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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S 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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INTRODUCTION

For over three years, Respondent City of La Cañada Flintridge ("City") ignored numerous warnings from state housing officials that the "Housing Element" of its General Plan required substantial revisions to comply with the City's statutory obligation to plan for and accommodate its fair share of new housing development. (See Gov. Code, § 65583 et seq.) Despite ample guidance and offers of technical assistance from the Department of Housing and Community Development ("HCD"), the City did not adopt *any* Housing Element revisions until October 4, 2022—nearly a year after the deadline. HCD found that Housing Element to be inadequate in numerous respects.

The Legislature created a remedy for this kind of intransigence. Under the Housing Accountability Act ("HAA") (Gov. Code, § 65589.5 et seq.), a municipality may not "disapprove" a qualifying affordable housing project on the grounds that it does not comply with a city's zoning if the developer submitted either a statutorily defined "preliminary application" or a "complete development application" while the city's Housing Element was not in substantial compliance with state law. (See *id.* § 65589.5, subds. (d)(5), (h)(5), (o)(1).) This provision, colloquially known as the "builder's remedy," incentivizes compliance with the Housing Element law by temporarily suspending the power of non-compliant municipalities to enforce their zoning rules against qualifying affordable housing projects.

This case is about whether the City violated the HAA's builder's remedy provisions when it disapproved a proposal by Real Party in Interest 600 Foothill Owner, LP ("600 Foothill") to replace an abandoned church on the City's main throughfare with a modest, five-story apartment building. Petitioner California Housing Defense Fund ("CalHDF") is a "housing organization" with standing under the HAA (see Gov. Code, § 65589.5(k)(1)(A)(i)), as well as a beneficially interested party within the meaning of Code of Civil Procedure section 1086 (see Declaration of Dylan Casey ["Casey Decl.," filed herewith], ¶¶ 3-10). CalHDF seeks a peremptory writ of mandate requiring the City to approve the project or, in the alternative, to process 600 Foothill's builder's remedy application in accordance with the HAA.

STATEMENT OF FACTS

A. The Housing Element Law and the City of La Cañada Flintridge

Municipal governments in California "have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." (Gov. Code, § 65580, subd. (d).[1] To ensure that municipalities fulfill this obligation, the Legislature enacted a comprehensive statutory scheme that requires municipalities to adopt and periodically revise a "Housing Element" as part of their General Plan, generally on an eight-year "cycle." (See *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 221-22.) This statutory scheme "sets forth in considerable detail a municipality's obligations to analyze and quantify the locality's existing and projected housing needs for all income levels, including the locality's share of the regional housing need." (*Cal. Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435, 445.) It also requires cities "to adopt and to submit to the California Department of Housing and Community Development a multiyear schedule of actions the local government is undertaking to meet these needs." (*Id.*)

The City of La Cañada Flintridge illustrates why the Housing Element law is necessary. Despite its location near the heart of the second largest metropolitan area in the United States—the City is less than ten miles from downtown Los Angeles—La Cañada Flintridge styles itself as a "semi-rural" community and has made the preservation of its purported "semi-rural character" into the overarching goal of local land-use policy. (See Administrative Record ("AR") 4525.) That policy has been wildly successful in one respect: For nearly half a century, the City has permitted almost no new housing within its borders, and the number of people living there (approximately 20,000) has remained basically unchanged since 1980. (AR

[1] This statutory obligation is roughly analogous to the constitutional obligation the New Jersey Supreme Court famously recognized in *Southern Burlington County NAACP v. Township of Mount Laurel* (1975) 67 N.J. 151, which requires cities to take affirmative steps to accommodate their fair share of the regional need for affordable housing. Unlike New Jersey's model, California's Housing Element Law (Gov. Code, § 65580 et seq.) imposes obligations to facilitate the development of housing affordable to households at all income levels. (See generally Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts* (2019) 71 HASTINGS L.J. 79, 102-03.)

4525, 6320.) Only 21 new housing units were constructed in the City between 2010 and 2020, and its population grew by a mere 15 people. (AR 4549, 4525.)[2] There is no deed-restricted or publicly subsidized affordable housing anywhere in the City. (AR 200, 4557.)

Despite its success in blocking housing development, La Cañada Flintridge is anything but "rural." The City owes its very existence to enormous state and federal investments in transportation infrastructure and military technology, which long ago transformed La Cañada Flintridge into a major high-tech employment hub centered around NASA's Jet Propulsion Laboratory.[3] The City's median household income today is approximately $210,000 per year (almost triple that of Los Angeles County as a whole), its schools are excellent, and more than ninety percent of residents own their homes. (See Request for Judicial Notice ["RJN"], filed herewith, at 0002; AR 4550.) Those homeowners have reaped massive financial rewards from a regionwide housing shortage the City's highly restrictive land-use policies helped to create. Property values in La Cañada Flintridge increased by nearly 200 percent between 2000 and 2018, and as of July 2021 the median price of a home in the City was approximately $2 million. (AR 4554.)

The City's statutory deadline to adopt a substantially compliant "Sixth Cycle"[4] Housing Element was October 15, 2021. (AR 443.) The City blew that deadline. Although City staff submitted a draft to HCD for feedback in October 2021, HCD deemed the draft deficient in numerous respects. (See AR 443-53.)

The City Council held a public hearing in February 2022 to discuss potential next steps in response to HCD's rejection of the October 2021 draft. At this hearing, at least one

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[2] These 21 additional units represent a growth rate of 0.3 percent, which is wildly out of sync with nearby municipalities—it is approximately *one thirteenth* the rate of growth in Pasadena's housing stock during the same period, *one twentieth* the growth rate in Glendale, and just over *one twelfth* the rate for Los Angeles County as a whole. (AR 4549, Table HE-26.)

[3] Although the Jet Propulsion Laboratory's official mailing address is in neighboring Pasadena, the entire complex is located within the borders of La Cañada Flintridge. (See Deirdre Edgar, *Location of NASA's JPL Is A Bit Of A Curiosity*, L.A. TIMES (Aug. 9, 2012), https://www.latimes.com/archives/blogs/readers-representative/story/2012-08-09/location-of-nasas-jpl-is-a-bit-of-a-curiosity.)

[4] "Sixth Cycle" refers to the sixth eight-year period since the Legislature enacted the Housing Element Law in 1980.

Councilmember made it clear that he viewed both HCD and the Housing Element Law as essentially illegitimate. "[T]he state has given the cities a bunch of rules and nobody is happy about it or wants them," he explained. (AR 913.) He suggested the City "try[] to change as little as we can," and urged the Council to consider simply adopting the version of the Housing Element that HCD had already rejected, without making any changes at all. (AR 909.)

Although the City Council did not agree at the February meeting to completely ignore HCD's findings, at least two councilmembers drew a tentative line in the sand on one issue HCD had flagged in its rejection letter: the City's failure to identify sites suitable for affordable housing development that were "distributed throughout the community in a manner that affirmatively furthers fair housing." (AR 445-46.) During the February meeting, the City's planning director explained to the Council that state law now precluded them from "dump[ing] all [the] low-income housing" in "industrial areas or an area not designed for housing." (AR 910.) According to the planning director, "[t]he state has caught on to that kind of thing and is saying no more. The sites have to be distributed throughout the community." (*Id.*) Despite this explanation, multiple members of the public commented that Foothill Boulevard, a four-lane arterial that bisects the City from the northwest to the southeast, should be a dividing line when it came to rezoning sites for the higher densities needed in order for affordable housing to be financially feasible. (See AR 912, 914.) Both the Mayor and the Mayor Pro Tem responded that they "agreed" with these commenters about the "need" to treat the north and south sides of Foothill Boulevard differently in this regard. (AR 914-15.)

In fact, Foothill Boulevard was already a dividing line in terms of the City's zoning and land-use controls. Palatial estates occupy much of the land south of Foothill Boulevard, where the City's zoning prohibits all new residential development except single family homes on very large plots of land. (See AR 4562-64.) Much of this area is zoned for minimum lot sizes of at least one acre. (AR 4564 [showing areas zoned for minimum one-acre lot sizes in light green].) North of Foothill Boulevard, by contrast, in a narrow, crescent-shaped area sandwiched between Foothill Boulevard and the Foothill Freeway, the City's "Downtown Village Specific Plan" ("DVSP") theoretically permits mixed-use, multi-family developments

with residential densities of up to fifteen housing units per acre. (AR 4563-64.)[5] None have been constructed since the DVSP was adopted approximately twenty years ago. (AR 3590.)

Over the next eight months, rumors began to circulate among City residents about proposals for "high density" development and "affordable housing" on the south side of Foothill Boulevard. "We all know that higher densities are more likely to create availability for low, moderate, and above moderate housing," one resident wrote to the City Council. (AR 2164.) Such higher density sites should be confined to locations with sufficient "remoteness from residential neighborhoods," he argued. (*Id.*) Another resident asserted that La Cañada Flintridge was not a "good choice" for "low income renters," but "if we must comply with the State's plans," the "only appropriate area is the 'island' surrounded by the freeway and North of Foothill Bl." (AR 2170-71.) "[T]he south side of Foothill is qualitatively different from the north side," according to yet another City resident. "There isn't a freeway buffer like there is on the north side." (AR 2593-94.)

Public opposition escalated in late August, when the Planning Commission held a hearing on a revised version of the Housing Element that would have increased the allowable density on a few sites south of Foothill Boulevard to 26-30 units per acre. Although some opponents expressed fears of increased "traffic" or "congestion," other residents made clear they simply did want groups they disliked moving to La Cañada Flintridge. "This housing element, is it for—is it for fair housing?" one asked the Commission. "Because if that's fair housing or affordable housing, what does that mean? Does that mean people move here?" If so, she argued, the City should "fight this." (AR 2598-99.) "To be honest," another commenter explained, "the low income housing does bring a different quality of life." (AR 2602.) "We shouldn't just necessarily roll over with what the state wants … to transform toward worse with more crime and more problems and people with a different kind of lifestyle." (AR 2602-03.)

[5] Further north, beyond the 210 Freeway, the City again permits only single-family homes—albeit on slightly smaller lots and at slightly higher densities than the areas south of Foothill Boulevard. (AR 4563-64.)

These themes reemerged at a City Council hearing on September 12. "[I]f we're concerned about who comes into our town," one commenter explained, "then we better start building [accessory dwelling units]" instead of permitting higher densities south of Foothill Boulevard. "[T]hat is the only way we can determine, you can determine as citizens, who is going to be living in your backyard," he asserted. (AR 3539-41.) "Obviously, I want as low a density as possible," another resident explained. "I don't want to think that I have to go out with my wife every time she wants to go to the grocery store when it's dark out, and that I have to dust off my shotgun that I haven't fired in 45 years to protect her." (AR 3543-45.)[6] Yet another resident testified that she moved to La Cañada Flintridge to escape "high crime because of very low income," and warned that "if we let low, low income come in … it comes along with higher crime." (AR 3492-93.) She then asked, "**Why don't we all just move to Compton or something, right? Let's just move to Compton."** (*Id.*)

Not a single City official condemned these comments. In fact, multiple officials made it clear they agreed with them. "I came to the city … for its schools—for its peace," one planning commissioner explained to the crowd at the August hearing. "I would like to keep it that way," she continued, "and I'm sure all my fellow commissioners here would like to keep it that way." (AR 2664.) The chair of the Planning Commission agreed, stating "I don't think multifamily housing is appropriate for City of La Cañada." (AR 2665.) At the City Council hearing on September 12, Mayor Keith Eich told the angry crowd that "Your public comments were compelling and thoughtful. They show concern for the needs of today and for the long-term future of our city." (AR 3584.) "[A] lot of what you all are thinking, what's been said tonight, I agree with," stated Councilmember Kim Bowman at the same hearing. (AR 3605-06.) Councilmember Theresa Walker told the crowd that she "appreciate[d] everybody who came out tonight," and explained that she now supported reversing the draft Housing Element's commitment to upzone certain parcels south of Foothill Boulevard. Instead of 26-30

[6] Numerous letters to the City Council similarly opposed "high density apartments" and "low income housing" on the grounds that the residents purportedly would bring "crime" to La Cañada Flintridge. (AR 5107-12.)

housing units per acre, as the previous draft had proposed for certain sites, she advocated a reduction in the allowable density on "everything south of Foothill boulevard" to a maximum of 12-15 units per acre—a density limit that had facilitated no residential development for twenty years in the area covered by the DVSP, and that, according to the City's own economic consultant, would continue to render the development of multi-family housing financially infeasible because of the high cost of land in the City. (AR 3605, 3590, 3595, 5207.)

The City Council approved these changes at the September 12 hearing, despite multiple warnings that doing so would likely cause HCD to reject the City's Housing Element again. (See AR 4439-40 [noting the Council directed planners to reduce the proposed density on multiple sites south of Foothill Boulevard "due to public testimony" at the September 12 hearing]; AR 3644-45, 3590-91 [warning Council that HCD would likely reject a Housing Element that lacked any higher density sites on the south side of Foothill Boulevard for failing to affirmatively further fair housing].) Three weeks later, on October 4, the City Council formally adopted a Housing Element that included these changes (hereafter "October 2022 Housing Element").

None of the sites identified as potential low-income sites in the October 2022 Housing Element are located in the area south of Foothill Boulevard that provoked public backlash. (See AR 5134 [showing potential low-income sites in light pink].). The vast majority of potential low-income sites are clustered either on the far western edge of the City or immediately adjacent to the Foothill Freeway. (See AR 5131 [low-income sites clustered immediately adjacent to City's western border]; AR 5132-35 [low-income sites located next to the Foothill Freeway].) Many of these sites are extraordinarily unlikely to be redeveloped with any housing, let alone low-income housing. Indeed, the owners of numerous properties that were included in the October 2022 Housing Element's sites inventory had previously notified the City that they had no intention of developing housing there. (See, e.g., AR 4440, 5114-16.) Unsurprisingly, on December 6, 2022, HCD found that the City's October 2022 Housing Element did not substantially comply with state law because, among other deficiencies, it neither "affirmatively further[ed] fair housing" nor identified sites to be rezoned that had a

sufficient likelihood of development within the next decade. (See AR 5263-66.)

B. 600 Foothill's Builder's Remedy Project

One of the sites where the October 2022 Housing Element reduced the allowable density to 12-15 units per acre was 600 Foothill Boulevard, which Real Party in Interest 600 Foothill, LP purchased in 2019. Located on the southwestern corner of Foothill Boulevard and Woodleigh Lane, the site is occupied by two vacant church buildings and a surface parking lot. (AR 5241.) 600 Foothill previously submitted a development application to build 47 senior apartments on the site, which the City disapproved on December 7, 2021, in spite of the Planning Commission's recommendation that the project be approved. (See AR 5234.)

On November 10, 2022, 600 Foothill submitted a complete Preliminary Application for a new project pursuant to the HAA. This Preliminary Application proposed to construct 80 apartments on the site, 16 of which would be reserved for persons earning less than sixty percent of the Area Median Income. (AR 5243.) The Preliminary Application explained that, as a result of the City's non-compliance with Housing Element law, the project was being proposed as a builder's remedy project pursuant to subdivision (d) of the Housing Accountability Act. (See Gov. Code, § 65589.5, subd. (d); AR 5235, 5243.) 600 Foothill paid all required fees for the Preliminary Application on November 14 (AR 7154), submitted an entitlement application for a conditional use permit, vesting tentative tract map, and tree removal permit on January 13, 2023 (AR 7154), and paid all required fees and invoices for the entitlement application on January 31, 2023. (AR 7166.)

On February 10 the City sent a letter to 600 Foothill explaining that certain aspects of its January entitlement application were incomplete. (AR 5276-79.) 600 Foothill provided all requested information and documentation in a follow-up submission on April 28, 2023, well before the statutory deadline of May 15, 2023. (See AR 6305, 7095-96, 7152-53, 7169, 7166.)

The City sent another letter to 600 Foothill on March 1, 2023. It labeled this letter an "incompleteness determination" even though the City did not identify or discuss any alleged omissions from 600 Foothill's application. (See AR 6280-81.) Instead, the March 1 letter stated the City's position that its October 2022 Housing Element substantially complied with

state law, notwithstanding HCD's findings to the contrary. (AR 6280.) It then listed several ways in which 600 Foothill's proposed project did not comply with the City's zoning requirements, including the density limit of 12-15 units per acre the City had included in the October 2022 Housing Element. (AR 6280-81.) The letter concluded by asking 600 Foothill to "[p]lease submit revised plans and materials" for a project that complied with the City's zoning rules for the site. (AR 6281.)

600 Foothill timely appealed the March 1 "incompleteness determination" (AR 6282-87), and the full City Council unanimously denied that appeal by formal resolution on May 1, 2023 (AR 7161-68). Although the City Council again styled its decision as an "incompleteness determination," both the resolution and their own statements made plain that was a pretext. The City Council's resolution states they denied 600 Foothill's appeal "on the basis that the 'builder's remedy' under the Housing Accountability Act does not apply and is not available for the project … because the City's Housing Element was, as of October 4, 2022, in substantial compliance with the Housing Element law." (AR 7167.) Mayor Keith Eich acknowledged at the hearing that 600 Foothill had submitted additional materials but said this was irrelevant to the question of whether the application was "complete." (AR 7095-96.) Counsel for 600 Foothill objected to this decision and demanded that the City review the "complete package" his client had submitted "last week." (AR 7158.) The City Council proceeded without reviewing the additional materials and provided no further avenue for appeal from their decision that the application remained "incomplete" because the project did not comply with the City's zoning. Instead, the City subsequently sent 600 Foothill two letters: one that confirmed its entitlement application was, in fact, complete, and another that invited 600 Foothill to submit an application for a different project that complied with the City's zoning. (See AR 7169, 7176-78.)

C. Procedural History

Petitioner California Housing Defense Fund submitted a letter to the City Council in support of 600 Foothill's project on April 28, 2023 (see AR 6301-63), and filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Judgment on July 25, 2023. The

City was served with CalHDF's papers on July 27, 2023 (see Proof of Service, filed July 27, 2023), and Real Party in Interest was served the following day (see Proof of Service, filed July 31, 2023). The City demurred to the Petition and moved to strike two sentences from its prayer for relief; the Court overruled the demurrer and denied the motion to strike on November 22, 2023. (See Order Overruling Demurrer and Denying Motion to Strike, filed Nov. 22, 2023.) CalHDF now moves for judgment on the writ of mandate.

ARGUMENT

La Cañada Flintridge violated the Housing Accountability Act ("HAA") on May 1, 2023, when it refused to process 600 Foothill's entitlement application unless the proposed project was revised to comply with the City's zoning rules. Under the HAA's "builder's remedy" provisions, a municipality may not "disapprove" a qualifying affordable housing project on the grounds that it does not comply with a city's zoning if the developer submitted either a statutorily defined "preliminary application" or a "complete development application" while the municipality's Housing Element was not in substantial compliance with the Housing Element Law. (Gov. Code, § 65589.5, subds. (d)(5), (h)(5), (o)(1).) In this case, La Cañada Flintridge lacked a substantially compliant Housing Element when 600 Foothill submitted a complete preliminary application for a qualifying project,[7] and the City's subsequent refusal to process the entitlement application for that project constituted a final "disapproval" within the meaning of the HAA.

I. THE CITY LACKED A SUBSTANTIALLY COMPLIANT HOUSING ELEMENT WHEN 600 FOOTHILL SUBMITTED ITS PRELIMINARY APPLICATION ON NOVEMBER 10, 2022.

The heart of the Housing Element Law is a requirement that each city include "an inventory of land suitable and available for residential development…to meet the locality's housing need for a designated income level." (Gov. Code, § 65583, subd. (a)(3).) This provision effectively requires each city to demonstrate that it is realistically possible under the

[7] The project qualifies because 20 percent of the project's housing units would be made available to low-income households within the HAA's definition (see AR 5243; Gov. Code, § 65589.5, subd. (h)(5)), and far more than two-thirds of the project's total square footage would be designated for residential use (see AR 5243; Gov. Code, § 65589.5, subd. (h)(2)(B)).

city's zoning regulations for private developers to build enough new housing to meet the city's assigned share of a regional housing target. If a city's existing zoning is too restrictive, the city must commit to rezoning sites for higher densities so the city can meet its share of that target by the end of the eight-year "planning period," and it must commit to doing so in a manner that affirmatively furthers fair housing. (See Gov. Code, § 65583, subds. (c)(1)(A)-(C).) Cañada Flintridge's October 2022 Housing Element failed to comply with these inventory and rezoning requirements for multiple reasons, *any one of which* is sufficient for CalHDF to prevail in this case.

A. The City Discriminated on the Basis of Both Race and Income When it Selected Sites for Rezoning.

The Housing Element Law requires cities to "affirmatively further fair housing" when selecting sites that will be rezoned to accommodate the city's share of the regional housing need. (Gov. Code, § 65583, subd. (c)(1).) This obligation must be understood, at a minimum, to preclude cities from deciding to rezone certain sites and not others because of the biases, prejudices, and stereotypes expressed by members of the public. (See Cal. Code Regs., tit. 2, § 12161, subd. (c) ["Where a public or private land use practice reflects acquiescence to the bias, prejudices, or stereotypes of the public … intentional discrimination may be shown even if officials or decision-makers themselves do not hold such bias, prejudice or stereotypes."].) Yet this is *exactly* what La Cañada Flintridge did here.

In August and September 2022, the City held public hearings on a draft Housing Element that would have committed the City to rezoning several sites on the south side of Foothill Boulevard for "high density" developments of 26 to 30 housing units per acre. The express purpose of these proposed rezonings was to make it financially feasible for developers to build housing that low-income households could afford. (See AR 4520, 4606.) Multiple members of the public stated that they opposed the higher density development because they assumed "low income" residents would bring "crime" or would have "a different kind of lifestyle." (See, e.g., AR 2602-03, 3491-94, 3539-41, 3543-45, 3493, 5107-10, 5112.) One City resident stated that, if higher density apartments were built in the neighborhood, he would

"have to dust off [his] shotgun" in order to protect his wife from the "low income" residents of the developments. (AR 3545.) Another resident sarcastically asked "Why don't we all just move to Compton or something, right? Let's just move to Compton." (AR 3493.)[8] Not a single city official condemned these comments, and multiple officials suggested that they either agreed with them (see, e.g., AR 2661, 2664-65) or felt it was their duty to yield to the views of their constituents who did not want "higher density" developments on the south side of Foothill Boulevard (see, e.g., 4469). After the September 12 hearing, the City Council ignored planning staff's advice and reduced the allowable density on multiple sites south of Foothill from 26-30 units per acre to 12-15 units per acre—including the site at 600 Foothill Boulevard that is the subject of this case. (AR 3647-56, 4440.) They did so with full knowledge that the City's own economic consultant had found that the high cost of land in the City makes development at 12-15 units per acre financially infeasible even for market-rate housing projects, let alone for projects containing deed-restricted affordable units. (See AR 3595, 5206-09.) And on October 4, 2022, the Council adopted the revised version of the Housing Element containing these infeasibly low densities on sites south of Foothill Boulevard. (See AR 4475-77.)

This sequence of events is strikingly similar to cases in which courts have found violations of the Fair Housing Act. (See 42 U.S.C. § 3604, et seq.) In *Mhany Management, Inc. v. County of Nassau*, for example, municipal officials initially supported a proposed zoning change that would have allowed the development of a 300-unit apartment building, but then abruptly reversed course after a contentious public hearing where several members of the public "expressed concern that [the zoning change] would be used to introduce affordable housing and associated undesirable elements into their community." (*Mhany Mgmt, Inc. v.*

[8] The City of Compton is located just south of the Watts neighborhood in Los Angeles. As of 2022, Compton's population was approximately 25 percent black and approximately 71 percent Hispanic and its median household income was approximately $69,000 per year. (RJN 0002-03.) La Cañada Flintridge, by contrast, is 1.1 percent black and 9.8 percent Hispanic or Latino, and its median household income is more than $210,000. (*Id.*) The City of Compton has been a widely recognized symbol of black urban poverty at least since the late 1980s, when the album "Straight Outta Compton" by the hip-hop musical group N.W.A. popularized a new variant of hip-hop and became "one of the definitive works of the genre." (RJN 0013.)

County of Nassau (2d Cir. 2016) 819 F.3d 581, 608.) There, as here, the majority of project opponents did not make any overtly discriminatory statements and focused instead on issues like traffic, parking, and school overcrowding. (*MHANY Management, Inc. v. Village of Garden City* (E.D.N.Y. 2013) 985 F.Supp.2d 390, 417, aff'd sub nom. *Mhany Mgmt., Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581.) But this does not excuse a city's actions so long as the discriminatory animus of constituents was *one* "significant" factor motivating the decision. (*Id.* at 413-14; accord *United States v. Yonkers Bd. of Educ.* (2d Cir. 1987) 837 F.2d 1181, 1226 [discriminatory animus of constituents need not be the "dominant" factor motivating city's decision, only a "significant" factor]; *Ave. 6E Investments v. City of Yuma* (9th Cir. 2016) 818 F.3d 493, 505 [surveying caselaw and concluding that "the relevant cases clearly hold that a city's denial of a zoning change following discriminatory statements by members of the public supports a claim of discriminatory intent"].)

La Cañada Flintridge officials *clearly* acquiesced to the biases and prejudices of city residents when they revised the draft Housing Element's sites inventory and rezoning program to eliminate multiple "low-income" sites south of Foothill Boulevard. This was a blatant violation of California and Federal fair housing laws alike. (See Gov. Code, § 65008, subd. (b)(1)(C) [prohibiting "discrimination" based on a development's intended "occupancy by persons and families of very low, low, or moderate income"]; Cal. Code Regs, tit. 2, § 12161, subd. (c) [discriminatory intent can be inferred from public officials' acquiescence to prejudices and biases held by members of the public]; *Mhany Management, Inc., supra*, 819 F.3d 581 [inferring racially discriminatory intent from facts less egregious than those here].) And it precludes a finding that the City's October 2022 Housing Element substantially complied with the Housing Element law, which requires cities to "affirmatively further fair housing" when selecting sites for rezonings. (Gov. Code, § 65583, subd. (c)(1); *Martinez, supra,* 90 Cal.App.5th at p. 289 ["[I]f a municipality is engaging in housing discrimination, it is not affirmatively furthering fair housing."].)

B. The City Did Not Complete the Rezonings By the Statutory Deadline.

The Housing Element also requires cities that do not timely adopt a Housing Element to

complete their rezoning programs on an accelerated timeline. (See Gov. Code § 65583, subd. (c)(1)(A).) The City's statutory deadline to adopt a compliant Sixth Cycle Housing Element was October 15, 2021. (AR 443.) The City missed this deadline by more than 120 days, so it was obligated to complete the rezonings "no later than one year from" October 15, 2021. (See AR 4504-08; Gov. Code § 65583, subd. (c)(1)(A).) But the City did not complete the rezonings by October 15, 2022. Indeed, the October 2022 Housing Element did not even commit to completing the rezonings until October 2023—a full year late. (See AR at 4624, 4627-28, 4644, 4646 [committing to "rezone the properties … by October 2023"].) Because the City did not complete the rezonings by the statutory deadline, it was not in substantial compliance at the time of 600 Foothill's Preliminary Application on November 10, 2022. Indeed, because HCD did not certify the October 2022 Housing Element as substantially compliant before the City's rezoning deadline, as a matter of law the City could not have been substantially compliant until it completed those rezonings—which it did not do until November 2023. (See Gov. Code, § 65588, subd. (e)(4)(C)(iii).)

C. The City Did Not Assess the Suitability of Nonvacant Sites in its Inventory.

"The goal [of the sites inventory requirement in the Housing Element law] is not just to identify land, but to pinpoint sites that are adequate and realistically available for residential development targets for each income level." (*Martinez, supra*, 90 Cal.App.5th at p. 244.) The Legislature therefore imposed particularly stringent requirements on cities that rely on *nonvacant* sites to show that they have sufficient zoned capacity to accommodate their share of the regional housing needed. (See Gov. Code, § 65583.2, subd. (g)(1).) A housing element that relies on nonvacant sites for half or more of its designated low-income sites must "demonstrate that the existing use [on each nonvacant site] does not constitute an impediment to additional residential development." (Gov. Code, § 65583.2, subd. (g)(2).) "An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued." (*Id.*)

The October 2022 Housing Element did not provide individualized assessments of the

development potential of nonvacant sites, which constituted all but two of the low-income sites in the City's inventory. (AR 5264-65.) Instead, the City Council included a vague, conclusory statement in a resolution adopting the October 2022 Housing Element that simply asserted that none of the existing uses would impede residential development. (See AR 4506.) Nor is there substantial evidence in the record to rebut the statutory presumption that the existing uses on these nonvacant sites will impede residential development. In fact, there is clear evidence that the existing uses on many of these sites *are* impediments to residential development. To take just one example, site number 81 in the City's inventory is occupied by a Ross Dress for Less department store, and a deed of trust dated August 18, 2016 prohibits the owner of that property from demolishing or modifying the existing structure, or changing the use of the property, without permission from the lender. (AR 2222, 2238 at § 1.07(A).) The City Council was notified of this fact months before adoption of the October 2022 Housing Element (see AR 2206), but still failed to provide any explanation whatsoever for why it would not be impediment to redevelopment of that property into housing. The October 2022 Housing Element therefore did not substantially comply with the express statutory requirement that it assess whether any "existing leases or other contracts" might impede residential development on nonvacant sites in its sites inventory (Gov. Code, § 65583.2, subd. (g)(1)).

D. The City Did Not Realistically Assess the Development Capacity of Any Sites in its Inventory.

Beyond the specific analysis required for nonvacant sites, a housing element must "specify for each site," vacant or nonvacant, "the number of units that can *realistically* be accommodated." (Gov. Code, § 65583.2, subd. (c), emphasis added.) If a site has a minimum zoned density, that density serves as the baseline for calculating how many units the site can realistically accommodate. (*Id.* at subd. (c)(1).) The minimum density number must then be "adjusted" to account for the effects of land use controls, other constraints, and the availability of utilities. (Gov. Code, § 65583.2, subd. (c)(2); RJN 0041-43 [HCD Sites Inventory Guidebook explaining that "The capacity calculation must be adjusted to reflect the realistic

potential for residential development capacity on the sites in the inventory."].)[9]

The October 2022 Housing Element correctly identified the baseline densities for sites in its inventory (see, e.g., AR 5124, 5129), but it applied no "adjustment" at all to *any* of those sites. It needed to apply a significant downward adjustment on the number of units projected on each site to account for, among other constraints, the City's maximum floor-area ratio of 1.5 (AR 4607), its 80-percent maximum lot-coverage requirement (AR 4566), its 35-foot height limit (AR 4567), and significant parking requirements (AR 4572) for sites in mixed-use zones. Limits like these diminish the "realistic" possibility of achieving as many units as the minimum density hypothetically allows. The October 2022 Housing Element's failure to address them 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 for the City to accommodate its fair share of new housing development. Because the October 2022 Housing Element did not apply any adjustments at all to reflect the "realistic" capacities of the sites in its inventory, it did not substantially comply with the Housing Element law.

E. Fewer Than Half of the October 2022 Housing Element's Low-Income Sites Were Zoned Exclusively for Residential Use.

The October 2022 Housing Element was required to accommodate "[a]t least 50 percent of the very low and low-income [housing target] […] on sites […] for which nonresidential uses or mixed uses are not permitted." (Gov. Code § 65583.2, subd. (h).) Failing that, the October 2022 Housing Element had to "accommodate all of the very low and low-income housing need on sites designated for mixed use [that] allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project." (*Id.*) But the October 2022 Housing Element did neither. Instead, only 45 of the 483 very low- and low-income housing units in the City's inventory were located on sites meeting the

[9] Such adjustments for the impact of other land-use controls and development standards are critically important to a realistic assessment of a parcel's capacity. (See generally Sara C. Bronin, *Zoning by a Thousand Cuts* (2023) 50 PEPPERDINE L. REV. 719.)

statutory criteria. (AR at 5124-29.) The remaining units were located on sites the City said it would rezone to one of several "mixed use" and/or "Religious Institution Overlay" designations—none of which limit development to residential uses or require that residential uses occupy at least 50 percent of the total floor area. (See AR at 5124-29, 4607-10.) The October 2022 Housing Element therefore did not substantially comply with state law.

II. THE CITY DISAPPROVED 600 FOOTHILL'S PROJECT.

In this litigation, the City has previously argued that it did not "disapprove" 600 Foothill's builder's remedy project within the meaning of the HAA because it labeled both its March 1 letter to 600 Foothill and its May 1 City Council resolution "incompleteness determinations" rather than disapprovals. (See Respondent's Demurrer, filed August 29, 2023, at pp. 10-11.) The Court properly rejected this argument because the HAA states that it is to be construed broadly so as "to afford the fullest possible weight to the interest of, and the approval and provision of, housing" (Gov. Code, § 65589.5, subd. (a)(2)(L)), and because the statute's definition of the phrase "disapprove the housing development project" states that it "includes any instance in which a local agency…[v]otes on a proposed housing development project application and the application is disapproved" (*id.*, § 65589.5, subd. (h)(6); see Order Overruling Demurrer and Denying Motion to Strike, filed Nov. 22, 2023, at p. 4.).

The City indisputably "disapproved" 600 Foothill's entitlement application. On May 1, 2023, the full City Council considered 600 Foothill's appeal from the City's March 1 letter, which explained that, because the City was taking the position that its October 2022 Housing Element substantially complied with the Housing Element law, 600 Foothill's proposed project would need to be revised to comply with the City's zoning requirements. (AR 6280-81.) After a brief speech by Mayor Keith Eich, the City Council voted to adopt a formal resolution denying 600 Foothill's appeal. (AR 7160.) Like the March 1 letter, the May 1 resolution said nothing about any purported omissions from 600 Foothill's entitlement application. Instead, the resolution stated that the City Council denied 600 Foothill's appeal "on the basis that the 'builder's remedy' under the Housing Accountability Act does not apply and is not available for the project … because the City's Housing Element was, as of October 4, 2022, in

substantial compliance with the Housing Element law." (AR 7167.) At the hearing itself, moreover, Mayor Eich explained that "if the appeal is denied, the project will be processed accordingly as a standard, nonbuilder's remedy project, including any applicable environmental review." (AR 7103.) Voting on a formal resolution stating that a project is not eligible to be evaluated under a particular standard, and will instead be evaluated under another standard the City has *already concluded the project does not satisfy*, indisputably qualifies as a final "disapproval" within the HAA's definition of the term. (See Gov. Code, § 65589.5, subd. (h)(6); *Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1340 ["[W]hen all a plaintiff challenges is … the denial of a special project, the plaintiff need only show that the administrative agency has finally ruled on that project."].)

Indeed, the Legislature designed the HAA to combat exactly the kind of deliberate attempt to evade judicial review the City engaged in here. "Precisely because the HAA cabins the discretion of a local agency to reject proposals for new housing," the First District Court of Appeal recently explained, the statute jettisons conventional norms of deference to municipal land-use decisions in favor of "'more rigorous independent review' … to prevent [cities] from circumventing what was intended to be a strict limitation on [their] authority." (*Cal. Renters Legal Advocacy and Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 844 [quoting *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 299].) In this case, "rigorous independent review" requires the Court to look past the label the City Council affixed to their May 1 decision. The City cannot transform what clearly functioned as a final disapproval of the Project into an unreviewable, non-final decision simply by mislabeling it an "incompleteness determination."

Nor does the City's June 24, 2022 letter to 600 Foothill indicate that further administrative remedies were available. That letter began by repeating, for a third time, what the City had already made abundantly clear to 600 Foothill both in its March 1 letter and in the May 1 City Council resolution: that the City was taking the position that its October 2022 Housing Element substantially complied with state law, notwithstanding HCD's determination to the contrary, and that the City would not approve 600 Foothill's project in its current form

because it did not comply with the City's zoning rules. (AR 7174-78.) The City's suggestion that 600 Foothill revise the project to comply with zoning requirements does not demonstrate that that further administrative remedies were available, because the option to submit a different project is not a remedy for the City's illegal refusal to approve the project as submitted. (*Freeny*, *supra*, 216 Cal.App.4th at p. 1340.) Nor would it have made any sense for 600 Foothill to appeal the June 24 letter, which simply repeated the position the City had taken in both its March 1 letter and the May 1 resolution. Such an appeal would have been entirely futile because the City had already made plain, multiple times, that it would not approve the application unless 600 Foothill revised the project to comply with the City's zoning. (See *Felkay v. City of Santa Barbara* (2021) 62 Cal.App.5th 30, 40-41 [futility exception applied where city "made plain" it would not permit proposed development]; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 832-34 [futility exception applied where it was "inconceivable the city council would grant a variance for the very project whose prospective existence brought about the enactment of the rezoning"].)

The Court should grant Petitioner's Motion because the City's May 1 resolution was a final "disapproval" within the meaning of the HAA, and because any attempt to appeal the June 24 letter would have been futile.

III. THE COURT SHOULD ORDER THE PROJECT APPROVED DUE TO THE CITY'S BAD FAITH.

The HAA authorizes this Court to "issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section." (Gov. Code, § 65589.5, subd. (k)(1)(A)(ii).) Although the City has previously argued that its own failure to timely complete an environmental review of the project pursuant to the California Environmental Quality Act ("CEQA") prevents the Court from ordering the project approved (see Demurrer, filed Aug. 29, 2023, at pp. 10-11), the City is wrong. (See, e.g., *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 734 ["[A]lthough it may look a bit like putting

the cart before the horse, a lead agency can commit to a project before completing a thorough environmental review."].) Indeed, because CEQA applies only to "discretionary" decisions (see Pub. Res. Code, § 21080, subds. (a)-(b)), and because a finding of bad faith effectively removes any remaining discretion the City otherwise would have had to disapprove the project, CEQA will not be relevant at all if the Court finds the City acted in bad faith.

This is a rare case where the standard for bad faith is satisfied. City officials not only failed to condemn the discriminatory statements made by multiple members of the public at hearings shortly before they adopted the October 2022 Housing Element, they stated that they either agreed with those statements or had a duty to capitulate to the demands—which is exactly what they proceeded to do by reducing the maximum density of proposed "low-income" sites south of Foothill Boulevard to a level that they knew would render development financially infeasible, according to the City's own consultant. The City Council was warned multiple times at the September 12, 2022 hearing that this would be at odds with the City's obligation to affirmatively further fair housing. But on October 4, 2022, the City Council adopted a Housing Element that required these infeasibly low densities anyway. When 600 Foothill subsequently proposed a project under the HAA's builder's remedy, the City Council concocted a bizarre scheme to evade judicial review of their decision to disapprove that project, wherein they claimed that the project application was "incomplete" but refused to review the very application materials they claimed were "incomplete."

This is textbook bad faith. The Court therefore should exercise the authority granted by the Legislature to order the City to approve the project. In the alternative, the Court should order the City to process 600 Foothill's builder's remedy application pending the City's timely completion of CEQA review (see, e.g., Cal. Code Regs., tit. 14, § 15107, 15108), and retain jurisdiction until the City has completed that review and processed 600 Foothill's application.

CONCLUSION

The Court should order 600 Foothill's project approved, or else order the City to process the application in accordance with the HAA, because the City unlawfully disapproved the project due to its non-conformance with the City's legally unenforceable zoning rules.

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Respectfully submitted,

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