RYAN J. PATTERSON (SBN 277971)
BRIAN O'NEILL (SBN 298108)
ZACKS, FREEDMAN & PATTERSON, PC
601 Montgomery Street, Suite 400
San Francisco, CA 9411
Tel: (415) 956-8100
Fax: (415) 288-9755
ryan@zfplaw.com
brian@zfplaw.com

Attorneys for Petitioners and Plaintiffs
YES IN MY BACK YARD and
SONJA TRAUSS

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL 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.

FIFTH 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

**PETITIONERS' OPPOSITION TO RESPONDENTS' DEMURRER**

Date: July 27, 2022
Time: 9:30 a.m.
Dept: 501
Judge: Hon. Charles F. Haines

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SAN FRANCISCO, CALIFORNIA 94111

**TABLE OF CONTENTS**

I. INTRODUCTION……..5

II. BACKGROUND..... 6

III. STANDARD OF REVIEW..... 6

IV. ARGUMENT..... 7

A. Petitioners Adequately State a Claim for Relief Under the HAA..... 7

1. The Project has Been Deemed Compliant as a Matter of Law. ..... 7

2. The Project Complies with All Applicable Objective CUA Standards ..... 9

3. The Project Did Not Require Approval of Any New Conditional Uses ..... 13

B. Declaratory Relief is Available to Challenge Respondents' Pattern and Practice ..... 14

D. Petitioners Adequately Pled Exhaustion of Their Administrative Remedies..... 19

V. CONCLUSION..... 19

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

## TABLE OF AUTHORITIES

**Cases**


*Augustine v. Trucco* (1954) 124 Cal.App.2d 229 .....7

*Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo*
(2021) 68 Cal.App.5th 820 .....11, 13, 14

*Californians for Native Salmon Assn. v. Department of Forestry*
(1990) 221 Cal.App.3d 1419 .....15, 16, 17

*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 .....19

*Essick v. City of Los Angeles* (1950) 34 Cal.2d 614 .....12

*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97 .....19

*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586 .....12, 13

*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125 .....18

*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board*
(2022) 76 Cal.App.5th 1 .....13, 15, 16, 17

*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal. App.3d 1176 .....12

*Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476 .....19

*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34 .....6

*Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808 .....12, 14

*Stoddard v. Edelman* (1976) 4 Cal.App.3d 544 .....12

*Tristam v. Marques* (1931) 117 Cal.App. 393 .....6

*Venice Town Council v. City of Los Angeles* (1996) 47 Cal.App.4th 1522 .....15, 16, 17

*Wilson v. Transit Authority of City of Sacramento* (1962) 199 Cal.App.2d 716 .....6

*Wollmer v. City of Berkeley* (2011) 122 Cal. Rptr. 3d 781 .....11


**Statutes**


Gov. Code § 65589.5(h)(5) .....8

Gov. Code § 65589.5(h)(8) .....11

Gov. Code § 65589.5(h)(9) .....7, 8

Gov. Code § 65589.5(j)(1) .....7



ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

Gov. Code § 65589.5(j)(2)(A)-(B) .....7, 9
Gov. Code § 65589.5(l).) .....14
Gov. Code § 65901 .....13
Gov. Code § 65940 .....12
Gov. Code § 65941.1 .....8
Gov. Code § 65943 .....7, 8

**San Francisco Planning Code**

Planning Code § 253 .....5
Planning Code § 253(b) .....10
Planning Code § 263.7(c) .....10
Planning Code § 303 .....9, 10
Planning Code Sec. 303(c)(3) .....10, 11
Planning Code § 305 .....10
Planning Code § 317 .....5

**Secondary Sources**

San Francisco Planning Department, Preliminary Project Assessment Informational Packet (January 21, 2022) .....8
Governor's Office of Planning and Research, The Planner's Training Series: The Conditional Use Permit (1997) .....11, 12

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

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601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

## I. INTRODUCTION

This case concerns the City of San Francisco's unlawful disapproval of a housing development project that proposes to construct 316 new group-housing dwelling units, 48 of which would be restricted as affordable, as well as a new church facility and retail space in a 13-story mixed-use building located at 450 O'Farrell Street in the Tenderloin neighborhood of San Francisco (the "Project"). Respondents disapproved the Project based on a subjective determination regarding what is "necessary, desirable, and compatible" with the neighborhood, and on speculative findings regarding the "likely" class of persons who reside in group housing and assumptions of the "likely" behaviors of those persons. Respondents' basis for the disapproval is prohibited by the Housing Accountability Act ("HAA"), which requires any disapproval to be based on findings that the project fails to meet applicable, objective standards and criteria, or that the project would have a specific, adverse impact upon the public health or safety. Respondents made no such findings.

Respondents' unlawful disapproval is symptomatic of a much broader problem of the City's pattern and practice of ignoring its legal duties and obligations under state law to approve code-compliant housing, which has led San Francisco to be amongst the top two most expensive housing markets in the country. Respondents' demurrer is emblematic of this problem, as Respondents argue that the HAA does not apply to any housing development project that requires a Conditional Use Authorization ("CUA"). The City requires a CUA for any project over 40 feet tall in most zoning districts, as well as any project that involves the demolition of an existing legal or illegal dwelling unit, even when such units are replaced. (*See* SF Planning Code §§ 253, 317.) In practice, these requirements force every major housing project into the CUA process and, according to Respondents, allows the City to disapprove such projects based solely on highly subjective neighborhood compatibility concerns. This is the exact situation the HAA was intended to prevent. Respondents' position would effectively exempt San Francisco from the requirements of the HAA and must be rejected. The CUA provisions *are part of the zoning code*, and projects that meet CUA standards are code-compliant. This Project was entirely consistent with the City Code's *objective* CUA standards, yet Respondents disapproved the project based on subjective CUA standards. This action was in violation of the HAA.

## II. BACKGROUND

The Project originally consisted of 176 dwelling units with a mix of studios, one-, two-, and three-bedroom units in a similarly sized building (the "Original Project"). The City approved the Original Project in 2013, finding that it met all applicable standards for a CUA. On January 24, 2020, the applicant applied to amend the previous approval to replace the 176 dwelling units with 316 smaller group-housing units, which is a principally permitted use. The Project did not propose any significant changes to the building envelope that was approved under the Original Project. On June 24, 2021, the San Francisco Planning Commission voted to approve the Project, specifically finding that "Planning Code Section 303 establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use authorization," and "the Project is consistent and does comply with said criteria."

The Planning Commission's CUA approval was appealed to the Board of Supervisors on the basis that group housing was incompatible with the needs of the Tenderloin community and the "saturation" of group housing in the area. The Board voted to uphold the appeal and disapprove the Project, finding that group housing "would fail to serve the community, is not necessary and desirable for and is not compatible with the existing neighborhood and community." The Board's findings did not identify any applicable, objective general plan and zoning standards that the Project failed to meet; nor did the findings state that the Project would have a specific, adverse impact upon the public health or safety. Rather, the Board disapproved the Project based solely on vague, subjective, and prohibited "neighborhood compatibility" grounds.

## III. STANDARD OF REVIEW

Against a demurrer, a complaint must be liberally construed to determine if it states a cause of action entitling plaintiff to any relief. (*Wilson v. Transit Authority of City of Sacramento* (1962) 199 Cal.App.2d 716, 720–21.) "Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears." (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) All that is necessary as against a demurrer is to plead facts entitling the plaintiff to some relief. (*Tristam v. Marques* (1931) 117 Cal.App. 393, 397.) "In determining whether or not the complaint is sufficient, as against the

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SAN FRANCISCO, CALIFORNIA 94111

demurrer . . . the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good . . . although the plaintiff may demand relief to which he is not entitled under the facts alleged." (*Augustine v. Trucco* (1954) 124 Cal.App.2d 229, 236.)

## IV. ARGUMENT

### A. Petitioners Adequately State a Claim for Relief Under the HAA

The HAA requires a local agency to approve housing development projects that comply with applicable, objective general plan, zoning, and subdivision standards and criteria, unless the agency makes written findings based on a preponderance of the evidence that the housing development project would have a specific, adverse impact upon the public health or safety and there is no feasible method to satisfactorily mitigate or avoid the identified public health and safety impacts. (Gov. Code § 65589.5(j)(1).)

Petitioners' first cause of action alleges that Respondents violated the HAA by disapproving a housing development code-compliant project without making any of the required health and safety findings. Respondents' demurrer to the first cause of action hinges entirely on the premise that the Project was not code-compliant. The City does not contend, nor could it, that the Board made any of the required findings. Respondents' contention that the Project was not code-compliant is incorrect, as the Project was deemed compliant as a matter of law and the Project is, in fact, compliant with the objective standards applicable to housing development projects that secure entitlements through the City's CUA process. As such, Petitioners adequately state a claim for relief.

1. The Project has Been Deemed Compliant as a Matter of Law.

The HAA requires a local agency to provide written documentation explaining the reasons it considers a housing development to be not code-compliant within 60 days of the date that the application for the housing development project is "determined to be complete," and a project is deemed compliant as a matter of law if the agency fails to timely provide the required written compliance documentation. (Gov. Code § 65589.5(j)(2)(A)-(B).)

The HAA specifically pegs the compliance determination deadline from the date an application is "determined to be complete." The HAA provides a precise definition of the term

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SAN FRANCISCO, CALIFORNIA 94111

"determined to be complete," which means "the applicant has submitted a complete application pursuant to Section 65943." (Gov. Code § 65589.5(h)(9).) This definition is distinct from the term "*deemed* complete," which the HAA defines as the applicant submitted "a preliminary application pursuant to Section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a complete application pursuant to Section 65943." (Gov. Code § 65589.5(h)(5).) When the HAA uses the term "deemed complete" this refers to a preliminary application *or* a development application submitted pursuant to Gov. Code § 65943, while references to the term "determined to be complete" refers *only* to a development application. Thus, the compliance determination required by section (j)(2) *must* be made following the submittal of a development application.

The City argues that it identified noncompliance in its 2013 response to the Original Project's Preliminary Project Assessment ("PPA") application, and that the PPA "is the relevant benchmark for purposes of determining project compliance under the HAA." (Demurrer, p. 15.) The City's argument is legally and factually erroneous for multiple reasons. First, as explained above, the required compliance determination must be made following the submittal of a *development application* pursuant to Gov. Code § 65943, not a preliminary application pursuant to Gov. Code § 65941.1 (also known as an SB 330 application). Second, even if a preliminary application were the relevant benchmark, the City's PPA application is *not* the equivalent of a state SB 330 preliminary application. The City's own informational packet confirms that PPA and SB 330 applications are distinct, noting that "housing development projects may submit a Preliminary Housing Development Application (SB 330) along with the PPA application."[1] No matter which *state* application the compliance determination is made from, the City's local PPA application is not the relevant benchmark for determining compliance.

Moreover, the City's 2013 PPA response is irrelevant to the CUA application at issue here, which was not submitted until *seven years later* in January 2020. The City has taken the position that the change to group housing proposed in January 2020 "requires authorization under the procedures for a new CUA." (Demurrer, p. 15.) Thus, the City believes the January 2020 proposal

[1] San Francisco Planning Department, "Preliminary Project Assessment Informational Packet" (January 21, 2022), https://sfplanning.org/sites/default/files/forms/PPA_InfoPacket.pdf

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

was a *new* application, which would have required a new compliance determination. The City cannot have it both ways, arguing that the 2020 change to group housing is a separate application that required Board approval, while simultaneously being the same application for purposes of the HAA compliance determination. Further, the City's 2013 PPA response *was also untimely*. The PPA application included in Respondents' RJN was submitted on October 18, 2013, while the City's PPA response that purportedly identified noncompliance was provided 63 days later on December 20, 2013, three days beyond the HAA's 60-day deadline. Even assuming an HAA compliance determination is made from an SB 330 preliminary application, *and* that the City's PPA application is the equivalent of an SB 330 preliminary application, *and* that the City's 2013 PPA application response is somehow relevant to an application submitted seven years later – the Project is *still* deemed compliant as a matter of law due to Respondents' untimely determination. (Gov. Code § 65589.5(j)(2)(B).) Thus Petitioners' adequately state a claim for relief due to Respondents' failure to make the required findings to disapprove a code-compliant project.

2. The Project Complies with All Applicable Objective CUA Standards

The City argues that *any* project that requires a CUA is, by definition, not code compliant. Respondents' demurrer asserts the "CUA process allows housing projects that fail to satisfy the City's objective zoning standards to get built," and the City has "implemented a process that permits projects, which are not Code-compliant, as a Conditional Use." (Demurrer, p. 15.) The City argues that the City can disapprove any CUA project based entirely upon subjective standards such as whether a project "is necessary or desirable for, and compatible with, the neighborhood." (*Id*.)

The City's argument fundamentally misunderstands how conditional uses function and fit within planning and zoning law. Conditional uses procedures and standards are part of the zoning code, not method for deviating from the code. The City's CUA provisions provide a different procedure, with different applicable standards, for approving code-compliant CUA projects. Projects can comply with the zoning district standards in Article 2 and 2.5 of the Planning Code and be approved by the Planning Department. Alternatively, projects can be designed to be compliant with the CUA standards in Planning Code § 303 and be approved by the Planning Commission. These are two different processes with two different set of applicable standards for determining

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SAN FRANCISCO, CALIFORNIA 94111

code compliance. Respondents' own brief confirms this, explaining that certain CUAs are "for projects that are at least half an acre in size and meet specified design requirements." (Demurrer, p. 14.)

The City's Planning Code confirms that CUA projects are, in fact, code-compliant projects. Planning Code § 303 requires that the Planning Commission make five required findings before approving a CUA. One of the required findings is that the "use or feature as proposed *will comply with the applicable provisions of this Code* and will not adversely affect the General Plan." (SF Planning Code Sec. 303(c)(3).) If CUA projects were, by definition, not code-compliant, the Planning Commission could *never make this required finding*. This contrasts with the City's variance procedures, which are designed to allow for code deviations. The variance provisions do not require a finding of code-compliance, but instead require a finding that the variance "will be in harmony with the general purpose and intent of this Code." (SF Planning Code § 305.)

The City's Planning Code establishes a separate set of standards that are applicable only to CUA projects. For example, the Planning Code allows projects above an established base height with a CUA, but only "up to but not exceeding the height limit prescribed by the height and bulk district in which the property is located." (SF Planning Code § 253(b).) The 450 O'Farrell Project, for example, is within the 80-130-T Height and Bulk District. This district establishes a base 80-foot height limit and maximum 130-foot height limit for CUA projects. (SF Planning Code § 263.7(c).) This is a clear example how the City's Planning Code provides two different sets of applicable standards depending on what type of entitlement process a project undergoes. A project could seek Planning Department approval, in which case the applicable height standard is 80 feet. Alternatively, a project could seek Planning Commission approval through the CUA process, in which case the applicable height standard is 130 feet. The 450 O'Farrell Project is 130 feet tall and sought approval through the CUA process, and therefore meets the objective height standard applicable to CUA projects in the 80-130-T Height and Bulk District.

The HAA, however, prohibits the City from disapproving a housing development project based on purported noncompliance with the Planning Code's *subjective* CUA standards, such as neighborhood compatibility. The City must base any disapproval on the Planning Code's *objective* CUA standards that involve no personal or subjective judgment, such as the 130-foot CUA height

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601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

limit that was applicable to the 450 O'Farrell Project. (See Gov. Code § 65589.5(h)(8).) If the City wants more control over housing development projects that are subject to the Code's CUA provisions, the City must adopt objective CUA standards and criteria "knowable in advance, to be applied to all." (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 843 ("*CARLA*").)

The City argues that the base 80-foot height limit is the "applicable" standard. This simply is not the case. CUA projects are subject to a different set of applicable standards. With respect to height, the 450 O'Farrell project required a CUA and therefore was subject to the 130-foot maximum height limit that is established for the 80-130-T Height and Bulk District. The 80-foot height limit is the applicable to non-CUA projects. The 130-foot height limit, *which is also part of the City's Planning Code*, is applicable to CUA projects. This is similar to the analysis of a density bonus project in *Wollmer v. City of Berkeley* (2011) 122 Cal. Rptr. 3d 781, where the court explained that a city's "inclusionary ordinance, *which is part of the City's zoning ordinance*, generally *requires* the City to grant density bonuses upon a proper application . . . [which] in turn requires a waiver of development standards," and "[t]aking these laws together as they operate in the context of a density bonus project, it is clear that the waived zoning standards are not 'applicable.'" (*Id.*) Like in *Wollmer*, the City's CUA provisions *are part of the City's zoning code* and *require* the approval of a CUA that meets the established CUA criteria. The City's CUA provisions confirm this, stating that "the Planning Commission ***shall approve*** the application and authorize a Conditional Use if the facts presented are such to establish" the CUA criteria. (SF Planning Code § 303(c).) Like in *Wollmer* where a project can meet zoning standards *or* density bonus standards such that the zoning standards are no longer "applicable," in San Francisco a project can meet zoning district standards *or* CUA standards such that the zoning district standards are no longer "applicable."

The City's CUA process is consistent with the general planning and zoning principle that conditional uses are allowed by code after a public hearing, as opposed to projects that are allowed by right. (See Governor's Office of Planning and Research, The Planner's Training Series: The

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601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

Conditional Use Permit (1997).)[2] Courts recognize that conditional uses are granted *pursuant* to the zoning code, and are separate and distinct from other procedures designed to allow for code such as variances, nonconforming uses, and rezonings. (*Essick v. City of Los Angeles* (1950) 34 Cal.2d 614, 623 (explaining that a conditional use is granted "within the terms of the Zoning Plan or ordinance itself rather than to obviate the practical difficulties, unnecessary hardships or results inconsistent with the general purposes of the zoning regulations"); *Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808 (explaining that a "conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations"); *Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586, 591 (noting that "it is a widely accepted rule that the issuance of a conditional use permit does not amount to a zoning change").)

Courts have found that a local government's approval of a conditional use is a valid exercise of police power precisely *because* such approvals are compliant with the zoning code. (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal. App.3d 1176, 1184 (explaining the hierarchy of planning laws by stating that "the validity of a conditional use permit, which is governed by the zoning regulations, depends (derivatively) on the general plan's conformity with statutory criteria."); *see also Hawkins v. County of Marin*, (1976) 54 Cal.App.3d 586, 594 (explaining that because "use permits issued pursuant to [the zoning code] must necessarily conform to its requirements, it follows that if that code section is kept consistent with the general plan, use permits issued thereunder will also be consistent therewith").)

A critical element for the valid issuance of a conditional use permit is that a zoning code must "establish criteria for determining" compliance, and a proposed conditional use must then be found compliant with the established conditional use criteria. (*Stoddard v. Edelman* (1976) 4 Cal.App.3d 544, 548 (stating that local governments "can issue conditional use permits only if the local zoning ordinance has established criteria for determining such matters"); *Hawkins, supra,* Cal.App.3d at 591-92 (holding that the "decision to grant such a [conditional use] permit must be guided by established criteria").) Gov. Code § 65901 is similarly instructive regarding how

[2] Available at https://opr.ca.gov/docs/theconditionalusepermit_071997.pdf.

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SAN FRANCISCO, CALIFORNIA 94111

conditional uses fit within planning and zoning law. Gov. Code § 65901 states that a local board "shall hear and decide applications for conditional uses or other permits *when the zoning ordinance provides therefor and establishes criteria for determining those matters*, and applications for variances from the terms of the zoning ordinance." This section again differentiates between conditional uses that are permitted by the zoning code itself and must be governed by established criteria, and variances that allow for deviations from the zoning code.

The City's CUA procedures are rooted in the same basic planning principles regarding conditional uses that have been confirmed by decades of court precedent and codified in state law. Specifically, conditional uses are permitted *by the code itself* and do not constitute deviations from the code. Conditional uses *must* be governed by established criteria, and the City's authority to approve or disapprove CUA projects must be based on those established criteria. However, the HAA establishes an additional limitation on a local government's ability to deny a project based on *subjective* or inapplicable CUA criteria. (*See CARLA, supra*, 68 Cal.App.5th at 843.) If Respondents wish to exert additional control over CUA housing development projects, the City must promulgate objective CUA standards "knowable in advance, to be applied to all" and cannot disapprove projects based on subjective compatibility concerns. (*Id.*)[3]

3. The Project Did Not Require Approval of Any New Conditional Uses

Even if Respondents' position that conditional uses are code "deviations" were correct, no new conditional uses were proposed as part of the Project. In fact, the Project *reduced* the number of conditional uses as compared to the Original Project. Respondents' demurrer confirms this, explaining that 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

[3] Respondents appear to argue that requiring the City to approve housing development projects that comply only with objective CUA standards is contrary to the City's constitutional authority. (Demurrer, p. 15.) This argument was soundly rejected by the court in *CARLA*. Respondents deceptively quote the "HAA leaves local governments free to establish and enforce policies and development standards appropriate to local circumstances," while omitting the second half of the sentence: "*as long as* those policies and standards are consistent with meeting the jurisdiction's share of the regional housing need and, if used to deny or reduce the density of housing developments, *are objective so that their application is predictable*." (*CARLA*, supra, 68 Cal.App.5th at 850 (emphasis added).) This is precisely Petitioners' point.

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

dwelling units to group housing." (Demurrer, p.15.) All of the conditional uses that were necessary to construct the Project were *already approved* by the City in 2014, and Respondents had a vested right to construct a project pursuant to the already-approved conditional uses.[4]

The proposed change was to convert the units to group housing, which is a principally permitted use. Courts have found that "[w]hen a conditional use permit is obtained, the permittee may make those uses of the property authorized by the zoning ordinance in the absence of a permit *and in addition* those uses authorized by the permit. (*Sports Arenas Properties, Inc. v. City of San Diego* (1985) 40 Cal.3d 808.) Even if the approved conditional uses were code "exceptions," Respondents had already authorized the conditional uses – and these uses did not need to be approved again. The proposed change to a group housing use is entirely code-compliant and allowed by right. Under these facts, a new CUA should not have been required.

4. Respondents Acted in Bad Faith

Respondents argue that Petitioners failed to overcome the HAA's "presumption" against bad faith and that there must be "objective evidence of bad faith" to support such a claim. (Demurrer, p. 16.) There is no HAA presumption against bad faith, and Respondents again provide a deceptive partial quotation to the *CARLA* decision that *rejected* the trial court decision that limited the HAA only to instances where a local agency acted in bad faith. (*CARLA*, *supra*, 68 Cal.App.5th at 850 (HAA constitutional even "without limiting the statute to local agencies that act in bad faith.") The HAA defines "bad faith" as an action that is "frivolous or otherwise entirely without merit." (Gov. Code § 65589.5(l).) Petitioners allege that the City's denial of a code-compliant project, based on clearly speculative and unsupported evidence, without even an attempt at making the required health and safety findings was clearly frivolous and without merit.

**B. Declaratory Relief is Available to Challenge Respondents' Pattern and Practice.**

[4] Respondents again provide a deceptive partial quotation to claim Petitioners' comment letter to the City purportedly "concedes" that the project required code exceptions. (Demurrer, p. 15.) The actual quotation mirrors the alternative argument made here, that even if the project required exceptions, the exceptions are allowed "without any zoning amendments or general plan amendments, and have been approved, the majority of them twice, by the Planning Commission." (RJN, Ex.P, 003.)

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

A declaratory relief claim is sufficient when the facts show "the existence of an actual controversy relating to the legal rights and duties of the parties and requests that the rights and duties of the parties be adjudged by the court . . . whether or not the facts alleged establish the plaintiff is entitled to favorable declaration." (*Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 12). Declaratory relief is available "when it is alleged an agency has a policy of ignoring or violating applicable laws," and interpretation of an agency's responsibilities under state law "is a particularly appropriate subject for judicial resolution." (*Venice Town Council v. City of Los Angeles* (1996) 47 Cal.App.4th 1522, 1566-67.) Declaratory relief is available to review "an overarching, quasi-legislative policy set by an administrative agency." (*Californians for Native Salmon Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419.) Petitioners here allege that the City has implemented two overarching, quasi-legislative policies intended to evade its legal duties under the HAA, and an actual controversy relating to the legal rights and duties of the parties exists with respect to how housing development project application that seek a CUA must be process under the HAA.

First, the City has an overarching policy that any housing development project that seeks a CUA is, by definition, not code compliant and not subject to the HAA. The City's demurrer confirms the existence of this policy, explaining that the City has "implemented a process that permits projects, which are not Code-compliant, as a Conditional Use," and that the "CUA process allows housing projects that fail to satisfy the City's objective zoning standards to get built." (Demurrer, p. 13.) The City's own explanation of its policy clearly shows that it considers any CUA project to be noncompliant and that the City has no duty to process CUA projects pursuant to the HAA. Without even a hint of irony, Respondents argue that "the City has not adopted any such policy, and Petitioners cite to none." (Demurrer, p. 17.) Petitioners cite to Respondents' own admissions. The project here is emblematic of the City's policy, as the City insisted on a new CUA for a project that had *already been approved* and consisted solely of a change to the principally permitted group housing use, then subsequently claimed the project was not subject to the HAA due to the CUA requirement. The Department of Housing and Community Development (HCD) also found that the Respondents' denial of this project was "indicative of review processes that may be

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

constraining the provision of housing in San Francisco" and an example of the "larger trends in the City/County's review of housing." (FAP, Ex. A.) As a result, HCD opened a violation investigation into "the City/County's practices with respect to housing review and approval generally." (*Id.*)

To be clear, Petitioners' declaratory relief claim does not seek a declaration whether any specific project is code-compliant. Rather, Petitioners seek a judicial declaration that the City has a duty to make an individual compliance determination on a case-by-case basis, and that the City's general policy to treat all CUA project as noncompliant without making individual compliance determinations violates state law. This is "an actual controversy relating to the legal rights and duties of the parties" with regard to CUA projects, which can be appropriately resolved by judicial declaration. (*See Monterey Coastkeeper, supra,* 76 Cal.App.5th at 12).

Second, Petitioners allege Respondents' overarching policy is to process CUA projects without providing the required written code compliance determination within 60 days after a development application is deemed complete as required. Respondents' demurrer clarifies why the City has failed to carry out this mandatory legal obligation, as Respondents incorrectly assert the City's PPA application is the relevant benchmark to determine project compliance under the HAA. (Demurrer, p. 18.) As explained above, the written compliance determination must be made after a development application, not a preliminary application, is deemed complete. This narrow, precise question is "particularly appropriate subject for judicial resolution." (*See Venice Town Council, supra,* 47 Cal.App.4th at 1566-67.)

Respondents argue that because "administrative mandamus provides an adequate, if not the sole, remedy for Petitioners' HAA claims, they cannot state a claim for declaratory relief." (Demurrer, p. 16.) This exact argument was rejected in *Native Salmon* where plaintiffs challenged a state agency's approval of a timber harvest plan (THP) and "not only sought administrative mandate to vacate the plan approval, but also sought declaratory relief, outside the context of the specific THP at issue" to resolve a dispute about general policies. (*Native Salmon, supra,* Cal.App.3d at 1424.) The court held that "a proper complaint for declaratory relief cannot be dismissed by the trial court because the plaintiff could have filed another form of action." (*Id.*) The court explained that this argument "confuse[s] review of specific, discretionary administrative

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

decisions with review of a generalized agency policy" and explained "piecemeal litigation of the issues in scores of individual proceedings would be an immense waste of time and resources." (*Id.*)

Just as in *Native Salmon,* Petitioners seek relief by administrative mandate to vacate a specific agency decision, but also seek declaratory relief outside the context of that decision to resolve a dispute regarding Respondents' general policies it applies to processing all CUA housing project applications. Petitioners' claim for declaratory relief seeks to resolve an actual controversy regarding the parties' rights and duties under the HAA with respect to all CUA housing projects. Resolution of this dispute will avoid piecemeal litigation of the same issue for scores of individual projects, which can only be accomplished through a claim for declaratory relief.

This argument was also rejected in *Venice Town Council.* In *Venice Town Council,* Plaintiffs alleged that a city had an "informal policy" of requiring a finding of feasibility before requiring replacement demolished affordable units in violation of state law. *(Venice Town Council, supra,* 47 Cal.App.4th at 1565.) The Court rejected that declaratory relief was unavailable, explaining the alleged violations in individual permits was "symptomatic of the much broader problem the action is designed to relieve." (*Id.* at 1566-67.) Just as in *Venice Town Council*, Petitioners allege violations of the HAA in the 469 Stevenson Project as an example of the much broader problem regarding the City's informal policies related to the processing of all CUA housing projects, which is entirely appropriate for declaratory relief.

Respondents rely primarily on *Monterey Coastkeeper* to support their argument that declaratory relief is not available to challenge a generalized policy. In *Monterey Coastkeeper*, petitioners alleged that a regional water board failed to regulate agricultural runoff "in a manner that achieves and maintains water quality objectives and protects beneficial uses" and sought declaratory relief for respondents to "act in accordance with their legal obligations to protect public health and the environment." (*Monterey Coastkeeper, supra,* 76 Cal.App.5th at 9.) *Monterey Coastkeeper* confirms declaratory relief ***is*** available to challenge a pattern and practice of ignoring relevant law, but challenges to "intricate and complex" issues regarding the overall *effectiveness* of policies are not controversies that can be solved by judicial declaration. (*Id.* at 14.) Unlike in *Monterey Coastkeeper*, Petitioners do not broadly challenge the effectiveness of San Francisco's

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601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

housing policies. To the contrary, Petitioners acknowledge that the correct processing of CUA applications pursuant to the HAA will not resolve the housing crisis. However, resolving this controversy is the exact type of narrow, precise question that can, and must, be resolved by judicial declaration to avoid repeatedly litigating the same issue in individual projects.

**C. Petitioners' Third Cause of Action is Clear and Specific**

Petitioners allege Respondents disapproval of the CUA was invalid because Respondents did not proceed in the manner required by law, issued a decision unsupported by the findings, and issued findings that are unsupported by the evidence. (FAP, ¶ 65.) Respondents argue this cause of action is uncertain and that Petitioners do not allege how the disapproval was invalid. (Demurrer, p. 18.) "Demurrers for uncertainty are disfavored, and are granted only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135.) Petitioners make three clear, specific allegations to explain why Respondents' disapproval was invalid. First, Petitioners allege a CUA should not have been required for a project that did not include any new conditional uses. ((FAP, ¶ 66.) Respondents plainly understand this allegation and respond that the project change necessitated Planning Commission action. (Demurrer, p. 18.) Second, Petitioners allege the Board inappropriately based their disapproval on findings solely related to the type of housing provided, which is principally permitted, rather than findings related to any proposed conditional uses. (FAP, ¶ 67, 70.) Respondents respond that the Board did make appropriate findings, which again confirms Respondents understand this allegation. Respondents' argument, however, proves Petitioners' point. Respondents' demurrer references a finding related to the type of housing provided, noting the Board found group housing would "fail to meet the needs of the neighborhood, including the needs of families." (Demurrer, p. 18.) This finding is *completely irrelevant* to any of the conditional uses that were purportedly under consideration, and instead were directed toward the type of housing provided. Third, Petitioners allege that the Board's findings regarding the "likely" class of persons who reside in group housing and assumptions regarding the "likely" behaviors of that class of persons were speculative and unsupported by evidence. (FAP, ¶ 68, 70.) Respondents simply ignore this specific, clear allegation. Petitioners' third cause of action undoubtedly meets the low threshold of

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601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

comprehensibility to withstand a demurrer for uncertainty, considering Respondents responded to Petitioners' allegations *in the demurrer itself*.

**D. Petitioners Adequately Pled Exhaustion of Their Administrative Remedies**

A demurrer may only be properly sustained "based on the failure to *adequately plead* exhaustion of administrative remedies." (*Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 482; *see also Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 333.) Respondents argue that Petitioners failed to exhaust their administrative remedies by not raising the issue of the City's invalid CUA disapproval during the administrative proceedings. Petitioners adequately pled that they raised this issue, asserting that Petitioners wrote several letters stating "the Board's findings were speculative and unsupported," and pleading that "Petitioners commented during the local process that nothing in the amendment affected the previously approved Project which would require Planning Commission or Board of Supervisors approval." (FAP, ¶¶ 40, 66.) Petitioners adequately pled exhaustion of administrative remedies, which is all that is required to withstand an exhaustion claim on demurrer. Respondents ignore the legal standard and fail to even mention Petitioners' pleadings at all. Instead, Respondents inappropriately rely on judicial notice to "convert a demurrer into an incomplete evidentiary hearing." (*See Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 115.) Respondents' RJN only provides the Court with *one* of Petitioners' letters and a transcript of only *one* of the Board's hearings. Respondents' exhaustion claim is without merit and misleading without a complete record.[5]

## V. CONCLUSION

Respondents violated the HAA by disapproving a 316-unit housing development project that complied with all applicable, objective code standards without making any of the required findings. Petitioners respectfully request that the Court deny the demurrer and if the demurrer is sustained on any basis, Petitioners request leave to amend.

[5] Even looking beyond the pleadings, the one letter Respondents *did* provide raised the issue that a new CUA was not required almost verbatim as it was pled, stating, "Nothing in the action of the Planning Commission affects the previously approved site plan and associated construction impacts, and group housing is a permitted use in this zoning district, requiring no Planning Commission or Board of Supervisors approval." (Respondent's RJN, Ex. P, p. 1.) Petitioners' second letter, which Respondents omitted, raised the issue that the Board's findings were unsupported and speculative.

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

Respectfully submitted,

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ZACKS, FREEDMAN & PATTERSON, PC

By: Ryan J. Patterson
Brian O'Neill
Attorneys for Petitioners,
Yes In My Back Yard and Sonja Trauss

ZACKS, FREEDMAN & PATTERSON, PC
601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111