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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

CALIFORNIA HOUSING DEFENSE FUND; CALIFORNIANS FOR HOMEOWNERSHIP, INC.; YES IN MY BACK YARD; NICHOLAS WEININGER; ELIZABETH SIEGLE; PRODAN STATEV; JEREMY ROBERTS

Petitioners and Plaintiffs,

v.

THE CITY AND COUNTY OF SAN FRANCISCO

Respondent and Defendant.

Case No. 26-CPF-519569

PETITIONERS' OPPOSITION AND REPLY BRIEF

Judicial Officer: Ross, Dept. 613

Petition Filed: Feb. 13, 2026
Trial Date: Nov. 17, 2026

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I. INTRODUCTION

The City's opening and opposition brief is long, but revealing.

Perhaps most conspicuously, the City dedicates eleven pages to its failure to comply with subdivision (h)(2) of Government Code section 65583.2, as interpreted by the Court of Appeal in *New Commune DTLA LLC v. City of Redondo Beach* (2025) 115 Cal.App.5th 111 [review denied], but nowhere in those eleven pages does the City say that it has actually complied with the law. Instead, the City makes meritless procedural arguments and attempts to relitigate and rewrite *New Commune*—a case that has survived several attacks from California's cities and counties, including a depublication request, a petition for review, and an attempt to legislatively overrule it. *New Commune* is the law of the land, the City's rezoning violates that law, and Petitioners are entitled to a writ of mandate on that basis alone.

The City's brief and the accompanying declaration of Joshua Switzky also reveal, for the first time, new aspects of the mathematical sleight of hand that the City is using to justify its rezoning capacity analysis. Most critically, the City is comparing pre-rezoning capacity calculated using the high-quality BlueSky model with post-rezoning capacity using the simplistic "soft sites" method, which assumes a 70% chance of development for every qualifying non-residential property in the City. This apples to oranges comparison makes no sense and vastly overstates the increase in capacity associated with the City's modest rezoning.

Taken together with other serious flaws in the soft sites method, the City's capacity analysis creates absurd results. A **45%** increase in allowed density can drive increases in the City's stated realistic capacity of as high as **8,000%**. Sites with **decreases** in allowed density end up with a **ten-fold increase** in realistic capacity. Other flaws with the method include:

- The 70% likelihood of development factor for non-residential sites has no factual basis whatsoever. The City does not even try to point to evidence to support it.
- The 2% likelihood of development factor for residential sites lacks a sufficient factual basis. The City's own BlueSky method rarely predicts a likelihood of development in excess of 1%.
- The City has not complied with its obligation to account for the existing uses on nonvacant rezoning sites under subdivisions (g)(1) and (g)(2) of Government Code section 65583.2.
- The City has not articulated a lawful basis for assigning rezoning sites to income categories, and

has categorized legally ineligible small sites to the lower-income categories.

- The City is double-counting certain sites as both "pipeline" sites and sites that contribute ordinary realistic capacity.
- The City has used absurd density figures for certain sites, rivaling the most densely packed places in the history of the modern urban world.

So the City has not lived up to its commitments to develop an analytical model to support its rezoned capacity, nor its obligation to comply with state law in its rezoning. For those independent reasons, the Petition must be granted.

The City's rezoning also has a separate major flaw. The rezoning's centerpiece, the Housing Choice – San Francisco ("HCSF") program, attempts to evade state laws that constrain local governments' land use powers. This is obviously illegal, and the City's efforts at justification fall flat. Worse, the City, in attempting to justify the program, recounts the numerous ways that the program displaces the Legislature's objectives in favor of the City's. This displacement clearly contradicts the California Constitution's supremacy clause, which sets state law above local rules. Petitioners are entitled to a writ of mandate invalidating the HCSF program's limits on the use of state law benefits.

Having failed to convincingly rebut Petitioners' substantive points, the City attempts a number of procedural arguments. These arguments misunderstand and mischaracterize the Petition and the legal issues at stake, and are meritless.

II. STANDARD OF REVIEW

The City's brief contains an extensive discussion of the standard of review applicable to this case. In certain important respects, the City's explanation is incorrect.

At the core of the City's discussion of the standard of review applicable to Petitioners' first cause of action, as well as the City's arguments around other procedural matters, is a fundamental mischaracterization of this litigation as a challenge to a legislative action by the City. At times, the City mischaracterizes this case as a challenge to the City's housing element adopted in 2023. (Respondent's Opening and Opposition Brief ["ROB"], filed Aug. 17, 2026, p. 34.) Elsewhere, the City mischaracterizes this case as a challenge to the City's Family Zoning Plan ("FZP"). (See ROB, 41 [arguing that Petitioners were required to raise legal issues during the adoption process for the FZP].)

It is neither. Instead, Petitioners are challenging the City's *failure to act*. Petitioners contend that, taken together, the various actions that the City has taken between its adoption of the sixth cycle housing element on January 31, 2023 (AR 3105) and the statutory deadline to implement the housing element rezoning on January 31, 2026 (see Gov. Code, § 65583, subd. (c)(1)(A)) do not satisfy the commitments made in the City's housing element and the requirements of state housing element law. This sort of failure to act is not governed by the generalized, deferential standards cited in the City's papers (ROB, 30); it is subject to a specific statutory regime that places the burden on the City to demonstrate that it has complied with its housing element rezoning commitments. (Gov. Code, § 65587, subd. (d)(2).)

The City suggests that, even in this burden-shifted context, ordinary principles of deference to local agencies apply. Not so. The City's authorities arise out of circumstances where the legislature has not mandated close judicial review and where the agency is "not required by law to make findings indicating the reasons for its action." (*Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230.) In the housing element context, the Legislature has expressly directed the courts to weigh evidence (by shifting the evidentiary burden to local agencies), has expressly authorized enforcement litigation specific to the state law obligations being litigated in this case, and has expressly required local agencies to make specific factual findings supporting their actions.

Indeed, the standard in a typical petition under Code of Civil Procedure section 1085 is so deferential precisely *because* the petitioner ordinarily bears the burden of proof. (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 106 ["*Unless otherwise provided by law*, the petitioner always bears the burden of proof in a mandate proceeding brought under Code of Civil Procedure section 1085. *Thus*, it is petitioner's burden to establish that LACERS's decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." [emphasis added and citations and internal quotation marks omitted]].) It would make no sense for the Legislature to shift the burden of proof to the local agency, but for the agency's action to nevertheless enjoy a presumption of validity preventing it from being reversed absent an overwhelming showing by the petitioner.

Indeed, the courts have repeatedly recognized that ordinary deference does not apply in cases involving burden-shifted state housing statutes. (*California Renters Legal Advocacy & Education Fund*

v. City of San Mateo (2021) 68 Cal.App.5th 820, 844 ["Precisely because the HAA cabins the discretion of a local agency to reject proposals for new housing, it is inappropriate for us to defer to the City's interpretation of the Guidelines. We must engage in more rigorous independent review . . . in order to prevent the City from circumventing what was intended to be a strict limitation on its authority." [internal quotation marks omitted]]; *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 301 ["In the present case, the City was *not* given discretion to impose conditions and then determine whether they were satisfied: It was *required* to approve the development project if the conditions specified by the *Legislature* were met. . . . [W]e find the highly deferential standard of review applied by the trial court inappropriate here."].)

In fact, even in cases that do not involve burden shifting, the recent published housing element cases apply rigorous independent judicial review of local housing policies. (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 244; *New Commune DTLA LLC v. City of Redondo Beach* (2025) 115 Cal.App.5th 111, 136 [review denied].) The City cites these cases for the proposition that courts do not review the substance or propriety of local housing policy (ROB, 30-31), but the reality is just the opposite: these cases involved courts digging deep into the substance of local policies and even the evidence related to specific housing element inventory sites. Concepts of deference to local agency decision-making are almost completely absent from these cases.

The City also notes that its housing element has been certified by the state Department of Housing and Community Development ("HCD"), and that it is therefore presumed to comply with state law. (ROB, 30-31.) This is true, but irrelevant. Again, Petitioners are not challenging any aspect of the housing element; indeed, they are seeking to enforce it!

Separately, Petitioners' second cause of action raises a purely legal question: Can a local government exempt certain portions of its zoning code from state law? That cause of action is subject to independent judicial review, and no deference is accorded to either party. "[W]here the facts are not disputed . . . [the Court] exercise[s] independent judgment to address a pure legal question." (*Danser v. Public Employees' Retirement System* (2015) 240 Cal.App.4th 885, 890.)

III. ARGUMENT

A. The City's Procedural Arguments Are Meritless.

1. Petitioners' Claims Are Not Barred By The Statute Of Limitations.

As with the City's discussion of the standard of review, the City's arguments around the statute of limitations fundamentally mischaracterize this case. Petitioners are not challenging the City's housing element adopted in 2023, or the validity of any commitment or policy enacted in the housing element. Instead, Petitioners are seeking to *enforce* the commitments made in the housing element.

This case became ripe on January 31, 2026, when the City failed to meet the state law deadlines for completing its housing element rezoning. Until that date, it remained unclear whether the City would meet its rezoning obligations. So the statute of limitations for Petitioners' challenge began running, at the earliest, on January 31, 2026. (Cf. *Save Our NTC, Inc. v. City of San Diego*, 105 Cal.App.4th 285, 291-293 [holding claim for challenge to local ordinance did not accrue until local ordinance went into effect, notwithstanding that the ordinance had been enacted many months earlier].) This case was filed two weeks later, meeting any conceivably applicable statute of limitations.

The City responds with a bizarre argument: Petitioners should have understood, based on the text of the housing element, that the City would fail to meet its rezoning obligations three years later, and should have sued to invalidate the housing element on that basis. (ROB, 34, 41, 48-49.) To get there, the City insists that the details of its rezoning and its intended analytical approach for analyzing the impact of that rezoning were clear in 2023. But the City's position is belied by its own concession elsewhere in its brief:

> [T]he Housing Element outlined three rezoning scenarios, while acknowledging that the final rezoning program would come as a separate proposal and legislative action after Housing Element adoption.

(ROB, 22.)

Page 22 of the City's brief is correct: neither the City's specific rezoning plan nor its specific method for analyzing that plan was clear until at least late 2025. None of the three "rezoning scenarios" described in the housing element corresponds to the specifics of the FZP. (See AR 3547, 3553-3557.) And, as we discuss below, some aspects of the City's approach to analyzing the impact of the plan were not clear until August of this year, when the City filed its brief and the accompanying explanatory

information provided by Joshua Switzky. (See *infra*, Section III.B.1.d.)

And to be clear, the City's housing element did not disclose that the City planned to ultimately use the soft sites method to analyze the impact of its rezoning. Instead, it was used to create a *high-level estimate* of the impact of the three *potential* rezoning scenarios in the context where the City was not committing to any specific rezoning. The housing element explains:

> This narrative describes the rezoning concepts that the City intends to pursue . . . While this document and submittal include three comprehensive scenarios that include several rezoning strategies, the City will develop a final proposal for rezoning which meets the RHNA sites shortfall and other requirements to address AFFH through a public process and additional analysis following adoption of the Housing Element within the time required as per State law. Accompanying this narrative is a database (Appendix 4) listing the sites currently being considered in one of Rezoning Program scenarios . . .
>
> While the Rezoning Program includes a detailed range of proposed rezoning elements, it will come as a separate proposal and legislative action after Housing Element adoption, informed and shaped into final form by extensive community outreach and analysis.

(AR 3547.) There is no indication in Program 7.1.1 or anywhere else in the housing element that the soft sites method was the "analytical model" the City intended to use to demonstrate that its *actual* rezoning was adequate; indeed, the housing element never referred to the soft sites method as a "model" at all. If the City had intended to use the soft sites method for this purpose, it would have referred to that method in Program 7.1.1 rather than using the term "analytical model."

In fact, the adoption process for the housing element makes clear that the BlueSky model was the model that the City had in mind when it crafted Program 7.1.1. In May 2022, San Francisco submitted a draft housing element to HCD for review. (Request for Judicial Notice in Support of Petitioners' Opposition and Reply Brief ["RJN"], filed herewith, Ex. 3.) That draft housing element used the BlueSky model to estimate the redevelopment potential of "[u]nderutilized and [v]acant [s]ites." (*Id.* [see page 13 of the section titled "Sites Inventory and Rezoning Program"].) HCD responded, saying in regards to the City's rezoning program: "The [housing] element may utilize a methodology similar to underutilized sites to meet requirements for calculating capacity and demonstrating redevelopment potential." (RJN, Ex. 4, p. 6.) The City subsequently developed Program 7.1.1, which promised to develop a rezoning program that would "reasonably account for sites' likelihood of development . . . using an analytical model." (AR 3238.)

In any event, the City readily concedes that the "soft sites" method articulated in the housing element doesn't actually correspond to the "soft sites" method used by the City in 2025 to assess its rezoning, despite the City's rhetorical trick of using the same name for the two different methodologies. The City's brief identifies three significant ways that the 2025 "soft sites" method departs from the procedure the City articulated in 2023. (ROB, 26-27.)

Finally, the City's actual, deeply flawed method of calculating a net capacity increase for each rezoning site was not known until even later, when it was revealed in the Declaration of Joshua Switzky filed with the City's brief. (*See infra*, Section III.B.1.d.)

Petitioners possess neither a crystal ball nor a time machine. We had no way of knowing in 2023 that we would need to challenge an approach developed by the City in late 2025 and finally described in detail in 2026. No aspect of this case is barred by the statute of limitations.

2. Petitioners' Claims Are Not Barred By The Exhaustion Requirement.

a. Petitioners Are Not Subject To An Exhaustion Requirement Because They Are Challenging A Failure To Act, Not Any One City Resolution Or Ordinance.

Once again, the City's exhaustion arguments depend on a fundamental mischaracterization of this case. Petitioners are not challenging any legislative act by the City. Petitioners are not challenging the FZP itself,[1] or its adoption in December 2025. Instead, Petitioners allege that the City failed to complete its rezoning obligations by the statutory deadline of January 31, 2026, taking into account all of the actions taken by the City between the adoption of its housing element on January 31, 2023 and the January 31, 2026 deadline.

The City concedes that it has attempted to satisfy its rezoning obligations through the cumulative effect of three separate ordinances. (ROB, 17 n.2.) So there was no one administrative hearing addressing the City's compliance with the rezoning deadline or obligations. Nor does state law provide for such a hearing, or authorize a city to require that concerns about its compliance with its rezoning obligations be raised a public hearing on one of the legislative components of the city's rezoning plan. Indeed, the City could have taken additional rezoning actions between December 12, 2025 (when the FZP was adopted) and January 31, 2026 to satisfy its rezoning obligations and avoid litigation.

[1] Outside of the context of Petitioners' second cause of action.

The City's argument seems to be that the gravamen of Petitioners' lawsuit is a challenge to the FZP. But this is not true. With the exception of Petitioners' narrow challenge regarding the HCSF Program's override of state law, Petitioners have no problem with the FZP. Petitioners' concern is that the City did not do *more*, either through an additional rezoning ordinance or in the FZP itself. There was no exhaustion requirement that applied before Petitioners filed this lawsuit challenging the City's inaction.

b. The City Is Barred From Invoking The Exhaustion Doctrine Because It Did Not Provide The Notice Required By Subdivision (b)(2) Of Government Code Section 65009.

Even if the Court accepts the City's position that an exhaustion requirement related to the City's rezoning obligations might be triggered at the time of the City's adoption of the FZP, the City is legally barred from invoking that requirement. The exhaustion requirement applicable to land use decisions, and the one cited by the City in its briefs, is found in subdivision (b) of Government Code section 65009. (See ROB, 32.) The City has failed to comply with the threshold requirement for invoking this requirement:

> If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public notice issued pursuant to this title a notice substantially stating all of the following: "If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing."

(Gov. Code, § 65009(b)(2); see *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 993 ["The public notice [published by] the City . . . did not include the warning specified in Government Code section 65009, subdivision (b)(2). Therefore, the City is precluded from objecting to issues raised . . . after the . . . public hearing. The exhaustion requirement . . . does not apply."].)

Petitioners have reviewed the record and the published hearing notice for the Board of Supervisors' hearing on the FZP, and it does not appear that the City provided the required notice. (RJN, Ex. 2.) The exhaustion requirement therefore does not apply.

c. Applying An Exhaustion Requirement Would Be Manifestly Unjust Because The City Did Not Provide A Complete Explanation Of Its Rezoning Analysis Until It Filed Its Brief In This Case.

At the time of the FZP's adoption, the City had not made public much of the information about the capacity calculations performed by the City. The City provided this information to Petitioners for the

first time when it filed the Declaration of Joshua Switzky with its Opening and Opposition Brief. The City cannot withhold crucial details about its rezoning actions when those actions were taken, then rely on those details to fill in gaps in its arguments during litigation while castigating Petitioners for not having filled in every gap in their arguments during the FZP's adoption process. To penalize Petitioners for the City's secrecy would be manifestly unjust. (Cf. *Gaumer v. County of Tehama* (1967) 247 Cal.App.2d 548, 553 [excusing plaintiffs from exhaustion requirements because defendant's failure to provide notice made exhaustion impossible].)

d. In Any Event, Petitioners Adequately Exhausted As To Every Issue Raised In This Litigation.

A writ petitioner exhausts administrative remedies when it fairly apprises the agency of the facts and issues at hand. (*McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264.) Less specificity is required to exhaust administrative remedies than is required in the later judicial proceeding, and a petitioner need not cite precise statutes or make precise legal arguments to preserve issues for judicial review. (*Ibid.*; *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176–177.)

The City has identified two specific issues on which the City contends Petitioners failed to exhaust. In both cases, Petitioners fairly apprised the City of their concerns.

First, the City contends that Petitioners failed to specifically exhaust remedies as to one subpart of their claim that the City did not comply with subdivision (h)(2) of Government Code section 65583.2, as interpreted by the Court of Appeal in *New Commune*, *supra*, 115 Cal.App.5th 111 [review denied]. (ROB, 41.) The City is demanding far more specificity here than the law requires. The exhaustion requirement is not a requirement to fully brief the legal issues related to every individual sub-clause of a subdivision of a section of statute. Petitioners cited to *New Commune*, a case that extensively discusses both the minimum residential density and mixed-use requirements in subdivision (h)(2). (Petition, filed Feb. 13, 2026, Ex. E, pp. 6-7.) Petitioners explained that the City could not satisfy the subdivision (h)(2) requirements with an overlay or with mixed-use zoning. (*Id.*) That was more than enough to put the City on notice, and nothing remotely like the vague reference rejected by the Court of Appeal in *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1448.

Second, the City contends that Petitioners failed to exhaust two components of their argument on the

second cause of action. The first of these allegedly unexhausted components is Petitioners' point that the City should not be able to create a bipartite zoning code, such that state law applies to some of the code but not the rest. (ROB, 68.) But this is a straightforward policy point that bears on the Court's decision. It is not a standalone legal argument. Exhaustion rules do not bar Petitioners from presenting the policy consequences of a ruling for the City on a legal argument that all parties agree was raised in administrative proceedings. (See Petition, Ex. F, pp. 7-11 [public comment letter informing City that it cannot enact zoning rules that evade state law]; Answer, filed June 29, 2026, ¶ 220 [admitting City received public comment letter].)

The City frames its objection, furthermore, as an objection to Petitioners' unearthing the City's SB 79 ordinance. (See ROB, 68.) Aside from the fact that Petitioners—again—are entitled to explain the policy consequences at stake in the lawsuit (see *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1994) 22 Cal.App.4th 1814, 1823 [stating that courts should avoid rulings that "would have dangerous public policy implications"]), the SB 79 ordinance was enacted on May 5, 2026, six months after the FZP was enacted (see RJN, Ex. 1, p. 7 [labeled "Page 398" in the page footer]). It would therefore have been impossible for Petitioners to include arguments around the City's SB 79 ordinance during the administrative proceedings surrounding the FZP's adoption. Courts "do not require exhaustion where the petitioner can show it would be futile or impossible to exhaust." (*Sanchez-Quim v. Garland* (9th Cir. Nov. 9, 2022) 2022 U.S. App. LEXIS 31027, at *2; see also *Gaumer*, *supra*, 247 Cal.App.2d at 553 [excusing plaintiffs from exhaustion requirements because defendant's failure to provide notice made exhaustion impossible].)

The other allegedly unexhausted component of Petitioners' argument on the second cause of action is the point that the DBL operates on top of the HCSF program. (ROB, 58, 66, 67.) But Petitioners repeatedly made this point to the City during the adoption process for the FZP. On November 3, 2025, Petitioners wrote that in the event of litigation, "[t]he City would . . . be ordered to grant development applicants access to both the HCSF program and state laws, including the Statewide Density Bonus Law." (Petition, Ex. E, p. 1.) And: "Developers may use both the HCSF rules and any state law bonuses or protections that apply." (*Id.* at p. 3; see also *id.* at p. 6 [expanding on the argument].) On December 1, 2025, Petitioners sent another letter with the same arguments. (See Petition, Ex. F.) The City admits to

receiving both letters. (See Answer, ¶¶ 217-222.) There is no serious dispute that Petitioners have satisfied the exhaustion requirement here.

The City persists. It fixates on a specific citation in Petitioners' opening brief. (See ROB, 67 [protesting that Petitioners failed to cite the Housing Accountability Act in the administrative process].) Admittedly, Petitioners' comment letters did not cite the specific subdivisions of the Housing Accountability Act (subdivisions (f)(6) and (f)(8)) that Petitioners now cite in support of their arguments. But the exhaustion doctrine does not limit Petitioners to the legal authority provided during the administrative exhaustion process. The City's caselaw comes nowhere close to articulating such a stringent rule. (See *Park Area Neighbors*, *supra*, 29 Cal.App.4th at 1448 [exhaustion doctrine applied because plaintiffs did not raise certain arguments, not because plaintiffs failed to provide certain legal citations during administrative proceedings]; *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 282 [similar].)

Contrary to the City's insinuations, the caselaw articulates a lenient rule. "[L]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163) "The fact that . . . [administrative] comments do not refer to specific statutory language is not dispositive." (*East Peninsula Ed. Council*, *supra*, 210 Cal.App.3d at 176.) So long as the respondent "learn[s] the contentions of interested parties before litigation is instituted," the exhaustion rules are satisfied. (*Sensible Development*, *supra*, 172 Cal.App.3d at 162-163.)

Petitioners made an argument during the FZP's adoption process. (Petition, Exs. E, F.) Petitioners provided further legal authority to support their argument during litigation. (Petitioners' Opening Brief ["POB"], filed Aug. 3, 2026, pp. 34-35.) Not only is that allowed, it is the normal course of events. (See, e.g., *East Peninsula Ed. Council*, *supra*, 210 Cal.App.3d at 176-177 [holding exhaustion doctrine satisfied by layperson commentary without legal citations].) The City must win its case on the merits, not by asking the Court to delete individual citations from Petitioners' briefing.

B. The City Has Not Adequately Rezoned.

1. The City Has Not Met The Commitments Made In Its Housing Element.

a. The City's Housing Element Committed The City To A Robust Rezoning Process As An Alternative To Traditional Rezoning Site Analysis.

When a city's existing zoning is inadequate to accommodate its allocation under the Regional Housing Needs Assessment ("RHNA") in any income category, the city's housing element must identify "[s]ites zoned for nonresidential use that can be redeveloped for residential use, and for which the housing element includes a program to rezone **the site[s]**, as necessary . . . ." (Gov. Code, § 65583.2(a)(4) [emphasis added]; see Gov. Code, § 65583(c)(1)(A) [requiring rezoning program to provide for the rezoning of "those sites"—that is, the sites identified in the housing element].)

During the current housing element cycle, the vast majority of cities straightforwardly followed this mandate and identified specific sites and specific zoning changes for those sites in their housing elements. But a small number of larger cities chose to defer the process of selecting specific sites and specific zoning changes until the rezoning was due several years later, based on the large number of sites in those cities and the purported need for additional study. While this approach at best dubiously complies with the provisions of housing element law cited above, the private organizations that work in housing element enforcement opted not to challenge its use because these housing elements included binding commitments around the eventual rezonings that would (if followed) ensure that the rezonings satisfied the requirements of state law.

In San Francisco, we were assuaged by four major, binding commitments included in the City's housing element. First, the City committed to rezone to accommodate a specific number of additional units in terms of realistic capacity, and this number included the "buffer" capacity mandated by HCD as a condition of certification for local housing elements. (AR 3238.) Second, the City committed to use an analytical model to address state law requirements for site eligibility. (*Ibid.*) Third, the City agreed to specifically ensure that the sites it chose to rezone would comply with various state law requirements for housing element rezoning sites. (*Ibid.*) Fourth, the City agreed not to add new constraints on housing development without analyzing them and offsetting any reduction in development capacity. (AR 3238, 3244.)

b. The Commitments Made In The City's Housing Element Are Binding And Enforceable.

Now that its housing element has been certified and the statute of limitations to challenge the housing element itself has passed, the City is attempting to renege on all four of these commitments—a remarkable bait-and-switch.

But state law makes these commitments binding. Unlike nearly every other program or commitment in a general plan element, which must be enforced through generalized and highly-deferential judicial review mechanisms, housing element program commitments involving rezoning and constraints reduction are specifically made enforceable by interested parties like Petitioners under Government Code section 65587(d). And the local agency bears the burden of proof that it has met these commitments. (Gov. Code, § 65587(d)(2).) This burden shifting applies to the four commitments described above.

This is a noteworthy departure from typical local policy enforcement litigation, and it appears to be unique to housing element rezoning and constraints reduction programs. But the City's brief downplays the enforceability of its housing element commitments, framing them as voluntary and uncertain. For example, the City points to its use of the term "seek" in Program 7.1.1 and suggests that the word "seek" is so non-committal that the City's commitment to rezone its RHNA shortfall of 36,282 units is not enforceable. (ROB, 35.) And the City characterizes its decision to include "buffer" units in its shortfall calculation as voluntary and non-binding, even though the buffer was required by HCD as a condition of obtaining HCD certification for a city's housing element and the City repeatedly highlights that certification elsewhere in its brief. (ROB, 48, 52.)

This argument is absurd. Like the other commitments at issue here, the commitment to rezone to satisfy HCD's required buffer is the mechanism the City used to obtain HCD certification of its housing element and to avoid litigation by groups like Petitioners at the time the City adopted its housing element. The Legislature surely did not intend to allow the City to gut the strong enforceability provisions in Government Code section 65587 by using weasel words that everyone (the City included) viewed as binding in 2023 but that the City now views as aspirational.

Government code section 65587 is clear: the commitments being enforced in this litigation are binding and enforceable.

c. The City's Soft Sites Approach Is Not An Analytical Model And Does Not Meet The Commitments Made In The City's Housing Element.

In our opening brief, we told the Court that we were not able to identify any analysis performed by the City that could satisfy the City's commitment to develop an "analytical model" to support the adequacy of its rezoning. We expected that the City might come forward with some new, internally developed model to justify its rezoning approach. Instead, the City has simply pointed to its "soft sites" method, a simplistic and factually baseless series of calculations applied uniformly across the City. As we have previously explained, this approach comes nowhere near meeting the commitment made in the City's housing element to develop an analytical model. (*See* POB, 15-19.)

The City insists that it disclosed its intention to use the soft sites method as its rezoning "analytical model" in its housing element. (ROB, 52.) As we discuss above, this is false. (See *supra* at III.A.1.) The housing element used the soft sites method to justify initial estimates of additional capacity under possible rezoning scenarios. The City was clear that neither these scenarios nor this initial analysis was final. (AR 3547; see ROB, 22.) The context in which the City crafted Program 7.1.1 (the source of the analytical model requirement) furthermore makes clear that the City was, at the time, considering the BlueSky model as the likeliest candidate to fulfill this requirement. (See *supra*, Section III.A.1.) The City's final rezoning program, rather than pointing to the soft sites method, which the housing element never refers to as a "model," committed to instead use an analytical model.[2]

In any event, the City does not meaningfully rebut the central argument made about the soft sites method in Petitioners' opening brief: the method is not a "model," but rather a simplistic calculation that applies unform discounting factors across tens of thousands of varied sites throughout the City.

Most absurdly, the City has attributed a **70 percent likelihood of redevelopment** to every non-

[2] The City misconstrues a quote from Petitioners' opening brief to suggest that Petitioners' admit that the City planned to use the soft sites method as its "analytical model." (See ROB at 34:3-5.) When we said that the housing element established "what, precisely, the City must do," we were referring to the requirement to use an analytical model, not conceding that the City planned to use the soft sites method all along.

residential site eligible for inclusion in the soft sites calculation.[3] The record and the City's submissions are devoid of any support for this 70 percent figure. (See generally AR; see also Declaration of Stephen Menendian in Support of Petitioners' Opposition Brief ["Menendian Decl."], filed herewith, ¶¶ 19-21.) Indeed, the City explains how it arrived at its 2 percent likelihood of redevelopment for sites with existing residential uses,[4] but conspicuously says nothing about a basis for the 70 percent figure. (ROB, 24:25-28; Menendian Decl., ¶ 19.) The City pulled this number out of a hat.[5]

The 70 percent figure particularly boggles the mind when one learns that on similar sites, the soft sites method projects a *zero* percent likelihood of redevelopment. (Switzky Decl., ¶ 9.D.) "Institutional buildings" such as college campuses and hospitals are assigned a zero percent factor (*ibid.*), while churches are assigned a seventy percent factor (see, e.g., POB, 22 [discussing the City's inclusion of the Holy Trinity Greek Orthodox Church, which the City has assigned a realistic capacity of 988 units; see also *infra*, Section III.B.2.c.). The City cannot insist with a straight face that this astronomical disparity is "reasonabl[e]," as required by the housing element. (AR 3238.)

The City also appears to incorrectly apply the 70 percent factor to certain residential sites, which the City's capacity analysis mischaracterizes as non-residential. For example, it appears that the City has treated the property at 445-701 Wawona Street as non-residential, and assigned the parcels on that property a total realistic capacity (under the HCSF program) of 530 units. (AR 20090, Lines 31604,

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[3] The City spends pages and pages of its brief and the Switzky Declaration detailing the arithmetic it used to calculate how many units can theoretically fit on a given site, accounting for the site's zoning envelope. (ROB, 22-23; Switzky Decl., ¶¶ 5-6, 8-9.B.) That is not what is at issue. What is at issue is the factors relied on by the soft sites method to "reasonably account for sites' likelihood of development during the planning period," as promised by Program 7.1.1. (AR 3238.) The soft sites method uses three factors to address this requirement. First, on certain sites, the soft sites method assumes the likelihood of development during the planning period is zero. (Switzky Decl., ¶ 9.D.) Second, on sites that have existing residential units and are not covered by the first factor, the soft sites method assumes the likelihood of development during the planning period is two percent. (*Id.* at ¶ 9.E.) Third, on sites that do not have existing residential units and are not covered by the first factor, the soft sites method assumes the likelihood of development during the planning period is seventy percent. (*Id.* at ¶ 9.F.)

[4] The alleged basis for the two percent figure, however, is asserted in a single sentence with a single citation to a single page in the record. (See ROB, 24.) This is not enough to satisfy the City's burden of proof. (See Menendian Decl., ¶ 19.) The City also says that past development trends support a *lower* probability factor of 1.26 percent, not the two percent used in the soft sites method. (See ROB, 27:27.)

[5] Furthermore, the City's housing element stated that a 70 percent likelihood of development figure was appropriate for "projects that have filed for a building permit or are awaiting a first construction document." (AR 3535.) It is not realistic that the same figure should be applied to sites where no application has been filed at all.

32007, 77772, 77773.) But the site is home to Arden Wood, a residential assisted living facility.[6] (See *id.* [refer to column Q for the description of existing uses].)

Nor is the City correct that the 70 percent figure is "consistent with the findings from the BlueSky regression analysis for the existing capacity." (ROB, 24.) For the vast majority of sites, the likelihood of development generated by the BlueSky model was less than 1%—drastically lower than the 70% figure used in the soft sites method. (See AR 3660 [refer to Table A, column U].)

The result is that the soft sites method overstates the realistic capacity of the City's rezoning sites by orders of magnitude. The City's rezoning capacity table shows some increases in capacity of over 1,000,000% relative to the expected unit counts generated by the BlueSky model.[7] For thousands of sites, the allowed density increased by 100% or less while the realistic capacity increased by over 1,000%. And many sites with modest increases in total zoned capacity have received comically high increases in realistic capacity. For example, the sites at 608 Filbert Street and 829 Fell Street saw their maximum densities increase by **68%** under the FZP, but the realistic capacity attributed to those sites increased by **over 30,000%**.[8] The sites at 824-838 Ellis Street, 1350 Van Ness Avenue, 1412 Van Ness Avenue, 1415 Van Ness Avenue, 1455 Bush Street, 1530 Bush Street, 1565 Bush Street, and 815 Eddy Street all saw their maximum densities either **remain exactly the same or increase approximately 45%**, depending on which of the City's sources is to be believed,[9] but their realistic capacities **increased by 2,500% to 8,200%**.[10]

These are not isolated examples; they are typical. In reality, the bulk of the new "capacity" identified by the City is not the result of rezoning between 2023 and 2026, but of the City's choice to use

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[6] https://www.ardenwood.org/

[7] Compare, e.g., AR 3660, Table A, Line 26301 [parcel 1768-001 shows BlueSky total realistic capacity of 0.010 units]; AR 20090, Line 18605 [final net realistic capacity for the same parcel, using HCSF, of 144.47 units, an increase of 1,444,700%].

[8] AR 3660, Table A, Lines 676, 7893; AR 20090, Lines 46358, 50598.

[9] For each site the City has rezoned, there are two sources provided by the City that purport to state the pre-rezoning capacity for the site: The site inventory table generated at the time the City adopted its housing element (AR 3660), and the City's rezoning capacity analysis table (AR 200090). In the vast majority of cases, these two sources disagree about the pre-rezoning capacity for the City's sites, with no discernable pattern as to which source lists the larger capacity, or by how much.

[10] AR 3660, Table A, Lines 6768, 6770, 6785, 6819, 6822, 6827, 7179, 7332; AR 20090, Lines 3504, 4032, 49596, 49606, 49647, 49648, 49682, 50009 [program realistic capacity figures].

a conservative analytical model to calculate realistic capacity in 2023 and to use a baseless, simplistic discounting method in 2026.

Perhaps anticipating this comparison, the City seeks to downplay the predictive value of the BlueSky model in its brief. For example, the City suggests that the BlueSky analysis is generalized rather than individualized. But this is not true; as Petitioners have explained (POB, 12-13, 16-17), the BlueSky model creates an individualized likelihood of development figure for each site in the City's inventory, based on a wide range of site-specific factors. Taking, for example, just the parcels on the 100 block of States Street, the BlueSky model generated this diverse set of development probabilities: 0.1922928%, 0.1696507%, 0.1725879%, 0.1643744%, 0.1721466%, 0.1802315%, 0.1698959%, 0.1703961%, 0.1727221%.[11]

Similarly, the City seeks to minimize the BlueSky-derived rezoning model developed by the City's Office of Economic Analysis ("OEA"), noting that it was developed for a different purpose than the soft sites method championed by the City's planners and attorneys. (ROB, 54.) But that is exactly the point! The OEA model is a sophisticated analysis designed to generate realistic figures to allow the City to accurately plan for its economic future. The soft sites method, by contrast, is a simplistic set of calculations developed to help the City justify its minimal rezoning. The former purpose is the one more likely to produce accurate realistic capacity figures.

Ultimately, though, this case is not about forcing the City to use the BlueSky model, in particular, to assess its rezoning. The City was and remains free to choose a different approach, so long as it involved a factually-supported analytical model that accounts for the likelihood of development factors articulated in state law. The City bears the burden of demonstrating that it has done so, and it has not met that

[11] (AR 3660, Table A, Lines 50294-50302.)

burden.[12]

The City remarks that it used several tools other than the soft sites method to assess the FZP. (ROB, 27.) These are the "citywide capacity method," the "financial feasibility" method, the "Century Urban analysis," and the Office of Economic Analysis ("OEA") model. (*Id.* at 27-29.) The City does not appear to argue that any of these satisfies Program 7.1.1's requirement to validate the housing element rezoning with an analytical model. (See *id.*) Petitioners stand by their arguments in the Opening Brief regarding these methods (see POB, 17-19), which the City's brief does not rebut (see ROB, 27-29).

d. The City's Decision To Calculate Rezoned Capacity By Subtracting Preexisting Capacity Using The BlueSky Model From FZP Capacity Using The Soft Sites Method Makes No Sense.

The overstated post-rezoning capacity driven by the City's use of the soft sites method to estimate realistic capacity is exacerbated by a feature of the City's analysis that was revealed for the first time in its brief: the City calculated the net increase in zoned capacity by subtracting the pre-rezoning *BlueSky* capacity from the post-rezoning *soft sites* capacity. (ROB, 27; Switzky Decl, ¶ 9.G.)

This apples-to-oranges math makes no sense. Even if the Court accepts the City's use of the soft sites method to calculate post-rezoning realistic capacity, the City must calculate net capacity by subtracting pre-rezoning capacity figures from within the same analytical regime—that is, calculated using the soft sites method. Otherwise, the bulk of the net rezoning figures do not reflect the impact of the City's rezoning, but rather the effect of the City's change in calculation methodology.

Furthermore, the City states elsewhere in its brief that the OEA model does not provide "any analysis of realistic capacity under Housing Element Law." (ROB, 29.) But the OEA model is simply an update of the BlueSky model! (Answer, ¶ 116.) So in one context, the City argues that the BlueSky model is good enough that its projections can be subtracted from the soft sites method's projections to

[12] The City cites cases regarding ordinary deference to local legislative actions for the proposition that the Court must defer to the City's selection of the soft sites method. Not so. First, while the adoption of the FZP was a legislative act, the City's choice to defend its rezoning using the soft sites method—aspects of which were revealed for the first time in this litigation—was not. (See *supra*, Section III.A.2.a.) Second, the City's reliance on *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, is misplaced. *Greenebaum* was decided when state law provided almost no specificity about the content or analysis to be included in a housing element, instead specifying vague "goals" to be considered. (*Greenebaum*, 153 Cal.App.3d at 407 ["Although Government Code section 65302 states that the city's general plan 'shall' include a 'housing element' it does not specify how exacting that element must be."].) Today, state law contains detailed requirements around housing elements and housing element rezonings, and specifically authorizes interested parties to enforce these requirements in litigation in which the City bears the burden of proof. (See *supra*, Section II.)

arrive at a net number of expected new units under the FZP. In another context, the City says that the BlueSky model does not produce reliable projections for purposes of the Housing Element Law. The motive for the contradiction is transparent: the BlueSky model, as a realistic analytical model, produces much lower figures for expected housing construction than the soft sites method. (See also *infra* at Section III.B.1.c.)

e. The City's Analysis Is Rife With Inconsistencies And Errors.

i. The City Double-Counted Certain Sites In Calculating Expected New Residential Construction

As previously explained, the Housing Element Law required San Francisco, when it adopted its housing element, to demonstrate capacity for 82,069 units—the RHNA allocation. (See AR 3532.) The City counted towards that capacity projects in the residential development "pipeline," or projects that were "approved and entitled" or "awaiting approvals or building permits." (*Id.*; ROB, 20.) That was permissible. Later, however, when the City calculated the additional residential capacity created by the FZP, the City included some sites that had already been counted as pipeline sites. This produced an impermissible double count on these eleven sites:

Address	Line # in Pipeline Table[13]	Line # in Rezoning Table[14]	Projected Pipeline Units	Projected FZP Units
2055 Chestnut Street	4554	92034	32.540	75.79[15]
2051 Market Street	64932	39032	19.771	29.77
1217 Sutter Street	7059	50021	15.652	23.37
1047-1049 Clayton Street	14661	56152	1.407	3.40
1027 Clayton Street	14616	56036	1.407	3.39
801 Congo Street	105346	87544	0.704	0.19
2011 Filbert Street	5191	1819	1.407	0.14

[13] This column provides the line number where the site appears in Table A of the Excel sheet at AR 3660.

[14] This column provides the line number where the site appears in the Excel sheet at AR 20090.

[15] All numbers in this column reflect the City's projections with the HCSF program. The only site in the table that also has a projection without the HCSF program is 2055 Chestnut Street, which is projected to accommodate 63.70 units without the HCSF program.

Address	Line # in Pipeline Table[13]	Line # in Rezoning Table[14]	Projected Pipeline Units	Projected FZP Units
531 Panorama Drive	53250	34562	0.824	0.10
25 Ford Street	66436	85115	0.704	0.10
526 Molimo Drive	58587	34957	0.704	0.10
1915 Diamond Street	120713	90431	0.704	0.10

(See AR 3660 [pipeline table, see Table A]; AR 20090 [rezoning table].) The double counting of these sites does not by itself show that the City has failed to create the new residential capacity promised in the housing element. The numbers involved are too small: the City projects that the FZP will produce approximately 136 new units on these sites, and excluding these sites does not reduce the City's estimate of new residential capacity below the promised 36,282 units. (See AR 3532.)

But the double counting underscores the soft sites method's shoddy inadequacy. A method that counts units on sites that the City has already counted towards its pipeline residential development numbers is not a method that "reasonably account[s] for sites' likelihood of development" as promised in the City's housing element. (AR 3282.)

ii. The Soft Sites Method Projects Unrealistic Densities On Rezoned Sites

The soft sites method, beyond the problems above, projects that some sites will develop at absurd densities. For example, 1142 Van Ness Avenue, a 12,605 square foot lot hosting an existing building, is projected to produce 520.92 units with the HCSF program. (AR20090 [line 3943].) This is a density of over 1,800 units per acre. For context, Hong Kong's infamous Kowloon Walled City occupied a site of approximately six and a half acres and housed some 33,000 residents. (Wikipedia, "Kowloon Walled City," available at <https://en.wikipedia.org/wiki/Kowloon_Walled_City>, [as of Sept. 17, 2026].) Assuming three people to a unit (likely an underestimate) and hence 11,000 units gives an estimated density of 1,692 units per acre for the Walled City. Housing in the style of the Kowloon Walled City is not going to be built in San Francisco. (See Evid. Code, § 452, subds. (g), (h) [courts may judicially notice facts that cannot reasonably be disputed].) The soft sites method projects that three other sites will develop at similarly improbable densities: 1100 Franklin Street (1,588 units per acre), 930 Van Ness

Avenue (1,315 units per acre), and 1188 Franklin Street (1,307 units per acre). (See AR20090 [lines 3293, 50015, and 50001].) Such absurdities further show that the soft sites method is not "reasonabl[e]." (AR 3282.)

iii. The City's Rezoning Capacity Analysis Predicts Massive Realistic Capacity Increases On Parcels Where Maximum Densities Have Decreased.

Included on the City's rezoning capacity analysis table is a particularly strange subset of sites: parcels where the new maximum allowable density is *lower* than the pre-rezoning maximum. Even more bizarrely, the City attributes large increases in realistic capacity to these sites.

For example, according to the City's housing element inventory,[16] the site at 170 South Van Ness Avenue had a pre-rezoning maximum density of **283.57 units/acre**, and the BlueSky model attributed a realistic capacity of approximately **19.5 units** to the site. (AR 3660, Table A, Line 64585.) After rezoning, the site allows **244.563 units/acre**, assuming the use of the HCSF program. (AR 20090, Line 38949.) Despite this decrease in density, the City attributes a net increase of **180.97 units** to the site. (*Id.*)

The site at 1690 Folsom Street is similar. Its pre-rezoning maximum density was **202.55 units/acre**, and the BlueSky model gave it a realistic capacity of **15.78 units**. (AR 3660, Table A, Line 64681.) Now, the site allows **167.71 units/acre**, assuming use of the HCSF program, and the City attributes a net increase of **145.62 units** to it. (AR 20090, Line 38976.)

These density decreases, coupled with realistic capacity increases, underscore the fact that the City's purported increase in realistic capacity comes largely from new math, not new zoning.

f. The City Has Violated Its Commitment Not To Add New Constraints On Housing Development.

The City also committed to "not add government constraints that reduce project financial feasibility as determined by an analysis prior to the rezoning enactment," (AR 3238) and promised that "any City-adopted rezoning or development controls shall not impose any new governmental constraints to the development of housing unless those increased constraints are offset by the removal or reduction of other constraints" (AR 3244.) As Petitioners explained in their opening brief, like the other commitments in

[16] As with other sites, for the examples listed in this paragraph, there is an inconsistency between the pre-rezoning densities listed in the City's housing element inventory, and those listed in the rezoning capacity analysis.

the City's housing element, these flowed from state law requirements and the City's decision to defer the development of its rezoning program until years after the adoption of its housing element. (See POB, 19-20.)

But the City added several constraints without analyzing or offsetting their impact. (*Ibid*.)

In response, the City's argument boils down to this: because the City's Board of Supervisors made findings that the City had not created new constraints, the Court is bound to trust those findings unless Petitioners identify profound flaws in the evidence underlying them. (ROB, 55.) But in reality, the Board's conclusory findings are based on no evidence at all:

- The City has no evidence that its new minimum office densities do not impact the financial feasibility of mixed-use projects that include office components. Of course new limits on the design of office units within mixed-use projects may act as a constraint on the development of those projects, and the City has conducted no analysis nor adduced any evidence to the contrary.

- The City has no evidence that its new limits on maximum residential unit size do not act as a constraint on at least some forms of residential development. The City essentially argues that its new maximums are so large that they will not actually constrain development (ROB, 56), but it has conducted no analysis nor adduced any evidence to justify this assumption.

- The City has no evidence that its new parking maximums do not act as a constraint on development. The City's argument (ROB, 56) that parking is costly to build misunderstands the issue. In some development contexts, additional parking is necessary to command the high market rents necessary to subsidize affordable units for lower-income tenants. The City also misrepresents Petitioners' demand for *analysis* of this constraint with a demand to *eliminate* it (*id.*); nothing in CEQA or the rules for obtaining state grants prohibits the City from *analyzing* the constraint created by these new parking maximums.[17] Nor is the City permitted to use its own definition of the term "constraint" to free itself from state housing element law obligations around analyzing constraints on residential

[17] If the City had used a real analytical model to assess development probabilities for rezoned sites, for example, there is a good chance that the model would have accounted for this new constraint. (See AR009711 [explaining that the OEA/BlueSky model accounts for the stringency of zoning controls].) But the City instead decided that all of the rezoning sites had either a zero percent, two percent, or seventy percent probability of redevelopment, called this a "model," and made no effort to account for new constraints on housing development added by the FZP.

development. (See ROB, 56:25-27.)

- The City has no evidence that its new limits on curb cuts do not act as a constraint on development. Intuitively, new limits on how a site is configured for ingress and egress will of course impact development, and the City has adduced no evidence to the contrary.

The City makes two additional arguments regarding its failure to analyze constraints, both of which are meritless.

First, the City argues that even if it has created new constraints, those have been offset by the same rezoning (in the FZP) that it is attempting to use to satisfy its housing element rezoning obligations. (ROB, 57.) But the City's rezoning obligations and its obligation to offset the creation of new constraints are separate. The City can't double-dip by claiming that the same new capacity satisfies both obligations. In any event, because the City never analyzed these new constraints, it is impossible to say how much additional capacity the City must provide to offset their impact.

Second, the City suggests that its rezoning capacity analysis can double as its analysis of these new constraints. (ROB, 57.) But nothing in the City's "soft sites" analysis or any of the other approaches described by the City considers parking maximums, or minimum office densities, or curb cuts, or any of the other constraints Petitioners have identified. The City cannot recycle these unrelated analyses to satisfy its commitments in Programs 7.1.1 or 8.1.6, or the state law requirements those commitments are intended to implement.

2. <u>The City Has Not Satisfied State Law Requirements For Housing Element Rezoning.</u>

a. The City Did Not Select Rezoning Sites When It Adopted Its Housing Element, So It Must Prove That Its Rezoning Sites Meet State Law Requirements.

As explained above (*supra*, Section III.B.1.a.) and in Petitioners' opening brief (POB, 15-19), the City did not select its rezoning sites at the time it adopted its housing element, and it must therefore demonstrate that those sites meet state law criteria for housing element rezoning sites in the context of the rezoning itself. Indeed, the City specifically committed to do so in Program 7.1.1. (See POB, 15-17, 21.)

b. The City's Brief Includes A Transparent Attempt To Relitigate New Commune DTLA LLC v. City Of Redondo Beach*, Because The City Knows That Its Rezoning Does Not Comply With The Court Of Appeal's Published Decision In That Case.*

In October 2025, the Second District Court of Appeal issued a published decision strictly

interpreting the provisions of subdivision (h) of Government Code section 65583.2. (*New Commune*, *supra*, 115 Cal.App.5th 111 [review denied].) The *New Commune* decision reverberated through city planning departments across the state because it sharply limits a form of political expediency common in housing elements, whereby cities rezone sites for housing development while leaving intact the opportunity to develop purely commercial or industrial uses on the rezoned parcels. This approach reduces opposition from the owners of the rezoned parcels. This is typically accomplished through a zoning "overlay," but other times (as here) it is baked into the zoning itself.

The *New Commune* court held that, for lower income housing element rezonings, this approach is doubly illegal.

First, it violates the minimum residential density provisions in the first sentence of subdivision (h)(2) of Government Code section 65583.2, as interpreted by *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193. Because zoning that permits the construction of purely non-residential projects would allow sites to be developed with zero residential units, it cannot comply with the state-mandated minimum density of 20 units per acre for lower income sites. (*New Commune*, *supra*, 115 Cal.App.5th at 135 ["The City's overlay is inconsistent with the mandatory minimum density requirements because it allows development on identified sites without requiring any residential construction, i.e., it allows for construction with zero residential units."].)

Second, the approach violates the mixed-use allowance invoked by most cities to comply with the second sentence of subdivision (h)(2), because it does not constitute "mixed-use" zoning within the meaning of the statute. "By preserving the underlying commercial and industrial zoning, thereby allowing future development without any residential component, the overlay fails to meet the requirement that residential use occupy no less than 50 percent, and up to 100 percent, of total floor area of projects on the designated sites." (*New Commune*, *supra*, 115 Cal.App.5th at 136.)

The *New Commune* court made it clear that these were separate and independent reasons for invalidating Redondo Beach's planned housing element rezoning. (*New Commune*, *supra*, 115 Cal.App.5th at 136 ["These are independent bases for invalidating the City's housing element, separate from the minimum density violations discussed above."].)

The City's rezoning does not comply with these provisions, as interpreted in *New Commune*. This is

not surprising. By the time the *New Commune* decision was announced, the development of the FZP was already well underway, and there was widespread understanding among cities that *New Commune* would either be depublished, reviewed by the California Supreme Court, or legislatively overruled. But the decision stuck, and the effort to overturn it in the Legislature failed.[18] *New Commune* is the law of the land.

The City devotes eleven pages of its brief to subdivision (h)(2) and *New Commune*, much of which is an attempt to relitigate that case, complete with a multi-page section on the public policy reasons for rejecting its rule. Because *New Commune* is binding on this Court, these arguments need not be addressed in detail. But we will address the highlights.

The City mischaracterizes *New Commune* as limited to zoning overlays, and argues that the FZP is not governed by *New Commune* because it is not an overlay. This is incorrect. Although *New Commune* happened to address rezoning through an overlay, the rules it announced have nothing to do with overlays—they have to do with whether the rezoned land allows for the development of purely non-residential uses. (*New Commune*, *supra*, 115 Cal.App.5th at 135.) In any event, elsewhere in the City's brief, the City concedes that the HCSF component, at least, is a zoning overlay. (ROB, 67-68.)

The City argues that "[a] careful reading of Section 65583.2(h)(2) shows that the Legislature did not intend for the minimum density requirement in (h)(2) to mean that Lower-Income Shortfall Sites must preclude all non-residential development." (ROB, 40.) This is exactly the interpretation rejected by the *New Commune* court. (*New Commune*, *supra*, 115 Cal.App.5th at 136 ["Because the City's overlay maintains **commercial and industrial zoning rights that section 65583.2(h)(2) requires be eliminated**, the overlay fails as a matter of law." [emphasis added]].)

The City argues that the *New Commune* court's interpretation would render the state's No Net Loss statute moot, because there would be no need to address capacity lost through the development of non-residential projects on housing element sites. (ROB, 45.) But subdivision (h)(2) only applies to a subset of a city's housing element sites, and even as to those sites, the No Net Loss law is still needed to address

[18] The unsuccessful bill to legislatively overrule *New Commune* was AB 2741, introduced by Assemblymember Al Muratsuchi in early 2026. The bill would have amended subdivision (h) of Government Code section 65583.2 to disapprove *New Commune*'s interpretation and would have made that amendment retroactive to the beginning of the current housing element cycle.

situations where those sites develop with fewer residential units than expected.

The City argues that public policy favors the type of either-or zoning rejected by the Court of Appeal in *New Commune*, to allow corner stores and churches to coexist with apartment buildings and duplexes. (ROB, 46-48.) But this argument fundamentally misunderstands the rule in *New Commune*. The Court of Appeal did not prohibit mixed-use zoning or mandate that an entire *neighborhood* be free of commercial uses. It merely enforced the Legislature's mandate that, in order to be listed as lower-income rezoning site, the zoning for a parcel must require that parcel to be developed in the future with housing. And, to be clear, *New Commune* still allows for *mixed-use* zoning on those parcels, so long as the zoning mandates that at least *part* of the new development be used as housing.

The City argues that only its C-2 and C-3 districts "principally permit substantial amounts of non-residential uses," and that sites in other districts are adequate to satisfy the City's rezoning obligations. (ROB, 44.) But the *New Commune* holding is not limited to sites that "principally permit" non-residential uses, or sites that permit "substantial amounts" of non-residential uses. To comply with (h)(2), as interpreted by *New Commune*, the City must *prohibit* these uses *in their entirety*, unless developed as part of a mixed-use project that includes sufficient residential units to meet the state law minimum density standards. In any event, the City has not done the math to show that it has adequate rezoning sites to overcome its *New Commune* problem, and it bears the burden of showing that it has done so.

The City, finally, attempts to seek safe harbor under the second sentence of subdivision (h)(2), which provides an exception to the general rule. (ROB, 42-43.) That is, the City attempts to illustrate that its low-income sites "allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project." (Gov. Code, § 65583.2, subd. (h)(2).) But the City's brief argues only that "the development of substantial amounts of non-residential use [is] highly unlikely." (ROB, 42.) That is not the rule. The rule is that the City's zoning must "require" mixed-use projects to dedicate half their floor area to residential uses. (Gov. Code, § 65583.2, subd. (h)(2).) It is not enough that the City's zoning code might make it *likely* that most projects will meet this standard. In any event, the minimum density provision in subdivision (h)(2) applies regardless and is an independent reason that the City's rezoning is inadequate, so the City cannot avoid its *New Commune* problem by invoking this

provision. (*New Commune*, *supra*, 115 Cal.App.5th at 136.)

The City also writes that it would "have the discretion to deny" projects that do not meet the requirements of subdivision (h)(2). (ROB, 42.) This, too, fails state law's requirements. The City, if it has discretion to deny improper projects, also has discretion to approve them. Subdivision (h)(2) demands that the City eliminate such discretion and categorically forbids improper projects.

c. The City Has Not Complied With The State Law Requirements Around Non-Vacant Sites

As Petitioners detailed in their opening brief, the City has failed to comply with subdivisions (g)(1) and (g)(2) of Government Code section 65583.2, which require cities to provide additional analysis and evidence when they include non-vacant sites in housing element sites inventories. (POB, 23-25.) The City concedes that these provisions apply to rezoning sites. (ROB, 49-50.) And for the reasons discussed above, because the City did not select its rezoning sites at the time it adopted its housing element, it must demonstrate compliance with subdivisions (g)(1) and (g)(2) now. (See *supra*, Section III.B.1.a.) Because the City was required to comply with these provisions to meet its rezoning obligations, they are enforceable under Government Code section 65587(d)(2), and the City bears the burden of proving that it has complied with them.

The City nevertheless argues that it was not required to comply with subdivision (g)(1) and (g)(2) now because these requirements are triggered at the time of housing element adoption. (ROB, 48-49.) We discuss this in greater detail above in addressing the City's statute of limitations argument (*supra*, Section III.A.1.) but to reiterate: this argument is absurd. The City admits that it only identified three hypothetical rezoning scenarios in its housing element, and that it did not select its actual rezoning sites until 2025. (AR 3547; see ROB, 22.) It could not have complied with subdivisions (g)(1) and (g)(2) in 2023 because there was no concrete rezoning program to assess.

The City also attempts to construe its soft sites exclusion criteria as its implementation of subdivisions (g)(1) and (g)(2). (ROB, 50.) But this small handful of excluded site categories comes nowhere near the analysis mandated by subdivisions (g)(1) and (g)(2). In particular, for lower-income sites, subdivision (g)(2) requires the City to adduce "substantial evidence that the [existing] use is likely to be discontinued during the planning period." (Gov. Code, § 65583.2(g)(2).) The fact that the City has excluded certain categories of sites does not mean that it has evidence that the existing uses are likely to

discontinue for all of the sites in categories it has *not* excluded.

To the extent the City is arguing that the *calculation* portion of the soft sites method implements subdivisions (g)(1) and (g)(2), that is incorrect. The only likelihood of development factor used in the soft sites analysis is a flat 2% likelihood of development for existing residential uses, and 70% likelihood of development for non-residential properties. (ROB, 27.) This flat approach is not what subdivisions (g)(1) and (g)(2) require. Additionally, the City appears to concede that the soft sites method uses a time horizon longer than the housing element planning period, so it cannot satisfy subdivision (g)(2)'s requirement for evidence of discontinuation of existing use during the planning period. (ROB, 52:8-9.)

This contrasts with the City's approach to other capacity calculations, which correctly assessed residential capacity "during the planning period." (ROB, 20.) For example, when the City counted up how many units would be built due to projects with active applications or permits (i.e., pipeline projects), the City did not assume that one hundred percent of each project's units would be built during the planning period and discounted the units attributable to the project accordingly. (*Id.* at 20-21.) "For projects with long build-out timelines . . . the City . . . estimate[d] the number of units that could be built within the planning period." (*Id.*) "For other projects . . . the City . . . applied a discount factor based on how far along the project was."[19] (*Id.* at 21.)

Next, the City argues that its size makes it difficult to comply with the actual statutory requirements in subdivisions (g)(1) and (g)(2). And in particular, the City resists subdivision (g)(2)'s evidentiary requirement, as interpreted by the *New Commune* court, which invalidated one of Redondo Beach's housing element sites because it was occupied by a grocery store with a long term lease, even in the face of a letter from the property owner expressing interest in redeveloping the property. (*New Commune*, *supra*, 115 Cal.App.5th at 800-801; see ROB, 51 ["Unlike San Francisco, Redondo Beach is a small jurisdiction and it proposed a third of its low- and very low-income RHNA on a single site. . . . In that circumstance, it may be an abuse of discretion to not contact property owners and analyze property-

[19] The discount factors were as follows. "[T]he analysis counts 70% of units in projects that have filed for a building permit or are awaiting a first construction document, 66% for projects that have Planning approvals, and 82% for projects with planning applications filed." (AR 3535.) So the City believes that discount factors from 66 to 82 percent are appropriate for residential development projects *where an application has already been filed*. This further underscores the egregious, unjustified optimism of the soft sites method's 70 percent discount factor for sites where *no application has been filed*.

specific lease terms. But in a large city like San Francisco, it is an abuse of discretion to spend four years doing so."])

But there is no special rule under subdivisions (g)(1) and (g)(2) for large jurisdictions. And that is not an accident; the Legislature is perfectly capable of enacting provisions specific to large jurisdictions where appropriate. (*See, e.g.*, Gov. Code, §§ 66016.5, subd. (a)(6); 65913.3.5, subd. (c).) And the Legislature has even specifically excluded San Francisco from definitions within state housing law, where appropriate. (*See, e.g.*, Gov. Code, § 65583.2(e)(1).) If the City wants to be excluded from the requirements in subdivisions (g)(1) and (g)(2), that is a request best addressed to the Legislature, not the courts.

The City's citation to *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289—a case from over 40 years ago—is telling. That case was decided long before the Legislature added the highly specific requirements in modern housing element law. Today's trial courts look to *Martinez* and *New Commune*, not *Buena Vista Gardens*, for guidance in enforcing the substantive provisions of housing element law.

In any event, the City is overstating the burden of complying with subdivisions (g)(1) and (g)(2) in two critical ways.

First, Petitioners are not demanding that the City go out and contact every owner of every property on the City's sites inventory to ask about existing uses. The City already maintains detailed information about existing uses and structures on parcels within the City, some of which it already included in its site inventory tables. The law merely requires the City to account for the factors and to identify the evidence described in subdivisions (g)(1) and (g)(2). The City could most easily have accomplished this by producing an analytical model that considers factors related to existing use, as it promised to do in housing element Program 7.1.1. Or the City could have applied discount factors specific to reasonable and manageable existing use categories—for example, applying a modest discount to single-story commercial buildings between 30 and 60 years old, and applying a more significant discount to newer and larger structures.

Second, the City focuses on the sheer volume of sites involved in its rezoning, glossing over the fact that a large proportion of its purported rezoning capacity comes from a small number of sites. (AR

20090 [fewer than 1,000 of the City's 92,041 rezoning sites account for 75% of the net rezoned capacity].) The City could easily have conducted a more fulsome review of existing uses on these sites with high rezoning capacity. Instead, the City buried its head in the sand and ignored well-known uses on these sites based on its apparent belief that it was not required to comply with subdivisions (g)(1) and (g)(2).

The result is a rezoning analysis that attributes thousands of units to sites for which even a cursory review would reveal disqualifying existing uses. For example, Petitioners' opening brief highlighted a site containing the Holy Trinity Greek Orthodox Church, a preschool, and a recreation center. The City increased the allowable height on this parcel from 40 to 50 feet and transitioned it to form-based zoning. (ROB at 36.) As a result of those changes, the City says that the site's realistic capacity increased five orders of magnitude—from 0.022 units to almost 1,000 units. (ROB at 36; AR 3660, Table A, Line 119855; AR 20090, Line 44545.) This claim is absurd for any sort of site, but becomes all the more absurd considering the thriving existing uses on the site, none of which are likely to discontinue by 2031.

In response, the City points to the prospect of redeveloping surface parking lots that are present on the site. But this ignores the parking needs of the existing church, preschool, and recreation center. And the City's rezoning capacity analysis did not actually calculate the site's capacity based on this surface parking redevelopment plan.[20]

In any event, the Holy Trinity site is not an isolated example. The City's rezoning capacity analysis is replete with similar examples of sites with extensive, thriving existing uses. For example:

- In addition to the Holy Trinity property, the City attributes large unit counts to sites with a number of active churches and religious institutions, including the Salesian Office of the Provisional (527 units, Line 3923[21]), the Lake Merced Church of Christ (348 units, Line 44668), the Union for Reform Judaism (205 units, Line 90613), the Daring Faith Celebration Center (185 units, Line 44897), the

[20] The City was well aware that, to include sites based on partial redevelopment, it was required to account for that form of development when it calculated site capacity. This was one of the bases on which Petitioner Californians for Homeownership prevailed in its previous housing element litigation against the City of Beverly Hills, and Petitioners provided the City a copy of the trial court decision in that case, in advance of the City's adoption of the FZP. (Gelfand Decl., Ex. 5.)

[21] References are to the row numbers in the table at AR 20090. The unit counts listed are the City's realistic capacity figures under the HCSF program.

Temple United Methodist Church (134 units, Line 91759), Ebenezer Lutheran Church (131 units, Line 33949), Calvary Armenian Congregationalist Church (123 units, Line 90679), the Church of Jesus Christ of Latter Day Saints (118 units, Line 49184), and St. Francis' Episcopalian Church (93 units, Line 84242).

- Established schools, including the Brandeis School of San Francisco (244 units, Line 44613), St. Bridget Academy (208 units, Line 3472), and Terra School (93 units, Line 13914).
- A UCSF Health medical office building (198 units, Line 6052).
- City Center Shopping Market, a thriving retail center that was renovated in 2022 and where a brand new grocery store is opening later this year.[22] (924 units, Line 92033).

To be clear, we are not asking the Court to individually strike these sites from the City's rezoning capacity analysis. This case is not about individual sites, and Petitioners are not required to go through the City's list of rezoned parcels to identify the ones with disqualifying existing uses. Instead, that is a task the City was required to undertake by January 31, and we are asking the Court to determine that it failed to do so.[23]

d. Neither The City's Brief Nor The Record Contains Any Meaningful Explanation For The City's Allocation Of Units By Income Level.

As Petitioners explained in their opening brief, the record appeared devoid of any meaningful factual basis for the City's allocation of realistic capacity units to RHNA income categories on the City's rezoning sites. (POB, 22-23.)

This remains so for the City's allocation of units to the moderate income category. The City's brief does not attempt to provide any support for the City's practice of attributing to its moderate income RHNA 50% of all of its rezoning sites, other than those eligible for use as a lower-income site.

As for lower-income sites, the City's brief has confirmed that the City used a simplistic and factually

[22] https://sf.eater.com/2025/3/28/24396183/t-and-t-asian-supermarket-opening-san-francisco-announcement

[23] The City's citation to Government Code section 65010 is unpersuasive. Section 65010 is a procedural rule that requires plaintiffs to demonstrate prejudice (for example, missing the opportunity to provide public comment) for an alleged violation of a *procedural* requirement (for example, a notice requirement in advance of a hearing). The courts do not apply section 65010 to public interest cases brought by nonprofit groups to enforce housing element, and no prejudice was shown by the plaintiffs in the *New Commune* or *Martinez* cases cited by both parties.

baseless method to make this allocation. Rather than attempting to analyze the likely affordability breakdown for projects on the City's rezoning list, the City simply took any site that was eligible under state law for the inclusion of *any* lower-income units and that fell within a broad range of expected total units, and assigned **100%** of that site's units to the lower-income RHNA categories (very low income and low income).

This is absurd. Just because a parcel *is eligible* to be listed at a particular income level does not mean that it is realistically likely to be developed as a project with 100% of the units available at that income level. Instead, the City was required to consider "typical densities of existing or approved residential developments at a similar affordability level" and to adjust the unit counts accordingly. (Gov. Code, § 65583.2, subd. (c)(2).)[24]

But even accepting the City's approach, the City appears to have miscategorized numerous sites that are ineligible to accommodate lower-income RHNA. The Housing Element Law limits local governments' ability to designate small sites in a housing element rezoning as appropriate for low-income housing:

> A site smaller than half an acre shall not be deemed adequate to accommodate lower income housing need unless the locality can demonstrate that sites of equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units as projected for the site or unless the locality provides other evidence to the department that the site is adequate to accommodate lower income housing.

(Gov. Code, § 65583.2, subd. (c)(2)(A).) San Francisco's housing element rezoning designates many less-than-half-acre sites as appropriate for low-income housing. (See AR 20092.) The City has provided sufficient evidence to justify some but not all of these sites.

The City's housing element includes case studies of low-income residential projects that developed on less-than-half-acre sites during the previous planning cycle. (See AR 3629-3659.) Of these projects, 833 Bryant Street included the greatest number of affordable units: 146. (AR 3656.) If we give the City the benefit of the doubt and assume that these are all low-income units, then the City has—arguably—

[24] Again, the City was well aware of this requirement because it was one of the bases on which Petitioner Californians for Homeownership prevailed in its previous housing element litigation against the City of Beverly Hills. (Gelfand Decl., Ex. 5.)

"demonstrate[d] that sites of equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units" for less-than-half-acre sites where up to 146 low-income units are projected.[25]

The City's rezoning includes fifteen less-than-half-acre sites where more than 146 low-income units are projected:

Address	Line Number in Sites Capacity Table[26]	Parcel Size (sq. ft.)[27]	Projected Low- and Very Low-Income Units
930 Van Ness Avenue	50015	13,080	201.17 (no HCSF[28])
1303 Franklin Street	50054	18,884	231.45 (no HCSF)
1200-1210 Geary Boulevard	50048	18,928	231.48(no HCSF)
1601 Bush Street	3574	17,812	156.13 (no HCSF)
1301 Van Ness Avenue	3516	20,063	165.87 (no HCSF)
2201 Van Ness Avenue	49282	12,196	174.3 (with HCSF)
1710 Franklin Street	3686	18,608	197.92 (with HCSF)
180 Redwood Street	4026	16,380	239.52 (with HCSF)
1501 Divisadero Street	6022	12,468	175.54 (with HCSF)
2330 Post Street	52051	13,623	179.76 (with HCSF)
2233 Post Street	5987	16,804	191.27 (with HCSF)
1515 Scott Street	52099	17,252	192.84 (with HCSF)
1545 Divisadero Street	6052	18,726	198.31 (with HCSF)
2080 Market Street	84771	17,868	187.55 (with HCSF)
1695 Broadway	3472	21,567	208.12 (with HCSF)

[25] A strict reading of the statute would pose problems for the City. If, for example, "sites of equivalent size" does not mean merely that the City must provide examples of less-than-half-acre sites that developed with low-income housing but must provide sites that compare more exactly in size to the City's rezoned low-income sites, then the City has failed to meet the Housing Element Law's requirements. (Gov. Code, § 65583.2, subd. (c)(2)(A).) Petitioners are willing to assume that the burden on the City is not quite so stringent.

[26] This column provides the line number where the site appears in the Excel sheet at AR 20090.

[27] One half acre is 21,780 square feet.

[28] The City has provided two different projections for the number of low-income units expected under the FZP: one that includes the HCSF program and one that does not.

(See AR 20090.) Because the City has never provided examples of less-than-half-acre sites that have developed with equivalent numbers of low-income units, the City, for these fifteen sites, was required to "provide[] other evidence . . . that the site[s] [are] adequate to accommodate lower income housing." (Gov. Code, § 65583.2, subd. (c)(2)(A).) This "other evidence" was, of course, the promised "analytical model" pursuant to Program 7.1.1. (AR 3238.) But none of the City's "models" accounts for the specific viability of low-income development on less-than-half-acre sites. (See ROB, 20-29 [summarizing methodologies, none of which specifically accounts for less-than-half-acre sites].) For this additional reason, the soft sites method—and the City's other methods—fail to satisfy the requirements of the Housing Element Law and the promises made in the City's housing element.

C. For These Reasons, The City's Zoning Is Inconsistent With Its General Plan Housing Element In Violation Of Government Code Section 65860.

For the reasons discussed in above, the City has failed to make its zoning consistent with the commitments in its general plan housing element within a reasonable time (i.e., the three-year period provided in Housing Element Law for housing element rezonings). (See Gov. Code, § 65583, subd. (c)(1)(A)(i).). The City is therefore in violation of Government Code section 65860.

D. The City Has Not Identified Any Lawful Basis For Prohibiting The Use Of State Density Bonus Law In Connection With Projects Proposed Under The "Housing Choice – San Francisco" Program.

The HCSF component of the City's rezoning contains a provision barring residential development projects from receiving benefits under state laws, including the DBL. (See S.F.P.C. § 206.10(b)(5).) This is illegal for the simple reason that state law trumps local law. (Cal. Const., art. XI, § 7.) The City presents a number of arguments in an attempt to save this planning code provision, but these arguments fail.

1. The Housing Choice – San Francisco Program Is Not "A Density Bonus Greater Than What Is Described In" The State Density Bonus Law

Having disposed of the exhaustion issue (see *supra*, Section III.A.2.d.), Petitioners address the substantive legal arguments presented by the City in defense of the HCSF program.[29] The City argues that the HCSF program is "complements" the DBL. (ROB, 58.) Embedded here is the notion that the

[29] Again, these arguments are reviewed de novo since they implicate a pure question of law. (*Danser*, *supra*, 240 Cal.App.4th at 890.)

HCSF program offers benefits superior to those of the DBL (see *id.* at 59-61) and therefore satisfies the rule that local bonus programs must provide "a density bonus greater than" the DBL (Gov. Code, § 65915, subd. (n); see also Request for Judicial Notice in Support of Respondents Opening and Opposition Brief ["City's RJN"], filed Aug. 17, 2026, Ex. O, p. 38 [HCD interpretation of state law stating that local governments may adopt a "super density bonus"]). The City's approach fails on two points. First, the HCSF program is less generous than the DBL. Second, the City's approach discards the text of state housing law in favor of a complex measuring exercise that the Legislature did not intend and that Courts are ill-suited to undertake.

To the first point: the HCSF program, across the board, offers benefits that are poorer than those offered by the DBL.

DENSITY BONUS LAW	HOUSING CHOICE – SAN FRANCISCO
A project may demolish rent-controlled units, hotels, and historic resources. (ROB, 59, citing Gov. Code, § 65915, subds. (c)(3), (d)(3).)	Projects that demolish more than two rent controlled units, hotels, or local historic resources are ineligible for Housing Choice. (ROB, 59, citing S.F.P.C. § 206.10(b)(9).)
The City cannot "apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by" the DBL. (Gov. Code, § 65915, subd. (e)(1).)	No analogous provision.
An applicant is entitled to an unlimited number of waivers of development standards to ensure the project can be built as designed. (Gov. Code, § 65915, subd. (e)(1).)	A limited number of specifically enumerated development standards are reduced or eliminated. (S.F.P.C. § 206.10(d)(1)-(d)(2).) In addition, some (but not all) standards can be modified by up to 15%. (*Id.* at subd. (d)(1)(M).)
An applicant is entitled to up to five concessions or incentives, depending on the number of affordable units in the project and their affordability levels. (Gov. Code, § 65915, subd. (d)(2).) An applicant for a builder's remedy project is entitled to two additional concessions or incentives. (Gov. Code, § 65589.5, subd. (f)(6)(C)(i).) Concessions may be used to reduce	If a project applicant wishes to obtain additional relief from local zoning standards beyond what is provided in S.F.P.C. § 206.10(d)(1)-(d)(2), the applicant must include specific amenities or provide specific benefits sought by the City. (S.F.P.C. § 206.10(e).) Relief from certain standards cannot exceed absolute caps. (*Id.* at

DENSITY BONUS LAW	HOUSING CHOICE – SAN FRANCISCO
or eliminate local development standards, with no cap on the scope of the reduction or on what can be eliminated. (See, e.g., *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 774 [concession used to reduce setback].) The local government must approve a concession unless specific, written findings can be made. (Gov. Code, § 65915, subd. (d)(1).) The local government bears the burden of proof if it wishes to deny a concession. (*Id.* at subd. (d)(4).)	subd. (e)(7).) Alternatively or in addition, the project applicant may seek a major modification of a development standard. (See S.F.P.C. § 334(d).) Some standards, such as building height, parking requirements, wind standards, floor area ratio limits, and others, are not eligible for major modifications. (*Id.* at subd. (d)(3).) The decision to grant a major modification rests on the Planning Commission's discretionary evaluation of subjective factors, and the Planning Commission may impose conditions of approval for modifications. (*Id.* at subds. (d)(4)-(d)(6).)
Permitted density is based on the local zoning (whether that zoning is form-based or capped at a specific number of dwelling units per acre) plus a density bonus. (Gov. Code, § 65915, subds. (b)(1), (f), (g).)	Permitted density is based on the local form-based zoning of HCSF. (ROB, 60.)

The City may attempt to escape this comparison by drawing different analogies between DBL provisions and HCSF provisions. Or the City may claim that the disjuncture between the DBL and the HCSF program's benefits on balance favors the HCSF program. But this game is unavailing. For one thing, the disjuncture between the City's planning code and state law demonstrates that the former undermines rather than complements the latter. (See *infra*, Section III.D.3.) For another thing, the DBL and the HAA make clear that any local bonus program must operate alongside, not to the exclusion of, the DBL. (See *infra*, Section III.D.2.) Courts cannot indulge a local government's efforts to shuffle around comparisons between a local program and the DBL when the Legislature has made clear that the relevant question is simply whether the local program permits or excludes use of the DBL. Courts are poorly suited to such an exercise, especially if (as the City claims) the evidence before the Court is limited to a record. (See Joint Case Management Conference Statement, filed May 22, 2026, pp. 4-5.)

The City presents a narrower argument, in addition. An applicant who seeks to build a new residential project must be able to construct at least five units under the local zoning code before they can

avail themselves of the DBL. (Gov. Code, § 65915, subd. (i).) Thus, a parcel whose zoning does not accommodate a five-unit project is effectively ineligible for the DBL. (See ROB, 59.) If the City wants to provide a zoning bonus for projects on such parcels, the City says, that is allowed. In such cases there is no clash with the DBL because the DBL does not apply. (See Gov. Code, § 65915, subd. (n) ["nothing in this section shall be construed to prohibit a city . . . from granting a proportionately lower density bonus than what is required by this section for developments that do not meet the requirements of this section"].)

But this concession does not save the City. The question is not: Where the DBL does not apply, may the City offer applicants a local zoning bonus? The question is: Where an applicant can develop a DBL-eligible project under local zoning, may the City nonetheless forbid the applicant from using the DBL? As explained at length in this brief (see *infra*, Section III.D.2.), the answer to the latter question is "No."

In addition, the HCSF program's application to small lots is not as great an advantage as the City pretends. This is for two reasons. First, a project seeking to use the DBL may span multiple lots, so long as they are "contiguous." (Gov. Code, § 65915, subd. (i).) The unit count "do[es] not have to be based upon individual . . . parcels." (*Ibid.*; see also Gov. Code, § 65928 [defining "development project" without limiting the term to single-parcel projects].) An applicant, then, could seek DBL benefits for a project that includes five or more units across multiple lots, even if no single lot contains five units. Second, the DBL's five-unit minimum applies only to new construction projects. "'Housing development' . . . means a development project for five or more residential units . . . 'housing development' also includes . . . a project to substantially rehabilitate and convert an existing commercial building to residential use or the substantial rehabilitation of an existing multifamily dwelling." (Gov. Code, § 65915, subd. (i).) Consequently, an applicant seeking to rehabilitate an existing building could avail themselves of the DBL, even if the rehabilitation would not produce five or more units. In either of these cases—a five-plus unit project spanning multiple small parcels or a project to rehabilitate an existing building—the HCSF program fails to provide "a density bonus greater than" that provided by the DBL. (*Id.* at subd. (n).) The program, therefore, cannot operate to the exclusion of the DBL.

Ultimately, if the City wishes to enact a local bonus program, it can do one or both of the following. It can enact a program that applies explicitly to "developments that do not meet the requirements of" the

DBL. (Gov. Code, § 65915, subd. (n).) Or it can enact a program that offers "a density bonus greater than" that offered by the DBL. (*Ibid.*) The HCSF program does not meet either of these standards. As detailed in the next section, the HCSF program, from the DBL's perspective, is not a local bonus program at all: the HCSF program simply alters the maximum allowable density under local zoning, and project applicants may seek additional density or other benefits under the DBL beyond that maximum allowable density.[30]

2. Local Zoning Rules—Especially Local Zoning Rules Enacted Pursuant To A Housing Element Rezoning—Must Operate In Addition To, Not To The Exclusion Of, The DBL

At a fundamental level, the DBL does not care what the City says or how the City characterizes its local zoning rules. The DBL is state law. The City cannot override it. (Cal. Const., art. XI, § 7.) It does not matter that section 206.10(b)(5) of the City's Planning Code states that a project using the HCSF program may "not receive any density or development bonuses or relief . . . in any other State or local law or program, including but not limited to California Government Code Sections 65915 *et seq.*" The City can write whatever it wants into the Planning Code, but the City cannot set the terms for when state law does and does not apply.

The question of whether the DBL applies is resolved by the following inquiry. First, look at "the greatest number of units allowed under the zoning ordinance, specific plan, or land use element of the general plan."[31] (Gov. Code, § 65915, subd. (o)(6).) Second, determine whether that limitation will accommodate a project that is eligible for the DBL—that is, a project that includes a requisite percentage of affordable units. (*Id.* at subd. (b)(1).) New-construction projects must also include a minimum of five units. (*Id.* at subd. (i).) If the zoning ordinance, specific plan, or general plan will accommodate such a project, then the DBL applies, and the City's duty to allow a density bonus is mandatory. (*Id.* at subd. (b)(1).) Stroppy protestations by the City, even if they are enshrined in the Planning Code, play no part.

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[30] To clarify: a *bonus* program, from the perspective of the DBL, would be a rule that does the following. "Here is the zoning density allowed for a project. Project applicants may seek benefits under the DBL that build on this base density. Then, after the DBL benefits have been applied, here are additional benefits and density that project applicants are entitled to." The HCSF program, obviously, does not do this.

[31] Determining this number is more complicated for form-based zoning rules (such as those in the HCSF program) than for density-based zoning rules, but it is possible in either case. (See Gov. Code, § 65915, subd. (o)(6); see also POB, 29, fn. 5.)

Thus, if the HCSF program will allow a project that is eligible for the DBL—as it will in most cases—then the City must allow a project applicant to take advantage of the DBL.

The City responds[32] that the DBL permits local governments to create local bonus programs that exclude the use of the DBL. (ROB, 66-67.) The City caveats that such programs must provide "a density bonus greater than" the DBL. (Gov. Code, § 65915, subd. (n).) But the HCSF program does not meet this threshold. (See *supra*, Section III.D.1.) Moreover, as Petitioners explained in their opening brief, local bonus programs must operate *on top of* the DBL, and this is what it means for a bonus program to provide a greater bonus than the DBL. (POB, 26-29.)

The City cites local programs adopted by other jurisdictions that bar use of the DBL. (ROB, 66-67.) But no authority approves these programs as compliant with state law. (See *id.* [citing no authority].) They are illegal for the same reason that the HCSF program is illegal. Petitioners may at some point file litigation against the other offending jurisdictions, but that possibility does not affect this case. The existence of illegal zoning rules elsewhere in California will not save San Francisco.

The City then writes:

> [S]tate law defines "maximum allowable residential density" to mean the same thing as the "base density" of a project, before any density bonus, incentives or concessions or waivers of development standards are applied. (§ 65915, subd. (o)(6).) But where a local program operates through an overlay and does not make changes to the base zoning, the program[] does not modify or alter the base density calculation.

(ROB, 67.) The City misrepresents the DBL. The DBL does not say that the "maximum allowable residential density" under local zoning is the "base density." (Gov. Code, § 65915, subd. (o)(6).) The DBL defines the terms "maximum allowable residential density" and "base density," which are interchangeable in the statute, to mean "the greatest number of units allowed under the zoning ordinance, specific plan, or land use element of the general plan." (*Ibid.*) Is the HCSF program part of San Francisco's zoning ordinance? Of course it is. Both common sense and the text of the City's Planning Code say so. (See, e.g., S.F.P.C. Article 1 [titled "General Zoning Provisions"]; see also S.F.P.C.

[32] The City frames its response as proving that "Petitioners have failed to carry their burden." (ROB, 67.) But this issue is a question of statutory interpretation and hence subject to independent judicial review, and neither party carries a burden of proof. (*Danser*, *supra*, 240 Cal.App.4th at 890.)

§§ 206.1(e)-(g) [describing the HCSF program as a "zoning tool" that provides "zoning modifications"]; 206.10, subds. (b)(1) [designating zoning districts where the HCSF program applies], (d)(1) [listing "zoning modifications" to which HCSF projects are entitled]; see generally S.F.P.C. § 206.10 [setting zoning rules for HCSF projects]; see also AR 21895-21896 [memo from SF Planning referring to FZP, including HCSF, as a "rezoning"].) Moreover, the HCSF program was enacted to satisfy the Housing Element Law's requirement that San Francisco "make sites available . . . with appropriate *zoning*" and enact "a program for *rezoning*." (Gov. Code, § 65583, subd. (c)(1) [emphasis added].) Thus, the HCSF program contributes to the "maximum allowable residential density" or "base density" under the DBL. (Gov. Code, § 65915, subd. (o)(6).)

The City's claim that overlay zoning programs do not count towards the maximum allowable residential density likewise finds no support in the DBL's text, and the City provides no citation to support its claim. (See ROB, 67.) Petitioners agree that the "base density" under the DBL is calculated prior to the application of any density bonus *under the DBL*. (See Gov. Code, § 65915, subd. (o)(6).) But the DBL does not distinguish between local "base zoning" and local zoning "bonus" or "overlay" programs when it comes to calculating base density. (See *id.*) Consistent with this, the California Court of Appeal confirms that proposed residential developments may seek DBL benefits on top of local zoning even when the local zoning operates through an overlay or local bonus program. (See *Bankers Hill 150*, *supra*, 74 Cal.App.5th at 782-783 [project proposed in an overlay zone could use DBL benefits].)

The City next turns to the provisions in the HAA that guarantee access to the DBL for projects on sites designated as low-income sites in a housing element rezoning. (See Gov. Code, § 65589.5, subds. (f)(6)(B), (f)(8).) The City does not push back on Petitioners' characterization of the statute and even appears to concede that "the Government Code states that certain lower-income sites are permitted to use the Density Bonus."[33] (ROB, 67.) The City's only counterpunch (aside from an exhaustion argument, disposed of *supra*, in Section III.A.2.d.) is that Petitioners "conflate the State Density Bonus and Housing Choice." (*Id.*) But Petitioners conflate nothing. The HAA says that sites designated for low-income

[33] It is possible that the City, with this language, was merely summarizing Petitioners' argument; the context leaves it unclear.

units as part of a housing element rezoning have access to the DBL. The HCSF program is a housing element rezoning, and some sites covered by the HCSF program are designated for low-income units. (See AR 20090; ROB, 25, 27.) At minimum, then, the DBL applies to those sites, and section 206.10(b)(5) of the San Francisco Planning Code has no effect.

3. By The City's Own Admission, The Housing Choice – San Francisco Program Is Intended To Undermine the Density Bonus Law

"[A] locality shall not offer a density bonus or any other incentive that would undermine the intent of" the DBL. (Gov. Code, § 65917.) The intent of the DBL, of course, is "to facilitate and expedite the construction of affordable housing." (Gov. Code, § 65852.1, subd. (f); see also *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 757 [DBL is "intended to encourage low-income housing"].)

The HCSF program "is designed to incent projects that support other important City policies and objectives—not just the provision of on-site affordable housing." (ROB, 60.) These include preserving "commercial spaces" and "storefronts that are historic," as well as creating "space for 'community benefit' uses," "family-friendly amenities," and "family-sized units." (*Id.* at 60-61.) These are worthy goals, but they differ from those of the DBL. The HCSF program in effect displaces the Legislature's objectives for the City's. That is not allowed. (Gov. Code, § 65917; see also Cal. Const., art. XI, § 7; *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 595 [local governments "cannot choose to forgo application of land use policies imposed by the Legislature"]; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 547 ["A city may not adopt ordinances and regulations which conflict with the state Planning and Zoning Law."].)

The City claims that a local rule undermines the DBL only "when it imposes conditions on the additional units not imposed on other projects." (ROB, 61.) But the authority the City cites does not support such a narrow reading of Government Code section 65917. The Attorney General opinion that the City cites concludes that "an ordinance conditioning the grant of a bonus under the [DBL] upon payment of a . . . fee imposed only on the density bonus units" is invalid. (102 Ops. Cal. Atty. Gen. 9 (2019).) The opinion does not limit the scope of section 65917. (See *id.*) Similarly, the Court of Appeal in *Building Industry Assn. v. City of Oceanside* held only that a growth control ordinance that applied to projects seeking to use the DBL but exempted other projects was invalid. (*Building Industry*, *supra*, 27

Cal.App.4th at 769.) The Court of Appeal said nothing about limiting section 65917 to this context. (See generally *id.*)

The City's authorities, moreover, help Petitioners' case. They stand for the proposition that local governments may not enforce rules that apply uniquely to density bonus units or projects that include density bonus units. (See 102 Ops. Cal. Atty. Gen. 9 (2019); *Building Industry*, *supra*, 27 Cal.App.4th at 769.) The HCSF program straightforwardly violates this proposition. *Building Industry Assn. v. City of Oceanside* is illuminating. There, the respondent city passed a growth control measure that limited the number of new housing units that could be built each year. (*Building Industry*, *supra*, 27 Cal.App.4th at 749.) The measure exempted affordable units reserved for low-income households or senior citizens. (*Id.*) But the exemption itself contained an exemption: low-income or senior units "built with density bonuses or other development considerations under any program" were still subject to the growth control measure. (*Id.* at 749-750.) The Court of Appeal held that this was a "clear facial conflict" with the DBL and therefore unlawful. (*Id.* at 770.)

The rule struck down in *Building Industry* was very much like section 206.10(b)(5) of the HCSF program. In *Building Industry*, the local government had restrictive zoning rules (a growth control ordinance). (*Building Industry*, *supra*, 27 Cal.App.4th at 749-750.) Here, San Francisco has restrictive zoning rules. In *Building Industry*, the local government created a program that loosened zoning rules for certain residential development projects. (*Id.*) Here, San Francisco's HCSF program loosens zoning rules for certain residential development projects. In *Building Industry*, projects that used the DBL were forbidden from accessing the looser zoning rules. (*Id.*) San Francisco's HCSF program does the same. (S.F.P.C. § 206.10(b)(5).) The exclusion of DBL projects from the looser zoning rules in *Building Industry* was illegal, so the exclusion of DBL projects from the HCSF program is likewise illegal.

The Court of Appeal's analysis in *Bankers Hill 150* makes a similar point. There, a project was proposed under an overlay zoning ordinance. (*Bankers Hill 150*, *supra*, 74 Cal.App.5th at 782-783.) The Court of Appeal wrote: "To the extent the [overlay zone] requires the City to deny a project entitled to a density bonus, incentive, or waiver of a development standard under the Density Bonus Law, it is preempted." (*Id.* at 783, citing *Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1169.) Once more, the rule is clear: the DBL applies to local zoning rules, and local

governments are not entitled to escape its application.

4. The "Housing Choice – San Francisco" Program Cannibalizes Existing Capacity In An Imaginary Effort To Satisfy Housing Element Rezoning Obligations Through A Mathematical Exercise Without Upzoning.

As the City puts it, "Housing Choice is a voluntary development program." (ROB, 18.) It is also, according to the City, "an overlay." (ROB, 67.) The City frames the program in this way because the City understands that if the program is a "rezoning," then the DBL can be applied on top of the HCSF. (Of course, the DBL is agnostic as to what label the local government puts on its zoning rules. The DBL, as state law, applies regardless of labels or characterizations in local ordinances. (See *supra*, Section III.D.2.)) The City's tactic does not accomplish what the City intends it to, but it does highlight another problem with the HCSF program, namely, that if the program bars use of the DBL, the HCSF program is not a "Rezoning Program" that creates new residential capacity that was promised in the City's housing element and required by the Housing Element Law. (AR 3238.) The HCSF program instead coopts capacity that already exists under the DBL and pretends that this is new capacity. (See POB, Section V.C.3.)

The City responds that it can satisfy its rezoning obligation without the HCSF program. (ROB, 61, 68-69.) The soft sites method, according to the City, calculates that 38,369 units will be built under the FZP without the HCSF program. (*Id.* at 61.) That is slightly more than the 36,282 unit minimum the City promised in its housing element. (AR 3238.) But the soft sites method suffers numerous flaws that mean that its estimate cannot be relied upon. (See *supra*, Sections III.B.1.c. through III.B.1.e.; see also Menendian Decl., ¶¶ 19-21.) These flaws mean the City's thin margin of 2,087 units over the required minimum cannot survive, and the City fails to meet its burden of proof. (Gov. Code, § 65587, subd. (d)(2).)

The City also protests that the HCSF program applies to some sites where the DBL does not. (ROB, 61-62.) This is halfway true: on some small sites, the HCSF program is available to new-construction, single-parcel projects, whereas the DBL is not. (See *supra*, Section III.D.1.) But even on these sites, the DBL is available for multi-parcel projects and projects that rehabilitate an existing structure. (*Id.*) The City illegally attempts to coopt that pre-existing DBL capacity for the HCSF program and claim that "new" capacity has been created. Furthermore, the City's "new" capacity calculations under the soft

sites method do not distinguish between sites where new-construction, single-parcel DBL projects are possible and sites where they are not. (See generally Switzky Decl.)

Finally, the City claims to have calculated its new capacity figures by comparing the expected number of units that will be built under the HCSF program to the expected number of units that would have been built under the pre-existing zoning *and* the DBL. (ROB, 62; Switzky Decl, ¶ 9.G.) This is superficially true but highly misleading. The City's calculations for the number of units that would have been built under the pre-existing zoning and the DBL rely on the BlueSky model. (AR 3620-3623.) The calculations for the number of units expected under the HCSF program rely on the soft sites method. (Switzky Decl., ¶ 4.) The soft sites method, as explained earlier, is wildly more optimistic than the BlueSky model (and unreasonably so). (See *supra*, Section III.B.1.c.) The City cannot argue that the HCSF program creates new capacity over and above pre-existing DBL capacity when the "capacity" numbers for the former are grossly inflated while the numbers for the latter are not.

In addition, "[a]t the time of the BlueSky model, the maximum density bonus was only a 50% increase in density." (Switzky Decl., ¶ 6.) The DBL has since been amended to grant even larger density bonuses—up to 80 percent for some projects. (Gov. Code, § 65915, subd. (f)(3)(D)(i).) The DBL now also includes density bonuses that stack on top of the bonuses that were available when the BlueSky model was developed, which range up to a 50 percent additional increase in density. (*Id.* at subd. (v).) The BlueSky model hence systematically underrates the amount of pre-existing residential capacity available under the DBL, and the HCSF program cannibalizes that capacity in a way that the City never accounts for.

5. Housing Element Rezonings Must Accommodate the Density Bonus Law, Even Assuming Other Rezonings May Evade It

On top of all of these flaws in the City's responses, the responses do not address Petitioners' principal argument. The City seems to think that Petitioners argue only: "The City, in enacting the HCSF program, cannibalized existing DBL capacity. Therefore, the HCSF program does not satisfy the City's obligation to rezone under the Housing Element Law and the City's housing element." That is indeed part of Petitioners' argument. But Petitioners argue more. Heading V.C.3. from the opening brief explains: "Whatever the general rule, San Francisco cannot forbid use of the Density Bonus Law for housing element rezonings." That is, even if San Francisco could enact a rezoning that evades the DBL

outside of the housing element context, a housing element rezoning must always be allowed to operate with the DBL. It follows that the HCSF program, which was enacted to fulfill the City's rezoning obligation under the Housing Element Law and the City's housing element, cannot preclude project applicants from seeking DBL benefits.

Petitioners' argument finds support in the structure and purpose of the Housing Element Law. (See POB, 31-33.) Petitioners' argument finds support in the interrelation between the Housing Element Law and other state housing laws. (See *id.* at 33-34.) Petitioners' argument finds support in the text of the Housing Accountability Act, which is part of the Housing Element Law. (See *id.* at 34-35.) To all this argument and authority, the City says nothing.[34]

E. The City's Housing Choice – San Francisco Program Violates Other State Laws, In Addition To The Density Bonus Law

As Petitioners explained in their opening brief, section 206.10(b)(5) of the HCSF program offends not only the DBL but a broad slate of California housing statutes. (POB, 35-36.) The City, in its opposition, does not directly address these statutes or engage with their text. The City's single response on this issue is that applicants are entitled to waive their rights under state housing law. (ROB, 62-66.) That argument is addressed later in this brief. (See *infra*, Section III.F.)

1. The City's Housing Element Contemplated a Rezoning That Would Allow Use of AB 2011

The City's opposition brief does mention one non-DBL state housing statute in another context. In arguing against the application of *New Commune* to the Family Zoning Plan, the City writes, "the Housing Element—certified by HCD—contemplated that AB 2011 would apply to many if not all to San Francisco's Lower-Income Shortfall Sites." (ROB, 48, citing AR 3563-3564.) That is an excellent point. The City's housing element—the source of the City's obligation to rezone—contemplates that the City's rezoning will allow use of AB 2011, at least on lower-income sites. The HCSF program's prohibition on the use of AB 2011 therefore violates commitments the City made in its housing element.

2. Petitioners Did Not Waive Their Arguments Regarding Senate Bill 9

The City argues that Petitioners waived arguments regarding the HCSF program's effort to evade Senate Bill 9 ("SB 9," found at Government Code sections 65852.21 and 66411.7). (ROB, 62, fn. 6.) It

[34] The City's sole relevant response is that Petitioners failed to exhaust these arguments when the City adopted the FZP. (ROB, 58.) That argument does not hold water. (See Section III.A.2.d., *supra*.)

is true that Petitioners' Opening Brief does not explicitly mention SB 9. But SB 9 is a state law, and Petitioners' Opening Brief clearly and forcefully argues that the HCSF program cannot evade *any* state law. (POB, 35-36.) The argument was not waived.

F. Contrary To The City's Claims, The Housing Choice – San Francisco Program Does Not And Cannot Function Through Voluntary Waivers by Project Applicants

The offending provision of the HCSF program, section 206.10(b)(5) reads: "An HC-SF Project . . . shall be a project that . . . does not receive any density or development bonuses or relief from applicable Planning Code standards in any other State or local law or program, including but not limited to [a long list of statutes]." The City argues that this provision can be construed as a waiver of benefits under state law that project applicants are entitled to enter into. (ROB, 62-66.) There are three fatal problems with the City's argument.

First, nothing in the provision's text suggests that it functions as a waiver. A waiver is "a positive act by which a legal right is relinquished." (The Law Dict. (2001 Version); see also *Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 745 ["California law defines waiver as the intentional relinquishment or abandonment of a known right or privilege"] citing *In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.) The offending provision in the HCSF program establishes no "positive act" that an applicant may undertake to waive their rights. (S.F.P.C. § 206.10(b)(5).) Nothing divides an applicant who has waived their rights from one who has not. Rather, an applicant, according to the provision, simply cannot avail themselves of state housing law if they use the HCSF program.

Second, a waiver must be voluntary. (*Kay v. Kay* (1961) 188 Cal.App.2d 214, 218; *In re Marriage of Perkal* (1988) 203 Cal.App.3d 1198, 1203.) The HCSF program, however, attempts to categorically prohibit the use of state law benefits. (S.F.P.C. § 206.10(b)(5).) It leaves no room for an applicant's volition. It is a mandatory "waiver," a forced "waiver," and thus no waiver at all.

Third, a waiver is only possible where a right is relinquished. "The term implies the intentional relinquishment of a known right after knowledge of the facts. It implies the intentional forbearance to enforce a right, and necessarily, therefore, assumes the existence of an opportunity for choice between the relinquishment and the enforcement of the right." (Ballentine's Law Dict. (3d ed. 1969).) California Courts have repeatedly emphasized this requirement. The Supreme Court writes: "[T]here can be no

waiver unless at the time of its exercise the right or privilege waived is in existence." (*San Bernardino Inv. Co. v. Merrill* (1895) 108 Cal. 490, 494; see also *Estate of Goyette* (1971) 14 Cal.App.3d 224, 232 [internal citations omitted] ["Waiver . . . implies an abandonment of a right that could be enforced or a privilege that could be exercised."].) If the HCSF program functions as a waiver, then it must be the case that an applicant could, absent a waiver, pursue a project that relies on both the HCSF program and state housing law. But the City's position (as Petitioners understand it) is that an applicant *never* has the right to do this. The City's position, then, forecloses the possibility that the HCSF program can operate as a waiver.[35]

1. The City's Attempt To Contort The Housing Choice – San Francisco Program's Prohibition On The Use Of State Housing Laws Into A "Waiver" Elides Crucial Legal Distinctions And Implicitly Concedes That Applicants Have A Right To Seek Benefits Under State Housing Laws Notwithstanding the Program's Prohibition

The City does not address the preceding three problems. It cannot. So the City attempts sleight of hand. For each of the elements necessary to create a waiver (a positive act, voluntariness, and the relinquishment of a known right), the City swaps in a superficially similar "element" and pretends it satisfies the law. Here is how that works.

NECESSARY ELEMENT	CITY'S RESPONSE
A waiver must be a "positive act." (The Law Dict. (2001 Version); *Adventist Health*, *supra*, 182 Cal.App.4th at 745.)	The applicant engages in a positive act by applying to construct a project under the HCSF program. (ROB, 65-66.)

The City pretends that *any* positive act that might be connected to a purported waiver can establish the waiver. That is wrong. The positive act that will create a waiver must be "a clear expression made with a full knowledge of the facts and an intent to waive the right." (*Perini v. Perini* (1964) 225 Cal.App.2d 399, 407; see also *Newman v. Albert* (1959) 170 Cal.App.2d 678, 685 [waiver must be a "decisive act"].) The party arguing that that a waiver exists must "prove it by clear and convincing evidence." (*Ukiah v. Fones* (1966) 64 Cal.2d 104, 107.) Any ambiguity in the act means no waiver was effected. (*Perini*, *supra*, 225 Cal.App.2d at 407.) The mere submission of an application cannot meet this standard.

[35] Plausibly, the City is arguing in the alternative. But this is not clear from its brief.

NECESSARY ELEMENT	CITY'S RESPONSE
A waiver must be voluntary. (*Perkal*, *supra*, 203 Cal.App.3d at 1203.)	The applicant's choice to submit a project application under the HCSF program is voluntary. (ROB, 65-66.)

The presence of some voluntary act somewhere in the application process does not suffice to establish a voluntary waiver of an applicant's right to benefits under state law. The voluntariness necessary to establish a waiver must be *with respect to the waiver specifically*. This goes hand in hand with the positive act requirement. (See *Perini*, *supra*, Cal.App.2d at 407 [waiver must demonstrate "intent to waive the right"].)

Does an applicant's choice to submit an application under the HCSF program, knowing that the HCSF program forbids use of state housing law, mean that an applicant has demonstrated an intent to waive their rights under state housing law? If the answer were yes, any local government could evade state housing laws governing housing development applications by adopting an ordinance stating that state housing laws do not apply within the jurisdiction. Then, when challenged, the local government could argue that its ordinance merely established a waiver of state law rights by any applicant seeking to construct a housing development. That is an absurd result that this Court cannot countenance. (See *Fireside Bank Cases* (2010) 187 Cal.App.4th 1120, 1129 ["a law should not be applied in a manner producing absurd results"].) Such a result, moreover, would nullify state housing law in defiance of the California Constitution. (See Cal. Const., art. XI, § 7.)

The City pleads that an applicant, when they apply to build a project under the HCSF program, is asked to sign an affidavit foreswearing any intent to seek DBL benefits. (ROB, 66.) But, of course, the City will refuse to accept an application without the affidavit. (City's RJN, Ex. S, p. 3.) So again the City leaves an applicant no choice in the matter.

The City's move here is the same move that courts reject in unconscionability or unconstitutional conditions analysis. (See, e.g., *Harikian v. G4S Secure Sols. USA Inc.* (S.D.Fla. May 23, 2019, No. 18-81201-CV-MIDDLEBROOKS) 2019 U.S.Dist.LEXIS 248697, at *6 [waiver of jury trial right in contract of adhesion offered by employer was not voluntary]; see also *Speiser v. Randall* (1958) 357 U.S. 513 [government may not condition tax exemption on waiver of First Amendment rights; plaintiffs'

ability to forgo tax exemption did not disturb this conclusion].) The fact that nobody is forced to accept a government program (like the HCSF program) does not render every non-negotiable term bundled into the program "voluntary" in the legally relevant sense. If it did, no condition attached to any optional government program could ever be called involuntary.

NECESSARY ELEMENT	CITY'S RESPONSE
A waiver must relinquish a known and pre-existing right. (*Goyette*, *supra*, 14 Cal.App.3d at 232.)	The applicant has a pre-existing right to pursue benefits under state law for a non-HCSF project, and they waive *that* right when they apply for an HCSF project. (ROB, 62.)

The legerdemain is obvious. The City is substituting out right (A)—the right to build a project using state housing laws and the HCSF program—for right (B)—the right to build a project using state housing laws and other provisions in the City's zoning code.[36] The City is saying that applicants under the HCSF program waive right (B). But right (B) is not and never has been at issue! It is right (A) that is at issue. Petitioners argue that applicants have such a right and that they do not waive it merely by applying to construct a project under the HCSF program.

If one takes the City at its word when it asserts its "waiver" argument, then applicants must be endowed with right (A) since "for there to be a waiver there must be an existing right to be waived." (*Redondo Beach v. Kumnick* (1963) 216 Cal.App.2d 830, 838.) Petitioners, oddly, find themselves in agreement: project applicants have the right to pursue benefits under state law, and this right survives unless an applicant actively and voluntarily waives it. The trouble is that section 206.10(b)(5) does not and cannot constitute a waiver, nor can the City's non-negotiable demands during the application process.

2. <u>If the City Wishes to Argue That an Applicant Has Waived Their Rights under State Law, the City Must Present an Actual Waiver—and Even in That Case, the Waiver Would Fail</u>

Petitioners concede that the rules outlined above do not prevent the City from asking an applicant

[36] There is another problem for the City here. It is not true, as the City implies, that the rest of the City's zoning code allows state law to operate unimpeded. The City's SB 79 ordinance, like the HCSF program, attempts to bar the use of state housing laws. (See S.F.P.C. § 207.11(b)(5); see also *infra*, Section G.)

who seeks to build a project under the HCSF program to affirmatively and explicitly waive their right to pursue benefits under state law. If the applicant, though free to refuse, were to waive their right, then the City might be able to hold the applicant to their waiver. The outcome of that case would depend on the substance of the waiver and the facts surrounding its ratification. But such a hypothetical holds no relevance to this action.[37] This is a facial challenge; the Court, accordingly, must adjudicate the validity of the relevant provision in the HCSF program on its own terms without reliance on any waivers that might be entered into in the future. (See *Trujillo v. Los Angeles* (1969) 276 Cal.App.2d 333, 343 ["The question of waiver is a question of fact" that turns on evidence in the particular case].)

Furthermore, even in that hypothetical scenario, the waiver would fail. That is because "a law established for a public reason cannot be contravened by a private agreement." (Civ. Code, § 3513.) State housing laws are established for a public reason, namely, to prevent local governments from saddling housing construction with heavy regulatory burdens. The Legislature has repeatedly emphasized this. "The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing." (Gov. Code, § 65589.5, subd. (a)(1)(B).) "Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in . . . reduction in density of housing projects, and excessive standards for housing development projects." (*Id.* at subd. (a)(1)(D).) "Solving the housing crisis . . . requires . . . [r]emoving barriers to housing production." (Stats. 2025, ch. 22, § 71(a)(2).)

The Legislature has made similar declarations in connection with the statutes at issue in this case. In enacting the DBL, the Legislature wrote: "It is a matter of urgent public necessity that the housing supply shortfall in California be eliminated." (Stats. 1979, ch. 1207, § 2(a).) Thus, the DBL was intended to mitigate "[g]overnment statutes, regulations, and policies which . . . frustrate the production of housing." (*Id.* at § 2(b)(4).) The Legislature has also stated that the DBL aims "to facilitate and expedite the construction of affordable housing." (Gov. Code, § 65582.1, subd. (f).) Finally, the DBL, "shall be interpreted liberally in favor of producing the maximum number of total housing units." (Gov. Code,

[37] The City appears to concur. "Because Petitioners have brought a facial challenge to Housing Choice, a court 'will consider only the text of the [FZP] itself, not its application to the particular circumstances of an individual.'" (ROB, 66 [citation omitted].)

§ 65915, subd. (r).)

The Legislature made numerous similar declarations in enacting SB 684. "California has a statewide housing crisis." (Stats. 2023, ch. 783, § 1(a).) "Restrictive zoning, land use, and burdensome permitting policies at the local and state level are a major cause of the shortfall between California's housing needs and the available supply of housing." (*Id.* at § 1(c).) And: "Houses cost more in California due to . . . heavy regulatory hurdles." (*Id.* at § 1(i); see also *id.* at § 5.)

The Legislature's statements regarding other state housing laws fall in the same vein. "The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing." (Gov. Code, § 65589.5, subd. (a)(1)(B).) "The Legislature's intent in enacting this section . . . was to significantly increase the approval and construction of new housing . . . by . . . curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects." (*Id.* at subd. (a)(2)(K).) "It is the intent of the Legislature . . . to . . . suspend certain restrictions on the development of new housing during the period of the statewide emergency." (Stats. 2019, ch. 654, § 2(c).) Scores of passages in state law echo the theme. The overriding purpose of these laws, unambiguously, is to ease California's devastating housing shortage by restraining local governments from pursuing policies that limit housing construction. It follows that section 3513 of the Civil Code prohibits private parties from waiving their rights under those laws.

Of course, as the City notes, every law serves some public purpose. (ROB, 63.) Courts have therefore limited the scope of section 3513 of the Civil Code so it does not sweep in every law enacted by the Legislature. If a statute's benefits to the public at large are "merely incidental to the legislation's primary purpose," then section 3513 does not apply. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049.) But the Legislature's motive in enacting broad packages of statewide housing laws, as detailed above, is unambiguously to benefit the public. The City cannot cite a single statute or Legislative declaration in support of its claim that state housing laws primarily exist to benefit project applicants. The existence of some benefit to a private party does not remove a statute from section 3513's ambit. (See *Adelanto Elementary School Dist. v. Krause* (2026) 121 Cal.App.5th 699, 713-716 [finding that statute requiring employers to provide a safe workplace conferred private benefits on employees but was

intended to achieve a broader public purpose and therefore could not be waived by employees].)

The City's reliance on *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417 is misplaced. The statute at issue in *Sharon S.* was Family Code section 8617, which terminated the responsibilities of a birth parent to their child when the child was adopted. (*Sharon S.*, *supra*, 31 Cal.4th at 427.) Sharon S., the birth parent, had authorized the adoption of her child but in the authorization stated that she intended "to retain all her rights to custody and control." (*Id.* at 423.) The Supreme Court asked whether the clash between this language and section 8617 rendered the adoption agreement ineffective. (*Id.* at 426-430.) Ultimately, the Court decided that Sharon S. was allowed to waive the provisions of section 8617 because they were intended "for the benefit of the parties to an adoption petition." (*Id.* at 427.) No broader public benefit was at stake. (*Id.* at 426-430.) That is unlike state housing law, where the Legislature's intent is mainly or entirely to benefit the public.

Bickel, which the City also relies on, provides even stronger support for Petitioners' position. It is true that in that case the Supreme Court ruled that an applicant for a housing development project could waive the local government's deadline, established by the Permit Streamlining Act ("PSA"), to rule on the application. (*Bickel*, *supra*, 16 Cal.4th at 1052.) It is also true that the Supreme Court reached this conclusion because the PSA's deadline existed for "the applicant's own benefit" rather than the benefit of the public at large. (*Id.*) But here is the rub. After *Bickel*, the Legislature immediately amended the PSA to "clarify that the [Act] . . . does not provide for . . . waiver by either the act's purpose or its statutory language." (Stats. 1998, ch. 283, § 5.) This amendment, moreover, explicitly rebuked the Supreme Court. (*Id.* ["The Legislature . . . is aware of the California Supreme Court's decision in *Bickel v. City of Piedmont*"].) If the Supreme Court erred in allowing an applicant to waive their rights under the PSA, then this Court would likewise err if it embraced the City's view that applicants may waive their rights under other state housing laws.

The City, in a different line of argument, points out that no language in state housing law explicitly prohibits an applicant from waiving their rights under those laws. (ROB, 63.) That is true but not

dispositive.[38] Civil Code section 3513 does not require a statute to include an explicit bar on waiver; section 3513 requires only that the statute be "established for a public reason." (Civ. Code, § 3513.) Courts often find that laws without an explicit bar on waiver establish rights that cannot be waived. In *Gombiner v. Swartz* (2008) 167 Cal.App.4th 1365, the Court of Appeal, citing Civil Code section 3513, held that a tenant could not waive their rights under Los Angeles's Rent Stabilization Ordinance, notwithstanding the absence of a nonwaiver provision in the Ordinance. (*Gombiner*, *supra*, 167 Cal.App.4th at 1372, fn. 2.) In *Adelanto Elementary School Dist. v. Krause* (2026) 121 Cal.App.5th 699, the Court of Appeal again cited section 3513 in rejecting an alleged waiver of a school district's right to seek a restraining order under the Labor Code. (*Krause*, *supra*, 121 Cal.App.5th at 713-716.) Nowhere did the Court of Appeal rely on an express bar on waiver that could be found in the law. (See *id.*)

The City's waiver argument is a dead letter. Section 206.10(b)(5) of the San Francisco Planning Code does not and cannot create any waiver. Worse for the City, because state housing law primarily serves public purposes, rights under state housing law cannot be waived at all. The argument on this issue is nonetheless instructive. The City's inability to force applicants to waive their rights implies that the City should likewise be prohibited from destroying applicants' rights through a local code amendment. State housing law serves a public purpose, which San Francisco cannot lawfully impede.

G. Petitioners' Arguments Regarding The City's SB 79 Ordinance Do Not Decide This Case But Do Illuminate The Policy Landscape In Which This Case Sits

Petitioners pointed out in their opening brief that San Francisco's efforts to evade the DBL did not stop with the HCSF program. The City pursued the same strategy when it updated its zoning code to implement Senate Bill 79 ("SB 79"). (See S.F.P.C. § 207.11(b)(5).) The City protests that this is "a parade of horribles" that "the Court should disregard." (Opp., 68.)

Petitioners agree that the City's attempt to evade the DBL is "horrible[]"[39] but disagree that it holds

[38] The City presents three requirements that must be satisfied for waiver to be permitted: "(1) the statute does not prohibit waiver; (2) the statute's public benefit is incidental to its primary purpose; and (3) the waiver does not seriously compromise any public purpose that the statute was intended to serve." (ROB, 62-63.) If any of these requirements is not met, no waiver is permitted. But the satisfaction of one requirement does not mean that a waiver *is* permitted.

[39] The City, incidentally, misunderstands the rhetorical device. A "parade of horribles" is not a fallacy if, as here, the horribles are in fact happening and something can be done to stop them. (See Wikipedia, "Parade of horribles," <https://en.wikipedia.org/wiki/Parade_of_horribles>.)

no relevance for the current action. The SB 79 ordinance is relevant for two reasons. First, it confirms that the City's attitude towards state housing laws is: evade, obstruct, and negate whenever possible. Second, the SB 79 ordinance illustrates the policy consequences at stake in this lawsuit. The Court need not and must not blind itself to those consequences. Courts commonly assess whether a ruling "would have dangerous public policy implications" and shy away from rulings that do. (*Krug*, *supra*, 22 Cal.App.4th at 1823.) Furthermore, when it comes to statutory interpretation, the Court's "fundamental task is to . . . effectuate the purpose of the statute." (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) In assessing whether the DBL can coexist with the HCSF's anti-DBL provision, therefore, the Court must orient itself around the DBL's purpose. (See, e.g., *U.D. Registry, Inc. v. State of California* (2006) 144 Cal.App.4th 405, 428 [interpreting statute to achieve the Legislature's purpose].)

The DBL's purpose is no mystery. As this brief details at length (see *supra*, Section III.F.2.), the DBL is intended to reduce local governments' power to limit or reject new housing projects and to maximize the "number of total housing units" that are produced (Gov. Code, § 65915, subd. (r)). In light of this, the Court must ask the following questions. Would allowing local governments to develop bipartite zoning codes, where pre-existing zoning rules operate with the DBL while new rules operate to the DBL's exclusion, have dangerous public policy implications? Would sanctioning such zoning codes effect the public policy that the Legislature intends the DBL to accomplish? The answers, though not dispositive, guide the Court's decision.

H. The City's Arguments Regarding Severability Are Premature—That Issue Can Be Resolved When The Court Fashions A Remedy

The City argues that the HCSF program's prohibition on the use of the DBL cannot be severed from the overall program. (ROB, 68-69.) The City jumps the gun. This case is still in the merits briefing phase. The scope of the judgment, if Petitioners are entitled to judgment, will be determined later. (See Rules of Ct. Rule 3.1590 [distinguishing "statement of decision" from "judgment" and providing a procedure for both]; see also Code Civ. Proc., § 1064 [distinguishing an "order" from a "judgment"]; *Jackson v. Board of Civil Service Commissioners of City of Los Angeles* (2024) 99 Cal.App.5th 648, 656 [holding court's ruling was not appealable judgment because it did not grant relief].) The Court, furthermore, has authority to order supplemental briefing on the severability issue after the merits of the

case have been decided. (See *Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267 [courts have inherent powers to ensure the orderly administration of justice, which powers "are not confined by or dependent on statute"]; see also Code Civ. Proc., § 128, subd. (a).) Courts commonly issue rulings on the merits that do not delineate the remedies that will be ordered in the judgment or writ but leave that question to be determined through the process outlined in the Rules of Court and, possibly, supplemental briefing. (See, e.g., *Santa Rita Union School Dist. v. City of Salinas* (2023) 94 Cal.App.5th 298, 325-328 [describing trial court's decision to issue a merits order that did not specify the remedies and then hold a hearing on the appropriate remedies before issuing judgment].) No authority or reasoning demands that this case be treated differently.[40]

I. Petitioners Are Entitled To Declaratory Relief

The Petition in this case seeks declaratory relief alongside the writ causes of action. (See Petition, ¶ 251 et seq.) The City believes that this means Petitioners were required to present specific arguments regarding declaratory relief in the opening brief. (ROB, 69.) But the Petition's separate assertion of a declaratory relief cause of action is no more than a cosmetic choice. Declaratory relief is a cause of action under Code of Civil Procedure section 1060, but it is also "another form of relief that may be issued in a mandamus proceeding." (*California Advocates for Nursing Home Reform v. Smith* (2019) 38 Cal.App.5th 838, 904.) If a party files a mandamus petition "instead of . . . declaratory relief causes of action, relief will not be denied where the allegations of the . . . petition are sufficient." (*Malott v. Summerland Sanitary Dist.* (2020) 55 Cal.App.5th 1102, 1109, citing *Woods v. Superior Court of Butte County* (1981) 28 Cal.3d 668, 672-674.)

Petitioners are entitled to declaratory relief for the exact same reasons that they are entitled to writ relief—reasons that have been briefed at length. This Court has the power to issue declaratory relief alongside writ relief, and it should do so.

IV. CONCLUSION

For the foregoing reasons, the Court should issue a ruling for Petitioners on all points.

[40] Petitioners, unlike the City, believe that the severability issue does not bear on the first cause of action. (But see ROB, 68-69.) If the Court agrees with the City, however, that issue would also best be addressed during supplemental briefing, after the Parties have been apprised of the Court's ruling on the law.

Dated: September 21, 2026

CALIFORNIA HOUSING DEFENSE FUND

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

California Housing Defense Fund et al. v. The City and County of San Francisco Case No. CPF-26-519569

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 2201 Broadway, PH1, Oakland, CA 94612.

On September 21, 2026, I served an unsigned copy of this proof of service and the following document(s):

PETITIONERS' OPPOSITION AND REPLY BRIEF

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITIONERS' OPPOSITION AND REPLY BRIEF

DECLARATION OF STEPHEN MENENDIAN IN SUPPORT OF PETITIONERS' OPPOSITION BRIEF

PETITIONERS' OBJECTIONS TO THE DECLARATION OF JOSHUA SWITZKY IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

DECLARATION OF MATTHEW P. GELFAND IN SUPPORT OF PETITIONERS' OPPOSITION AND REPLY BRIEF

I served the documents by email or electronic transmission: I caused a copy of the documents to be sent from the email address nick@calhdf.org to the email addresses provided in the service list below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed September 21, 2026 at Oakland, California.

Nicholas Eckenwiler

Nicholas Eckenwiler