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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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 1-35, Respondents and Defendants, NORDSTROM, INC.; 469 STEVENSON INVESTMENT, LLC; YERBA BUENA NEIGHBORHOOD CONSORTIUM, LLC, Real Parties in Interest.	Case No. CPF-22-517661 ORDER RE: DEMURRER Hearing Judge: Hon. Cynthia Ming-mei Lee Time: 9:30 a.m. Place: Department 503 Hearing Date: September 9, 2022

The above-titled matter came on regularly for hearing on September 9, 2022 at 9:30 a.m. in Department 503, the Honorable Cynthia Ming-mei Lee presiding. Ryan J. Patterson and Brian O'Neill of the law firm Zacks Friedman & Patterson P.C. appeared for petitioners and plaintiffs, Yes in My Back Yard and Sonja Trauss (collectively, "Petitioners"). Deputy City Attorneys Kristen A. Jensen and Kathy J. Shin appeared on behalf of defendants and respondents, the City and County of San Francisco, the Board of Supervisors, and Does 1-35 (collectively, "the City"). The Court took the

matter under submission and subsequently ordered another hearing on October 7, 2022 for the limited purpose of additional argument on declaratory relief under the Fourth Cause of Action.

Having now considered the parties' pleadings and oral argument, the Court SUSTAINS the demurrer for the following reasons.

I. Legal Background

Under Code of Civil Procedure section 430.30(a), "when any ground for objection to a complaint, cross-complaint, or answer 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." Though courts "must accept all factual allegations in the complaint as true, 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." (*Monterey Coastkeeper v. Cent. Coast Reg'l Water Quality Control Bd.* (2022) 76 Cal.App.5th 1, 16; *see also City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1999) 68 Cal.App.4th 445, 459 [holding "a demurrer tests the pleading alone, and not the evidence or the facts alleged"].)

A party may object by demurrer on grounds that "the court has no jurisdiction of the subject of the cause of action alleged in the pleading." (Code Civ. Proc. Section 430.10(a).) A party may also object on grounds that "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. Section 430.10(e).)

In general, "if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. Nevertheless, 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.) It is petitioner's burden to "demonstrate the manner in which the complaint might be amended." (*Ibid.*)

II. Judicial Notice

The City's request for judicial notice in support of its demurrer is GRANTED as to Exhibits A-D under Evidence Code section 452(h). The request for judicial notice of Exhibit E is GRANTED

under Evidence Code section 452(d). However, the Court's findings in its order on the Motion to Lodge and Serve the Record of Proceedings are not dispositive of the issues on demurrer. The request for judicial notice of Exhibit F is DENIED as the truth of matters asserted is not subject to judicial notice. (*Arce v. Kaiser Found. Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482.)

Petitioners' request for judicial notice in opposition to the demurrer is GRANTED as to Exhibit 2 under Evidence Code section 452(c) and Exhibit 3 under Evidence Code section 452(h). The request for judicial notice of Exhibits 1 and 4 are DENIED as the truth of matters asserted is not subject to judicial notice. (*Arce*, *supra*, 181 Cal.App.4th at 482.)

III. Discussion

The Court addresses each cause of action in the petition in turn.

A. First Cause of Action (Writ of Mandate – Code of Civil Procedure section 1094.5 and/or section 1085; Government Code section 65905.5 – Against All Respondents)

Petitioners allege that the City ignored their legal duty to either approve or disapprove housing development projects at one of the five public hearings allowed pursuant to SB 330, also known as Government Code section 65905.5. (Petition at ¶¶ 50, 52.) Petitioners fail to state a cause of action.

Under Government Code section 65905.5(d), "Nothing in this section supersedes, limits, or otherwise modifies the requirements of, or the standards of review pursuant to, Division 13 (commencing with Section 21000) of the Public Resources Code." As such, Petitioners fail to show that even if the five-hearing limitation has been reached under SB 330, a project is entitled to move forward where environmental review has not been completed or where an agency has found the EIR to be deficient. Petitioners' argument that the five-hearing limitation does not modify the requirements of CEQA under Government Code section 65905.5(d) because no formal hearing is required under CEQA Guidelines, section 15202(a),[1] and the City can fully comply with the requirements of CEQA without ever holding a public hearing ignores this point. (Opp. at 11.) At this juncture, CEQA review is still in progress. The Board reversed the Planning Commission's certification of the EIR based on

[1] Petitioners erroneously cite to section 15202(d). (Opp. at 11.)

an appeal by Real Party in Interest Yerba Buena Neighborhood Consortium, LLC ("Yerba Buena"). (Pet. ¶¶ 26, 27, 33.) The Board's decision states, "this Board remands the Final EIR to the Planning Department to undertake further environmental review of the Project consistent with this Motion, before further consideration of EIR Certification and any Project approvals." (Pet., Ex. B at 8.)

Moreover, although no formal hearing is required under CEQA Guidelines, the Guidelines encourage public hearings. (*see* CEQA Guidelines, § 15202(c) ["A public hearing on the environmental impact of a project should usually be held when the lead agency determines it would facilitate the purposes and goals of CEQA to do so"]; § 15202(d) ["A draft EIR or negative declaration should be used as a basis for discussion at a public hearing"].) Public hearings are also required under local laws governing CEQA. (*see, e.g.,* S.F. Admin. Code, § 31.14(a) ["The Environmental Review Officer shall provide public notice of the availability of the draft EIR and schedule a public hearing on the draft EIR with the Planning Commission"]; SF. Admin. Code § 31.16(b)(4) ["The Clerk of the Board shall schedule a hearing on the appeal before the full Board"].) Additionally, the San Francisco Planning Commission and Board of Supervisors are considered local legislative bodies and public meetings are required of legislative bodies under the Government Code. (*see* Government Code §§ 54952(a) and (b) [defining "legislative body" as "the governing body of a local agency…" [and] "a commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body"]; *see also* Government Code § 54953(a) ["all meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter"].)

In light of the Court's rulings, the Court does not address whether the hearings held by the City exceed the five hearing limitation under SB 330.

Accordingly, the demurrer is SUSTAINED without leave to amend as to Petitioners' First Cause of Action.

B. Second Cause of Action (Writ of Mandate – Code of Civil Procedure section 1094.5 and/or section 1085; Government Code section 65920 et seq., Public Resources Code section 21100 et seq. – Against All Respondents)

a. Government Code section 65920 et seq. (Permit Streamlining Act)

Petitioners fail to address the City's argument that where no EIR has been certified, the time limits for agency action on a project under Government Code section 65920 et seq., do not apply. Accordingly, Petitioners have waived this argument. (*see Consumer Advoc. Grp., Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 694, [a brief "should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration"].)

b. Public Resources Code section 21100 et seq.

Petitioners allege that the City ignored their legal duty under CEQA to certify an EIR within one year of an application being deemed complete pursuant to Public Resources Code section 21151.5. (Pet. at ¶ 55.) Petitioners fail to state a cause of action.

CEQA "contains no automatic approval provisions and its time limits are directory rather than mandatory." (*Schellinger Bros. v. City of Sebastopol* (2009), 179 Cal.App.4th 1245, 1260 (internal citations omitted).) Though "directory time limits may be enforced by a writ of mandate compelling the agency to act," that is not the case here. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 223). In *Sunset Drive*, the court found that a traditional writ of mandamus lay to compel a local agency to complete the process of completing and certifying an EIR where the agency refused to take any action towards doing so. (*Id.* at 222-223.) By contrast, Petitioners do not allege that the City failed to act on certifying and completing the EIR. They do not dispute that the Planning Commission certified a final EIR. Rather, they challenge the Board's subsequent vote to reverse the Planning Commission's certification of the EIR after an appeal by Yerba Buena. (Pet. at ¶ 56.) Similar to *Schellinger*, "the situation is not that the local agency has refused to exercise its discretion, but that it has in effect never stopped exercising that discretion, and, if anything, has over-exercised it." (179 Cal.App.4th at 1267.)

Additionally, Petitioners' requested relief that the Court reinstate Respondents' certification of the EIR for the 469 Stevenson Project, exceeds the scope of the Court's judicial authority. (Pet. at ¶ 59.) As in *Schellinger*, Petitioners seek "the command of the court to the City to take certain actions...[and] set aside all City decisions other than approval of the project in a particular form." (179 Cal.App.4th at 1265 (internal citations omitted).) However, as *Schellinger* held, "it is traditional mandamus under Code of Civil Procedure section 1085 that issues to compel the performance of a ministerial duty, and even then it will not compel the exercise of such a duty in a particular fashion." (*Ibid.*) Though Petitioners posited at oral argument the Court could alternatively order the Board to conduct a rehearing, this would similarly direct the Board's exercise of discretion.

Even if the Court considers Petitioners' argument that the Board's subsequent reversal of the certified EIR by the Planning Commission is an abuse of discretion subject to judicial review and can be set aside pursuant to an administrative mandamus under Public Resources Code section 21168 and Code of Civil Procedure 1094.5, the relief requested still exceeds the scope of the Court's judicial authority. (Opp at 9.) As stated in Public Resources Code section 21168.9, "nothing in this section authorizes a court to direct any public agency to exercise its discretion in any way." Moreover, as no Final EIR has been certified, the cause of action is not yet ripe. (*California Water Impact Network v. Newhall Cnty. Water Dist.* (2008) 161 Cal.App.4th 1464, 1485 [holding "A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses 'no further power to reconsider or rehear the claim"].)

Petitioners' argument that the Court need not order the City to exercise its discretion in any particular manner because the Planning Commission already exercised its discretion to certify a Final EIR ignores the Board's authority to decide appeals. (Opp. at 9; Pub. Res. Code § 21151(c) ["If a nonelected decisionmaking body of a local lead agency certifies an environmental report...that certification...may be appealed to the agency's elected decisionmaking body if any"]; CEQA Guidelines § 15090(b); S.F. Admin. Code § 31.16(a) ["the following CEQA decisions may be appealed to the Board of Supervisors (the "Board"): (1) certification of a final EIR by the Planning Commission..."]; *see also, e.g., Bakersfield Citizens for Loc. Control v. City of Bakersfield* (2004) 124

Cal.App.4th 1184, 1201–02 [citing Pub. Res. Code § 21151(c) and CEQA Guidelines § 15090(b)]; *Vedanta Soc. of S. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 526 [same].)

In light of the Court's rulings, the Court does not address the City's arguments under the doctrine of laches.

Accordingly, the demurrer is SUSTAINED without leave to amend as to Petitioners' Second Cause of Action.

C. Third Cause of Action (Writ of Mandate – Code of Civil Procedure section 1094.5 and/or section 1085; Government Code section 65589.5 – Against All Respondents)

Petitioners allege that the City has not proceeded in a manner required by law, in effect denying the Project by voting to void the Planning Commission's approval of the entitlements for the Project without making findings that the project would have a specific adverse impact upon the public health or safety as required by Government Code section 65589.5(j) (also known as the Housing Accountability Act or "HAA"). (Pet. ¶ 68.) Petitioners fail to state a cause of action.

The Court finds *Schellinger* instructive on this issue. *Schellinger* held, "The Housing Accountability Act expressly states that 'Nothing in this section shall be construed ... to relieve the local agency from making one or more of the findings required pursuant to Section 21081 ... or otherwise complying with the California Environmental Quality Act....' (Gov.Code, § 65589.5, subd. (e).) But it 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. (CEQA Guidelines, § 15090(a).)" (179 Cal.App.4th at 1262.)

Sequoyah Hills Homowners Assn. v. City of Oakland (1993) 23 Cal.App.4th 704 and *Tiburon Open Space Comm. v. Cnty. of Marin* (2022) 78 Cal.App.5th 700 do not support Petitioners' position that the HAA limits a local government's discretion under CEQA, as a Final EIR was certified in both cases. (Opp. at 13.) In *Sequoyah*, the planning commission held five public hearings to receive comments on a proposed home development project before it certified the Final EIR and approved a tentative map for a 45-unit mitigated alternative described in the EIR. (*Id.* at 710-711.) Appellant appealed the planning commission's decision to the city council, which held four more public hearings

and sustained the planning commission's decision. (*Ibid.*) The city council found that "the project was in compliance with the applicable general plan, zoning, and development policies of the City of Oakland, and that there would be no adverse impact on public health or safety if the project were approved under the specified conditions." (*Id.* at 712.) The city council therefore determined that the HAA prevented it from requiring the developer to lower the project density. (*Ibid.*) The court found that the city did not abuse its discretion when it found that any decreased density alternative to the proposed home development project would be legally infeasible and approved a mitigated alternative. (*Id.* at 716.)

Similarly, in *Tiburon,* the board of supervisors voted to certify the Final EIR, conditionally approve a developer's modified housing development plan, and rezone the property for increased density for the lots the developer would relocate to preserve the ridgeline. (78 Cal.App.5th at 720.) The county acted in the belief that it was compelled by two stipulated judgments in which the county "solemnly—and publicly—agreed to approve the developer building no fewer than 43 units on the property." (*Id.* at 709.) Even so, the court concluded that "the County did not abdicate its authority or otherwise undertake not to comply with CEQA." (*Id.* at 710.) The court found that it was implicit in the 1976 Judgment and explicit in the 2007 Judgment, that an EIR *would* be prepared...an EIR *was* prepared, and went through three drafts, and extensive revision before it was finally certified." (*Id.* at 731 [italics in original].) The administrative process also "involved extensive public input and participation, including multiple Planning Commission meetings and four public hearings before the Board prior to approval." (*Ibid.*)

Unlike in *Sequoyah* and *Tiburon,* the Board reversed the Planning Commission's certification of the EIR based on an appeal by Yerba Buena and made no decision regarding Project approvals. As discussed, the Board expressly "remand[ed] the Final EIR to the Planning Department to undertake further environmental review of the Project...before further consideration of EIR Certification and any Project approvals." (Pet., E. B at 8.) Accordingly, it is immaterial that the Board did not make the requisite findings regarding code compliance under Government Code section 65589.5(j), as under *Schellinger*, the provisions of the HAA do not apply until after the EIR is certified.

Accordingly, the demurrer is SUSTAINED without leave to amend as to Petitioners' Third Cause of Action.

D. Fourth Cause of Action (Declaratory Relief – Code of Civil Procedure section 1060 – Against All Respondents)

Petitioners seek a judicial determination and declaration as to the City's legal duties and rights under SB 330, CEQA, the PSA, and the HAA. (Pet.¶¶ 79, 80.) Petitioners fail to state a cause of action.

Where a petition seeks "to review the validity of an administrative action...such review is properly brought under the provisions of section 1094.5 of the Code of Civil Procedure rather than by means of declaratory relief." (*State of California v. Superior Ct.* (1974) 12 Cal.3d 237, 251; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127 [holding "it is settled that declaratory relief is not an appropriate method for judicial review of administrative decisions"].)

However, declaratory relief is the proper remedy "when it is alleged an agency has a policy of ignoring or violating applicable laws." (*Venice Town Council, Inc. v. City of Los Angeles,* (1996) 47 Cal.App.4th 1547, 1566; *see also, e.g., Californians for Native Salmon etc. Assn. v. Dep't of Forestry,* (1990) 221 Cal.App.3d 1419, 1429 [finding that appellants "challenge not a specific order or decision, or even a series thereof, but an overarching, quasi-legislative policy set by an administrative agency. Such a policy is subject to review in an action for declaratory relief"]; *Carloss v. Cnty. of Alameda* (2015) 242 Cal.App.4th 116, 125–26 [holding "a declaratory relief action is an appropriate method for obtaining a declaration that a statute or regulation is facially unconstitutional," but also holding "administrative mandamus is 'the proper and sole remedy' where a local agency's application of the law is at issue"].)

To the extent Petitioners ask for an order "commanding Respondents to comply with SB 330, CEQA, the PSA, and the HAA with respect to the proposed Project at 469 Stevenson Street, including...an order that the Project is deemed complaint with all 'all applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete' as a matter of law and an order directing Respondents

to approve the Project within 60 days pursuant to Gov. Code § 65589.5(k)," declaratory relief is unavailable. (Pet. at 17, ¶ 1; *Monterey Coastkeeper*, *supra*, 76 Cal.App.5th at 18 [holding "declaratory relief generally is not available to use the courts to tell an administrative agency how to do its job"].)

To the extent Petitioners allege a broader pattern and practice of not complying with SB 330, CEQA, the PSA, and the HAA, they fail to state specific facts supporting that claim. (Pet. ¶ 79.) In *Monterey Coastkeeper, supra,* 76 Cal.App.5th at 18, the court found that "although the complaint generally alleges a pattern and practice of ignoring or not implementing the NPS Policy, at its heart, the complaint contests the effectiveness of the State Board's and regional water boards' efforts to implement the policy." Similarly, Petitioners' allegations that the City failed to comply with the five-hearing limitation, failed to certify the EIR within one year, and failed to approve a code-complaint housing development Project without making any findings related to 'objective, identified written public health or safety standards,' contests the Board's decision on appeal with respect to one specific project, as opposed to a broader pattern or practice of violating state law. (Pet. ¶¶ 78.) By contrast, in *Native Salmon*, "appellants alleged a list of 65 approved THPs [timber harvest plans] as illustrative of respondents' 'procedure' to issue responses to public comments tardily or not at all, and of respondents' having 'consistently ignored' their duty to assess cumulative impacts [on the environment]." (221 Cal.App.3d at 1425.) Similarly, in *Venice Town Council*, appellants alleged numerous specific examples in which the City violated the Mello Act, which "imposes a mandatory duty on the City in certain circumstances to require replacement housing for low-or moderate-income persons or families where units occupied by qualifying persons are converted or destroyed." (47 Cal.App.4th at 1552, 1559-60.)

The Court finds that Petitioners' reliance on a November 18, 2021 letter from the Department of Housing and Community Development ("HCD") is insufficient to show that the City has a policy of violating state law. (Ex. A to Pet.) HCD addressed only two projects – 469 Stevenson Street and 450-474 O'Farrell Street and requested that the City provide written findings for actions taken by the Board on both projects. (*Id.*) The Board issued its written decision on the 469 Stevenson Street Project less than a month later on December 14, 2021. (Ex. B to Pet.) Additionally, HCD referenced

only the O'Farrell Street project regarding its concerns that the City may have violated the "5 Hearing Rule" and the HAA. (Ex. A to Pet.)

The Court further finds that the claim for declaratory relief, as alleged, is wholly derivative of the first through third causes of action for violations under SB 330, CEQA, the PSA, and the HAA. (Pet. ¶ 79.) Where the trial court concludes "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 Fin. Corp.* (2008) 164 Cal.App.4th 794, 800.)

Accordingly, the demurrer is SUSTAINED as to Petitioners' Fourth Cause of Action.

At oral argument, Petitioners requested leave to amend the cause of action for declaratory relief. When asked how Petitioners would amend the petition to show that the City has a policy of violating state law, Petitioners indicated that they would attach formal policy documents from the City in support of their claim and allege examples of other projects beyond the 469 Stevenson Street Project. The Court therefore grants Petitioners' request to amend the cause of action to allege facts supporting their claim that the City has a policy of violating state law.

V. Conclusion

For the reasons stated above, the City's demurrer is SUSTAINED without leave to amend as to the First, Second, and Third Causes of Action. The demurrer is SUSTAINED with leave to amend as to the Fourth Cause of Action for declaratory relief. Petitioners have 30 days from the date of this order to amend the petition.

IT IS SO ORDERED.

Dated: October 21, 2022

Hon. Cynthia Ming-mei Lee
JUDGE OF THE SUPERIOR COURT

CPF-22-517661 YES IN MY BACK YARD, A CALIFORNIA NONPROFIT ET AL VS. CITY AND COUNTY OF SAN FRANCISCO ET AL (CEQA Case)

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on October 21, 2022 I served the foregoing **Order RE: Demurrer** on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

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