's account into question. The fact that City *staff* concluded 600 Foothill's

application was complete (Opp. at 23) only strengthens CalHDF's argument that the City Council acted in bad faith when they refused to review the very application materials they claimed were incomplete.

C. The HAA's Project-Approval Remedy is Constitutional.

The City argues that the HAA's project-approval remedy—which, as noted above, applies only where a court finds that a city acted in "bad faith" when it violated the statute (Gov. Code, § 65589.5, subd. (k)(1)(A)(ii))—is unconstitutional because it "runs afoul of the City's 'police power.'" (Opp. at 23.) But the police power is not a blank check—it does not authorize municipal land-use actions with no "real and substantial" relationship to the welfare of the region as a whole. (*Cal. Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435, 456 [quoting *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 609].) A "bad-faith" disapproval under the HAA lacks such a "real and substantial" relationship *by definition*, and thus exceeds the scope of the city's police power even where state law does not otherwise prohibit the city's conduct (as it does here). (See, e.g., *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 336-39 [city's "arbitrary and discriminatory" reversal of earlier zoning change intended to facilitate housing development did not bear a real and substantial relationship to the regional welfare].) Even if bad-faith housing disapprovals *were* within the scope of the municipal police power, it would still be well within the Legislature's prerogative not only to prohibit them but also to authorize judicial remedies that eliminate the municipalities' discretion over the specific projects at issue. (See *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 313 [rejecting "home rule" challenge to statute that "addresses the crisis level statewide lack of affordable housing *by eliminating local discretion to deny approval*"], emphasis added.)[10] The City's constitutional objection lacks merit.

[10] Indeed, the Legislature's authority is even more expansive here than in *Ruegg & Ellsworth* because La Cañada Flintridge is a general law city, not a charter city. (See *Steinkamp v. Teglia* (1989) 210 Cal.App.3d 402, 404 ["[G]eneral law cities are simply creatures of the state and as such are parts of the machinery by which the state conducts its governmental affairs."].)

D. The City's Vesting Argument is Wrong and Irrelevant.

Finally, the City argues that a project's eligibility for the builder's remedy turns not on whether the City has adopted a substantially compliant housing element at the time the applicant submits a statutorily defined preliminary application, but rather on whether the City has adopted a substantially compliant housing element at the time it disapproved the project. (Opp. at 24-25.) The Court should reject this interpretation of the HAA not only because it is inconsistent with the statutory text, but also because it would render the builder's remedy a nullity—no housing developer would ever submit a builder's remedy application because of the uncertainty about whether the project would remain eligible long enough to be approved. (See Gov. Code, § 65589.5, subd. (a)(2)(L) [directing courts to liberally construe the HAA "to afford the fullest possible weight to the interest of, and the approval and provision of, housing"]; *Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 842, 851 [noting HAA's core purpose of providing greater certainty in the land-use permit-approval process].)

Even if correct, the City's interpretation still would not help them here. The City was not in substantial compliance with the Housing Element Law as of May 1, 2023 because it had not completed its mandatory rezonings pursuant to Government Code 65588, subdivision (e)(4)(C)(iii). (See AR 6297-6300.) The City also has repeatedly argued that "there was no change" to the site inventory in its February 21, 2023 Housing Element (the last version the City adopted before its May 1 disapproval). (AR 6203; see also Koleda Decl., ¶¶ 55-56.) The City's February 2023 Housing Element therefore suffered from the same deficiencies that CalHDF identified in the October 2022 Housing Element.

CONCLUSION

The Court should grant CalHDF's Motion in full because the City disapproved 600 Foothill's builder's remedy application on the grounds that it did not comply with the City's zoning, even though the City had not adopted a substantially compliant Housing Element at the time 600 Foothill submitted its preliminary application.

Respectfully submitted,

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