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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

YES IN MY BACK YARD, a California non-profit 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,

NORDSTROM, INC.; 469 STEVENSON INVESTMENT, LLC; YERBA BUENA NEIGHBORHOOD CONSORTIUM, LLC,

Real Parties in Interest.

Case No. CPF-22-517661

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAN FRANCISCO'S DEMURRER

Hearing Date:	August 9, 2022
Hearing Judge:	Hon. Cynthia Ming-mei Lee
Time:	1:30 p.m.
Place:	Department 503
Date Action Filed:	January 20, 2022
Trial Date:	None

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INTRODUCTION

Petitioners challenge the City's decision to recirculate an EIR for a 27-story construction project ("Project") for further environmental review. But the Court should dismiss the Petition in its entirety. First, Petitioners cannot state a cause of action under the Housing Accountability Act ("HAA") because the Act's requirements do not apply until the project EIR is certified, and the Project was never "disapproved" in violation of the Act. Rather, the Board required more environmental review. Second, Petitioners fail to state a claim under SB 330 because the statute's five-hearing limit, like the limits under the Permit Streamlining Act ("PSA"), also do not apply until the EIR is certified, and the City did not conduct five hearings that count towards the limit. Third, Petitioners fail to state a CEQA cause of action because the time limits for EIR certification are directory, and Petitioners fail to allege a final decision that is ripe for judicial review. Finally, Petitioners' claim for declaratory relief fails because it is wholly derivative of their other failed claims, and declaratory relief is otherwise unavailable. For these reasons, the City respectfully submits that the Petition should be denied.

STATEMENT OF FACTS

On November 17, 2017, the San Francisco Planning Department received applications for an Environmental Evaluation and a Preliminary Project Assessment ("PPA") respecting the Project at 469 Stevenson Street in San Francisco. (Request for Judicial Notice, "RJN," Ex. A; *see* Petition, ¶ 18.) On May 17, 2018, the Department issued the PPA to the applicant (or "Project Sponsor") (RJN, Ex. A, p.1), advising that complete review of the Project would require a project application that addressed the comments and issues identified in the PPA. (RJN, Ex. B, p.1.)

On May 31, 2018, the Project Sponsor submitted, and the Planning Department accepted, a revised Environmental Evaluation application. (RJN, Ex. A; *see also* Petition, ¶18.) On or after October 2, 2018, the Project Sponsor submitted applications for a Downtown Project Authorization, a Transportation Demand Management Program, a Shadow Analysis, and a Conditional Use Authorization for the Project (RJN, Ex. A, p.2; collectively, the "Project Application"). On October 16, 2018, the Planning Department accepted the Project Application. (RJN, Ex. C, p.1.) On January 10, 2019, the Department issued a Plan Check Letter, identifying outstanding requirements and missing information necessary to begin the environmental review process. (RJN, Ex. C.)

The Project, as modified by subsequent submittals (*see*, *e.g.*, revised Project Application dated May 19, 2021, RJN, Ex. D), proposed to construct a new 27-story (274-foot tall) mixed-use building, containing 495 dwelling units and approximately 4,000 square feet of ground floor retail. (Petition, Ex. B., p.1.) The Project included a below-grade garage—consisting of three levels that contain 166 vehicular parking spaces, 200 Class 1 bicycle spaces, and three freight loading spaces—and required approximately 55,850 cubic yards of excavation. (*Id.* at p.2.)

On October 2, 2019, the Department published a Notice of Preparation of an Environmental Impact Report ("EIR") and prepared an Initial Study. (Petition, ¶ 20; RJN, Ex. A, p. 2.) On March 11, 2020, the Department published the Draft EIR, and on April 16, 2020, the Planning Commission received public comments on the Draft EIR at a public hearing. (Petition, ¶ 22.)

On November 12, 2020, the Planning Commission held an informational hearing on the Project. (Petition, ¶ 23.) Thereafter—on June 10, 2021, June 24, 2021, and July 22, 2021—the Commission continued public hearing on certification of the EIR and the requested entitlements (a Conditional Use Authorization and Downtown Project Authorization) without hearing the items. (Petition, ¶ 25; RJN, Ex. A, p.3.) On July 29, 2021, at a duly noticed public hearing, the Commission certified the EIR, adopted CEQA Findings and approved the Downtown Project Authorization and Conditional Use Authorization for the Project. (Petition, ¶ 26; RJN Ex. A.)

On August 30, 2021, the Yerba Buena Neighborhood Consortium, LLC appealed the Commission's certification of the EIR—but not the Project entitlements—to the San Francisco Board of Supervisors. (Petition, ¶ 27.) On October 5, 2021, the Board voted to continue the hearing on the CEQA appeal to October 26, 2021. (Petition, ¶ 27.) On October 26, 2021, the Board voted to reverse the Planning Commission's certification of the Project EIR. (Petition, ¶ 28.)

On December 14, 2021, the Board adopted written findings (set forth in Motion No. M21-182) memorializing its decision to reverse the EIR certification, and finding that the EIR's analysis of the Project's potential impacts to historic resources, potential geotechnical impacts from construction, and potential physical impacts resulting from gentrification and displacement of local residents, as identified in the Initial Study, were inadequate. (Petition, ¶ 33; Ex. B., p.8.) In all other respects, the Board found that the EIR sufficient as an informational document under CEQA, and directed the

Planning Department to undertake further environmental review of the Project consistent with its findings. (Petition, ¶ 37; Ex. B., p.8.) The Board's findings were based on the written record before the Board and testimony presented at the appeal hearing, as maintained in the Clerk of the Board of Supervisors File No. 210919, and incorporated into the Board's motion. (Petition, Ex. B. p.7.)

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(a).) "A demurrer tests the pleading alone, and not the evidence or the facts alleged." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) Thus, a demurrer is properly sustained to a pleading that does not state facts sufficient to constitute a cause of action or where the Court lacks jurisdiction on the subject of the cause of action alleged. (Code Civ. Proc., § 430.10(a), (e).)

In determining the sufficiency of a petition, the Court assumes the truth of all facts properly pleaded, but it "will not, however, assume the truth of contentions, deductions or conclusions of fact or law … and may disregard allegations that are contrary to the law or to a fact of which judicial notice may be taken." (*Wolfe v. State Farm & Cas. Ins. Co.* (1996) 46 Cal.App.4th 554, 560; *Monterey Coastkeeper v. Central Coast Regional Water Quality Control Board* (2022) 76 Cal.App.5th 1, 16.)

A petitioner bears the burden of proving a reasonable possibility that an amendment could cure a defective pleading. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 520 fn. 16.) Conversely, "where the nature of the [petitioner's] claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." (*City of Atascadero*, *supra*, 68 Cal.App.4th at 459.)

ARGUMENT

I. Petitioners Fail to State a Cause of Action Under the HAA.

Petitioners contend that the City violated the HAA (Government Code section 65589.5) by "effectively denying . . . the Project without making findings . . . required by section 65589.5(j)." (Petition, ¶ 68.) After multiple rounds of briefing and oral argument on the issue, this Court has already determined that "under *Schellinger*, the EIR has not yet been certified and the provisions of

HAA do not apply." (RJN, Ex. E, p.3.) Moreover, Petitioners fail to state facts showing that the City has disapproved the Project, a threshold element for a claim of relief under the Act.

A. The Requirements of the HAA Do Not Apply Until the EIR is Certified.

The HAA expressly states: "Nothing in this section shall be construed to relieve the local agency from . . . complying with the California Environmental Quality Act . . . ." (Gov. Code, § 65589.5, subd. (e).) When a project requires an EIR, CEQA requires the lead agency to certify the EIR prior to approving the project. (Pub. Resources Code, § 21151(a); 14 Cal. Code Regs., § 15090(a); *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245,1258.) Given the requirements of CEQA, and the provision for these requirements in subdivision (e) of the HAA, the court in *Schellinger* held that the HAA "specifically pegs its applicability to the approval, denial or conditional approval of a 'housing development project' . . . which, as previously noted, can occur *only after the EIR is certified.*" (179 Cal.App.4th at 1262 [original italics].)

Much like Petitioners here, the petitioner in *Schellinger* commenced litigation after the city council voted to recirculate an EIR for a housing development project to address new environmental issues. (*Schellinger*, *supra*, 179 Cal.App.4th at 1253, fn. 8.) The petition alleged a cause of action under CEQA and a cause of action under the HAA. (*Id.* at pp. 1253-1255, fn. 10.) After rejecting petitioner's CEQA claims, the court "reach[ed] the same conclusion concerning the impact of Government Code section 65589.5: it too cannot be used to halt the decision-making process specified by CEQA . . . ." (179 Cal.App.4th at 1250.)

Specifically, the court found that "just like the Permit Streamlining Act, the Housing Accountability Act has no provision automatically approving EIRs if local action is not completed within a specified period." (*Schellinger*, *supra*, 179 Cal.App.4th at 1262 [finding "there is no indication the Legislature meant to modify or accelerate CEQA's procedures"].) Therefore, and as this Court has already determined, "The HAA does not relieve the local agency of complying with CEQA" (RJN, Ex. E, p.3-4), and Petitioners cannot state a claim for relief under either Act.[1]

[1] Petitioners also fail to allege any facts re bad faith to claim relief under Gov. Code § 65589.5(k). Unsupported allegations fail to rebut the law's presumption against such a finding. (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th

B. The City Has Not Disapproved the Project.

The requirement for specified findings under subdivision (j) of the HAA applies only if a local agency proposes to "disapprove" a project that complies with objective zoning requirements "or to impose a condition that the project be developed at a lower density." (Gov. Code, § 65589.5(j).) Even if Petitioners could overcome the express carve-out for CEQA under subdivision (e) of the Act, which they cannot, they still fail to allege that the City either disapproved the Project or imposed impermissible conditions to state a claim under subdivision (j).

The HAA defines "disapprove the housing development project" to mean that a local agency either (A) votes on a project application and disapproves it, or (B) "Fails to comply with the time periods specified in subdivision (a) of Section 65950 [i.e., the PSA]." (Gov. Code, § 65589.5(h)(6).) Petitioners first contend that the City "effectively den[ied]" the Project "by voting to void the Planning Commission's approval of the entitlements for the Project." (Petition, ¶ 68.) As discussed further below, under CEQA, the City cannot approve a project until the EIR is certified, and the Board of Supervisors has not, in fact, voted on the Project Application *because* EIR certification is still pending. That the Planning Commission's approvals were rendered void is incidental to the provision for administrative appeals under CEQA. (Pub. Resources Code, § 21151(c); 14 Cal. Code Regs., § 15090(b); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201–1202 ["If an EIR is certified by an unelected planning commission, then the lead agency must allow the public an opportunity to appeal the certification to an elected body."].) By law, the Planning Commission's actions on the Project were not final, and no decision on the Project Application may be rendered until the EIR is certified. (*Schellinger*, *supra*, 179 Cal.App.4th at 1258.)

Petitioners further contend that the City failed to comply "with the time periods specified in subdivision (a) of Section 65950 of the PSA, which constitutes a disapproval of the Project under the HAA." (Petition, ¶ 73.) As discussed in Section III.C below, the PSA's time limits take effect only upon certification of the EIR, and like the other requirements of the HAA, do not apply here. (*See also* Petition, ¶ 71 [noting that the time periods under Section 65950(a) require action on a project "after

820, 851 ["we will not presume that municipalities routinely proceed in bad faith when they apply their development laws and standards"].)

certification of an EIR."].) Absent any facts establishing that the City "disapproved" the Project, Petitioners cannot state a claim for relief under subdivision (j) of the HAA.

II. Petitioners Fail to State a Cause of Action Under SB 330.

A. The Five-Hearing Rule Does Not Apply Where CEQA Review is Still Underway.

Petitioners allege that the City violated the five-hearing limitation on project approvals under Government Code section 65905.5, or "SB 330" (Pet., ¶¶ 43, 44, 49-53), and on this ground ask the Court to "reinstate Respondents' approval of the 469 Stevenson Project." (Pet., ¶ 53.) By the statute's own terms, the five-hearing rule does not apply until the EIR is certified, and, in any event, the City did not hold more than five hearings on the Project within the meaning of SB 330.

Subdivision (d) of the law states "Nothing in this section supersedes, limits, or otherwise modifies the requirements of, or the standards of review pursuant to, Division 13 . . . of the Public Resources Code," or CEQA. (Gov. Code, § 65905.5(d).) CEQA does not require lead agencies to certify an EIR within five hearings. Rather, the law requires an agency—prior to approving a project that requires an EIR—to certify that the agency completed the EIR in compliance with CEQA. (Pub. Resources Code, § 21151(a); 14 Cal. Code Regs., § 15090(a)(1); *Schellinger*, *supra*, 179 Cal.App.4th at 1258 ["It is only after the final EIR is certified that the project can be approved."].)

It is significant that Petitioners do not dispute the City's determination that the Project required an EIR. (*See* Petition, ¶ 21.) They also concede that the Planning Commission's certification of the EIR was appealed to the Board of Supervisors (Petition, ¶ 27), and that the Board reversed the Commission's determination (Petition, ¶ 27), thereby rendering the prior certification, and any project approval that relied on the certification, void. (Petition, ¶ 38, citing S.F. Admin. Code, § 31.16(b)(10).) Notwithstanding these facts, by asking the Court to "reinstate Respondents' approval," Petitioners apparently deny the effect of the Board's decision on appeal. (*See* Petition, ¶ 53.) After extensive briefing and oral argument on the issue, this Court has already determined that "Petitioner's argument that the EIR was certified is unpersuasive as it ignores the Board's authority to decide appeals on the certification of a final EIR by the Planning Commission." (RJN Ex. E, p. 3.)

Moreover, under CEQA, if an agency's nonelected decision-making body certifies an EIR, the decision is appealable to elected decision-making body. (Pub. Resources Code, § 21151(c); 14 Cal.

Code Regs., § 15090(b); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201–1202 ["If an EIR is certified by an unelected planning commission, then the lead agency must allow the public an opportunity to appeal the certification to an elected body."] Therefore, neither CEQA nor SB 330 support Petitioners' contention that once there is a sixth hearing, or continuance of a hearing, the project applicant has a right to move forward on a project without further environmental review—or that an EIR that the lead agency determined to be deficient can be "reinstated."

B. There Have Not Been Enough Hearings to Establish a Violation.

SB 330's mandate that a jurisdiction "either approve or disapprove" a project application within five hearings must be applied in a manner "consistent with the applicable timelines under the Permit Streamlining Act (Chapter 4.5 (commencing with Section 65920))." (Gov. Code, § 65905.5(a).) The PSA, in turn, measures the time for agency action on a project application "from the date of certification of an EIR." (Petition, ¶ 39 [citing Gov. Code, § 65950(a)(2)].) In other words, the five-hearing rule under SB 330 does not apply *until the EIR for a project has been certified*. And, consistent with the carve-out for CEQA's requirements under subdivision (d) of the law, any hearings held to implement the requirements of CEQA are not counted against the five-hearing limit.

Here, Petitioners identify eight hearings on the Project, seven of which were agendized to consider the CEQA review of the Project. (Petition ¶¶ 22, 25-28.) The first of these hearings was held exclusively to receive comments on the Draft EIR. (Petition ¶ 22.) The April 16, 2020 hearing on the Draft EIR for the Project, required under section 31.14 of the San Francisco Administrative Code, does not count towards the five-hearing limit. (*See* 14 Cal. Code Regs., § 15202(d) ["A draft EIR or negative declaration should be used as a basis for discussion at a public hearing"], (f) ["A public agency may include, in its implementing procedures, procedures for the conducting of public hearings pursuant to this section."] The July 29, 2021 hearing at which the Planning Commission certified the EIR and approved the Project entitlements is similarly not a hearing that must be counted to determine whether SB 330 has been violated. (*See* 14 Cal. Code Regs., § 15202(b) ["If an agency provides a public hearing on its decision to carry out or approve a project, the agency should include environmental review as one of the subjects for the hearing"]; *Bakersfield Citizens for Local Control*,

supra, 124 Cal.App.4th at 1200 ["Since project approval and certification of the EIR generally occur during the same hearing, the two events are sometimes treated as interchangeable."].)

Following the Commission's determination, the Board of Supervisors held two hearings to consider the appeal of the EIR. (*Id*. at ¶¶ 27, 28.) These hearings were also agendized exclusively to address the EIR certification. As explained above, the October 26, 2021 Board of Supervisors hearing on the appeal of the EIR certification is required by CEQA, and therefore these hearings do not count towards SB 330's five-hearing limit. (*See* Pub. Resources Code, § 21151(c); 14 Cal. Code Regs., § 15090(b).) In short, of the eight hearings identified in the Petition, at least four, and potentially as many as seven of the eight, do not count for purposes of the five-hearing limit under SB 330.

At the conclusion of its appeal hearing, the Board did not make a final determination on the Project's approvals, but rather directed the Planning Department to conduct further environmental review consistent with its findings on the EIR. (Petition, ¶ 37; Ex. B., p.8.) Petitioners have not shown any basis in SB 330 to short-circuit this process.

III. Petitioners Fail to State a Cause of Action Under CEQA or the PSA.

A. Section 21151.5's Time Limits are Directory and Do Not Entitle Petitioners to Their Requested Relief.

Petitioners allege that the City violated Public Resources Code section 21151.5 by failing to certify an EIR for the Project within a year of their application being deemed complete. (Petition, ¶¶ 55-56.) First, Petitioners contention that the Project Application was accepted as complete on May 31, 2018 (Petition, ¶ 18) is contradicted by facts that are subject to judicial notice (e.g., the Plan Check Letter issued for the Project, RJN, Ex. C, p.1). Therefore, this Court should not accept the allegation as true. (*Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at 16 ["a reviewing court 'may not consider conclusions of fact or law, opinions, speculation or allegations which are contrary either to law or to judicially noticed facts."].) Second, "CEQA itself contains no automatic approval provisions and its time limits are directory rather than mandatory." (*Schellinger*, *supra*, 179 Cal.App.4th at 1260 [citing "an unbroken line of authority"].)

In *Schellinger*, the petitioner argued that a court may—pursuant to authority granted in *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215—issue a writ of administrative mandate to

compel a city to certify a proposed EIR, even though the city council had decided that the draft EIR required recirculation to address new issues. (*Schellinger*, *supra*, 179 Cal.App.4th at 1250.) The Court of Appeal rejected this construction of *Sunset Drive* (*ibid.*) and stated three reasons why the case and CEQA section 21151.5 did not entitle petitioners to their requested relief. (*Id.* at 1265.) These reasons apply equally here.

First, *Sunset Drive* holds that *traditional* mandamus may lie to compel the performance of a ministerial duty, including compliance with the directory deadline under Section 21151.5, but the case does not authorize a court to command the particular exercise of an agency's discretion under CEQA. (*Schellinger*, *supra*, 179 Cal.App.4th at 1265.) Specifically, and as relevant to this case, a court cannot order an agency to certify a draft EIR, or to "set aside all City decisions other than approval of the project in a particular form." (*Ibid.*, internal quotations omitted.) Indeed, the *Schellinger* court found that CEQA expressly prohibits the granting of such relief. (*Id.* at 1266 [quoting Pub. Resources Code, § 21168.9(c): "Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way."].) In short, "A public agency may be directed to comply with CEQA, or to exercise its discretion on a particular subject, but a court will not order that discretion to be exercised in a particular fashion, or to produce a particular result." (*Ibid.*)

Second, *Sunset Drive* only concerns a local agency's blanket refusal to exercise its discretion. (*Schellinger*, *supra*, 179 Cal.App.4th at 1267.) The petitioner in *Sunset Drive* had allegedly complied with all requests for further information and simply asked that the city either approve the petitioner's third proposed draft EIR, or advise it of the manner in which the document was inadequate. (*Ibid.*) A writ of mandate issued because the city nevertheless "*refused to take any action*." (*Ibid.* [original italics]; *Sunset Drive*, *supra*, 73 Cal.App.4th at 222 ["Sunset is not asking Redlands to approve the draft EIR in its current form, but only to complete a draft EIR in some form."].) In contrast, Petitioners here do not allege that the City has refused to exercise its discretion, but rather, like the petitioners in *Schellinger*, allege that the City "if anything, has over-exercised it." (*Schellinger*, at p. 1267; *see* Petition, ¶¶ 37 ["the Board . . . directed the Planning Department to conduct further review"]; 44 ["The City has already held eight public hearings on the Project"]; 56 ["Respondents' *action* reversed the Planning Commission's certification of the EIR"] (italics added); 59 ["Petitioners . . . challenge the

Respondents' *actions*"] (italics added).) And Petitioners' requested relief—that the Court "reinstate Respondents' certification of the EIR" (Petition, ¶ 59)—is not the proper subject of traditional mandamus or CEQA section 21151.5. (*Schellinger*, at p. 1265-1267.)

Finally, an applicant's unreasonable delay in meeting requests for information by the lead agency "shall suspend the running of the time period[]" for the agency to prepare an EIR. (14 Cal. Code Regs., § 15109.) And a petitioner's acquiescence in any such delay amounts to laches, "an accepted ground for relaxing the directory deadline of section 21151.5." (*Schellinger*, *supra*, 179 Cal.App.4th at 1250, 1267-1269.) The time limit for certifying an EIR under section 21151.5 is also measured from the agency's receipt of a complete project application. (Pub. Resources Code, § 21151.5(a)(2).) And, contrary to Petitioners' stated receipt date of May 31, 2018 (Petition, ¶ 18), facts subject to judicial notice show that the Project Sponsor did not submit a complete application until October 16, 2018 (RJN, Ex. C), and then submitted a revised Project Application as late as May 19, 2021. (RJN, Ex. D.) In any event, the City is not aware of, and the Petition does not allege, any objection from the Project Sponsor pursuant to Section 21151.5, and the pleadings show that Petitioners themselves did not insist on the one-year deadline—May 31, 2019 by Petitioners' calculation (*see* Petition, ¶¶ 18, 33)—until at least three years after that period had run. Petitioners thus acquiesced in any alleged delay in certification of the EIR, and therefore cannot state a claim for relief on this ground. (*See Schellinger*, at p. 1269 [finding laches because "the one-year deadline came and went without a word of protest from" the petitioner].)

B. Any Other Claim under CEQA is Neither Ripe Nor Properly Pleaded.

Insofar as Petitioners attempt to allege any claims under CEQA outside of Section 21151.5, the claims are not ripe and Petitioners fail to state facts sufficient to support a cause action. Any challenge to a public agency's decision on the grounds of noncompliance with CEQA "shall be commenced" pursuant to Section 21167. (Pub. Resources Code, § 21167.) Section 21167 pegs the time for commencing an action to a local agency's filing of a notice of determination or a notice of exemption under CEQA section 21152. (Pub. Resources Code, § 21167(b)-(e).) In the absence of such notice, the time to commence an action begins to accrue once the agency decides to approve or carry out the project. (Pub. Resources Code, § 21167(a), (d).)

In other words, a claim under CEQA is not ripe for judicial review until the underlying administrative process has resulted in a final decision. (*See* Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont. Ed. Bar 2022) § 23.103 ["A CEQA claim is not ripe for review before the administrative process has resulted in a final decision."].) And an agency's process in preparing an EIR is not final and subject to judicial challenge until the EIR is certified and the agency decides to approve (or disapprove) the project. (*Id.* at §§ 23.110, 23.111; *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1488 ["A judicial proceeding challenging compliance with CEQA and/or specifically attacking the adequacy of the EIR, . . . is properly commenced after the lead agency certifies the EIR and approves the project."].)

The Petition does not, and cannot, allege that the City filed a notice of determination, a notice of exemption, or otherwise approved the Project. Indeed, Petitioners concede that "the City does not consider its action to be 'final'" (Petition, ¶ 42), and that the Board has "directed the Planning Department to conduct further review." (Petition, ¶ 37.) Accordingly, the City's action on the Project is not final for purposes of CEQA and therefore not ripe for judicial review.

Finally, Petitioners fail to allege any facts to support a claim under CEQA. Indeed, Petitioners concede that "Respondents fully complied with CEQA" (RJN, Ex. F, p.3), and they have represented to this Court that the present action was brought to enforce the provisions of the HAA and "not for the sake of CEQA" (*id.* at p.8). Absent facts sufficient to support a claim for relief, the second cause of action should be dismissed. (Code Civ. Proc., § 430.10(e).)

C. The Permit Streamlining Act does not Apply.

Petitioners inexplicably reference the PSA in their second cause of action, which is otherwise styled as a CEQA claim. (*See*, *e.g.*, Petition, ¶ 59 [seeking an order "commanding Respondents to perform their legal duties under CEQA and the PSA"].) As discussed, above, the PSA's time limits for agency action on a project are based on the date that the agency certified the EIR. (Gov. Code, § 65950(a).) As no EIR for the Project has been certified, these time limits do not yet apply. And even if they did apply, the limits are directory and not mandatory, and do not authorize the relief Petitioners seek (i.e., an order "to reinstate Respondents' certification of the EIR"). (*Schellinger*, *supra*, 179 Cal.App.4th at 1260 [finding the PSA "like CEQA, has no 'deemed approved' provision for EIRs"].)

IV. Petitioners Cannot State a Claim for Declaratory Relief.

Petitioners seek a declaration from the Court respecting the City's alleged legal duties and Petitioners' rights "under SB 330, CEQA, the PSA, and the HAA." (Petition, ¶ 79.) The claim is wholly derivative of Petitioners' failed claims, and is not otherwise amenable to declaratory relief.

A. A Claim for Declaratory Relief Fails When It Is Wholly Derivative of Other Failed Claims.

"Where a trial court has concluded the plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is 'wholly derivative' of the statutory claim." (*Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800.)

The language of the proposed declaratory relief cause of action shows that it is wholly derivative of Petitioners' alleged causes of action for violation of "SB 330, CEQA, the PSA, and the HAA." (Petition, ¶ 79.). And judicial declaration is only sought "as to the applicability of state law to Respondents' actions, and of the resulting legal obligations of Respondents." (Petition, ¶ 80.) Therefore, absent facts sufficient to support Petitioners' foregoing failed claims, this claim also fails.

B. Administrative Mandamus Provides an Adequate Remedy.

"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; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127.) "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.) Indeed, "[w]hen a remedy has been designated by the Legislature to review an administrative action, declaratory relief is unavailable." (*County of Los Angeles v. State Water Resources Control Bd.* (2006) 143 Cal.App.4th 985, 1002 [finding demurrer was correctly sustained to declaratory relief claims]. 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 v. Regents of University of California* (1979) 93 Cal.App.3d 233, 244.)

As the pleadings show, and as this Court has determined, "Whether the Board's decision to reverse the EIR should be vacated is the basis of Petitioner's petition." (RJN, Ex. E, p.3; Petition ¶¶ 9 [identifying appellant in CEQA appeal as real party in interest "that obtained the action challenged herein"], 45 [challenging "[t]he Board's action to reverse the EIR certification" as "abuse of the CEQA process"], 46 ["The Board's action clearly violates the HAA."]; Petition Prayer ¶ 2 ["For an order vacating the Board's action that reversed the EIR certification . . ."].)

A CEQA case that seeks review of a "determination, finding, or decision . . . made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency . . . shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure." (Pub. Resources Code, § 21168.) The HAA also requires Petitioners to bring their suit "pursuant to Section 1094.5 of the Code of Civil Procedure." (Gov. Code, § 65589.5(m).) Under local laws, the Board of Supervisors decides any appeal of an EIR certification. (S.F. Admin. Code, § 31.16(a).) At "a hearing on the appeal," the Board exercises its discretion in determining "all facts, evidence and issues related to the adequacy, accuracy and objectiveness of the CEQA decision . . . ." (*Id.* at § 31.16, subd. (b)(4), (b)(6), (c)(3).) Accordingly, Section 21168, and Code of Civil Procedure section 1094.5, governs this case.

Given the Legislature's designated remedy for Petitioners' alleged grievances, they cannot state a claim for declaratory relief.

C. Petitioners Fail to Allege an Actual Controversy Ripe for Declaratory Relief.

Insofar as Petitioners seek relief for future cases that go beyond the City's specific action on the 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.) "Declaratory relief requires a court to have 'narrow, precise questions to guide its examination'" (*id.* at 14); it "does not embrace controversies that are 'conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.'" (*Del Cerro Mobile Estates*

v. City of Placentia (2011) 197 Cal.App.4th 173, 186.) "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." (*Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at 14-18.) The court rejected these allegations based on judicially noticed evidence of a State Water Board order upholding a regional water board's decision. (*Id.* at 17-18.) Although the court did not accept the State Board's conclusions, it found that the judicially noticed facts sufficed to refute Petitioners' unsupported claims of an agency "pattern or practice" of ignoring relevant law. (*Ibid.*) Moreover, the court found that the complaint, "at its heart," challenged the effectiveness of the board's efforts to implement the law, and "a dispute over the correctness of these decisions is not amenable to declaratory relief." (*Id.* at 18 ["Declaratory relief generally is not available to use the courts to tell an administrative agency how to do its job."].)

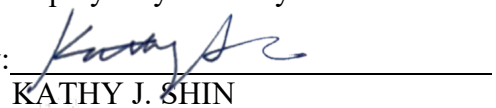
Petitioners' contention that "Respondents' actions . . . represent a pattern or practice of the City's review of housing development projects that has caused San Francisco to be amongst the top two most expensive housing markets in the United States" (Petition, ¶ 79), likewise improperly seeks to control discretion properly reserved to the Board of Supervisors, and fails to present a narrow, precise question that constitutes an actual controversy sufficient for declaratory relief.

CONCLUSION

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

Dated: July 15, 2022

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By: 
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CITY AND COUNTY OF SAN FRANCISCO

PROOF OF SERVICE

I, LAUREN SKELLEN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On July 15, 2022, I served the following document(s):

- San Francisco's Notice of Demurrer and Demurrer to Petition for Writ Of Mandate and Complaint for Declaratory Relief
- Declaration of Kathy J. Shin in Support of San Francisco's Demurrer
- Request for Judicial Notice in Support of San Francisco's Demurrer to Petition and Complaint
- Memorandum of Points and Authorities in Support of San Francisco's Demurrer

on the following persons at the locations specified:

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in the manner indicated below:

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address: lauren.skellen@sfcityatty.org ☒ in portable document format ("PDF") Adobe Acrobat or ☐ in Word document format. OR

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be served electronically through File & ServeXpress in portable document format ("PDF") Adobe Acrobat.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 15, 2022, at San Francisco, California.



LAUREN SKELLEN