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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 REPLY 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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I. INTRODUCTION

The City's response barely even attempts to defend its actions against Petitioner's claims. Instead, the City largely argues this case is moot because the City adopted some redline edits to the 6th Cycle housing element that it adopted in January 2023 (the "Original Housing Element"). The City took this action in part to try to moot this case and evade judicial review of its clearly illegal actions but still wants to gain the benefits *as if* it had complied with the law by leaving the Original Housing Element approval actions in place. Not only must the Original Housing Element approval be voided, but the City continues to fail to implement its housing element programs and the amendments the City adopted in May 2025 (the "Amended Housing Element") still fail to comply with the Housing Element Law.

The City argues that this case is moot because the relief Petitioner seeks has already been achieved, and thus there is no effective relief this Court could grant. This is wrong. The California Environmental Quality Act ("CEQA") specifically grants courts the authority to void the *approval* of a project (Pub. Res. Code § 21168.9(a)); yet the City argues its Original Housing Element approval was valid. In addition, courts have the authority to overturn findings from the Department of Housing and Community Development ("HCD") that a local government was in substantial compliance with the Housing Element Law (Gov. Code § 65585.03)); yet the City argues its Original Housing Element was in substantial compliance with the law. The relief Petitioner seeks has *not* been granted, and this relief will have significant impacts on future City actions with respect to housing development project applications currently pending with the City.

Finally, the Amended Housing Element did not correct the flaws in the City's inventory of sites to meet the City's regional housing needs allocation ("RHNA"). Because the City's inventory relies on voter restricted sites where rezoning at the densities proposed is uncertain, and the City failed to carry its burden to demonstrate the uses on nonvacant sites are not an impediment to redevelopment, the City's Amended Housing Element is still out of compliance with the Housing Element Law.

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II. ARGUMENT ON REPLY

A. The Case Is Not Moot

Courts generally refrain from issuing purely advisory opinions, and instead only decide a controversy "by a judgment which can be carried into effect." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) The pivotal question to determine whether a case is moot is "whether the court can grant the plaintiff any effectual relief." (*Id.* at p. 1574.) The bar to find a case moot is high, as a court must find an event has occurred "which renders it *impossible* for [the] court, if it should decide the case in favor of plaintiff, to grant him *any* effectual relief whatever . . ." (*Ibid*.) Put another way, a case is moot if the court's ruling will "have *no* practical effect." (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454.)

As Petitioner has explained to Respondent multiple times, Petitioner seeks a judgment to void the City's approval of a housing element for failing to comply with the CEQA and a declaration that the City was out of compliance with the Housing Element Law since February 1, 2023. Not only can this Court provide the relief that Petitioner seeks, but this judgment would also have a significant, practical effect on multiple housing project applications currently pending with the City. As a result, it is not impossible for this Court to provide Petitioner with effective relief, and therefore the case is not moot.

1. *Petitioner's CEQA Claim is Not Moot*

The City does not even attempt to argue its adoption of the Original Housing Element without completing an EIR complied with CEQA. In fact, the City admits that it completed an EIR prior to adopting the Amended Housing Element in response to this lawsuit, and the City made several comments throughout the process that it was preparing an EIR in part to try to moot this lawsuit. The EIR the City prepared confirmed that approval of the Original Housing Element would 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 its inventory – densities that went into effect immediately upon adoption – would cause significant effects that were not disclosed to the City Council, or the

public, before approval in violation of CEQA.

The City does not dispute this and instead argues that the relief Petitioner seeks has already been granted and that rendering a judgment in this case would have no practical effect. The City is incorrect in both assertions.

a. The Relief Petitioner Seeks Has Not Been Granted

First, the City argues that Petitioner has already obtained the relief it was seeking because the City purportedly "rescinded" the Original Housing Element, making the case moot. While the City argues it purportedly "rescinded" the Original Housing Element, the action the City *actually* took was to approve a redline amendment to Original Housing Element. (Augar 16928-17028.) HCD's certification of the amendments confirms this is the case, as HCD wrote that it had previously found the Original Housing Element in substantial compliance, and that the "amendments would not negatively impact the finding of substantial compliance once the amendments have been adopted." (AUGAR25871.) In other words, the City's position is that Original Housing Element was valid and was in effect from the date it was adopted until HCD certified the amendments. The City only amended the Original Housing Element prospectively and did not "rescind" the validity of its approval action retroactively.

While the Opposition suggests otherwise, the City fully understands the relief Petitioner seeks has not already been granted. Petitioner seeks the relief authorized by statute, specifically 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).) As explained in Petitioner's Opening Brief, courts have the authority to issue an order that a public agency's actions be voided under Pub. Res. Code § 21168.9(a). (*John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, 102 ["Directing an agency to void its approval of the project is a typical remedy . . . for a CEQA violation."] [internal citations omitted]; *Bakersfield Citizens for Local Control* (2004) 124 Cal.App.4th 1184, 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

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voided"].)

The City knows it did not void the prior approval and continues to argue that its Original Housing Element was properly adopted and in effect from January 31, 2023, until the City's amendments were certified by HCD on July 1, 2025. That is not the equivalent of *voiding* a prior action. When an action that is void, it "is so from the very beginning, and legal rights cannot be predicated upon it." (*City of San Pablo v. City of Richmond* (1957) 148 Cal. App. 2d 358, 361; *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 544 [explaining a measure that conflicts with state law is void "at the time it is passed"]) CEQA permits a court to order a decision made without complying with CEQA void ab initio, as if the decision never existed. This is the relief Petitioner seeks.

b. The Relief Petitioner Seeks Would Have A Practical Impact

California courts have not offered a definition of "effectual relief" or "effective relief," but have made it clear that whether the requested relief is "effective" is determined by whether the requested relief would have any practical impact. (*Woodward Park Homeowners Ass'n v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.) The City argues that the relief Petitioner seeks would "make no sense" because the Original Housing Element was amended and is no longer an "ongoing activity." Petitioner presumes that this argument means the City believes the relief Petitioner seeks would have no practical effect. Petitioner disagrees.

First, once a site is designated in a housing element inventory as suitable for residential use, the site automatically acquires new development rights to proceed at the densities permitted by the site inventory. These rights are conferred by the Housing Accountability Act ("HAA"), a provision within the Housing Element Law, and come into effect immediately upon adoption of a housing element. A jurisdiction is generally limited in its ability to disapprove a housing project that is "consistent with the density specified in the housing element" and projects consistent with the "most recently updated and adopted housing element" in effect on the date an application was deemed complete are entitled to certain development rights. (Gov. Code 65589.5(d)(5); (f)(8).)

Petitioner is aware of at least one complete application on Site 201 that was submitted

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to the City for a housing project that is consistent with the density in the Original Housing Element, which the City later reduced in Amended Housing Element. (AUGAR 17013-15, 21035-16, 25368-69.) In this respect, the Original Housing Element is still an "ongoing activity" as the City is still obligated to process this application for Site 201 consistent with the Original Housing Element density, which the City did not void retroactively, *even though* the City later reduced the density permitted on this site in the Amended Housing Element.

Second, if the City's prior approval of the Original Housing Element were voided due its noncompliance with CEQA, this would also impact the City's compliance status under the Housing Element Law. As noted above, HCD recognized that it had found the City's Original Housing Element in substantial compliance with Housing Element Law, and the "amendments would not negatively impact the finding of substantial compliance." (AUGAR25871.) If the City's Original Housing Element adoption were voided as if it never existed, the City's compliance status would *also* be voided. This status is not merely about the past, but this is critical regarding the City's *future* obligations with respect to applications submitted prior to HCD's certification of the Amended Housing Element.

Under the HAA, local governments cannot disapprove, reduce the density of, or make infeasible certain housing development projects unless the local government is able to make one of six specifically enumerated findings supported by a preponderance of the evidence. Three of those findings require the agency to make a finding that the jurisdiction was in substantial compliance with the Housing Element Law at the time the housing application was complete. (Gov. Code § 65589.5(d)(1), (5)-(6).) The City has received multiple housing development project applications prior to the date that HCD certified the Amended Housing Element. For 409-411 Napa, an applicant submitted a preliminary application on March 3, 2025 for a 5-unit project. (RJN, Ex. No. 1.) A planning application for 409-411 Napa was submitted on March 6, 2024. (RJN, Ex. No. 2.) For 83 Princess Street, an applicant submitted a preliminary application on May 28, 2025 for a 46-unit project. (RJN, Ex. No. 3.) For 215 Sausalito, an applicant submitted a preliminary on March 3, 2025 for a 3-unit project, one of which would be affordable. (RJN, Ex. No. 4.) For 605-613 Bridgeway, an applicant submitted

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a preliminary application on February 20, 2024 for a 59-unit project, which would utilize the Density Bonus Law for 26 of the 59 units. (RJN, Ex. No. 5.) A second preliminary application for 605-613 Bridgeway was submitted on May 28, 2025 for a 53-unit project, which would not utilize the Density Bonus Law. (RJN, Ex. No. 6.)

These projects are protected by the HAA, and when the City takes a future action on these projects, the City will need to make findings under subd. (d) regarding whether the City was in substantial compliance with the Housing Element Law on the date the applications were submitted. (Gov. Code § 655589.5.) Thus, the question of whether the City was *previously* in substantial compliance is still a live controversy. Voiding and setting aside the prior approval will grant YIMBY, and the public, effective relief by ensuring that the City does not erroneously make findings that it was in substantial compliance when these applications were submitted. Petitioner's prayer for relief specifically requested that the Court issue a declaration "that the City may not rely on paragraphs (1) or (5) of subdivision (d) of Section 65589.5 of the Government Code" to disapprove housing development projects and a declaration that the City "has been, out of compliance with the Housing Element Law from February 1, 2023, until the City lawfully adopts a sixth revised housing element that the Court finds in substantial compliance with both CEQA and the Housing Element Law." (FAP p. 43.) Not only has this relief not yet been granted, but this relief would have a significant, practical impact on multiple housing development projects proposed within the City. If this Court does not determine the question of whether the City was previously in substantial compliance, this live controversy will simply be the subject of litigation later if the City erroneously makes substantial compliance findings on individual housing development project applications. YIMBY qualifies as a "housing organization" under the HAA, has a beneficial interest in ensuring that the City adhere to its obligations under the HAA, and has standing to sue for HAA violations. (Gov. Code § 65589.5(k)(1)(A)(i), (k)(2).)

c. <u>The Case Law Cited by the City Undermines Its Mootness Argument</u>

The City cites to *McCann v. City of San Diego* (2023) 94 Cal.App. 5th 284 for the

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proposition that with the adoption of the amendment to the Original Housing Element, none of the remedies under Pub. Res. Code § 21168.9 are available for the court to order. *McCann* involved a CEQA challenge to project approvals to underground overhead utility wires, a project that was later "rescinded" in its entirety and was consistent with trial court's order to "set aside" the project approval. (*Id*. at 293.) The court explained that, whatever name the city or trial court called the city's action, the remedial action was consistent with what is authorized by CEQA – namely "[v]oiding a project approval."(*Ibid*.) In contrast, here the City did not "rescind" its prior approval within the meaning of the remedial action described in Pub. Res. Code § 21168.9(a), but rather adopted a redline edit to its prior approval. The City still maintains that its Original Housing Element was validly adopted and in effect up until the amendments were approved. The City has *not* voided its approval, which *Mcann* confirms is the proper remedial action a local government must take to comply with CEQA.

The City also attempts to analogize this dispute to *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. However, *Save Tara* supports Petitioner's argument that the belated preparation of an EIR for a project does not render a CEQA claim moot. The dispute in *Save Tara* centered on a claim a city had violated CEQA by failing to prepare an EIR before approving a loan and development agreement for a housing project. The City prepared an EIR for the project as the case made its way through court but did not void its development agreement. Despite the Citty's claim that the tardy EIR rendered the dispute moot, the court ruled "that the preparation and certification of an EIR does not render the appeal moot. No irreversible physical or legal change has occurred during pendency of the action and *Save Tara* can still be awarded the relief it seeks, *an order that City set aside its approvals*." (*Id*. at 127.)

The City is attempting to argue that its actions are distinguishable from *Save Tara* because the City "rescinded" the Original Housing Element and considered an EIR prior to adopting the amendments. The City is again trying to pull tricks with semantics to convince this Court it took an action that it did not take. The City did not "set aside its *approvals*" of the Original Housing Element, which is the action *Save Tara* confirms is the action that a local government must take. The City instead adopted amendments to the *project* and are

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desperately trying to keep its *approvals* in place. *Save Tara* supports Petitioner's argument that the CEQA claim is not moot.

The City also argues this case is distinguishable from *Vichy Springs Resort, Inc. v. City of Ukiah* (2024) 101 Cal.App.5th 46 because Petitioner's complaint does not outline any remedial actions to mitigate the significant environmental impacts of the now amended Original Housing Element. This is simply an incorrect reading of the decision. The court in *Vichy Springs* focused on whether the decision of the court would have a practical impact or provide the suing party with relief – not just whether any environmental mitigation or remedial action could be taken. (*Id.* at 873-6.)

Petitioner seeks an order to void the City's *approval* of the Original Housing Element, which has significant and real-world practical implications for applicants with pending housing development projects and housing advocacy organizations like YIMBY, and its members, who want to see desperately needed housing built within the City. The case law cited by the City undermines its own mootness argument.

2. *Petitioner's Housing Element Claim is Not Moot*

The City argues that Petitioner's housing element claim is moot because Petitioner's claims are only focused on the Original Housing Element. This is a mischaracterization of Petitioner's claims. Petitioner claims that the City is out of substantial compliance with the Housing Element Law for multiple reasons.

First, Petitioner claims that the City's adoption process was procedurally defective, due to both CEQA violations and prejudicial defective notice, and therefore void. Petitioner agrees the process for the Amended Housing Element adoption did not suffer these same defects. Petitioner still seeks to overturn the approval of the Original Housing Element due to these procedural defects and seeks, at a minimum, a judicial declaration that the City was out of compliance until the Amended Housing Element was certified by HCD on July 1, 2025, at a minimum. As explained above, the issue of substantial compliance is still a live controversy and judgment on this issue will still have a significant and practical impact on the City, YIMBY, and the applicants with pending applications.

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Second, Petitioner claims that the City failed to carry out its housing element programs by the deadlines required by law. This issue, which is addressed in more detail below, is still a live controversy because the City has *continued* to fail to carry out Programs 5, 7, 10, 17, 24, 25, and 26, and the deadlines for these programs were not amended. (AUGAR 16929-40.) Further, this Court can still grant the relief that Petitioner seeks for its past failure to carry out its programs, including revoking HCD's finding that the City was in substantial compliance.

Third, Petitioner claims that the City's housing element site inventory is legally inadequate. The City's Amended Housing Element was merely a red-lined amendment to the Original Housing Element, not a wholesale replacement. (AUGAR 25268-72.) The Amended Housing Element did make some changes to individual sites listed in the inventory. However, as explained in more detail below, Petitioner's site inventory claim relates to the City's reliance on sites subject to a vote of the electorate and the methodology the City utilized in listing nonvacant sites. These fundamental flaws in the City's housing element inventory were not amended as part of the City's most recent action.

Moreover, even if Petitioner's claims only addressed the Original Housing Element, the case would *still* not be moot for the same reasons Petitioner's CEQA claims are not moot. The Court can *still* issue an order voiding the Original Housing Element *approval*, which is the relief Petitioner seeks. The City has not demonstrated that its purported "rescission" meets the high bar for this Court to find that it is "impossible . . . to grant [petitioner] any effectual relief whatever . . ." (*Wilson & Wilson*, supra, 191 Cal.App.4th at 1573.) Judgment in this case would have a practical effect on the City, YIMBY, and the applicants with pending development projects before the City and the case is therefore not moot.

3. *The Exceptions to Mootness Apply to this Case*

Even if this Court were to find that Petitioner's claims do not present a live controversy, this Court should nonetheless render a judgment because all three exceptions to the mootness doctrine apply. As the City acknowledges, there are three discretionary exceptions to the mootness doctrine: "(1) when the case presents an issue of broad public interest that is likely to recur; (2) when there may be a recurrence of the controversy between

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the parties; and (3) when a material question remains for the court's determination." (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480 [internal citations omitted].) This dispute meets all three of the discretionary exemptions to the mootness doctrine.

First, this dispute is of broad public interest because it affects a large group of people in the City of Sausalito, including YIMBY and YIMBY members, as well as applicants with pending applications, as well as every resident in the City who has an interest in where new housing will be accommodated. Local housing elements also carry out the allocation of housing through regional agencies, such as the Association for Bay Area Governments, and the state has declared that housing is a statewide issue. (Gov. Code § 65580(a).)

The City argues that this case does not qualify for the public interest exception because the claims are procedural and unlikely to reoccur. The City relies on *Downtown Palo Alto Comm. for Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, which involved the creation of parking and improvement district through an allegedly faulty notice procedure. Unlike the establishment of an improvement district, the adoption of housing elements is part of a state-mandated recurring eight-year cycle. (Gov. Code § 65588 (e)(3)(A).) The City will need to complete CEQA again next cycle, will likely need to rely on voter-restricted sites again, and will have more housing element program deadlines to carry out (which the City argues are completely voluntary). This case raises important questions regarding the City's duties and responsibilities under state law, which are guaranteed to occur again in just over five years from now. Courts have found that when a specific process is *mandated* to reoccur, the reoccurrence mootness exception applies. (*Los Angeles Internat. Charter High Sch. v. Los Angeles Unified Sch. Dist.* (2012) 209 Cal. App. 4th 1348.)

Second, there may be a recurrence of the controversy between YIMBY and the City, not only with respect to future housing elements but with respect to the controversy of whether the City was in substantial compliance with Housing Element Law between February 1, 2023 and July 1, 2025 through individual actions challenging the City's substantial compliance findings on pending project. Moreover, YIMBY could still bring another lawsuit against the

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Amended Housing Element, raising the exact the same failure to implement and site inventory controversies in the current litigation.

Third, material questions remain for the Court's determination. The Court is not just being asked to adjudicate past conduct, but there is a current controversy regarding whether the City was in substantial compliance before HCD certified its Amended Housing Element.

While the case is not moot, the three mootness exceptions nonetheless would apply. Moreover, the City made it clear in its public meetings that it was amending the Original Housing Element to moot this lawsuit, indicating that the City was using the housing element amendment process to evade judicial review. If the Court condones this tactic, the City could simply propose a few redline edits, call it a "rescission," and prevent interested parties like YIMBY from ever getting a resolution to its claims. The City repeatedly argued that this case should not be heard while it undertook the amendments, and as a result this case has been pending for two and a half years. The City is now a third of the way through the eight year housing element cycle and, due to its deficient housing element and failure to carry out its programs, the City has permitted just eighteen units of housing with almost all of those units (seventeen) being ADUs. (OB, RJN, Ex. G, p. 2.) YIMBY, and the public, deserve judicial review of the City's deficient housing element.

B. <u>The City Was, and Is, Out Of Compliance with the Housing Element Law</u>

The City's rushed to adopt the Original Housing Element with a flawed process and without any intention of ever implementing it just to avoid the potential ramifications of missing the statutory adoption deadline. At a minimum, the Court must find that the City was out of compliance until July 1, 2025, when the amendments were certified by HCD. However, the City has continued to ignore its housing element programs and its amendments failed to address the fundamental flaws in the City's site inventory. As a result, the City continues to be out of compliance with the Housing Element Law.

1. *The City's Housing Element Adoption Process Was Procedurally Defective*

The City does not even attempt to dispute that it failed to follow the procedures

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required under state law in its rush to adopt *something* prior to the statutory deadline. These errors include publishing the housing element the night before the hearing when Gov. Code §§ 65092 and 65094 requires ten-day advanced notice; failing to provide the City Council with written recommendations from the Planning Commission as required by Gov. Code § 653531 (which was impossible with the marathon back-to-back Commission and Council hearings); failing to refer significant Council modifications back to the Commission as required by Gov. Code § 65356; failing to make draft housing elements available to the public in violation of Gov. Code § 65585(b); failing to consider HCD's findings prior to adoption in violation of Gov. Code § 65585(e) (which was impossible as a draft was never even sent to HCD before adoption); and administratively modifying the housing element in closed door meetings with HCD without any public review whatsoever and failing to adopt those changes at a public hearing in violation of Gov. Code § 65356. (See OB pp. 28-29.)

The City relies on *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899 for its assertion that its procedural defects should be ignored. In *Rialto Citizens,* the court found that even though public notice was technically defective because it did not specifically include the planning commission's recommendations under consideration, the defect was not prejudicial because it was still sent "several weeks" after the commission made its recommendation and ten days before the council hearing. (*Id.* at 919.) The court contrasted this with the situation in *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, where the court invalidated an action where a commission's recommendations were provided to a board of supervisors two days before, "giving the public only one full business day to prepare comments." (*Ibid*.) Both courts explained the critical question is whether the public was "afforded the opportunity to respond to clearly defined alternative objectives, policies, and actions." (*Ibid*.) There can be no question that the City's adoption process failed to meet this standard and was far more prejudicial than the prejudicial "one full business day" notice overturned in *Environmental Defense Project*. Here, the public had *less* than one day to review the entirety of the housing element and there were no written Commission recommendations *whatsoever*. The public had all of five minutes

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between the end of the Commission hearing and the start of the Council hearings to prepare comments on the Commission's oral recommendations. (AR 11961-3.)

The City also claims there is no evidence that there would have been a different result had the City proceeded differently. This statement is belied by the City's own actions it took to roll back its illegal adoption process immediately after its rushed adoption. The City ultimately took *two-and-a-half more years* to study the environmental impacts, hold study sessions, and consider public input before subsequently removing several sites and reducing the density of other sites from the Site Inventory. In the meantime, the owner of Site 201 (605-613 Bridgeway) submitted a complete development application to vest the proposed project in the Original Housing Element density, which the City ultimately voted to significantly reduce the density in the face of public opposition. (AUGAR 17013-15, 21035-16, 25368-69.)

There can be no question that City's procedural defects did not provide Petitioner (and the public generally) a meaningful opportunity to review and comment on the Original Housing Element. The fact that there *was*, in fact, a different result after the City allowed a public process further demonstrates that the City's flawed process was prejudicial. As a result, the City's approval must be set aside.[1]

2. *The City Has Failed to Carry Out Its Housing Element Programs*

A local government's obligations under the Housing Element Law do not stop at adoption, but each housing element must include a "program that sets forth a schedule of actions during the planning period, each with a timeline for implementation" to achieve the goals and objectives of the housing element. (Gov. Code § 65583(c).)

The City does not even attempt to dispute that the City failed to carry out virtually every program in its housing element – not just Program 19. (OB pp. 32-33.) The City instead argues this is not an issue, as it believes the City is under absolutely no obligation to carry out its housing element programs, calling its programs "voluntary." The City also claims these

[1] The City also argues this claim is moot. As explained above, this Court can still grant the relief that Petitioner seeks. Specifically, the Court can void the prior approval and find that the City was not in substantial compliance with the Housing Element Law due to the City's procedural defects.

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programs are completely unenforceable because mandamus does not lie to enforce promises "that are not commanded by statute."

The problem with the City's argument is that carrying out housing element programs *is* specifically commanded by statute. The Housing Element Law has been significantly strengthened specifically to ensure that housing element programs are mandatory, not optional, leading HCD to proclaim that a "housing element is no longer a paper exercise – it's a contract with the state of housing commitments for eight years." (OB, RJN, Ex. D.) Not only are these programs mandatory, but the deadlines are enforceable, as any person "may bring an action to compel compliance with the deadlines and requirements of paragraphs (1), (2), and (3) of subdivision (c) of Section 65583" and the local government "shall bear the burden of proof." (Gov. Code § 65587(d)(2).) The City does not even attempt to carry this burden. 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]

3. *The City's Site Inventory Is Inadequate*

A failure to demonstrate "realistic development capacity" in a site inventory to meet a jurisdiction's 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.) The City's site inventory fails to substantially comply with the Housing Element Law.[3]

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[2] The City again argues this claim is moot because the City changed *some* of the program deadlines. The City has *still* failed to carry out the deadlines in its Amended Housing Element, including Programs 5, 7, 10, 17, 24, 25, and 26. (AUGAR16929-40.) Further, this Court can grant the relief that Petitioner seeks for its past failure to carry out its programs, including revoking the City's substantial compliance status.

[3] The City questions whether Petitioner is challenging the Original Housing Element or Amended Housing Element. As explained above, the Amended Housing Element is simply a redlined version of the Original Housing Element. The flaws regarding City's reliance on

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a. Voter-Restricted Sites Can Not Be Relied Upon in the City's Site Inventory

Approximately two-thirds of the lower-income units in the City's inventory are located on voter-restricted sites, where rezoning relies on the voters approving a future ballot measure to allow increased density on these sites. (AR 3429-30, 3743-45.) These sites cannot be relied upon to ensure the City's inventory is sufficient to meet its RHNA because the City cannot possibly demonstrate that voter-restricted sites can be developed during the planning period.

The City states that the Housing Element Law does not require every inventory parcel to be immediately available at the density proposed. Petitioner agrees. Where the parties diverge is whether the law requires an inventory to rely only on sites where the City can demonstrate with certainty that the rezoning identified in the inventory can be completed. Petitioner asserts that a site inventory must only rely on sites that are "suitable *and available* for residential development," and if there are not existing sites sufficient to meet RHNA, the housing element must contain a rezoning program with "sites that *can be developed*" at the densities necessary to meet its RHNA within the planning period. (Gov. Code § 65583(a)(3); (c)(1)(B).) Petitioner makes this assertion because that is precisely what the law says. The law does not say that an inventory can be made up of sites where the City must cross its fingers and hope that the rezoning can take place. The law commands that the rezoning program "***shall*** identify sites that ***can*** be developed for housing within the planning period" to meet its RHNA. (Gov. Code § 65583(c)(1).) The City does not know whether the sites within its inventory "can be developed" at the densities necessary to meet its RHNA. The City has no control over the rezoning of the sites on which its inventory relies.

The City claims that Petitioner has not met its burden to show HCD's approval of its inventory is "clearly erroneous or unauthorized." The City relies on *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, which rejected a challenge to a housing element that lacked a discussion that was not mandated by statute, explaining that the court would "not insert a

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voter-restricted sites and site inventory methodology remain unchanged between the two versions.

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requirement omitted by the Legislature" that was approved by HCD. (*Id*. at 248.) The court in *Martinez*, however, did reject HCD's determination of substantial compliance when the court determined that the City's use of a RHNA overlay contradicted mandatory statutory language that inventory sites "*shall* be zoned with minimum density." (*Id*. at 239.) The court found that this clear statutory requirement "effectively rebuts the presumption," and the court would not defer to HCD's "bare approval," particularly with "nothing to explain the HCD's rationale for finding the overlay complies with the Housing Element Law." (*Id*. at 243.)

The same is true here as with the overlay that *Martinez* found did not substantially comply with the Housing Element Law. The Housing Element Law includes a mandatory, clear requirement for a rezoning program that "*shall* identify sites that *can* be developed for housing within the planning period" to meet its RHNA. (Gov. Code § 65583(c)(1).) The City's rezoning program does not meet this requirement, as it contains sites subject to voter restrictions where it is uncertain whether those sites "can be developed" during the planning period. HCD's bare approval does not control over clear statutory requirements. HCD did not provide any rationale to support including voter-restricted, and in fact provide rationale that supports the *opposite* conclusion. HCD rejected sites that required the City to get future approval from BCDC to expand berth capacity, calling these sites merely "aspirational." (AR 24569.) The City's site inventory that conflicts with clear statutory requirements effectively rebuts any presumption of validity.

The City argues that the uncertainty of voter-restricted sites is not an issue because the Housing Element Law includes a process for replacing inventory sites to maintain sufficiency. This "replacement procedure" is of no help to the City, as the No Net Loss law explicitly states that a local government "***shall*** ensure that its housing element inventory . . . including sites rezoned pursuant to Section 65584.09, can accommodate, ***at all times throughout the planning period***, its remaining unmet share of the regional housing need." (Gov. Code § 65863(a) (emph. added).) The "replacement procedures" prohibits any "administrative, quasi-judicial, legislative, *or other action*" that would result in its inventory to become insufficient to meet its RHNA unless the agency takes *concurrent* action to ensure there is no net loss of residential

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capacity. (Gov. Code § 65863(b).) There is no possible way for the City to comply with this requirement to ensure its inventory remains sufficient to accommodate its RHNA at all times unless the City has identified an alternative inventory that would go into effect immediately upon a vote failing. The City has no such back up plan, its plan is to seek declaratory relief or an opinion from the Attorney General on what to do. (AUGAR 16931-32.)

Regardless, the court in *Martinez* has already rejected the claim that the No Net Loss Law provides a sufficient backstop to ensure an inventory is adequate in the first instance. The court explained that this provision was meant to deal with *future* flexibility, and "has no impact on the requirements" of the site inventory. (*Id*. at 242.) The bottom line is that the City's site inventory does not *currently* meet the mandatory requirement to include sites that "can be developed" within the planning period and therefore the site inventory is inadequate to meet the mandatory requirements of the Housing Element Law.

The City further argues the law only requires local governments to "address and, where appropriate and legally possible, remove governmental and nongovernmental constraints" and does not compel the City to remove constraints. (Gov. Code § 65583(c)(3).) This provision has nothing to do with the City's obligations with respect to the site inventory. Subd. (c) includes ten different mandatory housing element programs. Subd. (c)(1) includes the requirements to ensure that its site inventory is sufficient to meet its RHNA. Subd. (c)(3), on the other hand, includes a requirement to remove constraints to housing generally, but specifically for supportive housing for "persons with disabilities." In short, Gov. Code § 65583(c)(3) has nothing to do with the inventory requirements in subd. (c)(1).[4]

The City's opposition alludes to the argument that Petitioner is attempting to circumvent the voter's initiative power. This is incorrect. In fact, Petitioner believes that relying on non-voter restricted sites or voting to lift the restrictions *before* relying on those sites

[4] The City suggests that Petitioner argues that the City must get voter approval first, and that this unrelated section of the Housing Element Law proves Petitioner wrong. To the contrary, Petitioner only argued that removing voter restrictions is a pre-requisite to counting those inventory sites toward meeting its RHNA. The City's inventory could meet its RHNA in a variety of ways, including by relying on sites that are not subject to voter restrictions.

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would show greater respect to the will of the voters. The City has released an analysis of the rezoning ballot measure, which states the measures "must be approved by voters in order for the City to complete the program of rezoning set forth in the Amended Housing Element and maintain compliance with State Housing Element Law" and goes on to list the various penalties the City will endure if the vote fails. (RJN Ex. G, H.) The vote is not so much a choice regarding where housing should be approved as it is a warning to lift the existing voter-approved restrictions or suffer the consequences.

The Housing Element Law requires a rezoning program that "shall identify sites that can be developed" within the planning period to meet its RHNA, and the City's reliance on voter-restricted rezoning sites fails to meet that requirement. (Gov. Code § 65583(c)(1).)

b. The City Failed to Perform the Required Nonvacant Site Analysis

The City failed to perform the multi-factor analysis to rely on non-vacant sites as required by Gov. Code § 65583.2(g). The City barely addresses the issues raised in Petitioner's Opening Brief, instead falling back on HCD's certification and a presumption of validity. This ignores the specific presumption and standard of review when a local government relies on nonvacant sites to accommodate 50 percent or more of its RHNA. Subd. (g)(2) establishes a presumption that existing uses will impede future redevelopment and squarely places the burden on the *local government* to provide substantial evidence to the contrary. This provision was expressly not at issue in *Martinez*. (*Martinez*, *supra*, 90 Cal.App.5th at 246, fn. 19.)

The vacant site analysis required by the Housing Element Law is exacting. The analysis must specify the additional development potential for "each site." (Gov. Code § 65583.2(g)(1).) The methodology does require an evaluation of overall trends like a city's past experience converting existing uses to higher density development, as well as site specific analysis including "*the* current market demand for *the* existing use," and any existing leases or contracts that would perpetuate "*the* existing use or prevent redevelopment of *the* site." (*Id*.) Further, when the presumption in (g)(2) is triggered, the local government must provide substantial evidence to overcome the presumption that "*an* existing use" impedes additional

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development and that "*the* use is likely to be discontinued."

First, the City failed to analyze the statutory factors. The City relies on pending and proposed projects to estimate future demand (AUGAR 16953-54) and does not even mention the City's past experience of *actually* converting existing uses to higher density development as required by (g)(1). The City did not consider "the current market demand for the existing use" for each site as required by (g)(1), instead only looking at the tax assessed value that has nothing to do with the value of existing *uses*. (AUGAR 17013.) The City failed to investigate existing leases and contracts of each site, instead stating that the City is "not aware" of any lease restrictions. (AUGAR 16951.)

Second, the City did not even attempt to complete the (g)(2) analysis to overcome the impediment presumption and show that the existing uses on each site will be discontinued. The City's Opposition confirms this is the case, incorrectly arguing that the "law does not require each site to convert" but requires "a realistic, evidence-based showing across the inventory." (Oppo. p. 39 ln. 15-16.) To the contrary, the law *does* require that a local government demonstrate with substantial evidence that the uses on each site are likely to discontinue when a local government relies on nonvacant sites to accommodate more than 50 percent of its RHNA. The City's Opposition is an admission the City failed to complete the (g)(2) analysis.

Petitioner does not quarrel with how the City weighed certain factors on certain sites, Petitioner objects to completely failing to address the specific factors listed in the statute and failing to show that existing uses on each site will discontinue during the planning period.[5]

Petitioner is particularly concerned regarding the City's failure to conduct the required analysis on three privately owned sites – Sites 402, 72, and 303 – which account for nearly half of all the City's very-low-income RHNA. (AUGAR 17013.) Not only did the City fail to

[5] Petitioners do not concede the presumption of validity applies to subd. (g)(2). Regardless, the presumption is effectively rebutted as the City's housing element conflicts with the clear statutory requirements that the element "***shall*** specify the additional development potential for each site," "***shall*** consider factors including the extent to which existing uses may constitute an impediment," and "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.)

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provide substantial evidence that the uses on these specific sites will discontinue during the planning period, the City allocated these sites with wildly unrealistic rates of affordable housing ranging from 52% to 80%. The City's Opposition does not even attempt to defend these numbers or point to any evidence anywhere, in the record or otherwise, that would come close to supporting an affordability mix at these ratios. Rather than basing affordability allocations on "existing or approved residential developments" as required by statute (Gov. Code § 65583.2(c)(2), the City instead relies on *proposed* projects – but even these projects that allocate 15%-20% *moderate* income units do not come close to supporting allocation in the City's inventory. (AUGAR 16957-58.)

Even if the City had complied with the required statutory analysis in (g)(1) and even if the impediment presumption in (g)(2) did not apply, a court may still overturn a housing element that is arbitrary, capricious, or entirely lacking in evidentiary support. (*Fonseca v. City of Gilroy* 148 Cal. App. 4th 1174, 1191.) While the policy choice to list Site 402 in the City's inventory over other sites might not be reviewable, allocating 80% of the proposed units on this site must have some basis in fact or evidence. The City just picked an arbitrary number of affordable units for the sole purpose of reaching a certain RHNA number, which has no basis in reality and lacks any evidentiary support. As a result, the City's Housing Element inventory must be found out of substantial compliance with the Housing Element Law.

III. CONCLUSION

For the reasons stated above, Petitioner seeks an order voiding the City's approval, declaring the City out of compliance with the Housing Element Law, and directing the City to adopt a substantially compliant housing element.

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