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KENNETH A. STAHL (Bar No. 326495)
BRIANA J. BRAMER (Bar No. 294029)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Suite 600
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: ken.stahl@msrlegal.com
briana.bramer@msrlegal.com
Attorneys for Petitioner and Plaintiff LIXIN (LEON) CHEN

DYLAN CASEY (Bar No. 325222)
NICHOLAS ECKENWILER (Bar No. 348744)
CALIFORNIA HOUSING DEFENSE FUND
360 Grand Avenue #323
Oakland, CA 94160
Telephone: (443) 223-8231
No facsimile
dylan@calhdf.org
nick@calhdf.org
Attorney for Petitioner and Plaintiff
CALIFORNIA HOUSING DEFENSE FUND

RYAN J. PATTERSON (Bar No. 277971)
BRIAN J. O'NEILL (Bar No. 298108)
PATTERSON & O'NEILL, PC
235 Montgomery Street, Suite 950
San Francisco, CA 94104
Telephone: (415) 907-9110
Facsimile: (415) 907-7704
ryan@pattersononeill.com
brian@pattersononeill.com
Attorneys for Petitioner and Plaintiff
YES IN MY BACK YARD

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

LIXIN (LEON) CHEN; CALIFORNIA HOUSING DEFENSE FUND; and YES IN MY BACK YARD,

Petitioners/Plaintiffs,

v.

CITY OF CUPERTINO; CITY OF CUPERTINO COMMUNITY DEVELOPMENT DEPARTMENT; CITY OF CUPERTINO PLANNING DIVISION and DOES 1 through 10, inclusive,

Case No. 25CV462857

VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF

Respondents/Defendants.

Petitioners and Plaintiffs LIXIN (LEON) CHEN ("Chen" and/or "Petitioner") by and through his attorneys, Miller Starr Regalia; CALIFORNIA HOUSING DEFENSE FUND by and through its attorneys Dylan Casey and Nicholas Eckenwiler; and YES IN MY BACK YARD by and through its attorneys Patterson and O'Neill, PC, (collectively, "Petitioners") petition this Court for a writ of mandamus, directed to Respondent and Defendant CITY OF CUPERTINO ("City"), CITY OF CUPERTINO COMMUNITY DEVELOPMENT DEPARTMENT ("CDD"), CITY OF CUPERTINO PLANNING DIVISION ("City Planning Division") and DOES 1 through 10 (collectively, "Respondents") to compel Respondents to comply with their duties and obligations under the California State Housing Accountability Act ("HAA") (Gov. Code § 65589.5), Housing Crisis Act (commonly known as "SB 330") (Gov. Code § 65941.1), and Permit Streamlining Act ("PSA") (Gov. Code § 65943) as set forth below. Petitioners allege and complain as follows:

INTRODUCTION

1. In the midst of a severe housing crisis gripping the state of California, Respondents are flouting their responsibilities to process housing projects that are protected by state law. This case arises from Respondents' bad faith attempt to rob Chen of his vested rights under California law to develop a housing project with low-income homes, in violation of Respondents' duties under the HAA, SB 330, and PSA, and for the plainly improper purpose of evading state housing law. In order to avoid having to process a project that state law requires them to approve, Respondents wrongly claimed that Chen's vested rights relating to the project were expired and unenforceable. Respondents then added insult to injury by inviting Chen to appeal the decision, only to refuse to entertain the appeal they had invited after Chen filed an appeal in good faith and paid the appeal fee. In so doing, Respondents waited nearly 60 days to inform Chen that they would not entertain the appeal, then attempted to backdate their final administrative decision to more than two months earlier so that Chen would have limited time to file this Petition.

2. Respondents' attempt to subvert the protections and benefits the legislature intended to provide for housing development projects is yet another example of why California continues to suffer from a housing crisis and why the California Legislature has needed to enact multiple statutes to address what it has described as a "housing affordability crisis of historic proportions." (Gov. Code 65589.5(a)(2).)

3. As recognized by the California Legislature, the current housing crisis is driven, in part, "by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing." (Gov. Code § 65589.5(a)(1)(B).) Such is the case here, where Respondents' pattern of conduct includes, but is not limited to: (1) attempting to subvert the PSA and SB 330 through arbitrary and bad-faith application procedures and policies; (2) ignoring state housing laws that permit low-income housing development projects when a city does not have a compliant housing element; and (3) denying housing applicants vesting rights to which they are entitled under state law. These policies and practices are antithetical and antagonistic to the Legislature's effort to address California's ongoing housing crisis, thus necessitating the filing of this Petition for Writ of Mandate.

PARTIES TO THE ACTION

4. Petitioner and Plaintiff Lixin (Leon) Chen is an individual and resident of the State of California. Chen is the owner of certain real property consisting of 86 acres associated with Assessor's Parcel Numbers 356-05-007, 356-05-008, and 356-27-2026, commonly known as 0 Canyon View Drive., Cupertino, California, 95014 (the "Project Site").

5. Petitioner and Plaintiff California Housing Defense Fund ("CalHDF") is a California nonprofit public benefit corporation.

6. CalHDF's mission is to advocate for the construction of housing at all income levels throughout the state, including in Cupertino, to meet the needs of California residents. This advocacy includes, but is not limited to, litigation under state laws (including the HAA and the Housing Element Law) that limit local governments' discretion to disapprove housing development projects and to impose strict land use policies. CalHDF brings this Petition

on its own behalf and on behalf of others affected by Respondents' failure to comply with state law.

7. Petitioner and Plaintiff Yes In My Back Yard ("YIMBY") is a § 501(c)(3) nonprofit corporation; it is the litigation affiliate of YIMBY Action, a § 501(c)(4) nonprofit corporation, whose membership cuts across socioeconomic lines, including members with very low, low, moderate, middle, and higher incomes ("YIMBY Members"). YIMBY litigates for housing projects through its project YIMBY Law, whose mission is to end the housing shortage and achieve affordable, sustainable, and equitable housing for all. YIMBY's mission is to increase the accessibility and affordability of housing in California by enforcing state housing laws and by advocating for increased access to housing for households of all income levels, including for YIMBY Members who reside in, or wish to reside in, the City of Cupertino. YIMBY has a direct and substantial interest in ensuring that Respondents' actions are in conformity with the requirements of law, that those requirements are properly executed, and that Respondents' duties are enforced. YIMBY Members, as well as the general public, will be adversely affected by the acts described herein and are aggrieved by the acts, decisions, and omissions of Respondents as alleged in this Petition and Complaint. YIMBY brings this Petition and Complaint on its own behalf and on behalf of others affected by Respondents' failure to comply with state law as alleged herein.

8. Respondent and defendant City of Cupertino is, and at all relevant times was, an incorporated city in Santa Clara County, duly organized and existing under and pursuant to the laws of the State of California.

9. Respondent and Defendant City of Cupertino Community Development Department ("CDD") is, and all relevant times was, the department within the City of Cupertino responsible for planning, development review, permitting, code enforcement, advancing the City's General Plan and administering programs related to affordable housing in the City.

10. Respondent and Defendant City of Cupertino Planning Division ("City Planning Division") is responsible for implementing the City's development policies, programs, and regulations, and for reviewing development proposals to assess and determine whether said

proposals conform with the City's adopted policies and ordinances. The City Planning Division also serves as staff to the City of Cupertino's City Council and Planning Commission on land use issues.

11. Petitioners are unaware of the true names or capacities of the parties fictitiously sued herein as Does 1 through 10, inclusive, and will amend this Petition and Complaint to set forth their true names and capacities when the same have been ascertained. Petitioner is informed and believes, and thereon alleges, that all fictitiously named Respondents and Defendants were the agents and employees of the other fictitiously named or actually named Respondents and Defendants and, acting within the course of scope of such employment or agency, took some part in the acts or omissions hereinafter set forth, or are the principals and took some part in such acts or omissions, by reason of which said fictitiously named Respondents and Defendants are liable to Petitioner for the relief prayed for herein.

12. Respondents and Defendants are referred to collectively herein as "Respondents."

JURISDICTION AND VENUE

13. This Court has jurisdiction over the matters alleged in this Petition and Complaint pursuant to Code of Civil Procedure §§ 1085 and1094.5, which authorize this Court to issue a writ of mandate.

14. Venue is proper in the Superior Court for the County of Santa Clara in accordance with Code of Civil Procedure §§ 394 and 395 because the entire controversy occurred in Santa Clara County and because Respondents are situated in Santa Clara County.

15. This action is timely because it is brought within 90 days of a final action on a housing development project application. (Gov. Code § 65589.5(m).)

16. Petitioners have performed any and all conditions precedent to filing this action to the extent required by law and exhausted all available administrative remedies prior to initiating this action.

LEGISLATIVE BACKGROUND

The Housing Crisis and the Housing Accountability Act's "Builder's Remedy"

17. When the Legislature enacted recent amendments to the HAA, it found that the state of California is facing a "housing supply and affordability crisis of historic proportions." (Gov. Code § 65589.5(a)(2)(J).) The Legislature further found that "[t]he consequences of failing to effectively and aggressively confront [the housing] crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives . . ." (Gov. Code § 65589.5(a)(2)(A)(J).)

18. One of the primary drivers of the housing crisis is opposition to new housing from local governments. The HAA's findings of fact observe that the housing crisis has been caused in part by "local governments that limit the approval of housing" and fail to pay "adequate attention to the economic, environmental, and social costs" of disapproving new housing. (Gov. Code § 65589.5(a)(1)(D).)

19. To ensure that each local government's land use regulations sufficiently accommodate its fair share of the regional housing demand at all income levels, every local government is required to adopt an update to the housing element of its general plan every eight years. (Gov. Code § 65580, et. seq.) (the "Housing Element Law"). The housing element update must include, *inter alia*, (1) an assessment of housing needs; (2) an inventory of site resources and development constraints; and (3) a rezoning program to meet housing needs. (*Id.*)

20. Once a city's housing element update is complete, it must be submitted to the state Department of Housing and Community Development ("HCD") for review. HCD then makes a determination whether the housing element is "substantially compliant" with the requirements of state housing law or not. (Gov. Code § 65585.03.)

21. If a local government fails to adopt a housing element update, or if HCD determines that the housing element update is not substantially compliant with state housing law because the housing element does not sufficiently accommodate the local government's fair share of the regional need for housing, the local government is subject to significant legal consequences.

One such consequence is a mechanism under the HAA known as the "Builder's Remedy." (Gov. Code § 65589.5(d)(6).)[1]

22. The Builder's Remedy generally prohibits a local government that does not have a substantially compliant housing element from disapproving a housing project, or conditioning the approval of housing in a manner that would render the housing development project infeasible, *even if the project is inconsistent with the City's General Plan or zoning ordinance,* as long as the project proposes to reserve at least 13% of the homes for low-income households. (Gov. Code § 65589.5(h)(3)(C)(i)(III).)[2]

23. A local government may only disapprove a housing project brought pursuant to the Builder's Remedy if it makes specific findings supported by a preponderance of the evidence that either: (1) it has adopted a housing element that is in substantial compliance with the Housing Element law, or (2) one of the very narrow exceptions to the Builder's Remedy applies, such as a significant and unavoidable health and safety impact. (Gov. Code § 65589.5(d)(2).)

24. A local government's adopted housing element may only be found to be in substantial compliance with the Housing Element Law if either HCD or a court has found it to be in substantial compliance. (Gov. Code § 65585.03.)

25. Applicants and qualified housing organizations may bring suit under the HAA to challenge a disapproval made without the proper findings. (Gov. Code § 65589.5(k)(1)(A)(i).) The Legislature recently expanded the definition of a "disapproval" to include, among other things, "mak[ing] a written determination that a preliminary application described in subdivision (a) of Section 65941.1 has expired or that the applicant has otherwise lost its vested rights under the preliminary application for any reason other than those described in

[1] At the time Chen submitted his Preliminary Application on February 20, 2024, and his formal Development Application on August 16, 2024, the Builder's Remedy was contained within Government Code section 65589.5(d)(5), but as of January 1, 2025, the Builder's Remedy provision has been renumbered to subdivision (d)(6).

[2] Low-income households are defined as households earning 60% of the area median income or below. (Health and Safety Code § 50053.)

subdivisions (c) and (d) of Section 65941.1." (Gov. Code section 65589.5(h)(6)(H).) The HAA now also defines disapproval to include making an improper incompleteness determination (Gov. Code § 65589.5(6)(F)), among other definitions.

26. Under the HAA, local governments bear the burden to show that they complied with the law. (*See* Gov. Code § 65589.6 [A City "shall bear the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5"].) The Legislature has also made clear that any ambiguities must be resolved in favor of housing. (Gov. Code § 65589.5(a)(2)(L).)

SB 330's Provision for Vested Rights with a "Preliminary Application"

27. SB 330 added a provision to the PSA, Gov. Code § 65941.1(a), that permits a housing development applicant to submit a "preliminary application" for their housing project ("Preliminary Application"). As soon as an applicant submits a complete Preliminary Application, the applicant's rights vest such that, for purposes of the HAA, the housing development project is only subject to the "ordinances, policies, and standards that were adopted and in effect" at the time of submission of the Preliminary Application. (Gov Code § 65589.5 subd. (o)(1).)

28. The Legislature recently clarified that a local agency may not disapprove a housing project proposed under the Builder's Remedy, even if the local agency currently has a substantially compliant housing element, if the applicant submitted a complete Preliminary Application under section 65941.1(a) at a time when the city did not have a substantially compliant housing element, as determined by HCD or a court of competent jurisdiction. (Gov. Code. § 65589.55.)

The Permit Streamlining Act's Iterative Completeness Process

29. Once a Preliminary Application is submitted, an applicant must then submit a full "formal" development application ("Development Application") within 180 days of the submission of the Preliminary Application to preserve the vested rights under the Preliminary Application.

30. Upon submission of the Development Application, the local government is

required to make a determination whether the Development Application is complete. (Gov. Code § 65943.) This process is governed by the PSA. (Gov. Code § 65920, et seq.)

31. The PSA provides strict timelines for when agencies must determine whether an application is complete. (Gov. Code § 65943.) The PSA also sets forth a process for an applicant to appeal a completeness determination and requires an agency to make a final determination on that appeal within 60 days. (Gov. Code § 65943.)

32. Once a Development Application is submitted, the local government has 30 days to make a determination as to whether the application is complete. (Gov. Code § 65943.) If the local government determines the Development Application to be incomplete, it must list with particularity what items are missing, and the applicant may then resubmit the application with the requested material. At that point, "a new 30-day period shall begin, during which the public agency shall determine the completeness of the application." (*Id.*) The completeness determination is an iterative process that contemplates the possibility of numerous resubmissions and 30 day response periods to make a Development Application complete.

33. If a local government determines, pursuant to Government Code section 65943, that an application is incomplete, the applicant must resubmit the application within 90 days of receipt of the incompleteness determination, or else the Preliminary Application will expire and lose its vested rights. (Gov. Code § 65941.1(e)(2).) Government Code 65941.1(e)(2) expressly cross-references section 65943, which contains an iterative process that contemplates multiple resubmission windows.

FACTUAL BACKGROUND

The City's Failure to Adopt a Substantially Compliant Housing Element

34. The City had a statutory duty to adopt a substantially compliant sixth cycle housing element by January 31, 2023, but failed to do so.

35. On February 3, 2023, Petitioners CalHDF and YIMBY filed a Petition for Writ of Mandate (Case No. 23CV410817) to compel the City to adopt a substantially compliant housing element as required by law.

36. The parties agreed to resolve the claims via a Stipulated Judgment, entered

on January 8, 2024. Amongst other things, the Stipulated Judgment required that "[u]ntil the date that the City adopts a Housing Element Revision that is in substantial compliance with Housing Element Law, the City shall not use the provisions in subdivision (d)(1) or (d)(5) of Government Code Section 65589.5 to disapprove a housing development project for very low, low-, or moderate impact households . . .." (See, Notice of Entry of Judgment by Stipulation, *California Housing Defense Fund, et. al. v. City of Cupertino*, Case No. 23CV410817, attached as Exhibit A.) In other words, the City agreed to abide by the requirements of the Builder's Remedy.

37. The City also agreed that if a housing development project "has filed a preliminary application under Government Code Section 65941.l between February 1, 2023, and the date the City adopts a substantially compliant Housing Element Revision, the City agrees to comply with all of the provisions of Government Code Sections 65589.5(o) and 65941.1 in reviewing the housing development project[.]" (Exhibit A.)

Chen Submits the Preliminary Application when the City Did Not Have a Compliant Housing Element, Vesting his Rights to Proceed Under the Builder's Remedy

38. On February 20, 2024, Petitioner Chen submitted a Preliminary Application (the "Chen Preliminary Application") for a 30-unit project with 20 percent of the units set aside as affordable to low income households (the "Project") on the Project Site. This application set forth all the information required by SB 330, Gov. Code § 65941.1, including but not limited to, the Project location, a site plan and elevations, the existing uses on the Project Site, the proposed land use by number of units, the square footage of residential development, and the proposed number of parking spaces.

39. At the time Chen submitted his Preliminary Application, the City did not have an adopted and substantially compliant housing element under state law. Indeed, at that time, the City was bound by the Stipulated Judgment entered into with Petitioners CalHDF and YIMBY, conceding that it was bound to abide by the requirements of the Builder's Remedy.

40. HCD did not certify that the City's Housing Element was substantially compliant until September 4, 2024, well after Chen's submission of his Preliminary Application on February 24, 2024.

41. Therefore, Chen's submission of his Preliminary Application on February 24, 2024 vested his rights to pursue a Builder's Remedy project as of that date, and those rights remained vested after the City obtained HCD certification of substantial compliance. (Gov. Code §§ 65589.5(o); 65589.55.)

42. In fact, on March 14, 2024, the City agreed that the Chen Preliminary Application was complete and properly submitted on February 24, 2024.

43. Because the Project proposes to reserve 20% of the units for low-income households, and because Chen submitted the Chen Preliminary Application for the Project when the City was out of compliance with the Housing Element Law, the Project is eligible for the protections of the Builder's Remedy. (Gov. Code §§ 65589.5(d)(6).) As a result, unless Respondents are able to make one of the written findings contained within Gov. Code § 65589.5(d), Respondents are prohibited from disapproving the Project, even if the Project is inconsistent with the City's zoning and General Plan.

Chen Submits the Development Application and the City Wrongly Claims that the Preliminary Application is Expired

44. Chen timely submitted a Development Application for the Project on August 16, 2024 (the "Chen Development Application"). The Chen Development Application proposes to build, *inter alia*, a community sports center open to the public and 35 residential units consisting of 28 single family homes and 7 low income two-story townhomes. The Chen Development Application was submitted within the required 180-day period following the submission of the Preliminary Application. For that reason, and because the Chen Development Application did not propose to change the number of residential units set forth in the Preliminary Application by 20% or more, the Chen Development Application retained the vested rights obtained by the submission of the Preliminary Application. (Gov. Code §§ 65941.1(d); (e)(1).)

45. Respondents responded to the Chen Development Application on September 13, 2024, determining that the application was incomplete and identifying additional information, plans, drawings, and surveys that Respondents contended Chen needed to submit. Although consistency, compliance, and conformity with City development standards are not

required for Builder's Remedy projects, Respondents' September 13, 2024 letter attached two separate matrixes containing 22 pages of standards, referenced under the heading "Applicable City Standards." Respondents also set forth what they characterized as a "partial list of some of the project components that are inconsistent, out of compliance, and/or non-conforming with City standards", noting that any revisions to the plan sheets or the provision of additional information "required for application completeness will result in additional compliance notes ***in the next round of review*** since most standards cannot be adequately evaluated without the required additional information." (emphasis added.) Respondents included this list of alleged inconsistencies with City standards notwithstanding that the alleged inconsistencies did not reflect a lack of completeness in the materials Chen had submitted, the proper subject of an incompleteness determination.

46. Because consistency, compliance, and conformity are not required for Builder's Remedy projects, Petitioners CalHDF and YIMBY sent a Notice of Potential Breach of the Stipulated Judgment to the City on October 22, 2024, explaining that the City's response to the Chen Development Application appeared to be inconsistent with the City's duty under the Stipulated Judgment to process housing development projects pursuant to the Builder's Remedy.

47. The parties met and conferred on October 31, 2024 to discuss the City's processing of the Project, and the City assured CalHDF and YIMBY that it intended to abide by the requirements of the Builder's Remedy in the processing of Chen's project.

48. Chen replied to Respondents' September 13, 2024, incompleteness determination and resubmitted his application materials for the Project on December 12, 2024, as provided in Gov. Code section 65943, and within the 90-day deadline set forth in Gov. Code section 65941.1(e)(2) (formerly (d)(2).) In his resubmittal, Chen correctly stated that "objective standards are inapplicable due to the Builder's Remedy."

49. Respondents' responded by letter on January 10, 2025 (the "January 10 Letter"). (*See* letter dated January 10, 2025, attached as Exhibit B.) The January 10 Letter contended that the Chen Development Application was still incomplete, and attached a matrix stating, among other things, that Chen had not addressed the Project's consistency with objective

standards identified in Respondents' September 13, 2024 letter. In fact, Chen had addressed the Project's consistency by correctly stating that objective standards were inapplicable to a Builder's Remedy project.

50. Indeed, although Respondents flagged Chen's failure to address consistency with City standards as one basis for the incompleteness determination, a project's alleged inconsistencies with standards is not a proper basis for making an incompleteness determination.

51. The January 10 Letter further stated that because the information needed "to complete the application has not been submitted within 90 days of receiving the City's written identification of the necessary information" on September 13, 2024, Chen's Preliminary Application "has expired and has no further force or effect." Respondents apparently interpreted Gov. Code section 65941.1(e)(2) erroneously to mean that if a development application is not determined to be complete within 90 days of the City's *initial* incompleteness determination under Gov. Code section 65943, the Preliminary Application expires. Under this interpretation, an applicant would effectively receive only one opportunity to respond to an incompleteness determination before losing its vested rights.

52. The January 10 Letter also stated that under section 65943 and the City's Municipal Code section 19.12.040(F), Chen "may appeal this decision in writing to the Planning Commission," and the City would make a final written determination on the appeal within 60 days.

Chen Appeals the Wrongful Determination that the Preliminary Application Expired

53. Accordingly, Chen filed a formal appeal to the City on January 23, 2025, ("Chen's Appeal") requesting that pursuant to Municipal Code section 19.12.040(F), the City review its January 10, 2025, determination that Chen's Preliminary Application had expired. Chen's Appeal was accompanied by a $505 appeal fee. In this same correspondence, Chen advised that that he would submit additional materials to make the Development Application complete within the timeframes required by SB 330 and the PSA.

54. Chen's Appeal set forth a detailed explanation for why Respondents' interpretation of Gov. Code section 65941.1(e)(2) was a plainly erroneous interpretation of SB 330

that conflicts with the language, spirit, and intent of state housing law. Chen's Appeal explained that SB 330 expressly cross-references the PSA's iterative completeness process with unlimited resubmission windows. (Gov. Code § 65941.1(e)(2) (cross-referencing § 65943.) Chen's Appeal also explained that SB 330's Preliminary Application process is designed to work in tandem with both the PSA, which is intended to *reduce* barriers to an application achieving completeness, and the HAA, which is intended to maximize the production of housing. Both of these intents would be undermined by Respondents' interpretation of SB 330. As Chen's Appeal stated, "The City's reading of SB 330 would only encourage cities to engage in gamesmanship with completeness determinations and falsely determine applications to be incomplete so they can then argue that an SB 330 Preliminary Application has expired."

55. Chen's Appeal further pointed out that Respondents' interpretation of Gov. Code § 65941.1(e)(2) had been expressly *rejected* by both HCD and the only court to have considered the question. Specifically, Chen attached to the appeal an HCD Notice of Violation letter to the City of Beverly Hills dated December 2, 2024, where HCD advised that the city would violate the HAA, PSA, and SB 330 if it refused to process the applicant's Builder's Remedy project on the grounds that the Preliminary Application had expired due to the Development Application being incomplete 90 days after an initial incompleteness determination. (*See* HCD's Notice of Violation Letter to City of Beverly Hills, dated December 2, 2024, attached as Exhibit C.) Specifically, HCD wrote: "HCD reminds the City…that the 90-day deadline resets after each incompleteness determination. A project with multiple incompleteness letters and responses may have multiple 90-day periods." (*Id*.)[3]

56. Chen's Appeal also pointed out that HCD's directive on this issue was recently affirmed in *Jha v. City of Los Angeles* (Case No. 23STCP03499) ("*Jha*"), the only Court to consider and rule on this issue. In its Judgment Granting Petition for Writ of Mandate, the Court

[3] On February 12, 2025, HCD issued a Notice of Violation to the Town of Los Gatos where it reiterated that "…the 90-day deadline resets after each incompleteness determination made by the Town. (*See* HCD's Notice of Violation Letter to Town of Los Gatos, dated February 12, 2025, attached as Exhibit D.)

correctly reasoned that "[t]he statute supports [the applicant's] reading that the submission and completeness evaluation for an application is an iterative process *with no limit on the number of submissions*." (Judgment Granting Judgment Granting Petition for Writ of Mandate, *Jha*, filed September 17, 2024, attached as Exhibit E.) The *Jha* decision was also enclosed with the appeal.

The City Refuses to Hear the Appeal After Expressly Inviting It and Inducing Chen to Pay the Appeal Fee

57. Respondents did not respond to Chen's January 23, 2025, letter until nearly two months later, in a letter dated March 17, 2025 (the "March 17 Letter") (*See* letter dated March 17, 2025, attached as Exhibit F.) Although Respondents had previously invited Chen to appeal their January 10, 2025 determination and induced him to pay the $505 appeal fee, the March 17 Letter stated that Respondents were declining to hear Chen's Appeal and that an appeal was in fact inappropriate. The March 17 Letter stated that Respondents could not hear an appeal based on their erroneous interpretation of Gov. Code § 65941.1(e)(2) because the City "lacks jurisdiction to rewrite state law."

58. Respondents' contention that the City lacked the jurisdiction to interpret Gov. Code § 65941.1(e)(2) is inconsistent with their earlier January 10, 2025 determination that the Chen Preliminary Application had expired, which was based entirely on Respondents' interpretation of Gov. Code § 65941.1(e)(2).

59. The March 17 Letter also stated that the January 10, 2025 determination was the City's final administrative determination.

60. Respondents' attempt to backdate the final administrative decision to January 10, 2025 after making Chen wait nearly 60 days for a decision on the appeal the City invited was a bad faith attempt to prevent Chen from timely filing this action. In fact, the March 17 Letter is the final administrative determination.

61. In doing all of the foregoing, Respondents have and are continuing to unlawfully deny Chen his right to pursue a Builder's Remedy project without making written findings based on a preponderance of the evidence of one of the criteria contained within section 65589.5 subdivision (d).

62. CalHDF and YIMBY intended to participate in Chen's Appeal of Respondents' erroneous finding that Chen's vested Preliminary Application had expired, but were denied the opportunity to participate in such appeal when Respondents declined to hold a public hearing on this matter.

63. Chen responded to Respondents on April 4, 2025, advising of Chen's intent to file a Petition for Writ of Mandate and Complaint for Declaratory Relief litigation under the HAA, SB 330, and PSA unless Respondents reverse their erroneous decision that the Chen Preliminary Application expired and agree in writing that the application can move forward with its vested rights. This Petition for Writ of Mandate and Complaint for Declaratory Relief followed.

FIRST CAUSE OF ACTION

Writ of Mandate - CCP § 1094.5 and/or § 1085; Violation of Permit Streamlining Act ("PSA")

Gov. Code § 65920

(All Petitioners Against All Respondents)

64. The allegations of paragraphs 1 through 63, above, are hereby incorporated herein by reference as though set forth in full.

65. Petitioners Chen, CalHDF, YIMBY, and the public each have beneficial interests that have been, and will further be, severely injured and adversely affected if Respondents' actions are not set aside and invalidated, and if Respondents' interpretation of the requirements of the PSA are allowed to be enforced against Petitioners. Petitioners' interests include: (1) ensuring that Respondents comply with state laws requiring the good-faith processing and approval of housing development projects, particularly projects to address the housing needs of California residents; (2) ensuring that Respondents' actions are in conformity with the requirements of state law; and (3) having those requirements properly executed and their public duties enforced. Petitioners have a clear, present, and legal right to Respondents' performance of their legal duties as described herein, which Respondents have failed to perform.

66. SB 330 added a Preliminary Application process to the PSA specifically to provide early vested rights for housing development projects, and to facilitate the production of housing. Per Gov. Code sections 65941.1(e)(2) and 65943, a Preliminary Application remains

valid so long as an applicant responds to a Development Application incompleteness determination within 90 days after receiving the determination.

67. Respondents have refused to recognize Chen's vested rights, and sent Chen a letter falsely stating that his vested rights under SB 330 had expired, despite the fact that Chen responded to Respondents' incompleteness determinations within 90 days to ensure that the Chen Preliminary Application remained valid.

68. Respondents' erroneous interpretation of SB 330 will encourage cities to falsely determine that Development Applications are incomplete to defeat vested rights, in contravention of the PSA's goal of removing barriers to the completeness of applications.

69. The PSA's process is limited to gathering information about a project proposal, not substantive determinations regarding a project's consistency with code standards. Respondents' incompleteness letters include comments that are inaccurately identified as "incomplete" items, in conflict with the PSA. When a local jurisdiction improperly characterizes a determination of project consistency as incomplete items, as Respondents did here, the jurisdiction impermissibly demands more information than necessary to achieve a complete application in violation of the PSA.

70. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law to challenge Respondents' actions, and a writ of mandate under Code of Civil Procedure § 1094.5 and/or § 1085 is the prescribed remedy for violations of this type. Chen has performed all conditions precedent to the issuance of a writ of mandate. Petitioners seek an immediate stay or other appropriate relief, including an injunction, declaration, and/or order, commanding Respondents to perform their legal duties under the PSA, including with respect to the preliminary application vesting rights and development application for the proposed Project.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

Writ of Mandate - CCP § 1094.5 and/or § 1085; Violation of Housing Accountability Act (HAA) Gov. Code § 65589.5

(All Petitioners Against All Respondents)

71. The allegations of paragraphs 1 through 70, above, are hereby incorporated herein by reference as though set forth in full.

72. Petitioners assert that Respondents' actions constitute an unlawful disapproval of the Project because Respondents abused their discretion by not proceeding in the manner required by law, issuing a decision unsupported by the findings, and issuing findings that are unsupported by the evidence.

73. Petitioners Chen, CalHDF, YIMBY, and the public each have beneficial interests that have been, and will further be, severely injured and adversely affected if Respondents' actions are not set aside and invalidated, and if Respondents' interpretation of the requirements of the HAA are allowed to be enforced against Petitioners. Petitioners' interests include, *inter alia*, (1) ensuring that Respondents comply with state laws requiring the good-faith processing and approval of housing development projects, particularly projects to address the housing needs of California residents; (2) ensuring that Respondents' actions are in conformity with the requirements of state law; and (3) having those requirements properly executed and their public duties enforced. Petitioners have a clear, present, and legal right to Respondents' performance of their legal duties as described herein, all of which Respondents have failed to perform.

74. The HAA limits the ability of local governments to disapprove housing development projects for very low, low, or moderate-income households (defined as projects with at least 13% of the units reserved for low-income households) even when such projects are inconsistent with zoning and General Plan standards, if the local government did not have a substantially compliant Housing Element at the time a Preliminary Application was submitted. The HAA defines "disapprove" to include, *inter alia*, (1) any instance in which an agency "[v]otes or takes final administrative action on a proposed housing development project application and the application is disapproved…" (Gov. Code § 65589.5(6)(A)); (2) "[m]akes a written determination that a preliminary application described in subdivision (a) of Section 65941.1 has expired or that the applicant has otherwise lost its vested rights under the preliminary application for any reason

other than those described in subdivisions (c) and (d) of Section 65941.1" (Gov. Code section 65589.5(h)(6)(H)); or (3) makes an improper incompleteness determination. (Gov. Code § 65589.5(h)(6)(F).)

75. The burden of proof is on Respondents to show that their "decision is consistent with the findings as described in subdivision (d), and that the findings are supported by a preponderance of the evidence in the record, and with the requirements of subdivision (o)." (Gov. Code § 65589.5(i); see also Gov. Code § 65589.6.) Additionally, it is California state policy that housing laws "should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(2)(L).) Respondents failed to comply with these requirements.

76. An applicant or qualified housing organization may bring an action to enforce the HAA if "the local agency, in violation of subdivision (o), required *or attempted to require* a housing development project to comply with an ordinance, policy, or standard not adopted and in effect when a preliminary application was submitted." (Gov. Code § 65589.5(k)(1)(A)(i)(III)(emphasis added).) Here, because Chen submitted the Chen Preliminary Application prior to the City's Housing Element being deemed substantially compliant with the Housing Element Law, he is entitled to pursue an affordable housing project pursuant to the HAA's Builder's Remedy. In violation of the HAA, Respondents have attempted to deny Chen his rights under the Builder's Remedy by refusing to recognize Chen's vested rights and sending Chen a letter contending his vested rights expired despite the fact that Chen responded to Respondents' incompleteness determinations within 90 days to ensure that the Chen Preliminary Application remained valid.

77. Respondents failed to make any findings of fact to support their disapproval of the Builder's Remedy project, in violation of Gov. Code § 65589.5(d).

78. Respondents' erroneous determination that the Chen Preliminary Application expired is not only contradicted by HCD and the only court to have made a ruling on this issue, but as a practical matter, would eviscerate the protections afforded by the Builder's Remedy. Under Respondents' interpretation, because an agency has 30 days to respond to

resubmittals, an applicant would not have a second opportunity to ensure an application is complete before losing preliminary application vesting rights even if an applicant responded to an incompleteness determination within 60 days. Indeed, contrary to California law, Respondents' interpretation only gives an applicant one shot to make an application complete.

79. Respondents' erroneous determination is a bad faith course of conduct designed to defeat the Builder's Remedy through a procedural gimmick that the Legislature clearly did not intend, as it created SB 330 to *facilitate* the production of housing.

80. Respondents further acted in bad faith by inviting Chen to appeal their erroneous decision and pay a $505 appeal fee, then waiting nearly 60 days before falsely informing him that an appeal was actually improper. This course of conduct was designed to harass Chen.

81. Respondents further acted in bad faith by attempting, in their final determination on March 17, 2025, to backdate their final administrative determination to January 10, 2025, so that Chen would have difficulty filing this litigation in a timely manner.

82. Respondents also improperly disapproved the Project by using the Project's purported inconsistency with City development standards as a basis for its incompleteness determination. Builder's Remedy projects are not required to comply with City development standards. Further, Respondents may not use the incomplete process to make consistency determinations. Instead, Respondents may only use this process to gather information about the project.

83. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law to challenge the Respondents' actions, and a writ of mandate under Code of Civil Procedure § 1094.5 and/or § 1085 is the prescribed remedy for violations of this type. Petitioners have performed all conditions precedent to the issuance of a writ of mandate. Petitioners have performed all conditions precedent to the issuance of a writ of mandate. Petitioners seek an immediate stay or other appropriate relief, including an injunction, declaration, and/or order, commanding Respondents to perform their legal duties and obligations under the HAA, including with respect to the proposed Project.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

Declaratory Relief - Code Civ. Proc. § 1060

(All Petitioners Against All Respondents)

84. The allegations of paragraphs 1 through 83, above, are hereby incorporated herein by reference as though set forth in full.

85. An actual controversy has arisen and now exists between Petitioners and Respondents concerning their obligations and duties under California statutory law, including but not limited to Respondents' policies and practices which operate to avoid obligations established by state law, such as: (1) refusing to process housing development projects that qualify under the "Builder's Remedy" section of the Government Code; and (2) disregarding the vested rights of Preliminary Applications and associated housing development project applications under state law. As set forth herein, Petitioners contend that Respondents' actions are prohibited by the state Housing Accountability Act (Gov. Code § 65589.5), SB 330 (Gov. Code § 65941.1), and Permit Streamlining Act (Gov. Code § 65943).

86. Petitioners further contend that Respondents' actions are intended to evade their legal duties and deny Petitioners their rights under these state laws. Petitioners are informed and believe, and on that basis allege, that Respondents contend in all respects to the contrary. A judicial determination and declaration as to the applicability of state law to Respondents' actions, and of the resulting legal obligations of Respondents, is therefore necessary and appropriate.

WHEREFORE, Petitioners pray for judgment as hereinafter set forth.

PRAYER

WHEREFORE, Petitioners pray for judgment as follows:

1. For writ of mandate or other appropriate relief, including an injunction, declaration, and/or order, commanding Respondents to review and process the Chen Development Application pursuant to the state Permit Streamlining Act's provisions;

2. For writ of mandate or other appropriate relief, including an injunction, declaration, and/or order, commanding Respondents to review and process the Chen Development

Application pursuant to the provisions of SB 330, including refraining from denying vested rights to the Project;

3. For writ of mandate or other appropriate relief, including an injunction, declaration, and/or order declaring Respondents' refusal to review and process the Chen Development Application void for violating the HAA, SB 330, and PSA; issuance of a writ of mandate ordering Respondents to accept and process the Chen Development Application, and for Respondents to take any and all necessary steps to immediately process the Chen Development Application and approve the Project as submitted, and issue all related, necessary Project approvals within 60 days; and for the Court to retain continuing jurisdiction over this matter to ensure compliance with this Court's decision and applicable law;

4. For writ of mandate or other appropriate relief, including an injunction, declaration, and/or order under Code of Civil Procedure sections 1094.5 and/or 1085: (1) commanding the City Planning Division to fulfill its mandatory duty to accept and process the Chen Development Application pursuant to Government Code section 65589.5 subdivision (d); (2) commanding Respondents to promptly render all appropriate and lawful approvals, entitlements and actions necessary to allow Chen to construct the Project within 60 days, consistent with Chen's rights under state and local law, including specifically the HAA; and (3) for the Court to retain continuing jurisdiction over this matter to ensure compliance with this Court's decision and applicable law;

5. For writ of mandate or other appropriate relief, including an injunction, declaration, and/or order, commanding Respondents to comply with the Housing Accountability Act with respect to the proposed Project, including, but not limited to, an order that the Project is eligible for the Builder's Remedy, and directing Respondents to approve the housing development project within 60 days due to Respondents' bad faith actions pursuant to Gov. Code § 65589.5;

6. A declaration that: (1) Respondents violated Government Code section 65589.5 subdivision (d) by failing to process and accept the Chen Development Application and approve the Project consistent with Government Code section 65589.5 subdivision (d); (2) Respondents' rejection of the application and denial of the Project was arbitrary, capricious, and

devoid of merit or evidentiary support; (3) Respondents' denial of the Project has no rational basis and no cognizable nexus to any discernable Project impact; and (4) for an order declaring that Respondents' actions constituted bad faith as defined by Government Code section 65589.5 subdivision (l).

7. For costs of suit herein;

8. For attorneys' fees pursuant to Code of Civil Procedure § 1021.5 and Gov. Code § 65589.5;

9. For fines and penalties to be assessed pursuant to Gov. Code § 65589.5; and

10. For any other relief that the Court deems just and proper.

Dated: April 7, 2025

MILLER STARR REGALIA

By: 

KENNETH A. STAHL
BRIANA J. BRAMER
Attorneys for Petitioner/Plaintiff LIXIN (LEON) CHEN

Dated: April 7, 2025

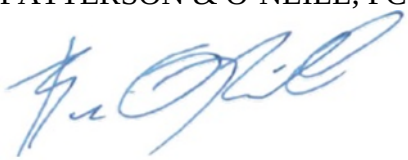
CALIFORNIA HOUSING DEFENSE FUND



DYLAN CASEY
NICHOLAS ECKENWILER
Attorneys for Petitioner and Plaintiff, CALIFORNIA HOUSING DEFENSE FUND

Dated: April 7, 2025

PATTERSON & O'NEILL, PC



RYAN PATTERSON
BRIAN O'NEILL
Attorneys for Petitioner and Plaintiff, YES IN MY BACK YARD

VERIFICATION

I, Lixin (Leon) Chen, declare as follows:

I am a resident of the State of California and am a petitioner in this action.

I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF ("Verified Petition for Writ of Mandate") and know its contents. The matters stated in the Verified Petition for Writ of Mandate are within my knowledge, and I know them to be true.

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

Executed on April 7, 2025



Lixin (Leon) Chen

VERIFICATION

I, Sonja Trauss, declare as follows:

1. I am a natural person and a resident of the State of California. I am a petitioner in this action and the founder of petitioner Yes in MY Back Yard ("YIMBY"). I am authorized to verify this VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF on behalf of YIMBY.

2. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF and know its contents. The matters stated in the VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF are true of my own knowledge from having reviewed the project application materials regarding the housing development project at 0 Canyon View Drive, Cupertino, California, 95014.

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

Executed on April 7, 2025.

Sonja Trauss

VERIFICATION

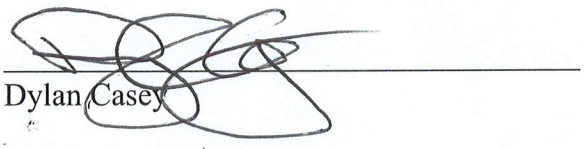
I, Dylan Casey, declare as follows:

I am a natural person and a resident of the State of California. I am the Executive Director of Petitioner California Housing Defense Fund ("CalHDF"). I am authorized to verify this VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF on behalf of CalHDF.

I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF and know its contents. The matters stated in the VERIFIED PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER EXTRAORDINARY RELIEF; COMPLAINT FOR DECLARATORY RELIEF are true of my own knowledge from having reviewed the project application materials regarding the housing development project at 0 Canyon View Drive., Cupertino, California, 95014, except as to those matters stated upon information and believe, and as to those matters, I believe them to be true.

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

Executed on April 7, 2025



Dylan Casey

EXHIBIT A

**Electronically Filed
by Superior Court of CA,
County of Santa Clara,
on 1/10/2024 3:34 PM
Reviewed By: L. Quach-Marcellana
Case #23CV410817
Envelope: 14078221**

CELIA W. LEE State Bar #172981
clee@goldfarblipman.com
BARBARA E. KAUTZ, State Bar #231050
ktiedemann@goldfarblipman.com
GOLDFARB & LIPMAN LLP
1300 Clay Street, Eleventh Floor
City Center Plaza
Oakland, California 94612
Telephone: (510) 836-6336
Fax: (510) 836-1035

CHRISTOPHER D. JENSEN, State Bar #235108
christopherj@cupertino.org
City Attorney
City of Cupertino
10300 Torre Avenue
Cupertino, California 95014
Telephone: (408) 777-3105
Fax: (408) 777-3366

Attorneys for Respondent
CITY OF CUPERTINO

[Exempt from Filing Fees (Gov. Code §6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

CALIFORNIA HOUSING DEFENSE FUND, a California nonprofit public benefit corporation; and YES IN MY BACK YARD, a California nonprofit public benefit corporation; and Petitioners, v. CITY OF CUPERTINO, Respondent.	Case No.: 23CV410817 Assigned for all purposes to: Dept 18, the Hon. Mary Arand **NOTICE OF ENTRY OF JUDGMENT BY STIPULATION** Action Filed: February 3, 2023

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 8, 2024, the Honorable Mary Arand, Judge of the Superior Court, signed and filed an Order entering the parties' Stipulated Judgment. A true and correct copy of the Stipulation for Entry of Judgment and Order and the Stipulated Judgment is attached here to as Exhibit 1.

DATED: January 10, 2024

GOLDFARB & LIPMAN LLP

By: _____

CELIA W. LEE
Attorneys for Respondent
CITY OF CUPERTINO

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

PROOF OF SERVICE

California Housing Defense Fund and Yes In My Back Yard v. City of Cupertino
Santa Clara Superior Court Case No.: 23CV410817

I, Season A. Shimizu, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. My email address is sshimizu@goldfarblipman.com. On January 10, 2024, I served the document(s) described as:

NOTICE OF ENTRY OF JUDGMENT

on the interested party(ies) in this action as follows:

Keith E. Diggs, Esq.
YIMBY LAW
877 Cedar Street #150
Santa Cruz, CA 95060
Phone: 703-409-5198
keith@yimbylaw.org

Attorney for Petitioner
Yes in My Back Yard

Dylan Casey, Esq.
Nicholas Eckenwiler, Esq.
California Housing Defense Fund
360 Grand Ave #323
Oakland, CA 94160
Phone: 443-223-8231
dylan@calhdf.org
nicholas@calhdf.org

Attorneys for Petitioner
California Housing Defense Fund

☒ BY ELECTRONIC SERVICE (per CCP section 1010.6(e)(2))
I caused the above-listed document(s) to be served electronically by:

☒ Sending it/them to the email address(es) listed in this Proof of Service either as an attachment OR as a clickable link to an online file-hosting folder controlled by Goldfarb & Lipman that contains the document(s).

☒ [State] I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 10, 2024, at Pinole, California.

Season A Shimizu

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

EXHIBIT 1

EFS-020

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 172981
NAME: Celia W. Lee
FIRM NAME: Goldfarb & Lipman LLP
STREET ADDRESS: 1300 Clay Street, Floor 11
CITY: Oakland STATE: CA ZIP CODE: 94612
TELEPHONE NO.: 510-836-6336 FAX NO.: 510-836-1035
E-MAIL ADDRESS: clee@goldfarblipman.com
ATTORNEY FOR (*name*): City of Cupertino

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara
STREET ADDRESS: 161 North First Street
MAILING ADDRESS: 191 N orth First Street
CITY AND ZIP CODE: San Jose 95113
BRANCH NAME: Old Courthouse

CASE NUMBER: 23CV410817

PLAINTIFF/PETITIONER: CA Housing Defense Fund, Yes In My Back Yard
DEFENDANT/RESPONDENT: City of Cupertino
OTHER:

JUDICIAL OFFICER: Hon. Mary Arand

PROPOSED ORDER (COVER SHEET)

DEPT: 18

NOTE: This cover sheet is to be used to electronically file and submit to the court a proposed order. The proposed order sent electronically to the court must be in PDF format and must be attached to this cover sheet. In addition, a version of the proposed order in an editable word-processing format must be sent to the court at the same time as this cover sheet and the attached proposed order in PDF format are filed.

1. Name of the party submitting the proposed order:
   City of Cupertino, California Housing Defense Fund, Yes In My Back Yard

2. Title of the proposed order:
   Stipulation for Entry of Judgment; [Proposed] Order

3. The proceeding to which the proposed order relates is:
   a. Description of proceeding: N/A - This is for settlement of the entire action
   b. Date and time:
   c. Place:

4. The proposed order was served on the other parties in the case.

Celia W. Lee
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

CASE NAME:	CASE NUMBER:
California Housing Defense Fund, Yes In My Back Yard v. City of Cupertino	23CV410817

PROOF OF ELECTRONIC SERVICE
PROPOSED ORDER

1. I am at least 18 years old and **not a party to this action.**

   a. My residence or business address is *(specify):*
   1300 Clay Street, Floor 11, Oakland, CA 94612

   b. My electronic service address is *(specify):* sshimizu@goldfarblipman.com

2. I electronically served the *Proposed Order (Cover Sheet)* with a proposed order in PDF format attached, and a proposed order in an editable word-processing format as follows:

   a. On *(name of person served) (If the person served is an attorney, the party or parties represented should also be stated.):*
   Kevin E. Diggs, Yes In My Back Yard; Dylan Casey and Nicholas Eckenwiler, California Housing Defense Fund

   b. To *(electronic service address of person served):* keith@yimbylaw.org; dylan@calhdf.org, nicholas@calhdf.org

   c. On *(date):* 12/29/2023

[x] Electronic service of the *Proposed Order (Cover Sheet)* with the attached proposed order in PDF format and service of the proposed order in an editable word-processing format on additional persons are described in an attachment.

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

Date: 12/29/2023

Season A. Shimizu
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Filed
January 8, 2024
Clerk of the Court
Superior Court of CA
County of Santa Clara
23CV410817
By: jsilveira

CELIA W. LEE State Bar #172981
clee@goldfarblipman.com
BARBARA E. KAUTZ, State Bar #231050
ktiedemann@goldfarblipman.com
GOLDFARB & LIPMAN LLP
1300 Clay Street, Eleventh Floor
City Center Plaza
Oakland, California 94612
Telephone: (510) 836-6336
Fax: (510) 836-1035

CHRISTOPHER D. JENSEN, State Bar #235108
christopherj@cupertino.org
City Attorney
City of Cupertino
10300 Torre Avenue
Cupertino, California 95014
Telephone: (408) 777-3105
Fax: (408) 777-3366

Attorneys for Respondent
CITY OF CUPERTINO

[Exempt from Filing Fees (Gov. Code §6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

CALIFORNIA HOUSING DEFENSE FUND, a California nonprofit public benefit corporation; and YES IN MY BACK YARD, a California nonprofit public benefit corporation; and Petitioners, v. CITY OF CUPERTINO, Respondent.	Case No.: 23CV410817 Assigned for all purposes to: Dept 18, the Hon. Mary Arand **STIPULATION FOR ENTRY OF JUDGMENT; ~~[PROPOSED]~~ ORDER** Action Filed: February 3, 2023

Petitioners CALIFORNIA HOUSING DEFENSE FUND and YES IN MY BACK YARD and Respondent CITY OF CUPERTINO, by and through their respective counsel of record, hereby stipulate to entry of the Stipulated Judgment attached hereto as Exhibit A.

This Stipulation may be executed in counterpart.

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

DATED: December 29, 2023 GOLDFARB & LIPMAN LLP

By: _____
CELIA W. LEE
Attorneys for Respondent
CITY OF CUPERTINO

DATED: December 21, 2023 CALIFORNIA HOUSING DEFENSE FUND

By: _____
DYLAN CASEY
Attorney for Petitioner
CALIFORNIA HOUSING DEFENSE FUND

DATED: December 21, 2023 YIMBY LAW

By: _____
KEITH DIGGS
Attorney for Petitioner
YES IN MY BACK YARD

[PROPOSED ORDER ON FOLLOWING PAGE]

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

~~[PROPOSED]~~ ORDER

Having considered the Stipulation for Entry of Stipulated Judgment and the Stipulated Judgment attached herein as Exhibit A, and for good cause shown, IT IS HEREBY ORDERED as FOLLOWS:

(submitted as a separate document)

The Clerk is ordered to enter the Stipulated Judgment as the judgment in this matter.

IT IS SO ORDERED.

Dated: January 8, 2024

Mary S. Arand

Hon. Mary Arand
Judge of the Superior Court

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

EFS-020

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 172981 NAME: Celia W. Lee FIRM NAME: Goldfarb & Lipman LLP STREET ADDRESS: 1300 Clay Street, Floor 11 CITY: Oakland STATE: CA ZIP CODE: 94612 TELEPHONE NO.: 510-836-6336 FAX NO.: 510-836-1035 E-MAIL ADDRESS: clee@goldfarblipman.com ATTORNEY FOR (*name*): City of Cupertino	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara STREET ADDRESS: 161 North First Street MAILING ADDRESS: 191 N orth First Street CITY AND ZIP CODE: San Jose 95113 BRANCH NAME: Old Courthouse	CASE NUMBER: 23CV410817
PLAINTIFF/PETITIONER: CA Housing Defense Fund, Yes In My Back Yard DEFENDANT/RESPONDENT: City of Cupertino OTHER:	JUDICIAL OFFICER: Hon. Mary Arand
PROPOSED ORDER (COVER SHEET)	DEPT: 18

NOTE: This cover sheet is to be used to electronically file and submit to the court a proposed order. The proposed order sent electronically to the court must be in PDF format and must be attached to this cover sheet. In addition, a version of the proposed order in an editable word-processing format must be sent to the court at the same time as this cover sheet and the attached proposed order in PDF format are filed.

1. Name of the party submitting the proposed order:
   City of Cupertino, California Housing Defense Fund, Yes In My Back Yard

2. Title of the proposed order:
   [Proposed] Stipulated Judgment

3. The proceeding to which the proposed order relates is:
   a. Description of proceeding: N/A - this is for settlement of the entire action
   b. Date and time:
   c. Place:

4. The proposed order was served on the other parties in the case.

Celia W. Lee
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

CASE NAME:	CASE NUMBER:
California Housing Defense Fund, Yes In My Backyard v. City of Cupertino	23CV410817

PROOF OF ELECTRONIC SERVICE
PROPOSED ORDER

1. I am at least 18 years old and **not a party to this action.**

   a. My residence or business address is *(specify):*
   1300 Clay Street, Floor 11, Oakland, CA 94612

   b. My electronic service address is *(specify):* sshimizu@goldfarblipman.com

2. I electronically served the *Proposed Order (Cover Sheet)* with a proposed order in PDF format attached, and a proposed order in an editable word-processing format as follows:

   a. On *(name of person served) (If the person served is an attorney, the party or parties represented should also be stated.):*
   Kevin E. Diggs, Yes In My Back Yard; Dylan Casey and Nicholas Eckenwiler, California Housing Defense Fund

   b. To *(electronic service address of person served):* keith@yimbylaw.org; dylan@calhdf.org, nicholas@calhdf.org

   c. On *(date):* 1/2/2024

[x] Electronic service of the *Proposed Order (Cover Sheet)* with the attached proposed order in PDF format and service of the proposed order in an editable word-processing format on additional persons are described in an attachment.

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

Date: 1/2/2024

Season A. Shimizu
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Filed
January 8, 2024
Clerk of the Court
Superior Court of CA
County of Santa Clara
23CV410817
By: jsilveira

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

CALIFORNIA HOUSING DEFENSE FUND, a California nonprofit public benefit corporation; and YES IN MY BACK YARD, a California nonprofit public benefit corporation; and Petitioners, v. CITY OF CUPERTINO, Respondent.	Case No.: 23CV410817 ~~[PROPOSED]~~ **STIPULATED JUDGMENT** Assigned for all purposes to: Dept 18, Hon. Mary Arand Action Filed: February 3, 2023

Pursuant to the Stipulation for Entry of Judgment submitted by Petitioners CALIFORNIA HOUSING DEFENSE FUND ("CalHDF") and YES IN MY BACK YARD ("YIMBY") and Respondent CITY OF CUPERTINO ("City"), and pursuant to the Court's power under Code of Civil Procedure Section 664.6:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of Petitioner and against Respondent based on the following findings:

1. The City did not adopt the sixth cycle update to its housing element ("Housing Element Revision") by the January 31, 2023 statutory deadline for doing so;

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

2. Due to the significant undertaking of time and effort required to prepare the Housing Element Revision compared to City staff available to work on such preparation, the City was required to find and employ a planning consultant for assistance, and due in part to the timing of the due date for sixth cycle revisions for Southern California cities, the City had significant difficulty in locating an available consultant to assist;

3. After securing the services of a consultant in October 2021, and finding performance of such consultant inadequate, the City was forced to seek and engage the services of a different, second consultant to assist with its Housing Element Revision preparation, with such second consultant not being engaged until November 2022 for limited purposes then in March 2023 for the broader purpose of completing the Housing Element Revision for the City;

4. On February 3, 2023, the City submitted a draft Housing Element Revision to the California Department of Housing and Community Development ("HCD"), commencing the 90-day review period mandated by Government Code Section 65585(b). After receiving comments from HCD, the City revised its draft Housing Element Revision and submitted a second draft to HCD on October 16, 2023;

5. Government Code Section 65759, subdivision (a), provides that the California Environmental Quality Act does not apply to any action necessary to bring a city's housing element into compliance with a court order or judgment rendered under Article 14 of Chapter 3 of Division 1 of Title 7 of the Government Code;

6. Government Code Section 65754, subdivision (b), requires any judgment in favor of a petitioner which finds that the housing element does not substantially comply with the requirements of state law, must order the local jurisdiction to bring its housing element into compliance with those requirements within 120 days and bring its zoning ordinance into consistency with the updated housing element within 120 days thereafter;

7. Government Code Section 65759, subdivision (b), provides that, upon good cause shown, the court can extend the time required for a local jurisdiction to bring its housing element into compliance by way of two extensions of time, not to exceed a total of 240 days;

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1300 Clay Street
Eleventh Floor
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California
94612
510 836-6336
510 836-1035 FAX

8. The parties acknowledge that good cause may exist to grant the City additional time to meet the requirements of Government Code Section 65754, which additional time may be necessary to allow the City to develop a draft Housing Element Revision that is likely to be determined to be in substantial compliance by HCD, and that Petitioners would not oppose a request for an extension of time under Government Code Section 65754, provided that the City acts in good faith to meet its obligations under Section 1 of this Stipulated Judgment, below; and;

9. The parties have agreed to the entry of this judgment because they wish to avoid the time and expense of litigation, so as to avoid wasting taxpayer money on unnecessary litigation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

1. The City shall adopt a Housing Element Revision in substantial conformance with the Housing Element Law (Government Code Sections 65580 *et seq.*) and abide by the following schedule with respect to its Housing Element Revision:

a. With respect to the City's second draft Housing Element Revision, submitted to HCD on October 16, 2023:

i. In the event that HCD determines that the second draft Housing Element Revision substantially complies with the Housing Element Law, or conditionally determines that the second draft Housing Element Revision will substantially comply with the Housing Element Law upon changes agreed to by the City and communicated to Petitioners by the City, the City may adopt such second draft Housing Element Revision (and any pertinent changes referred to in this paragraph), but only after the 60-day review period pursuant to Government Code Section 65585(b)(3) has passed. Upon such adoption, the City will then be considered in substantial compliance with the Housing Element Law.

ii. In the event that HCD fails to review the second draft Housing Element Revision within 60 days, the City may adopt it, but only after the 60-day

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

review period pursuant to Government Code Section 65585(b)(3) has passed.

b. If HCD finds that the City's second draft Housing Element Revision does not comply with the Housing Element Law, the City will submit a revised, third draft Housing Element Revision within 75 days after HCD's determination, notifying HCD that the draft is subject to the review procedure set forth under Government Code Section 65754. Subsections (i) and (ii) of Sections 1(a) above regarding the second draft Housing Element Revision shall also apply to any third draft Housing Element Revision submitted to HCD; provided, however, that the HCD review period shall be 45 days pursuant to Government Code Section 65754(a). However, if HCD finds that the City's third draft Housing Element Revision does not comply with the Housing Element Law, then the City may elect either to submit a revised, fourth draft Housing Element Revision within 45 days after HCD's determination, subject to the review procedure set forth in Section 1(a) and this subsection 1(b), or to adopt the Housing Element Revision as permitted by Government Code Section 65585(f). The procedures set forth in Section 1(a) and this subsection 1(b) will apply to any further submittals of the Housing Element Revision to HCD.

c. If the City elects to adopt the Housing Element Revision as permitted by Government Code Section 65585(f), then in the event that HCD determines that the adopted Housing Element Revision substantially complies with the Housing Element Law, or conditionally determines that the adopted Housing Element Revision will substantially comply with the Housing Element Law upon non-substantial changes agreed to by the City and communicated to Petitioners by the City, the City will then be considered in substantial compliance with the Housing Element Law. However, in the event that HCD determines that the adopted Housing Element Revision does not substantially comply with the Housing

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1300 Clay Street
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94612
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Element Law, then Petitioners may, after objecting to such draft within the time allowed for HCD review, challenge the validity of the adopted housing element within 60 days of adoption.

d. In accordance with Section 65755 of the Government Code, the Court will, with the entry of this Stipulated Judgment, mandate the approval of all final subdivision maps for residential housing projects as provided in Section 65755(a)(5).

e. All applications for building permits, development permits pursuant to Government Code Section 65940, or tentative or final subdivision maps, related to new residential units proposed to be constructed are currently available on the City's website. The City will ensure that all such applications will continue to be available to the public on the City's website.

f. The City will conform its zoning ordinance to any adopted Housing Element Revision within 120 days of the adoption of such Housing Element Revision.

g. Pursuant to Government Code Section 65759, the adoption of the City's Housing Element Revision, as well as those rezonings to which the Housing Element Revision commits, and which are required for an adequate housing element pursuant to Government Code Sections 65588(e)(4)(C) and 65587(d)(1), are exempt from the California Environmental Quality Act ("CEQA").

2. Until the date that the City adopts a Housing Element Revision that is in substantial compliance with Housing Element Law, the City shall not use the provisions in subdivision (d)(1) or (d)(5) of Government Code Section 65589.5 to disapprove a housing development project for very low, low-, or moderate impact households, as defined in Government Code Section 65589.5(h)(3), or an emergency shelter, or to condition the approval of such a project in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards. If the housing development project

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

or emergency shelter has filed a preliminary application under Government Code Section 65941.1 between February 1, 2023, and the date the City adopts a substantially compliant Housing Element Revision, the City agrees to comply with all of the provisions of Government Code Sections 65589.5(o) and 65941.1 in reviewing the housing development project or emergency shelter.

3. Regarding any preliminary application to develop "housing for very low, low, or moderate income households" pursuant to Government Code Section 65589.5(h)(3) that it has received or will receive from February 1, 2023 until the date the City adopts a Housing Element Revision following a determination of substantial compliance by HCD: if the City charges a processing fee for such preliminary application, it shall cite the ordinance or resolution expressly establishing such fee. If no such ordinance or resolution expressly establishes a processing fee for preliminary applications, then the City shall not charge a fee for processing a preliminary application submitted before such time as an ordinance or resolution expressly authorizing such fee is duly adopted.

4. In the event that any party believes the opposing party is in breach of any of the terms of this judgment, they shall give written notice to the opposing party of the breach, which notice shall set forth with reasonable particularity the alleged breach and the action that the notifying party believes is required to remedy the alleged breach. The parties shall meet, confer, and attempt to resolve the alleged breach within forty-five (45) calendar days of such notice. If the parties cannot resolve the alleged breach within such time, any party may seek judicial enforcement.

5. The City agrees to pay YIMBY a total of $6,000 and CalHDF a total of $9,000 as a compromise resolution for petitioners' claims for costs and fees.

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Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

6. The Court shall retain jurisdiction over this action and the parties thereto until the terms of this Judgment are fulfilled.

DATED: January 8, 2024, ~~2023~~

Mary S. Ouard
JUDGE OF THE SUPERIOR COURT

Respectfully submitted (with signatures in counterpart),

CALIFORNIA HOUSING DEFENSE FUND

By: _____
DYLAN CASEY
Attorney for Petitioner
CALIFORNIA HOUSING DEFENSE FUND

YIMBY LAW

By: _____
KEITH E. DIGGS
Attorneys for Petitioner
YES IN MY BACK YARD

GOLDFARB & LIPMAN LLP

By: _____
CELIA W. LEE
Attorney for Respondent
CITY OF CUPERTINO

Goldfarb & Lipman LLP
1300 Clay Street
Eleventh Floor
Oakland
California
94612
510 836-6336
510 836-1035 FAX

EXHIBIT B

CITY OF CUPERTINO

COMMUNITY DEVELOPMENT DEPARTMENT
PLANNING DIVISION

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3308 • FAX: (408) 777-3333
CUPERTINO.ORG

SENT VIA ELECTRONIC MAIL

January 10, 2025

Lixin Chen
10168 Amelia Court
Cupertino, CA 95014
leonlixinchen@gmail.com

RE: Application Incomplete Letter
APNs 356-05-007, 356-05-008, 356-27-026
Tentative Map, File # TM-2024-003
Hillside Exception, File # EXC-2024-006
Tree Removal Permit, File # TR-2024-029

Dear Lixin Chen,

Thank you for your application submitted for the above referenced permits on the property located at APNs 356-05-007, 356-05-008, and 356-27-026. After reviewing the plans, the Cupertino Municipal Code ("CMC"), Cupertino General Plan, Cupertino BMR Manual, the Tree Removal Application Form, and the Planning Permit Application Checklist, Planning Division staff has determined that your application is *incomplete* in accordance with the Permit Streamlining Act (California Government Code Section 65920).

APPLICATION COMPLETENESS

Please find in the attached document, Attachment A, a list of items that were identified in the project incompleteness letter dated September 13, 2024, but were not addressed in the application resubmission on December 12, 2024.

Pursuant to California Government Code Section 65941.1(d)(1) and 65941.1(d)(2), the City has determined that the application for the development project is not complete because the specific information needed (as listed above) to complete the application has not been submitted within 90 days of receiving the City's written identification of the necessary information. Since this information has not been submitted within the 90-day period, the preliminary application pursuant to Government Code Section 65941.1 has expired and has no further force or effect.

Pursuant to California Government Code Section 65943(c) and Cupertino Municipal Code Section 19.12.040(F), the applicant may appeal this decision in writing to the Planning Commission, at which time a final written determination by the City on the appeal is due no later than 60 calendar days after receipt of the applicant's written appeal. (California Government Code Section 65943(c))

Sincerely,
/s/
Emi Sugiyama
Associate Planner
City of Cupertino

Attachments: A – Table of Incomplete Items

EXHIBIT C

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
651 Bannon Street, Suite 400
Sacramento, CA 95811
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

December 2, 2024

Michael Forbes
Director of Community Development
City of Beverly Hills
Via: mforbes@beverlyhills.org
455 N Rexford Drive
Beverly Hills, CA 90210

Dear Michael Forbes:

RE: Beverly Hills Builder's Remedy Applications – Notice of Violation

On June 26, 2024, the California Department of Housing and Community Development (HCD) issued a Letter of Support and Technical Assistance to the City of Beverly Hills (City) regarding compliance with Government Code section 65589.5, subdivision (d)(5), known colloquially as the "Builder's Remedy," pertaining to the proposed development at 125-129 Linden Drive (Linden Project). On August 22, 2024, HCD issued a Notice of Violation (NOV) to the City pertaining to the City Council's denial of the applicant's appeal of the City's incompleteness finding regarding the Linden Project, based on the finding that a General Plan Amendment and Zoning Change (GPA/ZC) are required for the submittal.

In addition to the Linden Project, HCD is aware of nine additional "Builder's Remedy" applications where the City has issued incompleteness determinations on the basis that a GPA/ZC is required. The ten projects in question represent a total of 981 units, including 198 units affordable to low-income households. Along with reiterating HCD's position that a GPA/ZC is not required for "Builder's Remedy" projects, HCD would like to expand further on two positions outlined in the August NOV:

> (1) the iterative nature of the 90-day deadline described in Government Code section 65941.1, subdivision (d)(2), (i.e., the deadline resets each time the City makes an incompleteness determination);[1] and
>
> (2) that an SB 330 preliminary application remains vested unless the number of residential units or square footage of construction changes by 20 percent or more.[2]

[1] Gov. Code, § 65941.1, subd. (d)(2).
[2] Gov. Code, § 65941.1, subd. (c).

Background and Summary

Following the issuance of the August NOV regarding the Linden Project, HCD received requests for technical assistance for nine other Builder's Remedy projects in Beverly Hills. HCD has reviewed the projects and has determined that each qualifies for the benefits described in Government Code section 65589.5, subdivision (d)(5). In each case, HCD understands that the applicant submitted a preliminary application pursuant to Government Code section 65941.1 prior to May 1, 2024, when HCD certified that the City's housing element was substantially compliant with state law.

HCD understands that the City rejects each application's vesting and status as a Builder's Remedy project. The consistent issue across all projects appears to be the City's requirement for a GPA/ZC. As stated in the previous NOV to the City and reiterated below, the Housing Accountability Act (HAA) and the Permit Streamlining Act (PSA) prohibit the City from requiring a GPA/ZC for projects qualifying under Government Code section 65589.5, subdivision (d)(5).

In addition to the requirement for a GPA/ZC, HCD also finds the City's liberal interpretation of what may disqualify a project from the vested rights protected under Government Code section 65941.1 to be problematic. Finally, HCD rejects the City's claim that the PSA only provides one 90-day period for a developer to submit all of the information necessary for its full application to be deemed complete. The remainder of this letter outlines these thematic issues and provides a summary of the projects in question.

General Plan Amendment and the Housing Accountability Act's Builder's Remedy

The HAA is clear that a project protected by the Builder's Remedy may not be disapproved for inconsistency with a jurisdiction's general plan land use designation and zoning ordinance.[3] Accordingly, a jurisdiction that refuses to process or approve a project subject to the Builder's Remedy due to the applicant's refusal to submit a GPA/ZC (requested or required by the jurisdiction to resolve such an inconsistency) violates the HAA.

Indeed, where a jurisdiction cannot lawfully disapprove a project for inconsistency with the general plan land use designation or zoning ordinance, it would be illogical if the jurisdiction could lawfully disapprove a project for failing to resolve that very inconsistency. In other words, the City's requirement for a GPA/ZC is essentially a requirement for consistency, and disapproving the Project for failure to resolve that inconsistency is effectively a disapproval on the grounds of inconsistency. The HAA prohibits such a disapproval.

[3] Gov. Code, § 65589.5, subd. (d)(5).

Determining Application Completeness under the Permit Streamlining Act

Even if the City were permitted to require a GPA/ZC under the HAA, the PSA[4] prohibits the City from using the absence of the GPA/ZC application as a reason to determine that a project application is incomplete, if the item is not explicitly required on the submittal requirement checklist. The City cannot determine that an application is incomplete on the basis that it does not include a request for a GPA/ZC unless the City's submittal requirement checklist requires the applicant to submit such a request. When issuing an incompleteness determination, the City must provide a list of items that were not complete and "[t]hat list shall be limited to those items actually required on the lead agency's submittal requirement checklist."[5]

Here, the City's submittal checklist did not include a requirement for a GPA/ZC at the time of submittal, and therefore, the City cannot deem these applications incomplete for failing to include a GPA/ZC.

Vesting under Government Code Section 65941.1

HCD would also like to inform the City of other obligations under Government Code section 65941.1 that protect the vested rights of a project.

If the City determines that the application for a development project is not complete pursuant to Government Code section 65943, the development proponent is required to submit the specific information needed to complete the application within 90 days of receiving the agency's written identification of the necessary information.[6] If the applicant does not submit the information within the 90-day period, the preliminary application expires.[7] However, this 90-day deadline resets after each incompleteness determination. A project with multiple incompleteness letters and responses may have multiple 90-day periods.

In the recent case of *Jha v. City of Los Angeles,* the Superior Court held that multiple 90-day submission periods are permitted under the PSA:

> Section 65941.1(d)(2) expressly refers to completeness pursuant to section 65943. In turn, section 65943(a) refers to "any subsequent review of the application determined to be incomplete", "any resubmittal of the application", and "a new 30-day period." The use of the words "any" and "new" in section 65943(a) indicate that multiple resubmissions of an application may be made. This statute supports [the developer's] reading that the submission and completeness evaluation for an application is an iterative process with no limit on the number of submissions.[8]

[4] Gov. Code, § 65920 et seq.
[5] Gov. Code, § 65943, subd. (a).
[6] Gov. Code, § 65941.1, subd. (d)(2).
[7] *Ibid.*
[8] *Jha v. City of Los Angeles,* Decision on Petition for Writ of Mandate (July 24, 2024, Los Angeles Superior Court Case No. 23STCP03499), p. 23.

The court went on to conclude that the PSA should not be interpreted in a vacuum, but rather in its relation to the HAA, and the Legislature has mandated that the HAA must be interpreted to "afford the fullest possible weight to the interest of, and the approval and provision of, housing."[9]

In addition, as explained in our June 26, 2024 letter, the preliminary application remains vested unless the number of residential units or square footage of construction proposed in the full application changes from the preliminary application by 20 percent or more (subject to certain conditions as listed in the statute).[10]

In HCD's review of the "Builder's Remedy" projects listed in the "Summary of Projects" section below, HCD found that the City improperly deemed preliminary applications void and of no effect due to changes that neither materially altered the project described in the full application from that contemplated in the preliminary application nor fell outside of the 20 percent provision of the PSA. These modifications include, but are not limited to, adding State Density Bonus Law (SDBL) concessions and waivers that did not change the unit count or square footage by more than 20 percent, requesting approval under the Subdivision Map Act because the project changed from apartments to condominiums, text contained in a submitted Zoning Change application that should not be considered in a completeness determination for a Builder's Remedy project anyway, and the addition of a commercial use that did not change the unit count or square footage by more than 20 percent. These modifications do not justify disturbing the vesting of the preliminary applications.

A full summary and explanation of the projects and HCD's understanding of the City's reasons for lost vesting under Government Code section 65941.1 are found below.

Summary of Projects

- **125 Linden Drive**
  - 165 units (33 affordable)
  - Preliminary application submitted: October 24, 2022
  - Application status: Appeal denied
  - Issues raised by City Incomplete Letter(s): GPA/ZC, 90-day expiration, preliminary application divests because of addition of commercial use
- **346 Maple Drive**
  - 65 units (13 affordable)
  - Preliminary application submitted: October 6, 2023
  - Application status: Second Incomplete Letter issued
  - Issues raised by City Incomplete Letter(s): GPA/ZC,[11] 90-day expiration[12]

[9] *Ibid*. (quoting *Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842, 855).
[10] Gov. Code, § 65941.1, subd. (c).
[11] Refers to the City's requirement for a GPA/ZC application as part of the submittal.
[12] Refers to the project losing vesting rights due to expiration of a single 90-day period.

- **401 Oakhurst Drive**
  - 25 units (5 affordable)
  - Preliminary application submitted: October 30, 2023
  - Application status: Second Incomplete Letter issued
  - Issues raised by City Incomplete Letter(s): GPA/ZC, 90-day expiration
- **232 South Tower Drive**
  - 55 units (11 affordable)
  - Preliminary application submitted: October 5, 2023
  - Application status: Second Incomplete Letter issued
  - Issues raised by City Incomplete Letter(s): GPA/ZC, 90-day expiration
- **9229 Wilshire Boulevard**
  - 116 units (24 affordable), Mixed Use project
  - Preliminary application submitted: December 13, 2023
  - Application status: Developer filed appeal to Beverly Hills City Council regarding second Incomplete Letter issued
  - Issues raised by City Incomplete Letter(s): GPA/ZC, preliminary application vesting lost because of additional SDBL waivers and concessions[13]
- **145 South Rodeo Drive**
  - 30 units (6 affordable), Mixed Use project
  - Preliminary application submitted: February 23, 2024
  - Application status: First Incomplete Letter issued
  - Issues raised by City Incomplete Letter(s): GPA/ZC, preliminary application vesting lost because of additional SDBL waivers and concessions and submission of request under Subdivision Map Act[14]
- **140 South Camden Avenue**
  - 27 units (6 affordable)
  - Preliminary application submitted: March 15, 2024
  - Application status: First Incomplete Letter issued
  - Issues raised by City Incomplete Letter(s): GPA/ZC, preliminary application vesting lost because of additional SDBL waivers and concessions and submission of request under Subdivision Map Act
- **214 Hamilton Drive**
  - 90 units (18 affordable)
  - Preliminary application submitted: October 30, 2023
  - Application status: Second Incomplete Letter received
  - Issues raised by City Incomplete Letter(s): GPA/ZC, 90-day expiration, compliance with City development standards[15]

[13] The City claims the project lost vesting due to adding concessions and waivers that were not included in the preliminary application.
[14] The City claims the project lost vesting due to adding a subdivision map request that was not included in the preliminary application.
[15] Compliance with development standards is not an application checklist item under Government Code section 65941.1, subdivision (a).

- **8844 Burton Way**
  - 200 units (40 affordable); Mixed-Use project
  - Preliminary application submitted: December 15, 2023
  - Application status: Second Incomplete Letter received
  - Issues raised by City Incomplete Letter(s): GPA/ZC, 90-day expiration, compliance with City development standards
- **211 Hamilton Drive**
  - 210 units (42 affordable)
  - Preliminary application submitted: October 31, 2023
  - Application status: Second Incomplete Letter received
  - Issues raised by City Incomplete Letter(s): Preliminary application vesting lost because the change in the theoretical maximum density of the parcel indicated in the ZC application exceeded 20 percent[16]

Conclusion

The City's failure to accept the applications for processing due to the lack of a GPA/ZC is in violation of the HAA and PSA. Furthermore, the City's submittal checklist did not include a requirement for a GPA/ZC at the time of submittal and the PSA prohibits the City from deeming an application incomplete for items not on the checklist. City staff must process all projects contained in this letter without further delay and without imposing a requirement for a GPA/ZC.

The City must also consider its obligations under Government Code section 65941.1 that retain each project's vested rights. First, the 90-day period to submit information to complete a full application reset after each incompleteness determination, and the preliminary application remains vested during these 90-day periods. Second, the modifications mentioned in the project summaries above do not void the vesting created by the preliminary application submittal.

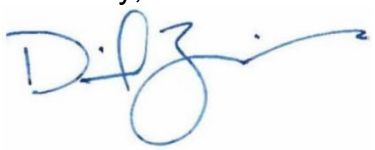
Under Government Code section 65585, HCD must notify a local government when that local government takes actions that violate the HAA and the PSA and may notify the California Office of the Attorney General.[17]

[16] The unit count of the project did not change between the preliminary application and full submittal. The theoretical maximum density proposed in a ZC application does not fall under the 20 percent change provision under Government Code section 65941.1, subdivision (c). Moreover, any information contained in a GPA or ZC application does not void vesting because those applications should not have been required for a Builder's Remedy project.
[17] Gov. Code, § 65585, subds. (i)(1), (j).

The City has until December 20, 2024, to provide a written response to this letter. HCD will consider any written response before taking further action authorized by Government Code section 65585, subdivision (j), including, but not limited to, referral to the California Office of the Attorney General.

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Bentley Regehr at bentley.regehr@hcd.ca.gov.

Sincerely,



David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

EXHIBIT D

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
651 Bannon Street, Suite 400
Sacramento, CA 95811
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

February 12, 2025

Sean Mullin, Planning Manager
Town of Los Gatos
Community Planning Department, Planning Division
110 E. Main Street
Los Gatos, CA 95030

Dear Sean Mullin:

RE: Town of Los Gatos – 980 University Avenue Project – Notice of Potential Violation

On August 30, 2024, the California Department of Housing and Community Development (HCD) issued a Letter of Technical Assistance (letter) (enclosed) to the Town of Los Gatos (Town) regarding compliance with the Permit Streamlining Act (PSA) (Gov. Code, §§ 65941.1, 65943) and the State Density Bonus Law (SDBL) (Gov. Code, § 65915). In the August 30, 2024 letter, HCD advised the Town that, under the PSA, the 90-day period for a developer to resubmit an application after an incompleteness determination resets with each incompleteness determination. However, on October 23, 2024, the Town informed an applicant for a development at 980 University Avenue (Project) that it interprets the PSA to provide a single 90-day period to achieve completeness and will treat applications not meeting this deadline as expired. As a result, and consistent with HCD's August 30, 2024 letter, HCD hereby notifies the Town that its failure to not reset the 90-day period after each incompleteness determination would be in potential violation of state housing law.

Background

HCD understands that the Project proposes to construct 68 townhouse units on the site, of which at least seven units (ten percent of the overall unit count) will be affordable to lower-income households. HCD also understands the applicant submitted a preliminary application for the Project pursuant to Government Code section 65941.1 on March 27, 2024, before resubmitting the preliminary application on April 5, 2024. HCD did not certify that the City's housing element was substantially compliant with state law until July 10, 2024. The applicant intends to make use of the provisions of the Housing Accountability Act (HAA) as amended by Assembly Bill 1893 (Chapter 268, Statutes of 2024) that went into effect on January 1, 2025.

HCD understands the applicant then filed a full development application for the Project on September 24, 2024, which was within the six-month statutory time period required by Government Code section 65941.1, subdivision (e), to maintain the vested rights conferred by the preliminary application. The Town determined the application to be incomplete on October 22, 2024, and informed the applicant the following day that it would continue to interpret the PSA to restrict applicants to a single 90-day period to achieve completeness. The Town further informed the applicant that it would treat applications not meeting this deadline as expired. Applicant would, therefore; have to achieve completeness by January 20, 2025. Although the Town and the applicant have mutually agreed to extend the time period, the Town maintains the position that there is only one 90-day review period.

90-Day Incompleteness Period under the Permit Streamlining Act (PSA)

Under the PSA, if an agency determines that the application for the development project is not complete pursuant to Government Code section 65943, the development proponent is required to submit the specific information needed to complete the application within 90 days of receiving the agency's written identification of the necessary information.[1] HCD reminds the Town; however, that the 90-day deadline resets after each incompleteness determination made by the Town. A project with multiple incompleteness letters and responses may have multiple 90-day periods.

Imposing a single 90-day resubmittal period limits the completeness determination process to only one or two resubmittals, making the process more difficult for diligent applicants to benefit from the protections of the PSA's preliminary application process. The Town's incorrect interpretation of the PSA, namely that it allows an applicant only a single 90-day resubmittal period, is inconsistent with the intent of the PSA. The Town's interpretation was also expressly rejected in a recent Los Angeles Superior Court ruling which concluded "that when an applicant receives an incompleteness determination pursuant to section 65943 – not just the first incompleteness determination – an applicant has 90 days to respond." (*Janet Jha v. City of Los Angeles, et al.* (Super. Ct. L.A. County, July 24, 2024, No. 23STCP03499), p. 24.)

Conclusion

Failure by the Town to allow for an additional 90-day resubmittal period after each of its incompleteness determinations would be a violation of the PSA. The Town must allow the applicant to resubmit the application within 90 days of any incompleteness determination. The Town should also uphold its PSA obligations under Government Code section 65941.1 by honoring the Project's vested rights.

[1] Gov. Code, § 65941.1, subd. (e)(2).

Under Government Code section 65585, HCD must notify a local government when that local government takes actions that violate the HAA and the PSA and may notify the California Office of the Attorney General of those violations.

The City has until February 26, 2025, to provide a written response to this letter. HCD will consider any written response before taking further action authorized by Government Code section 65585, subdivision (j), including, but not limited to, referral to the California Office of the Attorney General.

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact David Ying at david.ying@hcd.ca.gov.

Sincerely,



Shannan West
Housing Accountability Unit Chief

Enclosure: Town of Los Gatos – Saratoga Road Project – Letter of Technical Assistance (August 30, 2024)

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
651 Bannon Street, Ste. 400
Sacramento, CA 95811
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

August 30, 2024

Jennifer Armer, Planning Manager
Town of Los Gatos
110 E. Main Street
Los Gatos, CA 95030

Dear Jennifer Armer:

RE: Town of Los Gatos – Saratoga Road Project – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) received a request for technical assistance from Arielle Harris of Cox Castle (CC) on behalf of SummerHill Homes (SHH) on April 17, 2024 regarding the application of the Permit Streamlining Act (PSA) (Gov. Code, §§ 65941.1, 65943) and the State Density Bonus Law (SDBL) (Gov. Code, § 65915). The PSA governs the timing of development applications, while the SDBL allows certain housing developments to obtain incentives/concessions in development standards by providing affordable housing, among other provisions. The purpose of this letter is to provide technical assistance for the benefit of the Town of Los Gatos (Town), CC, and SHH regarding eligibility under the law.

Project Description and Background

HCD understands that the proposed project involves the construction of 155 units, of which 18 percent are affordable (28 units) to lower-income households, on an 8.82-acre site. On June 30, 2023, SHH submitted a preliminary application to vest rights for the project under the HAA, followed by a full application on December 15, 2023. The Town issued an invoice for the full application on December 19, which SHH paid the following day. CC has posed the following questions:

Question #1: When is an "application for a development project" deemed "submitted" under Government Code section 65941.1, subdivision (d)(1), where the local agency intake process does not offer a means of concurrent fee payment?

HCD understands that when development project applications are submitted to the Town, a Town staff person first checks to verify the appropriate type of permit being sought, then generates the invoice accordingly. Because this process requires action on the part of the staff person, it is not procedurally possible for an applicant to submit an application and associated fee at the same time. While in most instances this practice creates an insignificant delay, it is a matter of great concern to an applicant that is

attempting to submit a full application with the 180-day submittal window to maintain vesting under a Preliminary Application.[1] For the purposes of meeting PSA review deadlines for the full application[2], the Town considers the 30-day application completeness clock to have started when the invoice is paid, not when the application is submitted.

While it is reasonable for the Town to start its review of the project – and with it the application completeness clock – after its fees are paid, the inconsistent lag time between application submittal and invoice payment is concerning. The Legislature found and declared with the passing of the PSA that "there is a statewide need to ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects".[3] The intent of the PSA is to ensure that applicants are provided clear instructions and that local jurisdictions are consistently processing projects in accordance with the specific timelines outlined in the statute to streamline development. Considering the current housing crisis in California, delays in permitting processes and approval times add constraints to the cost of residential construction. Therefore, compliance with the PSA is even more pertinent today to meet the urgent housing needs across California.

As mentioned above, it is critically important for an applicant to be able to submit a full application within the 180-day submittal window to maintain vesting under a Preliminary Application. The Town should explore modifying its intake procedures for development applications of this type to provide an option for the applicant to pay the fee associated with the type of application being sought. If the applicant has misidentified the type of application, the Town can subsequently charge or refund the applicant the difference between the fees. Alternatively, the Town might consider amending its municipal code or other adopted procedures to address the circumstance encountered by the subject project (i.e., establish that procedural delays for which the Town is responsible are not a basis to lose Preliminary Application vesting status).

<u>Question #2</u>: Does the 90-day deadline provided in Government Code section 65941.1, subdivision (d)(2), of the Permit Streamlining Act require the housing development project applicant to achieve "application completeness" within 90 days of the agency's first incompleteness determination to avoid expiration of the preliminary application, or does it allow for multiple rounds of completeness review and resubmittals as long as the applicant responds within 90 days of each incompleteness determination, consistent with Government Code section 65943?

The 90-day deadline restarts with each subsequent resubmittal by the applicant. Subdivision (d) of Government Code section 65941.1 references section 65943, which provides for an iterative process in which deadlines reset upon resubmittal. Because of that reference, it is reasonable to conclude that the subdivision envisions a similar back-

[1] Gov. Code, § 65941.1, subd. (d)(1).
[2] Gov. Code, § 65943, subd. (a).
[3] Gov. Code, § 65921.

and-forth process. Nothing in the subdivision explicitly precludes this. Furthermore, requiring a single 90-day review period would limit the completeness determination process to only one or two resubmittals, making the process more difficult for diligent applicants seeking to use the protections of the preliminary application system. An interpretation that there is a single finite 90-day review period is inconsistent with both the intent of the PSA and the Legislature when it introduced this system in Senate Bill 330 (Chapter 654, Statutes of 2019). This interpretation is also inconsistent with a recent Los Angeles Superior Court ruling which concluded "that when an applicant receives **an** incompleteness determination pursuant to section 65943 – not just the **first** incompleteness determination – an applicant has 90 days to respond." (*Janet Jha v. City of Los Angeles, et al.,* (Super. Ct. L.A. County, 2024, No. 23STCP03499).)

Question #3: Can a housing development project applicant and a city or county mutually agree to an extension of the 90-day time limit provided in Government Code section 65941.1, subdivision (d)(2)?

Yes. As mentioned above, subdivision (d)(1) links its process to that of section 65943, which provides in its subdivision (d) that the timelines for submittal do not preclude "an applicant and a public agency from mutually agreeing to an extension of any time limit provided by this section." It logically follows that if a project is in a situation where section 65943 is applicable because the application is not complete, then the local government and the applicant should be able to extend the submittal timelines by mutual agreement. HCD encourages local governments and applicants to work together to successfully realize residential development projects.

Conclusion

In conclusion, while applications under Government Code section 65941.1, subdivision (d)(1), are deemed "submitted" upon submission of required materials and payment of applicable fees, cities should make it possible for applicants to submit all materials and payments concurrently to maximize efficiency. The 90-day review period for completeness determination under the PSA is not finite and, rather, resets for subsequent resubmittals, and when mutually agreement upon by both applicants and local governments, the 90-day time limit may be extended. HCD remains committed to supporting the Town of Los Gatos in facilitating housing at all income levels and hopes the Town finds this clarification helpful. If you have questions or need additional information, please contact David Ying at David.Ying@hcd.ca.gov.

Sincerely,

Shannan West
Housing Accountability Unit Chief

EXHIBIT E

Electronically Received 09/16/2024 05:35 PM

PATTERSON & O'NEILL, PC
235 MONTGOMERY STREET, SUITE 950
SAN FRANCISCO, CALIFORNIA 94104

RYAN J. PATTERSON (SBN 277971)
BRIAN O'NEILL (SBN 298108)
PATTERSON & O'NEILL, PC
235 Montgomery Street, Suite 950
San Francisco, CA 94104
Tel: (415) 907-9110
Fax: (415) 907-7704
ryan@pattersononeill.com
brian@pattersononeill.com

Attorneys for Petitioner and Plaintiff
JANET JHA

FILED
Superior Court of California
County of Los Angeles
09/17/2024
David W. Slayton, Executive Officer / Clerk of Court
By: J. De Luna Deputy

SUPERIOR COURT – STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – UNLIMITED CIVIL JURISDICTION

JANET JHA,

Petitioner and Plaintiff,

vs.

CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES; and DOES 1-25,

Respondents and Defendants,

Case No. 23STCP03499

~~[PROPOSED]~~ **JUDGMENT GRANTING PETITION FOR WRIT OF MANDATE**

Dept: 85
Judge: Hon. James Chalfant

PATTERSON & O'NEILL, PC
235 MONTGOMERY STREET, SUITE 950
SAN FRANCISCO, CALIFORNIA 94104

WHEREAS, on September 21, 2023, Petitioner Janet Jha filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Relief (the "Petition") against Respondents City of Los Angeles and the City Council of the City of Los Angeles ("Respondents") alleging causes of action under the Permit Streamlining Act ("PSA"), Density Bonus Law ("DBL"), and the Housing Accountability Act ("HAA") arising out of the disapproval by Respondents of Petitioner Jha's proposed 40-unit housing development project at 13916 W. Polk Street (the "Project");

WHEREAS, the Petition came for trial on July 18, 2024, in Department 85 of this Court. Petitioner Jha appeared through her counsel, Ryan J. Patterson and Brian O'Neill of Patterson & O'Neill, PC, and Respondents appeared through their counsel, Donna Wong and Kaiulani Lie of the Office of the Los Angeles City Attorney;

WHEREAS, after taking the matter under submission at the conclusion of the trial, the Court adopted a ruling on July 24, 2024, regarding the Petition (the "Court's Ruling");

WHEREAS, the Court, having read the submissions of the parties to this action, including the Petition, briefs, and matters judicially noticed, and having read and considered the administrative record and the arguments of counsel;

THE COURT DOES HEREBY ORDER, ADJUDGE, AND DECREE, as follows:

1. Judgment is entered in favor of Petitioner for the reasons set forth in the Court's Ruling, attached hereto as **Exhibit 1**. However, the complaint for declaratory relief is denied.

2. A writ of mandate shall issue as follows:

   a. Respondents must set aside, vacate, and annul the City Council's June 27, 2023 action (Council File 23-0525), which the Court found was a disapproval of the Project; and

   b. Respondents must set aside, vacate, and annul the Planning Department's May 16, 2023 Loss of Vesting Rights Letter, and Respondents must recognize that Petitioner Jha's preliminary application, dated June 23, 2022, remains valid and in effect pursuant to the Court's Ruling; and

   c. The Project does not require any general plan amendments or rezoning

applications, and the Project's application as of June 27, 2023 should be processed consistent with the Court's Ruling; and

d. The Project is eligible for regulatory incentives, concessions, and waivers under State Density Bonus Law (Gov. Code § 65915) in compliance with this Court's Ruling; and

e. The Project is eligible for the Builder's Remedy (Gov. Code § 65589.5(d)(5)) in compliance with this Court's Ruling; and

f. Respondents must review and process the Project pursuant to the PSA, the HAA, and the DBL as interpreted in the Court's ruling within 60 days after service of the writ.

3. This matter shall be remanded for further proceedings in compliance with the writ of mandate.

4. Similarly situated parties shall take nothing by this action.

5. Nothing in this writ shall limit or control any discretion legally vested in Respondents, including but not limited to, the request, receipt, and consideration of further information related to the California Environmental Quality Act or other applicable laws.

6. As the prevailing party, Petitioner shall recover her costs of suit from Respondents pursuant to applicable law. Petitioner may bring a motion for attorney's fees pursuant to applicable law.

7. The Court hereby retains jurisdiction in this action until there has been full compliance with the writ.

IT IS SO ORDERED.

Dated: 09/17/2024

James C. Chalfant / Judge

Hon. James C. Chalfant
Judge of the Superior Court

PATTERSON & O'NEILL, PC
235 MONTGOMERY STREET, SUITE 950
SAN FRANCISCO, CALIFORNIA 94104

Exhibit A

FILED
Superior Court of California
County of Los Angeles
JUL 24 2024
David W. Slayton, Executive Officer/Clerk of Court
By: J. De Luna, Deputy

Janet Jha v. City of Los Angeles et al., 23STCP03499

Decision on petition for writ of mandate: granted with remand

Petitioner Janet Jha ("Jha") seeks a writ of mandate compelling the Respondents City of Los Angeles and its City Council (collectively, "City") to review and process her development application pursuant to the Permit Streamlining Act ("PSA"), the Housing Accountability Act ("HAA"), and the Density Bonus Law ("DBL").

The court has read and considered the moving papers, oppositions, and replies, heard argument on July 18, 2024, and renders the following decision.

A. Statement of the Case

1. The Petition

Petitioner Jha filed the Petition against the City on September 21, 2023, alleging mandamus based on violations of the PSA, the HAA, and the DBL, and for declaratory relief. The Petition alleges in pertinent part as follows.

a. Housing Element Law

When the Legislature enacted the Housing Element Law, it declared that local governments need to designate and maintain a supply of land and adequate sites for the development of housing sufficient to meet the locality's housing need for all income levels. Pet., ¶21.

The HAA provides an avenue for developers to provide housing for very low, low-, or moderate-income households[1] when a local government fails to adopt a housing element in substantial compliance with the Housing Element Law. Pet., ¶22. The local government shall approve housing, and not condition that approval in a matter rendering that housing project infeasible, unless the local government can make certain written findings based upon a preponderance of the evidence. Pet., ¶23.

A local jurisdiction cannot determine whether its adopted element is in substantial compliance with the Housing Element Law. Pet., ¶25. It must submit a draft housing element to the State Department of Housing and Community Development ("HCD"), which must issue findings before the local jurisdiction adopts the housing element. Pet., ¶25. If HCD finds the draft element is not substantially compliant, the local jurisdiction must either revise the draft to address any issues or adopt the draft housing element with written findings explaining why it substantially complies with the Housing Element Law. Pet., ¶25. It must then submit the adopted housing element to HCD for it to find whether it substantially complies with the Housing Element Law. Pet., ¶25. In a March 16, 2023 memorandum, HCD advised that a local jurisdiction's housing element is only in substantial compliance with the Housing Element Law on the date HCD issues a letter finding to that effect. Pet., ¶26.

The Housing Element Law requires local governments to update their housing element in eight-year cycles. Pet., ¶27. The City had not adopted a substantially compliant housing element by the time the current cycle began on October 15, 2021. Pet., ¶27. Although it drafted a housing element on November 24, 2021, HCD found on February 22, 2022 that it was not substantially

[1] For convenience, very low, low-, and moderate-income households are sometimes referred to herein as "low-cost housing".

compliant. Pet., ¶28. The City revised and resubmitted the draft housing element on April 28, 2022, and HCD found it substantially compliant on May 11, 2022. Pet., ¶28. The City adopted the housing element on June 14, 2022, and HCD certified its compliance with the Housing Element Law on June 29, 2022. Pet., ¶28.

Under Government Code[1] sections 65589.5(o)(1) and 65941.1(a), a housing development applicant who submits a complete preliminary application is vested with the zoning and general plan standards in effect at the time of submission. Pet., ¶30. This includes entitlement to the HAA's builder's remedy if submitted when the jurisdiction does not have a compliant housing element, even if it adopts one during the entitlement process. Pet., ¶31. HCD confirmed as much in a June 2023 Notice of Violation issued to the City of La Cañada Flintridge and in an October 2023 Letter of Technical Assistance to the City of Santa Monica. Pet., ¶32, Ex. A.

b. The Project

On June 23, 2022, Jha submitted a preliminary application for a 40-unit project with 20% set aside as affordable to lower-income households at 13916 W. Polk Street (the "Project"). Pet., ¶53. Because the City found the preliminary application for the Project was complete on June 24, 2022, development rights in effect on that date vested for the Project. Pet., ¶54.

Jha proposed a housing project that reserved 20% of the units for low-cost housing while the City was out of compliance with the Housing Element Law. Pet., ¶55. Under the builder's remedy, the City was barred from disapproving the Project unless it made one of the written findings required under section 65589.5(d). Pet., ¶55.

On August 11, 2022, Jha filed an Affordable Housing Referral Form with the Affordable Housing Services Section of the City's Planning Department ("Planning"). Pet., ¶57. The City signed this form on December 12, 2023. Pet., ¶64. After a meeting with City staff on December 9, 2022, Jha was allowed to submit a PSA development application. Pet., ¶66. Jha submitted the application and paid the fees on December 21, 2022. Pet., ¶66.

On January 26, 2023, the City sent Jha a 39-page Project Review letter. Pet., ¶67. The Project Review asserted the application was incomplete and did not comply with objective zoning standards. Pet., ¶67. The Project Review further said that, although the Project was eligible for the builder's remedy, HAA does not specify the entitlement process that a local government can require. Pet., ¶68. Planning's position was that a general plan amendment ("GPA") and rezoning were the proper entitlement path. Pet., ¶68. This is not an entitlement at all, but rather a legislative action. Pet., ¶68.

Section 65589.5(d) does provide an entitlement path. Pet., ¶71. If HCD does not find a local jurisdiction's housing element substantially compliant by the jurisdiction's statutory deadline, the local jurisdiction may not use section 65589.5(d)(5) to deny a qualifying affordable housing project. Pet., ¶72. HCD's Notice of Violation to La Cañada Flintridge explained that a jurisdiction shall not disapprove a housing development project for low-cost housing, or condition approval in a manner that renders the housing development project infeasible for development for such households, without one of five written findings. Pet., ¶71, Ex. A.

On April 5, 2023, Jha resubmitted revised application materials in response to the Project Review. Pet., ¶81. The City sent a second Project Review asserting the application was incomplete for failure to comply with City code standards. Pet., ¶¶ 82-83. The letter emphasized that the City would not process the development application unless Jha sought legislative rezoning that she did not want. Pet., ¶85.

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Jha appealed the City's incompleteness determination of her application. Pet., ¶86. The City Council's Planning and Land Use Management Committee ("PLUM") recommended denial of the appeal, and the City Council denied it on June 27, 2023. Pet., ¶¶ 92-93.

On May 16, 2023, the City wrote Jha a letter asserting that the preliminary application's submittal had expired and that Jha's vested rights therefore had terminated. Pet., ¶95. Section 65941.1(d)(2) states that if a public agency determines that the application for the development project is incomplete, the development proponent shall submit the specific information necessary to complete the application within 90 days of receiving the agency's written identification of the necessary information. Pet., ¶99. This means that the 90-day period resets with every new completeness determination. Pet., ¶99. The City wrongly interpreted the statute to mean that an applicant has only a single 90-day clock after the first written incompleteness determination. Pet., ¶100. Planning argued that, even if Jha were entitled to approval pursuant to the builder's remedy, it no longer applied because Jha's vesting rights had expired and the City's Housing Element was now in substantial compliance with the Housing Element Law. Pet., ¶104.

After Jha received the City's May 16 letter, she asked HCD to clarify the preliminary application expiration provision. Pet., ¶103. HCD confirmed that the application remains valid after a second incompleteness determination so long as the applicant resubmits within 90 days of that determination. Pet., ¶103.

c. Causes of Action

The first cause of action seeks mandamus for violation of the PSA. The PSA requires public agencies to compile lists of the information required from an applicant for a development project. Pet., ¶109. It also has strict timelines when an agency must determine whether an application is complete. Pet., ¶109. Agencies can only judge whether an application is complete based on the items in the checklist. Pet., ¶109.

The City's Project Review letters violated the PSA because they treated project consistency with a zoning ordinance or general plan as an item necessary for an application to be complete. Pet., ¶110. The City refuses to process an application when it makes a substantive decision regarding project consistency. Pet., ¶110. Section 65931 defines a development "project" as an activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. Pet., ¶111. This does not include rezonings or GPAs. Pet., ¶111. Courts have held that applicants cannot use the PSA to compel legislative changes to a zoning ordinance or a general plan. Pet., ¶111. Conversely, the City cannot demand that an applicant seek such changes through a PSA completeness determination. Pet., ¶111. The City refused to accept Jha's development application based on purported non-compliance with substantive zoning standards and criteria, not because of incomplete information. Pet., ¶114.

The second cause of action seeks mandamus for violation of the HAA. The City unlawfully disapproved the Project and failed to proceed in the manner required by law. Pet., ¶117. The City disapproved the low-cost housing Project without making one of the findings under section 65589.5(d)(1)-(5), and also did not support such findings by a preponderance of evidence in the record. Pet., ¶121. Although Jha submitted the preliminary application before the City's Housing Element was deemed substantially compliant with the Housing Element Law, the City attempted to deny her the builder's remedy. Pet., ¶122.

The third cause of action seeks mandamus for violation of the DBL. The Project reserved 20% of the units for low-cost housing. Pet., ¶128. This entitled the Project to two incentives or

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concessions and a waiver or reduction of any development standards that will physically preclude the Project at the proposed density. Pet., ¶128. The City denied Jha those incentives without making the public health and safety findings required under the HAA. Pet., ¶129.

The fourth cause of action seeks declaratory relief. The City has avoided its obligations under state law through its refusal to process housing development projects that qualify under the builder's remedy. Pet., ¶132.

d. Prayer for Relief

Jha seeks a writ of mandate compelling the City to review and process development applications pursuant to the PSA and SB 330. Pet. Prayer, ¶¶ 1-2. Jha also seeks a writ of mandate (1) voiding the June 27, 2023 denial of the PSA appeal based on violation of section 655589.5(d), (2) compelling Planning to accept and process the Project application, and (3) compelling the City and Planning to take all steps necessary to process the application, approve the Project, and issue all related approvals within 60 days. Pet. Prayer, ¶3. Jha seeks a declaration concerning the City's violations. Pet. Prayer, ¶7. Jha also seeks attorneys' fees, costs, and fines under section 65589.5. Pet. Prayer, ¶¶ 8-10.

2. Course of Proceedings

On September 25, 2023, Jha served the City with the Petition and Summons.

On November 6, 2023, the parties stipulated to extend the deadline for all responsive pleading to February 1, 2024.

On March 5, 2024, the Court overruled the City's demurrer and denied its motion to strike.

On March 22, 2024, the City filed its Answer.

B. Governing Law

1. The Housing Element Law

The Legislature finds that the provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government. §65580(c). The Housing Element Law details the substantive requirements that each housing element must include. §65583(a)-(c).

At least 90 days prior to adoption of a revision of its housing element, or 60 days prior to the adoption of a subsequent amendment thereto, the local jurisdiction agency shall submit a draft element revision or draft amendment to HCD. §65585(b)(1). In the preparation of review findings, HCD may consult with any public agency, group, or person and shall receive and consider any written comments from such entities regarding the draft or adopted element or amendment under review. §65585(c).

HCD shall review the draft and report its written findings to the planning agency within 90 days of its receipt of the first draft submittal for each housing element revision, or 60 days of its receipt of a subsequent draft amendment or an adopted revision or adopted amendment to an element. §65585(b)(3). In its written findings, HCD shall determine whether the draft element or draft amendment substantially complies with the Housing Element Law. §65585(d).

Prior to the adoption of its draft element or draft amendment, the legislative body shall consider the findings made by HCD if they become available within the time limits set in section 65585. §65585(e).

If HCD finds that the draft element or draft amendment does not substantially comply with this article, the legislative body shall either change the draft element or amendment to so comply or adopt the draft element or draft amendment without changes. §65585(f). If the legislative body

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adopts without changes, it shall include in its resolution of adoption written findings that explain why the legislative body believes the draft element or draft amendment substantially complies with the Housing Element Law despite HCD's findings. §65585(f)(2).

The legislative body shall submit a copy to HCD promptly after adopting the element. §65585(g). HCD shall then review it and report its findings to the planning agency within 60 days of submission. §65585(h).

"Despite the mandatory nature of many of the Housing Element Law's provisions compliance has been mixed statewide." Martinez v. City of Clovis, (2023) 90 Cal.App.5th 193, 226. The Legislature has amended the Housing Element Law multiple times since 2017, and a 2018 amendment, AB 72, increased HCD's oversight powers. Id. AB 72 added HCD's ability to review any local government action that is inconsistent with an adopted housing element and to revoke its findings of substantial compliance until the local jurisdiction complies. Id. at 226, n. 9; §65585(i), (j).

The Housing Element Law provides that a local government that fails to adopt a housing element that has been found to be in substantial compliance within 120 days of the statutory deadline is required to complete mandatory rezoning within one year instead of the permitted three years. §65583.2(c). If the one-year requirement applies, the local government's housing element cannot be found to be in substantial compliance until that city has completed the rezoning. §65588(e)(4)(C)(iii).

A local government that fails to substantially comply with the Housing Element Law is subject to enforcement action by the Attorney General. §65585(l). A failure to adopt a housing element found by HCD to be in substantial compliance makes the local government ineligible for certain program funding. §65589.11. A local government that is compliant with Housing Element Law requirements is awarded preference for certain state funding programs. §65589.9. A "compliant housing element" is defined for purposes of this preference as "an adopted housing element that has been found to be in substantial compliance with the requirements of this article by [HCD] pursuant to Section 65585." §65589.9(f)(2).

2. The Housing Accountability Act

a. Legislative Findings and Intent

The Legislature recognizes the lack of housing as a critical problem that threatens the economic, environmental, and social quality of life in California. §65589.5(a)(1)(A). It adopted the HAA in 1982 to "significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters." §65589.5(a)(2)(K). To date, the goal remains unfulfilled. Id.

The HAA reflects the Legislature's findings that "the availability of housing is of vital statewide importance," and that providing the necessary housing supply "requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels." §65580(a)-(b).

Effective January 1, 2018, the Legislature significantly amended the HAA to strengthen its provisions, expand its applicability, and increase local governments' liability for violations. The HAA found that California is in a housing crisis that is "partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing". §65589.5(a)(1)(B).

07/25/2024

The consequences of those actions include discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration. §65589.5(a)(1)(C).

Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects. §65589.5(a)(1)(D). The state's homeownership rate was at its lowest level since the 1940s and ranks 49 out of the 50 states. §65589.5(a)(2)(E). The lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians. §65589.5(a)(2)(F).

The HAA should be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." §65589.5(a)(2)(L).

It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety under either section 65589.5(d)(2) and 65589.5(j)(1) arise infrequently. §65589.5(a)(3).

It is the policy of the state that a local government not reject or make infeasible housing development projects that contribute to meeting the need determined pursuant to the HAA without a thorough analysis of the economic, social, and environmental effects of the action and without complying with section 65589.5(d). §65589.5(b).

b. Project Approval Based on Vested Rights

Section 65589.5 is referred to colloquially as the "anti-NIMBY law." Schellinger Brothers v. City of Sebastopol, (2009) 19 Cal.App.4th 1245 1253, n. 9. Subject to certain exceptions, a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application which included all the information required by section 65941.1(a) was submitted. §65589.5(o)(1).

A housing development project "shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity." §65589.5(f)(4).

Section 65589.5(j)(1) provides:

> "When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:
>
> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct,

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and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (emphasis added).

Section 65589.5(j) applies to market rate housing as well as affordable housing. Honchariw v. County of Steinhaus, (2011) 200 Cal.App.4th 1066, 1070. The HAA applies to all residential housing developments and takes away the agency's ability to deny residential projects based on subjective development policies. Id. at 1072-77.

"Disapprove the housing development project" includes any instance in which a local agency "votes on a proposed housing development project application and it is disapproved", "fails to comply with the timer periods specified in Section 65950" or fails to meet the time limits specified in Section 65913.3. §65589.5(h)(6).

If the court finds that an agency acted in bad faith in disapproving a project in violation of the HAA, the appropriate remedy is an "order or judgment directing the local agency to approve the housing development project." §65589.5(k)(1)(A)(ii). "Bad faith" "includes, but is not limited to, an action that is frivolous or otherwise entirely without merit." §65589.5(l).

The local jurisdiction bears the burden of proving that its decision conforms to the conditions specified in section 65589.5. §65589.6.

c. The Builder's Remedy

A local agency shall not disapprove a housing development project for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low- or moderate-income households, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, for one of five conclusions:

(1) the local jurisdiction has adopted a housing element in substantial compliance with the Housing Element Law and has met or exceeded its share of the regional housing need allocation pursuant to section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by section 65008. §65589.5(d)(1).

(2) the proposed housing development would have a specific, adverse impact on the public health or safety that cannot be feasibly mitigated without rendering the project unaffordable or infeasible. A specific, adverse impact on public health or safety does not include inconsistency with the zoning ordinance or general plan land use designation. §65589.5(d)(2)(A);

(3) denial of the project is required to comply with specific state or federal law, and there is no feasible method to comply without rendering the project unaffordable or infeasible;

(4) the proposed land for the project is zoned for, and surrounded on at least two sides by, agriculture or resource preservation purposes;

(5) the housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the

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jurisdiction has adopted a revised housing element in accordance with section 65588 that is in substantial compliance with the Housing Element Law. §§ 65589.5(d)(1)-(5).

Section 65589.5(d)(5) means that, when the local government does not have a housing element in substantial compliance with the Housing Element Law, it cannot disapprove an applicable project based on inconsistencies with the jurisdiction's zoning ordinance or general plan land use designation. This is colloquially referred to as the "builder's remedy."

A "housing development project" includes any mixed-use development consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use. §65589.5(h)(2). "Housing for very low, low-, or moderate-income households" includes buildings where 20% of the units are sold or rented to lower income households. §65589.5(h)(3).

"Deemed complete" means the applicant has submitted a preliminary application pursuant to section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a complete application pursuant to section 65943. §65589.5(h)(5).

"Disapproval of a housing development project" includes whenever a local agency votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit. §65589.5(h)(6)(A).

A "specific, adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." §65589.5(j)(1)(A). The Legislature's intent is that conditions that would have a specific, adverse impact upon the public health and safety should arise infrequently. §65589.5(a)(3).

d. Consistency with Other Laws

New housing developments constructed within the coastal zone shall, where feasible, provide housing units for persons and families of low or moderate income. §65590(d). Where it is not feasible to provide these housing units in a proposed new housing development, the local government shall require the developer to provide such housing, if feasible to do so, at another location within the same city or county, either within the coastal zone or within three miles thereof. Id.

Nothing in the HAA relieves the local agency from complying with, *inter alia*, the Coastal Act or the California Environmental Quality Act ("CEQA"). §65589.5(e). Nothing in the HAA, aside from section 65589.5(o), shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need. §65589.5(f)(1). However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development. Id.

3. The Permit Streamlining Act

The PSA (§§ 65920-964) states that there is a statewide need to ensure a clear understanding of the specific requirements which must be met for the approval of development projects and to expedite decisions on such projects. §65921. The PSA requires that each agency maintain lists that "specify in detail the information that will be required from any applicant." §65940.

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Once a development project application has been submitted, the agency must make a written determination whether the application is complete within 30 calendar days, or else "the application together with the submitted materials shall be deemed complete." §65943(a). Agencies have "30 days, and 30 days only" to determine that an application is incomplete. Orsi v. City Council of Salinas, (1990) 219 Cal. App. 3d 1576, 1584.

When the agency makes an incompleteness determination, it must provide "an exhaustive list of items that were not complete" which is limited to those items required on the agency's submittal requirement checklist. §65943(a). Upon any resubmittal, a new 30-day review period begins during which the agency shall determine completeness, but the agency "shall not request the applicant to provide any new information that was not stated in the initial list of items that were not complete." §65943(a).

If the application is determined incomplete, the agency must provide a right to appeal that determination. §65943(c). There shall be a final written determination on the appeal no later than 60 calendar days after receipt of the written appeal. Id. If a final written determination is not made within that 60-day period, "the application with the submitted materials shall be deemed complete." Id.

Deemed complete does not necessarily mean deemed approved. *See* §65950 (agency shall approve or disapprove project within specified time limits). The PSA does not create an exception to the well-established law requiring hierarchical consistency of land use permits, zoning ordinances, and general plans. Land Waste Management v. Contra Costa County Board of Supervisors, ("Land Waste") (1990) 222 Cal.App.3d 950, 960. Hence, the PSA does not require that a permit application be deemed approved if not acted on within the statutory period when the permit application would require a legislative change in the applicable zoning ordinance, general plan, or other controlling land use legislation. Id. at 961.

The City's actions under the PSA are reviewed as traditional mandate. §65943(c).

4. The Density Bonus Law

The DBL (§§ 65915-18) is intended to allow a developer to include more total units in a project that would otherwise be allowed by the local zoning ordinance in exchange for low-cost rental units, and to "cover at least some of the financing gap of affordable housing with regulatory incentives, rather than additional public subsidy." §65915(u).

A local government shall grant one density bonus as specified in subdivision (f), incentives or concessions as specified in subdivision (d), waivers or reductions of development standards as described in subdivision (e), and parking ratios as described in subdivision (p), if an applicant agrees to construct a housing development that will contain stipulated percentages of low income and very low-income units or target population units (*e.g.*, disabled veterans). §65915(b).

A "housing development" means a development project for five or more residential units, including mixed use developments. §65915(i).

A "density bonus" means a "density increase over the otherwise maximum allowable gross residential density," but the developer also may elect "a lesser percentage of density increase, including, but not limited to, no increase in density." §65915(f). The amount of the density bonus varies according to the amount by which the percentage of low and very low-income units exceed the percentages. §65915(f).

Density bonuses shall be granted based on the "maximum allowable density" for the project site, defined as "the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, the maximum allowable density for the specific

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zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail." §65915(o)(5).

An applicant for a density bonus pursuant to subdivision (b) may submit a proposal for specific incentives or concessions. §65915(d)(1). The local government shall grant the requested incentive or concession unless (1) it makes a written finding, based on substantial evidence, that the project will not result in "identifiable and actual cost reductions" of affordable housing costs or for rents of the targeted units as specified in subdivision (c), (2) the concession or incentive would have a specific adverse impact upon public health and safety, the physical environment, or real property listed in the California Register of Historical Resources and for which there is no feasible method of mitigation without rendering the development unaffordable to low- and moderate-income households, or (3) the concession or incentive would violate state or federal law. §65915(d)(1)(A)-(C). §65915(d).

The applicant may also apply for and receive development waivers or reductions that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions/incentives permitted. §65915(e)(1). The local agency may not apply a development standard that will have this effect. §65915(e)(1). However, the local government is not required to waive or reduce development standards if there would be an adverse impact on health, safety, or the physical environment, and for which there is no feasible method of mitigation to avoid the impact. Id. Nor is the local government required to waive or reduce development standards that would have an adverse effect on real property listed in the California Register of Historical Resources, or to grant any waiver or reduction that would violate state or federal law. §65915(e)(1).

C. Standard of Review

1. Administrative Mandamus

Actions to enforce the HAA are brought as administrative mandamus. §65589.5(m); Honchariw v. County of Stanislaus, (2011) 200 Cal.App.4th 1066, 1072. *See* Pet. Op. Br. at 9.

The parties' principal debate for the HAA mandamus claim is whether (a) the City bears the burden of proof by a preponderance of the evidence under section 65589.6, (b) the HAA's "reasonable person" standard applies, pursuant to which a court must determine whether "substantial evidence…would allow a reasonable person to conclude that the housing development project" complies with applicable standards (§655589.5(f)(4)), and (c) any uncertainties should be resolved in favor of housing projects because the HAA must "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." §65589.5(a)(2)(L).

The City argues that these standards do not apply because the reasonable person standard only applies to deciding whether the Project complies with a local "applicable plan, program, policy, ordinance, [or] standard" for a final merits decision and the City has not made a merits decision disapproving the Project. §65589.5(f)(4), (j). The reasonable person standard also does not apply to determine whether density bonus or general plan amendment ("GPA") application procedures are applicable because they are "questions of statutory interpretation that [the court] will review independently." Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo, ("Cal Renters") (2021) 68 Cal.App.5th 820, 839. Opp. at 13.

Jha correctly replies (Reply at 5) that the HAA's reasonable person standard applies to any action to enforce the HAA, including the determination whether a housing development project

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"is consistent, compliant, or in conformity" with applicable standards. §655589.5(f)(4). The HAA also broadly defines "disapproval" as any instance in which an agency "[v]otes on a proposed housing development project application and the application is disapproved." §65589.5(h)(6). Nothing limits the HAA solely to a final merits decision. Additionally, the court finds that the City's actions constitute a disapproval. *See post.*

2. Traditional Mandamus

Actions under the PSA are governed by traditional mandamus. §65943(c). Neither party addresses what form of mandamus applies to enforcement of the DBL, but in this context it is governed by traditional mandamus.

A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. A traditional writ of mandate is the method of compelling the performance of a legal, ministerial duty required by statute. *See* Rodriguez v. Solis, (1991) 1 Cal.App.4th 495, 501-02. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

In the absence of a ministerial duty, traditional mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. An agency decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees' Retirement System, (2010) 187 Cal.App.4th 98, 106. In applying this deferential test, a court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Western States Petroleum Assn v. Superior Court, (1995) 9 Cal.4th 559, 577. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angeles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. A writ will lie where the agency's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579. No administrative record is required for traditional mandamus.

3. Overlap of HAA, PSA, and DBL

Jha argues that the issues under the PSA and DBL cannot be viewed in isolation, separate from the HAA's more favorable standards of review. Rather, these overlapping laws must be construed together to carry out the Legislature's directive that the law be interpreted to favor housing. Reply at 5. This is true, but it does not change the standard of review for enforcement of the PSA and DBL.

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Jha further argues that the question "whether an application is complete for purposes of the PSA is also relevant under the HAA, which incorporates by reference the PSA's definition of a complete application." Lafayette v. City of Lafayette, (2022) 85 Cal.App.5th 842, 851. The court is "not dealing with the PSA in a vacuum, but rather in its relation to the HAA". Id. at 855. Similarly, a DBL eligibility determination is inextricably linked to the HAA's consistency determination. The HAA expressly incorporates the DBL by reference, stating "the receipt of a density bonus, incentive, concession, waiver, or reduction of development standards pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent . . .." §65589.5(j)(3). In other words, a determination of consistency under the HAA also requires a determination of DBL eligibility, and both questions must be reviewed under the HAA's reasonable person standard. Reply at 6.

Insofar as it is evaluating a HAA claim, the court agrees that factual issues concerning the PSA and DBL determinations are governed by the reasonable person standard. However, a legal issue is "subject to *de novo* review. Citizens for E. Shore Parks v. State Lands Com., (2011) 202 Cal.App.4th 549, 573. The City is correct (Opp. at 13) that whether density bonus or GPA application procedures apply are "questions of statutory interpretation that [the court] will review independently." Cal. Renters, *supra,* 68 Cal.App.5th at 839.

In construing a statute, a court must ascertain the intent of the legislature so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841. The statutory language must be harmonized with provisions relating to the same subject matter to the extent possible. Id. "'The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, '[t]here is no need for judicial construction and a court may not indulge in it. [Citation.]'" MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, ("MCI") (2018) 28 Cal. App. 5th 635, 643.

If a statute is ambiguous and susceptible to more than one reasonable interpretation, the court may resort to extrinsic aids, including principles of construction and legislative history. MacIsaac v. Waste Management Collection & Recycling, Inc., (2005) 134 Cal.App.4th 1076, 1082 (*quoting* Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd., (1994) 23 Cal.App.4th 1120, 1126). In reviewing legislative history, ballot pamphlets, prior versions of the bill, legislative committee reports, legislative analyst reports, bill reports, and other legislative records are also appropriate sources indicative of legislative intent. In re John S., (2001) 88 Cal.App.4th 1140, 1144, n. 2; Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., 133 Cal.App.4th 26, 32. Documents not constituting legislative history include authoring legislator's letters, press releases, and letters by interested persons not communicated to the legislature as a whole, including letters to the Governor urging that a bill be signed or not signed. statements. Id. at 37.

Where ambiguity still remains, the court should consider "reason, practicality, and common sense." Id. at 1084. This requires consideration of the statute's purpose, the evils to be remedied, public policy, and contemporaneous administrative construction. MCI, *supra,* 28 Cal.App.5th at 643. The enactment must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in

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nature, and which, when applied, will result in wise policy rather than mischief or absurdity. Lungren v. Deukmejian, (1988) 45 Cal. 3d 727, 735. Finally, statutes are not construed in isolation and every statute must be read and harmonized with the statutory scheme. People v. Ledesma, (1997) 16 Cal.4th 90, 95.

In interpreting the HAA, the court does not defer to the City's interpretation of its own regulations. Although a court would normally defer to an agency's interpretation of its own ordinances, land use decisions under the HAA are different precisely because the HAA cabins the discretion of local agencies. Cal Renters, *supra,* 68 Cal.App.5th 820, 844. The court must engage in a "more rigorous independent review…in order to prevent the City from circumventing what was intended to be a strict limitation on its authority." Ruegg & Ellsworth v. City of Berkeley, (2021) 63 Cal.App.5th 277, 299.

D. Statement of Facts[2]

1. The Preliminary Application

On June 23, 2022, Jha submitted a preliminary application for the Project to vest the development standards in effect at that time pursuant to section 65941.1. AR 57-64. The Project is a 40-unit housing development that reserves 20% of the units for low-income households. Id.

2. The AHRF

On August 11, 2022, Jha filed an Affordable Housing Referral Form ("AHRF") with Planning's Affordable Housing Services Section. AR 100-12. AHSS staff did not respond to the submittal until 34 days later, on September 26, 2022. AR 1637. AHSS staff determined that the Project was not eligible for the DBL program. Id. The staff stated that the Property site is in the RA zone, which permits only one family dwelling and does not allow multi-family uses. LAMC

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[2] Petitioner Jha requests judicial notice of (1) a HCD letter of technical assistance to the City of Fillmore dated August 24, 2023 (Ex A) and (2) a HCD notice of violation issued to La Cañada Flintridge dated June 8, 2023 (Ex. B). The unopposed requests are granted. Evid. Code §452(c); American Indian Model School v. Oakland Unified School District, (2014) 227 Cal.App.4th 258, 293.

The City requests judicial notice of (1) the legislative history for SB 330 (§65941.1) (Ex. 1), (2) a March 16, 2023 memorandum from HCD's deputy director to planning directors and interested parties (Ex. 2), (3) a HCD letter of technical assistance to the City of Compton dated March 28, 2024, (4) a September 3, 2021 letter from HCD to the City concerning its draft housing element (Ex. 4), (5) a February 22, 2022 letter from HCD to Planning concerning the City's adopted housing element (Ex. 5), (6) a May 11, 2022 letter from HCD to Planning concerning the City's revised housing element (Ex. 6), (7) a June 29, 2022 letter from HCD to Planning concerning the City's adopted housing element (Ex. 7), (8) City Council files No. 21-1230 and 21-123—S1 concerning the City's housing element (Exs. 8, 9), (9) the City's housing element (Ex. 10), (10) Planning forms for density bonus, subdivision instructions, subdivider's statement, landscape plans, floor plans plot plans, and elevation plans (Ex. 11), (11) City Charter sections 100-07 (Ex. 12), and (12) year 2022 and 2023 calendars (Ex. 13). The requests are granted. Evid. Code §452(b), (c), (h).

In reply, Petitioner Jha requests judicial notice of a June 26, 2024 HCD letter of technical assistance to the City of Beverly Hills (Ex. 1). The request is granted. Evid. Code §452(c).

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§12.07.A.1. Id. AHSS staff stated that Jha will need to apply for a zoning change to allow multi-family uses. Id.

Jha requested an appeal of Planning's refusal to process the AHRF. According to Jha, the City responded that there is no recourse to challenge the City's processing of an AHRF. *See* AR 1637.

On October 14, 2022, a City Planner notified Jha via email that the AHRF was still in the processing stage. He indicated that a GPA, multiple zoning changes, and fees exceeding $100,000 would be necessary for the Project. AR 1641-42.

3. The Application and Project Review Letters

Jha contends that she was unable to submit the Project application until the City agreed to sign the AHRF. After multiple emails and meetings with Jha, a City Planner signed the AHRF on December 12, 2022. AR 1754.

According to Jha, Planning insisted that her Density Bonus request was invalid. On December 12, 2022, Planning created a new application with a new planning case number for a GPA Application and zone changes. AR 171. Planning issued case numbers for both a Density Bonus Application (AR 2039-40) and a GPA Application (AR 1796-97).

On December 21, 2022, Jha paid $38,352.77 in application filing fees for a Density Bonus Application. AR 2039-40. She was also invoiced $136,557.20 for the GPA Application and zone changes. Id. Jha's counsel at trial informed the court that she never submitted a GPA Application and did not pay this invoice.

On January 6, 2023, Planning sent Jha a 39-page Project Review letter which stated that, while Jha believes the proper entitlement path for the Project is a Density Bonus, Planning's position is that the proper entitlement path is a GPA, zone change, various other zone adjustments, all of which are in City Charter section 558 and the LAMC and subject to the findings under section 65589.5(d). AR 2042. Planning's letter stated that section 65589.5(d) does not specify the entitlement process that can be required and confirmed that a Density Bonus is not the proper entitlement process. AR 2043. The letter cautioned that it was not a disapproval of the Project but rather an identification of the process by which the Project will be reviewed. AR 2043. The letter listed 54 items for correction of the information already submitted. AR 2043-79. Some of the corrections concerned the need for a GPA and zone change. *See* AR 2056. Other corrections sought compliance with various code requirements, such as requesting that Jha "show active engagement with the public street" and "show how human scale is maintained." AR 2048. According to Jha, the majority of items did not request information and instead sought signatures on referral forms by multiple City departments, including the Preliminary Application and Review Program Unit, Bureau of Engineering, Bureau of Sanitation, Housing Department, and Los Angeles Department of Building and Safety ("LADBS"). AR 2046-50. The various referral forms, in turn, were used by the different departments to indicate whether staff believed the Project complies with the City's code. *See, e.g.,* AR 39.

On April 5, 2023, Jha submitted revised application materials in response to Planning's Project Review letter. AR 2100-205. The City responded with a Second Project Review letter on April 28, 2023. AR 641-86. This letter again stated that Jha believes the proper entitlement path for the Project is a Density Bonus, but Planning's position is that the proper entitlement path is a GPA, zone change, various other zone adjustments, all of which are in City Charter section 558 and the LAMC and subject to the findings under section 65589.5(d). AR 642. Planning argued that section 65589.5(d) does not specify the entitlement process that can be required and confirmed

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that a Density Bonus is not the proper entitlement process. AR 642. The letter again cautioned that it was not a disapproval of the Project but rather an identification of the process by which the Project will be reviewed. AR 642.

The Second Project Review letter also noted that the Project is now a condominium project based on the April 3, 2023 communication but that was not previously identified. AR 642. The documents submitted cannot be considered complete for a subdivision because no subdivision application had been made or paid for, and none of the items on the checklist and subdivider's statement form had been provided. AR 642. The letter listed 45 items for Jha to "amplify, correct, clarify, and supplement". AR 642-84. The majority of the corrections concerned the need for a GPA and zoning changes. *See, e.g.*, AR 675 ("correct the allowable maximum height for all buildings and structures") AR 645 ("needs to be amplified, corrected, clarified and supplemented to identify the correct type of entitlement requested (e.g., General Plan Amendment....").

4. The Appeal and Planning's Determination of Loss of Vesting Rights

On May 12, 2023, Jha appealed Planning's incompleteness determination to the City Council pursuant to the PSA. AR 719-27. On May 16, 2023, while the appeal was pending, Planning wrote Jha that she had lost her vesting rights from the June 23, 2022 preliminary application. AR 761-63. Planning's letter stated the preliminary application was deemed submitted on June 23, 2022, the 180-day period under section 65941.1(d)(2) ended on December 21, 2022. The City's letter added that on January 6 2023, Planning wrote the initial Project Review letter and more than 90 days had passed without receipt of all missing or incomplete information identified. AR 762. Although Jha had submitted a response to the City's January 6, 2023 incompleteness letter within 90 days (AR 386), the resubmittal did not satisfy the required information. AR 762. In addition, Jha had modified the Project to be a condominium project. AR 762.

A complaint was made to HCD about the loss of vesting, but HCD's June 28, 2023 email stated that its investigation found "no apparent violation" of housing law". AR 2921, 2962. Jha submitted her own inquiry to HCD to ask whether the Project's vesting rights expired after receiving a second incompleteness determination. An HCD staff member responded: "No, the preliminary application does not expire if the development application is deemed incomplete since Government Code section 65943 allows for resubmittal of the requested items." AR 2638.

5. The City Council Appeal

Planning provided the City Council with a June 12, 2023 staff report that repeated its position that the "correct entitlement path forward is not a Density Bonus request" and that the Jha must "proceed with a General Plan Amendment, Zone Change, Height District Change" and other entitlements. AR 786. Planning recommended denial of the appeal "due to flaws" in Jha's submittals (rather than any missing information). AR 823.

On June 20, 2023, the City Council's PLUM Committee conducted a hearing and unanimously recommended denial of Jha's appeal under the PSA. AR 1077-78.

On June 27, 2023, the City Council held an appeal hearing and voted to deny Jha's PSA appeal. AR 1138.

E. Analysis

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Petitioner Jha seeks mandamus compelling the City to carry out its duties pursuant to the PSA, HAA, and DBL, accept her development application as complete, and approve the Project within 60 days.[3]

1. The PSA

The purpose of the PSA is "to expedite decisions" on development projects. The PSA is solely designed to gather information about the project being proposed, not to determine whether a project is zoning compliant. Once a development project application has been submitted, an agency must first determine whether the application is complete and provide an exhaustive list of incomplete items. §65943(a).[4]

In response to local governments' denial of housing projects, HCD has explained in a technical letter to the City of Filmore that a determination that an application is incomplete based on a purported zoning code inconsistency violates both the PSA and the HAA. HCD explained

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[3] Certain of the parties' arguments may be dealt with summarily. Jha is correct that the court determined on demurrer the builder's remedy applies to her project application. Pet. Op. Br. at 1. The City was required to update its sixth housing element cycle by October 15, 2021 but did not meet the deadline. The City was not in compliance with the Housing Element Law until HCD certified the City's housing element on June 29, 2022. The court determined that the City did not achieve housing element compliance by the June 23, 2022 date when Jha submitted a complete preliminary application, and therefore she may invoke the builder's remedy in section 65589.5(d). In doing so, the City still could require the Project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need. §65589.5(f)(1).

Although the City's opposition reiterates these arguments and raises new arguments that imposition of the builder's remedy would violate the City's right to home rule and constitute an underground regulation/penalty, the arguments are not persuasive. *See* Reply at 7. As a result, the court need not address the City's arguments on the builder's remedy, including headings E, F, H, and I. *See* Opp. at 17-21.

The City also argues that the preliminary application does not vest against later state regulations (Opp. at 17), apparently suggesting that the application does not vest with respect to the HCD's certification of the City's housing element. At trial, the City's counsel reiterated that section 65589.5(o) subjects the Project only to the local ordinances, policies, and standards in effect at the time of the preliminary application, not the HCD's action. This issue was raised and rejected by the court on demurrer. *See* Reply at 6. The HCD's action prevents the City's housing element from being compliant but is not itself an ordinance, policy, or standard.

Finally, the City correctly argues that Jha fails to support her declaratory relief pattern and practice claim. Opp. at 21. While Jha tries to maintain the viability of that claim by arguing that she may request discovery and a separate trial regarding the City's pattern and practice of violating state housing law after the mandamus claim is heard, she did not have leave to bifurcate her claims. *See* Reply at 14. The pattern and practice claim is waived. *See* Balboa Insurance Co. v. Aguirre, (1983) 149 Cal.App.3d 1002, 1010.

[4] The HAA provides a separate process to determine zoning code compliance after an application is accepted as complete. For projects with fewer than 150 units, the written compliance determination shall be provided "[w]ithin 30 days of the date that the application for the housing development project is determined to be complete." §65589.5(j)(2).

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that a zoning code-compliance comment "cannot be used as a basis for determining the completeness of the application" and that when "a local jurisdiction improperly characterizes comments as incomplete items, the jurisdiction impermissibly raises the bar to achieving a complete application, in violation of the PSA." Pet. RJN Ex. A p. 2; RJN Ex. B, p. 5.

HCD's interpretation of the PSA is somewhat supported by section 65944(a), which prohibits an agency from requesting new information once a public agency accepts an application as complete. At that point, the local government may only request the applicant to clarify, amplify, correct, or otherwise supplement the information required for the application in the course of processing the application. Id.

Jha correctly contends that the City violated the PSA by demanding that she comply with zoning requirements in order for her application to be complete. Planning's Project Review letter states that the application "does not comply with objective zoning standards" and includes 34 demands for Jha to "clarify, amplify, correct, or otherwise supplement the information provided". Despite Planning's use of statutory language, the demands for corrections were based on the City's determination that the Project is not code-compliant rather than on missing items in the application. But this information can only be requested after the application is accepted as complete. Pet. Op. Br. at 11.

Jha also correctly argues that the City's demands for legislative action were outside the scope of the PSA, which only applies to "development projects", defined as "any activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." §65931. Zoning changes and general plan amendments are legislative acts and not development projects involving the issuance of an entitlement. Arnel Development Co. v. City of Costa Mesa, ("Arnel Development") (1980) 28 Cal. 3d 511, 514. Legislative acts are not entitlements as they are subject to referendum, are not reviewed against established standards, do not need to be supported by findings, and do not require notice and hearing for affected property owners. Id. at 522. The PSA "cannot be used to compel legislative changes to a zoning ordinance or a general plan because the act is limited to projects that are adjudicatory in nature." Land Waste, *supa,* 222 Cal.App.3d at 959; *see also* Landi v. County of Monterey, (1983) 139 Cal.App.3d 934, 935-37. In short, legislative actions such as rezonings and GPAs fall outside the scope of the PSA. Pet. Op. Br. at 11.

Jha contends that the only items identified in the City's Project Review letter that were missing from the application were applications for GPAs and zone changes. The City does not even have an application for a GPA, which may only be initiated by the City itself. City Charter §555(b). Thus, the City is demanding an application that does not exist. The City's demand for legislative change applications is itself a determination that the Project does not comply with current zoning. Its incompleteness determination based on missing legislative applications therefore was invalid. Pet. Op. Br. at 11-2.

According to the City, nothing in the PSA forbids it from reviewing the completeness of a legislative application based on an existing list of application requirements and then providing a written list of missing materials within the time specified by section 65943. The City may borrow from the PSA process even though an application is not subject to the deemed approved terms of section 65950 for an agency's failure to timely act. Land Waste, *supra,* 222 Cal.App.3d at 950, 961 (the PSA does not require that a permit application be deemed approved if not acted on within the statutory period when the permit application would require a legislative change; section 65950 does not compel legislative acts such as GPAs or zoning changes). Opp. at 14-15.

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It is not clear what the City means by borrowing from the PSA process. Whether they are described as an entitlement or not, it is clear that the City cannot graft legislative changes such as a GPA or zoning change onto the completeness determination. The City's refusal to process an application based on a missing GPA Application was invalid.

Jha similarly argues that density bonus eligibility determinations similarly are outside the PSA. The DBL prohibits a local government from refusing to accept an application as incomplete merely because it believes the project is ineligible for a density bonus. Rather, the DBL states that "to provide for the expeditious processing of a density bonus application," a local government shall notify the applicant with the application is complete within the PSA's timelines. §65915(a)(3)(C). Only "[i]f the local government notifies the applicant that the application is deemed complete" may the agency provide a determination regarding density bonus eligibility. §65915(a)(3)(D). This determination regarding density bonus eligibility occurs after an application has been accepted as complete. Pet. Op. Br. at 12.

Jha states that the City refused to accept her application as complete based on an erroneous determination that the Project is not eligible for a density bonus. Planning's letters repeatedly state that a Density Bonus Application is "not the correct" entitlement path. Under the plain language of the DBL, the City's refusal to accept the application as complete based on a determination of density bonus ineligibility was invalid. Pet. Op. Br. at 12.

The City responds that Jha grafts the word "only" onto quoted language in section 65915(a)(3)(D) to incorrectly claim that the City is prohibited from identifying basic Density Bonus eligibility issues until an application is deemed complete. Jha promotes this rewriting to argue the City must accept and process all Density Bonus applications no matter how little information is provided. A court may not "under the guise of construction rewrite the law". DiCampli-Mintz v. County of Santa Clara, (2012) 55 Cal.4th 983, 992. Opp. at 14.

Section 65915(a)(3)(D) provides that "[i]f the local government notifies the applicant that the application is deemed complete", it may provide a determination regarding density bonus eligibility. It is true that the provision does not say that the local government can determine bonus density eligibility only in that circumstance. Nonetheless, the City cannot refuse to accept an application based on a determination of ineligibility for a density bonus. The DBL specifically allows local governments to create a "list of all documents and information required to be submitted with the density bonus application in order for the density bonus application to be deemed complete." §65915(a)(3)(B). This is separate from a determination of density bonus eligibility and there is nothing in section 65915(a)(3)(B) permits a determination of ineligibility to be used to deny completeness. Section 65915(a)(3)(D) expressly states that any determination regarding the density bonus or eligibility for incentives, concessions, or waivers shall be based on the development project at the time the application is deemed complete. The City could not make this eligibility determination at the application completeness stage.

The City then argues that there is no basis to require a merits review of Jha's applications because Jha does not dispute that they are incomplete. The City notes that Planning issued a case number for both a Density Bonus Application (AR 2039-40) and a GPA Application (AR 1796-97). On January 6, 2023, Planning's letter identifying how both applications were incomplete. AR 2041-93. Jha submitted additional materials on April 5, 2023. AR 2100-2205. Planning's second letter on April 28, 2023 explained that both applications remained incomplete. AR 641-

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86. Jha appealed the incompleteness decisions to the City Council. AR 719-27.[5] Planning's June 12, 2023 staff report explained why the GPA Application process applies, and why both applications remained incomplete. AR 3020-61. The City Council upheld the incompleteness determination on June 27, 2023. AR 1138. Opp. at 9-10.

The issues raised in the City's review letters concern documents and information that are required in the City's lists of application requirements. AR 1792-1928; City RJN Ex. 11. The City is entitled to demand compliance with its list of application information. §§ 65940, 65943. Opp. at 16.

Jha does not address the City's detailed identification of incompleteness issues for the GPA Application. She merely contends that the GPA Application cannot be used. On or about December 12, 2022, Planning emailed all the instructions for the GPA Application process, including a GPA Initiation Request form that Jha could have filled out for GPA initiation. AR 1807-12.[6] Planning explained that, while Jha's application indicates that she is requesting Project approval under section 65589.5, that section does not specify the entitlement process. AR 2043. Once the GPA Application is complete, the application would be subject to the HAA builder's remedy findings at section 65589.5(d)(5), if applicable. AR 2042, 3034. Opp. at 15.[7]

The City adds that the Density Bonus Application was incomplete. The application materials have been either incomplete or internally inconsistent throughout the process of reviewing application completeness, resulting in review letters dated January 6, 2023 (First Review – AR 2042-79), April 28, 2023 (Second Review – AR 641-86), July 12, 2023 (Third Review – AR1139-89), August 2, 2023 (Fourth Review – AR1271-72), and August 23, 2023 (Fifth Review – AR1273-1330). Opp. at 15-16.

Contrary to Jha's claim, Planning's demand that the application be made "consistent" does not refer to project consistency with a City development standard but rather that Jha's Density Bonus Application be internally consistent. AR 641-705, 2041-93, 3300-309. For example, the description of housing units has been inconsistent even though the application form states that applications "filed with unclear or inconsistent information will result in delays...." AR 1901. Jha's initial application papers described a 45-unit Project. AR 82, 228. Other papers describe the Project as 40 units. AR 41, 232. The number of proposed units, market rate units and/or

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[5] The City argues that Jha provided responses that failed to complete either application (AR 3448-69 (6/2/23), 3411-46 (6/16/23), 3299-309 (missing items)) and Planning responded (AR 3337-39 (6/14/23)). Opp. at 9-10.

[6] Jha reiterates that the City's Charter prohibits private parties from initiating GPAs. City Charter §555. There are no "GPA application procedures" because there is no such thing as a GPA application. Reply at 10. However, the case relied on by Jha expressly states that City Charter section 555(a) does not place any limitation on a private party's ability to request a GPA. Westsiders Opposed to Overdevelopment v. City of Los Angeles, (2018) 27 Cal.App.5th 1079, 1089. The court accepts the City's position that Jha could initiate the GPA process.

[7] According to the City, Jha submitted a GPA Application in part (AR 3052-53 (Staff Appeal Resp. #4), but it was incomplete as explained in Planning's reports and its Exhibit I to the City Council. AR 3299-309 (Ex. I). Opp. at 15. At trial, Jha's counsel denied that Jha ever submitted a GPA Application. The City's citation (AR 3052-53) is to staff's statement that Jha directed the City to use material from the Density Bonus Application for the GPA Application, and she has submitted material for the GPA Application. This is insufficient to show submission of a GPA Application.

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affordable units remained inconsistent. AR 232, 1161, 1300. Other incompleteness and/or inconsistencies are: (1) failure to provide information about removal of off-site trees (AR 234, 663, 1299-1300, 1307-09); (2) an incomplete declaration regarding incentives and waivers (AR 667, 1301-03); (3) missing building permits and certificates of occupancy (AR 673, 1309); (4) illegible or inadequate floor plans (AR 677, 1313-14); and (5) missing landscaping and open space plans (AR 679, 1316). Opp. at 15-16.

Jha replies that her Density Bonus Application is complete. GPAs and zoning changes are outside the scope of PSA procedure, and most of the incomplete items were invalid demands for legislative changes, determinations of project consistency, and DBL eligibility determinations. Jha argues that she cannot go through all 45 pages of Planning's inane comments because of her briefing page limits but will address the items specifically discussed in the City's opposition, which demonstrate how the City abused the PSA process. Reply at 12-13.

While the City takes issue with the fact that Jah amended the Project from 45 units in the preliminary application to 40 units in the application, the HAA specifically allows an applicant to revise the number of units by less than 20% following the preliminary application submittal. §65589.5(o)(2)(E). Planning claimed the 40-unit Project is inconsistent with the AHRF that listed 45 units. AR 231. Planning failed to mention that Jha submitted the AHRF on August 11, 2022, just after the preliminary application. Planning failed to process the AHRF until December 12, 2022, four months after submittal and just a week before the deadline to submit a development application. AR 1754. The only reason the AHRF did not match the updated Project plans was because Planning failed to timely sign the form. Reply at 12.

The City also points to missing landscaping and open space plans, but Jha told Planning that landscaping and open space would not be included in the Project. AR 1316. She sought a DBL waiver from these requirements. Still, Planning argued that "[t]rees in the public right of way are landscaping." Id. In other words, Planning demanded that Jha submit a landscaping plan to identify existing off-site trees (that were already identified in her Tree Disclosure). Landscaping plans show the details of proposed landscaping, not the presence of existing off-site trees. *See* LAMC §12.21(G). Reply at 12-13.

The City points to an incomplete declaration regarding requested incentives and waivers. This is untrue. Jha did submit a complete declaration for waivers and incentives. AR 9-12. Planning did not request information from Jha and instead demanded that she confirm the applicable code standard with LADBS by submitting a Preliminary Zoning Form that is "intended to determine compliance with City zoning." AR 434, 1301. A determination regarding zoning code-compliance cannot be used as a basis for determining completeness. Reply at 13.

Other incomplete items included inadequate floor plans because the recreation room did not state whether it would be used as an "exercise room" or a "game room" (AR 1314), even though the term "recreation room" is defined as a room "designed to be utilized primarily for games, the pursuit of hobbies, social gatherings, and such activities." LAMC §12.03. The City also could not determine whether the clearly labeled rooftop terrace was a fourth story (AR 1315), yet simultaneously demanded that Jha "show how the terrace will be used directly on the plans" (AR 1314), as if Jha could predict how future residents will use their private terraces. Reply at 13.

Aside from the improper requirements for a GPA, zone change, and improper determination of density bonus eligibility, the court cannot determine from the parties' presentation whether the City had legitimate reasons to find the Density Bonus Application incomplete. There may be inconsistencies or incomplete information that could justify the

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determination.[8] However, the City clearly chose the wrong path in requiring a GPA, zone change, and determining density bonus ineligibility, and these were the main reasons for the incompleteness determination. As a result, the City's incompleteness determination cannot be upheld.

2. Jha's Vesting Rights Did Not Expire

In SB 330, the Legislature added a provision to the PSA preliminary application process specifically for housing development projects, the purpose of which is to secure vesting rights and lock into place existing development standards. §65941.1. To maintain vesting rights, an applicant must submit a development application within 180 days of submitting a preliminary application. §65941.1(d). Additionally, if an agency makes an incompleteness determination "pursuant to Section 65943",[9] the applicant must submit the information needed to complete the application within 90 days or the preliminary application expires. Id.

Jha contends that the City unlawfully refused to recognize the Project's vesting rights. According to Jha, section 65941.1(d) specifically references the iterative process of application and completeness determination, stating that an applicant must respond within 90 days if the public agency makes an incompleteness determination "pursuant to Section 65943." §65941.1(d). An incompleteness determination "pursuant to Section 65943" includes both an initial completeness determination and any subsequent determination made in response to a resubmittal. In other words, each time a new written completeness determination is made pursuant to section 65943, an applicant has 90 days to respond in order to maintain vesting rights. Pet. Op. Br. at 13.

The City argues that Jha's interpretation of section 65941.1(d) is incorrect. An applicant does not have 90 days to respond each time an incompleteness determination is made. The developer has 180 days after submitting a preliminary application to submit "all of the information" required for a complete application. §65941.1(d)(1). If there is an incompleteness determination, the developer "shall submit" the information for completion in 90 days. §65941.1(d)(2). A failure to do so means that "the preliminary application shall expire and have no further force or effect." Id. Opp. at 11-12.

The City points to the legislative history of SB 330 (section 65941.1) as establishing that a single 90-day period to complete the application was added so that the law "delineates a protocol for both the applicant and the jurisdiction." Resp. RJN Ex. 1, pp. 83, 98-99, 277, 284, 289, 300. It is designed so that a "developer doesn't just put in an initial application, lock rules, then go away for 10 years and come back wanting locked rules for their project."[10]

As a result of an amendment, the American Planning Association ("APA") removed its opposition to SB 330 because there would be an "obligation of the applicant to pursue a complete application in a reasonable timeframe in order to retain their vested rights." Resp. RJN Ex. 1, p.

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[8] Neither party addresses Planning's point in the Second Project Review Letter that the Project is now a condominium project, the documents submitted cannot be considered complete for a subdivision because no subdivision application had been made or paid for, and none of the items on the checklist and subdivider's statement form had been provided. AR 642. At trial, Jha's counsel stated that the Project is a rental project, not a condominium project.

[9] Pursuant to the PSA, once an applicant resubmits an application in response to an agency's incompleteness determination, a new 30-day period begins wherein the agency must make another completeness determination. §65943(a).

[10] The City's citation for this quotation (Ex. 1, p. 267) is not in its requested judicial notice.

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1184. The APA letter urged the Legislature to utilize the PSA's existing process but removed its opposition to SB 330 when amendments created an "obligation of the applicant to pursue a complete application in a reasonable timeframe in order to retain their vested rights." Resp. RJN Ex. 1, p. 68. The APA stated that it preferred the PSA's existing vesting trigger but noted that "these amendments are intended to ensure this new two-step application approval process creates incentives for the applicant to complete the development processes in a timely manner...." Id. The APA stated that the amendment "will require...the applicant to complete the process in a timely manner in order to receive the vesting benefits of the bill." Resp. RJN Ex. 1, p. 1182. Opp. at 11-12. [11]

The City concludes (Opp. at 10, 16) that this legislative history indicates that section 65941.1's 90-day provision is designed to cut off vesting rights and Jha's interpretation would interpret the 180-day and 90-day periods out of existence. *See* Select Base Materials, Inc. v. Bd. of Equalization, (1959) 51 Cal.2d 640, 645, 647 (statutes are construed to avoid rendering "nugatory important provisions of the statute."). Given this interpretation of section 65941.1(d), the Project has no builder's remedy protection because any vesting rights expired when Jha failed to submit a complete application within 90 days of Planning's January 6, 2023 incompleteness letter. AR 3037-38.

On May 16, 2023, Planning wrote Jha that she had lost her vesting rights from the June 23, 2022 preliminary application. AR 761-63. Planning stated the preliminary application was deemed submitted on June 23, 2022 and the 180-day period under section 65941.1(d)(2) ended on December 21, 2022. Planning wrote the initial Project Review letter on January 6 2023, and more than 90 days had passed without receipt of all missing or incomplete information identified. AR 762. Although Jha had submitted a response to the City's January 6, 2023 incompleteness letter within 90 days (AR 386), the resubmittal did not satisfy the required information. AR 762. Therefore, the vesting preliminary application had expired. AR 762.

The City notes that a complaint was made to HCD about the loss of vesting, but HCD's June 28, 2023 email stated that its investigation found "no apparent violation" of housing law". AR 2921, 2962. Opp. at 10, 16.

At trial, the City's counsel explained that the loss of vesting rights also means the loss of a section 65589.5(d) builder's remedy. The HAA prohibits a local government from applying development standards that were not in effect at the time a preliminary application is submitted. §65589.5(o). The HAA states that is a violation to require, or even attempt to require, a project to comply with an ordinance, policy, or standard not adopted and in effect when a preliminary application was submitted. §65589.5(k)(1)(A)(i)(III). If vesting rights under the preliminary application expire, then the builder's remedy – which applies only when the local government does not have a housing element in substantial compliance with the Housing Element Law – would not apply to Jha because the City now has a compliant housing element.[12]

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[11] Assuming that the APA's statement is proper legislative history, it is a statement by a third party and not accorded significant weight. *See* Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc., *supra,* 133 Cal.App.4th at 38.

[12] The City's counsel also stated that the loss of vesting rights would not prevent further review of the Project application. For this reason, Planning continued to review and deny Jha's Density Bonus Application as incomplete or internally inconsistent in additional review letters dated July 12, 2023 (AR 1139-89), August 2, 2023 (AR 1271-72), and August 23, 2023 (AR 1273-1330)

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Section 65941.1(d)(1) provides that the applicant must submit an application that includes all necessary information within 180 days after submitting the preliminary application. The plain language of the provision sets a 180-day deadline. Section 65941.1(d)(2) provides that, if the agency determines that the application is incomplete pursuant to section 65943, the applicant shall submit the missing information within 90 days and the failure to do so will mean the application has expired. In turn, section 65943 provides that the agency must make a written determination on the completeness of an application within 30 days of submittal, or it will be deemed complete. §65943(a). Upon receipt of "any resubmittal of the application, a new 30-day period shall begin, during which the public agency shall determine the completeness of the application." Id.

At trial, the parties' counsel agreed on the relationship of section 65941.1(d)(1) and (2). If an applicant fails to submit an application within 180 days after the preliminary injunction, the 180-day deadline in section 65941.1(d)(1) bars it from doing so. If, on the other hand, an applicant submits an application within 180 days, it is timely even if it is incomplete. This is true despite the language in section 65941.1(d)(1) that the application must include "all of the information required to process the development application". Counsel agreed that an incomplete application submitted within 180 days is still timely under section 65941.1(d)(1). The court accepts the parties' interpretation.

The incompleteness issue is dealt with by section 65941.1(d)(2). This is where the parties diverge. The City contends that the applicant receives a single 90-day period to cure the incomplete application. If the information submitted does not complete the application, then the preliminary application expires and is no further force and effect. §65941.1(d)(2). Jha contends that there may be multiple iterations of this 90-day submission and 30-day evaluation process. So long as an applicant meets the 90-day deadline, there is no bar.

The court agrees with Jha that multiple iterations of the 90-day submission/30-day review are permissible under section 65941.1(d)(2). Section 65941.1(d)(2) expressly refers to completeness pursuant to section 65943. In turn, section 65943(a) refers to "any subsequent review of the application determined to be incomplete", "any resubmittal of the application", and "a new 30-day period." The use of the words "any" and "new" in section 65943(a) indicate that multiple resubmissions of an application may be made. The statute supports Jha's reading that the submission and completeness evaluation for an application is an iterative process with no limit on the number of submissions.

The court's conclusion is supported by the fact that the court is "not dealing with the PSA in a vacuum, but rather in its relation to the HAA," and the Legislature has mandated the HAA must be interpreted to "afford the fullest possible weight to the interest of, and the approval and provision of, housing." Save Lafayette v. City of Lafayette, (2022) 85 Cal.App.5th 842, 855 (refusing to interpret the PSA to treat a multi-year delay as a resubmittal that terminated earlier vesting rights and instead recognizing the project's decade-old vesting rights in part because the HAA's policy that favors housing).[13] The City's interpretation makes it more difficult for

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[13] The City argues that the court in Save Lafayette v. City of Lafayette, *supra,* 85 Cal.App.5th at 854-55, rejected the prospect of a "deemed disapproved" consequence to passage of the PSA's timelines in part because no statutory text supported the argument and there is no statutory text to support Jha's argument either. Opp. at 16-17. Perhaps, but the point remains that the PSA and HAA must be interpreted to give full weight to the approval of housing.

applicants to maintain vesting rights and directly conflicts with the Legislature's clear mandate to interpret its provisions in favor of housing development.[14]

The legislative history provided by the City does not undermine this conclusion. The Assembly Bill Analysis states that "[i]f the local agency determines that the information provided is not complete, the proponent has 90 days after receiving this determination in writing to provide the information, or their preliminary application will expire." Resp. RJN Ex. 1, p. 40. This statement is consistent with the conclusion that when an applicant receives an incompleteness determination pursuant to section 65943 – not just the first incompleteness determination – an applicant has 90 days to respond. This interpretation does not read the 90-day deadline out of existence because an applicant still must diligently respond to each incompleteness determination within 90 days.

The June 28, 2023 email HCD email cited by the City is not weighty. HCD staff wrote that it had "received a request for a letter of support" for the Project and found "no apparent violation of state housing law." AR 2962. The email's conclusion is unsupported by any facts or analysis. In contrast, Jha submitted an inquiry to HCD asking whether the Project's vesting rights expired after receiving a second incompleteness determination. An HCD staff member responded: "No, the preliminary application does not expire if the development application is deemed incomplete since Government Code section 65943 allows for resubmittal of the requested items." AR 2638. Reply at 8-9. Jha responded to the City's incompleteness determination within 90 days as required and there was no violation of section 65941.1(d)(2).

Jha submitted the preliminary application on June 23, 2022. She filed the AHRF on August 11, 2022 and the City waited four months to sign it, until December 12, 2022. Jha paid her Density Bonus Application fees nine days later. After Planning sent her the January 6, 2023 Project Review letter, Jha submitted revised the application materials within 90 days, on April 5, 2023. After Planning's second Project Review letter of April 28, 2023, Jha promptly appealed on May 12, 2023. This timeline shows Jha's diligence in pursuing her application.

Jha's vesting rights did not expire, and the City's refusal to recognize them was inconsistent with the PSA and violated the HAA.

3. The City Disapproved the Project Under the HAA

It is undisputed that the Project meets the definition of "housing for very low, low-, or moderate-income households" under the HAA. §65589.5(h)(3). The HAA prohibits a local government from disapproving an affordable housing project unless it makes written findings based on a preponderance of the evidence in the record as to one of five specifically enumerated findings. §65589.5(d). The court has already determined that the City cannot disapprove the Project based on section 65589.5(d)(5) (the builder's remedy) because the City was not in compliance with the Housing Element Law on the date that Jha submitted a complete preliminary application. There is no evidence that any of the other enumerated findings apply, and the City did not attempt to make such findings. In short, there is no valid basis for the City to disapprove the proposed affordable housing Project.

The City argues that the court is reviewing the City's determination of incompleteness under PSA section 65943 as to both applications. The builder's remedy disapproval findings

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[14] Can the local government ever end the cycle of resubmissions within 90 days? Probably so by relying on the 180-day period in section 65941.1(d)(1), but the court need not decide this issue.

apply to a merits disapproval of the Project entitlement, not an incompleteness appeal. §65589.5(d)(5). Nothing in the HAA equates a decision on PSA incompleteness to the disapproval of a project application or entitlement. *Cf.* §65589.5(h)(6)(HAA definition of "disapprove" references the "land use approvals or entitlements" for a building permit). Planning stated that the applications remain incomplete, but it will process either of them once complete. AR 3338. To the extent that Planning made an "early pre-decision compliance review," it was for Jha's information, not a decision on the merits. AR 764-76. The City has not made a final merits disapproval of either application, and for that reason Jha cannot claim that Planning's statement that the GPA Application is the correct process is itself a disapproval of the Project. Opp. at 19.

The short answer is that Jha is correct that the City Council's decision on completeness is a disapproval. Pet. Op. Br. at 17. The HAA defines disapproval as any instance in which an agency "[v]otes on a proposed housing development project application and the application is disapproved . . .." §65589.5(h)(6). While the City Council purported only to vote on whether the application was complete, its vote disapproved the Project based primarily on the City's perceived general plan and zoning inconsistencies. The City did not simply recommend a GPA and zone change; it required them. The City Council made clear the Project cannot be approved unless it is modified to be consistent with the general plan or the general plan is modified to be consistent with the Project. This is a disapproval.

4. <u>The City Violated the HAA</u>

The court has already determined that the builder's remedy applies, and therefore general plan and zoning inconsistencies are not a valid basis to deny the Project. The City did not make any written findings regarding any of the other four enumerated bases to disapprove an affordable housing project, and therefore the City's vote to disapprove the project was in violation of the HAA. §65589.5(k)(1)(A)(i).

The City correctly notes that the HAA does not specify procedures for the review and processing of a builder's remedy project. Unlike other HAA or DBL provisions, there is no HAA text that prevents legislative procedures from applying to projects receiving builder's remedy protection. *Cf.* §§ 65589.5(j)(4) (project "shall not require" rezoning), 65915(f)(5), (j)(1) (density bonus or incentive "shall not require" a plan amendment). There is also nothing in the HAA that says a builder's remedy project must be approved ministerially, or that a specific process must be used, in contrast to other statutes that expressly reference a ministerial process. *Cf.* §§ 65913.4(a), 66317(a), 65852.21, 66411.7(a), (b)(1). Opp. at 11.

The City argues that it is contrary to the plain language of section 65589.5(o) for Jha to claim that the City must use a process that does not follow the laws and policies under which the Project vested. The entitlements associated with the GPA Application honor the City policies in effect on the June 24, 2022 date of the preliminary application that specify the GPA Application procedure and satisfy the need to legalize the Project within the City's zoning and planning framework. §65589.5(o)(1); AR 1535-42. Nothing in the HAA prohibits the City from seeking a GPA or zone change. Opp. at 11-12.

The City relies on a March 28, 2024 HCD letter of technical assistance to the City of Compton in which HCD agreed that the HAA does not specify the process for reviewing a project with builder's remedy protection and also agrees that a jurisdiction may require a general plan amendment or zone change to review such a project. Resp. RJN Ex. 3. Opp. at 12.

HCD's letter stated that a jurisdiction without an adopted housing element in substantial compliance with state law when the preliminary application was submitted and subject to the

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builder's remedy is not prevented by the HAA "from requesting a general plan/zoning code amendment" to avoid a legal non-conformity. Resp. RJN, Ex. 3. Further, the builder's remedy does not expressly prevent the city from requiring discretionary permits and/or legislative actions that would be required for similar projects *(e.g.*, GPAs, zoning changes, CUP, specific plan amendments). Ex. 3. HCD warned, however, that the HAA would be violated if the city's insistence on a GPA or zone change would render the project infeasible because it "delays project approval or increases the cost of the approval process." Ex. 3. Opp. at 12.

Jha agrees that the builder's remedy does not specify the entitlement process and that nothing requires the City to approve the Project ministerially. Jha correctly argues (Pet. Op. Br. at 15-16; Reply at 9) that the City attempts to sidestep the HAA by claiming that the builder's remedy does not specify the entitlement path that a local government must follow, and that the proper entitlement path for the Project is a GPA and zoning change. The HAA requires agencies to approve applications pursuant to the PSA's mandatory deadlines, and nothing permits an agency to force an applicant to seek a legislative change that is outside the scope of those protections. §65589.5(o)(6)(B); Land Waste, *supra*, 222 Cal.App.3d at 959. The HAA requires mandatory approval unless fact-specific findings are made, and forcing an applicant to seek a legislative action strips the applicant of these rights and protections.

Jha argues that GPAs are not entitlements, they are legislative acts. Arnel Development, *supra,* 28 Cal. 3d at 514. GPAs are governed by Chapter 3 of the Planning and Zoning Law, and most sections do not apply to charter cities. §65700. The review and approval of development projects, on the other hand, are governed by Chapter 4.5, the entirety of which applies to charter cities (including the PSA). § 65921. Legislative actions and the review of development projects are two distinct processes, subject to different procedures, and serve different functions. "[A] legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts." Patterson v. Central Coast Regional Com, (1976) 58 Cal.App.3d 833, 840. Reply at 9.

The court need not agree with Jha that GPAs and zone changes are not entitlements to agree that they are legislative enactments that cannot be compelled when the builder's remedy applies. The City cannot compel Jha to seek a legislative action through the review of a development project for the same reason Jha cannot compel the City to approve a legislative action through the submittal of a development application. The builder's remedy applies to projects, not properties, and legislative changes are not "housing development projects" governed by the HAA. Chandis Securities Co. v. City of Dana Point, (1996) 52 Cal.App.4th 475, 485-86. Reply at 9.

Jha is correct that the City's interpretation of the HAA would eviscerate the builder's remedy in section 65589.5(d)(5), which states that a local government must approve an affordable housing project notwithstanding any purported general plan or zoning inconsistency. In other words, requiring legislative changes is simply a more circuitous route of requiring general plan and zoning consistency, which is not permitted when a jurisdiction does not have a certified housing element and the builder's remedy applies. A local government with a compliant housing element could disapprove a project for such an inconsistency, or could inform an applicant that his or her project would be disapproved unless a legislative change is granted, but it cannot do so where an affordable housing project is protected by the builder's remedy.[15]

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[15] According to Jha, the City attempts to nullify the builder's remedy by relying on section 65589.5(f)(1), which states that the HAA should not be interpreted to prohibit a local agency from requiring compliance "with objective, quantifiable, written development standards, conditions,

The City points to the language in section 65589.5(j)(4) that a project "shall not require a rezoning" to suggest that the City can require rezoning. Opp. at 11, 13. Jha correctly replies (Reply at 10) that section 65589.5(j)(4)'s reference to rezoning relates to a determination of project consistency, which is required for market-rate housing projects protected by the HAA. Section 65589.5(j)(4) states that a housing project is not inconsistent with applicable zoning standards, and rezoning is not required, if the project is consistent with objective general plan standards. For builder's remedy projects, consistency is not required for the project to be approved.

Jha notes (Reply at 10-11) that the HCD recently superseded March 28, 2024 Compton technical letter in a June 26, 2025 technical letter to the City of Beverly Hills. Reply RJN Ex. 1. The Beverly Hills technical letter noted that the March 28 letter to Compton stated that the HAA does not prohibit a city from requesting a general plan/zoning code amendment to avoid a legal non-conformity but also clarified that such an action may not be required where the builder's remedy applies. Reply RJN Ex. 1. In its Beverly Hills letter, HCD stated that the HAA is clear

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and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584." (emphasis added). The first step in the housing element process is for a local government to identify the "appropriate zoning and development standards" to accommodate its RHNA. §65583(c)(1). Section 65589.5(f)(1) only allows a local government to enforce standards that are "appropriate to, and consistent with," meeting a jurisdiction's RHNA. A local government that failed to have a certified housing element and is subject to the builder's remedy does not have standards "appropriate to, and consistent with" meeting its RHNA requirements. This is why the builder's remedy exists. If a local government has failed to go through the required housing element process to identify the standards "appropriate to, and consistent with" meeting its RHNA requirements, section 65589.5(d)(5) allows affordable housing projects a path to approval notwithstanding existing standards. Pet. Op. Br. at 16.

Moreover, section 65589.5(f)(1) requires that the development standards, conditions, and policies be applied to "facilitate and accommodate development at the density permitted on the site and proposed by the development," not to provide a backchannel method to thwart the protections of section 65589.5(d)(5). Jha proposed an affordable housing project at a time when the City did not have a compliant housing element and the "density permitted" on the site is not constrained by existing general plan and zoning density standards. The builder's remedy makes clear that such density standards are not a valid reason to disapprove the project. The City can enforce other objective standards (*e.g.*, height, setbacks) but must do so in a manner that facilitates and accommodates the density proposed by the Project. Pet. Op. Br. at 16-17.

Finally, section 65589.5(f) merely contains a series of general interpretive provisions regarding how the HAA should be "construed." Section 65589.5(d) provides the specific findings that a local government must make to lawfully disapprove a proposed affordable housing project. It is a basic canon of statutory construction that "when a general and particular provision are inconsistent, the latter is paramount to the former." CCP §1859. A general interpretive provision cannot be read to nullify the builder's remedy provision as it applies to a particular project. Interpreting section 65589.5(f)(1) to allow cities to impose zoning and general standards that section 65589.4(d)(5) states are not a valid reason to disapprove a project would reduce the builder's remedy to mere surplusage. A "construction making some words surplusage is to be avoided.'" People v. Valencia, (2017) 3 Cal.5th 347, 357. Pet. Op. Br. at 17.

While the court agrees with Jha's analysis, the City's opposition does not rely on section 65589.5(f)(1).

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that a project protected by the builder's remedy may not be disapproved for inconsistency with the jurisdiction's general plan and zoning ordinance. §65589.5(d)(5). "Accordingly, a jurisdiction that refuses to process or approve a project subject to the Builder's Remedy due to the applicant's refusal to submit a GPA[zoning change] requires or required by the jurisdiction to resolve such an inconsistency violates the intent of the HAA." Ex. 1. The requirement of a GPA or zoning change is "essentially a requirement for consistency," and disapproval of a project for failure to resolve that inconsistency is effectively a disapproval on the grounds of inconsistency. Ex. 1. HCD also noted that Beverly Hills did not have a GPA or zone change on its submittal requirement checklist and under the PSA the city could not determine that an application is incomplete based on failure to include a request for a GPA or zone change. Ex. 1.

The deference and the weight given to an agency's interpretation is situational and dependent on the presence or absence of factors supporting the merit of the interpretation. Yamaha Corp. of America v. State Board of Equalization, (1998) 19 Cal.4th 1, 7-8, 12. Some deference is warranted where there are "indications of careful consideration by senior agency officials" or "the agency 'has consistently maintained the interpretation in question.'" Id. at 13. An administrative construction of a statute is only entitled to as much deference as is warranted by "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control". Hoechst Celanese Corp. v. Franchise Tax Bd., (2001) 25 Cal.4th 508, 524.

The Beverly Hills technical letter strongly supports Jha's position and is entitled to some weight. It is consistent with the court's view, which is that the City may not require GPA or zone change on Jha's Project that is protected by the builder's remedy. Therefore, the City violated the HAA.

5. The City Violated the DBL

The DBL (§§ 65915-18) is intended to allow a developer to include more total units in a project that would otherwise be allowed by the local zoning ordinance in exchange for low-cost rental units, and to "cover at least some of the financing gap of affordable housing with regulatory incentives, rather than additional public subsidy." §65915(u).

A local government shall grant one density bonus as specified in subdivision (f), incentives or concessions as specified in subdivision (d), waivers or reductions of development standards as described in subdivision (e), and parking ratios as described in subdivision (p), if an applicant agrees to construct a housing development that will contain stipulated percentages of low income and very low-income units or target population units (*e.g.*, disabled veterans). §65915(b).

A "housing development" means a development project for five or more residential units, including mixed use developments. §65915(i).

A "density bonus" means a "density increase over the otherwise maximum allowable gross residential density," but the developer also may elect "a lesser percentage of density increase, including, but not limited to, no increase in density." §65915(f). The amount of the density bonus varies according to the amount by which the percentage of low and very low-income units exceed the percentages. §65915(f).

Density bonuses shall be granted based on the "maximum allowable density" for the project site, defined as "the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If the density

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allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail." §65915(o)(5).

An applicant for a density bonus pursuant to subdivision (b) may submit a proposal for specific incentives or concessions. §65915(d)(1). The local government shall grant the requested incentive or concession unless (1) it makes a written finding, based on substantial evidence, that the project will not result in "identifiable and actual cost reductions" of affordable housing costs or for rents of the targeted units as specified in subdivision (c), (2) the concession or incentive would have a specific adverse impact upon public health and safety, the physical environment, or real property listed in the California Register of Historical Resources and for which there is no feasible method of mitigation without rendering the development unaffordable to low- and moderate-income households, or (3) the concession or incentive would violate state or federal law. §65915(d)(1)(A)-(C). §65915(d).

The applicant may also apply for and receive development waivers or reductions that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions/incentives permitted. §65915(e)(1). The local agency may not apply a development standard that will have this effect. §65915(e)(1). However, the local government is not required to waive or reduce development standards if there would be an adverse impact on health, safety, or the physical environment, and for which there is no feasible method of mitigation to avoid the impact. Id. Nor is the local government required to waive or reduce development standards that would have an adverse effect on real property listed in the California Register of Historical Resources, or to grant any waiver or reduction that would violate state or federal law. §65915(e)(1).

Jha argues that the amount of density bonus is based on the "maximum allowable gross residential density" or "base density," which the law defines as "the maximum number of units allowed under the zoning ordinance, specific plan, or land use element of the general plan...." §65915(o)(6). On the other hand, incentives/concessions and waivers are awarded based on the percentage of "total units" that are restricted to low- and very-low income households. §65915(d). The DBL definition of "total units" is unrelated to zoning and is simply "a calculation of the number of units that: (i) Excludes a unit added by a density bonus awarded pursuant to this section. (ii) Includes a unit designated to satisfy an inclusionary zoning requirement." §65915(o)(8). In other words, the term "total units" simply means the number of units proposed for the project. Similarly, the DBL defines a "housing development" to mean "a development project for five or more residential units, including mixed-use developments" without any reference to zoning standards. §65915(i). Thus, a "housing development" is a project that proposes at least five units. Pet. Op. Br. at 18-19.

Jha's Project is a housing development that includes 20% of units restricted to low-income households and is therefore entitled to two incentives/concessions and an unlimited number of development standard waivers. §65915(d), (e). Jha proposed incentives to the applicable floor area ratio and low-impact development standards, as well as various waivers to development standards of setbacks, height limits, parking standards, and others. AR 136-37.

AHSS staff determined that the Project is not eligible for the DBL program. AR 1637. The staff stated that the Property site is in the RA zone, which permits only one family dwelling and does not allow multi-family uses. LAMC §12.07.A.1. AR 1637. AHSS staff stated that Jha will need to apply for a zoning change to allow multi-family uses. AR 145-47, 1637. In fact, the City unilaterally converted the application from a density bonus request to a zone change, assigning the Project a new Planning number. AR 171. Pet. Op. Br. at 19.

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Jha contends that the City did not deny the requested incentives/concessions, and development standard waivers due to public health and safety concerns, but rather due to the City's erroneous determination that a site must be zoned for a minimum of five base units to be eligible for any of the DBL's protections. The number of base units is only relevant to calculate the density bonus which Jha does not seek. It is distinct from the "total units" used to determine eligibility for incentives/concessions/development standard waivers. So long as the project includes the minimum level of affordability, the City may only deny the proposed incentives/concessions/waivers for the statutorily enumerated reasons. §65915(d), (e). The DBL includes "very limited exceptions" to deny requested incentives/concessions/waivers and zoning inconsistency is not one of them. *See* Bankers Hill 150 v. City of San Diego, (2022) 74 Cal.App.5th 755, 770. The City's refusal to grant the incentives/concessions/waivers is a violation of the DBL. Pet. Op. Br. at 19.

The City responds that Jha incorrectly reads the DBL. Her literal reading of the terms "total units" and "housing development" in sections 65915(o)(8) and 65915(i), respectively, would create an absurd result. Both terms refer to the number of base units identified by the zoning and land use designation based on usage of the "housing development" term. *Compare* §§ 65915(b)(1)(G), (c)(1)(B)(ii)("all units in the development, including total units and density bonus units"), §§ 65915(a)(1)("When an applicant seeks a density bonus for a housing development"), 65915(b)(1)(if an applicant "seeks and agrees to construct a housing development, excluding any units permitted by the density bonus") *with* 65915(o)(8)(i)("total units…[e]xcludes a unit added by a density bonus"). Jha's literal application of the definitions in sections 65915(o)(8) and 65915(i) would permit a density bonus project in any industrial zone or land use category that does not authorize residential uses so long as the number of proposed units is five or more. At trial, the City's counsel reiterated that Jha's interpretation would allow incentives, concessions, and waivers for a project in an industrial zone. *See* Unzueta v. Ocean View School Dist., (1992) 6 Cal.App.4th 1689 (statutes are interpreted to avoid absurd results). Opp. at 14.

Scrutiny of the DBL shows the City is wrong. An applicant for a qualifying housing development make seek and obtain one density bonus as specified in subdivision (f), incentives or concessions as specified in subdivision (d), waivers or reductions of development standards as described in subdivision (e), and parking ratios as described in subdivision (p). §65915(b)(1). A "housing development" means a development project for five or more residential units, including mixed use developments. §65915(i). The developer may elect to seek no increase in density as part of her density bonus (§65915(f)) and may seek specific incentives or concessions (§65915(d)(1) and development waivers or reductions (§65915(e)(1)) as Jha has. While the density bonus available pursuant to section 65915(b) is defined as an increase to maximum allowable density (§65915(f)) and maximum allowable density means the greatest number units allowed by the zoning ordinance (§65915)(o)(6)), there is simply no tie between bonus density, incentives or concessions, and waivers or reductions in development standards that would permit application of the maximum allowable density definition too the latter two entitlements.

The court agrees with Jha (Reply at 11-12) that the City is equating the terms "total units" in section 65915(o)(8) and "base density" in 65915(o)(6) even though each has a specific, unique definition in the DBL. "Total units" refers to the number of units in a project excluding any density bonus units. §65915(o)(6). "Base density" is only relevant for determining the amount of density bonus and refers to the units allowed under the zoning or general plan. §65915(o)(8). Reading these terms to be identical would render the statutory definitions surplusage. *See* MacIsaac v.

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Waste Management Collection & Recycling, Inc., (2005) 134 Cal.App.4th 1076, 1082. Reply at 11.

The plain language of the DBL controls. So long as a project that restricts a certain percentage of the "total units" to low-cost housing can be approved, it is eligible for incentives, concessions, and waivers with "very limited exceptions." *See* Bankers Hill 150 v. City of San Diego, (2022) 74 Cal.App.5th 755, 770. Zoning is not one of those exceptions. While the City argues that reliance on the plain language definition of "total units" would allow density bonus projects in zones where residential uses are not permitted, such as in an industrial zone, inconsistency with zoning or general plan requirements could be a valid reason to disapprove a project where (a) there would be an adverse impact on health, safety, or the physical environment, and for which there is no feasible method of mitigation to avoid the impact (b) there would be an adverse effect on real property listed in the California Register of Historical Resources, or (c) it would violate state or federal law. §65915(d)(1), (e)(1). Because the Project restricts 20% of the total units as affordable, the City's refusal to grant incentives, concessions, and waivers violated the DBL.[16]

F. Conclusion

The Petition is granted in large part. Jha is entitled to a judgment on her mandamus claims that (1) the City's determination that Jha's application is incomplete violated the PSA because the City wrongly required a GPA, zone change, and determined density bonus ineligibility, (2) the City violated the HAA by imposing a GPA and zone change on Jha's Project protected by the builder's remedy, (3) Jha's vesting rights did not expire, and the City's refusal to recognize them was inconsistent with the PSA and violated the HAA, and (4) the City's refusal to grant regulatory incentives, concessions, and waivers violated the DBL. Jha's claim for declaratory relief is denied. A writ shall issue directing the City to set aside the City Council's denial of the June 27, 2023 PSA appeal and to review and process Jha's Project application pursuant to the PSA, HAA and DBL as interpreted herein.

Jha's counsel is ordered to prepare a proposed judgment and writ, serve them on the City's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for August 27, 2024 at 9:30 a.m.

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[16] The City argues that it acted in good faith. Opp. at 21-22. The City's bad faith is relevant only to whether the court should direct it to approve the Project. §65589.5(k)(1)(A)(ii). If the court finds that an agency acted in bad faith in disapproving a project in violation of the HAA, the appropriate remedy is an "order or judgment directing the local agency to approve the housing development project" and attorney fees and costs. §65589.5(k)(1)(A)(ii). "Bad faith" "includes, but is not limited to, an action that is frivolous or otherwise entirely without merit." §65589.5(l). Jha fails to seriously address this issue and the court's decision requires further proceedings anyway.

Dated: July 23, 2024

Superior Court Judge

JAMES C. CHALFANT

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EXHIBIT F

COMMUNITY DEVELOPMENT DEPARTMENT
PLANNING DIVISION

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3308 • FAX (408) 777-3333 • planning@cupertino.gov

SENT VIA ELECTRONIC AND CERTIFIED MAIL

March 17, 2025

Lixin Chen
10168 Amelia Court
Cupertino, CA 95014
leonlixinchen@gmail.com

Subject: Appeal of an Administrative Decision for a Residential Project
(TM-2024-003, EXC-2024-006, TR-2024-029)

On February 20, 2024, the City of Cupertino ("the City") received a preliminary application, as defined in California Government Code section 65941.1, from Mr. Lixin Chen ("the Applicant") for a residential development project located on a vacant property at assessor's parcel numbers 356-05-007, 356-05-008, and 356-27-026. The Applicant filed a formal application on August 16, 2024 for a 33-unit residential development and the City provided a determination of application incompleteness, pursuant to the Permit Streamlining Act, on September 13, 2024. This determination outlined the items listed in the City of Cupertino's General Planning Application that were missing from the applicant's August 16, 2024 application submission.

The Applicant provided a revised submittal on December 12, 2024 and on January 10, 2025 the City provided the Applicant with a second project review letter, demonstrating how the revised submittal documents did not address the items noted as incomplete in the September 13, 2024 letter and noting that the preliminary application pursuant to California Government Code Section 65941.1 had therefore expired.

On January 23, 2025, staff received a request to appeal an administrative decision on the development application. In a letter provided in association with the request, Mr. Kenneth Stahl, counsel to the Applicant, purported to submit an appeal under Cupertino Municipal Code (CMC) section 19.12.040(F), which provides for the appeal of administrative interpretations of Municipal Code Title 19 (including completeness determinations under CMC section 19.12.090) to the Planning Commission. However, Mr. Stahl did not challenge or appeal the City's incompleteness determination or raise any issues related to the interpretation of the Municipal Code. In fact, Mr. Stahl's letter expressly states on page 1 of his letter, "For further clarification, although the January 10 letter also found Mr. Chen's application to be incomplete, we are not requesting review of that decision." (Underlining added.) Rather, his letter asserted an incorrect interpretation of

Government Code, section 65941.1(d)(2), unrelated to the Community Development Director's incompleteness determination or any interpretation of the Municipal Code. Neither the Director nor the Planning Commission has jurisdiction to rewrite state law. Accordingly, the appeal process set forth in Government Code, section 65943(c) does not apply and the applicant has waived any legitimate grounds for appeal. Consequently, the Director's January 10 administrative decision is final.

Please contact me at (408) 777-3205 or emis@cupertino.gov for any questions or concerns related to these comments.

Sincerely,
/s/
Emi Sugiyama
Associate Planner

Attachments: (A) Completed Appeal Form received on January 23, 2025.

CC: Kenneth A. Stahl
Miller Starr Regalia
1331 N. California Blvd. Suite 600
Walnut Creek, CA 94596
ken.stahl@msrlegal.com