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Court of Appeal, Second Appellate District
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Case No. B321477

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

YES IN MY BACK YARD, et al.,

Respondents and Petitioners,

v.

CITY OF CULVER CITY, et al.

Appellants and Respondents.

APPELLANTS' OPENING BRIEF

On Appeal From the Superior Court
for the State of California,
County of Los Angeles, Case No. 20STCV43253
Hon. Mary H. Strobel

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL **APPELLATE DISTRICT, DIVISION** SECOND	COURT OF APPEAL CASE NUMBER: B321477
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 109498, 246369 NAME: June S. Ailin, Pam K. Lee FIRM NAME: ALESHIRE & WYNDER, LLP STREET ADDRESS: 2361 Rosecrans Ave., Suite 475 CITY: El Segundo STATE: CA ZIP CODE: 90245 TELEPHONE NO.: (310) 527-6660 FAX NO.: (310) 532-7395 E-MAIL ADDRESS: jailin@awattorneys.com; plee@awattorneys.com ATTORNEY FOR (*name*): Appellants, City of Culver City and City Council, et al.	SUPERIOR COURT CASE NUMBER: 20STCV43253
APPELLANT/ PETITIONER:CITY OF CULVER CITY, et al. RESPONDENT/ REAL PARTY IN INTEREST: YES IN MY BACK YARD, et al.,	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Appellants, City of Culver City and City Council of the City of Culver City

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 20, 2023

June S. Ailin
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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I. INTRODUCTION

On July 13, 2020, the City Council of the City of Culver City ("City Council") adopted Ordinance No. 2020-010 amending the City's Zoning Code with respect to development standards in the single family residential zone (the "Ordinance"). The adoption of the Ordinance was the culmination of a years-long process of studying whether and how to update development standards applicable in the single family residential ("R-1") zone. Among other things, the Ordinance changed the allowable floor area ratio ("FAR")[1] in the single family residential zone from .6 to .45, and made changes to how FAR would be calculated.

As the City neared the end of that process, the Legislature formulated and adopted legislation intended to increase production of housing in California by removing certain obstacles to such development erected by cities and counties. The bill, known as SB 330, or the "Housing Crisis Act" (the "Act") went into effect on January 1, 2020, enacting and amending various sections of the Government Code. Among other things, SB 330 addresses delays and subjectivity in the processing and approval of housing development projects by limiting the discretion of city and

[1] "Floor area ratio" is defined in the Culver City Municipal Code as follows: "The floor area ratio (FAR) is the ratio of floor area to total lot area. The maximum floor area permitted on a site shall be determined by multiplying the floor area ratio (FAR) by the total area of the site (FAR x Site Area = Maximum Allowable Floor Area). Basement area shall not be included in calculation of FAR." (Administrative Record ("AR") 12.)

county officials who approve these projects. (Govt. Code §§ 65589.5, 65905.5.) It also addresses changes to development regulations that could limit the number of housing units that can be constructed. (Govt. Code § 66300.)[2]

Yes In My Back Yard and its president, Sonja Trauss (collectively, "YIMBY"), challenged the Ordinance, contending the change the City made to the maximum FAR was "outlawed" by the Act. While YIMBY admitted the Ordinance did not reduce the number of housing units that could be built on a lot in the R-1 zone, YIMBY's contention was that the change in maximum FAR was prohibited because it meant smaller homes, with fewer bedrooms, could be built, limiting development "intensity" or "residential development capacity" in a way prohibited by Section 66300.

The assumption behind YIMBY's position is that terms used in Section 66300 – "density" and "intensity" – have distinctly different meanings, but this assumption is not borne out by how these terms have actually been used in the land use context. While "density" refers to the number of housing units that can be built in an area of land, the term "intensity" has a wider range of meanings, sometimes synonymous, or nearly so, with "density", but not associated with building size or square footage in a residential zone. "Residential development capacity" is not defined in Section

[2] References to sections are to the Government Code unless otherwise indicated.

66300 and likewise does not clearly indicate whether it refers to the number of housing units or their size.

Clearing up the ambiguity created by the lack of clear definitions of terms used in Section 66300 requires consideration of indicators of legislative intent other than the words of the statute. The legislative intent, declared by the Legislature in express statements in SB 330, and also reflected in legislative committee reports, is unquestionably to promote the construction of *more* housing units, not *larger* more expensive ones.

Further, while at first blush subdivision (b)(1)(A) of Section 66300 appears to be an absolute prohibition on changes in certain development regulations, including FAR, Section 66300 does not prohibit changes that lead to greater density, facilitate development of housing, reduce housing development costs, or facilitate construction of housing for lower income households.

In practical terms and application, the Ordinance does not violate Section 66300 as it does not decrease the number of housing units that can be built on a single family residential lot. Before the Ordinance was adopted, three housing units could be developed on a single family residential lot – a single family residence, an accessory dwelling unit, and a junior accessory dwelling unit. After adoption of the Ordinance, those same three housing units still can be developed on a single family lot. Further, the City Council made findings, based on information provided by City staff regarding development patterns, regarding how the

change in FAR would facilitate development of accessory dwelling units ("ADUs"). Such "legislative facts" are not subject to being reweighed by the courts, and the courts will not substitute their judgment for that of the City Council.

Because most R-1 zoned lots in the City do not currently have three existing housing units on them, the Ordinance will result in increased density and facilitate additional housing production in the form of ADUs, which the Legislature has found provide lower cost housing for lower income households. Therefore, the Ordinance does not actually run afoul of Section 66300 and the Ordinance should not have been invalidated. Accordingly, the judgment must be reversed.

Reversal of the judgment requires that the award of attorneys' fees to YIMBY, made pursuant to Code of Civil Procedure § 1021.5, must also be reversed, because YIMBY will no longer be a successful party. However, even if the judgment is affirmed, an award of attorneys' fees is not warranted in this case because it is questionable whether the judgment benefits a significant number of people. Further, even if the award of attorneys' fees were somehow justified, it should be reversed as to the enhancement of the lodestar amount, because judge's reasons for the enhancement are improper.

II. STATEMENT OF FACTS

A. The City Undertook A Study of Residential Development Standards in the R-1 Zone

Property owners in single family residential neighborhoods in the City had long been concerned about unattractive, box-like "McMansions" being built in their neighborhoods. Property owners have felt oppressed by the loss of light and air, shadows cast on previously sunny rooms (AR 229), even to the point of describing the atmosphere as similar to "living next door to a penitentiary." (AR 733.) One resident commented: "A .45 FAR is tried and tested and is working beautifully [in other cities]. [*See* AR 25, 69, 764:1-4.] The only thing being lost here is the ability to screw over your neighbors in pursuit of profit." (AR 344.)

As a result of these concerns, the City began a process which played out over several years and began before Government Code § 66300 went into effect in 2020.

In January 2016, the City Council amended the City's single family residential design standards, but at the same time directed City staff to undertake a more detailed study of the "mansionization" issue. (AR 511.) The City retained John Kaliski, Architects ("JKA"), to undertake studies of residents' concerns and preferences about design standards related to home size. (AR 67) The study included extensive neighborhood meetings and an online questionnaire. (AR 67, 89, 661.) There were 99 comments made in person at neighborhood meetings and 239 responses to the online survey. (AR 27-28)

Residents expressed a variety of concerns. While there were those who expressed concern about the impact of reduction in home size, the majority expressed a preference for a lower FAR. (AR 29-35, 203-222, 690-691)

B. The City's Consultant Made Recommendations for Changes to Development Standards

Based on the public's input, JKA developed a set of recommendations for amending the City's single family residential (R-1) development standards, including recommendations for the City's hillside neighborhoods that reflect the impacts and challenges of development in hillside areas. (AR 12-15, 36-57.) JKA's initial recommendations included the following proposed changes:

- Change FAR from .60 to .45 for lots less than 10,000 SF and .35 for lots 10,000SF and larger. (AR 12)
- Include mezzanine areas and accessory buildings in calculation of FAR. (AR 12)
- Increase all setbacks and distances between structures on the lot. (AR 13-14)
- Continue to require a minimum of two off street parking spaces per housing unit. (AR 15)

A joint Planning Commission/City Council study session took place on May 8, 2019 at which JKA's original recommendations were discussed. (AR 16-57, 64, 66-77, 192-200.) The staff report for that joint study session referenced ADUs as a consideration in crafting an ordinance. (AR 70.)

Notes from an August 2019 meeting of the team working on the ordinance refer to the ordinance as a tool for encouraging the construction of ADUs. (AR 79.)

C. The Planning Commission Adopted Recommendations to the City Council

On January 22, 2020, City staff presented revised recommendations from JKA for amendments to R-1 development standards to the City's Planning Commission. (AR 164, 166-296, 297-306.) The recommendations included:

- Change maximum FAR from .6 to .45 for all lot sizes. (AR 169, 181)
- Exclude garages located behind the dwelling unit from calculation of FAR. (previously only detached garages were excluded from calculation of FAR). (AR 170)
- Increase front and side yard setbacks. (AR 171)
- Count double height area twice in calculating FAR, but exclude 250 square feet of that area from the calculation. (AR 171-172)
- Allow half covered or uncovered parking in rear or sideyard setbacks (AR 172, 188-189)
- Establishing an encroachment plane on the sides of a home that is on a diagonal rather than simply requiring the upper story of a home to be entirely stepped back a specific distance. (AR 173, 183)

The objective of the recommendations was to strike a balance between concerns about single-story homes being overwhelmed by adjacent two-story homes, while still allowing people to build a useful home. (AR 327-329.) "So we're not

really keeping people from doing anything. We're not changing the intensity, but we're affecting kind of the way that the – in a little bit, the way that the building is perceived from the street." (AR 329.) Encouraging construction of ADUs was also a consideration. (AR 428, 429)

The Planning Commission voted to recommend the City Council adopt most of the changes proposed by JKA. The one exception was the recommendation regarding the FAR. The Planning Commission recommended, on a 3 to 2 vote, that the FAR be changed from .6 to .5 instead of .45. (AR 304, 450-451.)

D. Ordinance No. 2020-010 Amending Development Standards in the R-1 Zone Is Introduced

The City Council held a public hearing on the Planning Commission's recommendation on May 26, 2020 and Ordinance No. 2020-010 was introduced. (AR 505, 509-654, 656-771) The Planning Commission's recommendations regarding proposed changes to the development standards are summarized in the staff report for that meeting. (AR 513-516) Much of the discussion at the meeting centered around whether the FAR should be .5 or .45. (AR 691-692, 742, 750-765) The City Council decided to set the FAR at .45 and to adopt the other changes in the development standards as recommended by the Planning Commission. (AR 768-770)

On January 13, 2020, the City Council had adopted an ordinance regarding ADUs and JADUs, in compliance with new statutes requiring, among other things, that ADUs and

JADUs not be counted toward FAR. (AR 148-159) One of the City Council's stated objectives in changing the FAR from the .5 recommended by the Planning Commission to .45 was to encourage and facilitate the construction of accessory dwelling units ("ADUs") and junior accessory dwelling units ("JADUs"). (AR 666-667, 670, 691, 742, 748, 755-757, 762-764)

E. YIMBY Comments on the Proposed Ordinance

On June 5, 2020, eleven days after the Ordinance was introduced for its first reading, YIMBY commented on the Ordinance for the first time. The City received a comment letter regarding the proposed ordinance signed by Sonja Trauss on YIMBY Law letterhead. (AR 854-855.) Among other things, the letter asserts that the change in FAR and "the changes in the method by which side and front yard setback requirements are applied to buildings of particular heights would . . . result in a reduction in residential intensity permitted on affected sites." (AR 855.) "Lower FAR and excessive setbacks result in smaller homes with fewer bedrooms, limit options for ADU placement, and disincentivize development. It is difficult to distinguish between a 'monster home' and a home that simply maximizes space for more residents. This particular ordinance is not well-crafted to make this distinction." (AR 855.)

The letter goes on to make statements regarding Ms. Trauss' view of Section § 66300: "The only way for the city to move forward with this effort and remain in compliance with state law is to concurrently re-zone for additional capacity

elsewhere. The law allows for reductions in residential intensity provided that the deficit is remedied elsewhere. As long as there is no net-loss in residential intensity or capacity the ordinance is permitted under Govt. Code § 66300(i)(1)." (AR 855, 876.)

On June 21, 2020, the day before the City Council's scheduled second reading of the Ordinance. Ms. Trauss also sent an email to the City Council and Michael Allen, the City's Current Planning Manager, with the letter attached. (AR 857.)

The proposed ordinance was on the City Council's agenda for June 22, 2020 for its second reading and adoption as part of the consent calendar, but was pulled from the consent calendar for separate discussion. (AR 868, 902) Mr. Allen addressed the City Council on whether the proposed ordinance was consistent with SB 330. (AR 906; Appellants' Appendix ("AA") 129-133) Ms. Trauss addressed the City Council on that subject as well. (AR 906; AA 127) Among other things, Ms. Trauss said: "We are an organization that sues cities that are out of compliance with state law. . . . So, you know, I know that you're doing your budget thing tonight. And if we win, you would also have to pay our attorney's fees . . . " (AA 135)

The agenda item was held over to the next City Council meeting on July 13, 2020 to allow time for staff to consult with California Department of Housing and Community

Development ("HCD")[3] and for discussion between Ms. Trauss and City staff. (AA 137-140; AR 907)

Mr. Allen followed the City Council's direction to contact HCD about the proposed ordinance. (AR 951-953.) HCD's response was that the intention of the statute was to ensure that a developer could still build the number of units allowed in the zone and R-1 zones are usually low density in any event. HCD noted the proposed changes might impact the number of bedrooms that could be included in a structure, but did not cite anything stating the number of bedrooms was significant or not affecting the number of bedrooms was a legislative objective of the statute. HCD did not take a position on whether the proposed changes violated the statute. (AR 950.)

Mr. Allen emailed Ms. Trauss on June 29, 2020 to set up a time for discussion. (AR 958.) Ms. Trauss did not respond until August 26, 2020, well after the Ordinance had been adopted. (AR 955)

F. <u>The Ordinance Is Adopted</u>

On the July 13, 2020 City Council agenda, the second reading and adoption of the ordinance was again on the consent calendar. (AR 974, 979-1039, 1059-1089) The staff report concluded the Ordinance is consistent with SB 330,

[3] The Legislature has tasked HCD with a variety of responsibilities related to housing policy, production and regulation. (*See generally,* Health & Safety Code, Div. 31, Parts 1 and 2.) The responsibility has been extended to various aspects of the Housing Crisis Act. (§§ 65589.5(d)(1) & (g)(4), 65941.1(b)(2), 66300 (a)(1) & (b)(1).)

particularly noting that the Ordinance did not reduce the number of units that could be built on a lot, facilitates construction of ADUs and JADUs by keeping land area open for their construction, and in fact functionally allows construction at an FAR in the .7 to .8 range. (AR 981-983.) The item was removed from the consent agenda to correct a clerical error in the Ordinance. (AR 1065) There was no further comment from YIMBY. (AR 1074-1075.) The City Council voted unanimously to approve the ordinance. (AR 1058, 1075.)

G. The City Consulted with HCD Regarding The Ordinance

The City consulted with HCD again regarding the Ordinance after its adoption, in August and September 2020. (AR 1124-1127.) HCD responded that the provision in the Housing Crisis Act providing for review of ordinances applied only to moratorium ordinances (AR 1126) and that there was no formal review process for ordinances related to SB 330, but said "[w]hat you have here seems to be inline [sic] with SB 330." (AR 1123.)

Mr. Allen contacted HCD for guidance again in October 2020, with regard to several ordinances, including the one that is the subject of this case, and followed up for purposes of a closed session with the City Council related to this litigation. (AR 1381-1382, 1374-1375.) HCD responded that it would review the ordinances (AR 1374) and indicated its review of the ordinances "is primarily focused on potential impacts on the ability to achieve *maximum density, including*

accounting for potential ADUs." (AR 1374 [emph. added].) In response to an inquiry by Mr. Allen for a further update, HCD responded: "No updates since our last update; same status." (AR 1373.)

III. PROCEDURAL HISTORY

A. Case Initiation and Pleadings

On November 10, 2020, YIMBY filed its Petition for Writ of Mandate, Prohibition, or Other Extraordinary Relief; Complaint for Declaratory Relief; and Request for Immediate Stay ("Petition"). (AA 10) The Petition alleged causes of action for a writ of mandate and for declaratory relief, both to the effect the Ordinance should be invalidated because it was allegedly inconsistent with Section 66300(b)(1)(A). (AA 16-17) The petition specifically targets the change in FAR, rather than changes to setback requirements or other specific provisions of the Ordinance (AA 14-15), although YIMBY admitted three housing units can still be developed on a lot after the adoption of the Ordinance. (AA 15)

The City filed its answer to the Petition on December 8, 2020. (AA 38)

B. Proceedings on the Merits

The case was set for hearing on February 22, 2022, before the Honorable Mary Strobel in Department 82 of the Superior Court for the County of Los Angeles. (AA 46)

YIMBY filed its opening brief on December 9, 2021. (AA 50)

The City filed its opposition brief and a request for judicial notice on January 18, 2022. (AA 70, 89) The request

for judicial notice asked the judge to take judicial notice of legislative history documents (AA 97-125) and the transcript of the correct agenda item for the City Council's first reading and discussion of the Ordinance on June 22, 2020, as the transcript included in the administrative record at AR 941-945 was of the wrong agenda item. (AA 127-141)

YIMBY filed its reply brief and a request for judicial notice on February 7, 2022. (AA 157, 171) YIMBY requested that the judge take judicial notice of SB 330 as originally introduced (AA 174-192) and the City's 2021-2029 Housing Element, which had been approved by the City Council only two weeks before the hearing on the merits. (AA 194-387)

The arguments in the briefs reflected the parties' differing positions on:

- What "density" and "intensity" mean in the context of Section 66300. (AA 59-61, 84)
- Whether the reduction in FAR violated Section 66300. (AA 61-62, 161-165, 167)
- The impact of the Legislature's express statements of legislative intent and other legislative history. (AA 79-82)
- Whether the changes made by the Ordinance regarding how FAR is calculated actually had an effect on the total square footage that could be constructed on an R-1 lot. (AA 84-85, 163-164)
- Whether, and if so, how, the Ordinance would impact or incentivize construction of ADUs and JADUs. (AA 62-65, 166-167)

- Whether the Ordinance met the requirements of exemptions provided in Section 66300 from the prohibition on changes to development standards. (AA 66, 82-87, 168-169)
- Whether the Ordinance reduces density. (AA 65-66)
- Whether HCD's view of the Ordinance is determinative. (AA 79, 167-168)

The hearing on the Petition took place as scheduled on February 22, 2022. (AA 392; Reporter's Transcript, Vol. 1 "RT(1)"[4] 1) The judge had prepared a tentative ruling finding that the Ordinance was invalid.[5] The judge granted both parties' requests for judicial notice. In addition to summarizing the facts and the parties' arguments, and discussing the standard of review, the judge:

- Noted that Section 66300 had been amended since the adoption of the Ordinance, but proceeded on the basis that the parties' arguments were focused on the statute as it existed when the Ordinance was adopted. The judge did not view the amendment as significant.[6] (AA 399, 410)

[4] Volume 1 of the RT contains proceedings on February 22, March 17 and May 26, 2022. Volume 2 contains proceedings on April 5, 2022. Volume 3 contains proceedings on November 8, 2022. In citations, the volume number follows "RT" in parentheses.

[5] Citations are to the final order, as the tentative ruling was adopted without change.

[6] Subdivision (k) was added to Section 66300 at the time of the referenced amendment, stating the changes to subdivision (b)(1)(A) are declaratory of existing law. Where a

- Characterized the issue as "whether the Ordinance has the effect of reducing FAR in the R1 zone to below what was allowed under the City's zoning ordinance in effect on January 1, 2018." (AA 400)
- Acknowledged the potential ambiguity in the phrase "less intensive use", but adopted YIMBY's position on the meaning of "less intensive use" and "reducing the intensity of land use". (AA 399, 400)
- Noted an FAR reduction that had the effect of allowing greater density or facilitating the development of housing would not be invalid. (AA 400)
- Concluded the Ordinance decreased FAR and did not incentivize the construction of ADUs and JADUs. (AA 402-408)
- The provision of the Ordinance providing a dwelling unit can have only one kitchen also "lessened the intensity of housing" in violation of Section 66300. (AA 408)
- None of the exceptions or interpretation policies expressed in Section 66300 applied to the Ordinance. (AA 408-409)
- Statements of HCD personnel regarding the Ordinance were not entitled to deference. (AA 409-410)

At the hearing on the merits, counsel for the City argued: there is nothing in the statute or legislative history

statute or amendment clarifies existing law, such action is not considered a change because it merely restates the law as it was at the time. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.)

emphasizing the number of bedrooms that can be constructed as a standard for evaluating changes to zoning ordinances (RT(1) 2-3); neither the statute nor the legislative history clearly defines "intensity" or "residential development capacity" (RT(1) 3); there is no guarantee a higher FAR would result in more bedrooms (RT(1) 3-4); the changes to the calculation of FAR offset any possible reduction in the amount of square footage that can be constructed (RT(1) 4-5); disputed YIMBY's characterization of the City's draft housing element as showing the Ordinance will have no effect on the number of ADUs (RT(1) 5-7); disputed the judge's conclusion the Ordinance does not meet the requirement of any exemption from the purported prohibition on changing development standards (RT(1) 7-8); and raised the potential for severance of the change in FAR to allow at least a portion of the Ordinance to remain in effect (RT(1) 8-9).

Counsel for YIMBY disagreed with the judge's view that encouraging construction of more bedrooms was not the focus of the statute (RT(1) 9-10); stated that the ordinance that facilitates construction of ADUs is not the Ordinance at issue in this case, but a previously adopted ordinance (RT(1) 10); responded to the City's proposal regarding severance of the Ordinance (RT(1) 11-12, 16); and explained what declaratory relief YIMBY was seeking (RT(1) 10-11, 13).

At the conclusion of the hearing, the judge adopted the tentative ruling as written. (RT(1) 17) The judge set a further hearing on March 17, 2022 to give the parties time to discuss whether it was necessary for the court to address the

declaratory relief cause of action and whether the parties could agree on a severance of the Ordinance. (RT(1) 12-14, 17; AA 412)

On March 17, 2022, the parties reported that discussions regarding declaratory relief and severance were ongoing and requested additional time to continue those discussions. (RT(1) 301-304; AA 415) A further hearing was set for April 5, 2022. (RT(1) 304; AA 415, 417) The judge requested a written report on the status of discussions regarding the severance issue be filed five court days before the hearing. (RT(1) 305-306; AA 415) Such a report was filed on March 29, 2022. (AA 418-422) No agreement had been reached.

At the April 5, 2022 hearing, the judge ordered counsel for the parties to meet and confer regarding a proposed form of judgment and a proposed form of writ of mandate, but set no deadline for submission of those documents. (RT(2) 2; AA 432) Approximately one month later, not having received the proposed documents, the judge issued an order to show cause, setting a hearing for May 26, 2022. (AA 433) Prior to that date, counsel for YIMBY lodged a proposed judgment and a proposed writ. (AA 435-443) Counsel for the City filed objections to those proposed documents and lodged alternative proposed documents. (AA 444-479) At the hearing, the judge signed the form of judgment submitted by the City, with an interlineation to the effect YIMBY was the prevailing party, "entitled to recover costs . . . Petitioners may file a motion for attorneys' fees separately per statute." (RT(1)

602, 606-607; AA 481-504, 508) The writ of mandate was issued by the clerk the same day. (AA 505-506, 508)

On May 31, 2022, the City filed its notice of appeal from the judgment. (AA 510) On July 5, 2022, the City filed its return to the writ of mandate, stating a notice of appeal had been filed. (AA 518-520)

C. Proceedings Regarding Attorneys' Fees and Costs

On July 11, 2022, YIMBY filed a memorandum of costs. (AA 521-526) As a result of discussion between counsel for YIMBY and the City, counsel for YIMBY corrected errors in the memorandum of costs and filed an amended memorandum of costs on August 4, 2022.[7] (AA 604-609, 625, 687-690) No motion to tax costs was filed.

YIMBY filed a motion for attorneys' fees on July 12, 2022, claiming fees under Code of Civil Procedure § 1021.5. (AA 527) The lodestar amount claimed for work on the merits of the case was $90,405, which YIMBY contended was based on below-market hourly rates. (AA 528, 536) YIMBY sought a fee enhancement – a 3.0 multiplier – for the fees for work on the merits of the case. (AA 528, 537-539) YIMBY contended the enhancement was warranted based on the "exceptional result" achieved and because pursuing this case precluded YIMBY from pursuing others. In addition, YIMBY argued the lodestar multiplier was also warranted because Ms. Trauss

[7] The parties stipulated to extend the deadlines for the filing of a memorandum of costs and of a motion to tax costs. (AA 512-514, 600-603)

had spent uncompensated time on "commenting on the ordinance, analyzing the impact of the ordinance on housing, and negotiating with Respondents in an effort to avoid the need for litigation." (AA 539) With the requested multiplier, the claim for work on the merits of the case became $271,215. (AA 528) With the addition of fees for work on the attorneys' fees motion ($9,310) and recoverable costs ($3,920.57, duplicating the amount claimed in the original memorandum of costs), the total claimed came to $284,445.57. (AA 528, 539)

The City opposed the motion on the grounds YIMBY had not established the elements of entitlement to attorneys' fees under Code of Civil Procedure § 1021.5. (AA 613-616) The administrative record reflected the absence of a consensus among the public that the Ordinance was beneficial, and the impact of the ruling was limited to the City of Culver City. (AA 614-615) Further, YIMBY had downplayed the impact of the litigation on its own pecuniary interests. (AA 615-616)

With regard to the amount of fees sought, the City argued the billing statements provided in support of the motion were redacted to such an extent that it was not possible to determine if the work performed was reasonably necessary. (AA 616-617) In addition, the City argued that certain fees were not reasonably incurred (AA 618-619, 624-625, 687-690); and a treble multiplier was not warranted because the issues were not novel or difficult, Ms. Trauss' time should not be considered because she is not an attorney, and petitioners' efforts to avoid litigation were late and

minimal. (AA 619-621) The City also pointed out that the claim for costs was duplicative of the memorandum of costs, which had been amended due to errors in its preparation. (AA 619)

In its reply, YIMBY revisited its original position regarding entitlement to fees (AA 693-694) and responded to the City's arguments the billing statements had been excessively redacted and questioning whether all of the time billed was reasonably incurred (AA 696, 698), and argued detailed billing statements were not required to support an award of attorneys' fees. (AA 697). YIMBY's counsel also argued the decision to amend the memorandum of costs was made "to avoid unnecessary argument over a relatively small sum." (AA 697)

YIMBY also defended its claim for a treble multiplier, based on the asserted public benefit purported to result from the judgment, the novelty and difficulty of the issues, and the City's failure to accept YIMBY's arguments that the Ordinance violated Section 66300. (AA 699-700) YIMBY sought an additional $10,507.33 for work performed since the filing of the motion. (AA 722-730)

The motion for attorneys' fees was heard on November 8, 2022. (AA 741; RT(3) 1) The judge had issued a tentative ruling prior to the hearing finding YIMBY was entitled to recover attorneys' fees under Code of Civil Procedure § 1021.5. (AA 777) The judge intended to award YIMBY attorneys' fees in the amount of $132,823.58, comprised of the lodestar amount with a .25 multiplier ($90,405 x 1.25 =

$113,006.25) for work on the merits and $19,817.33 for work performed after the filing of the attorneys' fees motion. (AA 786, 787) Because the costs were addressed by a memorandum of costs, the judge would not include them in the award made pursuant to the motion. (AA 788; RT(3) 13)

For the most part, oral argument addressed issues that had been raised in the briefs, but a few additional issues were raised. The City argued, among other things: YIMBY's counsel had cited a case in the reply that had been reversed by the California Supreme Court (RT(3) 3-4, 11-12); whether the potential to avoid litigation was a basis for enhancing the lodestar amount (RT(3) 13); whether the enhancement was granted to punish the City (RT(3) 7); and if the judge would not have awarded fees for YIMBY's counsel's work on a motion to tax costs (had one been made), then the judge should not award fees for YIMBY's counsel's work on correcting the errors in the memorandum of costs (RT(3) 5-6).

At the conclusion of oral argument, the judge adopted the tentative ruling as the final ruling with minimal changes, which included reducing the amount awarded by $1,010.00, the fees related to correcting the memorandum of costs. (RT(3) 16-17)

The ruling stated reasons for applying a multiplier to the lodestar amount for the work on the merits, which were the same as those stated in the tentative ruling. (AA 749, 786-787) The total amount awarded was $131,813.58. (AA 750)

On December 2, 2022, the City filed a notice of appeal with respect to the award of attorneys' fees. (AA 765-766)

In commencing work on the appeal, counsel for the City noticed that the change to the tentative ruling regarding the amount of fees for work on amending the memorandum of costs had not been properly reflected in the final order. The City made an unopposed *ex parte* motion to correct the order, *nunc pro tunc*, which was granted. (AA 768-832)

IV. STATEMENT OF APPEALABILITY

The judgment in this case is an appealable judgment under Code of Civil Procedure § 904.1(a)(1).

The order awarding attorneys' fees is appealable under Code of Civil Procedure § 904.1(a)(2).

V. STANDARD OF REVIEW

A. Appeal from the Judgment

The adoption of the Ordinance was a legislative act. (Govt. Code § 65850; *Taschner v. City of Laguna Beach* (1973) 31 Cal.App.3d 48, 67, *reversed on other grounds by Associated Home Builders, etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 596 fn. 14.) In a traditional mandamus proceeding in which the subject of judicial review is a legislative act, the court of appeal, like the trial court, determines whether the local government's action was arbitrary, capricious, or entirely without evidentiary support, contrary to established public policy, unlawful, or failed to conform to procedures required by law. (*Protect Our Neighborhoods v. City of Palm Springs* (2022) 73 Cal.App.5th 667, 676; *California Public Records Research, Inc. v. County of*

Alameda (2019) 37 Cal.App.5th 800, 805-806.) The petitioner has the burden of proof on this issue. (*Id.* at 805.)

As applied to legislative acts, the arbitrary and capricious standard of review is more deferential to local government decisionmaking than the substantial evidence standard. (*Id.* at 806.) While the court of appeal's review is independent of that of the trial court, in determining whether the legislative body has abused its discretion, the court may not substitute its judgment for that of the legislative body. If reasonable minds may disagree as to the wisdom of the legislative act, the act must be upheld. (*Id.)*

Findings of fact by the trial court are conclusive if supported by substantial evidence. (*Id.* at 806.) However, it is not the function of the judiciary to reweigh "legislative facts" underlying a legislative enactment. (*Protect Our Neighborhoods v. City of Palm Springs, supra,* 73 Cal.App.5th at 683.) Further, a legislative choice is not subject to "courtroom factfinding" and may be based on rational speculation unsupported by evidence or empirical data. (*Id.*)

Questions of law, including the interpretation of a statute, its application to undisputed facts, and whether the agency's action is consistent with applicable law, are subject to independent review by the court of appeal. (*Id.* at 676; *California Public Records Research, Inc. v. County of Alameda, supra*, 37 Cal.App.5th at 806.)

B. Appeal from the Attorneys' Fees Award

Generally, an award of attorneys' fees is reviewed for abuse of discretion. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578; *Sweetwater Union High School Dist. v. Julian Union Elementary School Dist.* (2019) 36 Cal.App.5th 970, 980.) An award will be reversed only if it is clearly wrong or has no reasonable basis. (*Id.*)

Factual findings in connection with an award of attorneys' fees are reviewed under the substantial evidence standard. (*Id.* at 981.) However, where the determination of whether the criteria for an award of attorneys' fees has been satisfied amounts to statutory construction and a question of law, the *de novo* standard of review applies. (*Id.* at 981) The application of those standards is subject to the abuse of discretion standard of review. (*569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 434; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 622.)

VI. ARGUMENT

A. The Legislature's Objective in Enacting Section 66300 Was to Increase the Number of Housing Units, Not Square Footage or Building Size; Therefore, the Changes Made By the Ordinance Do Not Violate Section 66300 Because the Number of Units That Can Be Built on an R-1 Lot Remains Unchanged

While Section 66300 includes several definitions in subdivision (a), the terms that are critical to the issue

presented in this case – "density," "intensity," and "residential development capacity" – are not among them. While "less intensive use" or "reducing the intensity of land use" arguably is defined in subdivision (b)(1)(A), the question of what "intensity" of land use actually means, remains unanswered by the statute.

While the courts presume that different meanings are intended when different words are used, that is not always the case. It is not the case here.

An examination of relevant definitions of the terms used in the statute does not conclusively establish that "intensity" means "more square footage." "Intensity," as used in the land use planning context, is sometimes similar to or the same as density, is often a reference to the impacts of development, but is generally not related to greater square footage.

In the face of the ambiguity created by the language of the statute, we must look to other sources for guidance. The Legislature expressly stated what it was trying to accomplish by adopting the Housing Accountability Act. Those express statements of legislative intent, convey the message that the Legislature intended to increase the number of housing units, not their size. Where the language of a statute is inconsistent with express statements of legislative intent, the language of the statute must give way.

Before the Ordinance was adopted, three housing units could be built on a lot in the R-1 zone – a traditional single family home, an ADU and a JADU. That remains true even after the adoption of the Ordinance.

YIMBY contends the change in FAR effected by the Ordinance means an additional bedroom could be built on each R-1 lot in the City. But one more bedroom is not a housing unit. One more bedroom will not house a family in search of a home. One more bedroom will not achieve the legislative objective.

1. Statutory Construction Begins With the Language of the Statute, But Does Not Necessarily End There

The primary issue in this case is the interpretation of a statute, Section 66300. Courts of appeal review such issues *de novo*. (*Segal v. ASICS America Corp.* (2022) 12 Cal.5th 651, 662; *People v. Venice Suites, LLC* (2021) 71 Cal.App.5th 715, 727.) The Court's fundamental task is to determine the Legislature's intent so as to give effect to the law's purpose. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082-1083)

Statutory construction is a three-step process. It begins with giving the words of the statute their plain and common sense meaning in the context of the statutory framework, without rendering any language surplusage. If the plain and commonsense meaning is clear and unambiguous, the process is complete. (*Id.* at 1082.)

The plain meaning approach, however, does not prohibit the Court from determining whether the literal meaning of the statute comports with its purpose, which will not be sacrificed to a literal construction of any part of the statute. (*Law Office*

of Carlos R. Perez v. Whittier Union High School District (2023) 87 Cal.App.5th 463, 472.)

Different words are presumed to have different meanings, but that is not always the case. (*Ferra v. Leows Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 866 ["regular rate of pay" and "regular rate of compensation" have the same meaning for purposes of determining the amount of additional money to be paid for missed meal or rest periods]; *People v. Yuksel* (2012) 207 Cal.App.4th 850, 854 [while an argument can be made that a minor is not a child, the Legislature used both terms to refer to a person under the age of 18 for purposes of a statute making it criminal for an adult motivated by an unnatural or abnormal sexual interest in children to arrange a sexually illicit meeting with a minor].)

Words do not have single, fixed, and immutable meanings established by some authority. They have only such meanings as are given to them from time to time when they are spoken, written, heard, or read by persons endeavoring to communicate. Whether the words of a statute are clear is often more complicated than the apparent "plain meaning" of the words, as it requires interpretation even to agree with the asserted "plain meaning". The meaning of the words of a statute or, to use the alternative approach favored by many courts, the intent of the Legislature, can only be determined with reference to the context in which the words are used. In analyzing the legislative usage of words, the objective sought to be achieved by a statute is the prime consideration even when the language is not ambiguous. Courts resist blind

obedience to the putative "plain meaning" of statutory language where literal interpretation would defeat the Legislature's central objective. (*Leslie Salt Company v. San Francisco Bay Conservation & Development Commission* (1984) 153 Cal.App.3d 605, 613-614; *Kramer v. Intuit, Inc.* (2004) 121 Cal.App.4th 574, 578-579.)

While ambiguous language necessitates a second step in the statutory construction process involving extrinsic aids, such as legislative history and maxims of construction, there is no law prohibiting examination of legislative history even when the language is not ambiguous. (*Id.* at 579; *MacIsaac v. Waste Management Collection & Recycling, Inc., supra,* 134 Cal.App.4th at 1083.)

The most significant source of legislative history is the Legislature's own declaration of findings and purposes. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d. 1, 15.) When legislative history answers or provides clues to legislative intent, the legislative history is a more reliable indicator of legislative intent than inferences based on canons of construction. (*People v. Superior Court of Riverside County* (2022) 81 Cal.App.5th 851, 862; *Ferra v. Leows Hollywood Hotel, LLC, supra,* 11 Cal.5th at 872, 879.)

If ambiguity remains after the second step, the Court "must cautiously take the third and final step of the interpretive process. [Citation.] Thus, '[i]n determining what the Legislature intended we are bound to consider not only the words used, but also other matters, "such as context, the object in view, the evils to be remedied, the history of the

times and of legislation upon the same subject, public policy and contemporaneous construction." [Citation.]'" (*MacIsaac v. Waste Management Collection & Recycling, Inc., supra,* 134 Cal.App.4th at 1084.)

2. The Meaning of "Intensity" is Less Clear Than That of "Density", But Neither Term Supports YIMBY's Interpretation of Section 66300

As discussed above, generally speaking, the words in a statute are to be given their ordinary meaning. Courts often look to general-purpose dictionaries to determine that ordinary meaning. When appropriate, where words are used in a specialized context, courts will look to specialized dictionaries. (*National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 499 ["[G]eneral-purpose dictionary definitions are not always the most reliable guide to statutory meaning; sometimes context suggests that the Legislature may have been using a term in a more technical or specialized way."].)

General purpose dictionary definitions of "density" and "intensity" do not shed much light on the meaning of those terms in the land use and housing context of Section 66300. The Merriam-Webster Dictionary defines "density" as "the quality or state of being dense." (https://www.merriam-webster.com/dictionary/density#dictionary-entry-1) It provides the following definitions of "dense": "marked by compactness or crowding together of parts"; "slow to understand"; "demanding concentration to follow or

comprehend"; "having high or relatively high opacity". (https://www.merriam-webster.com/dictionary/dense) Other definitions are provided in the context of mathematics, chemistry and physics, none of which are relevant to Section 66300.

The situation is similar with regard to "intensity": "the quality or state of being intense" or "the magnitude of a quantity (such as force or energy) per unit (as of area, charge, mass, or time)". (https://www.merriam-webster.com/dictionary/intensity#dictionary-entry-1) "Intense" means "existing in an extreme degree"; "having or showing a characteristic in extreme degree"; "marked by or expressive of great zeal, energy, determination, or concentration"; "exhibiting strong feeling or earnestness of purpose"; or "deeply felt". (https://www.merriam-webster.com/dictionary/intense)

There is, however, a specialized dictionary focused on land use and planning. "A Planner's Dictionary," created and compiled by the American Planning Association and published in 2004, gathers definitions of terms actually used in zoning and planning ordinances, reflecting the breadth of usage in the land use planning discipline, in an effort to capture "not just the technical terms used in planning, zoning, and development, but also the concepts that planners, public officials, and the public address in any consideration of community building." (A Planner's

Dictionary ("APD"), p. 2.)[8] (https://planning-org-uploaded-media.s3.amazonaws.com/publication/download_pdf/PAS-Report-521-522.pdf) Each definition is followed by the city and state whose ordinance includes the quoted usage.

With regard to "density," the definitions cited in APD generally concur that the term refers to the number of housing units per acre of land. The APD also cross-references from "density" to "intensity".

- The number of dwelling units permitted per net acre of land. *(Coral Gables, Fla.)*
- The number of dwelling units per gross area devoted to residential development. *(Baton Rouge, La.)*
- The number of dwelling units per acre. *(Durham, N.C.)*
- The number of dwelling units situated on or to be developed on a net acre (or smaller unit) of land, which shall be calculated by taking the total gross acreage and subtracting surface water, undevelopable lands (e.g., wetlands) and the area in rights-of-way for streets and roads. *(Muskegon, Mich.)*
- The number of dwellings or principal buildings or uses permitted per net acre of land. Net acre of land shall not include land required for public streets. *(Mankato, Minn.)*

[8] This approach of focusing on actual usage of words to discern their meaning lies at the heart of the Oxford English Dictionary. (*See,* Winchester, S., *The Professor and the Madman: A Tale of Murder, Insanity and the Making of the Oxford English Dictionary* (Harper, 1998).)

- The number of dwelling units allowed on an area of land, which area of land may include dedicated streets contained within the development. *(North Liberty, Iowa)*
- The permitted ratio of residential units to land area or the permitted ratio of building size to land area. *(Concrete, Wash.)*

(APD, p. 138) Note that most of these definitions relate to a residential development context.

"Intensity" has a broader range of usage, although APD cross-references it to "density." Here are the definitions of "intensity" compiled in APD:

- Relative measure of development impact as defined by characteristics such as the number of dwelling units per acre, amount of traffic generated, and amount of site coverage. *(Sandy, Ore.)*
- The degree to which land is occupied or the density of development. (There is no single measure of the intensity of land use. Rather, a land use is relatively more or less intense than another use. Generally, a particular use may be more intense due to one or more characteristics, such as traffic generated, amount of impervious surface, bulk of the structures, number of employees, density, or nuisance such as pollution, noise, light, etc.) *(Temple Terrace, Fla.)*
- The comparative degree of perceived increase or exaggeration from one use or condition to a proposed use or condition as it applies to parking needs, traffic

patterns, visual magnitude, or altered atmosphere or character on a particular parcel of land. *(Ephraim, Wisc.)*

- The level of concentration of activity occurring on a site or in an area. Intensity is often used interchangeably with density. (*Scottsdale, Ariz.)*
- The degree to which land is used referring to the levels of concentration or activity in uses ranging from uses of low intensity, e.g., agricultural and residential, to uses of highest intensity, e.g., heavy industrial uses. High intensity uses are normally uses that generate concentrations of vehicular traffic and daytime population and are less compatible with lower intensive uses. *(Norfolk, Neb.)*
- The degree to which land is used, measured by a combination of the type of land used and the amount of land or floor area devoted to that use. *(Chapel Hill, N.C.)*

(APD, p. 233-234)

The related term, "intensity of use," which is also cross-referenced with "density", is used as follows:

- The number of dwelling units per acre for residential development and the floor area ratio (FAR) for nonresidential development, such as commercial, office, and industrial. *(Pittsburgh, Pa.)*
- The number of square feet of development per acre by land use type with respect to non-residential land uses. *(Concord, N.C.)*

(APD, p. 234)

Other terms that incorporate the word "intensity" and their usage shed some light on the inquiry here.

> **development, low-intensity** *(See also **intensity**)* Land uses that have fewer impacts from density or uses (i.e., large lot single family, natural open space areas). *(Renton, Wash.)*
>
> This environment is characterized by very low-intensity land uses primarily related to natural resources use and diffuse recreational development, relatively low land values, relatively minor public and private capital investment, and/or relatively major biophysical development limitations. Management objectives are oriented toward establishing a balance between sustained-yield natural resource utilization and low-density recreational uses in this environment, with restriction of development in hazardous areas. *(Yakima County, Wash.)*

(APD, p. 143)

> **development, high-intensity** *(See also **intensity**)* Land uses with higher impacts from density or uses (i.e., multifamily, industrial, commercial uses). *(Renton, Wash.)*

(APD, p. 143)

> **use, intensification of** (*See also* intensity) A change in the use of a structure or site, where the new use is required by [local code] to have more offstreet parking spaces than the former use; or a change in the operating characteristics of a use (for example, hours of

operation), which generates more activity on the site. (*Rancho Mirage, Calif.*)

(APD, p. 435)

To the extent these definitions suggest "intensity" means something other than "density," they refer to impacts and secondary effects of development, often as a relative term, and not usually specific to a residential development context. None states that intensity necessarily refers to building height, square footage, or some other measurement of building size. As a relative term, "intensity" in the context of Section 66300 could refer to relative levels of development, e.g., low-intensity versus high-intensity.

3. The Term "Residential Development Capacity" Does Not Resolve the Question Whether Units or Square Footage is the Legislature's Focus

As amended effective January 1, 2022, subdivision (b)(1)(A) of Section 66300 contains a laundry list of changes in development standards that ends with "or any other action that would individually or cumulatively reduce the site's residential development capacity." This language is stated to be declaratory of existing law. (Section 66300(k).) "Residential development capacity" is not defined in Section 33600.

APD does not define the phrase "residential development capacity". It does define the individual words.[9]

[9] General purpose dictionary definitions of these words are consistent with the APD definitions. "Residential" means, as

residential Regularly used by its occupants as a permanent place of abode, which is made one's home as opposed to one's place of business and which has housekeeping and cooking facilities for its occupants only. *(Bondurant, Iowa)*
Activities within land areas used predominantly for housing. *(Temple Terrace, Fla.)*

(APD, pp. 333.)

development Any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as *an increase in the number of dwelling units in a structure* or a change to a commercial or industrial use from a less intensive use; any activity that alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered

relevant here, "used as a residence or by residents", or "of or relating to residence or residences." (https://www.merriam-webster.com/dictionary/residential) "Development" includes "a tract of land that has been made available or usable **:** a developed tract of land *especially* **:** one with houses built on it." (https://www.merriam-webster.com/dictionary/development) The meanings of "capacity" include "the maximum amount or number that can be contained or accommodated." (https://www.merriam-webster.com/dictionary/capacity)

species habitat, aquifer or other resource area, including coastal construction or other activity. *(Growing Smart Legislative Guidebook)*

Any human-caused change to improved or unimproved real estate that requires a permit or approval from any agency of the city or county, including but not limited to, buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations, and storage of materials. *(Durham, N.C.)*

The construction of a new building or other structures on a zoning lot, the relocation of an existing building on another zoning lot, or the use of open land for a new use. Also means any man-made change to improved or unimproved real estate, including but not limited to parking, fences, pools, signs, temporary uses, clearing of land, mining, dredging, filling, grading, paving, excavation, or drilling operations. *(Muskegon, Mich.)*

The physical extension and/or construction of urban land uses. Development activities include: subdivision of land; construction or alteration of structures, roads, utilities, and other facilities; installation of septic systems; grading; deposit of refuse, debris, or fill materials; and clearing of natural vegetative cover (with the exception of agricultural activities). Routine repair and

maintenance activities are exempted. *(California Planning Roundtable)*

Any man-made change to improved or unimproved real estate, including but not limited to construction of or substantial improvements to buildings or other structures, the placement of mobile homes, mining, dredging, filling, grading, paving, excavation, or drilling operations. *(Glen Ellyn, Ill.)*

The act of bringing about growth; to construct or alter a structure, to make a change in use or appearance of land, to divide land into parcels, or to create or terminate rights of access. *(Beaverton, Ore.)*

(APD, pp. 142-143 [emph. added])

capacity The maximum lawful level of designed use of any structure, or part thereof, as determined by the city's adopted building code and expressed in terms of occupants, seats, persons, employees, or other units specified by the building code. *(Gainesville, Fla.)*

The maximum number of persons that can avail themselves of the services (or goods) of an establishment or use at any one time, as determined by the required floor space per person established in the building code. *(Minneapolis, Minn.)*

(APD, pp. 103)

These definitions, however, do not lead to any inexorable conclusion regarding whether the phrase "residential development capacity" refers to the maximum amount or number of families, people, or square footage.

Because neither the language of Section 66300 nor the dictionary definitions discussed above resolve the question whether the Legislature's objective is the development of more housing units or larger housing units, the language is ambiguous. Therefore, we must look to expressions of legislative intent other than the words of the statute themselves to understand subdivision (b)(1)(A) of Section 66300.

4. Express Statements of Legislative Intent Focus on Increasing the Number of Housing Units, Identifying Smaller Units As A Means of Achieving That Goal

The Legislature's own declarations and findings are "the most significant source" of legislative intent, even when those declarations and findings are uncodified. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 15.) Express statements of legislative intent are controlling even where they appear to contradict the language of the statute. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, *disapproved on other grounds by Kowis v. Howard* (1992) 3 Cal.4th 888, 897-898.)

In *Friends of Mammoth,* the California Supreme Court held that, even though the language of the California Environmental Quality Act appeared to make that act

applicable only to public works projects, based on the Legislature's expressed intent to protect the environment to the greatest extent possible, the act also applied to projects undertaken by private property owners for which a government-issued permit is required. (*Id.* at 253, 259, 263-264.) "*Once a particular legislative intent has been ascertained, it must be given effect 'even though it may not be consistent with the strict letter of the statute.*' (*Dickey v. Raisin Proration Zone No. 1* (1944) 24 Cal.2d 796, 802, 151 P.2d 505, 508.) As we stated nearly a half century ago in *In re Haines* (1925) 195 Cal. 605, 613, 234 P. 883, 886: '*The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute*; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. *The intent prevails over the letter*, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Id.* at 259 [emph. added]; *see also, People v. Heston* (1991) 1 Cal.App.4th 471 [in light of purpose of statute, statute making it a felony to provide a firearm to someone "during the commission or attempted commission of a felony" also applies where the firearm is provided before the commission or attempted commission of a felony].)

SB 330 begins with express statements of legislative intent, which are not codified (AR 1009-1011), but which make it clear the Legislature's objective was the construction of more housing units per acre or lot, rather than increased square footage per housing unit.

Section 2(a)(4) of SB 330 states: "California needs an estimated 180,000 *additional homes* annually to keep up with population growth, and the Governor has called for 3.5 million *new homes* to be built over the next 7 years." Additional homes, not additional bedrooms or square footage. (AR 1010 [emph. added].)

The Legislature also expressed its concern about the price per housing unit, both in terms of construction costs and purchase price. (*See* SB 330, Section 2(a)(5), (6) (C) & (D), (9) & (10); AR 1010.) Smaller homes cost less to build and buy. "Homes, lots, and structures near good jobs, schools, and transportation remain underutilized throughout the state and could be rapidly remodeled or developed to add affordable *homes* without subsidy where they are needed with state assistance." (*See* SB 330, Section 2(13) [emph. added]; AR 1011.) Affordable *homes*, not affordable square footage. "Reusing existing infrastructure and developed properties, and building *more smaller homes* with good access to schools, parks, and services, will provide the most immediate help." (*See* SB 330, Section 2(14) [emphasis added]; AR 1011.) *More smaller homes,* not larger homes, not more square footage.

These express statements tell us that the Legislature's intent was to accommodate more families or households in more affordable homes, not to increase the square footage of homes.

5. Legislative Committee Reports Also Focus On the Number of Housing Units, Not Their Size

Legislative committee reports regarding SB 330 are consistent with the express statements of legislative intent in focusing on increasing the number of housing units that can be constructed rather than the construction of larger units. "Zoning ordinances also add additional constraints that can reduce *density*: setbacks, floor-area ratios, lot coverage ratios, design requirements, dedications of land for parks or other public purposes, and other regulations can reduce the space on a lot that a building can occupy *in ways that lower the number of units it is feasible to construct on a lot*." (AA 106 [emph. added]) "According to Up for Growth's 2018 analysis, housing underproduction is rampant throughout the United States, but California's underproduction is greater than the other 49 states combined. According to the 2016 McKinsey study, California's housing deficit is over 2 million *units*, and that it would require production of 500,000 *units* a year (3.5 million units total) over a seven year period to normalize the state's housing prices. According to HCD, there needs to be 180,000 *units* built per year to maintain housing costs. By contrast, housing production averaged less than 80,000 *new homes* annually over the last 10 years." (AA 118 [emph. added])

Note the lack of any discussion in these reports of housing size, square footage, or number of bedrooms or people. The Legislature's focus is on the number of housing

units rather than their size, and the terms "intensity" and "residential development capacity" should be construed in a manner consistent with the objective of increasing the number of housing units.

6. Because the Ordinance Does Not Reduce the Number of Housing Units That Can Be Built on an R-1 Zoned Lot, the Ordinance Does Not Violate Section 66300

Subject to certain conditions, the City allows the construction of a single family home, an ADU and a JADU on most lots in the R-1 zone. (AR 155-156.) The Ordinance does not change the number of housing units that can be built on an R-1 zoned lot. It does not change the density of housing permitted on an R-1 lot.

There is nothing to support the position that "intensity" or "residential development capacity" pertains to the square footage of residential structures. If "intensity" is meant to refer to a comparative measure of development, the Ordinance does not reduce intensity or residential development capacity of a lot. Whether or not three units on a 5,000 square foot lot is considered, low-, medium- or high-intensity development, the Ordinance does not change the number of units that can be built on an R-1 zoned lot.

Therefore, Ordinance No. 2020-010 does not violate Section 66300.

B. Ordinance No. 2020-010 Does Not Violate § 66300 Because It Facilitates an Increase in Density and Development of Housing for Lower Income Households

The potential for the Ordinance to facilitate construction of ADUs and JADUs was recognized as early as the May 8, 2019 joint Planning Commission/City Council study session. (AR 49, 195-198, 512; *see also* AR 79.) It is possible, with or without the change in FAR, to build a single family home, an ADU and a JADU on a typical R-1 lot. (AR 49, 478) However, the thinking was that a smaller primary structure would preserve land area on the lot and encourage a property owner or developer who wanted to maximize construction on a lot to include an ADU or JADU in a project rather than just build the largest possible single family structure. (*See* AR 30) Michael Allen, the City's Current Planning Manager, described the concept in terms of preserving land area on a lot for ADUs and JADUs while still allowing a typical home to be increased in size by about fifty percent. (AR 951-952 [copy attached as Exhibit 1])

The staff report to the City Council regarding the July 13, 2020 second reading of the Ordinance expressed the same concept more formally, and also pointed out that, practically speaking, if a single family home, an ADU and a JADU, were constructed on a lot, the actual FAR could reach .7. (AR 981, 982 [copy attached as Exhibit 2]; *see also* AR 79, 323, 324, 666-667, 422, 512, 513, 762-763; AA 131-132)

Based on this information regarding how changes in development standards would encourage development of ADUs and JADUs, the City Council made findings, in reliance on the statements in the staff report, that the change in FAR would

> provide opportunities for the creation of additional housing development through the construction of accessory dwelling units (ADUs) and junior accessory dwelling unit (JADUs). By reducing bulk and mass of a home, residents will have more opportunities for light and air access, privacy, maintenance of existing single-family neighborhood character, and development of ADUs and JADUs.
>
> New regulations will allow for existing single family dwelling units averaging between 1,200 and 1,800 square feet to further develop and expand to approximately 2,250 square feet. Further, consistent with Government Code Section 66300, the proposed Zoning Code Amendment facilitates the preservation of existing development and development of additional dwelling units through the construction of ADUs and JADUs; restricts the over-development of single family parcels, which has traditionally limited the ability to develop additional units via ADUs or JADUs; provides additional opportunities to construct ADUs and

JADUs, effectively increasing the housing supply and reducing the costs of housing development; and does not propose any changes which result in a net loss of residential capacity.

(AR 1043 [copy attached as Exhibit 3].) This finding, as part of the Ordinance, was approved by a unanimous vote. (AR 1058, 1074-1075)

Section 66300 does not absolutely prohibit all changes in development standards. Subdivision (f)(3) of Section 66300 provides as follows:

> (3) This section shall not be construed as prohibiting the adoption or amendment of a development policy, standard, or condition *in a manner* that:
>
> *(A) Allows greater density.*
>
> *(B) Facilitates the development of housing.*
>
> *(C) Reduces the costs to a housing development project.*
>
> . . .

In addition, subdivision (j) of Section 66300 provides as follows:

> (j) Notwithstanding subdivisions (b) and (f), this section *does not prohibit* an affected city or an affected county from enacting a development policy, standard, or condition *that is intended to preserve or facilitate the production of housing for lower income households, as defined in Section 50079.5 of the Health and Safety Code, or housing*

> *types that traditionally serve lower income households,* including mobilehome parks, single-room occupancy units, or units subject to any form of rent or price control through a public entity's valid exercise of its police power.

[Emphasis added.]

How much square footage gets built on any particular lot within parameters established by state law and local ordinances ultimately is within the discretion of the developer or homeowner. The City Council concluded the changes in FAR and how it is calculated made by the Ordinance would encourage a developer or homeowner who wants to build more square footage on a lot to include an ADU or JADU in their project. Inclusion of an ADU or JADU increases the actual density of housing units on the lot, as most R-1 lots in the City currently have only a single family home of 1200 to 1800 square feet. (AR 982, 1043)

In addition, the increase in actual density results from the production of *housing for lower income households at a lower cost*, as smaller housing units typically cost less to build. The Legislature, in the context of legislation to encourage the production of ADUs and JADUs, expressly found: "Accessory dwelling units offer *lower cost housing* to meet the needs of existing and future residents within existing neighborhoods, while respecting architectural character." (Govt. Code § 65852.150(a)(7) [emph. added].) Moreover, in enacting Government Code §§ 65852.1 and 65852.2, precursors to today's ADU statutes, the Legislature

found "there are many benefits associated with the creation of second-family residential units on existing single-family lots, which include . . . (2) Providing relatively affordable housing for low- and moderate-income households without public subsidy." (Stats.1982, c. 1440, § 2, operative July 1, 1983 [Exhibit 1 to Motion for Judicial Notice filed concurrently herewith.) Clearly, the Legislature considers ADUs and JADUs to be housing for lower income households.

Thus, the Ordinance is within the scope of, and furthers the legislative objectives of, subdivisions (f) and (j) of Section 66300, because it allows greater density than currently exists on most R-1 lots in the City, it will reduce housing development costs while facilitating the development of housing, and it is intended to preserve or facilitate the production of housing for lower income households – ADUs and JADUs.

No doubt YIMBY will attempt to challenge the City Council's findings regarding the effect the Ordinance is expected to have on the production of ADUs and JADUs on the grounds there is no data to show the Ordinance will actually have the stated effect. However, it is not the function of the judiciary to reweigh "legislative facts" underlying a legislative enactment.

In *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, the trial court had enjoined enforcement of portions of a city ordinance subjecting cyber cafes to a conditional use permit requirement and regulating their operations. One aspect of the regulations prohibited minors from patronizing

cyber cafes during school hours, unless accompanied by a parent or guardian (the "daytime curfew"). (*Id.* at 432, 439.) The city council had received a report from the city's police chief regarding criminal and gang activity at cyber cafes, including concerns about cyber cafes being a location at which gangs would recruit minors as members. (*Id.* at 430, 440, 441.) The court of appeal reversed the restraining order with respect to the daytime curfew (*Id.* at 443), finding that the trial court had improperly questioned the basis for findings made by the city council.

> In finding the daytime curfew constitutionally invalid, the court appeared to reweigh the evidence to determine whether the need for regulation was supported factually. The [trial] court stated it found "the restriction on the presence of minors during public school hours bears no basis to the declared legislative intent of public safety.... No 'cyber café' crimes have been reported to the police during school hours." In doing so, the court engaged in impermissible legislative factfinding. " 'It is not the judiciary's function ... to reweigh the "legislative facts" underlying a legislative enactment.' [Citation.] The scope of judicial review must be cognizant that the factual determinations necessary to the performance of the legislative function are of a peculiarly legislative character." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511, 120

Cal.Rptr.2d 197.) " '[T]he courts will not ... engage in a trial at which the court, as trier of fact, determines the factual basis upon which the Legislature may act.' [Citation.] 'In other words, in enacting legislation the Legislature has already, in the exercise of the legislative power, determined the facts necessary to support the legislation. The courts cannot revisit the issue as a question of fact, but must defer to the Legislature's determination unless it is palpably arbitrary.... Consequently, we must uphold the challenged legislation so long as the Legislature could rationally have determined a set of facts that support it.' " (*Id.* at p. 511, 120 Cal.Rptr.2d 197.) Here, the city council could rationally have determined from the facts before it that the daytime curfew was a needed prophylactic measure to deter minors from being recruited or victimized by gangs when they should, under law, be in school. So long as the daytime curfew passes scrutiny under the First Amendment, it is not for the courts to reweigh the facts considered by the city council when it determined the ordinance was needed.

(*Id.* at 442-443.)

In *Protect Our Neighborhoods v. City of Palm Springs, supra,* 73 Cal.App.5th 667, the city council had re-enacted an ordinance, with amendments, regarding use of single family

homes as vacation rentals. The petitioner challenged the city council's findings the amended ordinance was consistent with the city's zoning code and vacation rental was an ancillary and secondary use of residential property, on the grounds the findings were internally inconsistent and without any basis in fact. (*Id.* at 674, 675-676, 683.) As in *Vo,* the court of appeal rejected the petitioner's arguments. "'It is not the judiciary's function … to reweigh the 'legislative facts' underlying a legislative enactment. . . .' . . . '" [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . '" (*Id.* at 683 [citations omitted].)

While it is true that, even with a FAR of .6, an ADU and JADU could be added to an R-1 lot, it was within the City Council's legislative discretion to conclude that changes in development standards could open up property owners' minds to including an ADU or JADU on their property. The case law does not allow this Court to second guess the City Council's findings on this point, or its decision to adopt the Ordinance.

C. The Award of Attorneys' Fees is Improper

One of the elements of entitlement to an award of attorneys' fees under Code of Civil Procedure § 1021.5 is that the party seeking fees must have been the successful party in the case. If this Court reverses the judgment, YIMBY will no longer be the successful party and the award of attorneys' fees must be reversed as well. (*Orange Cove Irrigation District v. Los Molinas Mutual Water Co.* (2006) 30 Cal.App.5th 1, 23.)

However, even if this Court affirms the judgment, the award of attorneys' fees should be reversed because the judgment does not confer a benefit on the public or a significant segment of the public, as there is no consensus on what housing policy with regard to single family residential development should be. Further, the award should be reversed at least in part with respect to the enhancement of the lodestar amount because the enhancement is based on improper factors.

1. The Judgment Does Not Confer a Benefit on the Public or a Significant Segment of the Public

One of the elements a party must establish in order to be entitled to an award of attorneys' fees under Code of Civil Procedure § 1021.5 is that the outcome of the litigation conferred "a significant benefit, whether pecuniary or nonpecuniary, . . . on the general public or a large class of persons." (*Graham v. DaimlerChrysler Corp., supra,* 34 Cal.4th at 578.) This element requires that the subject matter of the case must implicate the public interest and the outcome must confer a benefit on a significant number of people. (*Id.*) The trial judge in this case found this element was met:

> Considering the Legislature's determination that the housing shortage in California is "a crisis of historic proportions," Petitioners' success in this writ action conferred a substantial public benefit on the general public and a large class of persons.

(AA 743)

> [T]he Legislature has identified housing as statewide concern and, in SB 330, has placed limits on the ability of cities to enact development policies that reduce the intensity of land use. This writ action conferred a substantial benefit on current and future City residents, a large class of persons, and also on the general public by enforcing that policy.

(AA 744)

In reaching this conclusion, the judge adopted the Legislature's view of what the state's policies regarding single family residential housing should be. It is not clear, however, that City residents or the general public agree that the state's housing policy is beneficial.

While a few of the City residents who commented on the Ordinance stated a preference for building larger single family homes, far and away the greater number of public comments were in favor of limiting the size of single family homes. (AR 29-35, 203-222, 690-691) More broadly, several cities have filed lawsuits challenging the Legislature's approach to housing policy, effectively eliminating local control of land use. In addition to the statements in the record in this case, the public's questioning of housing policy is reflected in pending litigation regarding other legislation affecting single family residential housing, SB 9, which allows splitting lots and constructing two housing units on each lot in single family residential zones. (*City of Redondo Beach, et al., v. Bonta,* Los Angeles Superior Court Case No. 22STCP01143,

filed March 29, 2022; *City of Rancho Palos Verdes, et al., v. Bonta,* Los Angeles Superior Court Case No. 22STCP02369, filed June 23, 2022 [Exhibits 2 and 3 to Motion for Judicial Notice filed concurrently herewith].)

Clearly, it is inaccurate to conclude the public has been benefitted when there is no consensus among those claimed to be benefitted that the Legislature's decisions regarding housing are wise policy. Under the circumstances, a conclusion that the public generally or a substantial segment of the public, will benefit if the judgment in this case is affirmed, is not supported by substantial evidence.

2. Even if the Judgment is Affirmed, the Award of Attorneys' Fees Should Be Reversed Because the Stated Grounds for Enhancing the Amount of the Award Are Improper

In determining the amount of attorneys' fees to be awarded, the trial court should first determine the lodestar amount, that is, the number of hours worked multiplied by a reasonable hourly rate. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1132; *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2022) 77 Cal.App.5th 517, 535.) The reasonable hourly rate used to calculate the lodestar is the product of a number of factors, including the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case. (*Ketchum v. Moses, supra,* 24 Cal.4th at 1132.)

Once the trial court has determined the lodestar amount, the trial court may decrease or increase the amount awarded. (*Id.; California DUI Lawyers Assn. v. Department of Motor Vehicles, supra,*77 Cal.App.5th at 535-536.) A party seeking enhancement of the lodestar amount has the burden of proof as to whether enhancement is warranted. (*Ketchum v. Moses, supra,* 24 Cal.4th at 1138.)

There are multiple factors that can be considered by the trial court in determining whether to increase or decrease the lodestar amount. They are: (1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award; (4) the fact that an award against the government would ultimately fall upon the taxpayers; (5) whether the attorneys in question received public and charitable funding for the purpose of bringing public interest lawsuits; (6) whether the monies awarded would inure to the attorneys or to the parties they represented. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49; *Ketchum v. Moses, supra,* 24 Cal.4th at 1132.)

Factors that are already included in calculating the lodestar should not be included in deciding whether to enhance the award. When the trial court uses the same factors to calculate the lodestar and to enhance it, an abuse of discretion occurs. (*Ramos v. Countrywide Home Loans,*

Inc., supra, 82 Cal.App.4th at 626; *Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 880.)

A trial court should enhance the lodestar amount only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience, billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award results in unfair double counting and is unreasonable. (*Ketchum v. Moses, supra*, 24 Cal.4th at 1138-1139.)

In the order awarding attorneys' fees, the trial judge stated her reasons for enhancing the lodestar amount:

> As discussed above, this writ petition presented questions of first impression involving SB 330, for which there was apparently no published case law. (See O'Neill Decl. ¶¶ 5-13.) Petitioners' attorneys presented the case effectively and obtained Petitioners' litigation objectives, including invalidation of the Ordinance. In addition, the hourly rates requested by Petitioners is [sic] arguably on the low side for comparable cases in Los Angeles. . . . grant , the difficulty and novelty of the questions at issue, and Petitioners' success, may not be fully reflected in the lodestar fee.
>
> The court also considers the declaration of Petitioner Trauss, in which she explains that the fee award will substantially inure to the benefit of

> YIMBY, a non-profit organization that has a limited litigation budget and that is dedicated to increasing the accessibility and affordability of housing in California by enforcing state housing laws, including SB 330. Trauss also details YIMBY's efforts, prior to City's adoption of the Ordinance and prior to litigation, to persuade the City Council to amend the Ordinance to comply with SB 330. Thus, while the fee award will ultimately be paid by taxpayers, the elected representatives of City had a meaningful opportunity to avoid litigation and the fee award.
>
> For all these reasons, the court grants a modest multiplier of 1.25, applied solely to the work on the merits. The court finds that a 3.0 multiplier would be excessive for the circumstances of this case, including, but not limited to, the significant number of lodestar hours awarded and the fact the fee award will ultimately be paid by taxpayers of the City.

(AA 749)

The first factor considered by the judge in deciding to apply a multiplier was that the interpretation of subdivision (b)(1)(A) of Section 66300 was a question of first impression. While this falls within the scope of one of the *Serrano* factors, there is plenty of prior case law on the interpretation of statutes, which makes the issue far less novel. Further, expertise and skill are reflected in the hourly rate used to

calculate the lodestar and should not be applied to justify enhancing the lodestar amount. (*Northwest Energetic Services, LLC v. California Franchise Tax Bd., supra,* 159 Cal.App.4th at 880.) YIMBY's counsel assumed the meaning of the term "intensity" was obvious and never really examined the meaning of the term. Overall, there was nothing particularly novel about the statutory interpretation issue and YIMBY's attorneys did not show particular skill in addressing that issue.

The judge also granted a multiplier because she concluded the hourly rates charged by the attorneys might be "on the low side." "Arguably" low rates are not a basis for a fee enhancement. The hourly rate should have been addressed by the trial court in determining the lodestar amount, if at all. (*Ketchum v. Moses, supra,* 24 Cal.4th at 1138.)

In addition, the judge said a multiplier was justified because YIMBY achieved its litigation objective of invalidating the Ordinance. Achieving the litigation objective is one of the factors that must be shown to establish entitlement to an award of attorneys' fees under Code of Civil Procedure § 1021.5. Whether an award is justified and what the amount of the award should be are two distinct questions. The judge improperly intertwined or merged those factors in applying a multiplier. (*Ramos v. Countrywide Home Loans, Inc., supra,* 82 Cal.App.4th at 626.)

Similarly, the judge considered YIMBY's efforts to persuade the City not to adopt the Ordinance. When attorneys' fees are sought on a catalyst theory, whether there

were pre-litigation efforts at settlement can be a factor related to whether private enforcement was necessary. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 251-252.) However, when fees are not sought on a catalyst theory, taking settlement efforts into account in deciding whether to apply a multiplier is improper. (*Ramos v. Countrywide Home Loans, Inc., supra,* 82 Cal.App.4th at 626.) In this case, awarding a multiplier punishes the City for sticking to its position. A fee enhancement should not be imposed to punish the losing party. (*Ketchum v. Moses, supra*, 24 Cal.4th at 1139.)

In short, the only reason given by the trial judge for applying a multiplier that is legally proper is that the fee award will inure to YIMBY, rather than to its attorneys. On the facts of this case, this is insufficient in and of itself to justify an enhancement of the lodestar amount. In a declaration in support of the motion, Ms. Trauss stated taking on this case precluded it from pursuing other cases, because its total litigation budget was $370,000. (AA 595, 596-597.) However, in 2020, YIMBY received contributions and grants of $1,251,095. (AA 707; compare to AA 662-663) Accordingly, the multiplier should be stricken from the award, or, alternatively, the issue should be remanded to the trial court for reconsideration of the reasons for, and the amount of, the multiplier.

VII. CONCLUSION

For the reasons set forth above, the City requests that the Court:

1. Reverse the judgment entered in the superior court and remand the case to the superior court for entry of a judgment denying YIMBY's petition for writ of mandate;

2. a. Reverse the order awarding attorneys' fees and remand the case to the superior court for entry of an order denying YIMBY's motion for attorneys' fees; or, alternatively,

   b. Reverse the order awarding attorneys' fees with respect to the granting an enhancement of the lodestar amount and remand the case to the superior court for entry of a revised order regarding the motion for attorneys' fees that does not provide for such enhancement.

DATED: April 19, 2023

ALESHIRE & WYNDER, LLP

JUNE S. AILIN
PAM K. LEE

By: 

JUNE S. AILIN
Attorneys for Appellants,
CITY OF CULVER CITY and
CITY COUNCIL OF THE CITY
OF CULVER CITY

CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)(1)]

I certify pursuant to Rule 8.204(c) of the California Rules of Court, the attached Appellants' Opening Brief was produced on a computer and contains 13,871 words, excluding cover pages, tables of contents and authorities, and signature lines, as counted by the Microsoft Word for Office 365 word-processing program used to generate this brief.



June S. Ailin

EXHIBIT 1

From: Coy, Melinda@HCD <Melinda.Coy@hcd.ca.gov>
Sent: Thursday, June 25, 2020 12:08 PM
To: Allen, Michael <Michael.Allen@culvercity.org>
Cc: Nickless, Greg@HCD <Greg.Nickless@hcd.ca.gov>
Subject: RE: SB 330 Question(s)

So sorry, I will take a look at your question and get back to you today.

From: Allen, Michael <Michael.Allen@culvercity.org>
Sent: Thursday, June 25, 2020 12:07 PM
To: Coy, Melinda@HCD <Melinda.Coy@hcd.ca.gov>
Cc: Nickless, Greg@HCD <Greg.Nickless@hcd.ca.gov>
Subject: Re: SB 330 Question(s)

Good afternoon Melinda,

Just following up on the below. Understanding that things may be backed up a little, please let me know you've received this and when I can expect a more expanded response or guidance.

Thank you,

Michael Allen
Planning Manager
City of Culver City, Current Planning Division
9770 Culver Boulevard
Culver City, CA 90232
Ph: 310.253.5727

From: Allen, Michael <Michael.Allen@culvercity.org>
Sent: Tuesday, June 23, 2020 11:48 AM
To: melinda.coy@hcd.ca.gov <melinda.coy@hcd.ca.gov>
Subject: Fw: SB 330 Question(s)

Good morning Melinda,

I hope this email finds you well. I am looking for a bit of guidance as it relates to SB 330, and how I might be able to get HCD to review and provide feedback on a pending text amendment we are processing related to our single family residential design standards.

In summary: In the last few years, Culver City has seen a significant boom in redevelopment of single family homes which have resulted in built out single family homes that have eliminated or significantly reduced the potential creation of additional/new housing. The City's existing FAR in the R1 zone is 60% - What we have seen over the last 5 years or so is a typical 1,300 square foot home on a 5,000 square foot lot, improved with a 3,000 square foot home, not including any detached accessory structures. If you factor in the typical set-backs, this leaves literally no room for the creation of ADUs/JADUs, unless they convert existing space after the brand new home is built (which is not likely). In response to the development trend, and in an effort to preserve/create space on a lot to be improved with either/both an ADU and JADU, staff worked with the community over the last 3 years and reached general consensus to reduce the 60% FAR to 45% consistent with neighboring jurisdictions.

What this accomplishes, is the average home in Culver City (about 1,300 sq. ft.) may still add approximately 700 sq. ft. to their primary dwelling unit, and the FAR of .45 preserves approximately 1,200 sq. ft. of the parcel that can be improved with an ADU/JADU, either attached or detached from the primary dwelling unit.

We find that this is consistent with the intent of SB 330 in that our modified standards do not reduce the density, provide objective development standards to facilitate over the counter approvals of the production of new housing, and contributes to the feasibility of new housing development with the potential creation of additional housing via ADUs/JADUs, while continuing to allow the expansion of the average existing single family dwelling unit, and encourages affordability and availability of housing, and encourages equitable development in close proximity to schools, parks, and services to achieve a reduced greenhouse gas footprint (consistent with SB 330 directive to "reuse existing infrastructure and developed properties, and that building more smaller homes with good access to schools, parks, and services, will provide the most immediate help with the lowest greenhouse gas footprint to state residents.").

Please let me know your thoughts, and how best I might go about soliciting review of the proposed amendments as it relates to SB 330.

Thank you!

Michael Allen
Planning Manager
City of Culver City, Current Planning Division
9770 Culver Boulevard
Culver City, CA 90232
Ph: 310.253.5727

From: Nickless, Greg@HCD <Greg.Nickless@hcd.ca.gov>
Sent: Tuesday, June 23, 2020 8:35 AM
To: Allen, Michael <Michael.Allen@culvercity.org>
Subject: RE: SB 330 Question(s)

Contact Melinda Coy at melinda.coy@hcd.ca.gov

From: Allen, Michael <Michael.Allen@culvercity.org>
Sent: Monday, June 22, 2020 6:41 PM
To: Nickless, Greg@HCD <Greg.Nickless@hcd.ca.gov>
Subject: SB 330 Question(s)

Good afternoon Greg,

I hope you're doing well!

Quick question, is there someone in HCD that would be a good resource to ask questions about SB 330?

EXHIBIT 2

Council's direction, Exhibit A to the proposed Ordinance was modified as follows:

- FAR is reduced from 0.50 to 0.45 to better reflect the input received by community members.
- Grading standard for neighborhood consistency has been added to ensure that new building pads in hillside neighborhoods with cross slope conditions maintain a grade that is the average elevation of the immediately adjoining lots calculated as the sum of the adjoining lot elevation divided by two.

During the June 22, 2020 City Council meeting, staff read into the record additional findings contained in the Ordinance with regard to the Zoning Code Amendment's consistency with SB 330, The Housing Crisis Act, 2019. Such findings do not change the substance of the Zoning Code Amendment.

On June 22, 2020, City Council continued the adoption of the proposed Ordinance to provide staff additional time to evaluate the proposed reduction of FAR from .60 to .45 and coordinate with the California State Department of Housing and Community Development (HCD) and representative of YIMBY Law related to SB 330, Chapter 12, the Housing Crisis Act of 2019 (the "Act"), as codified in Government Code Section 66300, and particularly regarding the prohibition of a local agency from adopting standards which reduce the intensity of housing (e.g. FAR, setbacks, height, etc.), as set forth in Government Code Section 66300(b)(1)(A).

SB 330, The Housing Crisis Act, 2019

In October 2019, the Act (Attachment No. 3) was signed by Governor Newsom with the intent to address zoning ordinances that restrict the intensity of development on residentially zoned lots. Staff discussed the intent and provisions of SB 330 with representatives of HCD, as well as a representative of Senator Skinner's Office who authored the bill, and the City Attorney's Office. The following additional analysis and discussions are based on such discussions.

The State Senate Committee on Housing, Bill Analysis specified that the intent of the Act was to address zoning ordinances and other regulations that could reduce density and/or the space on a lot that a building can occupy in ways that lower the number of feasibly constructible units (underlined for emphasis). The proposed Ordinance does not result in a reduction to the number of units that can be constructed on a lot. Conversely, the Ordinance further advances City initiatives to build additional housing in the form of Accessory Dwelling Units (ADU) and Junior Accessory Dwelling Units (JADU) by preserving buildable area on a lot, and incentivizing development of an ADU/JADU should a property owner wish to build-out their property to a floor area of up to .70, resulting in an actual increase in buildable floor area.

The Act included several declarations supporting adoption of SB 330 including the following:

- Declaration 5 - There is a need for affordable homes at below market rate.
- Declaration 9 - There is an increased cost for new housing construction.
- Declaration 10 - Lengthy permitting processes and approval times, fees, and costs for parking exacerbate the cost of residential construction.
- Declaration 14 - Reuse of existing infrastructure and developed properties and the construction of smaller homes with good access to schools, parks, and services will provide the most immediate help to produce the lowest greenhouse gas footprint per state resident.

Consistent with the Declarations of the Act, the proposed Ordinance encourages smaller footprint homes which result in more affordable housing costs and incentivizes the creation of additional housing via ADUs and JADUs which typically provide additional housing at below market rates. The construction of ADUs and JADUs also provide prospective buyers or existing owners a potential income source to offset their own housing costs and provide additional housing supply to multi-generational family members.

The proposed Ordinance eliminates the requirement for covered parking, further reducing construction costs for new homes and increasing buildable area for additional dwelling units as an ADU/JADU. Single-family homes are already permitted by administrative plan check, which reduces the review timeframes and thus the costs of construction. Lastly, the Ordinance encourages the preservation of existing infrastructure and developed properties by allowing an average expansion of between 450 and 1,050 square feet to the existing average sized single-family dwelling unit between 1,200 and 1,800 square feet, while also incentivizing ADU and JADU construction by allowing a property owner to realize an FAR of up to .70 by constructing an ADU/JADU. Incentivizing ADU and JADU construction also may provide additional smaller homes with nearby access to services, that reduce residential greenhouse gas footprint.

Section 2(c)(1) of the Act states that the intent of the legislation is to suspend restrictions on the development of new housing (underlined for emphasis). The proposed ordinance does not result in restrictions on the development of new housing. Single family neighborhoods in Culver City are already built-out and any construction in these neighborhoods involves the redevelopment of developed parcels. The Ordinance provides the ability for an average single-family home to expand while preserving smaller single-family homes, and consequently provides land area to build ADUs and JADUs, which incentivizes the development of new housing units should a property owner wish to realize built-out capacity of an FAR of up to .70 or more.

Government Code Section 66300(b)(1)(A) of the Act states that cities cannot adopt standards which reduce a parcel or parcels to a less intensive use or reduce the intensity of land use including FAR, setbacks, height, etc. However, as discussed above, the purpose of the Act, as defined by the State Senate Committee on Housing, was to limit such standards that would result in the reduction of the number of units that could be built on a lot or restrict the development of new housing. The declarations also state that the goals of the Act include preservation of smaller homes, reduction in construction and housing costs, and construction of additional housing units the proposed Ordinance does not result in restrictions to new housing or the decrease in the number of units that could be built on a R1 lot. Single-family zones in Culver City are built out and any new construction would be the result of redevelopment of existing developed parcels.

Further, Section 66300(b)(1)(A) must be considered in conjunction with Section (f)(3), which does not prohibit the adoption or amendment of a development policy, standard, or condition that, among other things, allows greater density, facilitates the development of housing, and reduces costs to a housing development project. The Ordinance facilitates the development of additional dwelling units through the construction of ADUs and JADUs; restricts the over-development of single family parcels, which has traditionally limited the ability to develop additional units via ADUs or JADUs; provides additional opportunities to construct ADUs and JADUs, effectively increasing the housing supply and reducing the costs of housing development; and does not propose any changes which result in a net loss of residential capacity.

EXHIBIT 3

construction that does not fit existing neighborhood character. The proposed Zoning Code Amendment will modify single family residential zone standards to regulate buildings that are more compatible with existing surroundings. The proposed Zoning Code Amendment is consistent with General Plan Goals and Policies that call for the preservation of existing single-family neighborhoods. Therefore, the proposed Zoning Code Amendment does not conflict with the goals, policies, and strategies of any elements of the General Plan, nor create any inconsistencies.

2. The proposed amendment would not be detrimental to the public interest, health, safety, convenience or welfare of the City.

The proposed Zoning Code Amendment was initiated as a result of public concerns that new construction in single-family neighborhoods is affecting quality of life for existing residents due to large homes. The proposed Zoning Code Amendment provides new regulations to better fit new homes within existing single-family zones consistent with prevailing FAR in adjacent cities, and provide opportunities for the creation of additional housing development through the construction of accessory dwelling units (ADUs) and junior accessory dwelling unit (JADUs). By reducing bulk and mass of a home, residents will have more opportunities for light and air access, privacy, maintenance of existing single-family neighborhood character, and development of ADUs and JADUs.

New regulations will allow for existing single family dwelling units averaging between 1,200 and 1,800 square feet to further develop and expand to approximately 2,250 square feet. Further, consistent with Government Code Section 66300, the proposed Zoning Code Amendment facilitates the preservation of existing development and development of additional dwelling units through the construction of ADUs and JADUs; restricts the over-development of single family parcels, which has traditionally limited the ability to develop additional units via ADUs or JADUs; provides additional opportunities to construct ADUs and JADUs, effectively increasing the housing supply and reducing the costs of housing development; and does not propose any changes which result in a net loss of residential capacity. In addition, with respect to hillside development standards for the Residential Hillside Overlay shown in Exhibit A, the proposed changes maintain consistency with the Culver Crest Overlay Zone, which were previously implemented in response to unique life safety conditions in the hillside areas. Based on the foregoing, the Zoning Code Amendment will not be detrimental to the public interest, health, safety, convenience, and welfare of the City.

3. The proposed amendment is in compliance with the provisions of the California Environmental Quality Act (CEQA).

The Project is considered exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the Project to amend the Zoning Code will have a significant effect on the environment. The proposed Zoning Code Amendment, modifying single family

PROOF OF SERVICE

Yes In My Back Yard, et al. vs. City of Culver City, et al.
Case No. 20STCV43253

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 Los Angeles, State of California. My business address is 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On April 20, 2023, I served true copies of the following document(s) described as on the interested parties in this action as follows:

ZACKS, FREEDMAN & PATTERSON, PC Ryan J. Patterson, Esq. Brian O'Neill, Esq. 601 Montgomery Street, Ste. 400 San Francisco, CA 94111 Telephone: (415) 956-8100 Fax: (415) 288-9755 E-mail: ryan@zfplaw.com brian@zfplaw.com	Attorneys for Petitioner and Plaintiffs YES IN MY BACK YARD SONJA TRAUSS
Hon. Mary H. Strobel Superior Court of California County of Los Angeles 111 N. Hill Street Los Angeles, CA 90012	Superior Court Judge Served Via U.S. Mail

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

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

Executed on April 20, 2023, at El Segundo, California.

Claire Evans

Claire Z. Evans