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SUPERIOR COURT – STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – UNLIMITED CIVIL JURISDICTION

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 Number: 21STCP03883

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

Dept: 85
Judge: James C. Chalfant
Hearing Date: July 19, 2022
Time: 1:30 p.m

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I. ARGUMENT IN REPLY

Respondents' opposition, rather than denying Petitioners' claims, doubles-down on the City's patently unlawful tactics it has employed to avoid its obligations under state law. Respondents continue to argue that Petitioner Jha's housing development application was never submitted and the City has no duty to process the application pursuant to the Permit Streamlining Act (PSA). Respondents go one step further, taking the extreme position that Petitioners claims are premature because of the "absence" of a filed application and there is nothing for this Court to review – at least until the City blesses Jha with the privilege of submitting an application. Simply put, that is not how the law works.

Respondents' opposition is also filled with factual inaccuracies. Respondents claim Jha's application was only "informally" submitted, and fees were not paid. The record shows Jha followed the City's specific submittal directions (AR 01113-15) and paid fees (AR 00748). Respondents argue the City rendered a decision on Jha's appeal of the incompleteness determination within 54 days. The record shows the City made its decision on September 1, 2021, 178 days after Jha first demanded an appeal. (AR 01153.) Respondents' opposition is untethered from the law and the facts.

The City has refused to accept Jha's application based on the erroneous position that the project is prohibited by the site's single-family zoning. Not only is this an invalid basis to refuse an application, but this directly contradicts the Housing Accountability Act (HAA) that requires local governments to approve projects at the densities allowed under the general plan. Respondents' frivolous and meritless positions is a continuation of the City's nearly half century track record of thumbing its nose at state law requirements.

A. Respondents Admit Petitioners' Preliminary Application Was Complete

Gov. Code § 65941.1(a) states that an applicant "shall be deemed to have submitted a preliminary application" upon providing the seventeen pieces of information listed in the statute. Respondents argue Petitioners' preliminary application claim is moot because it "changed its policy" apparently in response to "the year 2020 amendment to Government Code § 65589.5(o)(2)(E)." (Resp. Decl. Bilow p. 3 ¶ 1-2.) On January 31, 2022, Respondent emailed

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to explain that if Jha were to "return to confirm that this Preliminary Application was submitted, we would issue that confirmation." (*Id.* Ex. A.) The amendment that apparently spurred the change in policy was to the HAA, not the preliminary application requirements listed in Gov. Code § 65941.1(a). The preliminary application requirements *have not changed at all*. The fact that Respondents now say the preliminary application can be accepted merely confirms the City's initial refusal was unlawful. The claim is not moot, as the entire point of the preliminary application is to lock in the development standards that were in place at the time it was submitted. (*See* Gov. Code § 65589.5(o).) The fact that the City will accept Jha's preliminary application two years later is irrelevant. A judicial declaration that Jha's preliminary application is complete as of the date it was originally submitted is entirely appropriate.[1]

B. Jha's Application is Deemed Complete

Respondents refuse to recognize Jha's application and waffle between two equally invalid justifications for their refusal. First, Respondents claim the application was never "formally" submitted because it was "an informal drop-off" and "fees were never paid." This is just false. Jha asked the Planning Department how to submit the application, and Jha complied with specific instructions to submit electronic copies and drop off physical copies in bins outside the Department's office. (AR 01113-15.) The Planning Department confirmed receipt of the application submittal. (*Id.*) Jha also paid all requested fees. (AR 00748.) Jha could not pay any additional entitlement fees due to Respondents' refusal to accept the application and the City admits an "invoice was never created requesting payment of entitlement fees." (AR 00419.) Jha cannot pay fees that Respondents never requested. Second, Respondents state that the Planning Department can refuse an application if it believes the project is inconsistent with the zoning code. This practice has already been found "improper" and Respondents point to no authority to support their position. (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2010) 187 Cal App. 4th 1461, 1473.)

[1] Respondents also argue that Jha did not file a complete development application within 180 days after submitting the preliminary application and it expired. This argument is premised on the meritless claim that Jha's application was never submitted.

Alternatively, Respondents argue the City timely processed the application. Petitioners' Opening Brief on pages 11-12 thoroughly explained that no matter when you start counting, Respondents failed to meet every one of the PSA's deadlines. However, worth repeating is Respondents egregious failure to respond to Jha's demand for an appeal for 178 days when the PSA requires a decision within 60 days. Jha demanded an appeal on March 7, 2021 and the City clearly said there was no appeal process. (AR 01153.) The failure to respond to Jha's appeal stems from the lack of any formal appeal process, as the City admits an "appeal procedure is not codified in the Los Angeles Municipal Code."[2] (AR 00625.) Due to the City's failure to timely respond to Jha's application, the application is deemed complete as a matter of law. (*See* Gov. Code § 65943(a).)

C. The Project's Zoning is Inconsistent with the General Plan

The HAA greatly limits a local government's ability to deny housing development projects that comply with applicable development standards, except in cases where the agency finds the project would have an unavoidable public health or safety impact. (Gov. Code § 65589.5(j)(1)(A)-(B).) In 2018, the Legislature adopted amendments to strengthen the HAA and prohibit local governments from finding a project inconsistent, or requiring rezoning, in cases where the zoning is inconsistent with the general plan. (Gov. Code § 65589.5(j)(4).) Here, the City unlawfully disapproved Jha's application and required a rezoning, even though the parcel's zoning is inconsistent with the general plan.[3] Respondents make no attempt to argue the project is inconsistent with the general plan.

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[2] The City incorrectly stated that the appeal requirement was added in 2020 with the adoption of SB 330. The PSA appeal requirement was added nearly forty years ago by AB 2622. (*Orsi v. City Council* (1990) 219 Cal. App. 3d 1576, 1596.)

[3] The HAA defines "disapproval" as any instance in which a local agency "[v]otes on a proposed housing development project ***application*** and the ***application*** is disapproved." (Gov. Code § 65589.5(h)(6).) Respondents claim that there was no disapproval because the Council did not take a final vote on project entitlements. The definition of disapproval is explicitly tied to the project ***application***. The Council disapproved Jha's application because "you can't do multifamily in residential agriculture in RA zones. You have to get it rezoned." (AR 00634.) The Council's final administrative action disapproved Jha's application based on an inconsistency finding and unlawfully directed Jha to seek a rezoning.

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The City's General Plan Framework Element states that the Land Use Element's community plans "set forth how property may be used and form the basis for decisions on discretionary permits." (Res. RJN, Ex. 14 p. 167.) The property at issue here is within the Canoga Park - Winnetka - Woodland Hills - West Hills Community Plan ("Community Plan"). The Community Plan designates the subject parcel "Limited Commercial," with various corresponding "C" zones that allow for commercial uses and multi-family residential uses with densities up to one unit per 400 square feet. Despite the property's Limited Commercial land use designation, the site is zoned RA-1. The RA-1 zone prohibits all commercial and multi-family uses, allowing only one single-family residence per lot. The City argues that the Limited Commercial land use designation is consistent with single-family zoning, based solely on footnote 9, which states in pertinent part:

> "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…. 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."

The City focuses on the first sentence, which they argue is a codification of their "hierarchy of use" theory that all "more restrictive" zones are consistent with all "more intense" land use designations. The City ignores the last sentence of footnote 9, which states that "entitlements ***shall be*** one of the corresponding zones shown on the Plan." This is a mandatory directive that requires the City to approve projects according to the zones identified in the land use designation. This is consistent with the Framework Element's directive that the community plans "form the basis for decisions on discretionary permits." Read together, the general plan clearly requires entitlements to be issued per the general plan designation, even if the zoning is inconsistent with the plan. *This is exactly what the HAA requires.*

To fully understand footnote 9, it is important to explain the City's long history of ignoring state law. In 1978, AB 283 required the City to achieve zoning and general plan consistency by July 1, 1982. (*City of Los Angeles v. State of* California (1982) 138 Cal.App.3d 526) Rather than comply, the City unsuccessfully argued the requirement was unconstitutional

and the court ordered that "conformity shall be achieved by July 1, 1982." (*Id.* at 532.) The City disregarded the court and still failed to comply. Governor Deukmejian vetoed a proposed extension to the deadline, finding it "disturbing" that the City failed to comply and "inappropriate" to extend the deadline. (Pet. RJN, Ex. B.)

Despite all three branches of state government mandating compliance, the City ***still*** failed to achieve consistency. The City was then sued by a group of anti-development homeowner associations that sought to prevent the issuance of new permits until consistency was achieved. (*Elysian Heights Residents v. City of Los Angeles*, (1986) 182 Cal.App.3d 21, 26.) Faced with potentially thousands of lawsuits, the City agreed to a stipulated judgment that required a permit moratorium and implementation of a consistency program. (*Id.*) The parties agreed to adopt the "hierarchy theory" for purposes of the stipulated judgment. (*Warner Ridge Associates v. City of Los Angeles* (1991) 2 Cal.App.4th 238.)

By 1990, the consistency program was nearly complete. However, the City was sued again, this time by developer. Warner Ridge Associates owned a parcel designated "neighborhood and office," which allowed for a range of commercial zones, but the parcel was zoned only for single family residences. (*Id.*) The developer tried to rezone the property to a commercial zone, but the rezoning was denied. (*Id.*) The developer brought suit to enforce AB 283's consistency requirement and the trial court found the single family zoning was "not 'consistent' with the plan in any meaningful sense of the word 'consistent' nor in any sense in which the word 'consistent' has been used in the case law." (*Id.*)

Faced again with the threat of thousands of lawsuits, the City appealed and immediately "attempted to set its hierarchy theory in concrete" by adding a footnote to every community plan. (*Id.*) Perhaps not realizing you should not say certain things out loud, the City's stated rationale for the footnotes was because it "gives added credibility to a Commission or Council disapproval of a zone change." (Res. RJN, Ex. 18 p. 261.) Despite the City's post-hoc attempt to justify its rezone denial, the *Warner Ridge* court found the "City's recent amendment of its General Plan to include the hierarchy theory does not alter this result" because "[a] city may not

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adopt ordinances and regulations which conflict with state Planning and Zoning Law." (*Id.*) In other words, the footnotes *have already been deemed invalid and void.*

Respondents argue that Petitioners "fail to cite evidence or law to show how the Property's current zoning is inconsistent with the Community Plan." To the contrary, Petitioners cite to *Warner Ridge*, which specifically rejected the hierarchy theory and found that "[n]o reasonable person can seriously believe that a zoning ordinance which prohibits all commercial uses in an area designated in the general plan for commercial uses is 'consistent' with the general plan." Respondents somehow try to argue this case did not decide the consistency issue. The court did not reach the issue of whether the City "may *allow* a lower use." In other words, the court did say whether the City was free to approve a project that *proposed* a less intense use, calling the question "beside the point." The court focused instead on the larger issue of whether the City's residential zoning was consistent with the City's commercial general plan designation, which is identical to the issue here.[4]

Respondents claim its rejected hierarchy theory are "subject to long-standing and consistent interpretation" that must be given deference. Notwithstanding that the *Warner Ridge* court rejected the footnotes under a deferential standard, the HAA changed the standard of review "because the HAA cabins the discretion of a local agency to reject proposals for new housing, it is inappropriate for us to defer to the City's interpretation." *Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo*, 2021) 68 Cal.App.5th 820, 844.) Thus, courts engage in "more rigorous independent review . . . in order to prevent the City from circumventing what was intended to be a strict limitation on its authority." (*Id.*) The fact that the

[4] Respondents argue that *Warner Ridge* should not be relied upon because the opinion is unpublished and does not meet the test for collateral estoppel. California Rules of Court Rule 8.1115(1) permits a party to rely upon an unpublished opinion "[w]hen the opinion is relevant under the doctrines of law of the case," and *Warner Ridge* is certainly relevant to the question of consistency. Second, the *Warner Ridge* does meet the test for collateral estoppel, as the court decided "an issue of ultimate fact" *as applied* to law, not a pure question of law. (*See Church v. San Mateo Cnty. Assessment Appeals Bd.*, 52 Cal.App.5th 310, 321 (Cal. Ct. App. 2020.) The *Warner Ridge* court decided an issue of ultimate fact – whether single family zoning is consistent with commercial land use designation – as applied to state law consistency requirements.

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City has relied on the footnotes to deny housing projects for years is vice, not a virtue. The HAA amendments were described as "game changers" specifically to prevent local agencies from going about business as usual. (Pet. RJN, Ex. A, p. 4.) The HAA amendment specifically eliminated the deferential arbitrary and capricious standard, and requires a court to find a housing project compliant if substantial evidence would allow a reasonable person to conclude the project is compliant. (Gov. Code § 65589.5(f)(4).

The City also does not consistently apply the footnotes. The City routinely requires property owners to seek a general plan amendment to change a property to a *less intense* designation. Per the footnotes, a general plan amendment to a less intense designation would *never* be necessary because all less intense uses would already be allowed. For example, in a 2017 project approval, the City required a general plan amendment from the more intense Limited Manufacturing designation to the less intense Community Commercial designation and a corresponding zone change from the more intense M1 manufacturing zone to the less intense C2 commercial zone. (Pet. RJN, Ex. D) The City stated the amendment was necessary to accommodate a residential project, because the "Limited Manufacturing land use does not allow residential uses." (*Id.*) However, under the hierarchy of uses theory all less intense residential uses would have already been allowed. (*See also Westsiders Opposed to Overdevelopment v. Los Angeles*, (2018) Cal.App.5th 1079, 1083 (City required redesignation from the more intense Light Industrial to less intense General Commercial designation to accommodate residential project).) The City tries to have it both ways, relying on the footnotes to require rezoning and ignoring them when it will force a general plan amendment. The City clearly desires control, not consistency. While the City still has the ability to make local planning decisions regarding future development, those decisions *must be clearly spelled out in the City's general plan*. As the *Warner Ridge* court explained, a "general plan which designates property for intense development with the contemplation that designation may thereafter be prohibited through zoning is, in effect, no general plan."

The City cites to various cases interpreting the consistency requirement, none of which were decided under the HAA's more exacting reasonable person standard. Moreover, all of the

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cases involved questions of consistency with generalized policies rather than "specific mandates" like numerical density standards.[5] (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, (2001) 91 Cal.App.4th 342, 378.) The one case that does involve numerical density consistency is *Debottari v. City Council*, 171 Cal.App.3d 1204, where the Supreme Court of California found zoning that allowed two units per acre was inconsistent with a land use designation that allowed 3-4 units per acre. The inconsistency here is even more profound, where the zoning completely prohibits two *entire categories* of uses (multi-family residential and commercial) allowed by the general plan and only allows one unit where the general plan allows 43. If zoning that allows one less unit than the general plan is inconsistent, zoning that allows 42 less units is undoubtedly inconsistent.

The California Department of Housing and Community Development (HCD) agrees with this interpretation. In a letter to the City of Millbrae, HCD found that a general plan designation that allowed "up to 80 du/acre" was inconsistent with zoning that "limits development to 43 du/acre," and the City cannot require the project to be rezoned . . . without risk of violation of the Housing Accountability Act." (Pet. RJN, Ex. C.)[6] Again, this situation is even more egregious, where the zoning only allows one unit and the general plan allows 43. The City's disapproval of Jha's application and demand for a rezoning is clearly a violation of the HAA.

D. Even if the Zoning is Consistent, the City Must Facilitate the Density Allowed Under the General Plan

The density bonus law states that local governments must utilize "the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project." As Respondents point out, the Legislature added the inconsistency language after an analysis of the proposed amendment noted that "Theoretically the land use

[5] Respondents also argue that consistency should not be interpreted literally by citing to Civ. Code §1645 discussing contract interpretation and *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841 discussing constitutional interpretation, neither of which are relevant.

[6] Petitioners did not submit the HCD letter with Petitioners' Opening Brief because the letter was recently discovered while conducting research into the arguments made in Respondents' Opposition.

element and zoning should always be consistent. In reality, they are often inconsistent. In such cases, this bill will create confusion and conflict." (Res. RJN, Ex. 34 p. 4.) The analysis suggested picking one standard, either the zoning or general plan. (*Id.*) Instead, the legislature added language that "[i]f 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." This language is not redundant but intended to clear up any "confusion" that the maximum allowable density is used in cases of consistency, and the maximum density allowed by the general plan is used when there is an inconsistency.

The HAA and Density Bonus Law set out the same consistent/inconsistent dichotomy.[7] Just like the Density Bonus Law, the HAA states the general plan density is used in cases of inconsistency, and in cases of consistency the local agency can require the project "to 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*." (Gov. Code § 65589.5(j)(4).) Even if the zoning in this case *were* consistent, the City must only apply the zoning in a manner that facilitates the maximum density allowed on the site under the general plan.[8]

For the HAA, Respondents argue that the Legislature deleted language in original bill language that would have allowed projects to build at the "maximum" general plan density, proving this is not what the Legislature meant. (Res. RJN 29 p. 635.) However, the original bill

[7] Respondents claim that SB 35 (Gov. Code § 65913.4) does not have an "inconsistency" prerequisite, proving that the Legislature meant something different in the Density Bonus Law and HAA. Perhaps Respondents stopped reading SB 35 after subsection (b)(5)(A), but subsection (b)(5)(B) requires projects to be governed per the general plan in cases where the zoning is "mutually inconsistent," setting out the same consistency/inconsistency dichotomy as found in the Density Bonus Law and the HAA.

[8] These laws also demonstrate the flaw in the City's consistency argument, which clearly show the Legislature understood "consistency" to mean the full range of densities under the zoning and general plan should match. The City argues that because "one dwelling does not exceed the 43 unit density," there is no inconsistency. In the City's view, an inconsistency would only exist if the zoning allowed *more* housing, in which case the HAA would require the general plan's *lower* density to prevail. Respondents cannot seriously argue that the HAA should be interpreted to provide less housing.

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was much broader than merely requiring the maximum general plan *density*, and instead prohibited a local government from implementing zoning that did not "allow the maximum residential *use, density, and intensity* allocable on the site." (*Id.*) The American Planning Association ("APA") opposed this broad language and instead requested that the language be limited solely to density, explaining that "if the bill is amended to instead allow the developer to use the *density* specified in the housing element or zoning ordinance for a specific site, *whichever is higher*, APA would support that change." (Res. RJN, Ex. 32 p.691.) The resulting language reflects that exact compromise.

II. CONCLUSION

The City's refusal to even acknowledge an application exists until Jha concedes to its demand for a rezoning is based on a court-rejected theory that no reasonable person could believe and merely continues the City's decades long pattern and practice of ignoring state law requirements. The City's actions in this case were frivolous, without merit, and a clear bad-faith violation of the HAA. Respondents' misstatements of law and fact in their opposition are indicative of that bad faith. Petitioners request an order directing Respondents to carry out their duties under state law, in addition to an order directing Respondents to approve the housing development project within 60 days.

Respectfully Submitted,

Dated: July 5, 2022

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Dated: July 5, 2022

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