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YES IN MY BACK YARD

ELECTRONICALLY FILED
Superior Court of California
County of Marin
07/18/2025
James M. Kim, Clerk of the Court
By: J. Chen, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN - UNLIMITED CIVIL JURISDICTION

YES IN MY BACK YARD, a California nonprofit corporation,

Petitioner and Plaintiff,

v.

CITY OF SAUSALITO; and DOES 1-20,

Respondents and Defendants.

Case Number: CIV2300652

PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF

Date: October 22, 2025
Time: 1:30 p.m.
Dept: H

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that in Department H of the above-entitled court located at 3501 Civic Center Drive, San Rafael, California 94903, on October 22, 2025 at 1:30 p.m., or on the next available date convenient to the Court's calendar, Petitioner Yes In My Back Yard will move and does hereby move for an order granting Petitioner judgment on the petition for writ of mandate.

This motion is based on this notice and motion, the accompanying opening brief and request for judicial notice, the complete files and records in this matter, and other such matters as may be presented to the Court at or before the hearing on this motion.

Dated: July 18, 2025

PATTERSON & O'NEILL, PC

By: Brian O'Neill
Attorneys for Petitioner Yes In My Back Yard

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II. INTRODUCTION

The Housing Element Law (Gov. Code §§ 65580 et seq.) requires every city to plan for its fair share of the missing homes that California desperately needs to end its housing crisis. The primary mechanism to accomplish this goal is known as the "regional housing needs allocation" or "RHNA." (*See*, *e.g.*, Gov. Code §§ 65584.03(d); 65584.04(g)(2); 65584.05, (e)(1); 65584.06(f).) The state must "determine the existing and projected need for housing in each region," and then each region must distribute its RHNA among its local governments. (*Id.* §§ 65584.04–.05.) A locality must then revise its housing element in eight-year cycles to "make adequate provision for the [housing] needs of all economic segments of the community," "identify adequate sites" in a Site Inventory list, and commit to rezone enough land with "realistic development capacity" to meet its RHNA during the housing element cycle planning period. (*Id.* §§ 65580; 65583; 65583.2) The Site Inventory list must meet detailed statutory requirements necessary to demonstrate realistic capacity, particularly where a jurisdiction relies on nonvacant sites to meet its RHNA. (*Id.* § 65583.2.) A jurisdiction that fails to adopt a compliant housing element by the statutory deadline is subject to certain statutory consequences, such as loss of certain funding and the colloquially known "Builder's Remedy" – a provision that prevents a local government from disapproving certain affordable housing projects regardless of whether the project is inconsistent with the jurisdiction's general plan or zoning. (*Id.* §§ 65589.11, 65589.5(d)(5).)

The City of Sausalito ("City"), a community with a median home value above two million dollars that permitted just 37 new homes during the entire prior eight-year housing element cycle, was allocated a RHNA of 724 homes (including 315 lower-income homes). (RJN, Ex. A, AR 717, 12428.) Sausalito unsuccessfully appealed this allocation, in part due to the City's belief that it lacked sufficient site capacity because most lots in the City "are already fully or mostly developed with multifamily uses, commercial uses, or other non-residential uses at intensities that preclude the short-term intensification or reuse of these lots." (AR 12443.)

The City's housing element update process for the 6th Cycle was rushed and inadequate.

Just days after receiving a determination from the California Department of Housing and Community Development ("HCD") that the City's proposed draft revisions to its housing element failed to meet statutory requirements – and just one day before the January 31, 2023 statutory deadline to adopt a compliant housing element – Sausalito scrambled to revise the draft housing element to avoid the consequences of its own delays. (AR 454-766.) In its haste, the City disregarded multiple state law requirements. Despite acknowledging that adopting the housing element would require an Environmental Impact Report ("EIR") pursuant to the California Environmental Quality Act ("CEQA"), the City abandoned the CEQA process it had already started because there was not enough time to complete it. (AR 13655-663, 13793.) Additionally, because there was not enough time for the City to consider the statutorily required factors *before* listing sites on its Site Inventory list, the City delayed confirming whether the sites it listed would actually provide realistic development capacity adequate to meet its RHNA until *after* it adopted its Housing Element ("Original Housing Element").

The City had no intention of implementing the Housing Element it rushed to adopt. Instead, the City completely ignored its Original Housing Element while embarking on a lengthy process to certify a post hoc EIR and attempting to paper over the inadequacies of its Site Inventory. These actions merely confirm that the City failed to comply with CEQA and that the City had no intention of ever carrying out the commitments it made to the state in the Original Housing Element. At a minimum, this confirms that the City was out of compliance with the Housing Element Law until at least July 1, 2025, when the City's amendments to the Original Housing Element were accepted by the state.

However, the City's attempted amendment does not address the fundamental flaws in the City's Site Inventory list. Specifically, the City failed to demonstrate that the sites in its Inventory will be available for residential development at all times, failed to demonstrate that the sites provide realistic capacity to meet its RHNA, and failed to provide substantial evidence that the uses on nonvacant sites are likely to be discontinued and redeveloped with residential uses during the current planning cycle. As a result, the City is *still* out of compliance with the Housing Element Law's requirements.

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III. BACKGROUND FACTS

A. The City Challenges its RHNA Allocation

The Association of Bay Area Governments ("ABAG"), the regional agency tasked with distributing its RHNA among its local governments, allocated the City a RHNA of 724 units as part of the City's 6th Housing Element planning cycle, a substantial increase from the 5th Housing Element planning cycle when it was only allocated 79 units. (AR 12428.) The City failed to meet even its modest RHNA during the 5th planning cycle, only permitting 37 units. (AR 717.) After receiving its RHNA for the 6th Housing Element planning cycle, the City appealed its allocation. The City recognized that it is harder to develop residential housing on nonvacant parcels and argued there was not enough "vacant and underutilized land available for increased residential intensities" for the City to meet its RHNA assignment, and that ABAG's methodology for determining suitable sites for housing did not accurately reflect existing uses that would impede meeting its RHNA. (AR 12415, 12418, 12408-481.) The City's appeal was denied, and the City's RHNA remained 724.

B. The City Commits to an EIR and In-Depth Site Capacity Analysis

To try to identify sufficient capacity to meet its RHNA of 724 units, the City created the Housing Element Advisory Committee ("HEAC"). (AR 4-6.) The HEAC published multiple drafts of the Housing Element, with the first draft published in July 2022. (AR 5434-5981.) In meeting after meeting of HEAC, Planning Commission, and City Council over the next year and a half, the City repeatedly confirmed that it would prepare an EIR to accompany its Housing Element. (AR 10320-21 ["a Draft Environmental Impact Report, or Draft EIR, will be prepared and we anticipate releasing that this fall prior – probably, sometime in October or so -- to inform the community of what the environmental effects will be of the specific changes that would occur with the Housing Element Update"], AR 10772 ["So there will be the EIR"], AR 11478 ["In Sausalito it was planned that the Housing Element and the rezoning of sites would occur concurrently, so that the Housing Element and the Housing Element EIR would also be prepared concurrently, adopted at the same time."].) In late 2022 and early 2023, the City initiated the EIR process by hiring a CEQA consultant, issuing a Notice of Preparation,

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and holding a scoping meeting for the EIR. (AR 12339, 7455-57.)

Many of the HEAC meetings were focused on discussing whether particular sites should be studied further and met the criteria to be included in the Site Inventory as suitable for residential development. (AR 9852-53 ["Regarding the specific inventory of sites, I wouldn't add any questions about that right now, because we're still working on developing the criteria with the group and that site inventory."].) One of the express purposes of the EIR was to analyze the viability of properties for residential development. (AR 9813 ["Based on the feedback tonight we will refine those criteria and give you an updated list of sites to assume the new criteria."], AR 9949 ["we are preparing an environmental impact report, or an EIR, pursuant to the requirements of CEQA and that will programmatically analyze housing sites."], AR 11267-9 ["as we go through the EIR process, [] we may have sites that we identify an alternative that removes sites that have significant and unavoidable impacts.])

C. The City "Decouples" Environmental Review

Despite publishing multiple drafts of the housing element, the City never published a draft EIR. The City submitted a draft of its housing element to HCD on December 20, 2022, barely more than a month before the City's January 31, 2023 statutory deadline to have a certified housing element. (AR 13653-4.) This started HCD's 90-day clock to provide feedback, while the City was planning to revise the draft housing element to respond to HCD's feedback; publish a new draft for public review; draft, publish, publish, and certify an EIR; hold a planning commission hearing for a recommendation; and then approve a revised housing element. The City then rushed to complete all these tasks in the month it had left to certify a housing element to beat the statutory deadline.

The City held a joint Planning Commission and City Council meeting on January 12, 2023, while it waited for comments back from HCD on its draft housing element. (AR 11444-5.) At the meeting, Beth Thompson, the City's housing element consultant, informed the City Council that the EIR would not be completed until late Spring of 2023, and that the City was relying on the EIR to inform it about which housing sites selected by the City were appropriate for its Site Inventory. (AR 11454-5, 11457 ["We anticipate the housing sites will be informed

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by the Environmental Impact Report process and will come back to the Planning Commission and City Council at a subsequent meeting."], 11470 ["The EIR is currently being prepared, but it will not be ready for adoption at that time [January 31, 2023."].) Members of the City Council questioned Ms. Thompson about why the City had not published a draft EIR and she informed the City Council that it was because of staff turnover. (AR 11476.)

The City Attorney and Ms. Thompson then informed the City Council of the impacts of not having adopted a housing element by the statutory deadline, including being subject to the Builder's Remedy. (AR 11470-777.) After hearing of the potential consequences of not having adopted a housing element by January 31, 2023, the City Council decided to abandon the EIR process in an attempt to meet to the statutory deadline. (AR 11522 ["So I think that we are all absolutely in agreement that we will submit a Housing Element by the January 31st statutory deadline. And it sounds like everybody is in agreement with Councilmember Hoffman's approach of decoupling the EIR and zoning from the submittal of the Housing Element."].)

The City officially abandoned the EIR on January 23, 2023 – a week before the deadline – by withdrawing its Notice of Preparation. (AR 13793.) Three days later, HCD informed the City that its draft Housing Element did not comply with the Housing Element Law because it failed to: (1) analyze and compare the City's trends and patterns in its requirement to Affirmatively Further Fair housing to the larger region; (2) the Site Inventory was inadequate for a variety of reasons, including that it failed to have findings that nonvacant sites could accommodate more than 50 percent of the City's RHNA for lower-income households and lacked sufficient analysis of publicly-owned sites which are slated for development; and (3) it did not analyze potential and actual government constraints on the development of housing, such as parking requirements and the fact that a discretionary Design Review Permit is required to construct any housing in the City. (AR 8525-64.)

Despite getting HCD's feedback two months early and abandoning the environmental review that the City stated would inform realistic capacity for its site inventory, the City still now had just five days to make significant revisions to its draft, publish the draft for public review, hold a planning commission hearing to get a recommendation on the new draft, and

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hold a City Council hearing to adopt the new draft. The City scrambled to call a last-minute meeting of its Planning Commission and City Council to adopt a housing element before the statutory deadline. (AR 13791-92.)

D. The Marathon Joint Meeting to Beat the Statutory Deadline

The City published a revised draft of the Housing Element on a Sunday, just one day before its January 30, 2023 deadline to adopt a housing element. (AR 3121-3963.) The revised draft housing element Site Inventory relied heavily on sites restricted by Ordinance 1022 and 1128, which restricts increasing development potential on certain properties without a vote of the electorate. (AR 472-73.) In fact, 208 of the 315 lower-income units of the City's RHNA were accommodated on voter-restricted sites. (AR 3429-30, 3743-45.) The revised draft made significant changes to the housing element programs, and significantly modified the Site Inventory in a manner that affected specific properties, including by (1) significantly increasing the realistic capacity of opportunity sites; (2) adding Sites 85 (CalTrans site on Ebbtide), 86 (330 Ebbtide), and 202-206 (125 Bulkley); and (3) removing five sites from the Site Inventory: Sites 14 (300 Spencer), 52 (City Hall), 67 (Marinship), 68 (2320 Marinship), and 100 (66 Marion Avenue). (AR 8508.)

In an effort to rush through adoption of the revised draft housing element, the City held joint back-to-back meetings of the Planning Commission and City Council on January 30, 2023 that began at 3 p.m. and did not end until nearly 9 p.m. (AR 11966, 12264.) At the meeting, the Planning Commission orally modified the housing element, removing Sites 52 (Martin Luther King Junior Park) and 302 (Underwater) from the housing element; increasing the density of Site 84 by ten units; approving Site 201 (2660 Bridgeway); adding Sites 301 (225 Locust), 303 (1 & 3 Harbor Drive), 305 (2650 Bridgeway), and 306 (3000 Bridgeway); reducing the density of sites, including Site 303 (1 & 3 Habor Drive); and approving edits and amendments to the housing element programs. (AR 11961-63.) The City Council adopted a motion to approve all the housing element programs suggested by the Planning Commission, directed staff to revise the housing element program increasing opportunity for water-based housing at Site 301 and other areas, but made additional changes to the addition and removal of

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properties to the Site Inventory, including maintaining Site 52 (Martin Luther King Junior Park), removing Site 302 and directing staff to "reallocate" those units across sites in the Site Inventory, before adopting the Housing Element ("Original Housing Element"). (AR 11963-5.) The City Council voted to remove several available sites despite the property owner stating an intent to redevelop their property for residential use. (AR 11961-2, 8646, 8859.)

The City ignored comments that it had received from the property owner of Site 67 in its Site Inventory, who the City acknowledged was "experienced with affordable housing development," and who warned them that "the majority of the contemplated sites [in the Site Inventory] and correspondent land use prescriptions are quantifiably incapable of producing nearly any housing over the coming RHNA cycle." (AR 4696-8, 8285.) The City ignored a detailed financial analysis, which concluded that its sites at the densities and affordability levels were not financially viable. (AR 4185-86, 4696-8.)

The City also received an expert report from a professional real estate investment firm that analyzed properties on the City's Site Inventory, which found that all twelve properties it studied were financially infeasible with large negative residual land values (the estimated worth of a property after deducting all development costs from the potential revenue generated by a completed development). (AR 9473-74.) The investment firm found that the 50% affordability on Site 86 (330 Ebbtide) has a negative "$8.5m[illion] residential land value," and the 40% affordability on 611 Bridgeway has a negative $5.6 million residual land value, concluding that the "Unit yield and mix doesn't make sense." (AR 9471, 9469.) The investment firm found that Site 72 (2656 Bridgeway) "is potentially developable" but that the "Owner has requested 20% affordable" and "50% does not pencil," resulting in a negative residual land value of $10 million dollars. (AR 9461.) The report overall concludes that "it is not reasonable to assume these sites will develop at the contemplated affordability or density levels." (AR 9458.)

Program 19 of the Original Housing Element was a plan to streamline the City's development review procedures by creating a ministerial approval process, including developing Objective Design and Development Standards ("ODDS"). (AR 762.) The Original

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Housing Element committed the City to developing streamlined development procedures and objective design requirement for qualifying Senate Bill 35/330 projects "no later than November 2023[.]" (AR 197.) The Original Housing Element also committed the City to (1) adopting ODDS for all projects subject to the City's discretionary review process no later than May 2025; and (2) completing a review of the decision timelines of all discretionary applications for new residential units or remodels since 2015 within one year of adopting the Housing Element. (*Id*.) Since many of the sites the City relied on to meets its RHNA required rezoning to increase their density, Program 4 required the City to prepare a ballot measure for the sites subject to Ordinance 1022/Ordinance 1128 by March 2024 and hold an election by November 2024 for the electorate to vote on the rezoning of these sites. (AR 473.) If the vote failed, the program stated the "City Council will seek a legal opinion from the State Attorney General's Office as to how to proceed." (*Id.*)

City Council Resolution No. 14A-2023 to approve the Original Housing Element, authorized the City's Community Development Director "in coordination with the City Council Working Group to make all non-substantive changes to the Housing Element to make it internally consistent or to address any non-substantive elements." (AR 458.) The next day, the City filed a Notice of Exemption ("NOE") for the Original Housing Element from CEQA using CEQA's common sense exemption. (AR 1-3.)

E. HCD Certifies a Housing Element Modified By Staff

After the City adopted the Original Housing Element, a written version was not available to the public for several more weeks. The City finally published and submitted the Original Housing Element to HCD on February 27, 2023. (AUGAR 23684-996.)

However, a new "Modified" Housing Element was then submitted to HCD on April 25, 2023. This new Modified Housing Element made changes to the program to make Sites 73 (Dr. Martin Luther King, Jr. Academy - Nevada Campus) and 85 (CalTrans owned former right-of-way for a Highway 1 facility) available for development, "and to identify steps the City will take to identify a replacement site if the City has not received a commitment that the site will be made available by January 2026 from the agency that owns the site." (AUGAR 24005-

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24303.) The changes specified that the City agreed to meet with the Sausalito Marin City School District and CalTrans quarterly to determine if these sites could be developed for residential housing and agreed to rezone the site by January 2026. (AUGAR 24024-25.)

The City Council never approved the changes to the Modified Housing Element. On April 28, 2023, however, HCD notified the City that its Modified Housing Element "facilitated by conversations on April 21, 2023, and April 25, 2023, with you, [City Attorney] Sergio Rudin, and [Planning Consultant] Beth Thompson" was in substantial compliance with the Housing Element Law. (AUGAR 24566-70.) HCD stated that it "did not consider" potential capacity from liveaboards, because the program to "work with BCDC to expand berth capacity is aspirational" rather than a firm commitment. (AR 24566-67.) In its letter, HCD also noted that it had received public concern "in relation to public noticing and outreach," but was expressing "no opinion as to whether the City has complied with, or is excused from, any other provisions of the Government Code governing the preparation, adoption, and amendment of the City's general plan." (AR 24569.)

F. The City Abandons its Original Housing Element and Conducts Post Hoc Environmental Review

Immediately after it received HCD certification of the Modified Housing Element, the City Council sought to escape the commitments it had just made in the Original Housing Element and began working on an housing element amendment ("Amended Housing Element"). Starting in 2023, the City initiated the process for adopting an EIR for an Amended Housing Element, issuing Notices of Preparation, releasing a Notice of Availability, publishing a draft EIR, and holding a series of Study Sessions on the draft Amended Housing Element with both the Planning Commission and City Council. (AUGAR 24571-8, 25163-4, 25205-7, 17417-18080, 23633-23647.)

On April 5, 2024, HCD sent the City a Letter of Technical Assistance informing it that it had failed to timely and effectively implement programs from its Original Housing Element, including Program 19 (Development Review Procedures), noting that the City had missed its deadlines to develop streamlined development procedures and objective design requirement for

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qualifying Senate Bill 35/330 projects no later than November 2023, and that the City had not competed a review of its decision timelines for all discretionary applications within one year of housing element adoption. (RJN, Ex. B.) The City simply continued with its efforts to adopt an amendment but now included changes to the program deadlines to delay implementation of the Original Housing Element, including the ODDS. The City also proposed extending the timelines to prepare a ballot measure for holding an election on the voter-restricted sites from March 2024 to July/August 2025, and pushing the election date from November 2024 to November 2025. (AUGAR 22303-04.)

Just four months after the Original Housing Element was adopted, the City publicly acknowledged that Site 85 (CalTrans) was "unlikely to be developed within the housing element timeframe" and proposed removing it from the Site Inventory. (AUGAR 19657.) The Amended Housing Element also significantly reduced the residential capacity of Site 201 (605-613 Bridgeway) whose owner had already submitted a development application utilizing the density as permitted by the Original Housing Element. (AUGAR 17013-15, 21035-16, 25368-69.) After vigorous public opposition, the density of the MLK Park site was significantly reduced from 96 units down to 50. (AUGAR 17013.)

The Amended Housing Element added two new nonvacant sites to the Site Inventory, Sites 401 (2400 Bridgeway) and 402 (2680 Bridgeway) to make up for the shortfall from removing and reducing other sites – including removing Site 201 that already had a pending application. (AUGAR 16952-4, 17013.) Site 402 alone was identified to accommodate 24 very-low-income units, nearly a quarter of the City's very-low-income RHNA. (AUGAR 17013.) Affordable units were also "reallocated" to Site 303, upping the number of affordable units on this site from 14 up to 68. (*Id*.) The Amended Housing Element still relies heavily on voter-restricted sites. (AUGAR 17013-5.) On May 28, 2025, the City filed a Notice of Determination for the Final EIR. (AUGAR 15749-55.)

The City submitted the Amended Housing Element for review to HCD on September 5, 2024, and received a comment letter from HCD on November 4, 2024 explaining that the draft Amended Housing Element was deficient because it did not fully analyze the impact of adding

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nonvacant sites to its Site Inventory (Sites 401 [2400 Bridgeway] and 402 [2680 Bridgeway]), while decreasing or eliminating capacity at other sites, did not discuss new housing overlay zones, removed a site with an active project application, and delays the timeline for implementing Program 19 and its ODDS framework. (AUGAR 25268-72.)

G. The City Adopts the Environmentally Superior Amended Housing Element

On February 14, 2025, the City published a Final EIR, which found that the proposed Amended Housing Element would have significant and unavoidable environmental impacts on aesthetic resources, agriculture and forestry resources, air quality, and transportation and traffic even with the proposed robust mitigation measures but proposed adoption of a Statement of Overriding Considerations finding that the benefits outweighed the impacts. (AUGAR 19605-6, 19608-14, 23231-23351, 23633.) The Final EIR stated that the Amended Housing Element is the environmentally superior alternative to the Original Housing Element because "it would have fewer impacts on the environment than the proposed project," citing to entirety of the EIR. (AUGAR 23349.)

On February 19, 2025, the Planning Commission recommended certification of the Final EIR and adoption of the Amended Housing Element to the City Council. (AUGAR 16756-16633.) On April 3, 2025, the City submitted the draft Amended Housing Element to HCD for its review and submitted additional revisions on May 13, 2025. (AUGAR 25526.) HCD responded that the draft amendment will substantially comply with State Housing Element Law when it is submitted to HCD. (*Id.*) HCD's letter did not make any findings regarding nonvacant sites, but simply stated "[f]or your information, the housing element must demonstrate existing uses are not an impediment to additional residential development and will likely discontinue in the planning period (Gov. Code, § 65583.2, subd. (g)(2).)." (*Id.*) On May 27, 2025, the City Council certified the Final EIR, the Statement of Overriding Considerations, and approved the Amended Housing Element. (AUGAR 16634-17158.)

IV. STANDARD OF REVIEW

The generally applicable standard of review for a writ of mandate action provides that the court's inquiry extends "to the questions whether the respondent has proceeded without, or

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in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (CCP § 1094.5.) Although a writ of mandate may not force the exercise of discretion in a particular manner, "it will lie to correct abuses of discretion." (*County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 654.)

Under CCP § 1085, "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins." A petitioner must show that a public entity "had a ministerial duty to perform, and the petitioner had a clear and beneficial right to performance." (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700.)

V. ARGUMENT

A. The City Violated CEQA

1. *CEQA Requires Environmental Review of any Project with the Potential to Cause a Significant Effect on the Environment Before Approving the Project*

The Legislature intended CEQA to be "interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511.) CEQA prohibits a public agency from approving any project that may have adverse environmental effects without undergoing environmental review to identify, disclose, and potentially avoid or reduce any significant environmental effects. (Pub. Res. Code §§ 21002, 21100; 14 Cal. Code Regs. ("CEQA Guidelines") §§ 15126.6, 15370.) A project is defined as "the whole of an action" authorized by a public agency, "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code § 21065, CEQA Guidelines §§ 15378(a), 15064(d).)

One of the basic purposes of CEQA is to "[i]nform governmental decision makers and the public about the potential, significant environmental effects of proposed activities." (CEQA

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Guidelines § 15002(a)(1).) CEQA requires that environmental review be completed early, "at a point in the planning process where genuine flexibility remains." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307, *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 282.)

CEQA establishes a three-tier process to ensure that public agencies inform their decisions with environmental considerations. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) The first tier is jurisdictional, which requires an agency to conduct a preliminary review to determine whether a "project" is subject to CEQA. (CEQA Guidelines § 15060, Pub. Res. Code § 21065.) The adoption of a general plan amendment clearly qualifies as a "project" that is subject to environmental review. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 793–795 [general plans "guide the future growth and development of cities" that "have a potential for resulting in ultimate physical changes in the environment" and are properly defined as projects subject to environmental review].)

The second tier of the process requires an agency to determine whether a project is statutorily or categorically exempt from CEQA. A project that qualifies for neither a statutory nor a categorical exemption may nonetheless avoid further review under the "common sense" exemption, which applies where "it can be seen with certainty that there is *no possibility* that the activity in question may have a significant effect on the environment." (CEQA Guidelines § 15061(b)(3) [emph. added].) Whether an activity qualifies for the common sense exemption is an issue of fact, where the agency has the burden to demonstrate there is no possibility the project may have a significant effect on the environment. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 114.) The mandatory duty to provide factual support for the exemption "is all the more important where the record shows . . . that opponents of the project have raised arguments regarding possible significant environmental impacts." (*Id*. at 117.)

If there is a possibility that the project may have a significant effect, an agency must undertake an initial study to determine the type of CEQA document that must be prepared. The "fair argument" test contained within Pub. Res. Code § 21151 requires an EIR to be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have

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a significant environmental impact." (*No Oil, supra,* 13 Cal.3d at 75.) The fair argument test creates a low threshold and "reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.)

CEQA Guidelines § 15382 states, in pertinent part, that a "[s]ignificant effect on the environment means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna . . . ." (CEQA Guidelines §§ 15002(g), 15131, 15358(a)(2).) Even if the "exact extent and location" of future development cannot be determined, review of potential significant effects "cannot be postponed until such effects have already manifested themselves through . . . applications for approval of housing developments." (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 158–159.) An agency cannot avoid environmental review "simply because a project does not itself call for the construction of housing or other facilities . . ." (*Napa Citizens for Honest Gov't v. Napa Cnty. Bd. of Supervisors* (2001) 91 Cal. App. 4th 342, 368–69.)

2. *Adoption of a Housing Element Confers Immediate Development Rights that Have the Potential to Cause a Significant Effect on the Environment*

Housing element updates are not mere academic exercises. Once a housing element is adopted, the Housing Element Law imposes immediate, enforceable obligations. Specifically, the Housing Element Law provides: (1) a jurisdiction must implement its housing element programs; (2) a jurisdiction must approve certain qualifying housing projects on sites that are identified as suitable to accommodate affordable housing; and (3) the No Net Loss Law prohibits jurisdictions from taking any action to reduce residential capacity identified in its Site Inventory. (Gov. Code §§ 65585(i)(1)(A), 65589.5(d)(5)(A), 65863.)

First, housing elements must include a "program that sets forth a schedule of actions during the planning period, each with a timeline for implementation . . . that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and

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development controls . . .” (Gov. Code § 65583(c).) In 2017, the Legislature enacted AB 72 after an HCD report found that “there is a lack of implementation and enforcement of planning laws, which has created barriers to housing developments.” (RJN, Ex. C, pp. 5-6.) AB 72 provided HCD with the new authority to review compliance with an adopted housing element, “including any failure to implement any program actions.” (Gov. Code § 65585(i)(1)(A).) HCD has confirmed that a “housing element is no longer a paper exercise – it’s a contract with the state of housing commitments for eight years.” (RJN, Ex. D.) Housing element programs are not hypothetical policy documents – they are legal requirements that must be implemented by specific deadlines.

Second, once a site is designated in a housing element inventory as suitable for residential use, the site automatically acquires new development rights that were not available before adoption. These rights, which are created by the Housing Accountability Act (“HAA”), and which come into effect immediately upon adoption of a housing element and *before* a jurisdiction implements any rezoning program, restrict an agency’s ability to disapprove certain projects that are consistent with the density identified in the most recent housing element update. (Gov. Code § 65589.5(d)(5)(A), (f)(8).) Thus, designating a site in a Site Inventory as suitable for residential development imposes a legally enforceable change in the applicable density and land use of a site.

Third, the No Net Loss Law prohibits jurisdictions from taking any action that would reduce the residential density of sites included in its Site Inventory unless the local government simultaneously identifies sufficient additional sites with an equal or greater residential density to ensure there is no net loss of residential unit capacity. (Gov. Code § 65863(b).). Said another way, the No Net Loss Law transforms the adoption of a housing element into a permanent, jurisdiction-wide upzoning. Once a housing element is adopted to meet the jurisdiction’s RHNA, the jurisdiction is prohibited from taking any action that would downzone one property unless the reduction is offset elsewhere. Thus, adoption of a housing element is not an action that a jurisdiction can backtrack on – it is an enforceable commitment to accommodate the jurisdiction’s RHNA.

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Housing elements must identify specific sites and increase the allowable densities of those sites. Although adoption of a housing element does not approve the construction of housing itself, courts have repeatedly confirmed that environmental review is nonetheless required where the project will facilitate future growth, and environmental review cannot be postponed until an application is filed. (*Stanislaus Audubon Society*, *supra*, 33 Cal.App.4th at 158–59, *Napa Citizens*, *supra*, 91 Cal. App. 4th at 368–69.) Housing elements must provide more than enough detail to facilitate a review of the potential significant effects.

3. *The City Abused its Discretion By Ignoring Environmental Review In its Rush to Beat the Statutory Deadline to Adopt a Housing Element*

The City repeatedly confirmed that an EIR was necessary and would be completed prior to adoption of a housing element. (AR 9949, 10037, 10320-21, 10772, 11357-58, 11454.) The City hired a CEQA consultant, held a scoping meeting, and published a Notice of Preparation for the EIR. (AR 12339, 7455-57.) The City also recognized that the EIR would be critical in determining what properties would be suitable for residential development in the Site Inventory. (AR 11267-69 [City's consultant explaining "we may have sites that we identify an alternative that removes sites that have significant and unavoidable impacts. So if any of the sites are connected to significant and unavoidable impacts under CEQA, the California Environmental Quality Act, you may have an alternative that recommends refining the Housing Element to reduce those impacts"].) Yet, once it became clear that the City would not be able to certify an EIR by the statutory deadline to potentially avoid the Builder's Remedy, the City chose to "decouple" the EIR from adoption of the housing element. (AR 11522, 13793.) This decision was not made to comply with CEQA but rather to avoid the consequences of the City's own delays in preparing a housing element.

The City's NOE makes various feeble attempts to claim that adoption of the housing element did not require environmental review. (AR 1-3.) The NOE claims that adoption of a housing element is exempt under CEQA Guidelines § 15283, which is clearly only applicable to "regional housing needs determinations made by the Department of Housing and Community Development, a council of governments, or a city or county pursuant to Section

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65584 of the Government Code" – not to the adoption of a housing element.

The City's NOE also claims the housing element is "strictly a policy document" that would not result in any direct or indirect physical changes to the environment. (AR 3.) As explained above, this is simply incorrect, as adoption of a housing element confers immediate development rights to specific sites at specific densities. The City's EIR for the Amended Housing Element confirms the NOE is wrong. The EIR confirms that adoption of the Amended Housing Element would have significant and unavoidable environmental impacts. (AUGAR 19605-06, 19608-14, 23349-51, 23633.) In fact, the EIR confirms that the Original Housing Element would have *greater* environmental impacts than the Amended Housing Element, identifying the Amended Housing Element as the environmentally superior alternative. (AUGAR 23349.)

In short, the City's post hoc EIR confirms that the City approved a project that would have significant and unavoidable impacts without first completing CEQA review as required by law, and without disclosing potential impacts to the public or decisionmakers. (AUGAR 19605-6, 19608-14, 23231-23351, 23633.) When the informational requirements of CEQA are not complied with, an agency has failed to proceed in a "manner required by law," and the "goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred." (*Bakersfield Citizens for Loc. Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1220.) There can be no question that the City violated CEQA. The only question left for this Court to decide is the remedy.

4. *Setting Aside the City's Adoption of the Housing Element is the Appropriate Remedy*

Pub. Res. Code § 21168.9(a) requires that when a court finds that a decision of a public agency has been made without compliance with CEQA, the court "shall enter an order" that includes one or more of the statutory remedies for a CEQA violation. One remedy is a "mandate that the determination, finding, or decision be voided by the public agency, in whole or in part." (Pub. Res. Code § 21168.9(a).) Courts have repeatedly confirmed that "[d]irecting an agency to void its approval of the project is a typical remedy . . . for a CEQA violation."

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(*John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, 102 [internal citations omitted].)

In fact, multiple courts have explained that when a project is approved without legally adequate CEQA review, the approval *must* be set aside. (*Bakersfield Citizens for Local Control, supra,* (2004) 124 Cal.App.4th at 1221 [explaining CEQA Guidelines "unequivocally require the lead agency to certify a legally adequate final EIR prior to deciding whether or not to approve or carry out a contested project," and therefore "project approvals . . . also must be voided"], *San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced* (2007) 149 Cal. App. 4th 645, 672 [finding deficiencies in EIR and ruling "[a]s a result, the Project approvals must likewise be voided"], *LandValue 77, LLC v. Bd. of Trs. of California State Univ.* (2011) 193 Cal. App. 4th 675, 683 [finding EIR was inadequate "requires an order directing the [agency] to set aside its certification of the final EIR *as well as its approval of the project*"] [emph. added].)

Courts have, in some cases, only partially set aside the portion of the project approval that could result in an adverse change or alteration to the physical environment. (*Nat. Res. Def. Council, Inc. v. City of Los Angeles* (2024) 98 Cal. App. 5th 1176, 1237.) However, a court's failure to void project approvals that may have a significant effect on the environment is "at odds with one of the primary purposes of CEQA—i.e., the '[p]revent[ion of] significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when . . . feasible.'" (*Id*. at 1237-38. [internal citations omitted].)

Here, the City's post hoc EIR confirmed that approval of the Original Housing Element ***will*** cause significant and unavoidable environmental effects. (AUGAR 19605-6, 19608-14, 23231-23351, 23633.) The EIR specifically found that developing certain properties at the densities proposed in the Site Inventory – densities that went into effect immediately upon adoption – *will* cause significant effects. These significant effects were not properly disclosed to the City Council, or the public, before approval. The appropriate remedy, and the remedy required by CEQA, is to set aside the City's approval of the Original Housing Element.

Moreover, the City's approval cannot possibly be partially set aside. A Site Inventory is

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a fundamental and necessary component of a substantially compliant housing element. (Gov. Code § 65583(a)(3).) A housing element *must* include an inventory of sites to meet a jurisdiction's RHNA and must include a schedule of programs to ensure the densities identified in the Site Inventory can be reached. (Gov. Code § 65583(c).) In other words, a housing element without a Site Inventory *does not comply* with the Housing Element Law. The Site Inventory cannot be excised from the City's Original Housing Element without rendering the housing element out of compliance with the Housing Element Law. Therefore, the *only* appropriate remedy in this case is to set aside the City's approval of the Original Housing Element, which the City itself has confirmed will have a significant effect on the environment, in its entirety.

B. <u>The City Violated State Procedural Requirements</u>

1. *State Law Mandates Local Governments Follow Certain Procedures to Adopt General Plan Amendments*

The Planning and Zoning Law provides the "minimum" standards for the adoption of zoning laws, ordinances, rules, and regulations. (Gov. Code § 65800.) Gov. Code § 6530 et seq. requires that cities "prepare, adopt, and amend general plans and elements of those general plans *in the manner provided in this article*." (emph. added.) Among other requirements, a city planning commission must hold at least one public hearing, and subsequently approve a recommendation on the amendment of a general plan. (Gov. Code § 65353.) The public notice for the hearing must be sent 10 days in advance and must provide a description, "in text or by diagram, of the location of the real property, if any, that is the subject of the hearing." (Gov. Code § 65092, 65094.) A planning commission must then make a written recommendation on the amendment of a general plan. (Gov. Code § 65353.) A city's legislative body must then "approve, modify, or disapprove the recommendation of the planning commission," although "any substantial modification proposed by the legislative body not previously considered by the commission during its hearings, shall first be referred to the planning commission for its recommendation." (Gov. Code § 65356.)

In addition to these requirements, the Housing Element Law provides more specific

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procedures for the adoption of housing element amendments. The Housing Element Law requires the local government to post "draft revisions" on its website and email a link to all interested parties "at least seven days before submitting the draft revision to [HCD]." (Gov. Code § 65585(b).) The law also states that "[p]rior to the adoption of its draft element or draft amendment, the legislative body shall consider the findings made by [HCD]." (Gov. Code § 65585(e).) The Housing Element Law only provides two options for a local government if HCD finds a draft does not substantially comply with the law: (1) "Change the draft element or draft amendment to substantially comply with this article;" or (2) "Adopt the draft element or draft amendment without changes." (Gov. Code § 65585(f).)

Following proper procedure is necessary to protect the due process rights of landowners whose property interests may be impacted. (*See Scott v. City of Indian Wells* (1972) 6 Cal. 3d 541, 549.) The general plan amendments must undergo "rigorous public scrutiny," and "[p]ublic participation and hearings are required at every stage, in order to obtain an array of viewpoints." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 571.) Multiple courts have found that the proper remedy to cure procedural defects that occur prior to legislative enactments is to void the legislative enactment. (*Williams v. City of San Bruno* (1963) 217 Cal. App. 2d 480, 486, *City of Sausalito v. Cnty. of Marin* (1970) 12 Cal. App. 3d 550, 566, *Grimsley v. Bd. of Supervisors* (1985) 169 Cal. App. 3d 960, 966, *City of Palo Alto v. Pub. Emp. Rels. Bd*. (2016) 5 Cal. App. 5th 1271, 1315.)

2. *The City Failed to Follow State Law Procedures in its Rush to Beat the Statutory Deadline to Adopt a Housing Element*

The City clearly failed to follow the procedures required by the Planning and Zoning Law when it approved the Original Housing Element. For example, the City could not have possibly provided public notice with the location of properties that would be affected by the hearing ten days in advance as required by Gov. Code §§ 65092 and 65094 because the draft Original Housing Element was not published until January 29, 2023 – one day before the back-to-back Planning Commission/City Council hearing where the City orally modified the sites that would be affected during the hearing. (AR 3121-3963, 11961-3, 11963-5.) The Planning

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Commission also could not possibly have sent a *written* recommendation to the City Council before adoption as required by Gov. Code § 65353 because the Planning Commission orally modified the recommendation that was proposed by staff just minutes before the City Council hearing took place. (AR 11961-3.) The City Council then significantly altered the Planning Commission's orally modified recommendation, including by removing sites from the Site Inventory and adding additional sites, without first referring the modifications back to the Planning Commission for its recommendation as required by Gov. Code § 65356. (AR 11963-5.) This process led to mass confusion regarding what properties were affected, which did not become clear until a written version of the housing element was made available nearly a month later. (AUGAR 23684-996.)

In addition, the City failed to follow the specific procedures required by the Housing Element Law. The City could not have possibly made the draft housing element available to the public before adoption as required by Gov. Code § 65585(b) because the draft was orally modified by the Planning Commission and the City Council at the time of adoption. (AR 11961-3, 11963-5.) The City also could not have possibly considered HCD's findings prior to adoption as required by Gov. Code § 65585(e) because HCD was not provided with a draft until nearly a month *after* it was adopted by the City. (AUGAR 23684-996.) Further, HCD *never issued any findings at all* regarding the version of the housing element that was adopted by the City Council at the public hearing. Instead, City staff administratively made substantive amendments to the housing element to address HCD's concerns in the months *after* the housing element was adopted. (AUGAR 24005-24303.) HCD certified that the Modified Housing Element was substantially compliant with the Housing Element Law, not the Original Housing Element adopted by the City Council. (AUGAR 24566-70.)

While the City Council's resolution purported to provide staff with the authority to make such amendments, the Planning and Zoning Law and Housing Element Law make clear that any amendments must be approved by a jurisdiction's legislative body at a public hearing – not by City staff in closed-door meetings with HCD. Even putting the procedural defects of the City Council adoption hearing aside, the Modified Housing Element that HCD reviewed

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for compliance with the Housing Element Law *was never adopted by the City Council at a public hearing.* (Gov. Code § 65356.)

The procedural defects in the City's approval process were not mere technical transgressions but were prejudicial violations of state law that prevented any meaningful public review. Housing element updates constitute major changes in land use and zoning that not only have significant impacts on the owners of properties included in a Site Inventory (who will be *required* to build affordable housing when their properties redevelop), but all adjacent landowners can be affected by the change. As explained above, housing elements confer immediate development rights and are equivalent to a city-wide rezoning. The last-minute publication of a draft housing element (AR 8508) and the multiple significant oral modifications in back-to-back hearings, including adding and removing multiple properties from the Site Inventory (AR 11961-63), resulted in significant impacts to property owners throughout the City with virtually no opportunity for those owners to weigh in.

This is confirmed by the fact that the City took an additional *two-and-a-half years*, holding multiple study sessions and public hearings, to adopt changes to the Original Housing Element in the immediate aftermath of the City Council hearing. (AUGAR 19655-23632.) Due to intense public opposition, the City Council subsequently voted to remove several sites and reduce the density of other sites from the Site Inventory. For example, development of MLK Park was particularly contentious during the Amended Housing Element review process. The City Council requested visual simulations of projects on the site at various densities before ultimately reducing the density of the site from 96 units in the Original Housing Element down to 50 units in the Amended Housing Element. (AUGAR 17013.) This is precisely the type of public debate that the procedural requirements of state law are meant to facilitate *before* legislative action is taken.

The City clearly prejudicially abused its discretion by failing to proceed in the manner required by law. The City's rush to adopt *something* by the statutory deadline prevented meaningful public review; HCD never reviewed the version adopted by the City Council at a public hearing; and the City Council never adopted the Original Housing Element that HCD

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found in substantial compliance with the Housing Element Law. As a result, the Original Housing Element is void and must be set aside.

C. The City Failed to Implement its Original Housing Element

1. *Local Governments Have a Mandatory Duty to Implement Housing Element Programs*

Under the Housing Element Law, cities are required to adopt a program "that sets forth a schedule of actions during the planning period, **each with a timeline for implementation**" that the local government is undertaking or intends to undertake to achieve the goals and objectives of the housing element. (Gov. Code § 65583(c) [emph. added].) The Legislature's intent was to ensure that local governments "**prepare and implement housing elements** which, along with federal and state programs, will move toward attainment of the state housing goal." (Gov. Code § 65581 [emph. added].)

Failure to implement a housing element program renders a housing element not substantially compliant with the Housing Element Law. In 2017, the Legislature enacted AB 72, which among other things, provided HCD with the authority to review a local government's actions for compliance with an adopted housing element, "including any failure to implement any program actions." (Gov. Code § 65585(i)(1)(A).) HCD has repeatedly confirmed that a "housing element is no longer a paper exercise – it's a contract with the state of housing commitments for eight years and the Housing Accountability Unit will hold jurisdictions to those commitments." (RJN, Ex. D.) HCD has sent letters to multiple jurisdictions reiterating that local governments must timely carry out housing element programs to remain in substantial compliance with the Housing Element Law. (RJN, Ex. E.)

The Housing Element Law permits the public to bring an action to enforce the law. (Gov. Code § 65583(h) ["An action to enforce the program actions of the housing element shall be brought pursuant to Section 1085 of the Code of Civil Procedure."].) Courts must review a local government's actions for compliance with the Housing Element Law. (Gov. Code § 65587 [a "court's review of compliance with the provisions of this article shall extend to whether the housing element or portion thereof or revision thereto substantially complies

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with the requirements of this article."].) When a jurisdiction fails to carry out its housing element, revoking a finding that the jurisdiction is in substantial compliance with the Housing Element Law is an appropriate remedy. (Gov. Code § 65585(i)(1)(C).)

2. *The City Failed to Implement the Original Housing Element Programs*

In violation of the Housing Element Law, the City has failed to implement nearly all of the programs in the Original Housing Element. Recognizing this violation, on April 5, 2024, HCD sent the City a Letter of Technical Assistance informing the City that it had failed to timely and effectively implement programs from its Housing Element, including Program 19 (Development Review Procedures). (RJN, Ex. B.) Rather than timely implement the programs by the deadlines required in the Original Housing Element, the City instead sought to kick the deadlines out further in the Amended Housing Element. This does not change the fact that the City failed to implement the Original Housing Element and was therefore not in substantial compliance with the Housing Element Law over the two few years.

The City missed virtually every deadline in its Original Housing Element. The City failed to complete an EIR for the rezoning by October 2023 or initiate a ballot measure by March 2024 (Program 4) (AR 473); failed to update its zoning ordinance to require replacement housing by December 2023 (Program 5) (AR 475); failed to publish an SB 9 handbook or online mapping tool to assist in identifying SB 9 eligible properties by December 2024 (Program 7) (AR 476-7); failed to establish financial and regulatory incentives such as fee reductions by July 2024 (Program 10) (AR 482); failed to modify inclusionary requirements by December 2024 (Program 15) (AR 488); failed to adopt amendments to its zoning ordinance to allow for density bonuses and incentives consistent with the requirements of state law within one year of adoption (Program 17) (AR 490); failed to update the City's reasonable accommodations ordinance to remove constraints by October 2024 (Program 25) (AR 503); failed to complete a report on potential universal design requirements and home sharing opportunities by December 2024 (Programs 24 and 26) (AR 502-4); failed to establish procedures for liveaboard housing by December 2024 (Program 27) (AR 504); and failed to carry out the various "high priority" programs to affirmatively further fair housing, including

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Programs 7, 9, and 10 and its commitment to establish rental registry by 2024 to identify rental units that accept Section 8 (Program 22) (AR 497-9.). The only Program that the City successfully implemented from its Original Housing Element is Program 6, to encourage the development of ADUs – a program that was only implemented *after* HCD sent a letter of violation threatening to refer the City to the Attorney General due to its noncompliance. (RJN, Ex. F, p. 6.)

The City ignored the Original Housing Element from the beginning and clearly had no intention of ever implementing the Original Housing Element programs. Once the Original Housing Element was certified to beat the statutory deadline, the City put the Original Housing Element on a shelf and immediately began work to replace it with the Amended Housing Element. After rushing to stave off the consequences of missing the statutory deadline, the City abandoned the Original Housing Element completely, rendering it a dead letter. Relegating the adoption process to a paper exercise simply to beat the statutory deadline directly contradicts the Legislature's command that jurisdictions *must* implement housing elements to provide their fair share of the state's housing goals. (Gov. Code §§ 65585(i)(1)(A).) Over two and half years of this eight-year housing element cycle has passed, and only *now* has the City even begun to contemplate implementing any of its housing element programs. This is in clear violation of the Housing Element Law requirement that jurisdictions *must* implement housing element programs within the adopted timelines for implementation, which the City has ignored. (Gov. Code §§ 65581, 65583(c).)

The City had a ministerial duty to carry out its housing element programs by the deadlines that the City itself adopted. YIMBY, and the public generally, has a beneficial interest in the City carrying out its duties to help attain the state's housing goals. Regardless of whether the Original Housing Element was properly adopted, the City's failure to implement it is nonetheless a violation of the Housing Element Law that has led to a continued paltry level of housing production. Thus far the City has only permitted 18 units during the first two years of the current cycle with almost all of those units (17) being ADUs. (RJN, Ex. G, p. 2.) This is no doubt due to the fact that the ADU program is the *only* program the City implemented – and

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only after HCD threatened enforcement action. The City has clearly not implemented the Original Housing Element programs and as a result, the Court must find that the City has not been in compliance with the Housing Element Law.

D. The City's Housing Element Site Inventory is Legally Inadequate

1. *Site Inventories Must Accommodate RHNA At All Times During the Housing Element Cycle*

A failure to demonstrate "realistic development capacity" of the Site Inventory to meet lower-income RHNA renders a housing element noncompliant. (Gov. Code § 65583.2(c), 65583(a)(3).) The Housing Element Law requires a robust analysis of "realistic and demonstrated potential" to "ensure that its housing element inventory accommodates, *at all times throughout the housing planning period*, its remaining unmet share of its regional housing need." (Gov. Code §§ 65584.08 [emph. added], 65583.)

If available sites at existing densities cannot accommodate RHNA, a jurisdiction must include a program that "*will* accommodate those needs, which include rezoning actions to close the gap." (*Martinez v. City of Clovis* (2023) 90 Cal. App. 5th 193, 225 [emph. added].) This rezoning program is not optional, and a site may *only* count toward meeting a jurisdiction's RHNA if the site is subject to "a program for rezoning of those sites" by the statutory deadline of three years. (Gov. Code § 65583(c)(1).) The deadline for "completing *required* rezoning" may only be extended by one year in limited circumstances. (Gov. Code § 65583(f) [emph. added].) The Housing Element Law requires that a city's Site Inventory can its RHNA "at all times throughout the planning period" and prohibits a jurisdiction from taking "administrative, quasi-judicial, legislative, or other action" that would cause or permit its Site Inventory to be insufficient. (Gov. Code § 65863.)

2. *Voter-Restricted Sites Are Not Available to Meet RHNA*

The City's Site Inventory fails to comply with the Housing Element Law because its housing element does not ensure that the Inventory will be sufficient to meet its RHNA at all times throughout the planning period and does not include a program that requires rezoning by the applicable deadline. The City's Site Inventory relies heavily on parcels that are subject to a

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vote of the electorate to increase density. (AR 3429-30, 3743-45, AUGAR 17013-5.) The City cannot possibly confirm that the Inventory is currently adequate to meet its RHNA because these voter-restricted sites are neither currently available for development at the densities identified nor were these sites subject to "a program for rezoning of those sites" by the statutory deadline as required by the Housing Element Law. (Gov. Code § 65583.2(c).)

On the contrary, the City's program explicitly acknowledges that the voter-restricted sites ***will not*** be rezoned by the deadline and that its Site Inventory will be insufficient to meet its RHNA if voters do not approve of a ballot initiative. (AUGAR 16931-2, 17013-5.) The City cannot possibly confirm whether the site inventory is currently sufficient to meet the City's RHNA because the outcome of a future ballot initiative is unknown. (*Id*.) And if a vote fails, the City will not complete the rezoning by the statutory deadline and will instead "[r]equest opinion from the State Attorney General's Office as to the City's options, or seek declaratory relief in court." (AUGAR 16931-32.) It is unclear precisely who the City will sue for declaratory relief, but the City's program clearly does *not* require the sites in its Inventory to be rezoned to accommodate its RHNA by the statutory deadline as required by the Housing Element Law.

Further, the City's purported "rezoning program" is directly contradictory to the requirement to ensure its Inventory remains sufficient and *prohibits* taking any actions that would result in the Inventory becoming insufficient. (Gov. Code § 65863(a).) The program includes seeking declaratory *relief* from the Housing Element Law's mandatory requirement to rezone sites sufficient to meet its RHNA. (AUGAR 16932.) The City's rezoning program therefore does the *opposite* of what the Housing Element Law requires. It does not ensure sufficient capacity to meet the City's RHNA – it creates a program intended to avoid the City's RHNA obligations altogether.

The City is likely to argue that because HCD certified the City's housing element, this Court must accept that the City's Site Inventory and rezoning program substantially complies with the Housing Element Law. Although the Housing Element Law establishes a rebuttable presumption of validity for certified housing elements (Gov. Code § 65589.3), a rebuttable

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presumption "merely shifts the burden of proof to show the presumption is not correct." (*West Washington Properties, LLC v. Department of Transportation* (2012) 210 Cal.App.4th 1136, 1143–1144.) If a party provides sufficient evidence to negate the presumption, the "presumption disappears" and "has no further effect." (*Coffey v. Shiomoto* (2015) 60 Cal. 4th 1198, 1209 [citations omitted].) Further, HCD's "informal interpretation" of statutory requirements is not binding on courts, and "any deference that might be due the HCD's interpretation is overcome by the plain meaning" of the Housing Element Law. (*Martinez*, *supra*, 90 Cal. App. 5th at 243.) If a housing element does not comply with clear statutory requirements, this "effectively rebuts the presumption of validity." (*Id*.)

Here, the City's housing element does not meet the Housing Element Law's clear requirements to "ensure that its housing element inventory accommodates, at all times throughout the housing planning period, its remaining unmet share of its regional housing need" and provide "a program for rezoning of those sites" by the statutory deadline. (Gov. Code § 65583(c)(1).) The City cannot ensure that its Site Inventory is currently sufficient to meet its RHNA, nor can the City confirm that sites listed in its Inventory will be rezoned by the statutory deadline, and the program in its housing element does not require the sites to be rezoned. (AUGAR 16929-34.) As a result, the City's housing element does not substantially comply with the Housing Element Law.

In fact, HCD has tacitly acknowledged that sites in the City's Inventory cannot be counted toward meeting the City's RHNA obligations where development is uncertain. For example, Site 301 was allocated 30 lower-income units on liveaboard houseboats under the jurisdiction of the Bay Conservation and Development Commission ("BCDC"). (AUGAR 17014.) HCD found that because development of this site required the City "to work with BCDC to expand berth capacity," this site was "aspirational" and could not by counted toward the City's RHNA. (AR 24569.) Similarly, the voter-restricted sites require the City to seek permission from voters and are just as "aspirational" as the liveaboards that require BCDC approval. (AR 24566-67.)

Unless the City sought voter approval *before* listing sites in its Inventory, the City

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Council is currently legally prohibited from rezoning those sites and development of voter-restricted sites at the densities identified in the Inventory is aspirational. Alternatively, the City could have created an alternative Inventory of sites that are not restricted to ensure sufficient capacity at all times even if a vote fails. However, the City's Site Inventory and rezoning program as it stands is not a firm commitment that its Site Inventory will be rezoned to meet the City's fair share of housing if the rezoning vote fails, which is clearly what the Housing Element Law requires.

In short, the City's Site Inventory and rezoning program fail to meet fundamental, clear Housing Element Law requirements. As such, the City's Site Inventory and housing element do not substantially comply with the Housing Element Law.

3. *Site Inventories Must Demonstrate Realistic Development Capacity and that Uses on Nonvacant Site Will Be Discontinued.*

A local government's Site Inventory must demonstrate "realistic development capacity" to meet its RHNA and "shall specify for each site the number of units that can realistically be accommodated" at different affordability levels, and that number "shall be adjusted as necessary" based on the land use controls, typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction, and availability of public services. (Gov. Code § 65583.2(c).)

The Housing Element Law disfavors "nonvacant sites," and as a result must demonstrate the "additional development potential for each [nonvacant] site" relied upon to meet its RHNA and *must* consider statutory factors such as the existing uses, past experience converting such existing uses to higher density residential development, existing leases or contracts that would perpetuate existing uses or prevent residential development, development trends, and market conditions. (Gov. Code § 65583.2(g)(1).) When a locality designates "50 percent or more" of its lower-income RHNA to nonvacant sites, existing uses are "presumed to impede additional residential development, absent findings based on substantial evidence *that the use is likely to be discontinued*" during the current planning period. (*Id.* subd. (g)(2) [emph. added].)

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4. *The City's Site Inventory Is Unrealistic and Fails to Provide Substantial Evidence That Uses on Nonvacant Sites Will Be Discontinued*

The City's Site Inventory fails to demonstrate realistic development capacity, including because the number of lower income units that sites can accommodate is wildly unrealistic and was not adjusted based on the statutory factors. For example, the Site Inventory places nearly half of all the City's very-low-income RHNA units on just three privately owned sites – Sites 402, 72, and 303. (AUGAR 17013.) Site 402 is allocated 43 total units, with a whopping 24 units counted as very-low-income and another 12 units counted as low-income – meaning *more than 80% of the total units are estimated to be restricted as affordable*. (AUGAR 17013.) Site 72 is allocated 56 total units of capacity, with 31 very-low-income units and another 15 low-income units, again allocating over 80% of total units as affordable. (*Id*.) Site 303 has been allocated 129 units of capacity, with 50 very-low-income units and 18 low-income units, allocating 52% of the total units as affordable (despite the property owner stating interest in a 20% affordable project). (*Id*.)

The realistic capacity of a site must be based upon "typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction." (Gov. Code § 65583.2(c)(2).) The City can point to no market rate housing project in Sausalito, the Bay Area, or anywhere in California reaching *anywhere near* the affordability levels the City relies on in its Site Inventory. Studies demonstrate that almost all housing projects, even those with robust financial incentives, are financially infeasible with affordability levels of 40%.[1] The City's Site Inventory *more than doubles* that number. A real estate investment firm provided a study to the City before adoption of the Original Housing Element demonstrating how the City's density and affordability numbers were wildly unrealistic, that "it is not reasonable to assume these sites will develop at the contemplated affordability or density levels," and the City's allocation resulted in projects that were not financially feasible. (AR

[1] UC Berkeley Terner Center for Housing Innovation, *Modeling Inclusionary Zoning's Impact on Housing Production in Los Angeles: Tradeoffs and Policy Implications*, April 2024, p. 9 *available at* https://ternercenter.berkeley.edu/wp-content/uploads/2024/04/Inclusionary-Zoning-Paper-April-2024-Final.pdf.

9458, 9473-74.) The investment firm found that even at 50% affordability levels, multiple sites were already financially infeasible, resulting in negative residual land values upwards of $10 million dollars in some cases. (AR 9461, 9471, 9469.) The City's Amended Housing Element did the opposite of fixing these fundamental flaws, and in fact made them worse by *increasing* the affordability levels of sites, making projects even *less* feasible. The City had no choice but to increase these numbers on the few remaining sites after removing several viable sites where property owners had concrete plans for redevelopment. (AR 11961-2, 8646, 8859, AUGAR 25368-69.)

Rather than basing its allocation on "existing or approved residential developments" as required by statute, the City instead relies on proposed projects – but even these do not support the City's claimed capacity. (Gov. Code § 65583.2(c)(2).) The City mentions a proposed 19-unit project with 3 moderate-income units (15%) and a 5-unit project with 1 moderate-income unit (20%) – nowhere near the 80% affordability level used in the Site Inventory. (AUGAR 16957-58.)

Rather than analyzing "the current market demand for the existing use" as required by statute, the City instead utilized tax assessed value to determine if a site would financially benefit from being redeveloped. (Gov. Code § 65583.2(g)(1).) As anyone in California would know, tax assessed value has nothing to do with market demand or current market value. For example, the value of 2656 Bridgeway, a .93 acre industrial zone site, is listed as $1.6 million while the land of 2400 Bridgeway, a smaller .67 acre industrial zoned site just a few hundred feet away, is listed as $2.7 million. (AUGAR 17013.) The property owner of Site 86, allocated for 27 units (15 very low), even explained to the City that the Site Inventory identifies the property with an extremely low value because the property has been in the family since the 1800's and was last assessed in 1970. (AUGAR 25285.) Applicants do not determine whether redeveloping a site makes financial sense based on tax assessments – which is precisely why the Housing Element Law demands that City's analyze *actual market value* of existing uses. (Gov. Code § 65583.2(g)(1).) The City failed to analyze actual market conditions, or consider construction and development costs at all, resulting in wildly unrealistic capacity allocations

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and affordability levels that could never be reached in the real world.

Further, the factual basis for the City's claim that the City averages 259% percent of the maximum permitted density is simply false. (AR 630.) The City reached this wild claim by stating to have permitted 473% of the maximum permitted density at 99 Wolfback (one of just four non-ADU projects in the City). (AR 615.) The City fails to explain how approving one single-family dwelling in an R-1-20 zone, which principally permits one dwelling per parcel, somehow counts as nearly 500% allowed density. (Saus. Mun. Code § 10.22.040 Table 10.22-2.)

Further, the City has not had any success in actually converting existing uses to higher density residential development. The proposed projects that the City cites to have been stalled for years. The City lists the project at 1755 Bridgeway that has been pending *since 2018* (Project #2018-00413); the project at 2015 Bridgeway was first proposed in 2021 and the City has still not even deemed the application complete (Project #2021-00110); and the project at 409 Napa first went through historic review in 2021 (Project #2021-00240). (AUGAR 16953-4, 16957-8, RJN Ex. H.) These "pending" projects that the City relies on to meet the statutory factor of the City's "past experience with converting existing uses to higher density residential development" to demonstrate redevelopment is likely shows the opposite. (Gov. Code § 65583.2(g)(1).) Redevelopment of sites at the densities identified in the Site Inventory are completely unrealistic.

The City also failed to analyze whether any sites were restricted from redeveloping due to existing leases and contracts as required by statute. In fact, the housing element admits that the City did *not* investigate existing leases and contracts, instead stating that the City is "not aware" of any such restrictions. (AUGAR 16951.) There is no evidence whatsoever that the City ever even asked property owners whether such leases and contracts existed. The City simply added a line to its Amended Housing Element to pretend the City completed the analysis that the Housing Element Law requires.

Finally, the City fundamentally misunderstands the Housing Element Law requirement when a jurisdiction allocates 50% or more of its lower-income RHNA to nonvacant sites.

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(Gov. Code § 65583.2(g).) The statute states that "*in addition*" to the statutory factors a local government must evaluate for every nonvacant site in subd. (g)(1), an existing use "***shall be presumed*** to impede additional residential development, absent findings based on substantial evidence that the use ***is likely to be discontinued***" during the current planning period. (*Id*. subd. (g)(2) [emph. added].) Said another way, the law demands more than just an analysis of the statutory factors, the law demands that the City prove with substantial evidence that redevelopment of these sites is more likely than not in the next 8 years (or six years from the date the Amended Housing Element was adopted).

The City simply stopped at step 1, poorly attempting to analyze the factors in subd. (g)(1) to determine "the extent to which existing uses *may* constitute an impediment." (Emph. added.) The City, however, expressly and incorrectly skipped step 2. The Amended Housing Element states that "Because nonvacant sites comprise more than half of Sausalito's sites inventory, *Government Code Section 65583.2(g)(2)* requires that the City analyze the extent to which existing uses *may* constitute an impediment to additional residential development." (AUGAR 16949 [emph. added].) That is clearly not what subd. (g)(2) requires. Subd. (g)(2) requires more – specifically "substantial evidence that the use *is likely to be discontinued*" during the current planning period. (Emph. added.) The City clearly does not have substantial evidence that the uses on any of the nonvacant sites are likely to be discontinued because the City never even attempted to conduct the analysis required by subd. (g)(2) at all, and therefore did not make the required findings.

For example, on Site 402, the Site Inventory explicitly states that the City merely reviewed whether the site was "consistent with the Site Suitability Criteria and supported by the methodology for selecting nonvacant sites." (AUGAR 16946.) The Site Inventory states that parking and storage areas could be converted to housing. (AUGAR 17013.) The City ignores that the "storage" area of the site is part of the Sausalito Mini Storage facility, an existing use, and much of the existing parking area is currently reserved for Cartelligent, an existing automotive sales and leasing company where access to parking is obviously critical to their business. Do these businesses have leases or contracts that would prevent redevelopment?

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Are these storage and parking uses likely to be discontinued during the current housing element cycle? The City does not know – the City simply presumes that these areas are likely to be redeveloped with housing that is 80% affordable.

The City treats any parking areas and what it classifies as "underutilized" sites as vacant. This directly contradicts HCD's guidance regarding what constitutes "vacant" for purposes of the site inventory. (RJN, Ex. I, p. 2.) HCD's guidance states that vacant means a site that has *no improvements* that add value to the land and specifically identifies "a paved parking lot" as an improvement that adds value. (*Id*.) HCD provides examples of vacant sites, including "No existing uses, including parking lots" and states that "Underutilized sites are not vacant sites." (*Id*.)

Pursuant to Gov. Code § 65583.2(g)(2), these uses are *presumed* to be an impediment to redevelopment, and it is the City's burden to provide substantial evidence that these uses are likely to be discontinued during the current cycle. The City either did not understand the analysis required by subd. (g)(2) or treated what it characterized as "underutilized" sites as vacant sites not subject to subd. (g)(2)'s exacting standards. But either way, the City was wrong, and as a result the City failed to conduct the required statutory analysis. The City does not even describe existing uses let alone provide substantial evidence that such uses will be discontinued to overcome the presumption that the uses are an impediment to redevelopment.

The City cannot rely on the Housing Element Law's general presumption of validity to overcome the specific presumption and burden in subd. (g)(2). HCD's letter in response to the Amended Housing Element made no findings as to whether the City met the requirements of subd. (g)(2), simply reminding the City of its burden. HCD explained "[f]or your information, the housing element must demonstrate existing uses are not an impediment to additional residential development *and will likely discontinue in the planning period* (Gov. Code, § 65583.2, subd. (g)(2).)." (AR 8538 [emph. added].) The City failed to do so, and the City's housing element therefore does not substantially comply with the Housing Element Law.

The City's housing element virtually guarantees that the City will not meet its RHNA targets. The City removed multiple viable sites, over the protestations of the owners who

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desperately wanted to develop their properties (including one with a pending application), and instead stuffed as much RHNA as possible onto an ever decreasing, handful of nonvacant sites, with laughably unrealistic levels of affordability, and without any evidence that the existing uses will be discontinued during the next six years. Just as the Original Housing Element was merely a paper exercise to try to beat a statutory deadline, the City's Site Inventory contains arbitrary numbers on page to try to reach a statutory number rather than a realistic plan to ensure that the City meets its fair share of housing. The City's Site Inventory is woefully insufficient, does not meet mandatory statutory requirements, and will perpetuate, if not exacerbate, the ongoing housing crisis in the City, the region, and the state.

VI. CONCLUSION

The City's adoption of the Original Housing Element violated CEQA and procedural requirements of the Planning and Zoning Law and therefore must be set aside. In addition, the City pursued a housing element amendment while it utterly failed to implement the Original Housing Element, and was therefore out of compliance with the Housing Element Law even if the Original Housing Element were somehow allowed to stand. And finally, the City's Amended Housing Element did not fix the fundamental flaws of the City's Site Inventory, and in fact made matters worse by removing viable sites and allocating affordable units at even more unrealistic numbers to even less sites without the legally required analysis. Petitioner therefore seeks an order declaring the City out of compliance with the Housing Element Law and directing the City to adopt a substantially compliant housing element.

Dated: July 18, 2025

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