RYAN J. PATTERSON (SBN 277971)
BRIAN O'NEILL (SBN 298108)
ZACKS, FREEDMAN & PATTERSON, PC
235 Montgomery Street, Suite 400
San Francisco, CA 94104
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,

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

Real Parties in Interest.

Case No.: CPF-22-517661

PETITIONERS' OPPOSITION TO RESPONDENTS' DEMURRER

Date: August 12, 2022
Time: 9:30 a.m.
Dept: 503
Judge: Hon. Cynthia Ming-Mei Lee

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SAN FRANCISCO, CALIFORNIA 94111

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I. INTRODUCTION

It cannot be the case that a final, quasi-judicial decision subject to the substantive and procedural requirements of CCP § 1094.5 is immune to judicial review – no matter how erroneous, arbitrary, or pretextual the decision was. Nor is the decision any less final by virtue of it including an order for new administrative action. And lastly, a city cannot avoid compliance with state housing laws by violating CEQA. This case concerns San Francisco's unlawful disapproval of a housing development project that proposes to construct 495 new dwelling units, including 73 units that would be restricted as affordable housing, at 469 Stevenson Street in San Francisco, which is currently used as a parking lot (the "Project"). An application for the Project was first submitted in 2017, and an Environmental Impact Report ("EIR") totaling over 1,000 pages was certified by the City as adequate, accurate, and objective over a year ago. Despite this, the parking lot remains empty, and the applicant has been stuck in environmental review purgatory with no end in sight.

Respondents' 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, nor could they. Instead, the City's unlawful disapproval was couched as a decision under the California Environmental Quality Act ("CEQA"), which Respondents claim is completely unreviewable by this Court, regardless of whether its decision lacked any evidentiary basis. The City's erroneous decision not only violated CEQA, but Respondents' demurrer demonstrates how the City wields CEQA to insulate itself from liability for clearly illegal actions. Respondents argue that no law, not even the standards of CEQA itself, are applicable until the City decides its review is complete – even after an EIR is certified.

The City's decision to reverse the EIR certification must comply with the requirements of law, and the decision here was completely unsupported by any evidence. Respondents cannot violate the law simply by invoking CEQA, and this Court must examine the full record to prevent the CEQA process from being used as a "fearsome weapon" against proposed projects that will increase housing density. (*Tiburon Open Space Comm. v. Cnty. of Marin* (2022) 78 Cal.App.5th 700, 783.)

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II. BACKGROUND

On July 29, 2021, nearly four years after the Project application was submitted, the San Francisco Planning Commission certified an EIR for the Project, finding that the EIR complied with CEQA and was adequate, accurate, and objective. The Commission also approved the entitlements for the project. Three months later, on October 26, 2021, the Board of Supervisors reversed the certification and voided the project entitlements based on what the California Department of Housing and Community Development called "various vague concerns" related to gentrification, historic resources, and seismic issues. (Pet., Ex. A.) Another two months would go by before the Board adopted any written findings in support of its action, which largely relied on individual Board members' unsubstantiated "opinion" that the EIR was inadequate. (Pet., Ex. B.) As a result, the Board instructed the Planning Department to conduct further environmental review. (*Id.*) Another eight months have gone by since the Board's action, and a new EIR has yet to be circulated.

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 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.) On demurrer, "the allegations of the complaint are assumed to be true" and demurrer is "simply not the appropriate procedure for determining the truth of disputed facts." (*Ramsden v. Western Union* (1977) 71 Cal. App. 3d 874, 879.)

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IV. ARGUMENT

A. Petitioners Adequately State a Cause of Action Under CEQA

1. Petitioners' CEQA Claim Is Ripe

Petitioners' second cause of action states that the Board's reversal of the EIR certification was an abuse of discretion because the Board's decision was based on clearly erroneous and inaccurate findings that were supported solely by evidence that consisted entirely of argument, speculation, and unsubstantiated opinion and narrative. (Pet. ¶ 58.) The Board's decision and written findings were issued after a quasi-judicial proceeding, which is subject to judicial review by petition for administrative mandamus. (*See Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566.)

Respondents argue that Petitioners' claim is not ripe, citing to Pub. Res. Code § 21167, which establishes the statute of limitations for bringing various types of CEQA claims. Respondents take the remarkable position that, until the City decides CEQA review is complete and files a notice of determination or exemption, any City action under CEQA is completely unreviewable. In conjunction with its argument that a Petitioner cannot seek relief from a failure to meet CEQA's deadlines, so long as the City continues to "over-exercise" its unfettered discretion to demand more review, the City's position is that it can subject a project to an endless CEQA loop until the end of time while this Court is powerless to provide any relief. That cannot be how the law works.

CEQA actions are brought pursuant to Pub. Res. Code § 21168, not the statute of limitations provided in § 21167. Pub. Res. Code § 21168 allows for an action "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency" in accordance with the provisions of CCP § 1094.5, and does not limit such attacks to after a notice of determination is filed. Petitioners' cause of action attacks and seeks to set aside the Board's final decision in a quasi-judicial proceeding to reverse the certification of a final EIR, in accordance with the provisions of CCP § 1094.5.[1] The Board's clearly erroneous decision is clearly reviewable by this Court, and it can be set aside pursuant to Pub. Res. Code § 21168.

[1] Respondents' reliance on *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464 is misplaced. *California Water Impact Network* did not involve a challenge

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Respondents also argue that Petitioners fail to allege facts to support a CEQA claim. To the contrary, Petitioner allege that the Board's findings of "displacement" was based on opinion (Pet. ¶ 34), the Board failed to identify any historic impacts (Pet. ¶ 35), the Board routinely and properly relies on future Building Code compliance when determining whether EIRs are adequate yet did not do so here (Pet. ¶ 36), and that the Board's decision was based solely on the unsubstantiated statements and opinions of individual Board members (Pet. ¶ 37).[2] Petitioners adequately allege facts to support the CEQA claim, and the claim is clearly ripe for judicial review.

2. Petitioners Are Entitled to the Relief Sought

As Respondents explained in the demurrer, 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." (MPA, p. 7.) The Board subsequently "voted to reverse the Planning Commission's certification of the Project EIR." (*Id.*) Petitioners' cause of action asserts that the Board's action was an abuse of discretion, should be set aside, and the Planning Commission's EIR certification reinstated. (Pet. ¶ 58.)

Respondents rely on *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245 to argue that Petitioners are not entitled to any relief because a court cannot command the exercise of discretion in a particular manner. In *Schellinger*, a city council determined that a *draft* EIR, which had never been certified, should be recirculated for further analysis. (*Id.* at 1253.) The Court explained that the court's corrective authority under CEQA is "essentially negative," and a court may only void past decisions, but cannot control a future decision in order to "produce a particular result." (*Id.* at

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to a CEQA decision at all, but instead involved a challenge to a water supply assessment that was prepared as an informational document for inclusion in a later EIR. (*Id.* at 1474.) The Court found the challenge was premature because the assessment was not a final determination of adequate water supply, and the assessment could only be challenged after the findings were evaluated and adopted as part of the EIR. (*Id.* at 1488.) Here, there was a final decision on an EIR.

[2] Respondents deceptively quote a statement in Petitioners' Record Motion Reply Brief to argue that Petitioners "conceded" that the City complied with CEQA. (MPA, p. 16.) The City *did* fully comply with CEQA when the Planning Commission certified an adequate, accurate, and objective EIR. (Pet. ¶ 26.) The CEQA violation occurred when the Board subsequently and erroneously voted to reverse that certification and void the Planning Commission's approval of the project without supporting evidence. (Pet. ¶ 46, 58.)

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1266.) The Court explained that if the City's decision to recirculate were reversed, certification of an earlier *draft* EIR "would be the only matter pending for the City to take." (*Id.* at fn. 19.)

Herein lies the key distinction between *Schellinger* and the present case. In *Schellinger*, the city never exercised its discretion to certify a final EIR. Here, the Planning Commission exercised its discretion to determine the *final* EIR was adequate, accurate, and objective, and complied with the requirements of CEQA. (Res. RJN, Ex. A, p.3). The Commission exercised its legal authority to certify the final EIR and approve the project, an action that was subsequently reversed by the Board of Supervisors in a quasi-judicial hearing.[3] If the Board's erroneous decision were deemed void, an "essentially negative" corrective authority that the court in *Schellinger* specifically recognized, no further action by the City would be required. The final EIR would be fully certified, and the project would be approved. Thus, this Court does not need order the City to exercise its discretion in any particular manner for Petitioners to obtain the relief sought, because the City has already exercised its discretion to certify a final EIR. The Board's subsequent reversal of the certified EIR was an abuse of discretion, which is subject to judicial review and can be set aside pursuant to Pub. Res. Code § 21168 and CCP § 1094.5.

Petitioners also assert that the City failed to certify the EIR within one year as required by Pub. Res. Code § 21151.5. Respondents do not argue the City met the one-year deadline, and in fact argue the deadline should be measured from October 16, 2018 – almost four years ago. Rather, Respondents argue that their failure should be excused on the theory of laches, due to either unreasonable delay on the part of the applicant or acquiescence on the part of Petitioners. The existence of laches is a question of fact that must be determined in light of all applicable circumstances. (*In re Marriage of Plescia* (1997) 59 Cal.App.4th 252, 256.) Respondents again solely rely on *Schellinger*, where the court found that the "extensive record" demonstrated that there was unreasonable delay "solely attributable" to the developer, and thus laches was grounds for relief

[3] Unlike in San Francisco, where the Planning Commission is fully authorized to certify an EIR and approve project entitlements, the Planning Commission in the City of Sebastopol merely makes recommendations – and only the City Council is authorized to certify an EIR and approve a project. (*See* Sebastopol Municipal Code § 16.04.130)

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from the one-year deadline. (*Schellinger, supra*, 179 Cal.App.4th at 1267-68.) On demurrer, there is no extensive record for this Court to make a determination in light of all applicable circumstances, and the City bases its laches claim on a bare statement that "the City is not aware of" any objections to their failure to adhere to the one-year deadline. (MPA, at p. 15.)

Moreover, here the delay was not attributable to applicant's revisions as in *Schellinger*, but was caused by the City's demand for payment of a "bonus fee" on the project's density bonus units granted under state law.[4] (Pet. RJN, Ex. 1 Shin Dec., Ex. H.) The fee had no bearing on the potential environmental impact of the project and could have been easily resolved through a condition of approval, yet the City failed to act for seven more months solely due to their fee demand. This is despite the fact that the State Attorney General had recently issued an opinion that such fees "imposed" on density bonus units are invalid and a violation of state law. (Pet. RJN, Ex. 2) Rather than "impose" the illegal density bonus fee through a condition of approval, the City held the EIR hostage until the applicant acceded to the fee demand. On May 18, 2021, the applicant submitted a new affordable housing affidavit that agreed to pay the density bonus fee. (Pet. RJN, Ex. 3.) *Less than a month later*, the EIR was finally scheduled for a hearing. (Res. RJN, Ex. A, p.3). The City's delay in certifying the EIR was not "solely attributable" to the applicant; it was a shakedown.

Regardless, demurrer is not the appropriate procedure for determining the truth of disputed facts, and therefore the factual question of the City's claim of laches is not appropriate to reach at this stage. (*See Ramsden, supra*, 71 Cal. App. 3d at 879.)

Finally, Respondents argue that a claim for violating the one-year deadline may only be brought by administrative mandamus pursuant to CCP § 1085. Petitioners' CEQA cause of action raises claims under both CCP §§ 1094.5 and 1085, as the claims are partially interrelated. As explained, Petitioners' claim brought pursuant to CCP § 1094.5 asserts that the Board's reversal of the EIR certification was an abuse of discretion that must be overturned. The City has already

[4] The applicants had proposed to provide 94 below-market-rate units, *24 more affordable units than were legally required*, in lieu of paying the density bonus fee. The City insisted on the fee rather than more affordable housing. (Pet. RJN, Ex. 1; Shin Dec., Ex. H.)

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certified an adequate, accurate, and objective EIR, yet the City refuses to recognize that certification and has ordered additional environmental review. The City is already well beyond the one-year deadline, and it refuses to carry out its ministerial duty to certify the final EIR that fully complies with CEQA and approve the project.

B. Petitioners Adequately State a Cause of Action Under SB 330

Gov. Code § 65905.5, also known as SB 330, prohibits a local government from conducting more than five hearings in connection to a housing development project, and explicitly counts continued hearings toward one of the allowed five hearings. Subdivision (b)(2) of SB 330 defines the types of hearings that are included in the limitation, specifically stating that a hearing includes "***any*** public hearing, workshop, or similar meeting, including any appeal, conducted by the city or county with respect to the housing development project" and specifically "does not include a hearing to review a legislative approval," such as general plan or zoning amendments. Subdivision (b)(2) does not contain an explicit reference to CEQA hearings.

Respondents confirm that the City has already held eight public hearings, but argue that none of those hearing count because the hearings included consideration of the EIR, in addition to the project entitlements. (MPA, p. 12.) Respondents argue that SB 330 subdivision (d) excludes CEQA hearings from the five-hearing limit, yet subdivision (d) does *not* contain an exclusion for CEQA hearings. Subdivision (d) merely states that "Nothing in this section supersedes, limits, or otherwise modifies the *requirements* of, or the standards of review" of CEQA. Counting CEQA hearings toward the five-hearing limit does not "modif[y] the requirements" of CEQA because "CEQA *does not require formal hearings at any stage of the environmental review process*." (14 Cal. Code Regs., § 15202(d).) In other words, the City can fully comply with the requirements of CEQA without ever holding a public hearing.

If the Legislature had intended to exempt CEQA hearings from the five-hearing limit, it would have done so explicitly as it did for legislative approvals in (b)(2), but it did not. When a statute uses "particular language in one section of a statute but omits it in another section . . . it is generally presumed that [Legislature] acts intentionally and purposely in the disparate inclusion or exclusion." (*Russello v. United States* (1983) 464 U.S. 16, 23.) Subdivision (d) omits the hearing exemption

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language for CEQA that is contained in (b)(2), and the Legislature must have done so intentionally and purposefully. Moreover, Respondents acknowledge that "project approval and certification of the EIR generally occur during the same hearing," and these hearings are often treated as "interchangeable." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200.) As such, the SB 330 five-hearing limitation would be rendered completely meaningless if CEQA hearings did not count, because there would be no hearings left to hold once CEQA has concluded. Courts recognize that hearings for project approvals and EIR certification are treated as interchangeable, and the Legislature is "deemed to be aware of existing laws and judicial decisions" and to have enacted statutes accordingly. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897.) This case provides a clear example how SB 330 would be rendered meaningless under the City's interpretation, as the City has already held eight hearings on the project – and the City has taken the position that not a single one of them counts.[5]

There is no exception for CEQA hearings in SB 330, and the City has already held more than eight hearings on the project in violation of the five-hearing limit. The Board's reversal of the EIR certification, which voided the Planning Commission's approval of the project, guarantees that the City will violate SB 330 again in the future. As such, Petitioners adequately state a cause of action under SB 330.

C. Petitioners Adequately State a Cause of Action Under the Housing Accountability Act

Petitioners allege that Respondents violated the HAA by disapproving a code-compliant housing development project without making any of the required health and safety findings. Petitioners further allege that the City's actions were an abuse of the CEQA process designed to avoid its legal duty to approve a code-compliant housing development project within 120 days after certification of an EIR. (Pet. ¶ 70, 71.)

[5] Respondents also argue that SB 330 does not apply until after CEQA concludes because SB 330 states an agency must act "consistent with the applicable timelines under the Permit Streamlining Act." This provision simply reiterates an agency's obligation to act in accordance with the Permit Streamlining Act and does not exempt any hearing from the five-hearing limit.

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1. The HAA is Applicable Throughout the Approval Process

Respondents argue that the HAA does not apply at all until the City, in its unfettered unreviewable discretion, determines that the CEQA review process is complete. To the contrary, the provisions of the HAA are applicable throughout the application process. For example, the HAA requires a local government to make a written code-compliance determination within 60 days after the application is deemed complete. (Gov. Code § 65589.5(j)(2).) The HAA also prohibits a city from subjecting a project to any ordinance, policy, or standard not in effect when a preliminary application for the project was submitted, which is applicable throughout the entire review process. (Gov. Code § 65589.5(o)(2).) There is no declaration that CEQA supersedes the HAA, and courts consistently recognize that state statutes operate concurrently except where "the two acts are so inconsistent that there is no possibility of concurrent operation." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 18 (Courts will not impliedly supersede statutes "unless there is no rational way to harmonize the two potentially conflicting statutes").)

Courts have also explicitly recognized that the HAA does, in fact, limit a local government's discretion under CEQA. As the First District Court of Appeal recently confirmed, CEQA "recognizes that an agency's discretion is limited by its own legal obligations. Accordingly, where a legal obligation limits an agency's discretion, the scope of environmental review likewise is limited." (*Tiburon Open Space, supra*, 78 Cal.App.5th at 732.) Legal infeasibility limits discretion under CEQA, particularly where an action "would be prohibited by Government Code section 65589.5, subdivision (j) [HAA]." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715.) The City's discretion under CEQA is not unfettered and is limited by its other legal obligations under state law, including the HAA. In other words, the City cannot shield itself from liability for flagrantly illegal behavior, so long as it does so under the guise of CEQA.

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2. The City has Abused the CEQA Process to Violate the HAA

> CEQA was meant to serve noble purposes, but it can be manipulated to be a formidable tool of obstruction, particularly against proposed projects that will increase housing density . . . It must be tough enough when the opposition is purely private. However, when private opposition is joined with official hostility, CEQA becomes an even more fearsome weapon. When the project proponent faces sustained private opposition, plus the combined animus of [ ] local government, the temptation to throw in the towel must be overwhelming.
> (*Tiburon Open Space, supra*, 78 Cal.App.5th at 782.)

The housing development project at issue here proposes to construct 495 new dwelling units, including 73 units that would be restricted as affordable housing, on a parcel that is currently used as a parking lot. Four and a half years have gone by since the project application was submitted, with an EIR that has eclipsed over 1,000 pages, and the City has ordered *even more* environmental review based on completely unsubstantiated and speculative concerns. The City's demurrer is attempting to turn CEQA into an impenetrable black box that is subject to no other state laws, nor to judicial review, where the City can hold a project in abeyance indefinitely so long as it continues to "over exercise" the environmental review process. CEQA was never designed to "be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement," yet the City has turned its process into just that. (*Id.*)

The City fully complied with CEQA, and the Planning Commission certified the EIR as adequate, accurate, and objective; and also approved the entitlements for the project. Even accepting the City's proposition that the HAA does not apply until an EIR is certified, the HAA's provisions would be applicable here, where an EIR has already been certified. This is distinguishable from *Schellinger*, where the City never took a discretionary action on the draft EIR or the underlying project. (*Id.* at 1253.) The court's reasoning in *Schellinger* is inapplicable in this case, where the City has already taken discretionary action to approve the EIR and the entitlements. While the HAA "has no provision automatically approving EIRs," there is no need for an automatic approval of the EIR. (*Schellinger, supra*, 179 Cal.App.4th at 1262.) The EIR has already been certified.

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The Board of Supervisors' action in the CEQA appeal was baseless and an abuse of the CEQA process meant to avoid the City's legal duty to approve a code-compliant housing development project. Realizing there was no legally valid basis to deny the project under the HAA, the City manipulated CEQA into a tool of obstruction to circumvent the HAA. The City claims that the Board's action that voided the project entitlements was "incidental" to the Board's erroneous reversal of the EIR certification. Petitioners allege that the disapproval of the project entitlements was not merely incidental, but the driving force behind the Board's actions. (Pet. ¶ 70-75.) If the Court reviews the evidence and agrees that the Board's actions were pretextual and the Planning Commission's EIR certification was valid, the Board's vote to void the project entitlements would constitute a violation of the HAA. That determination can only be made on the basis of the entire record. Particularly on demurrer, where all facts properly pled must be assumed true, Petitioners adequately state a cause of action that asserts the City's action to reverse the *certified* EIR was unlawful under CEQA and violated the HAA. As Respondents point out, the court in *Schellinger* only reached the claims regarding the HAA "*[a]fter* rejecting petitioner's CEQA claims. (MPA, p. 9.) If Petitioners' claims regarding CEQA are valid, so too are the claims related to the HAA.

Similarly, the Legislature has recognized that "lengthy permitting processes and approval times" exacerbate the cost of residential construction and have contributed to the housing crisis. (SB 330, Sec. 2(a)(10).) As a result, the HAA defines "disapproval" of a housing development project to include any instance where an agency fails to comply with the time limits of the Permit Streamlining Act, which requires a final action on a project within 120 days after certification of an EIR. (Gov. Code § 65589.5(h)(5); Gov. Code § 65950(a).) Again, if this Court finds that the Board's reversal of the EIR certification was erroneous and the Commission's certification is upheld, the Board's vote to void the entitlements would also constitute a violation of the HAA for a failure to meet that deadline.

3. The HAA Requires Approval Even if an EIR Identifies Environmental Impacts

"An environmental impact report is an *informational* document," the purpose of which is to give the public and government agencies information. (Pub. Resources Code, § 21061; *see also In*

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re Bay-Delta Etc. (2008) 43 Cal.4th 1143, 1162.) However, the statute "does not necessarily call for disapproval of a project having a significant environmental impact, nor does it require selection of the alternative most protective of the environmental status quo." (*California Building Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 383.) CEQA specifically permits approval of projects that have significant environmental impacts upon a finding that "economic, social, or other considerations" render them feasible. (Pub. Res. Code § 21081(c).) As defined in CEQA, feasibility means capable of being accomplished "taking into account economic, environmental, *legal*, social and technological factors." (14 Cal. Code Regs., § 15364.) The CEQA review process is similarly constrained by an agency's duty to act on permits within statutory deadlines, even when those deadlines "are so short that review of the project under CEQA would be difficult." (14 Cal. Code Regs., § 15111.) CEQA's provisions recognize that, at its core, the law is informational rather than substantive, and an agency's actions under CEQA are constrained by its other legal obligations.

The HAA, in turn, specifically limits an agency's discretion to disapprove a housing development project, or condition the project to be developed at a lower density, unless the project "would have a specific, adverse impact upon the public health or safety" that cannot be mitigated. (Gov. Code, § 65589.5(j)(1).) This HAA requirement is not in conflict with CEQA but works in tandem with CEQAs provisions. An agency may not adopt an alternative or implement a mitigation measure through the CEQA process that would decrease density without violating the HAA, unless the agency has identified a "specific, adverse impact upon the public health or safety." (*See Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 716.) If the City were to ignore its duties under the HAA until the CEQA process is complete, the result could be a violation of the HAA. Yet if an agency approved a housing development project pursuant to the HAA, even one that would have significant environmental effects, the result would not be a CEQA violation. In sum, an agency can fully comply with CEQA and the HAA, but *only if* it recognizes its duties under the HAA throughout the CEQA process. The City here certified the EIR and approved the Project, consistent with its obligations under CEQA and the HAA. The Board's erroneous decision to overturn those approvals was a violation of both.

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4. The City Acted in Bad Faith

The HAA defines "bad faith" as an action that is "frivolous or otherwise entirely without merit." (Gov. Code § 65589.5(l).) Respondents argue that Petitioners failed to allege any facts regarding bad faith. To the contrary, Petitioners allege the City's denial of a code-compliant project, based on a clearly pretextual and prohibited basis, supported solely by vague, unsubstantiated concerns regarding the adequacy of the EIR, which are not supported by any evidence, was clearly frivolous and without merit. (Pet. ¶ 70-75.)

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

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.) Petitioners here allege that the City has implemented three policies that are inconsistent with its legal duties under SB 330, CEQA, and the HAA, and an actual controversy relating to the legal rights and duties of the parties exists.

First, the City has a policy that any hearing in which CEQA is discussed at all does not count toward the five-hearing limitation. As explained above, SB 330 does not exempt CEQA hearings from the limit as the law does for legislative approvals, which confirms the Legislature's intent to count CEQA hearings toward the limit. Moreover, CEQA does not require public hearings at all, and the City can fully comply with CEQA's requirements and SB 330's five-hearing limit. This is "an actual controversy relating to the legal rights and duties of the parties" with regard to SB 330, which can be appropriately resolved by judicial declaration. (*See Monterey Coastkeeper, supra,* 76 Cal.App.5th at 12.)

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Second, the City has a formal, written policy that violates CEQA's one-year EIR certification deadline. Local agencies are required to establish time limits to complete and certify EIRs that must not exceed one year. (Pub. Res. Code § 21151.5(a)(1)(A); *see also Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 220.) Moreover, those time limits must be "measured from the date on which an application requesting approval of the project is received and accepted as complete by the local agency." (14 Cal. Code Regs., § 15108). The City has adopted a policy that sets a "target" of completing an EIR within 18 months and completing a "complex" EIR within 22 months, almost double the statutory deadline. (Pet. RJN, Ex. 4.) Moreover, even though CEQA requires the deadline to be measured from the date on which an application is accepted as complete, the City measures the deadline from when the Planning Department determines the project description is "sufficiently stable."[6] (*Id.*) Moreover, even with deadlines almost twice the legal limit, the City has a pattern and practice of routinely ignoring these deadlines. According to the last informational report prepared by the Planning Department, the City only meets these deadlines 25% of the time. (*Id.*) The City's own findings confirm the City "has a policy of ignoring or violating applicable laws," for which declaratory relief is available. (*Venice Town Council, supra,* 47 Cal.App.4th at 1566-67.)

Third, Respondents' overarching policy is to ignore the limitations that the HAA places on the CEQA process. As explained above, a variety of HAA requirements are applicable throughout the CEQA process, and the City's legal obligations under the HAA limit the City's discretion under CEQA without relieving the City of its obligation to *comply* with CEQA. (*Sequoyah Hills, supra,* 23 Cal.App.4th 704, 715.) This is "an actual controversy relating to the legal rights and duties of the parties" with regard to the HAA, which can be appropriately resolved by judicial declaration. (*See Monterey Coastkeeper, supra,* 76 Cal.App.5th at 12).

[6] The terms "complex EIR" and "sufficiently stable" are not defined in CEQA, and the City policy gives unfettered discretion to the Planning Department to label an EIR "complex" and determine when a project description is "sufficiently stable." (Pet. RJN, Ex. 4.)

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Respondents appear to argue that there is a blanket prohibition against including declaratory relief claims in an action that also raises claims related to a specific administrative decision.[7] (Demurrer, p. 17.) This exact argument was rejected by the court in *Calif. for Native Salmon v. Dept. of Forestry* (1990) 221 Cal.App.3d 1419, where plaintiffs "not only sought administrative mandate to vacate the [permit] approval, but also sought declaratory relief, outside the context of the specific [permit] at issue" to resolve a dispute about general policies. (*Id.* 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.*) This was similarly rejected by the court in *Venice Town Council* that explained alleged violations in individual permits are often "symptomatic of the much broader problem the action is designed to relieve." (*Venice Town Council, supra*, 47 Cal.App.4th at 1566-67.) This argument is belied by CCP § 1060 itself, which states that a plaintiff "may ask for a declaration of rights or duties, *either alone or with other relief*."

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 that violate SB 330, CEQA, and the HAA that Respondents apply to all housing project applications. Petitioners' claim for declaratory relief seeks to resolve an actual controversy regarding the parties' rights and duties under state law to avoid piecemeal litigation of the same issue for scores of individual projects, which can only be accomplished through a claim for declaratory relief.

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. If the demurrer is sustained on any basis, Petitioners request leave to amend.

[7] Respondents also argue that declaratory relief claims fail when such claims are wholly derivative of other failed claims. First, Petitioners adequately state a cause of actions for all other claims. Second, Petitioners' declaratory relief claims are related to an attack of the City's general policies and are not derivative of claims related to the 469 Stevenson Project. Respondents demurrer "confuses review of specific, discretionary administrative decisions with review of generalized agency policy." (*Venice Town Council*, supra, 47 Cal.App.4th at 1566-67.)

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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