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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – UNLIMITED CIVIL JURISDICTION

YES IN MY BACK YARD, a California Nonprofit Corporation; and SONJA TRAUSS,

Petitioners and Plaintiffs,

vs.

CITY OF CULVER CITY; CITY COUNCIL OF THE CITY OF CULVER CITY; and DOES 1-25,

Respondents and Defendants.

CASE NO. 20STCV43253

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Dept: 82
Judge: Hon. Mary Strobel
Hearing Date: February 22, 2022
Time: 9:30 a.m

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I. INTRODUCTION

The California legislature enacted Senate Bill 330, the Housing Crisis Act of 2019, codified at Gov. Code § 66300 et seq. ("SB 330") to address the ongoing housing crisis. SB 330 prohibits a local agency from enacting any ordinance that would "lessen the intensity of housing" below what was allowed under zoning ordinances in effect on January 1, 2018, including an explicit prohibition against any reduction in floor area ratio ("FAR").[1] The City of Culver City enacted zoning changes in direct violation of SB 330 by reducing FAR on all 4,165 single-family parcels from 0.6 to 0.45, which reduces residential capacity in the City by more than three million square feet.

Respondents argue that the plain language of SB 330 should be ignored, and the Legislature did not mean what it said when it prohibited any zoning change that reduces FAR. Respondents improperly rely on isolated fragments of legislative history to nullify and rewrite the primary indication of the Legislature's intent – the text of the statute – to argue only zoning changes that reduce density are prohibited. Simply put, that is not what the law says.

The ordinance at issue plainly lessens the intensity of housing and reduces FAR in violation of SB 330. Respondents try to justify this violation by claiming that an ordinance enacted to stop what Respondents described as "excessive building" somehow increases residential capacity. Respondents invented this entirely new justification nearly three years into the process and only after Petitioners objected to the ordinance's obvious illegality: that the ordinance somehow "incentivizes" the development of Accessory Dwelling Units (ADUs). This contention is without any evidence or support. Respondents failed to refute the evidence in the record that the ordinance reduces residential capacity within the City by more than three million square feet. In fact, the City's recently adopted 2021-2029 Housing Element (part of the General Plan) proves the ordinance had no effect on the construction of ADUs and effectively admits that the FAR reduction eliminates thousands of single-family parcels as potential redevelopment sites that could be used to create more housing. The only

[1] FAR sets the allowable size of a building as a ratio vis-a-vis the size of a lot, e.g., a 0.50 FAR means 0.5 square feet can be built per 1 square foot of lot area. If a zoning district's FAR is reduced, less can be built on each lot.

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effect of the ordinance is to lessen the intensity of housing and reduce residential capacity within the City in violation of SB 330. As such, the ordinance must be deemed void.

II. ARGUMENT IN REPLY

A. SB 330 Prohibits Any Reduction in FAR

SB 330 states that a local agency shall not enact a development policy, standard, or condition that has the effect of changing the zoning of a parcel "to a less intensive use or reducing the intensity of land use." SB 330 provides a precise definition of the term "less intensive use," which includes "reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or anything that would lessen the intensity of housing." As explained thoroughly in Petitioners' Opening Brief, the language of the statute is clear and unambiguous that SB 330 prohibits any reduction in FAR, and "there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature." (*See Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

Respondents argue that SB 330 should be interpreted narrowly to only prohibit changes that result in a reduction in density or number of units.[2] The Legislature knows how to say "density" or "units" when it means "density" or "units." In fact, SB 330 uses the words "density" or "units" *95 separate times*. In Gov. Code § 66300(b), however, the Legislature conspicuously used the terms "less intensive use" and "reducing the intensity of land use," rather than "fewer units" or "reducing density." Respondents argue that it is "the effect of the change that matters, not just a literal reading of words." (Opp. Brief at 15.) The problem with Respondents' argument is that Gov. Code § 66300(b) expressly states the "effect" that the Legislature prohibited, which is the enactment of standards "that would

[2] Respondents argue that Petitioners did not exhaust administrative remedies as to the claim that the Legislature's intent was the creation of more bedrooms. This argument is without merit. Petitioners repeatedly stated that SB 330 prohibits any regulation that results in a "less intensive use," including an express prohibition against any reduction in FAR, and Petitioners raised this claim prior to adoption of the ordinance. (Opening Brief at 4, 7, 8, 9, 10, 11, 12, 13, 17, and 18; AR 857-859, 955-56.) Petitioners also stated that because the statute is clear, there is no need to rely on legislative intent. (Opening Brief at 9, 10.) Petitioners explained that the effect of the ordinance is the reduction of residential capacity that could be used for the creation of additional bedrooms, but Petitioners' claim is clearly that SB 330 prohibits reductions in FAR.

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have *any of the following effects*: (A) Changing the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use." Respondents attempt to create ambiguity by arguing that the statute does not define the terms "intensity of land use" or "residential capacity." (Opp. Brief at 15.) Respondents conveniently fail to mention that SB 330 *does* include an express definition of "less intensive use," which is a prohibited "effect," and the definition of "less intensive use" specifically includes any reduction in FAR.

Respondents rely on isolated fragments of legislative history to suggest that the Legislature is solely concerned with reductions in density, including two committee reports that discuss creating more units. These statements fail to demonstrate that this is the Legislature's *only* concern related to housing. The Legislature has acknowledged that the housing crisis is caused by a variety of factors, including lengthy permitting times, fees, and "excessive standards for housing development projects." (Gov. Code § 65589.5(a)(1)(D).) Moreover, committee reports do not reflect the Legislature as whole, and courts "do not view these brief summaries as comprehensive statements of the intent of the statute," recognizing that "statutory language is the primary indication of legislative intent." (*Fremont Indemnity Co. v. Fremont General Corp.*, (2007) 148 Cal.App.4th 97, 129.)

The statutory language that was eventually enacted demonstrates that the Legislature intended for Gov. Code § 66300(b) to cast a wide net to prohibit any standard that would potentially lessen the intensity of housing. When SB 330 was first introduced, this relatively narrow provision only prohibited "an amendment to an adopted general plan" that would have the effect of "changing the zoning classification" to a less intensive use. (SB 330 as Introduced by Senator Skinner, dated February 19, 2019, Petitioners' RJN, Ex. 1, p. 12.) As the bill made its way through the legislative process, this provision was significantly broadened to prohibit the enactment of any "development policy, standard, or condition" that would have the effect of "[c]hanging the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use." The definition of "less intensive use" was also expanded to include not only reductions in FAR, but also "new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or ***anything that would lessen the intensity of housing***." This

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broad and expansive language is the primary indication of legislative intent, and "significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." (*People v. McCart* (1982) 32 Cal.3d 338, 342-343; *see also* CCP § 1858.)

Respondents claim that the Legislature "has not expressed an intent to completely homogenize all residential development." (Opp. Brief at 17.) Gov. Code § 66300(b) contains no such requirement. As explained in the committee report provided by Respondents, "SB 330 is designed to address our housing crisis by asking local governments to process permits for housing that is already allowed under their existing rules." (Assembly Housing and Community Development Committee Report, dated June 17, 2019, Respondents' RJN, Ex. 2, p. 27.) This is not an onerous requirement. The original FAR standard was enacted by Culver City; it was not dictated by the state. SB 330 respects existing local rules, while prohibiting the enactment of new standards that would make the housing problem worse. The ordinance enacted here reduced FAR in direct violation of SB 330 and must be deemed void. (Gov. Code § 66300(b)(2).)

B. Respondents Fail to Refute That the Ordinance Results in a Reduction of Three Million Square Feet of Residential Capacity.

SB 330 includes an explicit prohibition against any reduction in FAR. Respondents erroneously assert that the ordinance, which reduced FAR from 0.60 to 0.45 on all 4,165 single-family parcels, somehow *increased* FAR due to various FAR exemptions. Petitioners already addressed this claim, explaining that *existing* exemptions in FAR calculations resulted in an effective FAR of 0.84 under the prior standard, which was reduced to 0.69 under the new ordinance. (Opening Brief at 12.) Respondents concede that the ordinance would "result in an actual FAR of as much as .70." (Opp. Brief at 7.) Respondents made no attempt to refute Petitioner's analysis and the evidence in the record, including the analysis of the City's Planning Manager Michael Allen, that without the ordinance, "*FAR would otherwise be approximately .85*." (AR 671; Opening Brief at 12). The difference between a 0.69 and 0.85 FAR is a reduction of approximately 750 square feet per parcel – over three million square feet of residential capacity city-wide.

Despite conceding that the ordinance reduced FAR from 0.84 to 0.70, Respondents nevertheless argue the ordinance did not decrease FAR because the ordinance exempts ADUs – while

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acknowledging that *state law already prohibited the City from counting ADUs toward FAR*. Respondents admit the City had already amended their municipal code to exempt ADUs and JADUs from FAR, as required by state law, before the ordinance at issue was adopted. (Opp. Brief at 7.) Respondents also claim that homeowners could add a basement to increase FAR, insinuating that the ordinance added a new FAR exemption for basements. (Opp. Brief at 7.) But the ordinance made no changes to how basements are calculated toward FAR, and Respondents unsurprisingly provide no citations to the record to demonstrate that it did.

Similarly, Respondents suggest a garage FAR exemption somehow increased the maximum allowable FAR. (Opp. Brief 15-16.) The existing standards *already exempted* detached garages from FAR calculations.[3] The ordinance actually *restricted* this exemption to only apply to detached garages located in the rear half of the lot. In other words, before the ordinance was enacted, detached garages were *always* exempt from FAR calculations, and now detached garages are only exempt if located in the rear half of the lot. Characterizing this new development restriction as an increase in FAR is, at best, disingenuous.

Respondents' other attempt to masquerade a development restriction as an increase to FAR is equally unavailing. Respondents suggest the ordinance added a new 250-square-foot exemption for staircases and elevators. (Opp. Brief at 17-18.) The 250-square-foot provision does not exempt staircases from FAR completely, but rather counts them once instead of twice. However, Respondents fail to mention that the existing ordinance *already included a more generous version of this provision*. Prior to the ordinance, the definition of FAR stated that "Staircases, elevator shafts, and the like shall be counted as one (1) plane floor." (AR 996.) The 250-square-foot provision was designed as a new

[3] Petitioners acknowledge that the ordinance does contain one new 200-square-foot exemption for attached, front-facing garages within the Residential Hillsides Overlay Zone. This zone represents a small portion of the total parcels affected by the ordinance, and still results in a FAR reduction of approximately 550 square feet per parcel in this overlay zone. Petitioners also note that the City *completely prohibits ADUs* within the Residential Hillsides Overlay Zone. Respondents' purported justification for the FAR reduction – to encourage ADUs – is therefore irrelevant in the overlay zone, and a 550-square foot reduction is particularly onerous for homeowners in this zone who have no option to expand habitable space through the construction of ADUs.

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cap on an existing, unlimited exemption to prevent the construction of "a grand entry hall with a grand stair in it." (AR 410.) The 250 sq. ft. staircase provision is a new development *restriction*, not a new exemption.[4]

The City's recently adopted General Plan Housing Element demonstrates how this FAR reduction reduces residential capacity and exacerbates the housing crisis. One of the key strategies the City has proposed to increase housing supply is the concept of "Incremental Infill," which would allow up to four units to be developed on single-family lots larger than 4,950 square feet. (2021-2029 Housing Element, Petitioners' RJN, Ex. 2, p. 168.) However, the City explained that it "is unrealistic to anticipate that all the eligible properties will be redeveloped" and established criteria to eliminate parcels as potential redevelopment sites. (*Id.*) The City eliminated any parcel that had an existing FAR of more than 0.25 because "redevelopment is less likely to yield significant net increase in square footage above the allowable FAR of 0.45." (*Id.*) The City ultimately eliminated 75% of all single-family parcels as potential redevelopment sites. (*Id.*) The City's Housing Element demonstrates the precise situation the Legislature was trying to avoid when it prohibited any reduction in FAR. The reduced FAR has made it harder to implement the City's own "Incremental Infill" strategy, eliminated a significant number of parcels as potential redevelopment sites, and as a consequence greatly reduced residential capacity within the City.

In sum, Respondents have made no attempt and provided no evidence, nor could they, to refute the evidence in the record that demonstrates the ordinance would directly result in a reduction of three million square feet of residential capacity within the City. In fact, Respondents concede that the ordinance only allows an FAR of 0.70, while the evidence shows that FAR was 0.85 prior to the ordinance. The ordinance clearly violates SB 330 and is therefore void.

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[4] Respondents also suggest that the ordinance amended the required setbacks "in a way that actually can increase maximum square footage" and claim that Petitioners misrepresented the setback amendments. (Opp. Brief at 16.) Petitioners did not raise any issues related to the minor second floor setback changes. However, Respondents' claim that the setback changes can increase maximum square footage is incorrect. FAR dictates the maximum square footage that can be built on a parcel, and the minor setback changes are irrelevant to the maximum square-footage that can be constructed.

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C. Respondents Fail to Refute That the Ordinance Does Not "Incentivize" ADUs.

The ordinance has no impact on the ability of a property owner to construct an ADU. As explained in Petitioners' Opening Brief, under the existing zoning standards there is an approximately 598-square-foot building area for an accessory structure that has absolutely no overlap with the building area for the primary dwelling. Even if a property owner used every square inch of primary residence buildable area, he or she could still build a two-story 1,196 square-foot ADU on the portion of the lot outside of the primary dwelling building area, just four square-feet shy of the maximum allowed by law. Respondents make no attempt to refute this fact, simply stating *without a single citation to the record or any analysis of any kind* that the "Ordinance increase[s] the potential for construction of up to three dwelling units on a lot where only one unit could have been built." (Opp. Brief 17-18.) This is clearly false.

Respondents' argument that reducing FAR somehow encourages ADUs is not based in evidence or fact, as confirmed by the lack of same in Respondents' Opposition Brief. Respondents state that a property owner can maximize square footage "by including an ADU or JADU on the property, *which doubles density on an R-1 lot*." (Opp. Brief at 18, emphasis in original.) This ignores the fact that a property owner *already had that option before the ordinance was passed*. The City's recently adopted 2021-2029 Housing Element confirms not only that ADUs were entirely feasible prior to the ordinance, but that the ordinance did not lead to an increase in ADU construction. In the two years *before* the ordinance was passed, there were 52 and 50 ADUs constructed in the City. (2021-2029 Housing Element, Petitioners' RJN, Ex. 2, p. 167) In the year immediately following the ordinance, the City projected that 49 ADUs would be constructed – essentially no impact – and projected that 50 ADUs per year would continue to be the trend. (*Id.*) The City's own analysis demonstrates that the ordinance had no effect on ADU construction.

Prior to the Ordinance, an owner with an existing 2,250-square-foot home could construct a 750-square-foot addition or construct an ADU, *or both*. After the Ordinance was enacted, the only choice is to construct an ADU. But for those who "can't afford to install a kitchen, bath, run plumbing, increase the electrical, and install a separate HVAC for what winds up being a separate house," the Ordinance leaves them with no option to construct additional housing at all. (AR 961.) Respondents

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failed to argue to the contrary, and have therefore waived any objection to this claim. (*See DuPont Merck Pharmaceutical Co. v. Sup. Ct.* (2000) 78 Cal.App.4th 562, 566.) ADUs were equally available both before and after enactment of the ordinance, so the only effect of the ordinance is to lessen the intensity of housing and reduce residential capacity within the City in violation of SB 330.

D. Respondents Fail to Refute That the Ordinance Effectively Reduces Density

SB 330's definition of "less intensive use" includes the catchall provision "*anything* that would lessen the intensity of housing," which encompasses any zoning trick that a local agency may enact in an attempt to reduce residential capacity. (Gov. Code § 66300(b)(1)(A).) Although the density allowed within the R1 District is limited to one primary dwelling, the existing zoning allowed for multiple kitchens, which in effect allowed an owner to create multiple independent living spaces within a single unit and provides for a more intensive housing use than single-family zoning typically allows. The ordinance added definitions to the term "kitchen" and "dwelling unit" to explicitly address concerns that "people were building lots of kitchens in units and, in essence, were creating internal apartment buildings . . . ." (AR 321-22.) Petitioner asserted that the practical effect of this zoning change was to lower the potential density within the R1 District, making it harder and more costly to create housing without constructing a separate ADU, all in violation of SB 330. (Opening Brief at 16.) Respondents failed to refute or respond to this issue at all, and they have therefore waived any objection to this claim. (*See DuPont Merck Pharmaceutical Co. v. Sup. Ct.* (2000) 78 Cal.App.4th 562, 566)

E. The Department of Housing and Community Development Took No Position on the Ordinance.

Respondents claim that HCD "did not have any issues" with the ordinance, which is a very generous reading of HCD's communications. Respondents repeatedly emailed HCD for their "review" of the ordinance while advancing the same factually incorrect statements made in their Opposition Brief, including that the existing zoning "leaves literally no room for the creation of ADUs/JADUs." (AR 1122-30.) Eventually, an HCD staff member responded, "We do not have a formal review process for ordinances related to SB 330." (AR 1123.) Contrary to Respondents' assertion, HCD took no position on the Ordinance. It is important to note that at the time the ordinance was passed, HCD did not possess the authority to enforce the provisions of SB 330. HCD's

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enforcement authority, pursuant to Gov. Code § 55585, did not include SB 330 until January 1, 2022 when AB 215 went into effect.

Petitioners acknowledge that an individual HCD staff member remarked that the ordinance "seems to be inline with SB 330" after she received multiple, factually incorrect emails from the City. (AR 1123.) This same staff member had previously explained that the ordinance's consistency with SB 330 was "actually a hard question" because "what it could impact in [sic] the number of bedrooms that can be built in a structure, that might trigger the less intensive use provision." (AR 1127.) This staff member's equivocal opinion, based on significant misinformation from the City, is not dispositive of HCD's position or the legality of the ordinance.

F. None of SB 330's Exemptions Is Applicable to the Project.

SB 330 does contain certain exemptions to its prohibition against zoning changes to less intensive uses – none of which apply here. SB 330 expressly states that the statute should be broadly construed so as to maximize the development of housing and that "[a]ny exception to the requirements of this section, including an exception for the health and safety of occupants of a housing development project, shall be construed narrowly." (Gov. Code § 66300(f)(2).)

Under the maxim of statutory construction *expressio unius est exclusio alterius*, if a statute contains a specific list of exemptions courts "will not create an exception the Legislature did not enact." (*See Lopez v. Sony Electronics, Inc.*, (2018) 5 Cal.5th 627, 636.) Respondents primarily rely on Gov. Code Section 66300(j), which states that SB 330 does not prohibit a zoning change to a less intensive use "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." Notwithstanding the fact that the ordinance had no impact on a homeowner's ability to construct ADUs, this exemption provides a specific list of four instances where a zoning change to a less intensive use is allowed – none of which is applicable to changes intended to facilitate ADUs. ADUs are not restricted as housing for qualified lower income households, are not mobilehome parks, are not single-room occupancy units, and are not subject to rent or price control. Gov. Code Section

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66300(j) provides a specific list of exemptions and does not include a "catch-all" provision. Even if the Legislature's command to interpret the exemptions narrowly were ignored and this exemption were interpreted broadly to include any form of affordable housing, Respondents have provided no evidence to demonstrate that ADUs within the City are an affordable option. Respondents allude to the idea that ADUs "***may*** provide housing for lower income households," while providing no citations or evidence to support this statement. (Opp. Brief at 4.) ADUs are market-rate units available to any individual, regardless of income.

Respondents also rely on the interpretive provision in Gov. Code § 66300(f)(3), which states that SB 330 shall not be construed to prohibit regulations that allow greater density; facilitate the development of housing; or reduce the costs to a housing development project. Section 66300(f)(3) is a general interpretive provision, *not a statutory exemption*, that is included along with the other interpretive provisions in Section (f)(1) and (f)(2) that state SB 330 shall be broadly construed to maximize housing, and exemptions shall be narrowly construed. Section 66300(f)(3) is meant to ensure that SB 330 is not construed to prohibit a local agency's ability to enact regulations that change parcels to a *more* intensive use, which is not the case here, and does not exempt regulations that fit within the statutory definition of a "less intensive use." Regardless, the ordinance here does not allow for greater density; does not facilitate the development of housing; and does not reduce the costs to a housing development project, as explained above. The only effect of the ordinance was to reduce residential capacity in the City by more than three million square feet.

III. CONCLUSION

In the midst of a housing crisis, Culver City specifically set out to prohibit what it described as "excessive building" on single-family zoned parcels to protect "existing neighborhood character." Ordinance No. 2020-010 reduced FAR on all 4,165 single-family parcels within the City, which results in a reduction of up to three million square feet of residential capacity, in direct violation of SB 330. The ordinance plainly lessens the intensity of housing on single-family parcels, which violates SB 330 and will only further exacerbate the housing crisis. Petitioners seek an order enjoining Respondents from enforcing the ordinance and declaring it null and void.

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Date: February 7, 2022

Respectfully submitted,

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