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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

YES IN MY BACK YARD, a California nonprofit corporation; SONJA TRAUSS; and JANET JHA, Petitioners and Plaintiffs, vs. CITY OF LOS ANGELES; CITY COUNCIL OF THE CITY OF LOS ANGELES; and DOES 1-25, Respondents and Defendants.	Case No.: 21STCP03883 Assigned to the Hon. James C. Chalfant Dept. 85 **CITY'S OPPOSITION TO WRIT** Writ Hearing Date: July 19, 2022 Time: 1:30 p.m. [Filed Concurrently with Request for Judicial Notice w/ Exhibits Volumes 1-3; Declaration of Justin Bilow w/ Exhibits] Action Filed: November 24, 2021

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I. INTRODUCTION

The claims made by Petitioners (Yes in My Backyard, Sonja Trauss, and Janet Jha) under the Permit Streamlining Act (PSA), Density Bonus, and the Housing Accountability Act (HAA) (§§Gov. Code[1] §§65920 et seq, 65915, 65589.5), are premature, moot, and ignore the plain text of State and City laws. At issue is an application for the Developer's (Janet Jha's) 67 unit Project that exceeds the development site's "RA" zoning for one unit (Project). The Project does not seek a zone change, and does not meet the prerequisites under Senate Bill (S.B.) 35, Density Bonus, or the HAA, to make the higher General Plan density of the "C1.5" zone applicable. Presuming a complete application was filed, the Project fails to provide 50% lower income units to be a S.B.35 project. In addition, the RA zoning is not "inconsistent" with the General Plan to make plan density applicable under the HAA and Density Bonus. This is because Footnote 9 in the applicable General Plan Map provides that the zones consistent with the site's land use category include the C1.5 zone, "as well as" the more restrictive RA zone. While a trial court upheld this footnote interpretation for existing zoning, the unpublished *Warner Ridge* case did not decide this issue. For these reasons the City requests the Court deny relief.

II. PERTINENT FACTS

A. The Project Is Proposed As If The Property Is Zoned For 43 Units When It Is Zoned for One

5353 Del Moreno (Property) is zoned RA-1 that allows a base unit count of one dwelling per lot. (OB6; AR416,[2] 472-73, 597,340-43). Within the City's General Plan, the Property is located in the Canoga Park-Winnetka-Woodland Hills-West Hills Community Plan (Community Plan) and has a land use category designation of "Limited Commercial." (AR113-21,416,472-73; RJN14 [Framework].) It is located in Woodland Hills. (RJN16,17[3] [p.I-2, boundaries; Map].)

The Project proposes a Density Bonus (§65915) approval that calculates a base, bonus and all unit count under the Community Plan's C1.5 zone and allows a base unit count of 43. (AR97-104,86-93,318,355-61.) The Project proposes 16.27% of the base as very-low-income units, a 55.81% density bonus, and an all unit count of 67 (Project). (AR318,355-61,554-57; OB6). It seeks both a 50% density bonus and an additional 20% veterans bonus. (AR97-104,355-61,554-57.)

B. The Developer Did Not Formally File An Application, But The City Still Notified The Developer Of Deficiencies Within 30 Days of Each Informal Submittal.

On August 18, 2020, during the COVID pandemic, the Developer's representative (Developer) left a Planning Application Form and other documents (Project Application) at the Department of City Planning (Planning). (OB6;

[1] All statutory references are to the California Government Code unless otherwise stated.
[2] Refers to: Opening Brief page 6; Administrative Record page 416.
[3] Refers to: City's Request for Judicial Notice, Exhibit 16, 17.

AR504-09,97-104[initial form]. The Project Application was not formally filed and "fees were never paid" for filing. (AR414,418-19,475-77,508-09,538,566-69,1181.)

Eight days later, by August 26, 2020, the City notified the Developer of deficiencies. On August 21, 2020, the City emailed submittal requirements for a zone change, instructions, and a list of missing items such as: a signed Geographic Project Planning Referral (Geo-Referral), a signed Affordable Housing Referral (Housing Referral), a Hillside Referral (Hillside Referral), and Project calculations using RA standards. Dates for these referrals were not listed on the main application. (AR97-104,351-65,412,506-09,1173-1200.) (RJN37 [calendar].) By August 26, 2020, the City also emailed that the August 17, 2020 request for a signed Housing Referral was defective because the "site is not eligible for a density bonus project because it is zoned [RA] for single family uses." (AR300-307, 501-03.)

On August 27, 2020, the Developer emailed supplemental application materials of: an unsigned Housing Referral, a signed Hillside Referral, and an unsigned Geo-Referral. (AR510,1201-14.)

Twenty-two days later on September 18, 2020, the City emailed that: 1) the Project Application was deficient for substantially the same reasons earlier stated; and 2) the Project could use the plan density of C1.5 if it used S.B. 35 (§65913.4). (AR315,412,513,518-19,1215-23.) The Developer however did not intend to use S.B.35. (AR349,516.)

One hundred twenty-five days later, on January 21, 2021, the Developer submitted a revised Project Application with a revised Planning Application Form and no fee. The Developer did not meet the 90-day resubmission deadline in §65941.4(d)(2) to retain any preliminary application rights, and did not get an extension. Planning however continued to correspond regarding a potential application. (AR86-93[form with new dates], 315,413,520-23,538; RJN37 [calendar].)

Four days later, the City emailed the Developer about deficiencies. On January 21, 2021, for the "updated" Housing Referral, the City emailed it was "unable to move forward with this specific request" because the Project still proposed a Density Bonus project in a single-family zone and sought a 50% density increase not applicable in the City. (AR412,501-03.) On January 25, 2021, Planning emailed that the "updated" Geo-Referral showed noncompliance with a number of specific standards, including the RA zoning standards and there would be no signature. (AR412,413,540-41,545-50.)

On February 26, 2021, Planning reiterated by email the same information. (AR522-23.)

C. Council Decided The Developer's Appeal Within 60 Days of Filing

The Los Angeles City Council (Council) denied the Developer's appeal in writing on September 1, 2021, fifty-four days after the appeal was filed under §65943 on July 9, 2021. (Pet.29-32; AR258-312,606-607; RJN37 [calendar].) On August 31, 2021 and September 1, 2021, Council held a hearing (AR608-617, 642-85) and received comments (AR313-

405, 570-94,618-41,686-703;]). Council also received a recommendation and report from Planning that explained the Project Application was not filed, but if it is considered filed it is incomplete. (AR406-569,595-602). Planning also explained that the Project did not seek a zone change or S.B.35 approval to allow the proposed density. (AR86-93,414.)

D. The City Changed Its Preliminary Application Policy And Position Per Later Legislation

On January 31, 2022, Planning notified the Developer that the §65941.1 Preliminary Application partially submitted on May 29, 2020 (dated May 19, 2020), and fully submitted June 18, 2020 (Preliminary Application), is eligible for confirmation. (AR716-27,748-49,778-89,1282-85; Decl. Bilow ¶3-8, Exh.A). The May 29, 2020 submission was missing information such as development plans and proposed approval process. (AR1282-85; Decl. Bilow, Exh. B, C.)

The City now defers verifying the availability of a proposed approval process until the time papers supporting a project application are filed, and waives inconsistencies with State and local standards in the information provided for proposed affordable units, bonus units, unit count, Density Bonus incentives/waivers, and floor area. (Decl. Bilow ¶3-8, Exh. A). This change responds to State law amendments. (Id.) Previously, Planning would verify the availability of a proposed stand-alone Density Bonus approval process by requesting the optional Housing Referral. (AR1282-83.)

III. PERTINENT REGULATORY, PROCESSING AND LEGISLATIVE CONTEXT

A. Incompleteness Appeals and Preliminary Applications Under §65943 and §65941.1

An applicant may "freeze" local regulations by submitting a "preliminary application" using City forms and instructions. (§65943, 65941.1.) (RJN20,24 [S.B. 330, Stats.2019, ch. 654; S.B. 8, Stats. 2021, ch.161].) (Decl. Bilow, Exh. B,C.) It is "deemed" submitted upon paying a fee and "providing all" 17 categories of information. (§65941.1(a).)

In 2020 the Legislature clarified that increases of 20% or more, in unit count or square footage, do not void preliminary application rights if the increase is from Density Bonus (§65915), or from "any other locally authorized program that offers additional density or other development bonuses when affordable housing is provided." (§65589.5(o)(2)(c) [implementing §65941.1(c)]; compare, Stats. 2019, ch.654, §3 [RJN24, S.B.330], with Stats.2020, ch.165, §5 [RJN22, S.B.1030, effective Sept. 25, 2020].)

For a project application under the PSA, the City requires "filing fees" and specified papers to "file" a project application, and start the 30-day clock to "determine in writing" if the application is complete, and provide a list of missing items required by the City's "submittal requirement checklist[s]" (§65940(a)(1), 65943(a) and (e); LAMC §19.00.A [RJN13]; AR565-59; AR351-66,1173-1200.) When an application is resubmitted, supplemented or amended, "a new 30-day period" begins for review. (§65943(a-b).) If the City determines that an application remains incomplete after

supplementing, the decision can be appealed in writing to Council. (§65943(c), 65932.) If there is no written appeal determination 60 days "after receipt" of the appeal, the application will be "deemed complete." The appeal is formally filed in writing using a Planning appeal form. (AR260-312.) The PSA does not prohibit an appeal form. (§65943.)

B. The Reasonable Person, Preponderance of Evidence, and Inconsistency Under The HAA

The City may require a "housing development project" to comply with "objective" plan and zone standards. (§65589.5(f)(1), (h)(2)[definition], and (j)(1) and (j)(4).) When a proposed project complies with "applicable, objective" standards, but the City "disapprove[s]" the project, or imposes a condition to "lower density," the City must make specified written findings supported by a "preponderance of the evidence in the record." (§655895.1(h), and (j)(1).)

A "housing development project" is "deemed" compliant with an "applicable" standard, if there is "substantial evidence" that would allow a "reasonable person to conclude" that the project is compliant. (§65589.5(f)(4).) A project can be "deemed" compliant with a particular standard if the City does not provide an applicant timely "documentation" of noncompliance after an application is "determined to be complete." (§65589.5(h)(9), (j)(2)(A) and (B).)

In addition, a project is "not inconsistent" with zoning and "shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan." (§65589.5(j)(4).) If in this context the City provides the applicant timely documentation of zoning noncompliance under §65589.5(j)(2), the City can make the project comply "with the objective standards and criteria of the zoning which is consistent with the general plan, however, the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan…." (§65589.5(j)(4).)

The Legislature adopted paragraph (j)(4) in 2018, via Assembly Bill (A.B.) No. 3194, and retained the inconsistency prerequisite to using plan density when it adopted later changes. (*Compare*, Stats. 2018, ch.243, §1 [RJN28, A.B 3194], with Stats. 2019, ch.654, §3 [RJN24, S.B.330, Housing Crisis Act of 2019]; Stats.2020, ch.165, §5 [RJN22, S.B.1030]; Stats. 2021, ch.161, §1 [RJN20, S.B.8]; Stats. 2021, ch.360, §8.1, 15 [RJN21, A.B.1584, ch. 360 prevails over ch. 161].)

The current language at (j)(4), replaced the introduced text of A.B.3194 that would have allowed development at the "maximum" general plan intensity. The Legislature deleted the introduced text upon the objection that it "'would take away the whole purpose of the General Plan being general …forcing the General Plan map to be like the much more specific zoning map.'" (RJN 32 [Analysis of A.B. No. 3194, as amended Apr. 16, 2018, p.7-8]; RJN 28,29,30,31 [compare, A.B

3194 as introduced Feb.16, 2018, Sec.1, with amendments of May 29, 2018 and June 21, 2018, and law at Stats. 2018, ch.243].)

C. Bonuses, Maximum Allowable Density, and Inconsistency Under Density Bonus

A "housing development" that "replace[s]" existing units and contains specified percentages of affordable or target population units (i.e., veterans), may obtain: "one density bonus"; one to four "incentives or concessions"; and unlimited "waivers" of development standards that "physically preclude" the project. (§65915.) In the City, there is a menu system of incentives, and procedures to grant bonuses greater than 35%. (§65915(n); LAMC §§12.22.A.25 and 12.2.4.U.26 [RJN9,11].) Due to existing City bonus programs, projects are entitled up to a 35% bonus and are ineligible for the State's 50% bonus. (§65915(f),(s); Stats. 2020, ch. 197, §2, 4 [RJN23, A.B. 2345]; Stats. 2019, ch.666, §1 [RJN27, A.B. 1763, §65915(f) as of Dec. 31, 2020 provides a max. 35% bonus]; LAMC §12.24.U.26 [RJN11, over 35% bonus effective Feb. 26, 2018, Ord. No. 185,373], 12.22.A.31 [RJN9, up to 80% bonus, effective Dec. 13, 2016, Ord. No. 184,745].)

A bonus is calculated on top of the "maximum allowable residential density," which is the density under the zoning "and" the land use element of the General Plan, or if a range is permitted, the maximum density of the "zoning range and" land use element of the General Plan. (§65915(b),(f) and (o)(5), (6).) General Plan density is used "[i]f the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan." (§65915(o)(5).) In 2008, the Legislature added the inconsistency language after a comment that the pending A.B. 2280 would apply a bonus to the density of the zoning "or" General Plan, noting: "Theoretically the land use element and zoning should always be consistent. In reality, they are often inconsistent. In such cases, this bill will create confusion and conflict." (RJN34 [Analysis of A.B. 2280, as amended June 18, 2008, p.4]; RJN 33,35 [Compare A.B. 2280, as amended June 18, 2008, with Stats. 2008, ch.454.)

D. The Range of Corresponding Zones For A Land Use Category Under Footnote 9

The applicable Map Legend lists C1.5 as one of the corresponding zones of the "Limited Commercial" land use category, and Footnote 9 expands the range of corresponding zones to include the more restrictive zones whose uses are permitted in the C1.5 zone by the municipal code. (RJN1,10,17 [LAMC §§12.04.A, 12.23.B(7)(b), Legend/Footnote 9]; AR319,340-43,334-36,416-17,598.) It states:

"Each Plan category permits all indicated corresponding zones as well as those zones referenced in the Los Angeles Municipal Code (LAMC) as permitted by such zones unless further restricted by adopted Specific Plans, specific conditions and/or limitations of project approval, Plan footnotes or other Plan map or text notations. Zones established in the LAMC

subsequent to the adoption of the Plan shall not be deemed corresponding to any particular Plan category unless the Plan is amended to so indicate.

It is the intent of the Plan that the entitlements granted shall be one of the zone designations within the corresponding zones shown on the Plan, unless accompanied by a concurrent Plan amendment." (RJN17)

Council adopted the language on March 27, 1991, amending all community plans to clarify the full range of zones that are consistent with each land use category. (RJN18 [Council File (CF) No. 90-1422, p.1-7, 43-46].) It memorialized the fact the "plans have been interpreted consistently" to mean that the "more restrictive zones are consistent with the applicable plan category." (RJN18 [CF 90-1422, p.19-20, 22-28,44-46].) It clarifies the full range of corresponding zones "without requiring the recitation of each and every corresponding zone." (RJN18 [CF 90-1422, p.24].)

There is no Map footnote that prohibits lower density zoning in the higher density land use categories, narrows the range of corresponding zones, or imposes a density minimum. Nor is there authority for greater density in a one-family zone in Woodland Hills, while there is one for Canoga Park. (RJN17 [Footnote 3]; RJN16 [Plan p.I-1 through 2, neighborhood boundaries]; RJN17 [Map].)

While the Legend does not explicitly indicate the RA zone corresponds to the Limited Commercial category, Footnote 9 provides that the RA zone is included. This is because the RA zone is more restrictive than the C1.5 zone that is indicated. (RJN1,10 [LAMC §§12.04.A and 12.23.B.7(b), listing zones most to least restrictive: RA, R1, R2, R3, R4 and C1.5].) It is also because the RA zone and its uses are referenced by the LAMC as permitted by the C1.5 zone. (RJN7 [LAMC §12.13.5.A.1, the C1.5 zone permits R4 and "single-family dwelling" uses]; RJN6 [LAMC 12.11.A.1, the R4 zone permits "R3"]; RJN5 [LAMC §12.10.A.1, the R3 zone permits "R2"]; RJN4 [LAMC §12.09.A.1, the R2 zone permits "R1"]; RJN3 [LAMC §12.08.A.1 and C.4, the R1 zone permits one dwelling per 5,000 sq.ft.]; RJN2 [LAMC §12.07.A.1 and C.4, the RA zone permits one dwelling per 17,500 sq.ft lot].)

IV. STANDARD OF REVIEW

A. The Permit Streamlining And Preliminary Application Claims Fall Under Traditional Mandate

The City's actions under the PSA and on the Preliminary Application are reviewed under traditional mandate or Civil Procedure Code (C.C.P) §1085. (§§65943(c) and 65941.1; *compare*, C.C.P. §§1094.5(a) with 1085(a).) The writ may compel "an act which the law specially enjoins" where the petitioner has a "clear" and "present" right to performance. (C.C.P. §1085(a); *Pomona Police Officers' Ass'n v. City of Pomona* (1997) 58 Cal.App.4th 578, 583-84; *California Ass'n for Health Services at Home v. Dept. of Health Services* (2007) 148 Cal.App.4th 696, 704.) The Court may not substitute their

judgment for the agency's and must uphold the action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for petitioner's rights." (*Sequoia Union High School Dist. v. Aurora Charter High Sch.* (2003) 112 Cal.App.4th 185, 195.) Extra-record evidence, such as the Bilow Declaration and Exhibits, is admissible to "establish whether the agency fulfilled its duties," or "to assist the trial court in understanding the agency's decision." (*Outfitter Properties, LLC v. Wildlife Conservation Bd.* (2012) 207 Cal.App.4th 237, 251.) It is appropriate when reviewing "informal administrative actions." (*Western States Petroleum Assn. v. Sup. Ct.* (1995) 9 Cal.4th 559, 575.)

B. A Disapproval Under The HAA Is Reviewed By C.C.P. §1094.5, Although Not Pertinent Here

Council did not approve, disapprove or lower the density of the Project here, but decided whether there was a complete application. This lawsuit does not challenge a final administrative decision on the Project. (*See generally*, *Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 832-33, 837 [project disapproval]; *Reznitskiy v. County of Marin* (2022) 2022 Cal.App.LEXIS 527, *4-6 [same].) If there was a decision on the Project the HAA claims would be brought under C.C.P. §1094.5 and the City would bear the burden of proving HAA compliance. (§65589.5(f)(4), (h)(6), (j)(1), (m) and (n), 65589.6.) However, it would be presumed that the City regularly performed its official duties, and that its findings are supported by substantial evidence. (Evid. Code §664; *Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963, 969.)

C. The City's Zone-Plan Consistency Interpretation Receives Heightened Deference

The City's interpretation must "be respected by the courts unless it is clearly erroneous or unauthorized." (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087, 1091 [a city's interpretation of its code "is entitled to great weight"]; *MCH Operating Lt'd Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219 [upholding a city's interpretation of its ordinance]; *see also Yamaha Corp. of America v. St. Bd. Of Equal.* (1998) 19 Cal.4th 1, 8.) Courts grant significant deference because agencies have the expertise and knowledge to administer their laws. (*Yamaha*, 19 Cal,4th 1, 12.) It is Petitioners' burden to show an interpretation is clearly erroneous or unauthorized. (*Id.* at 6-7.)

D. It is Petitioners' Burden to Prove Any Conditions Precedent To A Ministerial Duty

For traditional mandate, it is Petitioners' burden to establish that the City must take an action "the law specifically enjoins." (C.C.P. §1085(a)*; see* Evid. Code § 500; C.C.P. §1109.) Petitioners must prove that a given state of facts exist to compel action in a prescribed manner. (*Cal. Assn. for Health Services,* 148 Cal.App.4th 696, 707-708.) A writ cannot control discretion lawfully entrusted to an agency. *State of Cal. v. Superior Ct. of Orange County* (1974) 12 Cal.3d 237, 247.) Failure to demonstrate a ministerial duty is fatal. (*Larson v. Redondo Beach* (1972) 27 Cal.App.3d 332, 337.)

V. ARGUMENT

A. The Absence Of A Filed Application And Project Decision Makes The Claims Premature

The Developer did not formally "file" the Project Application to trigger the PSA 30-day clock; received a PSA appeal decision that would have determined whether there was a complete application at all; has no "accepted" application for processing; and received no formal "decision" on the requested entitlement that would trigger the HAA or Density Bonus issues. (§65943(a) and (e), 65944(a), 65589.5(h)(6), 65589.6; RJN Exh.13 [LAMC§19.00.A].) (AR258-312,414,418-19,508-09,538,566-69,606-607, 1181.) The standards and findings under the HAA apply to an action on a project after an application is accepted for processing, when there is a "vote," an "approval or disapproval" after the adoption of environmental analysis, or a "decision" on the requested entitlement. (§65589.5(f)(4), (h)(6) and (j)(1), 65589.6, 65950; *compare, Cal. Renters Legal Advocacy & Educ. Fund,* 68 Cal.App.5th 820, 832-33, 837 [deciding council denial].) These standards are irrelevant to the question here of whether there is a complete application under the PSA which was what Council actually decided.

B. A Change In City Position And Policy Make The Preliminary Application Claims Moot

The claims are moot for three reasons. First, the Developer's Preliminary Application of 2020 can be confirmed as submitted. (Decl. Bilow ¶ 3-8, Exh.A.) Second, the City changed it processing policy as discussed in Section II.D of this Opposition. Third, the Preliminary Application has "no further force or effect" because as discussed in Section II.B of this Opposition, the Developer failed to file with a filing fee "all" required information for a complete application within 180 days, or submit the information needed to complete the alleged August 18, 2020 application within 90 days of receiving the notice of incompleteness on September 18, 2020. There is no extension of time. (§65941.1(d), compare with 65950(b); 65943(a).) (*See, Federa v. Lahanier et al.* (1962) 200 Cal. App. 2d 483, 484-485 [dismissed challenge to a promotion list after the list expired].) Petitioners do not brief claims regarding the preliminary application of January 1, 2021, (AR824-31), and waive those claims.

The City substantially complied with §65941.1 because reviewing preliminary applications for correct and complete information gives effect to the express mandate that "all" 17 required categories of information, such as "proposed uses" and "proposed approvals process," are actually provided *before* a submission date is fixed. (§65941.1(a); RJN25,26 [Analysis of S. B. No.330, as amend. June 12, 2019, p.8; and as amended Aug. 12, 2019, p. 2 and 4].) (*See*, *Select Base Materials, Inc. v. Bd. of Equal.* (1959) 51 Cal.2d 640, 645,647 [adopting interpretation where "each part of the statute is given meaning" that avoids rendering "nugatory important provisions of the statute."].)

The claims about the Preliminary Application should be dismissed as "conjecture or supposition," because there is no evidence the City has returned to prior practice, and any requested declaration will only be a recitation of the statute. (*Burke v. City etc. of San Francisco* (1968) 258 Cal.App.2d 32, 34-35 [no controversy because the policy challenged was that of predecessor]; C.C.P. §1060, §1061.)

C. Council's Timely Appeal Decision Moots The PSA Appeal Claims

The fact the City timely issued an appeal decision to the Developer makes the claim that the City did not, or does not, provide a PSA appeal, a claim that is speculative, academic and therefore moot. (*Federa,* 200 Cal. App. 2d 483, 484-485.) As discussed in Section II.C of this Opposition, the City responded to and processed the appeal inquiry through a formal filing process, rendering a decision 54 days after filing. (AR258-602,606-703,1153; Pet.29-32; OB12; RJN13 [LAMC §19.00.A.) Since the Developer sought a Geo-Referral and Housing Referral out of order, and submitted them concurrently with, or subsequent to, the informal submission of Project Application, the City addressed the issues related to the referrals and the Project Application together in its appeal responses. (§65941(c).) (AR406-569,1173-1200.)

D. Presuming A Filed Application, The City Complied With The 30-Day Review Period

Presuming an informal drop-off was a formal application filing, each time the Developer submitted information, a new 30-day period began to determine incompleteness, and the City met that deadline each time as discussed in Section II.B of this Opposition. (§65943(a) and (b).) (RJN37 [calendar].) There was no "practice" of refusing to receive an application (OB12), but the consistent message that it would be an idle act to accept and process an application for a land use approval that was not legally available. (Civ. Code §3532 ["The law neither does nor requires idle acts."])

The City's emails constitute the written determinations of incompleteness. Emails are appropriate because the PSA does not specify the level of formality or form, and it was a regular form of communication between the parties during COVID. (§65943(a) and (b); Civ. Code §1633.5.)

Persuasive of the City's substantial compliance is *Lewis v. City of Hayward* (1986) 177 Cal.App.3d 103, 112, in which a city was found to comply with the PSA because the city made the incomplete status clear even though the city did not provide it in writing. Here, the City actually provided a written record of emails, and specifically itemized the missing information. (AR300-07,315,351-65,412,501-03,506-10,513,518-19,522-23,540-41,545-50,1173-1200,1201-23.)

Petitioners' arguments about noncompliance are unpersuasive. The September 18, 2020 and February 26, 2021 emails allegedly outside of the 30-day review period simply repeated the earlier notices within the 30-day period. (OB11; AR315,412,513,518-19,522-23,1215-23.) In addition, reliance on *Orsi v. City of Salinas* (1990) 219 Cal. App. 3d 1576, is

not persuasive because that agency was silent for forty-one days (*Id*. at 1579-80, 1583-84), which contrasts to the City's response to every piecemeal submission described in Section II.B and II.C of this Opposition

E. Presuming a Filed Application, The RA Zoning Standards Are Applicable

1. Zoning Inconsistency Is A Prerequisite To Applying Plan Density In Density Bonus and the HAA

The plain text of the HAA and Density Bonus require the Property's zoning to be "inconsistent" with the General Plan before "the general plan density shall prevail," or the City is required to accommodate "the density allowed on the site by the general plan." (§65589.5(j)(4), 65915(o)(5).) This cited text requires the Court to reject Petitioners' interpretation (OB15-16). "The court looks first to the words of the statute because the statutory language is generally the most reliable indicator of legislative intent." (*Bay Area Citizens v. Ass'n of Bay Area Gov't* (2016) 248 Cal.App.4th 966, 977 [upholding deference to an agency's interpretation of new laws, relying on the plain language, bill emphasis, and "the Legislature's declarations and findings"].)

The inconsistency requirement was added to the HAA and Density Bonus during the legislative process after the Legislature received comments about the relationship of zoning to the General Plan, as discussed in prior Sections III.B and III.C of this Opposition. For the HAA, the Legislature added the current paragraph (j)(4) in 2018 after *deleting* original bill language that would have allowed projects to build at "maximum" General Plan density. (RJN28-32 [A.B. 3194 amendments, analyses].) Deletion of the text means the statute "should not be construed to include the omitted provision." (*People v. Tingcungco* (2015) 237 Cal.App.4th 249, 256.) Subsequent amendments and the Housing Crisis Act of 2019 did not change this HAA paragraph. (RJN20,21,22,24,28.)

The inclusion of the term "inconsistent" in the HAA and Density Bonus means that the Legislature meant to convey a different meaning than in S.B.35 (§65913.4.). For projects using S.B.35, a project is consistent with zoning "if the density proposed is compliant with the maximum density allowed within that land use designation…." (§65913.4(a)(5)(A) [S.B.35]; *see also*, §65589.5(d)(5) [allowing denial of specified projects if inconsistent with "both" zoning and plan].) The omission of such a provision from another housing approval statute "is significant to show that a different legislative intent existed." (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 825.)

The City's interpretation ensures that "each part of the statute is given meaning," harmonizes, and does not "render nugatory important provisions." (*Select Base,* 51 Cal.2d 640, 645,647.) In contrast, Petitioners' offered interpretation improperly renders the term "inconsistent" without meaning. It also attempts to improperly compel actions beyond the

duties articulated by the statute text simply on the basis of legislative policy. (*Larson,* 27 Cal.App.3d 332, 337-338 [denying writ because legislative policy statements did not enjoin the acts sought to be compelled].)

In the Density Bonus statute, the sentence regarding zoning inconsistency contrasts with the text of the first sentence in the definition of "maximum allowable residential density," which says the density comes from the "zoning ordinance and" plan, or "zoning range and" plan, referencing the circumstance of zoning consistency with the plan. (§65915(o)(5).) The plain language of the first sentence directs the City to harmonize the impact of both zoning and the plan when there is consistency so that zone and plan can have "concurrent operation." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.) Petitioners' offered interpretation of always applying plan density would render the first sentence meaningless or redundant.

The City's interpretation reinforces zoning consistency with the General Plan in §65860, applicable to a wide range of land use actions. Although Density Bonus and the HAA do not define "consistent" or "inconsistent," the concept is well established by §65860 and associated caselaw. The land use understanding of the terms "consistent" and "inconsistent" prevail over a "literal" definition. (*See* Civ. Code §1645; *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 851].)

2. The RA zone is consistent with the Limited Commercial Land Use Category Based On Footnote 9, and Collateral Estoppel Does Not Change The Conclusion

Petitioners ignore Footnote 9 in order to contend that the RA zoning is inconsistent because the RA zone is not listed on the Legend next to the Limited Commercial category (OB17-18). Then they fail to cite evidence or law to show how the Property's current zoning is inconsistent with the Community Plan; how it is outside the range of uses allowed by the Limited Commercial category; or how it would "obstruct" the policies of the General Plan. (*See Corona-Norco Unified Sch. Dis.t v. City of Corona* (1993) 17 Cal.App.4th 985, 994.)

As discussed in Section III.D of the Opposition, Footnote 9 specifically states that the full range of Limited Commercial corresponding zones includes the C1.5 zone listed in the Legend, "as well as" the more restrictive zones, such as RA, permitted by the LAMC but not listed in the Map Legend. (RJN17 [Footnote 9, Legend].) Footnote 9 clarifies the impact of the Legend's list of zones. Consequently, Petitioners have not satisfied the zone-plan inconsistency prerequisite to applying plan density under the HAA and Density Bonus. (§§65589.5(j)(4), 65915(o)(5); *compare with* §65913.4(a)(5)(A).)

The City adopts a General Plan to guide its future development. (§65300.) The Framework Element states that the precise land use "designation" will be determined in the community plan." (RJN14 [framework]) The City's 35 Community Plans collectively comprise the General Plan's Land Use Element. (Pub. Res. Code § 21083.3(e)). However, the

Community Plans generally "do not state specific mandates or prohibitions." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378.)

Government Code §65860 requires the Property's zoning to be "consistent" with the Community Plan (i.e., General Plan); but does not rigidly dictate what is means to be consistent, and does not specify the sequencing of amendments. (§65860(a)(2) and (c).) The RA zoning and its uses must be "compatible with the objectives, policies, general land uses, and programs specified in the plan" category of Limited Commercial. (§65860(a)(2) and (c.).) It should not "frustrate" the achievement of the plan objectives and policies. (*Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 18 [shopping center was consistent despite exceeding size limits].) It does not mean that the Property's zoning must be "in rigid conformity with every detail" of the plan, such as zoning that exactly matches the density of the zones listed for the Limited Commercial land use category. (*Naraghi,* 1 Cal.App.5th 9, 17-18; *accord, Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717-18 [housing development was consistent despite not conforming precisely with land use designation]*; Corona-Norco,* 17 Cal.App.4th 985, 994 [upholding a zone change if "considering all it aspects it will further the objectives and policies of the general plan and not obstruct their attainment"].) Here, the RA zoning is compatible because it can have concurrent operation with the maximum plan density allowed. In other words, it is not "inimical" because one dwelling does not exceed the 43 unit density of the Limited Commercial C1.5 zone, and the zone does not "prohibit what the [plan] commands or command what it prohibits." (*Sherwin Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 902 [upholding local law]; Id.)

Petitioners cannot claim that the RA zoning or Footnote 9 is inherently void, as land use legislation is "voidable" if an action is timely brought within 90 days of the adoption. (§65009; *Gonzalez v. County of Tulare* (1998) 65 Cal. App. 4th 777, 789 (under the then 120-day limitations period, fn.5,7). Nor are these regulations now capable of being set aside years after adoption. (*See generally*, *City of Los Angeles v. State of* California (1982) 138 Cal.App.3d 526, 531-32 [consistency required of City as of 1982].) (AR16,113-14 [one dwelling since 1978]; RJN18,19[Footnote 9 adopted 1991; Plan update matrix indicates RA zone predated update since no parcels are zoned to RA].)

In addition, Petitioners cannot claim zone-plan inconsistency through the City's Housing Element in the General Plan (OB15) because the Property's parcel numbers are not listed on the applicable page for the Community Plan in the inventory of underdeveloped suitable sites identified for housing production. (RJN15 [Inventory]; AR473 [A.P.N.].)

Circumstances described in Section III.D of this Opposition indicate the City is entitled to deference concerning its interpretation of the zoning code and Footnote 9. They are regulations authored and implemented by the City that are

subject to long-standing and consistent interpretation. It is the City's "'expertise,' expressed as an interpretation (…), that is the source of the presumptive value of the agency's views." (*Yamaha,* 19 Cal.4th 1, 11.) (*See*, *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021 ["The construction placed on a piece of legislation by the enacting body is of very persuasive significance."]).

To the extent this Court seeks other rulings about the existing zones and uses allowed by a land use category under the footnote language and within the context of §65589.5(j)(4), the Court may refer to the ruling in *Snowball West Investments, LP v. City of Los Angeles*, (L.A.S.C. 20STCP00771) where the language appears in Footnote 23 there. (RJN38 [ruling dated Jun. 24, 2021, on appeal].) The unpublished opinion in *Warner Ridge Assoc. v. City of Los Angeles* (1991) 2 Cal.App.4th 238 (OB17-18) does not involve the above question, this Property, or the consistency of the RA zone. (Id. at 244-45, 257.) Instead, it decided a timely challenge under §65860, to a newly adopted RS zone on a different site in order to determine whether the zoning should be set aside. (2 Cal.App.4th 238, 244-45, 257.)

Warner Ridge does not meet the test for collateral estoppel because it did not involve the actual litigation and necessary decision of the "identical" issues raised by Petitioners concerning the Property. (*Church v. San Mateo County Assessment Appeals Board* (*Church*) (2022) 52 Cal.App.5th 310, 321-22 [not applying issue preclusion]; *County of Los Angeles v. County of Los Angeles Assessment Appeals Bd.* (1993) 13 Cal.App4th 102, 110. [did not apply collateral estoppel to contracts that were "similar" but concerned different property].)

While the *Warner Ridge* Court discussed its disagreement with the City's "hierarchy theory" and part of the footnote language, it is not authority for Petitioners' questions because it does not decide whether the City's zones and plans "may allow a lower use" or whether "a less intense use is included within a more intense use, or whether such a use may be permitted," calling the question "beside the point." (2 Cal.App.4th 238, 254; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892. 906 [A case does not stand for a proposition not considered].) Reliance on the case is problematic for two other reasons. First, it attempts to convert an unpublished case into citeable precedent to determine an issue of law – i.e. what development standard applies. (*Church*, 52 Cal.App.5th 310, 22.) Second, collateral estoppel would create a public injustice by preventing the City and individual property owners from litigating development standards within the zoning and planning context of an individual parcel. (*See generally, Pacific Maritime Association v. California Unemployment Ins. Appeals Bd.* (1965) 236 Cal.App.2d 325, 333-34 [applying injustice exception].)

3. The Project Does Not Provide 50% Affordable to Use Plan Density As A S.B.35 Project

The Project does not propose the 50% affordable required to utilize the Community Plan density as a "streamlined" S.B.35 project, and instead proposes to set aside 16.27% of the 43 base units from the C1.5 zone as lower income units. (§65913.4(a)(5)(A), (4)(B)(ii).) (AR318,355-61,513,554-57,1215; OB6; RJN36.) Although the Project does not comply with S.B.35, the Developer also declared that the Project did not intend to use S.B.35. (AR349,516[Sept.29, 2020 email].)

There is no absurdity in applying plan density and a "ministerial" approval process to projects that provide a mandatory percentage of affordable units in jurisdictions that are under-producing housing. (§65913.4(a), (a)(4); 14 Cal. Code Regs. §15268; RJN36 [50% determination].) Section 65913.4 (S.B.35) does not make inconsistency a prerequisite to using plan density because it seeks to "facilitate and expedite" and streamline production at specified income levels, in specific jurisdictions. (§65913.4(a)(4); *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 297, 326-27.)

F. Noncompliance With RA and S.B35 Standards Makes The PSA and HAA Inapplicable

The Project Application is not subject to the PSA timelines, the HAA findings, or the HAA's reasonable person analysis because as discussed in Section V.E of this Opposition, the RA standards apply. Therefore, the proposed 67 unit Project does not comply with the standard of one dwelling on the lot, and the Property therefore requires zones change legislation to accommodate the Project. (§65589.5(f)(4), (j)(1); *Land Waste Management v. Contra Costa County* (1990) 222 Cal.App.3d 950, 956, 959 [The PSA is limited to "only . . . 'projects' which are adjudicatory in nature."]; *Mira Dev. Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1202, 1222 [HAA findings don't apply to a project that requires legislation because the project is not one that complies with existing standards].) (AR97-104, 86-93,318,355-61,554-57; OB6; RJN12 [LAMC §12.32 zone changes].) Petitioners received regular communication that the Project fails to comply with applicable RA development standards as referenced in Section II.B and C of this Opposition.

Further, the Project cannot be analyzed as an S.B.35 development under the PSA or HAA because the Project does not meet the affordability standard as discussed in Section V.E.3 of this Opposition. (§65913.4(a)(5)(A); RJN36.).

G. There Is No Evidence For Relief Under A Pattern and Practice Theory

Petitioners waive any pattern and practice claim (Pet. Prayer For Relief ¶1,2,4) because they do not brief the claim or prove an on-going practice. (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010 ["points raised in a reply brief for the first time will not be considered …."]; To the extent they do brief such a claim (OB12), it demonstrates a challenge to "one agency decision." (*Compare*, *East Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection* (1996) 43 Cal. App. 4th 1113, 1123-24, 1131-32 [denying declaratory relief because the agency "changed its policy" and there was no proof of

"ongoing" challenged practice], with *Californians for Native Salmon etc. Assn. v. Dept. of Forestry* (1990) 221 Cal. App. 3d 1419, 1422 [proof of "overarching quasi-legislative policy"].)

H. The City Acted In Good Faith Based On The Plain Language of State and City Laws

For the foregoing reasons, the City's actions were taken in good faith. The HAA defines "bad faith" as an action that is "frivolous or otherwise entirely without merit." (§65589.5(l).) There is more than one standard, and the City's conduct does not meet any of them. (*Burkle v. Burkle* (2006) 144 Cal.App.4th 387, 401 [conduct that is "objectively unreasonable"]; *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440 [a claim is "legally frivolous is it is 'not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."].) Petitioners have not cited authority that the City's actions are with improper motive, or are entirely without merit.

VI. CONCLUSION

For the foregoing reasons the City requests denial of the requested relief.

Dated: June 20, 2022

Respectfully submitted,

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DONNA WONG, Deputy City Attorney

By: _____
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PROOF OF SERVICE

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 200 North Main Street, 701 City Hall East, Los Angeles, California 90012.

On June 20, 2022, I served the foregoing document described as: **CITY'S OPPOSITION TO WRIT** on all interested parties in this action as follows:

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[X] BY ELECTRONIC MAIL – I electronically transmitted the document listed above to the email addresses stated above which have been confirmed for each addressee stated above. My electronic service address is kamilah.hynds@lacity.org.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 20, 2022, at Los Angeles, California.

KAMILAH HYNDS