IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND DISTRICT, DIVISION FOUR

Case No. B314750
(Los Angeles Superior Court Case No. 20STCP00771)

SNOWBALL WEST INVESTMENTS LP,
Appellant,

v.

CITY OF LOS ANGELES and CITY PLANNING COMMISSION OF THE CITY OF LOS ANGELES
Respondents

Application for Permission to File Amicus Curiae Brief in Support of Appellant; Amicus Curiae Brief of Yes In My Back Yard

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Judges Mitchell L. Beckloff and Robert S. Draper

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, Rule 8.520(f), Yes In My Back Yard respectfully requests permission to file the attached amicus curiae brief in support of Appellant Snowball West Investments LP. No party in the pending appeal, or any counsel for a party, authored or made a monetary contribution to the preparation of any part of the proposed amicus brief.

Yes In My Back Yard (YIMBY) is a § 501(c)(3) nonprofit California corporation that is dedicated to increasing the accessibility and affordability of housing in California by enforcing state housing laws. YIMBY has members throughout the state of California, with membership that cuts across socioeconomic lines, including members with very low, low, moderate, middle, and higher incomes. YIMBY envisions an integrated society where every person has access to a safe, affordable home near jobs, services, and opportunity. To move California toward that goal, YIMBY regularly tracks local government's actions to ensure compliance with state housing laws that are designed to increase the supply of housing. YIMBY often brings lawsuits, and participates in amicus curiae briefing, in support of the production of more housing.

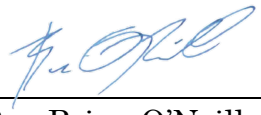
YIMBY seeks permission to file the accompanying brief in support of its mission. This case involves the interpretation of two recent significant legislative amendments to the Housing Accountability Act (HAA), the state law that recognizes "California's housing picture has reached a crisis of historic proportions despite the fact that, for decades, the Legislature has enacted numerous statutes intended to significantly increase the approval, development, and

affordability of housing for all income levels." (Gov. Code § 65589.5(2)(J).)

The outcome of this appeal will significantly impact the effectiveness of the HAA, and the ability of applicants to get housing development projects approved. YIMBY has expertise in the field of housing law, including the HAA, as well as significant experience regarding how local governments process housing projects. The proposed brief will assist the Court in deciding this matter, as the brief will explain how Respondent's position would essentially nullify the recent legislative amendments that were designed to strengthen the HAA. YIMBY therefore respectfully requests the Court grant its application to file the proposed amicus curiae brief.

Dated: August 31, 2022

ZACKS, FREEDMAN & PATTERSON, PC



By: Brian O'Neill
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Yes In My Back Yard

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

Pursuant to California Rules of Court, Rule 8.200(c), Yes In My Back Yard, a § 501(c)(3) nonprofit California corporation, submits this brief in support of Appellant Snowball West Investments LP. The position by Respondent City of Los Angeles ("City") in this case would eviscerate two recent amendments to the Housing Accountability Act (HAA) that the Legislature described as "game changers" for the purpose of advancing housing development projects in areas that have long been designated for growth under city and county general plans. Specifically, AB 1515 requires a court to independently determine that a project is code-compliant if substantial evidence would allow a reasonable person to conclude the project is compliant. HAA subdivision (j)(4) was then added by AB 3194, which prohibits a local government from requiring an applicant to secure a rezoning in cases where a site's zoning and general plan are inconsistent, and requires local governments to facilitate the density allowed on a site by the general plan.

First, the City seeks to unlawfully restrict the HAA's "reasonable person" standard, which clearly applies to the entirety of Government Code section 65589.5, including subdivision (j)(4). The City instead advances the outdated legal standard that its decision to force a project into its discretionary rezoning process must be upheld unless it is arbitrary or capricious. Second, the City argues that its "hierarchy of uses" zoning theory, which courts rejected more than 30 years ago, should be upheld under that outdated 'arbitrary and capricious' standard. The City's theory is that all "more restrictive" zoning, such as single-family zones in this case, are consistent with any "less restrictive" general plan designation, including those that allow multiple family housing.

The City's legal position is that no zoning district could be found inconsistent with the City's general plan unless the zoning allows for *more* housing, in which case subdivision (j)(4) requires the City to apply the *lower* density of the general plan. The City is therefore advancing an interpretation of AB 3194 that would turn the HAA on its head and significantly impede the production of housing in areas planned for growth. That cannot be how the law works. AB 3194 was clearly intended to *prohibit* local governments from requiring rezoning in these cases, and to instead *require* local agencies to accommodate development at the density allowed on a site by the general plan.

This Court should uphold both the express provisions and legislative intent of the HAA, which restrict local governments from denying critical housing projects that are consistent with the density allowed under their general plans and comply with all objective land use standards. Yes In My Back Yard is dedicated to the enforcement of state housing laws and, as Amicus Curiae in this case, requests that this Court reverse the Superior Court's ruling. A decision affirming the Superior Court ruling would allow cities and counties throughout the state to circumvent the HAA, exploit the same loopholes the Legislature intended to close with its recent amendments, and continue to exacerbate the statewide housing affordability crisis.

A. HAA Legal Background

The HAA greatly limits a local government's ability to deny housing development projects that comply with applicable development standards, except in cases where the agency finds the project would have an unavoidable public health or safety impact. (Gov. Code § 65589.5(j)(1)(A)-(B).) Because the HAA's protections are strongest when a project is found code-compliant, the Legislature has

enacted two significant and related amendments that focus on an agency's initial code-compliance determination to close certain loopholes that local governments have exploited to circumvent the HAA and disapprove housing development projects.

First, in 2017, AB 1515 changed the standard of review a court must apply to a local government's code-compliance determination whether a project is code compliant. Typically, significant deference is given to a local government's interpretation of its own code. Thus, a code-compliance determination under the HAA was generally upheld unless it was arbitrary, capricious, or without an evidentiary basis. AB 1515 eliminated that deference and now requires a court to independently determine that a project is code-compliant if substantial evidence would allow a reasonable person to conclude the project is compliant. (Gov. Code § 65589.5(f)(4); Amicus RJN, Ex. A. p. 3.)

In 2018, AB 3194 set out to "Narrow[ ] the circumstances under which a housing project may be denied under the Housing Accountability Act." (Amicus RJN, Ex. B. p. 1.) The author of AB 3194 explained the purpose of the bill was to "build on AB 1515 and strengthen [the] HAA even further." (Amicus RJN, Ex. C, p. 2.) The bill accomplished this by closing a loophole that local governments have exploited to avoid HAA compliance: maintaining low zoning densities to force projects into discretionary rezoning processes. (Amicus RJN, Ex. B, pp. 2-3.) The amendment added subdivision (j)(4), which states:

> For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, ***and shall not require a rezoning***, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan. If the local

> agency has complied with paragraph (2), the local agency may require the proposed housing development project to comply with the objective standards and criteria of the zoning which is consistent with the general plan, however, ***the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan*** and proposed by the proposed housing development project. (Emphasis added.)

The Legislative Counsel's Digest summarized the intended legal effect of AB 3194, noting that it "would require [a] local agency to apply those [objective] standards and criteria to facilitate and accommodate development *at the density allowed on the site by the general plan and proposed by the proposed housing development project*." [Emphasis added.] Subdivision (j)(4) accomplished this in two ways. First, it prohibits local governments from forcing a project into discretionary rezoning processes when zoning is inconsistent with the general plan. Second, when zoning is consistent with the general plan, subdivision (j)(4) requires zoning standards (i.e., setbacks, height limits, etc.) to be applied in a manner that facilitates the maximum density allowed under the general plan. The City's legal arguments would nullify the Legislature's amendments and must be rejected.

B. The "Reasonable Person" Standard Applies to Subdivision (j)(4)

Subdivision (f)(4) of the HAA provides as follows:

> For purposes of this section [i.e., the entirety of Government Code section 65589.5] a housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, or in conformity.

Subdivision (f)(4) makes clear that the "reasonable person" standard – not the more deferential arbitrary and capricious standard – applies broadly to the entirety of the HAA. Further, the reasonable person standard established by subdivision (f)(4) clearly pertains to the code-compliance determination made by cities and counties in connection with general plan designations, objective land use standards, and other applicable land use controls.

All of the HAA's code-compliance provisions are contained within subdivision (j), which provides essential land use protections under the HAA for housing development projects that meet all applicable, objective land use standards. Subdivision (j)(1) states that a code-compliant housing development project can only be disapproved upon a finding of significant public health and safety impacts; subdivision (j)(2) requires an agency to make a written code-compliance determination within a certain timeframe; and subdivision (j)(3) prohibits an agency from finding a project non-compliant based on the receipt of a density bonus, incentive, or waiver. In short, all of subdivision (j) is devoted to the code-compliance determination, and thus should be reviewed under a reasonable person standard. Subdivision (j)(4) is no exception.

Subdivision (j)(4) states: "For purposes of this section, *a proposed housing development project is not inconsistent* with the applicable zoning standards and criteria, and shall not require a rezoning, *if the housing development project is consistent* with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan." Subdivision (j)(4) clearly and unambiguously addresses a City's code-compliance determination in connection with a specific housing development project. Subdivision (j)(4) must therefore also be governed by the "reasonable person" standard. This is clear from the express statutory language of

subdivision (f)(4), as noted above, as well as the statutory structure that includes all code-compliance determination provisions within subdivision (j). This is further confirmed by the legislative history of subdivision (j)(4), which was specifically designed to "build on AB 1515" – which enacted the reasonable person standard.

The City argues that the "reasonable person" standard only applies to a particular housing project's code-compliance determination, not to the determination of whether zoning is inconsistent with the general plan. However, these determinations under (j)(4) *are and the same*. An agency must make a zoning/general plan consistency determination in response to a specific housing development project application, and that zoning/general plan consistency determination forms the basis for making the project's code-compliance determination. The provision cannot be split in two, with two separate standards of review.

Even under the City's interpretation, the prohibition on finding a project non-compliant in cases of zoning/general plan inconsistency contained in the first half of the first sentence of (j)(4) is subject to the reasonable person standard (because it applies to a project determination). However, the City argues that the prohibition is *only* applicable when the *City* determines there is a zoning/general plan inconsistency, and *that* determination in the second half of the first sentence of subdivision (j)(4) can only be overturned if it is arbitrary and capricious. The City's argument, if accepted by this Court, would render the "reasonable person" standard under the HAA completely illusory.

If a court must defer to a city's determination regarding whether the reasonable person standard of (j)(4) applies, this in effect is nothing more than a traditional, and deferential, arbitrary and capricious standard. This turns the City into the gatekeeper of the

HAA's reasonable person standard, which can only be unlocked in cases where an agency determines there is a zoning/general plan inconsistency. This not only directly contradicts the express statutory language of subdivision (f)(4) and the HAA's statutory structure; it would defeat the entire legislative purpose of both AB 1515 and AB 3194, which were specifically designed to "require courts to give less deference to a local government's consistency determination." (Amicus RJN, Ex. A. p. 3.)

The City's argument has already been rejected by courts. In refusing to defer to an agency's interpretation of whether its code standards were "objective" under subdivision (j)(1), a court found that "because the HAA cabins the discretion of a local agency to reject proposals for new housing, it is inappropriate for us to defer to the City's interpretation." (*Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 844 [*CaRLA*].) The *CaRLA* court explained its conclusion is "confirmed by considering subdivision (f)(4) of the HAA, which complements and reinforces subdivision (j)'s objectivity requirement," and thus courts must engage in a "more rigorous independent review . . . in order to prevent the City from circumventing what was intended to be a strict limitation on its authority." (*Id.*) This is precisely the City's argument and tactic here. The City is asking this Court to defer to its interpretation of whether its zoning and general plan are consistent under subdivision (j)(4) to force as many housing projects as possible into a discretionary rezoning and circumvent the HAA's protections. The City's goal is to retain discretionary control over projects that, as a matter of law, should be reviewed under the limited discretion allowed by the HAA.

The only legally permissible application of the reasonable person standard set forth in subdivision (f)(4) is to apply the standard to *all* of the HAA, including the entirety of subdivision (j), and subdivision

(j)(4) – not just the first part of the sentence. Thus, a zoning/general plan consistency determination under the HAA *must* be subject to the reasonable person standard, particularly when the City makes such a determination in response to a housing development project application.

C. The City's Demand for a Rezoning Violates Subdivision (j)(4) of the HAA

The City argues that it is has not violated the HAA because the project requires a rezoning, and legislative actions are not subject to the HAA. However, the City's demand that the housing development project obtain a rezoning is ***itself*** a violation of the HAA.[1] As noted above, subdivision (j)(4) strictly prohibits local governments from requiring a rezoning where, as here, there is a zoning/general plan inconsistency.

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[1] The City appears to argue that the HAA does not apply to the disapproval of a final map. The HAA clearly and broadly defines project disapproval as "***any instance*** in which a local agency . . . [v]otes on a proposed housing development project application and the application is disapproved, *including any required land use approvals or entitlements necessary for the issuance of a building permit*." (Gov. Code § 65589.5(h)(6).) The HAA clearly applies to *any* disapproval vote, including denial of a final map. Regardless, the prohibition on rezoning contained in subdivision (j)(4) is not tied to any specific approval action at all, and acts as a complete bar on a local government's demand for a rezoning in cases of zoning/general plan inconsistency no matter when the demand is made. The City cannot circumvent the HAA's prohibition on rezoning simply by making the demand a condition of final map approval.

1. Footnote 23 Erroneously Attempts to Redefine Consistency to Circumvent the Requirements of the HAA

The City argues that the property's multifamily general plan designation is consistent with agricultural zoning, based solely on footnote 23 of the general plan's land use map, which states in pertinent part:

> Each Plan category permits all indicated corresponding zones as well as those zones referenced in the Los Angeles Municipal Code (LAMC) as permitted by such zones…. It is the intent of the Plan that the entitlements granted shall be one of the zone designations within the corresponding zones shown on the Plan, unless accompanied by a concurrent Plan Amendment.

The City focuses on the first sentence, which it argues is a codification of their "hierarchy of uses" theory that all "more restrictive" zones are consistent with all "more intense" land use designations. However, the City ignores the last sentence, which states that "entitlements *shall be* one of the corresponding zones shown on the Plan." In other words, Footnote 23 mandates that the City approve projects according to the corresponding zones that are specifically identified in the land use designation. This is confirmed by the general plan's Framework Element directive that the land use designations within the general plan "form the basis for decisions on discretionary permits." (Res. RJN, Ex. L, p. 2JA437.) Read together, the general plan clearly requires entitlements to be issued per the general plan designation, even in cases where the zoning is inconsistent with the plan. This is exactly what the HAA requires.

Under the City's hierarchy of uses interpretation of consistency, the only way zoning can be found inconsistent with the general plan is if the zoning is "less restrictive" and allows *more housing* than the

general plan. The City's position is that subdivision (j)(4) only prevents the City from forcing an applicant into the discretionary rezoning in cases where the result would be a downzoning, making it easier to accommodate a project that would result in less housing. The City's position defies common sense and must be rejected.

2. The Zoning and General Plan Designation of Snowball's Property are Clearly Inconsistent

In this case, Snowball's property has Low Medium Residential and Low Residential general plan designations. The designations list specific corresponding zoning districts. The property's actual zoning, however, does not match any of the corresponding zones that are identified for the property's general plan designations. For example, in portions of the property designated as Low Medium Residential under the general plan, various corresponding residential zones are identified that allow multifamily dwellings at a density of up to one unit per 200 square-feet of lot area. The actual zoning, however, is A*gricultural*. The Agricultural zone is not listed as a corresponding zone for the Low Medium Residential general plan designation. The Agricultural zone completely prohibits all multifamily uses and only allows one single-family home per lot no matter the lot size.

As the City acknowledges in its brief, the general plan allows 215 units while the zoning only allows 19. This distinction goes to the heart of subdivision (j)(4) and the HAA's prohibition against a local government forcing a project to secure a discretionary rezoning in cases of inconsistencies.

The City cites to various cases interpreting the consistency requirement, none of which are applicable because they were not decided under the HAA's more exacting reasonable person standard. Moreover, all of the cases cited by the City involved consistency questions related to generalized policies, not "specific mandates" like

numerical density standards. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378; see also *Naraghi Lakes Neighborhood Pres. Ass'n v. City of Modesto*, (2016) 1 Cal.App.5th 9, 23 (deferring to agency's consistency determination where general plan provided "flexible guides to development , not rigid development limitations").) The one case that *does* involve an issue of consistency regarding specific density mandates is *Debottari v. City Council* (1985)171 Cal.App.3d 1204, where the Supreme Court of California found zoning that allowed two units per acre was inconsistent with a land use designation that allowed 3-4 units per acre. Here, the inconsistency is even more profound, where the zoning completely prohibits an entire category of use (multi-family residential) that is specifically allowed by the general plan and only allows 19 unit where the general plan allows 215. If the Supreme Court of California found zoning that allows one fewer unit than the general plan inconsistent, then zoning that allows nearly 200 fewer units is undoubtedly inconsistent.

The California Department of Housing and Community Development (HCD) also agrees with this interpretation. In a letter to the City of Millbrae, HCD found that a general plan designation that allowed "up to 80 du/acre" was inconsistent with zoning that "limits development to 43 du/acre," and the City cannot require the project to be rezoned . . . without risk of violation of the Housing Accountability Act." (Amicus RJN, Ex. D, p. 4.) Again, this situation is even more egregious, where the zoning only allows 19 units and the general plan allows 215. No reasonable person could conclude otherwise.

If the general plan specifies a greater density than allowed by the zoning, the zoning is by definition inconsistent with the general plan. In such situations, as is the case here, the HAA prohibits a local governments from requiring a rezoning in order to bring the zoning

density into conformance with the density that is already specifically allowed under the general plan. That is precisely the reason why the Legislature enacted subdivision (j)(4).

3. Footnote 23 was Enacted Specifically to Circumvent Zoning/General Plan Consistency Requirements and Has Already Been Found Invalid

To fully understand footnote 23, it is important to explain the City's long history of ignoring state law. In 1978, AB 283 required the City to achieve zoning/general plan consistency by July 1, 1982. (*City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526) Rather than comply, the City unsuccessfully argued the requirement was unconstitutional; the court ordered that "conformity shall be achieved by July 1, 1982." (*Id.* at 532.) The City disregarded that order and still refused to comply. Governor Deukmejian even vetoed a proposed extension, finding it "disturbing" that the City failed to comply and "inappropriate" to extend the deadline. (Amicus RJN, Ex. E.)

Despite all three branches of state government mandating compliance, the City still failed to achieve consistency. The City was then sued by a group of anti-development homeowner associations that sought to prevent the issuance of new permits until consistency was achieved. (*Elysian Heights Residents v. City of Los Angeles* (1986) 182 Cal.App.3d 21, 26.) Faced with potentially thousands of lawsuits, as the City estimated that the zoning of over 200,000 parcels were inconsistent with its general plan, the City agreed to a stipulated judgment that implemented a program to achieve consistency over several years. (*Id.* fn. 4.) Contrary to the City's argument, the "hierarchy theory" was not a codification of long-standing zoning policies, but an agreed upon scheme by two parties that was included

in a stipulated judgment as a means to achieve consistency faster. (*Warner Ridge Associates v. City of Los Angeles* (1991) 2 Cal.App.4th 238.)[2]

By 1990, the consistency program was nearly complete. However, the City was sued again, this time by a developer. Warner Ridge Associates owned a parcel designated "neighborhood and office," which allowed for a range of commercial zones, but the parcel was zoned only for single family residences. (*Id*.) The developer tried to rezone the property to a commercial zone, but the rezoning was denied. (*Id*. at 309.) The developer brought suit to enforce AB 283's consistency requirement and the trial court found the single-family zoning was "not 'consistent' with the plan in any meaningful sense of the word 'consistent' nor in any sense in which the word 'consistent' has been used in the case law." (*Id*. at 311.)

Faced again with the threat of thousands of lawsuits, the City appealed and immediately "attempted to set its hierarchy theory in concrete" by adding a footnote to every community plan. (*Id*. 315.) Perhaps not realizing you should not say certain things out loud, the City's stated rationale for the footnotes was because it "gives added credibility to a Commission or Council disapproval of a zone change." (Res. RJN, Ex. S, AR 35018.) Despite the City's post-hoc attempt to justify its rezone denial, in discussing the footnotes the *Warner Ridge*

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[2] The *Warner Ridge* opinion was ordered not to be published by the Supreme Court. Following a settlement agreement that allowed the proposed project to move forward, the City withdrew its petition for review and both parties supported the City's request for depublication. As explained in more detail below, California Rules of Court, Rule 8.1115 allows a party to cite to unpublished opinions of a California Court of Appeal when the opinion is relevant under the doctrine of collateral estoppel. Here, the *Warner Ridge* case meets the test for collateral estoppel.

court found the "City's recent amendment of its General Plan to include the hierarchy theory does not alter this result" because "[a] city may not adopt ordinances and regulations which conflict with state Planning and Zoning Law." (*Id.* at 316.) In other words, the footnotes relied upon by the City have *already been deemed invalid* and void ab initio.

The court specifically rejected the hierarchy theory, even under the more deferential arbitrary and capricious standard, and found that "***[n]o reasonable person*** can seriously believe that a zoning ordinance which prohibits all commercial uses in an area designated in the general plan for commercial uses is 'consistent' with the general plan." (*Id.* at 311.) The same rationale applies here. No reasonable person would believe that a general plan that allows multifamily uses at a density of one unit per 200 square feet is consistent with agricultural zoning that only allows one single family home.

4. The City Does Not Consistently Apply Footnote 23

Respondents claim that their rejected hierarchy theory is "subject to long-standing and consistent interpretation" that must be given deference. As explained above, the hierarchy theory was enacted to *avoid* the state's consistency requirement. The hierarchy theory was invented as part of a stipulated judgment, and immediately rejected by the *Warner Ridge* court. Immediately following the *Warner Ridge* decision, the City faced several similar lawsuits. (Amicus RJN, Ex. G, p. 1.) In one such case, the City agreed to upzone a property to bring it into conformance with the general plan as part of a settlement, despite denying the upzoning just a few months earlier. (*Id.*) Although the City ignored the footnotes in the immediate aftermath of the *Warner Ridge* decision to avoid liability, the City has now resurrected the footnotes and claim they have been valid the whole time.

Notwithstanding that the *Warner Ridge* court rejected the footnotes under a more deferential standard over thirty years ago, the fact that the City has relied on its footnotes to deny housing projects for decades is a vice, not a virtue. As explained above, the less deferential reasonable person standard of subdivision (f)(4), along with the rezoning prohibition of subdivision (j)(4), were described as "game changers" precisely to prevent local governments from going about business as usual. The Legislature intended to change the status quo to address the worsening housing crisis, and courts recognize "it is inappropriate for us to defer to the City's interpretation." (*Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 844.) A court is required to find a housing project compliant if substantial evidence would allow a reasonable person to conclude the project is compliant, which necessarily extends to the zoning/general consistency determination, regardless of a local government's past interpretations. (Gov. Code § 65589.5(f)(4).)

Moreover, the City also does not consistently apply the footnotes as it claims. The City routinely requires property owners to seek a general plan amendment to change a property to a more restrictive designation to accommodate a less intense project. Per the footnotes, a general plan amendment to a more restrictive designation would ***never*** be necessary because all less intense uses would *already* be allowed. For example, in *Westsiders Opposed to Overdevelopment v. Los Angeles* (2018) Cal.App.5th 1079, 1083, the City required a general plan redesignation from the **more** intense Light Industrial designation to the **less** intense General Commercial designation in order to accommodate a residential project. However, under the hierarchy of uses theory, *all less intense residential uses would have already been allowed*. In another project, the City required a general

plan redesignation from the more intense Neighborhood Office Commercial designation to the less intense High Medium Residential designation in order to accommodate a residential project. (Amicus RJN, Ex. F, p. 2.)

The City tries to have it both ways, relying on footnotes to require rezoning and ignoring them when it will force a general plan amendment. The City desires control, not consistency. To be clear, the City still has the authority to make local planning decisions regarding future development. However, those decisions ***must*** be clearly spelled out in the general plan in advance, and not by ad hoc rezoning decisions made on a parcel-by-parcel basis. As the *Warner Ridge* court explained, a "general plan which designates property for intense development with the contemplation that designation may thereafter be prohibited through zoning is, in effect, no general plan."

The City's disapproval of the Snowball project and demand for a rezoning is clearly a violation of the HAA. No reasonable person would conclude that a zoning district is consistent with the general plan when the zoning prohibits an entire category of uses specifically authorized by the general plan.

D. Collateral Estoppel

California Rules of Court, Rule 8.1115 allows a party to cite to unpublished opinions of the California Court of Appeal when the opinion is relevant under the doctrine of collateral estoppel. The Warner Ridge opinion is also citable because it meets the test for collateral estoppel. Collateral estoppel prevents re-litigation when the following factors are met: (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision must be final and on the merits; and (5) the party against whom collateral estoppel is asserted

was a party to the prior proceeding. (*Gabriel v. Wells Fargo Bank, N.A.* (2010) 188 Cal.App.4th 547, 556.)

The City argues that *Warner Ridge* does not meet the test for collateral estoppel because it did not decide the "identical" issue presented here, conceding that the other factors for collateral estoppel have been met. However, the *Warner Ridge* court did decide the identical issue presented here – whether a zoning district that is not identified as a corresponding zone for a general plan designation is "consistent" pursuant to the City's hierarchy of uses theory. The City admits as much, explaining that the *Warner Ridge* court "decided a timely challenge under § 65860" – which is the state law that *requires* zoning/general plan consistency. Collateral estoppel is available where a prior case decided "an issue of ultimate fact" as applied to law, not a pure question of law. (*See Church v. San Mateo Cnty. Assessment Appeals Bd.* (2020) 52 Cal.App.5th 310, 321.) Here, the *Warner Ridge* court decided an issue of ultimate fact – whether the "more restrictive" zoning is consistent with "less restrictive" general plan designations based upon the City's footnotes – as applied to state law consistency requirements.

The City somehow attempts to argue that *Warner Ridge* did not decide the consistency issue by pointing to language where the court said it would not reach the issue of whether the City "may allow a lower use." In other words, the court did not say whether the City was free to approve a project that *proposed* a less intense use, calling the question "beside the point." The court focused instead on the larger issue of zoning/general plan consistency that is identical to the one presented here, dedicating an entire section of the opinion under the heading, "We reject the City's hierarchy approach to consistency." (*Warner Ridge, supra,* 2 Cal.App.4th at 315.) The City cannot seriously argue *Warner Ridge* did not decide the consistency issue.

The City also argues that collateral estoppel would create a public injustice by preventing the City and individual property owners from litigating the same issue over and over again, *which is precisely why the doctrine of collateral estoppel exists*. The "public injustice" cases to which the City cites refer to situations where collateral estoppel would severely impact the rights of third parties not involved in the litigation. For example, in *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199 the court found applying collateral estoppel to determine water rights would conflict with third party "claims of major public entities to water." And in *Palmdale Hospital Medical Center v. Department of Health Services* (1992) 8 Cal.App.4th 1306, 1311, the court found that applying collateral estoppel against the California Department of Health Services on Medi-Cal overpayments would "shift to state taxpayers the cost of overpayments."

Here, the City has not identified which third parties would be severely impacted by requiring the City to apply the densities of its own general plan. Instead, the City is repeatedly denying desperately needed housing in the middle of a housing crisis based on a consistency theory that was explicitly rejected *nearly thirty years ago*. This is despite the Legislature's clear intent "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects" (Gov. Code § 65589.5(a)(2)(K).)

Contrary to the City's claim, public justice *supports* the application of collateral estoppel in this case where the City is utilizing rejected theories to deny housing. Amicus Yes In My Back Yard is involved in a similar lawsuit, where the trial court found that the City was collaterally estopped by the *Warner Ridge* decision from

denying a proposal to construct 67 residential units, with seven units designated for very-low-income households, based on the City's rejected hierarchy theory. (App. Second RJN, Ex. 1, pp. 35-37) Forcing property owners to sue the City and litigate the same issue repeatedly – just to be able to build housing that the City's own general plan allows – would be a public injustice.

The City also argues that the Appellant waived the issue of collateral estoppel. However, collateral estoppel is not only a legal claim, but is akin to a jurisdictional issue designed to protect the integrity of the judicial process that a court may invoke sua sponte. (*See Arizona v. California* (2000) 530 U.S. 392, 412 (explaining that "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte"); *Russell v. Rolfs* (1990) 893 F.2d 1033, 1037 (estoppel is "intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.); *Allen v. C & H Distr. LLC* (2015) 813 F.3d 566, 571 n.4 (estoppel may be invoked sua sponte and a "court is not bound to accept a party's apparent waiver of the doctrine").) An appellate court has the inherent authority to "reach[] a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161 fn. 6.) It is a "well-established principle" that a court may consider a waived claim on undisputed facts that would cause no unfairness to the parties. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) Here, the facts of the property's zoning district and general plan are undisputed, and the parties have fully briefed the issue of collateral estoppel. This Court has all the information necessary to decide the issue of collateral estoppel, and finding the issue waived would merely be a waste of judicial resources.

E. The City Must Facilitate the Density Allowed by the General Plan

The rezoning prohibition is only the first sentence of subdivision (j)(4) addressing situations of zoning inconsistency. In cases where zoning *is* consistent, the second sentence of (j)(4) states that a local government may only apply objective zoning standards in a manner to "facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project." (Gov. Code § 65589.5(j)(4).) In this case, if the Agicultural zoning is consistent with the site's Low Medium Residential designation as the City claims, the City has the ability to apply the objective zoning standards (e.g. setbacks, coverage, height, etc.) ***but only to the degree*** that it facilitates the density allowed by the general plan. Contrary to this requirement, the City is attempting to apply the *density* of the Agriculture zone to *prevent*, rather than facilitate, the density allowed by the Low Medium Residential designation. This is in direct violation of the HAA's requirement to facilitate and accommodate the density allowed by the Limited Commercial designation.

The California Supreme Court has recognized that the general plan is a city's "constitution" for future development. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.) In addition, the Housing Element of the general plan is heavily regulated and relied upon by the California Department of Housing and Community Development to determine whether localities have the planned capacity to accommodate their Regional Housing Needs Allocation. The Legislature, to provide certainty to home builders and ensure that claims regarding residential capacity made in Housing Elements are accurate, has given clear primacy to the densities allowed under the general plan in state housing laws.

For example, the Density Bonus Law also addresses both situations where zoning is consistent and inconsistent with the general plan. The law mandates that density bonuses be granted based on the "maximum allowable density" for the site, defined as: "the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, [it] means the ***maximum allowable density*** for the specific zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail." (Gov. Code § 65915(o)(2).)

The HAA must be read to also allow the maximum allowable density under the general in the same manner as the Density Bonus Law in order to harmonize the two laws. Otherwise, a local government would be *required* to grant a density bonus utilizing the general plan density but would then be free to deny the project under the HAA by relying on low zoning densities. This would lead to absurd results, and a "court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions." (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.)

The City claims that SB 35 (Gov. Code § 65913.4) does not have an "inconsistency" requirement for the general plan density to apply, which it argues "proves" that the Legislature meant to convey something different in the HAA. The City points this Court to subdivision (b)(5)(A) but fails to mention that *the very next subdivision* addresses zoning inconsistency. Subdivision (b)(5)(B) states, "In the event that objective zoning, general plan, subdivision, or design review standards are *mutually inconsistent*, a development shall be

deemed consistent with the objective zoning and subdivision standards pursuant to this subdivision *if the development is consistent with the standards set forth in the general plan*." All three housing laws lay out the same consistency/inconsistency dichotomy. Treating the HAA differently does not make sense.

The City also argues the Legislature deleted language in the original version of the bill that would have allowed projects to build at the "maximum" general plan density, proving this is not what the Legislature meant. (Res. RJN, Ex. O, p. 48.) However, the original bill was much broader than merely requiring the maximum general plan *density*, and instead prohibited a local government from implementing zoning that did not "allow the maximum residential *use, density, and intensity* allocable on the site." (*Id.*) The American Planning Association ("APA") opposed this broad language and instead requested that the language be limited solely to density, explaining that "if the bill is amended to instead allow the developer to use the *density* specified in the housing element or zoning ordinance for a specific site, *whichever is higher*, APA would support that change." (*Id.*) The resulting language reflects that compromise, and limits subdivision (j)(4) only to general plan density.

The City also claims this interpretation is redundant, and questions why the legislature would say the general plan density applies in cases of zoning consistency, and also in cases of inconsistency. This case perfectly demonstrates why both provisions are necessary. The Legislature understood that local governments try to use any "loophole" possible to retain discretion to deny housing projects. (Amicus RJN, Ex. A, p. 2) If the Legislature had only enacted a provision that says the general plan density applies, local governments would still be able to force projects into discretionary rezonings in cases of zoning inconsistency – *which is precisely what*

the City has done here. To close that loophole, the Legislature enacted provisions that specifically require general plan density to control in cases of zoning consistency *and* zoning inconsistency. The City admits SB 35 requires local governments to allow the maximum density under the general plan, yet SB 35 *also* contains two provisions stating the general plan applies in cases of consistency and in cases of inconsistency. (Gov. Code § 65913.4(b)(5)(A)-(B).) The Legislature took the same tack here.

The City is now attempting to create its own loophole to circumvent the state's requirement to approve housing, based on 30-year-old footnotes that were specifically designed to circumvent the state's consistency requirement. The Legislature understood the long history of zoning tricks that local governments have employed to avoid state law, and therefore explicitly required general plan density to apply no matter how you slice it. And for extra measure, the Legislature has demanded that the HAA be "implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code §65589.5(a)(2)(L).) The City's arguments and hierarchy of uses theory fly in the face of the Legislature's clear intent and must be rejected – again.

F. Statute of Limitations

The City argues that the rezoning requirement is valid because the statute of limitations in Gov. Code §66499.37 bars Snowball from challenging the condition of approval. Amicus Yes In My Back Yard is not closely familiar with the procedural history of the case, and takes no position on the statute of limitations issue.

However, it is important to stress that termination by statute of limitations is deemed a technical, rather than substantive, termination and "is in no way dependent on nor reflective of the merits – or lack thereof – in the underlying action." (*Lackner v.*

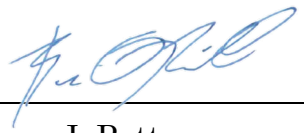
LaCroix (1979) 25 Cal. 3d 747, 751.) Statutes of limitation are specifically "intended to set controversies at rest by *foreclosing* consideration on the merits of the claim." (*Koch v. Rodlin Enterprises* (1990) 223 Cal.App.3d 1591, 1596.) Therefore, if the Court were to find that Snowball's claim is barred by the statute of limitations, the Court need not reach the merits of the case and should make clear that the decision is in no way an endorsement of the City's substantive arguments.

CONCLUSION

The City's denial of a desperately needed housing project is based on a court-rejected theory, continuing the City's decades long pattern of ignoring state law. The City's actions completely contradict the recent HAA amendments that the Legislature enacted to close the exact loopholes the City is attempting to exploit. Amicus Yes In My Back Yard therefore respectfully asks this Court to reverse the judgment below with direction that the City carry out its duties under the HAA to approve the housing development project, without requiring a rezoning, and facilitate the maximum density allowed on the site by the general plan.

Dated: August 31, 2022

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CERTIFICATE OF WORD COUNT

I, Brian O'Neill, certify that the attached Amicus Curiae Brief contains 7,228 words. Executed under penalty of perjury at San Francisco, California, on August 31, 2022.



Brian O'Neill