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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CALIFORNIA HOUSING DEFENSE FUND,

Petitioner and Plaintiff,

v.

CITY OF LA CAÑADA FLINTRIDGE,

Respondent and Defendant,

600 FOOTHILL OWNER, LP,

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

PEOPLE OF THE STATE OF CALIFORNIA'S, EX REL. ROB BONTA, AND CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S REPLY BRIEF

Date: February 20, 2024
Dept: 86
Judge: Hon. Mitchell L. Beckloff
Action Filed: July 25, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Despite the City of La Cañada Flintridge's ("the City's") protestations to the contrary, this case is simple. The People of the State of California and the California Department of Housing and Community Development ("HCD") (collectively, "the State"), simply ask the Court to enforce state housing law. Because the City did not have a housing element in substantial compliance with the law when 600 Foothill Owner, LP ("Foothill Owner") submitted its affordable housing development application, the City must process the application in accordance with the provisions of the Housing Accountability Act ("HAA") that are designed to fast-track affordable housing in jurisdictions that fail to comply with Housing Element Law obligations.

The City now concedes that "a local government cannot 'certify'" that a housing element is compliant with state law. (Ans. Br. at pp. 11-12.) Although that concession further simplifies the issues before this Court, it also reveals the City's haphazard and inconsistent approach to the very serious affordable housing matters presented. At no point during the relevant period did HCD indicate, let alone certify, that the City had a housing element in substantial compliance with state law, and yet the City contends that it "in good faith believed" its housing element was in substantial compliance and adopted a formal resolution saying so. (*Id.* at p. 19.) To the contrary, HCD repeatedly issued findings that the City did not have a housing element in substantial compliance with state law. But rather than making statutorily mandated findings as to why the City believed its draft element was in substantial compliance despite HCD's determinations, or seeking clarification from any court, the City chose to proceed in violation of state law.

What the City asks of this Court—to allow local governments to pretend a housing element is in substantial compliance with state law despite HCD's clear statements to the contrary and in the absence of a court ruling, and to deny affordable housing development projects as a result—contradicts Housing Element Law and undermines the state's legislatively adopted statutory housing scheme. Consequently, the State requests that this Court grant its petition for writ of mandate, vacate the City's denial of the Foothill Owner development project, and compel the City to process it in accordance with the law. The State also requests that the Court issue a declaratory

judgment that the City did not have a substantially compliant housing element between October 16, 2021 and November 17, 2023, and that HCD is the only statutorily vested agency that can certify substantial compliance.

ARGUMENT

I. THE CITY LACKS AUTHORITY TO SELF-CERTIFY ITS HOUSING ELEMENT AS SUBSTANTIALLY COMPLIANT WITH STATE LAW

The City, for the first time in its opposition brief, concedes that it is without authority to self-certify its housing element as substantially compliant with state law, or back-date the same. (Ans. Br. at pp. 11-12.) This acknowledgment plainly contradicts the actions the City took during the housing element revision and review process, as evidenced, for example, by the City Council's adopted resolution on February 21, 2023. (AR 6274-6279; AR 6279 ["The City further *certifies* that the City's Housing Element was in substantial compliance with State Housing Element law as of the October 4, 2022 Housing Element"] [emphasis added].) Given the City's concession, a local government's ability to self-certify a housing element is no longer a contested issue in this case. However, a declaratory judgment from this court confirming that a local government cannot self-certify or backdate a housing element is warranted, given the City's inconsistent position.

Although the City now disclaims authority to self-certify and backdate its housing element, without an order from this Court nothing stops it from doing so in the future. (Cf. *People ex rel. Feuer v. Super. Ct. (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1385 [citing *United States v. W.T. Grant Co.* (1953) 345 U.S. 629, 638 and *Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453] ["the trial court must also decide if [the order] affecting future conduct should be part of the relief it grants"].) The risk that the City will do so is apparent given the City's approach to this case: while it claims "There is No Such Thing as Backdating or Self-Certification," (Ans. Br. at p. 11), and maintains that it made no attempt to do so, here, it also says, confusingly, that "there is a provision in [Government Code, s]ection 65585(f)(2) which *allows* a city to 'self-certify' by adopting its draft element without changes," (*Id.* at p. 21 [emphasis added]), which is precisely what the City did here, albeit without making

the required written findings. (See Gov. Code, § 65585, subd. (f)(2).) The City goes on to explain that, although section 65585(f)(2) "allows" a City to self-certify compliance, the City Council decided "that it was not going to 'self-certify.'" (*Id.* at p. 21.) While these statements are difficult to square with the City's avowal that "there is no dispute that a local government cannot 'certify' a housing element compliant," (*Id.* at pp. 11-12), it appears the City may be attempting to preserve its right to self-certify in a future case. This Court should reject that attempt by issuing the State's requested declaratory judgment affirming that a local jurisdiction cannot self-certify its housing element. (Pet'rs-Intervenors' Op. Br. at pp. 14-15.)

II. HCD IS STATUTORILY AUTHORIZED TO CERTIFY HOUSING ELEMENTS AS SUBSTANTIALLY COMPLIANT WITH STATE LAW

HCD is the sole agency with statutory authority to certify a housing element as substantially compliant with state law. Here, again, the City's position appears inconsistent, as it argues that HCD is without authority to determine substantial compliance under the California Constitution, yet it still acknowledges HCD's role, in that HCD "refus[e]d to certify the City's Housing element as substantially compliant." (Ans. Br. at pp. 15, 18.) The City argues that HCD is attempting to evade court review of its housing element substantial compliance determinations. (*Id.* at pp. 17-19.) But, to the contrary, in this action the State requests a declaratory judgment that the City "did not have a housing element that substantially complied with state law" during the relevant period. (Pet'rs-Intervenors' Pet. at p. 13.)

A. Housing Element Law Validly Delegates Oversight Authority to HCD

Pursuant to the plain text of Housing Element Law, HCD is the only agency that can certify a housing element as substantially compliant with that law. Housing Element Law vests HCD alone with the authority to do the following: review draft and adopted housing elements, determine whether such elements substantially comply with the law, and revoke a previous compliance determination if a local government subsequently violates state housing element law. (Gov. Code, § 65585, subds. (d), (h), (i)(1)(B).) Housing Element Law prescribes a specific process in which a local government submits a draft housing element and revisions to HCD prior to the timely adoption of a draft housing element that "substantially complies" with the law.

(Gov. Code, § 65585, subds. (b)(1), (e).) Moreover, Housing Element Law grants HCD the power to determine whether a "draft element or draft amendment substantially complies with" the law. (Gov. Code, § 65585, subds. (d), (f).) The statutory scheme is clear: HCD is the agency vested with the statutory authority to certify housing elements as substantially compliant with state law.

The City argues that certain statutory provisions—for example, Government Code sections 65583.4(a)(2) and 65588(e)(4)(c)—appear to grant HCD "unchecked authority" that threatens "the rights of the City." (Ans. Br. at pp. 18-19.) But, as the City itself acknowledges, Housing Element Law provides a codified path for a local government to dispute HCD's determination that a housing element does not substantially comply with the law: adopt the draft housing element without the changes recommended by HCD, along with a resolution containing findings that explain its belief that the draft substantially complies with the law." (See *id.* at 21 [citing Gov. Code, § 65585, subd. (f)(2)].) At that point, the local government must again submit the adopted element to HCD for its review and findings of compliance. (Gov. Code, § 65585, subds. (g), (h).) The City elides these provisions and yet, at the same time, admits that it decided "that it was not going to" take the path provided by section 65585(f)(2). (*Id.* at p. 21.)

Moreover, the City's argument about HCD's purportedly "unchecked authority" derives from a false premise: that HCD claims authority to "finally determine 'substantial compliance' under the California Constitution." (Ans. Br. at pp. 16, 18-19.) That is a red herring. There is no dispute that HCD's findings are subject to judicial review, and that the judiciary is the ultimate arbiter of compliance. (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 242 [citations omitted]; *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372-374.) In this very case, the State and California Housing Defense Fund both expressly ask the *Court* to determine that the City's housing element was not in compliance with the law at the time the developer submitted its application, triggering the Builder's Remedy. The City itself could have petitioned for a judicial determination of compliance, had it taken appropriate steps to dispute HCD's findings. (Gov. Code, § 65585, subd. (f).) But for whatever reason, the City never did so.

So, while HCD's determination is subject to judicial review, in the absence of a judicial determination, HCD—and only HCD—has the authority to certify a housing element as

compliant with the law. (See *Martinez*, *supra*, 90 Cal.App.5th at pp. 241-243; see Pet'rs-Intervenors' Op. Br. at pp. 2-4, 15.) As courts have held in many other contexts, it is entirely within the legislature's power to delegate authority to an agency to make findings whether a regulated entity has complied with the law. (See *People ex rel. Younger v. Cnty. of El Dorado* (1971) 5 Cal.3d 480, 507 [discussing the legislative power to "make fundamental policy decisions and leave[] to some other body . . . the task of achieving the goals envisioned in the legislation]; *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 326 [upholding an agency's delegated power to make land use and building decisions].) Likewise, the legislature may delegate decision-making authority to an agency from which certain corrective action may flow. (Cf. *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 104-106.)

Here, the legislature determined that mandatory rezoning is triggered by a local government's failure to timely adopt a housing element that HCD determined to be in substantial compliance with the law. (Gov. Code, § 65588, subd. (e)(4)(C)(iii).) The City argues that, because a rezoning deadline hinges on HCD's substantial compliance determination, HCD has been delegated "unchecked power," or, relatedly, that rezoning and compliance cannot be statutorily linked because rezoning cannot precede compliance.[1] (Ans. Br. at pp. 12-16, 18-19.) But not only is the rezoning consequence well within HCD's delegated authority, rezonings can occur prior to a finding of substantial compliance, in part because a housing element is just one component of a local government's general plan, which includes a separate land use element. (Gov. Code, §§ 65300, 65302.) Moreover, a zoning ordinance is consistent with a general plan if, as the City itself notes, a local government has adopted a general plan and the land uses are compatible with the general plan. (Ans. Br. at p. 13; Gov. Code § 65860, subd. (a).) The sequence of a substantial compliance certification and rezoning does not impede general plan compliance, or a local government's ability to adopt a general plan.

[1] In *Californians for Homeownership, Inc. v. City of La Cañada Flintridge*, (Super. Ct. L.A. County, Sept. 5, 2023, 23STCP00699), the court required the City to complete the rezonings which it now states arise from the "unchecked authority" of HCD. Those rezonings, which the City completed last year, led to HCD's ultimate certification of the City's housing element as substantially compliant on November 17, 2023. (See HCD letter to Dr. Daniel Jordan, La Cañada Flintridge City Manager (Nov. 17, 2023) [hereinafter "November 17, 2023 Letter"], attached as Exhibit 3 to the State's Op. Br.)

B. HCD's Written Findings Are Entitled to Deference

Although HCD's housing element compliance determinations are not binding on courts, courts generally defer to those determinations "unless . . . clearly erroneous or unauthorized." (*Martinez*, *supra*, 90 Cal.App.5th at p. 243.) This heavy presumption in favor of HCD's findings may be overcome only by the plain meaning of statutory text. (*Ibid.*) The deference due to HCD's interpretations is consistent with the general principles governing deference to agency findings. Two categories of factors pertain to the weight afforded to an agency's informal statutory interpretation. (See *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1193.) The first category includes those factors "indicating a comparative interpretive advantage the agency has over the court due to . . . the technical nature of the legal text under consideration. The second . . . includes factors indicating that the agency's interpretation of a rule is likely to be correct, such as the agency's . . . longstanding maintenance of the interpretation in question." (*Ibid*. [citation omitted].) The greater the comparative advantage and reasonableness of the agency's determination, the greater the deference to the agency. (*Ibid*.)

As explained in the State's opening brief, both categories of factors favor deference to HCD's findings in this case. (Pet'rs-Intervenors' Op. Br. at pp. 12-15.) First, the review process of the City's several versions of its housing element involved technical analysis of the materials submitted by the City and members of the public.[2] Second, HCD's interpretation of such materials and text were consistent over several rounds of review.[3] Accordingly, in the absence of a finding that HCD's determinations were "clearly erroneous or unauthorized," or contradicted by the plain text of Housing Element Law, HCD's determinations are entitled to deference.

[2] The City appears to assert that members of the public "manipulated" and "monkeyed" with the housing element review process. (Ans. Br. at p. 10; see also Susan Koleda ("Director Koleda") Dec., ¶ 51.) But HCD is statutorily required to "receive and consider any written comments from any public agency, group, or person regarding the draft or adopted element or amendment under review." (Gov. Code, § 65585, subd. (c).)

[3] The City argues that HCD constantly moved the "goal posts" regarding substantial compliance. (Ans. Br. at p. 8 [citing Director Koleda Dec., ¶ 49.) Such an argument ignores the iterative nature of HCD's review, during which HCD is statutorily required to receive and consider new information, for example, public comment, and react accordingly. (See Gov. Code, § 65585, subd. (c).)

In an attempt to erode HCD's statutorily mandated authority, the City misconstrues applicable case law. (Ans. Br. at pp. 17-19.) The City relies on *Buena Vista Gardens Apartments Association v. City of San Diego* (1985) 175 Cal.App.3d 289, *Fonseca*, and *Martinez*, to assert judicial review over housing element compliance determinations. (Ans. Br. at p. 17.) As set forth above, judicial review over HCD housing element compliance determinations is uncontested. However, as these courts held—and as the City steadfastly ignores—HCD's written findings are entitled to deference when consonant with Housing Element Law. (*Martinez*, *supra*, 90 Cal.App.5th at p. 243; *Fonseca*, *supra*, 148 Cal.App.4th at p. 1194; *Buena Vista*, 175 Cal.App.3d at pp. 297-298.) The City also misconstrues the applicability of *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113, fn. 13, and *Boling v. Public Employees Relations Bd.* (2018) 5 Cal.5th 898, 911 (citing *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 12), both of which in fact state that an agency's—specifically HCD's in *Hoffmaster*—interpretation of relevant law are entitled to great weight. Although the City may disagree with HCD's written findings, only HCD is the statutorily authorized agency to determine whether a housing element substantially complies with the law.

III. THE CITY DID NOT HAVE A SUBSTANTIALLY COMPLIANT HOUSING ELEMENT BETWEEN OCTOBER 2021 AND NOVEMBER 2023

The administrative record in this matter demonstrates the City's failure to adopt a housing element by October 16, 2021 and through November 17, 2023 that substantially complied with Housing Element Law. The City asserts that its second version housing element, adopted on October 4, 2022, was substantially compliant with state law. (Ans. Br. at pp. 5-16; see AR 3733-3736; see also AR 4504-4508.) But HCD reviewed that housing element and, on December 6, 2022, determined that it did not substantially comply with Housing Element Law. (AR 5263 ["additional revisions are necessary to fully comply with State Housing Element Law"].) HCD advised the City that the draft element failed to affirmatively further fair housing ("AFFH") (AR 5263-5264); failed to include a complete inventory of land suitable and available for residential development in a manner consistent with its Regional Housing Needs Allocation ("RHNA")

determination (AR 5264-5265); and failed to describe the amendments the City would make to remove constraints on housing for persons with disabilities (AR 5265).

The City now asserts that its second housing element was substantially compliant with Housing Element Law based on: (1) the relevant infrastructure and topography of the City; (2) the City's purported compliance with AFFH requirements; and (3) the City's compliant site inventory.[4]

Preliminarily, the first argument has no bearing on substantial compliance—certainly the City, along with the hundreds of other local jurisdictions tasked with adopting a substantially compliant housing element, must contest with the existing infrastructure and topography within municipal borders—and the City points to no statutory provision allowing for delay in adopting a housing element due to any physical characteristics within a local government's boundaries. Even if those issues presented challenges, they were clearly resolvable. As to infrastructure, while HCD's December 3, 2021 review included a finding that the City must demonstrate sufficient existing or planned utilities, it recognized that the element included sufficient information to demonstrate the availability of water and sewer infrastructure. (AR 443-453.) And to the extent topography complicated the City's development of a site index, that too was ultimately resolved. Thus, the City's claims that the infrastructure and topography of the City somehow excuse the City's lack of compliance are unavailing.

A. Substantive Changes Occurred to Later Versions of the Housing Element, Particularly in Regards to the Noncompliant Site Inventory

The City (incorrectly) asserts that none of the sites included in the site inventory changed between the October 4, 2022 and the February 21, 2023 versions, and therefore the earlier version must have been compliant. (Ans. Br. at pp. 8-11.) But the site inventory demands much more than a mere list of sites. For example, if nonvacant sites included in the site inventory have existing uses, those uses are "presumed to impede additional residential development, absent findings

[4] The City also contends that the City Director of Community Development Susan Koleda's comments that the second version of the housing element would require additional "changes" and "clarifications" do not cut against substantial compliance. (Ans. Br. at p. 11.) But Director Koleda's statements flatly contradict the City's position that it "believed" its housing element was in substantial compliance.

based on substantial evidence that the use is likely to be discontinued during the planning period." (Gov. Code, §§ 65583, subds. (a)(3), (c)(1); 65583.2, subd. (g)(2).) HCD informed the City in its December 6, 2022 letter that the second version housing element was noncompliant with state law because it relied on nonvacant sites to accommodate most of housing needs for lower-income households, yet was not based on substantial evidence that the existing uses would not impede development. (AR 5264; Gov. Code, §§ 65583, subds. (a)(3), (c)(1); 65583.2, subd. (g)(2).) Thus, the site inventory was, on its face, deficient under state law.

Martinez highlighted the importance of the information required in a compliant sites inventory, including critical information "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 [emphasis added].) The record in this matter, and Director Koleda's declaration filed in support of the City's opposition brief (and its supporting exhibits), demonstrate that the October 4, 2022 housing element site inventory did not include sufficient information to show that the sites were "realistically" available for residential development.[5]

Appendix F to the second version housing element is an example of the insufficient nature of the City's site inventory in the second draft housing element. Appendix F lists public comments and responses to the draft, including objections to the inclusion of certain sites in the site inventory, as well as details regarding nonvacant sites. (AR 5210-5233; AR 5123-5129.) One such nonvacant site, the La Cañada United Methodist Church site, was included in the second version housing element, but confirmation of interest in potential development was not made until January 2023, well after the October 4, 2022 adoption of the second version of the housing element. (Compare Director Koleda Dec., at p. 32, with AR 5126.)

On a separate site, the City received a letter from the director of a preschool listed on the site inventory. That letter stated that "[t]he school owns the property outright and has no intention of discontinuing the current use whatsoever for the foreseeable future, especially and including

[5] The State has filed objections concurrently with this Reply to Director Koleda's declaration, the attached exhibits, and the City's request for judicial notice. Any discussion of Director Koleda's declaration or the supporting exhibits does not waive those objections.

the next eight year planning period." (AR 12812; AR 5233.) The City noted that objection, yet still included the site in its second version inventory.[6] (AR 5233; AR 5126.)

Six other sites (Nos. 29, 68, 69, 87, 88, 98, 99) were included in the second version housing element site inventory, but noted as "buffer" sites on the City's third version housing element and were not included by HCD in its ultimate certification of the site inventory. (Compare AR 5123-5129, with AR 6054-6061; AR 6298 [noting HCD did not consider the sites labeled only as of February 21, 2023 as "buffer" sites].) These six sites, which were ultimately marked as "buffer" sites in the City's site inventory, were nevertheless included as valid sites in its second version inventory. Such a change in characterization is a major substantive change in the site inventory.

A comparison of the facts of the *Martinez* case is helpful. In *Martinez*, where the court deferred to HCD's determination that a local university site was appropriately included in the City of Clovis's site index, the record included evidence of a dialogue between City of Clovis officials and the university. (See *Martinez*, *supra*, 90 Cal.App.5th at pp. 249-250.) There was documented communication between university staff and HCD about the need for additional student housing and the rezoning of sites on the City's inventory. (*Ibid*.) In this case, however, the City fails to document with substantial evidence that nonvacant sites listed in the second version inventory could realistically be developed in a manner to satisfy the City's RHNA obligations. In fact, the City made substantive, critical revisions between its second and third version inventories.

As detailed in Director Koleda's declaration, the specific changes made between the second and third housing elements undermine the City's claim that the second draft of the housing element substantially complied with Housing Element Law. (Director Koleda Dec., at pp. 32-35.) While she opines that the changes were not "critical," she also admits that, for example, certain sites were only verified as "eligible for inclusion" on the site inventory between the second and third version of the housing element. (*Id.* at p. 32 ["New language [added to the third version] did not change any parcels . . . *and verified sites were eligible for inclusion*."] [emphasis added].)

[6] The City includes a letter dated June 16, 2023, ***well after*** its October 4, 2022 or February 21, 2023 housing elements were adopted, in its supporting documents purporting to state that the preschool site "may be interested in re-development should circumstances change." (Exh. DD, Peter Sheridan Dec.)

Specifically, Director Koleda notes that "in January 2023, La Cañada United Methodist Church provided written confirmation of . . . interest [in working with non-profit housing providers to build needed low income housing]." (*Ibid.*)

Director Koleda's concession contradicts the argument that inclusion of nonvacant sites on the second version site inventory was supported by substantial evidence.[7] The church's confirmation of interest is substantial evidence coming to light *after* the City adopted the October 4, 2022 second version housing element. The addition of La Cañada United Methodist Church's written confirmation after the second version housing element closely resembles the university's and City of Clovis officials' back-and-forth in *Martinez*. (See *Martinez*, *supra*, 90 Cal.App.5th at pp. 249-250.) The new language added to the third version of the housing element ultimately led to HCD's certification of the housing element as substantially compliant, but only after the requisite rezonings. (AR 6297-6300; November 17, 2023 Letter.)

Importantly, the City concedes that the site inventory HCD ultimately certified was only deemed compliant in 2023 "after . . . communications" and "data clarification" were added. (Ans. Br. at pp. 10-11.) Thus, the City acknowledges that significant changes were made to the second version site inventory before HCD ultimately certified the third version as substantially compliant. Accordingly, the Court should affirm HCD's determination that the City lacked a substantially compliant housing element on October 4, 2022, in part due the noncompliant site inventory, and then again on February 21, 2023, because of the failure to rezone within the one-year statutory deadline of October 15, 2021. (AR 7170-7171; AR 6297-6300; Gov. Code, § 65588, subd. (e)(4)(C)(iii).)

B. The City Fails to Show that it Complied with AFFH Requirements

In its December 6, 2022 letter, HCD determined that the City failed to comply with AFFH requirements because the housing element did not include an assessment of how the distribution

[7] The City argues that its site inventory was supported by substantial evidence because it used a model endorsed by HCD and it sent "TWO mailings to each commercial and religious property owner in the City." (Ans. Br. at p. 10.) HCD provides general resources, including models and guidelines, in an effort to help cities comply with Housing Element Law, but mere use of those resources does not provide a rebuttable presumption of substantial compliance with state law in any specific situation. HCD's certification and written findings of substantial compliance alone provide such a presumption. (See *Martinez*, *supra*, 90 Cal.App.5th at p. 243.)

of households based on income levels exacerbates or remedies fair housing conditions. (AR 5263-5264.) The City argues that it took affirmative measures to comply with AFFH requirements, including by conducting housing workshops and community outreach. (Ans. Br. at pp. 7-8.) But the City fails to acknowledge the statutory requirements which HCD cited in its December 6, 2022 letter regarding the City's AFFH deficiencies. (AR 5263.) Government Code section 65583 includes five components that "shall" be included in a local government's assessment of fair housing, including, but not limited to, an "assessment of the contributing factors . . . for the fair housing issues" and "[s]trategies and actions to implement [the jurisdiction's fair housing] priorities and goals." (Gov. Code, § 65583, subds. (c)(10)(A)(iii)-(v).) The City failed to comply with the statutory mandates of Housing Element Law, as HCD concluded when it determined the second version housing element failed to substantially comply with state law.

C. The City Raises Improper and Irrelevant Arguments Regarding a Non-Party and Justiciability

To further complicate the straightforward nature of the State's claims, the City asserts inapposite arguments regarding a non-party and the justiciability of the State's claims. As to the non-party, the City appears to contend that it was harmed by the Southern California Association of Governments ("SCAG"), which is not a party to this action. (Ans. Br. at pp. 8-9.) In any event, SCAG's actions do not relate to the City's failure to adopt a housing element in substantial compliance with state law between October 2021 and November 2023. SCAG's RHNA determination and allocation process are not pertinent to the State's claims in this action.[8]

As to justiciability, the City's arguments regarding exhaustion of administrative remedies (Ans. Br. at p. 22); a "premature" writ (*id.* at pp. 22-23); environmental review (*id.* at p. 23); "disapproval" under the HAA (*ibid.*); and Government Code section 65589.5, subdivision (m), of

[8] Indeed, the City's discussion of the RHNA determination and allocation process indicates the City was amply prepared to timely adopt a housing element in substantial compliance with state law. As noted by the City, and by Director Koleda, the City's RHNA allocation only increased by two dwelling units between March 22, 2021 and July 1, 2021. (Director Koleda Dec., ¶ 20.) The City submitted its second draft housing element on October 4, 2022, well over a year after the RHNA allocation was finalized. It clearly had sufficient time to accommodate its RHNA allocation, or at the very least, the two additional dwelling units added between March and July 2021.

the HAA and Code of Civil Procedure section 1094.5 administrative writs of mandate (*id.* at p. 24), are similarly inapplicable to the State's claims, for several reasons. First, the State seeks a writ of mandate pursuant to Code of Civil Procedure section 1085 to compel agency action unlawfully withheld—here, the mere processing of the Foothill Owner application in accordance with the law. Such a section 1085 request is not cabined by an administrative record, and is not subject to the same exhaustion concerns.[9] Similarly, the City's arguments that a writ to compel processing of the application with the law is premature fail because the City unlawfully certified its housing element as substantially compliant as a basis to even process the application. The City's "disapproval" of the Foothill Owner application occurred in the context of its unlawful certification of its housing element, and the State's writ request simply asks that this Court require the City to process the application. Finally, the State seeks a declaratory judgment that the City's housing element was not substantially compliant, and a related writ pursuant to section 1085 to compel the City to comply with section 65589.5. (Gov. Code, § 65587, subd. (b) [an action enforcing Housing Element Law shall be brought under section 1085].) The State does not request a specific remedy pursuant to section 65589.5(m) and review of an administrative action through a section 1094.5 writ, but rather that the City be compelled to process the Foothill Owner application in accordance with the applicable provisions of the HAA.

IV. IN THE ABSENCE OF A SUBSTANTIALLY COMPLIANT HOUSING ELEMENT, THE CITY MUST PROCESS THE APPLICATION IN ACCORDANCE WITH THE LAW

Housing Element Law includes consequences for the failure to timely adopt a housing element in substantial compliance with state law, including the Builder's Remedy, which limits the government's ability to reject projects with certain affordable housing components. (Gov. Code, § 65589.5, subd. (d)(5).) Specifically, a local government may not disapprove a housing application because of zoning or land use inconsistency unless it has "adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article." (Gov. Code, § 65589.5, subd. (d)(5).) Thus, only jurisdictions that have adopted a housing

[9] Nevertheless, HCD raised the issues addressed in the State's petition and complaint in its Notice of Violation issued to the City regarding its violation of the HAA in disapproving the Foothill Owner application on May 1, 2023 and unlawful self-certification of its housing element. (AR 7170-7175.)

element "in substantial compliance" with Housing Element Law may disapprove an affordable housing project as "inconsistent with both the jurisdiction's zoning ordinance and general plan use designation."[10] (*Ibid*.) As demonstrated by the administrative record and the record in this case, on November 14, 2022 (the date Foothill Owner submitted a Builder's Remedy application), the City did not have a certified substantially compliant housing element. Consequently, it could not deny the application based on zoning or general plan inconsistency.

The City contends that the statutory language "as it existed on the date the application was deemed complete" applies only to the applicable zoning ordinance and general plan, and does not relate to the date a housing element is deemed in substantial compliance. (Ans. Br. at pp. 24-25.) But such a reading would render the Builder's Remedy meaningless, because it would allow a local government to receive a Builder's Remedy application, or several, and then delay determination until it had adopted a housing element in substantial compliance with the law. The City cites no authority in support of its statutory interpretation, and accordingly, the Court should follow the statute's plain text: Builder's Remedy applications are vested at the time of application, not at the time a local government renders a decision regarding the application.

CONCLUSION

For the reasons set forth above, the Court should grant the State's petition for writ of mandate and compel processing of Foothill Owner's affordable housing development application in accordance with the law, and enter a declaratory judgment that the City lacked a substantially compliant housing element and that HCD is the only agency statutorily vested to certify housing elements as substantially compliant with state law.

[10] An affordable housing project, for these purposes, is statutorily defined as designating either 20 percent of the total units for lower-income households or 100 percent of the units for moderate- or middle-income households. (Gov. Code, § 65589.5, subd. (h)(3); AR 6294 at fn.1.)

Dated: February 20, 2024

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Cal. Housing Defense Fund v. City of La Cañada Flintridge**
No.: **Los Angeles County Superior Court Case No.23STCP02614**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On February 20, 2024, I served the attached:

1. PEOPLE OF THE STATE OF CALIFORNIA'S, EX REL. ROB BONTA, AND CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S REPLY BRIEF;
2. PEOPLE OF THE STATE OF CALIFORNIA'S, EX REL. ROB BONTA, AND CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S OBJECTIONS TO DECLARATION OF SUSAN KOLEDA AND SUPPORTING EXHIBITS;
3. [PROPOSED] ORDER ON PEOPLE OF THE STATE OF CALIFORNIA'S, EX REL. ROB BONTA, AND CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S OBJECTIONS TO DECLARATION OF SUSAN KOLEDA AND SUPPORTING EXHIBITS;
4. PEOPLE OF THE STATE OF CALIFORNIA'S, EX REL. ROB BONTA, AND CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S OBJECTIONS TO RESPONDENTS' REQUEST FOR JUDICIAL NOTICE; AND
5. [PROPOSED] ORDER ON PEOPLE OF THE STATE OF CALIFORNIA'S, EX REL. ROB BONTA, AND CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT'S OBJECTIONS TO RESPONDENTS' REQUEST FOR JUDICIAL NOTICE

by transmitting a true copy via electronic mail as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on February 20, 2024, at Oakland, California.

Leticia Martinez-Carter
Declarant

Leticia Martinez-Carter
Signature

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