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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

YES IN MY BACK YARD, a California nonprofit corporation, and SONJA TRAUSS,

Petitioners and Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO BOARD OF SUPERVISORS, and DOES 1-25,

Respondents and Defendants.

FIRST CHURCH OF CHRIST, SCIENTIST SAN FRANCISCO, FORGE DEVELOPMENT PARTNERS, LLC, TENDERLOIN HOUSING CLINIC, and PACIFIC BAY INN, INC.,

Real Parties in Interest.

Case No. CPF-21-517651

CITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO FIRST AMENDED PETITION

Hearing Date: June 23, 2022
Hearing Judge: Honorable Charles F. Haines
Time: 9:30 a.m.
Place: Dept. 501

Date Action Filed: December 30, 2021

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INTRODUCTION

Petitioners challenge the City's denial of a Conditional Use Authorization for a project that exceeds objective standards for building height, bulk, open space, and loading under the San Francisco Planning Code. The Court should dismiss the Petition. First, Petitioners fail to state facts sufficient for a cause of action under the Housing Accountability Act (HAA) because the project at issue does not comply with applicable, objective zoning standards, a threshold requirement for relief under the Act. Second, declatory relief is unavailable because administrative mandamus offers an adequate remedy under Petitioners' HAA claim, and Petitioners fail to otherwise allege an actual controversy sufficient for declaratory relief. Third, Petitioners' pleading for any relief outside the HAA is uncertain, and they have failed to exhaust their administrative remedies for any such claim, thus failing to preserve it for judicial review. For these reasons, the City respectfully submits that the First Amended Petition should be dismissed.

STATEMENT OF FACTS

I. San Francisco's Conditional Use Authorization ("CUA") Process

The San Francisco Planning Code divides the City into zoning districts with corresponding development standards and permitted uses.[1] (S.F. Planning Code, §§ 201, 202, 202.1.) A Conditional Use "allows the Planning Commission to consider uses or projects that may be necessary or desirable in a particular neighborhood, but which are not allowed as a matter of right within a particular zoning district." (*Id.* at §§ 102, 202.) A Conditional Use Authorization thus requires a public hearing before the Planning Commission (*id.* at § 303) and the Board of Supervisors on appeal (*id.* at § 308.1). Authorization is also subject to conditions of approval that the Commission, or the Board on appeal (*id.* at § 308.1, subd. (d)), finds necessary to secure Planning Code objectives. (*Id.* at § 303, subd. (d).) These conditions of approval may be modified under the procedures for a new CUA. (*Id.* at § 303, subd. (e).)

Specified exceptions to quantitative zoning standards are permitted only through the CUA process. For example, new construction in an RC District that exceeds 50 feet in height is "permitted only . . . according to the procedures for conditional use approval in Section 303." (*Id.* at § 271, subd.

[1] Unless otherwise noted, hereafter the "Code" refers to the San Francisco Planning Code.

(b).) A CUA may also waive or modify additional Code standards for projects of "considerable size" (at least 0.5 acres) that qualify as a Planned Unit Development ("PUD"). (*Id.* at § 304.)

II. CUA for the Original (Dwelling Unit) Project

In October 2013, the San Francisco Planning Department ("Department") received an Application for a Preliminary Project Assessment ("PPA") for a proposed project at 450 O'Farrell Street. (Request for Judicial Notice, "RJN," Ex. A.) In December 2013, the Department issued the PPA based on the project site's location in San Francisco's Uptown Tenderloin Historic District, North of Market Residential Special Use District ("NOMRSUD"), Residential-Commercial, High Density ("RC-4") District, and 80-130-T Height and Bulk District. (RJN, Ex. B.) In summary, the Department found that the project required a CUA and several variances because it proposed to exceed the Code standards pertaining to building height, bulk, rear yard space, and unit exposure. (*Id.* at 006-008.)

On November 21, 2014, the applicant (or Project Sponsor), 450 O'Farrell Partners, LLC (authorized agent of property owner Fifth Church of Christ, Scientist) filed an Environmental Evaluation Application ("EEA") for environmental review of the project. (RJN, Ex.C, 002.) On September 8, 2015 (and thereafter through revised submissions), the Sponsor applied for a CUA (Application No. 2013.1535CUA) to construct the "Original Project." (*Ibid*.) The Original Project proposed to demolish three existing buildings at 450-474 O'Farrell Street and 532 Jones Street (containing a church, commercial uses, and five residential units); merge the three lots into a single parcel; and construct a new 13-story (130-foot) mixed-use building containing up to 176 dwelling units, new religious uses, commercial uses, parking, and private and common open space. (*Id.* at 3-4.)

The Sponsor applied for a CUA to exceed the applicable base height limit in RC Districts (under Code Section 253), the 80-foot base height limit in the NOMRSUD (under Section 263.7), applicable limits on building bulk (under Section 271); to establish a new religious institutional use in an RC District (under Section 209.3) and to demolish existing residential units (under Section 317). (RJN, Ex.C, 002.) The application also sought designation as a PUD in order to obtain exceptions from the Code standards for rear yard (Section 134), dwelling unit exposure (Section 140), permitted obstructions (Section 136), and off-street loading (Section 152). (*Ibid.*)

On September 13, 2018, the Planning Commission certified the project Environmental Impact Report ("EIR") and approved Application No. 2013.1535CUA, subject to the conditions of approval in Exhibit A to Commission Motion No. 20281. (RJN, Ex. C, pp. 2-3.)

On October 23, 2018, San Francisco Heritage appealed the Commission's EIR certification and CUA approval to the Board of Supervisors. (RJN, Ex. D.) On November 13, 2018, following public hearing on the appeal, the Board voted to approve the EIR certification (RJN, Ex. E) and the CUA for the Original Project (RJN, Ex. F).

III. CUA for the Revised (Group Housing) Project

On January 24, 2020, the Project Sponsor (now Forge Development Partners, LLC, co-sponsoring with Fifth Church of Christ, Scientist) filed Application No. 2013.1535CUA-02 with the Planning Department to amend the CUA approved for the Original Project. (RJN, Ex. G, 013.) In summary, the application sought to replace the previously approved dwelling units with group housing. (RJN, Ex.H, 004.) Based on the proposed project changes, on December 21, 2020, the Department issued an addendum to the previously certified EIR. (RJN, Ex. G, 013.)

Members of the community expressed concern that the shift to group housing came at the expense of family-sized units, and on April l5, 2021, the Planning Commission heard two versions of the project. (RJN, Ex. I, 002.) "Version 2" (reviewed in the December 2020 Addendum) proposed to construct 302 group housing rooms and accommodate 316 beds. (*Ibid.*) "Version 3" reflected the sponsor's response to community concerns and included "larger group housing rooms . . . intended to serve families." (*Ibid.*) This version increased the number of rooms from 302 to 316 and the number of beds from 316 to 632. (*Ibid.*) Because Version 3 required revising the EIR addendum and presented unresolved Code compliance concerns, the hearing on the CUA was continued. (RJN, Ex. G, 010.)

On June 10, 2021, the Project Sponsor revised Application No. 2013.1535CUA-02 to reflect the latest version of the project (Version 3B). (RJN, Ex.J, 005) This "Revised Project" generally proposed to replace the previously approved 176 Dwelling Units with 316 Group Housing rooms (with up to 632 beds) and remove all residential parking (*Ibid.*) The Original Project included 182,668 square feet ("sf") of residential space and 8,398 sf of residential open space, whereas the Revised Project included 172,323 sf of residential space and 5,056 sf of residential open space. (*Id.*, Ex.G, 002)

A. Planning Commission Review of CUA-2

On June 17, 2021, the Department published a second addendum to the certified EIR for the Revised Project. (RJN, Ex. K.) On June 24, 2021, the Planning Commission held a public hearing on Application No. 2013.1535CUA-02 and voted 4-2, with one absence, to adopt Motion No. 20935 and approve the amended CUA ("CUA-2"). (RJN, Ex. G, 033.)

During the hearing, Commissioners addressed public comments respecting overcrowding in the Tenderloin, and the needs of families requiring larger units. (RJN, Ex. L [Transcript], pp. 17, 22:5-13.) Commissioner Diamond, who voted to approve the project, stated "I am not very happy . . . the changes to this project resulted in many more units with much less open space than the original version," and recommended that the Board of Supervisors "take a much closer look at how group housing is being used." (*Id.* at p. 39:5-40:12.) Commissioner Moore, who voted against approval, stated "When a project comes back with this extreme measure of change, I believe that policy discussions have to be preceding decisions [that] put through group housing into the Tenderloin, of which there are three more recently approved projects . . . Family housing I think leads the discussion. This particular project does not provide family housing . . . 600 square feet are allocated for four people to live in . . . that just does not work." (*Id.* at p. 41, lines 12-25)

In Motion No. 20935, adopting CUA-2, the Commission added six conditions of approval to the original CUA that address Code limitations on group housing cooking facilities and the community's concerns for open space and family-sized units. (RJN, Ex. L, 038-039.)

B. Administrative Appeal to the Board of Supervisors

On July 21, 2021, the Pacific Bay Inn and Tenderloin Housing Clinic appealed the Commission's approval of CUA-2. (FAP, ¶ 24.) The Pacific Bay Inn later withdrew its appeal in light of "a late agreement reached with Forge" that addressed its concerns. (RJN, Ex. M, p. 99:9-12.)

The Tenderloin Housing Clinic ("Appellant") challenged the Revised Project as incompatible with the Tenderloin community, a neighborhood "already saturated with market rate group housing" (RJN, Ex. N, 052-053) and "already saturated with SROs" (RJN, Ex. M, p. 5:18-19).[2] The Appellant

[2] An SRO or "Single Room Occupancy Unit" consists of one occupied room with a maximum gross floor area of 350 square feet. (S.F. Planning Code, § 102.)

also raised concerns about the lack of community engagement (*Id.* at p.6:13-18 [discussing the Sponsor's failure to "address the issues of overcrowding that we currently see in our neighborhood"]); and the project's approval at an inclusionary rate falling below current standards. (*Id.* at p.7:2-5.)

On September 28, 2021, the Board of Supervisors held a duly noticed public hearing on the appeal of CUA-2. (RJN, Ex. M.) In addition to hearing from the public, the Appellant, and the Project Sponsor, the Board heard from Planning Department staff about the issues raised on appeal. (*See id.* at 38:14-60:14.) Staff reported that the sponsor had recently changed the project "by adding larger group housing rooms that may be shared by two or more individuals." (*Id.* at 40:8-11.) Of the 316 rooms proposed, approximately 28 rooms would exceed 500 square feet, up to a maximum of 860 square feet. (RJN, Ex G, 021.) According to the Department: "While these rooms may serve some families in the neighborhood, it does not provide the family housing to alleviate the community's concerns. ¶ The scope of the proposal is to provide group housing rooms, not dwelling units." (RJN, Ex. M, 040:12-16; Ex. G, 029 [finding "the project does not provide family housing"].)

The Board also inquired about the applicable inclusionary rate for the project under San Francisco's Inclusionary Affordable Housing Program (codified in Planning Code section 415). (RJN, Ex. M, 42:21-44:19.) Department staff reported that rental projects containing more than 25 units in the NOMRSUD were currently required to provide 25 percent of onsite units as "affordable" (or at below-market rents), subject to offsite alternatives or an in lieu fee. (*Id.* at 43:23-44-8.) The Revised Project, however, was not subject to this 25 percent inclusionary rate, as it was "grandfathered" at 13.5 percent, the rate in effect at the time the Original Project, for 176 dwelling units, had been approved. (*Id.* at 42:21-43:22.) Staff explained that the project was "locked in [at the lower rate] because the project sponsor was able to obtain a site permit by the deadline set forth in 415 to retain the grandfathering for the old project." (*Id.* at 43:14-17.)[3]

At the close of the September 28 hearing, the Board continued its consideration of the appeal to October 5, 2021. (RJN, Ex. M, pp. 99:24-101:14; Petition, Ex. B [Motion No. M21-172], 2:24-3:3.) On October 5, 2021, the Board upheld the appeal and disapproved the decision in Planning

[3] The Sponsor obtained a site permit for the Original Project on May 13, 2020. (RJN, Ex.G 003

Commission Motion No. 20935, thereby denying issuance of the CUA requested in Application No. 2013.1535CUA-02. (Petition, Ex.B.) Thereafter the Board adopted Motion No. M21-172, memorializing written findings that reflect the basis for the Board's decision. (*Id.*)

C. Group Housing

The Code defines a "Dwelling Unit" as a residential use consisting of "a room or suite of two or more rooms that is designed for, or is occupied by, one family doing its own cooking therein and having only one kitchen." (S.F. Planning Code, § 102.) Group Housing refers to "a residential use that provides lodging or both meals and lodging, without individual cooking facilities, by prearrangement for a week or more at a time, in a space not defined by this Code as a dwelling unit." (*Id.*) Examples of Group Housing include a "Residential Hotel, boardinghouse, guesthouse, rooming house, lodging house, residence club, commune, fraternity or sorority house." (*Id.*)

In light of its intended use, Group Housing may be built at a greater density than Dwelling Units. (*Compare* S.F. Planning Code, § 249.5, subd. (c)(4) [permitting one dwelling unit for each 125 square feet of lot area] *with* (c)(9) [incorporating density standards in § 209.3 that permit one group housing bedroom for every 70 square feet of lot area].) Group Housing is also subject to reduced Code requirements for open space (*id.* § 135, subd. (d)(2)) and exposure (*id.* § 140, subd. (b)), and is exempt from the unit mix standards applicable to Dwelling Units, intended "[t]o ensure an adequate supply of family-sized units in new housing stock" (*id.* § 207.7, subd. (a), (b)(2)).

To ensure the integrity of these Code sections, and limit Group Housing to its intended purpose, Group Housing units are not permitted the same kitchen facilities permitted in Dwelling Units. In 2005, the Zoning Administrator interpreted the Code to allow "limited kitchen facilities in group housing . . . not to create dwelling units for permanent residency, but to provide group housing residents the option of preparing their own meals." (RJN, Ex.O, S.F. Planning Code, Interpretations, § 209.2(a).) The interpretation was based on the Department's practice of allowing "limited kitchen facilities in hotel rooms or suites in tourist hotels with stays of less than 32 consecutive days." (*Id.*)

STANDARD OF REVIEW

"When any ground for objection to a complaint … appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may

be taken by a demurrer to the pleading." (Code Civ. Proc., § 430.30, subd. (a).) A demurrer is properly sustained to a pleading that does not state facts sufficient to constitute a cause of action or that is otherwise ambiguous and unintelligible. (Code Civ. Proc., § 430.10, subd. (e), (f).)

In determining the sufficiency of a petition, the Court assumes the truth of all facts properly pleaded; but it "may not consider conclusions of fact or law, opinions, speculation or allegations which are contrary either to law or to judicially noticed facts." (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 16; *see also Wolfe v. State Farm & Cas. Ins. Co.* (1996) 46 Cal.App.4th 554, 560.)

ARGUMENT

I. PETITIONERS FAIL TO STATE A CLAIM FOR RELIEF UNDER THE HOUSING ACCOUNTABILITY ACT

Petitioners allege that the City violated state law by disapproving a CUA for the Revised Project without making findings pursuant to subdivision (j) of the Housing Accountability Act (Government Code section 65589.5 or "HAA") (*See* First Amended Petition, "FAP," ¶¶ 46, 50-52.) Petitioners, however, concede that this provision of the HAA applies only to projects that "compl[y] with applicable, objective general plan, zoning, and subdivision standards and criteria . . . in effect at the time that the application was deemed complete." (*Id.* at ¶ 46 [quoting Gov. Code, § 65589.5(j)(1)], ¶ 48 [quoting standard "required to qualify for the requested land-use entitlements"]; *see also California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 831 ("*CRLA*") ["the HAA restricts the ability of local governments to deny an application to build housing *if the proposed project complies with general plan, zoning, and design review standards* . . ."] (italics added).)

The public record shows that the Revised Project, like the Original Project, relied on exceptions to objective zoning standards for height, bulk, and other criteria permitted through the City's CUA/PUD process. Absent a CUA, which the Revised Project failed to obtain, the project is not code-compliant. Therefore, Petitioners fail to meet the threshold element of their HAA claim.

A. THE PROJECT DOES NOT COMPLY WITH APPLICABLE OBJECTIVE ZONING STANDARDS

Whether specific code requirements "are 'applicable' and 'objective' for purposes of the HAA is a question of law; whether the project is consistent with those standards is one of fact . . . ." (*CRLA, supra,* 68 Cal.App.5th at 839.)

The issue of applicability "is straight-forward." (*CRLA*, *supra*, 68 Cal.App.5th at 839.) "[G]eneral plan, zoning, and subdivision standards and criteria, including design review standards" that are "objective" and "in effect" at the time a project application is deemed complete, apply to the project. (Gov. Code, § 65589.5, subd. (j)(1); *CRLA* at p. 844 ["the HAA requires municipalities to apply standards that are both 'objective' and 'in effect at the time that the application was deemed complete,'§ 65589.5, subd. (j)(1)"].)

As defined by the HAA, a standard is "objective" if it "involv[es] no personal or subjective judgment by a public official and [is] uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code, § 65589.5, subd. (h)(8).) The relevant test for objectivity is "reasonable certainty in application." (*CRLA*, *supra*, 68 Cal.App.5th at 852.) "The Legislature insists on objective criteria so as to ensure 'reasonable certainty … to all stakeholders' about the constraints a municipality will impose. . . ." (*Ibid.* [quoting legislative history].) Stakeholders include "neighbors, who want to know how big a building can be erected next door." (*Ibid.*) In other words, "the HAA does not wrest control from local governments so much as require them to proceed by way of clear rules adopted in advance . . . ." (*Id.* at p. 851.)

1. The City's Standards are Objective

As early as 2013, in the Preliminary Project Assessment, the Planning Department notified the Project Sponsor that the proposed project did not comply with quantitative, objective zoning standards in the Planning Code. (*See* RJN, Ex. B [PPA], p. 6-7.) Among other requirements, the Code states "any building . . . exceeding . . . 50 feet in height in a RM or RC District, shall be permitted only . . . according to the procedures for conditional use approval in Section 303 . . . ." (S.F. Planning Code, § 253, subd. (a).) "Exceptions from the base height of 80 feet [in the NOMRSUD] shall be permitted, . . . up to 130 feet in the 80-130-T Height and Bulk District, only . . . according to the procedures for

conditional use approval . . . .” (*Id.* § 263.7, subd. (c).) The Code further specifies maximum plan dimensions in the 80-130-T Height and Bulk District as 110 feet (length) by 125 feet (diagonal) (*id.* § 270, subd. (a)), and “[d]eviations from the[se] bulk limits . . . shall be permitted only . . . according to the procedures for conditional use approval . . . .” (*Id.* § 271, subd. (b).)

These are quantitative standards “knowable in advance, to be applied to all”—the hallmark of objective standards (*CRLA*, *supra*, 68 Cal.App.5th at 843)—with which the project did not comply. Accordingly, the PPA advised (*see* RJN, Ex.B [PPA], p. 6), and the Sponsor applied for, a CUA (RJN, Ex. H). The PPA further determined that the project required a number of variances because it did not comply with additional Code standards that could be waived without a CUA. (RJN, Ex.B, p. 8.)

Unless the Code provides for a CUA or other process, exceptions to the Planning Code’s “quantitative standards” require a variance. (S.F. Planning Code, § 305, subd. (a) [“No variance shall be granted. . . which would grant a privilege for which a conditional use procedure is provided by this Code”].) The Zoning Administrator decides variance applications after a hearing and a showing of “extraordinary circumstances” and other facts that warrant exception from otherwise applicable Code requirements. (*Id.* at § 305, subd. (c).) Rather than apply for a variance for each outstanding Code standard specified in the PPA, the Sponsor applied for designation as a PUD as part of its CUA application. A PUD is a form of Conditional Use for projects that are at least half an acre in size and meet specified design requirements. (S.F. Planning Code, § 304, subd. (a), (b).) These projects may be exempt from Code standards as authorized through a CUA. (*Id.*) The Sponsor thus applied for approval as a PUD, with exceptions from the Code standards for rear yard and off-street loading.

Again, these are all quantitative, objective zoning standards, with which the record consistently reflects the project did not comply. And “nothing in the HAA prevents cities from establishing and enforcing objective land use and design standards that are consistent with their other obligations.” (*CRLA*, *supra*, 68 Cal.App.5th at 852 [citing HAA subdivisions (f)(1) and (j)].)

2. The City’s Standards are Applicable

The foregoing zoning standards were in effect at the time the Sponsor applied for CUA-2, and at no point did any stakeholder dispute that the standards were objective and applicable. Indeed, Petitioners’ letter to the Board of Supervisors opposing the appeal of CUA-2, concedes that the

standards applied: "Though the project may require exceptions from specific zoning standards, these are all allowed under the PUD and CUA process . . . ." (RJN, Ex.P, 003.)

Specifically, the Revised Project continued to require exceptions from the Code standards for building height and bulk, rear yard space, and off-street loading. (RJN, Ex.G, 019-025.) Although the requirements for dwelling unit exposure and permitted obstructions, and the conditions of approval relating to residential parking no longer applied in light of changes from dwelling units to group housing, the other objective standards remained applicable. And because the project failed to comply with these standards, it required a CUA, subject to conditions of approval. (S.F. Planning Code, § 303, (d).) By changing the project, the Revised Project required amending the original conditions of approval (including conditions pertaining to the City's inclusionary affordable housing program) to reflect continued compliance with the Code. (*See*, *e.g.*, RJN, Ex.G 011.)

Amending the conditions of approval for a CUA requires authorization under the procedures for a new CUA. (S.F. Planning Code, § 303, subd. (e).) Under these procedures, the Planning Commission, and the Board on appeal, approve or disapprove the requested Conditional Use after making the factual determination required under Code Section 303(c), including whether a project is "necessary or desirable for, and compatible with, the neighborhood," impacts the public health and safety, and complies with the General Plan. (*Id.* at § 303, subd. (c).)

Insofar as Petitioners contend that the City's CUA process does not apply to the Revised Project, the contention undercuts the policy of the HAA to advance "the approval and provision of, housing." (Gov. Code, § 65589.5, subd. (a)(2)(L).) The City's CUA process allows housing projects that fail to satisfy the City's objective zoning standards to get built. Without this alternative to strict application of its Code, the City could not have approved the Original Project. Petitioners' contention is also contrary to law. "The HAA leaves local governments free to establish and enforce policies and development standards appropriate to local circumstances," including conditions of approval. (*CRLA*, *supra*, 68 Cal.App.5th at 850, 852.) Consistent with its constitutional authority and state law, the City thus implemented a process that permits projects, which are not Code-compliant, as a Conditional Use.

Insofar as Petitioners contend that the Revised Project should be approved notwithstanding the City's disapproval of a CUA, the contention amounts to a claim of entitlement to waiver. Specifically,

Petitioners contend that any market-rate housing development is entitled to a waiver from applicable, objective zoning standards. Petitioners cite to no law in support of this claim.

B. PETITIONERS FAIL TO ALLEGE ANY FACTS TO SUPPORT A CLAIM OF BAD FAITH

Petitioners also request relief under subdivision (k) of the HAA. (*See* FAP. Prayer, ¶ 6 [citing Gov. Code, § 65589.5(k)].) This provision allows a court to direct approval of a project and award petitioners' attorney's fees and costs, "if the court finds that the local agency acted in bad faith when it disapproved [the project] in violation of [the Act]." (Gov. Code, § 65589.5, subd. (k)(1)(A)(ii).) First, as discussed above, the City did not violate the HAA in disapproving the Revised Project. Second, Petitioners fail to allege any facts showing that the City acted in bad faith when it heard and decided the appeal of CUA-2. Absent "objective evidence of bad faith," Petitioners unsupported allegations fail to rebut the law's presumption against such a finding. (*CRLA*, *supra*, 68 Cal.App.5th at 851 ["we will not presume that municipalities routinely proceed in bad faith when they apply their development laws and standards"].)

II. PETITIONERS CANNOT STATE A CLAIM FOR DECLARATORY RELIEF BECAUSE ADMINISTRATIVE MANDAMUS PROVIDES AN ADEQUATE REMEDY

Petitioners seek a declaration from this Court respecting the City's alleged duties under the HAA. (FAP, ¶¶ 57-63.) "Any action," however, "brought to enforce the provisions of [the Act] shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure." (Gov. Code, § 65589.5, subd. (m).) Because a proceeding in administrative mandamus provides an adequate, if not the sole, remedy for Petitioners' HAA claims, they cannot state a claim for declaratory relief, and the court should uphold the City's demurrer to the second cause of action.

> "It is settled that an action for declaratory relief is not appropriate to review an administrative decision." (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249.) "A declaratory relief action is an appropriate method for obtaining a declaration that a statute or regulation is facially unconstitutional," but administrative mandamus is "the proper and sole remedy" where a local agency's application of the law is at issue."

(*Carloss v. County of Alameda* (2015) 242 Cal.App.4th 116, 125-126.) "Declaratory relief also cannot be joined with a writ of mandate reviewing an administrative determination." (*City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467 [citing *Guilbert v. Regents of University of*

California (1979) 93 Cal.App.3d 233, 244] (underscore added).) Courts in the First District thus hold that a "complaint reveals no issues susceptible of resolution by declaratory relief" when it raises errors "specifically appropriate to relief under Code of Civil Procedure section 1094.5." (*Guilbert*, *supra*, at 244.)

The gravamen of Petitioners' claim is that the City did not properly apply Gov. Code § 65589.5(j) when it decided the administrative appeal of CUA-2. Accordingly, they allege that the City did not "proceed[] in a manner required by law" in disapproving the project (FAP ¶ 50) as part of their first cause of action for writ of mandate (FAP, ¶¶ 41-56), which offers a remedy for this claim (*CRLA*, *supra*, 68 Cal.App.5th at 836–837 [citing Code Civ. Proc., § 1094.5, subd. (b)].)

Insofar as Petitioners seek relief for future cases that go beyond the City's specific action on the Revised Project, their claim is not ripe. "In assessing whether declaratory relief is available, a court determines whether 'a probable future dispute . . . is sufficiently ripe to represent an 'actual controversy' within the meaning of [Code Civ Proc., § 1060]." (*Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at 13.) "A difference of opinion as to the interpretation of a statute between a citizen and a governmental agency does not give rise to a justiciable controversy for declaratory relief." (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 155.)

Much like Petitioners, the appellants in *Monterey Coastkeeper* sought declaratory relief by alleging that the respondents had a "pattern and practice" of "ignoring or refusing to apply relevant law." (*Id.* at 14-18.) The court rejected these allegations because judicially noticed evidence did not support a finding of any such policy or practice. (*Id.* at 17-18.) Rather, the court found that the complaint, "at its heart," challenged the respondents' specific implementation of the applicable law. (*Ibid.*) Finding that "a dispute over the correctness of these decisions is not amenable to declaratory relief" (*ibid.*), the court denied the claim "because appellants failed to present a controversy susceptible to definitive and conclusive relief by declaratory judgment." (*Id.* at 8.)

Petitioners here allege as City "policy" that "any housing development project application processed [per the City's PUD or CUA] code sections are not subject to the HAA[]." (FAP, ¶ 59.) Contrary to this contention, the City has not adopted any such policy, and Petitioners cite to none. "Petitioners further allege that [City] practice is to process [PUD or CUA applications] without . . .

identifying and explaining [why] a project [is] non-compliant with any [PUD or CUA] standards . . . within 60 days after an application is deemed complete, as required by the HAA." (FAP, ¶ 60.)

In fact, the City's PPA application (not the CUA application) is the relevant benchmark for purposes of determining project compliance under the HAA. (Gov. Code, § 65589.5, subd. (h)(5) [referencing application requirements under Gov. Code § 65941.1].) And in the 2013 PPA, the City identified the applicable, objective Code requirements with which the Project did not comply, and the relevant entitlements (a CUA and variance) that the Sponsor would need to carry the project forward. Therefore, as in *Monterey*, "at its heart" the Petition attacks the City's final decision on CUA-2, which may only be reviewed by administrative mandamus. And by ignoring the PPA and other facts subject to judicial notice, Petitioners fail to state a controversy amenable to declaratory relief.

III. ANY NON-HAA CLAIM IS UNCERTAIN AND PETITIONERS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

A. Petitioners' Pleading is Uncertain

Petitioners' third cause of action purports to assert a claim separate from their HAA claims. (FAP, ¶ 65.) Petitioners generally allege that the City's disapproval of the project "is not based on the required findings or evidence in support of the findings" (FAP, ¶ 70) and reference Planning Code section 303 (FAP, ¶ 66), presumably to establish "the required findings." Yet Petitioners do not otherwise allege how the City violated the requirements for a CUA under Section 303. Indeed, Petitioners concede that the Board of Supervisors specifically found that the Revised Project did not meet the criteria under Section 303(c)(1), finding, for example, that the project would "fail to meet the needs of the neighborhood, including the needs of families."(FAP, ¶¶ 25, 32-36.)

Alternatively, Petitioners seem to contend that Section 303 is not the governing law, and that the Revised Project did not require any City approval (much as they argue in their HAA claims). (*See* FAP ¶ 66, 67.) Specifically, Petitioners reference the 2018 project approval and contend that group housing is a "principally permitted use" unaffected by the requirements of Section 303. (*Id.* ¶ 67.) (In fact, the Project Sponsor's 2020 application to change the conditions of approval for the project necessitated Planning Commission action, the appeal of which (FAP ¶ 24), necessitated Board action.)

Either way, Petitioners' third claim of relief under "CCP § 1094.5 and/or § 1085" is ambiguous and unintelligible and should therefore be dismissed as uncertain. (Code Civ. Proc., § 430.10(f).)

B. Petitioners Failed to Exhaust their Administrative Remedies

Insofar as Petitioners now seek to allege that the City violated Planning Code section 303, Petitioners did not raise this issue during the administrative proceedings, and thus failed to preserve their objection for judicial review. Interested parties "must present the *exact issue* to the administrative agency that is later asserted during litigation." (*Hagopian v. State* (2014) 223 Cal.App.4th 349, 371 (italics added); *see also Los Globos Corp. v. City of Los Angeles* (2017) 17 Cal.App.5th 627, 632 ["[e]xhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts"].)

State law further limits the issues in any legal action attacking a local land use decision "to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing." (Gov. Code, § 65009, subd. (b)(1).) The purpose of the rule is to give a public agency the "opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review." (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447 (italics in original).)

Petitioners participated in the administrative proceedings below by submitting a letter to the Board of Supervisors before its hearings on the appeal of CUA-2. Neither letter raised any issue under Planning Code section 303. As such, Petitioners' third theory of relief is barred.

CONCLUSION

The First Amended Petition fails to state a cause of action. Because this defect cannot be cured, the City respectfully requests that this Court sustain the City's demurrer without leave to amend.

Dated: May 19, 2022

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