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YES IN MY BACK YARD

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 OPPOSITION TO RESPONDENTS' DEMURRER

Date: September 11, 2024
Time: 1:30 p.m.
Dept: H

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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 need 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 in order 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, a community with a median home value approaching two million dollars that permitted just 58 new homes during the entire prior eight-year housing element cycle, was allocated a RHNA of 724 homes (including 315 lower-income homes) in the current cycle. (Res. RJN, Ex. A pp. 115, 203.) 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 days before the statutory deadline to adopt a compliant housing element was about to expire – Sausalito scrambled to try to revise the draft housing element to avoid the consequences of its own delays.

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In its haste, the City disregarded multiple state law requirements. Despite acknowledging that adopting housing element revisions would require an environmental impact report 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. Because there was not enough time for the City to consider the statutorily required factors *before* listing sites on its housing inventory list, the City instead said it would figure out later whether the sites it listed actually provide realistic development capacity adequate to meet its RHNA. And rather than giving members of the public (and City decisionmakers) legally adequate time to review and meaningfully consider critical long-range planning documents before adoption, the City posted a nearly 300-page document on the Sunday night before the adoption hearing and made multiple changes from the dais leading to rampant confusion regarding what was actually adopted until a modified draft was published a couple of months later. The City has now failed to implement its housing element programs as required by law as it seeks to amend the housing element to paper over the legal inadequacies of the version it rushed to adopt.

Petitioner adequately alleges facts that the current version of the housing element does not substantially comply with state law, which if proven true *will* be sufficient to overcome the rebuttable presumption of validity of housing elements determined by HCD as substantially compliant. The bar to withstand demurrer is substantially lower, which only requires that a Petitioner allege facts that *may* be able to overcome the presumption. Rebuttable presumptions merely shift the burden of proof regarding evidentiary disputes and factual findings, and demurrer is not the place to challenge disputed facts. Petitioner alleges facts that the City failed to demonstrate realistic development capacity to meet lower-income RHNA and failed to implement its housing element programs, and therefore the demurrer must be overruled.

III. BACKGROUND FACTS

Yes In My Back Yard ("YIMBY") is a California nonprofit public benefit corporation that litigates on behalf of the public interest with a mission to end the housing shortage in California by ensuring that local government comply with state law. (Pet. ¶¶ 14-15.) YIMBY

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filed a petition for writ of mandate alleging five causes of action to its housing element. Specifically, the first cause of action alleges the City violated CEQA by failing to adopt an EIR prior to adopting its sixth revision housing element; the second cause of action alleges the City failed to demonstrate realistic development capacity for its lower-income need allocation; the third cause of action alleges the City failed to implement its housing element programs; the fourth cause of action alleges the City failed to adopt its housing element in the manner required by law, and the fifth cause of action seeks declaratory relief. (Pet. ¶¶ 280-355.) Respondents filed a demurrer to the second and third causes of action.

Petitioner alleges that Respondents committed to preparing an environmental impact report (EIR) *prior* to adopting its housing element, only to change course at the last minute to avoid missing the statutory deadline and the repercussions under the Housing Element Law for missing the deadline. (*Id*., ¶¶ 31; 96-97.) In the City's rush to adopt *something* at the deadline, just weeks before the deadline the City Council directed staff to "decouple [the] EIR" from the project and convened a working group of two councilmembers to ensure the City's fifth revised housing element was adopted by January 31, 2023. (*Id.*, ¶¶ 91-99.)

On January 25, 2023, the Planning Commission recommended that the City remove capacity for dozens of lower-income homes from the site inventory list, including sites where the property owners had expressly acknowledged interest in developing housing. (*Id.*, ¶¶ 32; 100.) The next day, HCD found that the City's draft housing element did not substantially comply with the Housing Element Law. (*Id.*, ¶¶ 33, 106-11.) HCD found that the City's draft needed to "demonstrate the availability of [listed sites for residential development] within the planning period" and "demonstrate the[ir] affordability" – and HCD was reviewing the draft *before* the Planning Commission recommended removal of capacity for dozens of lower-income homes from the inventory list. (*Id*.)

Just four days later, on a Sunday afternoon, the City published a subsequent draft housing element. (*Id.*, ¶¶ 122-130.) The very next day—the City Planning Commission and City Council voted to adopt the sixth revision of its housing element after back-to-back hearings, in the same marathon evening session. (*Id.*, ¶¶ 131-138.) Petitioner alleges that, in the

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City's rush to adopt a housing element, the City failed to demonstrate "realistic development capacity" to meet lower-income RHNA, failed to consider the statutory factors to demonstrate that nonvacant sites would provide realistic capacity, and failed to support the City's site inventory list with substantial evidence. (Pet. ¶¶ 100-228.)

Due to the rush to adopt a housing element, the City Council authorized City staff to make modifications to the adopted version to address HCD comments – i.e., to fix its defects – without Council approval, *after it was already adopted*. (Pet. ¶ 231.) A new version of the City's housing element was submitted to HCD nearly three months after adoption with modifications (that have never been adopted by the City Council). (Pet. ¶ 232.) The modifications included a commitment for the City to work with owners of several site inventory properties to determine whether the properties could be made available for housing during the planning period, and if not, to replace those properties on the inventory list. (Pet. ¶¶ 235-238.)

Just three days after the never-before-seen modified housing element was submitted, HCD sent a letter stating that the modified housing element was in substantial compliance with the Housing Element Law. (Pet. ¶¶ 240-242.) HCD's letter, however, explained that the anticipated capacity from new "liveaboard" berths would be discounted from the sites inventory because these sites required the City "to work with BCDC to expand berth capacity," were therefore "aspirational," and could not be counted as realistic capacity. (Pet. ¶¶ 243-246.) HCD's determination also expressed no opinion "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." (Pet. ¶¶ 249.)

The City's housing element committed the City to implementing certain programs to facilitate the development of housing. One such program is Program 19, which according to the City "would result in the development and publication of Objective Design and Development Standards (ODDS) to address multifamily development at densities envisioned by the General Plan, Zoning Code, and Program 4." (Pet. ¶¶ 251.) On April 4, 2024, HCD sent a letter of technical assistance to the City stating that "the City must timely and effectively

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implement all programs, including Program 19. HCD is aware that the City has yet to adopt and implement this program." (Pet. ¶ 255.) The City's housing element committed the City to completing portions of Program 19 by November 2023, but the City has failed to do so. (Pet. ¶¶ 317-325.)

IV. STANDARD OF REVIEW

Against a demurrer, a complaint must be liberally construed to determine if it states a cause of action entitling plaintiff to any relief. (*Wilson v. Transit Authority of City of Sacramento* (1962) 199 Cal.App.2d 716, 720–21.) "Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears." (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) All that is necessary as against a demurrer is to plead facts entitling the plaintiff to some relief. (*Tristam v. Marques* (1931) 117 Cal.App. 393, 397.) "In determining whether or not the complaint is sufficient, as against the demurrer . . . the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good . . . although the plaintiff may demand relief to which he is not entitled under the facts alleged." (*Augustine v. Trucco* (1954) 124 Cal.App.2d 229, 236.) A court generally must accept as true all properly pled facts in the complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer is not the place to challenge disputed facts, as a "hearing on a demurrer cannot be turned into a contested evidentiary hearing." (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 365.)

V. ARGUMENT

A. Petitioner's Second Cause of Action States a Valid Claim

1. Petitioner Alleges Facts that the City's Housing Element Fails to Demonstrate Realistic Development Capacity to Meet its RHNA

The Housing Element Law disfavors "nonvacant sites," and as a result 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

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substantial evidence that the use is likely to be discontinued" in the current planning period. (Gov. Code § 65583.2(b)(3), (g).) Localities must explain why each nonvacant site relied upon to meet its RHNA will become available for housing in the next cycle, and must consider statutory factors such as 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. (*Id*., subd. (g)(1).) A failure to demonstrate "realistic development capacity" 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 the realistic development capacity *before* a local government can list such sites in its housing element inventory because the Housing Element Law requires that local governments ensure that the inventory "can accommodate, *at all times throughout the planning period*, its remaining unmet share of the regional housing need. (Gov. Code § 65583.)

The City's housing element allocates over 50 percent of its lower income housing need to nonvacant sites, and therefore was required to make findings regarding the realistic capacity of each nonvacant site based on the statutory factors and support those findings with substantial evidence. (Pet. ¶ 307.) Petitioner alleges that, in the City's rush to adopt a housing element in order to avoid the repercussions of failing to adopt by the statutory deadline, that the City failed to make the necessary findings, failed to consider the statutory factors, and failed to support the limited findings that were made with substantial evidence. (Pet. ¶¶ 100-228.)

Specifically, Petitioner alleges that the City failed to properly consider development trends and market conditions as statutorily required, resulting in sites that are allocated a wildly unrealistic number of lower-income units. Sites 72, 73, 75, 84, 85, 86, 201, and 202 were all allocated lower-income units that would result in negative residual land values (a metric that equals the value of the land after all development costs have been subtracted) in the millions of dollars. (Pet. ¶¶ 204-221.) Petitioner also alleges that the City failed to contact multiple property owners of listed nonvacant sites regarding whether their properties were available for

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residential development, some of which are subject to leases that would prevent residential development until 2028. (Pet. ¶ 105, 144, 221.)

Petitioner also explains that the City relies on sites that required approvals from outside agencies, and that the City failed to conduct any analysis regarding whether these sites are available for residential development. For example, Site 301 was allocated 30 lower-income units on liveaboard houseboats under the jurisdiction of the Bay Conservation and Development Commission ("BCDC") and that without any outreach to BCDC, the City could not demonstrate that Site 301 could realistically accommodate 30 new lower income units. (Pet. ¶¶ 222-227.) For Site 301, HCD agreed that new liveaboard units were "aspirational" because development of this site required the City "to work with BCDC to expand berth capacity." (Pet. ¶ 243.) Therefore, this listed site could not be counted as available capacity to meet the City's RHNA (*Id*.)

Petitioner also alleges that two other sites similarly required the City to work with outside agencies to make the sites available for housing, but the City failed to do so. (Pet. ¶¶ 234-238.) The housing element committed the City to conduct outreach to the agencies that owned Site 73 (Sausalito Marin City School District) and Site 85 (Caltrans) to determine whether these sites would become available for development *after* the housing element was certified, rather than *before* listing these sites on its housing inventory as required by law. (Pet. ¶¶ 234-238.) Petitioner alleges that because the City did not have substantial evidence demonstrating the realistic capacity of those sites at the time of adoption, those sites cannot be utilized in its inventory. (Pet. ¶ 247.)

Petitioner's concerns about the lack of outreach prior to adoption has proved prescient. The City has apparently now conducted the due diligence (that is statutorily required *before* listing a site) only to confirm that Site 85 is *not* available for residential development. The City is already seeking to amend its inventory list by "eliminating an unworkable site owned by Caltrans." (Pet. RJN, Ex. B) This conclusion could have been reached, and was legally *required* to be reached, *before* a site that does not provide realistic development capacity was

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listed on the City's housing inventory list. This is an admission that the housing element inventory list is invalid.

Petitioner also alleges that *more than half* of the capacity to accommodate the City's lower-income units relies on sites that are subject to ordinances that restrict any increase in residential densities and floor area ratio without voter approval. (Pet. ¶¶ 63-65.) These sites cannot possibly accommodate the identified capacity without approval by the voters or removing the voter approval requirement. Just as the City is required to conduct due diligence to determine whether an owners are interested in developing their property for housing *before* listing a property in the inventory list, the City was required to determine whether the sites subject to voter approval provide realistic development capacity before listing those sites in its inventory. The City could have accomplished this by completing a ballot measure to remove the voter approval constraints *before* listing these sites or, as other jurisdictions have done, sought technical assistance to determine whether the City's Housing Element obligations preempt local voter approval measures. (Pet. ¶¶ 69-72.) The City failed to take *any* measures to ensure that the voter approval sites can provide realistic capacity, instead kicking the can down the road until *after* certification. (*Id.*) In the same way Site 301 was deemed "aspirational" and could not be counted as a listed site because it required BCDC approval, more than half of the City's low-income capacity is similarly aspirational because these sites require voter approval. The City cannot ensure that its inventory can accommodate its remaining RHNA "*at all times throughout the planning period*" until the voter restrictions on its housing element sites are lifted. (Gov. Code § 65583.)

If Petitioner's allegations are true, which on demurrer must be accepted as such, the City failed to conduct the statutorily required analysis prior to listing sites in its inventory, failed to provide substantial evidence to demonstrate that the listed sites are available for residential development, and the listed sites do not in fact provide realistic capacity to accommodate the City's RHNA. As such, the Petition adequately alleges that the City's housing element does not comply with the Housing Element Law. (Gov. Code § 65583(a)(3).)

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2. On Demurrer, the Housing Element Rebuttable Presumption Only Requires Factual Allegations that *May* Be Sufficient to Overcome the Presumption.

A rebuttable 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.) The appropriate burden of proof, unless otherwise provided by law, is "proof by a preponderance of the evidence." (Evid. Code § 115.) If a party provides evidence sufficient to negate the presumption, the "presumption disappears" and "has no further effect." (*Coffey v. Shiomoto* (2015) 60 Cal. 4th 1198, 1209 (citations omitted).) On demurrer, all that is required is for a petitioner to plead facts that if proven true "*may* be sufficient" to overcome the rebuttable presumption burden of proof, and a petitioner is entitled to an opportunity to prove those allegations. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682.)

The Housing Element Law establishes a rebuttable presumption of validity for any housing element that HCD has determined is substantially compliant with statutory requirements. (Gov. Code § 65589.3) Petitioner's note that the rebuttable presumption of validity does *not* apply to other provisions of the Government Code governing the preparation, adoption, and amendment of the City's general plan, particularly where HCD declined to opine on such issues. (Pet. ¶¶ 249.) The rebuttable presumption may be overcome by properly pled facts that may be sufficient to demonstrate a housing element is invalid, utilizing a preponderance of the evidence standard, unless otherwise provided by law. (*See* Evid. Code § 115.) When determining whether an inventory list that allocates over 50 percent of its lower income housing need to nonvacant sites, the Housing Element Law specifically requires the local government to demonstrate that existing uses will be discontinued utilizing a substantial evidence standard. (Gov. Code § 65583.2(b)(3), (g).)

Respondents urge the Court to instead apply the Housing Element Law's rebuttable presumption to HCD's determination, rather than to the validity of the housing element itself, and to use a "clearly erroneous or unauthorized" standard. The rebuttable presumption applies

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to the *housing element*, and in any event the "clearly erroneous and unauthorized" standard does not apply to HCD's factual determinations. This is the standard that courts may *sometimes* apply to an administrative agency's formal, long-standing interpretations of statutes. (*See Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1193; *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113, fn. 13; *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 398.) Respondent's demurrer does not raise any legal or statutory interpretation disputes, and in the context of factual disputes the "clearly erroneous and unauthorized" standard is inapplicable. And again, the Legislature has specifically directed courts to determine whether a local government has provided substantial evidence to demonstrate that nonvacant sites provides "realistic development capacity." (Gov. Code § 65583.2(b)(3), (g).)

As explained above, Petitioner alleges that the City failed to conduct the nonvacant site analysis required by Gov. Code § 65583.2(g) prior to listing such sites in its inventory, the City failed to provide substantial evidence to demonstrate that the listed sites are available for residential development, and the listed sites do not, in fact, provide realistic capacity to accommodate the City's RHNA. The City's demurrer relies heavily on *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, which rejected a claim regarding substantial compliance with § 65583.2(g)'s requirements, but only *after* the City convinced the Court that "the record demonstrates all the relevant factors identified in subdivision (g)(1) of section 65583.2 were addressed." (*Id.* 247; 251.) *Martinez* was not decided on demurrer, including because factual disputes over whether the City properly considered all relevant statutory factors is not appropriate on demurrer. (*Unruh-Haxton, supra,* 162 Cal. at 365.) While the court in *Martinez* stated that the Housing Element Law presumption allowed the court to make certain factual inferences from the available evidence, these issues were factual disputes based on the evidence in the administrative record. (*Martinez, supra,* 90 Cal.App.5th at 250.)

Moreover, the City relies on HCD's findings regarding the City's rezoning program to satisfy its obligations under Gov. Code § 65583(c), which is simply irrelevant to Petitioner's allegations regarding whether the City substantially complied with the nonvacant site analysis in § 65583.2(g). HCD made no findings whatsoever regarding the City's compliance with §

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65583.2(g), beyond a generalized finding that the City's housing element substantially complied with the Housing Element Law. To the degree that HCD found that the City was *not* required to make findings regarding the availability of sites and support those findings with substantial evidence *before* relying on sites in its inventory, HCD is clearly wrong. The Housing Element Law clearly states that a local government "***shall*** specify the additional development potential for each site within the planning period," "***shall*** consider factors including the extent to which existing uses may constitute an impediment to additional residential development," and that "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 planning period." (Gov. Code § 65583.2.) These are mandatory requirements – and they must be satisfied before sites can be listed in the housing inventory.

Moreover, even if HCD's unrelated findings regarding the City's rezoning program were somehow relevant to Petitioner's allegations, HCD's findings stated that the rezoning program "acknowledges some parcels are subject to a vote of the electorate and includes a timeline for preparing the initiative ballot measures" and that "[i]t is critical that Sausalito implement these actions in accordance with the timelines in Program 4 to ensure timely rezoning of the subject parcels." (Res. RJN, Ex. C.) HCD stated that it "will be closely monitoring future actions throughout the planning period including key milestones and implementation deadlines for compliance with housing element law." (*Id*.)

The rezoning program committed the City to initiating a ballot measure in March 2024, conducting community outreach and education on the benefits of the selected sites, and putting the measure on the November 2024 ballot. (Res. RJN, Ex. A, p. 12.) The City has not implemented *any* of those steps that HCD stated was critical to its substantial compliance determination, and the deadline for the City to place a ballot initiative on the November 2024 ballot has already passed. (Pet. RJN, Ex. C; Elec. Code § 10403.) HCD's findings of substantial compliance relied on timely performance of the City's commitments, and the City has completely failed to implement its commitments. The City is now attempting to amend its prior commitment, potentially pushing the date of election for the ballot measure until

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November 2025. (Pet. RJN, Ex. A, p. 4.) The City's reliance on these findings is not only irrelevant to Petitioner's allegations, but merely demonstrate the City's multiple and ongoing Housing Element Law violations.

B. Petitioner's Third Cause of Action State a Valid Claim

1. Petitioner's Claim is Ripe Because the City Failed to Implement its Housing Element Programs

Gov. Code § 65583 (c) requires each Housing Element to include a program with a schedule of actions, each with a timeline for implementation that the local government will undertake to implement the goals and objectives of the Housing Element and that will result in beneficial impacts of the programs in the planning period. Any person can bring an action to compel the compliance with the deadlines and requirements of Gov. Code § 65583(c)(1)(2) and (3). (Gov. Code § 65587(d)(2).) If such an action is brought, the City has the burden of proof. (*Id*.)

One of the programs the City's housing element included is Program 19, where the City committed to preparing Objective Design and Development Standards (ODDS), first to "address multi-family development at densities envisioned by the General Plan, Zoning Code, and Program 4" and then "[f]ollowing completion of the ODDS for eligible multifamily projects, the City will prepare ODDS for single family development projects and multifamily projects that are not subject to streamlined review requirements under State law." (Res. RJN, Ex. A, p. 30.) As part of the City's Housing Element adoption process, the City compiled a "response matrix" to respond to HCD's comments on its draft housing element. Responding to comments that Program 19 was unclear, the City responded that that "the ODDS are being developed in three stages: 1) multifamily projects (in process), 2) multi-unit and mixed use projects, and 3) single family projects to ensure that constraints are minimized for all residential projects." (Pet. RJN, Ex. D, p. 16.) The City committed to adopting the first stage of ODDS multifamily projects within 1 year, or by November 2023. (*Id*.)

The City's yet-to-be-adopted Draft EIR to carry out the Housing Element programs also describes the "first bullet" of Program 19, which was to be completed by November 2023,

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stating that this part of Program 19 "would result in the development and publication of Objective Design and Development Standards (ODDS) to address multifamily development at densities envisioned by the General Plan, Zoning Code, and Program 4." (Pet. ¶ 252.)

As the City's response matrix made clear, the City has already been in the "process" of adopting the first tier of ODDS for multifamily projects. (Pet. RJN, Ex. D, p. 16.) The City first began its endeavor to create objective standards in June of 2021, and a City Council subcommittee has met 16 times since that time. (Pet. RJN, Ex. E, p. 3.) The City Council last held a study session on the "in process" multifamily ODDS that the City committed to adopt by November 2023 on March 19, 2024. (*Id.,* p. 1.) At that meeting, the City Council essentially sent the subcommittee back to the drawing board, directing staff to bring in more design professionals, "figure out something objective" to preserve views, preserve historic resources, encourage climate friendly designs, and a host of other issues. (*Id.,* p. 18) To date, the ODDS the City committed to adopt seven months ago have not come back to Council.

Following the March 19 Council meeting, HCD sent a letter of technical assistance to the City stating that "the City must timely and effectively implement all programs, including Program 19. HCD is aware that the City has yet to adopt and implement this program." (Pet. ¶ 254.) HCD's letter precisely notes how the City's Draft EIR described the implementation of Program 19, explaining that "Program 19 (Development Review Procedures) commits the City to adopt ODDS that would accommodate the maximum densities proposed to meet its RHNA and streamline the approval process for housing developments." (Pet. ¶ 255.)

In response to HCD's letter, the City completely reversed course regarding the details of Program 19. Despite the description of Program 19 in the Housing Element, the Draft EIR, and the response matrix that noted development of ODDS was "in progress," the City's response was that it had *already accomplished* Program 19 – nearly sixteen months *before* Program 19 was even adopted – when the City adopted a resolution on July 13th, 2021 that identified which *existing* standards *already* contained within its zoning code are objective. Said another way, the City's position is that Program 19 committed the City to do absolutely nothing, and is actually a "got done" list touting supposed past accomplishments rather than a

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"to do" list of steps that the City will take to increase housing production in the next housing element cycle. This defies common sense, and flies in the face of the plain language of Program 19, which states that the City "*is in the process* of preparing Objective Design and Development Standards (ODDS) and the ODDS *will be developed* to address multi-family development at densities envisioned by the General Plan, Zoning Code, and Program 4."

Respondents' demurrer claims that Petitioner "cherry picked" the deadline in Bullet 1 of Program 19, and that Petitioner's claim is not ripe because the deadline to complete Bullet Point 2 of Program 19 is not until May 2025. Petitioner agrees that the deadline for Bullet Point 2 has not yet passed, but that does not change the fact that the City failed to complete Bullet Point 1 by November 2023 as required. The City made clear in its response matrix that "the ODDS are being developed in three stages: 1) multifamily projects (in process), 2) multi-unit and mixed use projects, and 3) single family projects to ensure that constraints are minimized for all residential projects." (Pet. RJN, Ex. D, p. 16.) Stage 1 of the ODDS for multifamily projects was incorporated into Bullet Point 1 with a deadline of November 2023, but the City has failed to complete this portion of Program 19 as it was legally required to do. The City has already failed to carry out its Housing Element programs, and therefore the issue is ripe for review.

The City's demurrer seems to argue that development of the ODDS is equivalent to the rezoning required by Gov. Code § 65583(c)(1)(3), and because state law includes a three-year deadline to complete the mandatory rezoning, the three-year deadline somehow nullifies the deadline the City committed to in its housing element. First, development of the ODDS is not the equivalent of the mandatory rezoning required under state law, as the ODDS only address development standards (e.g., height limits, setbacks, etc.) and do not include upzoning the density of sites to reflect the residential capacity identified in the City's inventory list. The mandatory rezoning of § 65583(c)(1)(3) requires upzoning *densities*, and that requirement is reflected in Program *4*. Moreover, even if Program 19 were the equivalent of the mandatory rezoning, the City would still be required to carry out the programs by the deadlines as adopted in its housing element. Respondents offer no support for the proposition that a locality can

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ignore its own adopted rezoning deadlines if the statutory maximum rezoning deadline is longer. The public, including housing developers, must be able to rely on the deadlines contained within an adopted housing element. A local government is required to carry out its adopted housing element programs, and any person can bring an action to compel the compliance with the adopted deadlines. (Gov. Code § 65587(d)(2).)

In a last-ditch effort to avoid compliance with its own housing element programs, the City is now attempting amendments to Program 19 to try to extend the ODDS deadline to three years and to eliminate the requirement to develop ODDS in three stages. (Pet. RJN, Ex. A, pp. 9-11.) If the *current* deadline for Program 19 was *already* three years, as the City erroneously claims, there would be no reason for the City to propose amendments to change Program 19's deadline. The City *knows* that it has failed to carry out the housing element programs and it is attempting to paper over those failures by extending the deadlines the City has already missed, including its failure to place a ballot measure lifting voter restrictions by November 2024 as noted above. This merely confirms Petitioner's claim that Respondents have failed to comply with the housing element as currently adopted in violation of the Housing Element Law.

VI. CONCLUSION

Petitioner adequately states a claim and alleges facts that the City failed to adopt a substantially compliant housing element and failed to implement its housing element programs as required by the Housing Element Law. (Gov. Code § 65583(a)(3).) Petitioner therefore respectfully requests that the Court overrule the demurrer, and if the demurrer is sustained on any basis, Petitioner requests leave to amend.

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