New Commune DTLA LLC vs. City of Redondo Beach et al, 23STCP00426

~~Tentative~~ decision on petition for writ of mandate: denied

Petitioner New Commune DTLA LLC ("NCD") seeks a writ of mandate compelling Respondents City of Redondo Beach, its City Council, and its Department of Community Development ("Department"), (collectively, "City") to process its application for a Project at 1021 N. Harbor Drive ("Property"), approve the Project, and issue all related and necessary permits.

The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner NCD commenced this action on February 14, 2023, alleging (1) mandamus based on the Housing Accountability Act ("HAA"), (2) administrative or traditional mandamus based on the Permit Streamlining Act, and (3) declaratory relief. The verified Petition alleges in pertinent part as follows.

On July 21, 2022, NCD submitted a preliminary application for the Project at the Propertym on which is located the SEA Lab educational facility, a vacant and underutilized site in the City's coastal zone. The Project is for construction of 35 housing units, six of which are set aside for lower income households as defined in Government Code[1] section 65589.5(h)(3).

At the time of the preliminary application, the City did not have a revised housing element that was in substantial compliance with the Housing Element Law. Because the City's housing element was not yet in compliance, the State Department of Housing and Community Development ("HCD") had not certified it.

On November 10, 2022, NCD timely submitted its formal application for the Project. On December 7, 2022, the Department sent a rejection notice informing NCD that the City would not accept or process the application. The Department asserted that the Project was within the "Coastal Commercial" land use designation and the "CC-4" (Coastal Commercial) zoning district, and neither the zoning nor the land use designation permitted residential uses.

The rejection notice also asserted that NCD was not entitled to develop the Project under section 65589.5(d) because HCD had issued a compliance determination for the City's housing element. This compliance determination occurred on September 1, 2022, after NCD had submitted its preliminary application. The rejection notice advised NCD to submit permit applications consistent with uses approved for the CC-4 zone. Alternatively, it could submit applications for a general plan amendment, Land Use Plan ("LCP") amendment, and zoning amendment to construct residential units on the Property.

The Department's decision lacked written findings and was incorrect as a matter of law. The rejection notice, and the refusal to process the formal application, do not qualify as a valid notice of an incomplete application under section 65943. The formal application was complete by operation of law and must be processed to a final decision. Under the HAA's builder's remedy, NCD is entitled to approval of the Project because the City could not find that its revised housing element complied with the Housing Element Law.

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[1] All statutory citations are to the Government Code unless otherwise stated.

NCD requested an administrative appeal of the Department's decision to reject the application. The City Council heard the appeal on February 7, 2023, and decided that the Department's Director acted within her authority when she rejected the formal Project application. The City Council passed Resolution No. CC-2302-023 to that effect, denying the appeal. The City Council did not attempt to meet its burden of proof or make the findings required under the HAA.

NCD seeks (1) mandamus voiding the City Council's appeal decision and compelling the City to accept and process the formal application, approve the Project, and issue all necessary Project approvals, (2) a declaration that the Department Director violated section 65589.5(d) when she chose not to process and accept the formal application and approve the Project, (3) a declaration that the City Council violated section 65589.5(d) when it did not grant NCD's appeal and directing City staff to process the formal application and approve the Project, (4) a declaration that the Department Director and City Council's rejection of the formal application was arbitrary, capricious, and devoid of merit, (5) a declaration that the City Council's denial of the Project had no rational basis, and (7) attorney's fees under section 65598.5(k)(1)(A)(ii), CCP sections 1021.5 and 1036, and any other applicable law.

2. Course of Proceedings

On February 17, 2023, NCD served the City with the Petition and Summons by substitute service, effective February 27, 2023.

On April 19, 2023, Respondents filed a joint Answer.

On May 30, 2023, the court denied NCD's request to relate this case to New Commune DTLA, LLC v. City of Redondo Beach et al, Case No. 23STCV10146.

On July 13, 2023, the court denied NCD's request to relate this case to Wilshire LLC v. City of Redondo Beach et al., Case No. 23STCP02189.

On July 28, 2023, Respondents filed a joint amended Answer.

B. Standard of Review

Agency decisions under the HAA are reviewed as administrative mandamus. §65589.5(m); Honchariw v. County of Stanislaus, ("Honchariw") (2011) 200 Cal.App.4th 1066, 1072. CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Association for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 51415. The pertinent issues under section 1094.5 are (1) whether the respondent has proceeded without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP §1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. CCP §1094.5(c).

CCP section 1094.5 does not on its face specify which cases are subject to independent review of evidentiary findings. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. In cases other than those requiring the court to exercise its independent judgment, the substantial evidence test applies. CCP §1094.5(c). Land use decisions do not typically involve vested rights requiring independent review. *See* PMI Mortgage Insurance Co. v. City of Pacific Grove, (1981) 128 Cal.App.3d 724, 729. There is no vested right in the enforcement of a zoning ordinance. Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, (2001) 86 Cal.App.4th 534, 552.

"Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

An agency is presumed to have regularly performed its official duties (Evid. Code §664), and the petitioner seeking administrative mandamus therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137; Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion).

The agency's decision at the hearing must be based on the evidence. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The decision-maker is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 51415. Implicit in CCP section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Id.

C. Judicial Notice

NCD requests judicial notice of (1) an Assembly Committee on Local Governments Report on SB 2011, dated August 6, 1990 (NCD RJN Ex. 1); (2) a memorandum on "Summary and Clarification of Requirements for Housing Element Compliance" prepared by HCD's Division of Housing Policy Development, dated March 16, 2023 (NCD RJN Ex. 2); and (3) a Special Bulletin #3 regarding the state Senate's Natural Resources and Wildlife Committee Vote on SB 1579 and SB 1920, dated May 7, 1976 (NCD RJN Ex. 3).

Exhibit 2 is a March 16, 2023 HCD memorandum clarifying the HAA requirements for housing element compliance. NCD RJN Ex. 2. The memorandum explained that when a local jurisdiction submits an "adopted" housing element before submitting an initial draft or considering HCD's findings on an initial draft, HCD will treat the adopted element as an initial draft. Ex. 2, p. 1. The memorandum added that the local jurisdiction does not have the authority to determine that its adopted element is in substantial compliance with the HAA; it can only provide reasoning why the HCD should make such a finding. Ex. 2, p. 2. A local jurisdiction is only in compliance as of the date HCD issues a letter finding the adopted element to be in substantial compliance. Ex. 2, p. 2.

Exhibit 3 is a May 7, 1976 Special Bulletin issued by an entity called California Research regarding the state Senate's Natural Resources and Wildlife Committee Vote on SB 1579 and SB 1920. NCD RJN Ex. 3. The report explained that one senator had proposed an amendment to SB 1579 that would basically provide a percentage of housing for all socioeconomic strata based on similar percentages of like people throughout the state. NCD RJN Ex. 3, p. 3. The goal was to avoid creating, continuing, or encouraging only the elite to live on the coast. Id. The proposed amendment failed 3-5. Id. One Senator commented that parts of the idea were not bad, but housing policy should be consistent statewide with no preference given to areas near the coast. Id.

The City objects to all three exhibits on the basis that the scope of review for administrative mandamus is limited to the administrative record. Pet. Op. RJN Obj. at 2-4. Courts can take judicial notice of exhibits in administrative mandamus cases to support legal arguments but not to establish operating facts. Ochoa v Anaheim City Sch. Dist. (2017) 11 Cal.App.5th 209, 221; Bonome v City of Riverside, (2017) 10 Cal.App.5th 14, 20. Although neither cited case supports the City's position, the court agrees with it. Exhibits 1 and 3 meet this criterion, but Exhibit 2 does not.

Exhibit is not subject to judicial notice because there is no authentication other than a declaration stating that it is contained in a legislative history file. Bereczky-Anderson Decl. Not every document in a legislative file is subject to judicial notice. Specifically, there is no indication what California Research is or why its Special Bulletin #3 is in a legislative file. The evidence is insufficient to conclude that Exhibit 3 bears on legislative intent for any bill. *See* Evid. Code §452(b).

The City also objects that Exhibits 1-3 are not relevant to the City Council's February 7, 2023 decision. Pet. Op. RJN Obj. at 3-4. The City notes that Exhibits 1 and 3 are dated 1990 and 1976, respectively and Exhibit 2 is dated March 16, 2023, after the City Council's February 7, 2023 appeal decision. Id. The dates of these documents are of no particular moment if an exhibit is otherwise subject to judicial notice.

The City further objects that Exhibit is not an official act, also citing Martinez v. City of Clovis, ("Martinez") (2023), 90 Cal.App.5th 193, 243, which held that HCD's informal interpretation of statutory requirements is not binding on the court. Pet. Op. RJN Obj. at 4. Martinez explains that "any deference that might be due" to HCD's interpretation is overcome by the plain meaning of the statute at issue. Id. The amount of deference due to HCD's interpretation has no bearing on whether the interpretation is subject to judicial notice.

NCD's request is granted for NCD RJN Ex. 1 and denied for NCD RJN Exs. 2 and 3. *See* Evid. Code §452(c).

Two weeks after filing its opposition, the City filed a request for judicial notice of the trial court's final ruling in New Commune DTLA, LLC and Leonid Pustilnikov v. City of Redondo Beach and City Council of the City of Redondo Beach, ("Pustilnikov") Case No. 22TRCP00203 (Opp. RJN Ex. 1). On October 30, 2023, Department 8 (Hon. Ronald Frank) issued a decision denying NCD's petition for a writ of mandate in Pustilnikov. Opp. RJN Ex. 1. NCD argued, *inter alia*, that the City did not have a compliant housing element until HCD completed its review of on September 1, 2022. Opp. RJN Ex. 1, p.18. Judge Frank rejected this argument because the record reflected an interactive process in which HCD periodically indicated its conditional approval of earlier submittals. Opp. RJN Ex. 1, p.18. The City Council's July 5, 2022 resolution included all the conditions HCD had previously indicated were required for formal approval. Opp. RJN Ex. 1, p.18. The City therefore substantially complied with the Housing Element Law when it adopted the resolution on July 5, 2022. Opp. RJN Ex. 1, p. 18.

As NCD points out (Reply at 9-10), written trial court decisions have no precedential value and therefore are irrelevant for purposes of judicial notice. Crab Addison, Inc. v. Superior Court, (2008) 169 Cal.App.4th 958, 963, n. 3; Santa Ana Hospital Medical Center v. Belshé (1997) 56 Cal.App.4th 819, 831. The request is denied.

In reply, NCD seeks judicial notice of a December 12, 2023 *ex parte* application to intervene by the People of the State of California and HCD in California Housing Defense Fund v. City of La Cañada Flintridge, Case No. 23STCP02614 (NCD RJN Ex. 4). There, a city had adopted a revised draft housing element. NCD RJN Ex. 4, p. 4. HCD argued that under the

builder's remedy, section 65589.5(d)(5), a local agency may disapprove an affordable housing project that "is inconsistent with both the jurisdiction's zoning ordinance and general plan use designation" only if that housing element is in substantial compliance with the Housing Element Law. NCD RJN Ex. 4, p.5. The city did not have a housing element certified by HCD to be in substantial compliance with the Housing Element Law when the project application was submitted. NCD RJN Ex. 4, p.5.

Unlike the City's request, NCD does not seek judicial notice of a trial court ruling and only seeks to demonstrate that HCD's position on a city's substantial compliance with housing element requirements has remained consistent. Reply at 10. Nonetheless, NCD improperly seeks to include an extra-record operative fact (HCD's position) in the administrative record, and the request is denied.

D. Governing Law

1. The City's Housing Element

The Legislature finds that the provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government. §65580(c).

At least 90 days prior to adoption of a revision of its housing element, or 60 days prior to the adoption of a subsequent amendment thereto, the local jurisdiction agency shall submit a draft element revision or draft amendment to HCD. §65585(b)(1). In the preparation of review findings, HCD may consult with any public agency, group, or person and shall receive and consider any written comments from such entities regarding the draft or adopted element or amendment under review. §65585(c).

HCD shall review the draft and report its written findings to the planning agency within 90 days of its receipt of the first draft submittal for each housing element revision, or 60 days of its receipt of a subsequent draft amendment or an adopted revision or adopted amendment to an element. §65585(b)(3). In its written findings, the HCD shall determine whether the draft element or draft amendment substantially complies with the Housing Element Law. §65585(d).

Prior to the adoption of its draft element or draft amendment, the legislative body shall consider the findings made by HCD if they become available within the time limits set in section 65585. §65585(e).

If HCD finds that the draft element or draft amendment does not substantially comply with this article, the legislative body shall either change the draft element or amendment to so comply or adopt the draft element or draft amendment without changes. §65585(f). If the legislative body adopts without changes, it shall include in its resolution of adoption written findings that explain why the legislative body believes the draft element or draft amendment substantially complies with the Housing Element Law despite HCD's findings. §65585(f)(2).

2. The Housing Accountability Act

a. Legislative Findings and Intent

The Legislature recognizes the lack of housing as a critical problem that threatens the economic, environmental, and social quality of life in California. §65589.5(a)(1)(A). It adopted the HAA in 1982 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 and emergency shelters." §65589.5(a)(2)(K). To date, the goal remains unfulfilled. Id.

The HAA reflects the Legislature's findings that "the availability of housing is of vital statewide importance," and that providing the necessary housing supply "requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels." §65580(a)-(b).

Effective January 1, 2018, the Legislature significantly amended the HAA to strengthen its provisions, expand its applicability, and increase local governments' liability for violations. The HAA found that California is in a housing crisis that is "partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing," §65589.5(a)(1)(B). The consequences of those actions include discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration. §65589.5(a)(1)(C).

Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects. §65589.5(a)(1)(D). The state's homeownership rate was at its lowest level since the 1940s and ranked 49 out of the 50 states. §65589.5(a)(2)(E). The lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians. §65589.5(a)(2)(F).

The HAA should be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." §65589.5(a)(2)(L).

It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety under either section 65589.5(d)(2) and 65589.5(j)(1) arise infrequently. §65589.5(a)(3).

It is the policy of the state that a local government not reject or make infeasible housing development projects that contribute to meeting the need determined pursuant to the HAA without a thorough analysis of the economic, social, and environmental effects of the action and without complying with section 65589.5(d). §65589.5(b).

b. <u>Project Applications</u>

Subject to certain exceptions, a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application which included all the information required by section 65941.1(a) was submitted. §65589.5(o)(1).

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 or emergency shelter is consistent, compliant, or in conformity." §65589.5(f)(4).

Section 65589.5(j)(1) provides:

> "When a proposed housing development project complies with applicable, <u>objective</u> general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to <u>disapprove</u> the project or to impose a condition that the project be developed at a

lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (emphasis added).

Section 65589.5(j) applies to market rate housing as well as affordable housing. Honchariw, *supra,* 200 Cal.App.4th at 1070. The HAA applies to all residential housing developments and takes away the agency's ability to deny residential projects based on subjective development policies. Id. at 1072-77.

"Disapprove the housing development project" includes any instance in which a local agency "votes on a proposed housing development project application and it is disapproved", "fails to comply with the timer periods specified in Section 65950", or fails to meet the time limits specified in Section 65913.3. §65589.5(h)(6).

If the court finds that an agency acted in bad faith in disapproving a project in violation of the HAA, the appropriate remedy is an "order or judgment directing the local agency to approve the housing development project." §65589.5(k)(1)(A)(ii). "Bad faith" "includes, but is not limited to, an action that is frivolous or otherwise entirely without merit." §65589.5(l).

The local jurisdiction bears the burden of proving that its decision conforms to the conditions specified in section 65589.5. §65589.6.

c. The Builder's Remedy

In 1990, the Assembly Committee on Local Government issued a report on SB 2011, which amended the HAA to provide for the builder's remedy. NCD RJN Ex. 1, pp. 1-2. The comments explained that there were concerns that local governments do not always implement their general plan housing elements or that they are not always adequate to address affordable housing needs. NCD RJN Ex. 1, p. 3. SB 2011 would therefore prohibit local governments from denying 20% affordable projects even if they are inconsistent with the general plan and zoning. NCD RJN Ex. 1, p. 3.

A local agency shall not disapprove a housing development project for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low- or moderate-income households, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, for one of five conclusions:

(1) the local jurisdiction has adopted a housing element in substantial compliance with the HAA and has met or exceeded its share of the regional housing need allocation pursuant to section

65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by section 65008. §65589.5(d)(1).

(2) the proposed housing development would have a specific, adverse impact on the public health or safety that cannot be feasibly mitigated without rendering the project unaffordable or infeasible. A specific, adverse impact on public health or safety does not include inconsistency with the zoning ordinance or general plan land use designation. §65589.5(d)(2)(A);

(3) denial of the project is required to comply with specific state or federal law, and there is no feasible method to comply without rendering the project unaffordable or infeasible;

(4) the proposed land for the project is zoned for, and surrounded on at least two sides by, agriculture or resource preservation purposes;

(5) the housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with the HAA. §§ 65589.5(d)(1)-(5).

A "housing development project" includes any mixed-use development consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use. §65589.5(h)(2). "Housing for very low, low-, or moderate-income households" includes buildings where 20% of the units are sold or rented to lower income households. §65589.5(h)(3).

"Deemed complete" means the applicant has submitted a preliminary application pursuant to section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a complete application pursuant to section 65943. §65589.5(h)(5).

"Disapproval of a housing development project" includes whenever a local agency votes 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. §65589.5(h)(6)(A).

A "specific, adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." §65589.5(j)(1)(A). The Legislature's intent is that conditions that would have a specific, adverse impact upon the public health and safety should arise infrequently. §65589.5(a)(3).

d. <u>Consistency with Other Laws</u>

New housing developments constructed within the coastal zone shall, where feasible, provide housing units for persons and families of low or moderate income. §65590(d). Where it is not feasible to provide these housing units in a proposed new housing development, the local government shall require the developer to provide such housing, if feasible to do so, at another location within the same city or county, either within the coastal zone or within three miles thereof. <u>Id.</u>

Nothing in the HAA relieves the local agency from complying with, *inter alia*, the Coastal Act or the California Environmental Quality Act ("CEQA"). §65589.5(e). Nothing in the HAA, aside from section 65589.5(o), shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's

share of the regional housing need. §65589.5(f)(1). However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development. Id.

3. The Housing Crisis Act

In 2019, the Legislature enacted the Housing Crisis Act ("HCA"), declaring, despite the HAA, a temporary housing emergency statewide to preserve existing housing, enhance protections for occupants, and increase certainty in the development review process. *See* SB 330 §2(b).

Among other limitations, the HCA ensures housing production is not stymied by precluding an affected county or city – including charter cites and the electorate – from either reducing existing residential intensities or imposing a limitation on housing development within all or a portion of an affected city without first making a finding of an "imminent threat" to public health and safety. §§ 66300(a)(1)(B)(3), (b)(1)(A), (b)(1)(B)(i), 65589.5. The HCA prohibits an affected city

> "...from enacting a development policy, standard, or condition, as defined, that would have the effect of (A) changing the land use designation or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing zoning district below what was allowed under the general plan or specific plan land use designation and zoning ordinances of the county or city as in effect on January 1, 2018...." §66300(b)(1) (emphasis added).

An "affected county" or "affected city" includes the electorate of an affected county or city exercising its local initiative or referendum power, whether that power is derived from the California Constitution, statute, or the charter or ordinances of the affected county or city. §66300(a)(3). "Reducing the intensity of land use" includes reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site's residential development capacity. §66300(b)(1)(A). These prohibitions apply to any land use designation amendment or change adopted on or after January 1, 2020, and any change as of that date is void. §66300(b)(2).

To maximize the development of housing within this state, section 66300 should be broadly construed and any exception thereto narrowly construed, including an exception for the health and safety of occupants of a housing development project. §66300(f)(2).

4. The Coastal Act

The California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem. Public Resources ("Pub. Res.") Code §30001(a). The permanent protection of the state's natural and scenic resources is a paramount concern. Pub. Res. Code §30001(b). To promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction. Pub. Res. Code §30001(c).

Future developments that are carefully planned and developed consistent with the policies of the Coastal Act are essential to the economic and social well–being of the people of this state and especially to working persons employed within the coastal zone. Pub. Res. Code §30001(d).

To achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement. Pub. Res. Code §30004(a).

The Coastal Act is to be liberally construed to accomplish its purposes and objectives. Pub. Res. Code §30009.

Nothing in the Coastal Act shall exempt local governments from meeting the requirements of state and federal law with respect to providing low– and moderate–income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by other laws. Pub. Res. Code §30007.

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry. Pub. Res. Code §30222.

The Coastal Act requires each local government within the coastal zone to prepare and submit a Local Coastal Program ("LCP") to the Coastal Commission. Pub. Res. Code §30500(a). An LCP is comprised of a land use plan, which functions as the general plan for property in the coastal zone, and a local implementation plan, which includes zoning designations, zoning maps, and other implementing actions. Pub. Res. Code §§ 30108.5, 30108.6. Once an LCP is approved, the local government is statutorily delegated the review authority for development within that portion of the coastal zone. Pub. Res. Code §30519(a).

Aside from any other permit required by law from any local government or from any state, regional, or local agency, any person wishing to perform or undertake any development in the coastal zone shall obtain a coastal development permit ("CDP") with some exceptions. Pub. Res. Code §30600(a). A CDP shall be issued if the issuing agency, or the Coastal Commission on appeal, finds that the proposed development is in conformity with the certified LCP. Pub. Res. Code §30604(b).

The California Coastal Commission ("Coastal Commission") should encourage the protection of existing and the provision of new affordable housing opportunities for persons of low and moderate income in the coastal zone. Pub. Res. Code §§ 30604(f), (g). In reviewing residential development applications as defined in section 65589.5(h)(3), the issuing agency may not require measures that reduce residential densities below the density sought by an applicant if the density sought is within the permitted density or range of density established by local zoning plus the additional density permitted under section 65915, unless the issuing agency or the Coastal Commission makes a finding, based on substantial evidence in the record, that the density sought by the applicant cannot feasibly be accommodated on the site in a manner that is in conformity with the LCP or Pub. Res. Code section 30200 *et seq.* Pub. Res. Code §30604(f).

6. <u>RBMC Provisions</u>

The City has a certified LCP, which includes an implementing Zoning Ordinance for the Coastal Zone ("Coastal Ordinance") intended to "protect and promote the public health, safety, and general welfare" and to provide a precise guide for the growth and development of the City in order to carry out the Coastal Act as applied to the City in its LUP. Redondo Beach Municipal Code ("RBMC") §10-5.102 (AR 1576). The zoning regulations in the Coastal Ordinance shall apply to all land within the City's coastal zone except for public streets and rights-of-way. RBMC §10-5.201(a) (AR 1578). No development shall occur, no land shall be used, and no structure shall

be constructed, occupied, enlarged, altered, demolished or moved in any zone except in accordance with the provisions of Chapter 10 of the RBMC. RBMC §10-5.201(b) (AR 1578).

The applicant seeking to develop pursuant to the Coastal Ordinance shall file a completed CDP application with the Department. RBMC §10-5.2210(a)(1) (AR 1828). The CDP application will not be determined to be complete and shall not be filed until and unless the applicable requirements of RBMC section 10-5.2210 are met. RBMC §10-5.2210(c) (AR 1830). The application must include specific information as well as any such other data as may be required to demonstrate that the project is consistent with the finding required under RBMC section 10-5.2218. RBMC §10-5.2210(b)(19) (AR 1829-30). The application shall not be approved unless the decision-making body finds, *inter alia*, that the proposed development is in conformity with the City's LCP. RBMC §10-5.2218(c)(1) (AR 1836).

E. Statement of Facts

1. The Housing Element

On July 5, 2022, the City adopted a draft housing element via Resolution No. CC-2207-048 to incorporate recommended amendments from the HCD. AR 333-40. The draft's recitals explained that the City had been revising its housing element since 2017. AR 334. HCD received the City's latest draft housing element for review on July 13, 2021. AR 335. HCD then issued a September 2, 2021 letter stating that the draft housing element addressed many statutory requirements but needed revisions to fully comply with the Housing Element Law. AR 335.

The City submitted revisions on September 16, 2021, but did not receive new comments from HCD until January 5, 2022. A R 336-37. The City Council adopted a revised housing element on February 8, 2022. AR 338. HCD provided further comments on April 12, 2022 to bring the draft element in compliance with the Housing Element Law. AR 338. The City Council held a public hearing on July 5, 2022, considered the evidence presented, and adopted the revised housing element of its general plan. AR 339.

On September 1, 2022, HCD sent the City notice that it had completed its review of the housing element adopted by the City Council on July 5, 2022. AR 366. The City had addressed the statutory requirements HCD identified in its April 12, 2022 review, and HCD concluded that the housing element is in full compliance with the Housing Element Law. AR 366.

2. The Project Application

On July 20, 2022, NCD submitted a preliminary application for the Project. AR 342. The Project included 133,943 square feet of residential floor area in 30 units and 7,124 square feet of commercial space, a total of 141,067 square feet. AR 342. NCD acknowledged that the Property is located in a CC-4 zone, has a Coastal Commercial land use designation in the coastal zone, and that residential land use is not permitted or conditionally permitted in the CC-4 zone. AR 342. However, six of the 30 units, or 20%, would be dedicated to lower-income residents. AR 342. NCD asserted that it was entitled to develop the Project under section 65589.5(d) because the City's housing element was not compliant with section 65580 *et. seq.* AR 342.

The preliminary application form stated that it serves as a template for the preliminary application for housing development projects seeking vesting rights pursuant to SB 330, which is the HCA. AR 344. Submission of all the information required in the form and payment of the processing fee freezes the fees and development standards to those in effect as of the application date, unless an exception is triggered under section 65889.5(o). AR 344.

On November 10, 2022, NCD submitted its formal application for the Project. AR 370-

82. The formal application included applications for a CDP, Condominium Subdivision, and Environmental Assessment, and a Combined Application for a Conditional Use Permit and Planning Commission Design Review. AR 370, 375, 379, 384.

The formal application described the Project as a 142,557 square foot building with 35 residential units and 8,614 square feet of floor space for commercial use. AR 371, 376. Seven of the 35 units, or 20%, would be rented to lower-income residents. AR 380. The application reiterated that the Project did not comply with the development standards or permitted uses for a CC-4 zone. AR 373, 380. Nonetheless, NCD asserted that it was still entitled to develop the Project under section 65589.5(d). AR 380.

On December 7, 2022, the Department Director rejected the Project's formal application as incomplete. AR 390, 838. NCD had acknowledged that the residential uses described in the Project application were inconsistent with both the City's general plan land use designation and the CC-4 zone. AR 390. The rejection notice asserted that NCD was not entitled to develop the Project under section 65589.5(d)(5) because the City Council adopted a compliant housing element on July 5, 2022, which was before NCD submitted its preliminary application on July 21, 2022. AR 390. The Department Director asserted that if NCD wished to pursue the Project, it would have to complete either an application for a general plan amendment, LCP amendment, and zoning amendment. AR 390-91.

3. <u>The City Council Appeal</u>

NCD appealed from the Department Director's rejection of its Project application. AR 746. NCD argued that the Department Director's December 7, 2022 rejection notice did not qualify as a lawful notice of incomplete application because it failed to identify the incomplete items and unlawfully rejected NCD's builder's remedy rights. AR 749. The City's argument as to section 65589.5(d)(5) was incorrect as a matter of law because HCD did not approve the City's housing element until after NCD submitted the preliminary application. AR 749. The rejection notice also failed to include the "written findings, based upon a preponderance of the evidence in the record" required by section 65589.5(d). AR 749-50.

The City set the appeal hearing date for February 7, 2023. AR 394. In advance of the hearing, NCD sent the City Council a letter summarizing its objections to the Department Director's rejection. AR 673-81. NCD attached a technical letter of assistance from HCD for another project, dated October 5, 2022. AR 682-83. The recipient had asked whether the rights which vest upon a preliminary application still apply if the jurisdiction did not have a compliant housing element when the applicant submitted the preliminary application but achieved compliance during the entitlements process. AR 683. HCD responded that those rights do still apply. AR 683. Any potential benefits afforded to the applicant due to the jurisdiction's non-compliant status remain throughout the entitlement process even if the jurisdiction then achieves compliance while the entitlement process is ongoing. AR 683.

a. <u>The Staff Report</u>

On February 7, 2023, City staff issued a report outlining the facts of the case and the appeal hearing's structure. AR 725-30. The report included a slide presentation. AR 731-38.

The report noted that NCD's application sought a CDP and other approvals. AR 727. RBMC section 10-5.2210 outlines the necessary application procedures and applicable requirements for CDPs. AR 727. This includes any data that might be required to show a project is consistent with the findings required for approval pursuant to RBMC section 10-5.2218. AR

728. RBMC section 10-5.2218(c)(1) requires the proposed development to be in conformity with the LCP. AR 728. NCD admitted that CC-4 zoning does not allow for residential land uses. AR 735. Because NCD admitted that the Project would be inconsistent with the LCP, the Department Director determined that the application was incomplete. AR 728-29. The staff report repeated the Department Director's conclusion that the Project application would have been complete if NCD had filed applications for a general plan amendment, LCP amendment, and zoning amendment. AR 726-27.

The staff report did not discuss the timeline of the City's compliance with the Housing Element Law. *See* AR 731-38. It did note that the HAA expressly states it does not relieve the City from its obligation to comply with the Coastal Act and that the City has in place an LCP and Coastal Ordinance. AR 729.

b. <u>The Appeal Hearing</u>

At the hearing, the Department Director argued that the HAA does not excuse the City's obligation to comply with the Coastal Act. AR 1203. The City has an LCP, so it has an obligation to ensure compliance with it. AR 1204. The City's CDP application procedures have specific instructions for determining if an application is complete, and it is incomplete if it does not meet all requirements under RBMC section 10-5.2210. AR 1204. This includes a requirement to provide any data required to show that the project is consistent with the findings required for approval pursuant to RBMC section 10-5.2218. AR 1204. RBMC section 10-5.2218(c)(1) requires the proposed development to be in conformity with the LCP. AR 1204. NCD's application acknowledged that the Project does not conform to the LCP and Coastal Ordinance because CC-4 zones do not allow residential development. AR 1204-05. The Department Director therefore concluded the application was incomplete. AR 1205. The Department Director also reiterated that if NCD wanted to develop residential uses on the Property, it could submit an application for a general plan Amendment, LCP amendment, and zoning amendment. AR 1248-1249.

The Department Director confirmed that the City made no changes to the housing element after it was submitted to HCD in July 2022. AR 1270.

NCD argued that the HAA imposes lofty standards on a City seeking to reject a project application under section 65589.5(d). AR 1217. These included the City's duty to prove its position by a preponderance of the evidence, issue a written record and findings, and identify specific adverse impacts to health, safety, and welfare based on objective written criteria in place at the time the application is deemed complete. AR 1217. NCD argued that it was not looking for Project approval until a later stage. AR 1217. It just wanted the City to fulfill its mandatory duty to accept, receive, and process the application so the City Council or other decision-making body could fully examine the merits of the Project. AR 1217.

One Councilmember referenced a discussion at a previous meeting about harmonizing the Coastal Act and the Density Bonus Law. AR 1265. Pursuant to his understanding, harmonizing does not mean ignoring zoning requirements. AR 1265. It means meshing coastal zoning and the Density Bonus Law and the Coastal Act. AR 1265.[2]

[2] The minutes of the February 7, 2023 City Council meeting summarize the appeal hearing. AR 1189-91. The minutes mention a discussion of the Department Director's responsibility to assess whether the Project is a builder's remedy project and, if so, accept and process the application. AR 1191. NCD cites the minutes as demonstrating that the Department Director was

c. The City Council Resolution

On February 7, 2023, the City Council unanimously voted to pass Resolution No. CC-2302-023 ("Resolution") denying NCD's appeal. AR 1174-77.

The Resolution recitals stated that the City's housing element substantially complies with state law and HCD also has concluded that the housing element complies with state law. AR 1174.

The recitals also state that RBMC section 10-5.2210(c) provides that any CDP application shall not be determined to be complete until the requirements of RBMC section 10-5.2210 have been met. AR 1174. RBMC section10-5.2210(b) establishes the requirements for a CDP, including that the application contain such data as may be required to demonstrate that the project is consistent with the findings require pursuant to RMBC section 10-5.2218. AR 1174. In turn, RMBC section 10-5.2218 requires that any CDP approval must be based on compliance with the LCP and policies of the Coastal Act. AR 1174. NCD's Property is designated by the LCP and Coastal Ordinance as CC-4, which is a zone that does not allow for residential uses. AR 1174.

The City Council resolved that NCD had submitted preliminary and formal applications for a mixed-use housing development project in the CC-4 zone. AR 1175. The City's LCP and Coastal Ordinance establish the permitted uses in the CC-4 zone and NCD acknowledged that residential uses are not allowed in a CC-4 zone. AR 1175. To submit a complete application under RBMC and LCP, the application must comply with CDP application requirements in RMBMC section 10-5.22190(c), including that the project comply with the LCP and the Coastal Act. AR 1175. The applications demonstrated that the Project and its proposed residential uses do not comply with the City's certified LCP and the Coastal Ordinance. AR 1175.

The City has an obligation to ensure compliance with the Coastal Act. AR 1175. Accordingly, the Council upheld the Department Director's determination that the Project application was incomplete and could not be processed. AR 1175. Because the public agency had rejected the Project, CEQA did not apply. AR 1175.

E. Analysis

Petitioner NCD seeks mandamus to set aside the City Council's denial of its appeal and to compel the City to process and approve the Project application and issue all necessary Project approvals.[3] NCD raises two issues: (1) the City violated the HAA and the builder's remedy applies; and (2) the Coastal Act does not support the City Council's denial of NCD's appeal.

1. The HAA

The Project is a mixed-use development with 35 units of residential use, 20% of which are

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not vested with the authority to adopt the findings necessary for rejecting a project under the HAA and the builder's remedy. Pet. Op. Br. at 10. It is not clear how the minutes demonstrate this conclusion. In any event, it is undisputed that the City Council was the final decision-maker and that it had authority to make HAA findings.

[3] Although NCD seeks various forms of declaratory relief – the Department Director violated section 65589.5(d) when she chose not to process the formal application and approve the Project, the City Council violated section 65589.5(d) when it did not grant NCD's appeal, the Department Director and City Council's rejection of the application was arbitrary and capricious, and the City Council's denial of the appeal had no rational basis – these claims are subsumed within the Petition's administrative mandamus claim.

to be set aside for rental to low-income residents. The Project qualifies as an affordable housing development under the HAA (§65589.5(h)(2) and (3)). NCD argues that it has properly invoked the builder's remedy in section 65589.5(d) and its presumption of approval absent written findings made by the City to satisfy an exception. No such findings were made. Pet. Op. Br. at 13.

a. The Standard of Review for HAA Compliance

NCD argues that section 65589.5(d) creates a presumptive burden of approval for all housing development projects for very low-, low-, and moderate-income individuals. For a local jurisdiction to disapprove such a project, it must make "written findings, based upon a preponderance of the evidence in the record" that one of the exceptions contained within subdivision (d) exists; otherwise, it "shall not disapprove" the project. The local jurisdiction bears "the burden of proof . . . to show that its decision is consistent with the findings as described in subdivision (d), and that the findings are supported by a preponderance of the evidence in the record." §65589.5(i); *see also* §65589.6 (local government "shall bear the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5"). Pet. Op. Br. at 13.

Section 65589.5(d) is referred to as the builder's remedy in part because qualifying projects enjoy a presumptive burden of approval that a local agency cannot overcome without making the required findings supported by a preponderance of evidence in the record.[4] NCD argues that, to deny the Project, the City was required to adopt written findings that the Project "is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation . . . and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article." §65589.5(d)(5). Such written findings were required to "bridge the gap" between evidence supporting one of the exceptions in section 65589.5(d) and disapproval of the Project. *See* Topanga, *supra,* 11 Cal.3d at 515. Pet. Op. Br. at 13-14.

The City's denial of NCD's application does not attempt to make written findings to satisfy any of the five exceptions to prevent the builder's remedy from applying to the Project. The Resolution and the whole administrative record tell only one story: the City unlawfully relied on a single staff member's conclusion about the applicability of the HAA. The City abused its discretion when it disapproved the Project by rejecting the Project application without making written findings based upon a preponderance of the evidence to satisfy any of the exceptions in section 65589.5(d). Pet. Op. Br. at 14.

The City argues that NCD has the burden of proof in an administrative mandamus proceeding to show that no substantial evidence supports the findings. Afford v. Pierno, *supra,* 27 Cal.App.3d at 691. NCD cannot inject the HAA's standard of review without showing that the City disapproved the Project as defined by the HAA. The City argues that it has not denied the Project because the Project has not been processed or undergone review. The City relies on the evidence in the City Council's Resolution, the staff report, and the Director's December 7, 2022

[4] NCD notes that the roots of the builder's remedy lie in the 1990 amendments to the HAA. *See, e.g.,* Stats.1990, c. 1439 (SB 2011), §1. The Legislature intended that the remedy be used to mandate approvals of affordable housing development projects even if they were inconsistent with the local jurisdiction's zoning documents. *See, e.g.,* Assem. Com. on Local Governments Rep. on SB 2011 (1989-1990 Reg. Sess.), Aug. 6, 1990 ("This bill . . . prohibits local governments from denying 20% 'affordable' projects even if they are inconsistent with the General Plan and zoning . . ."). NCD RJN Ex. 1. Pet. Op. Br. at 13-14, n. 5.

letter.[5]

For example, the Resolution states that NCD had submitted an application for a mixed-use housing development project that includes a request for a CDP on a site that is designated as Coastal Commercial and zoned as CC-4. AR 1175. The City's LCP and Coastal Ordinance establish the allowed uses within the CC-4 zone. Id. NCD acknowledged in its applications that residential uses are not allowed in the CC-4 zone. Id. To submit a complete application for a coastal development permit under the RBMC and LCP, the application must comply with the application requirements for a CDP in RBMC Section 10-5.2210(c), which refers to all of the requirements in RBMC section 10-5.2210, including the submittal of "other data" to demonstrate consistency with the findings required for the approval of the permit, including that the project comply with the LCP and the Coastal Act. Id. Instead of demonstrating consistency, NCD's application demonstrated that the proposed project and proposed residential uses do not comply with the LCP and the implementing Coastal Ordinance. Id.

From this evidence, the City concludes that it did not intend to, and did not, deny the Project. Rather, the City determined that NCD's application was incomplete because it lacked necessary applications to amend the governing land use ordinances, including the City's LCP, to pursue residential development on the Property. NCD remains able to pursue approval of its Project should it submit necessary applications to amend the City's governing land use requirements. Opp. at 13.

The City adds that the HAA's builder's remedy relates to constraints on ultimate project denials, not project processing. The HAA provisions relating to project denial assume a complete application. A local agency shall not disapprove a housing development project [where] . . . [t]he housing development project . . . is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article...." §65589.5(d)(5). NCD offers no legal authority, nor is the City aware of any, that authorizes NCD to proceed without a proper application for its Project. As a result, the City was under no obligation to include HAA-required findings of denial, the HAA's builder's remedy is not implicated, and the case is governed by the ordinary administrative mandamus burden of proof. Opp. at 11-13.

NCD replies that the City's demand for an application that seeks a general plan amendment, LCP amendment, and zoning amendment qualifies as a summary disapproval of the Project. NCD's

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[5] The City notes that the party who challenges the sufficiency of the evidence to support a particular finding must summarize both favorable and unfavorable evidence on that point and show how and why it is insufficient. Schmidlin v. City of Palo Alto, (2007) 157 Cal.App.4th 728, 738, Where a party presents only facts and inferences favorable to his or her position, any contention that the decision is not supported by substantial evidence is waived. Id. The City argues that NCD failed to abide by this requirement by misleadingly characterizing the Resolution as a "Denial Resolution", intimating that the Project was denied, and wrongly asserting that the Resolution contains "no evidence." NCD fails to address the evidence in the Resolution (AR 1174-76), the staff report (AR 725-30), and the Department Director's December 2, 2022 letter stating that the application was incomplete. AR 838-41. Opp. at 11-12.

The mischaracterization of evidence is not a failure to cite that evidence. Additionally, NCD's failure to discuss the evidence in the Resolution, staff report, and Department Director letter is not a ground on which the court will find a waiver.

submittal of the SB 330 preliminary application rendered the application complete as a matter of law (see §65589.5(h)(5)), and the City's determination of incompleteness was a tactical maneuver to dodge the HAA's stringent standards for denying a housing development project. The HAA defines a housing development project disapproval to include an instance where 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. §65589.5(h)(6)(A). The City's repudiation of NCD's builder's remedy right and summary refusal to process the application falls squarely within this definition. The City Council ratified the summary disapproval of the Project in the Resolution, which officially declared that the City would not process, let alone approve, the Project. The Resolution all but conceded this was a disapproval in stating that "CEQA does not apply to projects which a public agency rejects or disapproves." AR 1177. Reply at 3-4.

NCD does not address all the statutory law concerning preliminary applications and their completeness, but this law aids it. HAA section 65589.5(h)(5) provides that, as pertinent to the Project, a preliminary application is "deemed complete" if it has been submitted pursuant to section 65941.1. Section 65941.1 provides that a preliminary application shall be deemed submitted if it provides listed information. §65941.1(a). Each local agency shall compile a checklist and application form that housing development project applicants may use, and the checklist or form shall not require or request any information beyond that expressly identified in subdivision (a). §65941.1(b). If the local agency determines that the application is not complete, it shall provide the applicant with an exhaustive list to that effect, limited to the items actually required on the agency's checklist. §65943.

NCD does not explain whether its preliminary application included the information required by section 65941.1(a) or used the City's checklist or form required by section 65941.1(b). However, NCD's preliminary application appears to be on a City form listing the information required by section 65941.1(a) (AR 344-50), including "the proposed land uses by number of units and square feet of residential and non-residential development using the categories in the applicable zoning ordinance". AR 348. Thus, it appears that the City should have deemed the preliminary application to be complete for purposes of the HAA. *See* §6558.5(h)(5). The City Council's determination was a disapproval under the HAA rather than a determination of incompleteness. *See* §65589.5(h)(6)(A).

As a result, the HAA's standard of review for denial of a project applies to HAA issues. The City's denial was required to make "written findings, based upon a preponderance of the evidence in the record" that one of the exceptions contained within 65589.5(d) exists. §65589.5(i). As discussed *post*, the City did not do so.

b. <u>Whether the City's Housing Element Was Substantially Compliant When the Preliminary Application Was Submitted</u>

The exception to the builder's remedy pertinent to this case is that the housing development project is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with section 65588 that is in substantial compliance with the HAA. §65589.5(d)(5). It is undisputed that the Project is inconsistent with the City's zoning and general plan land use designations on the date the application was deemed complete. Therefore, the issue is whether the City had a revised housing element in substantial compliance with the HAA.

Under the HAA, "a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect" when a preliminary application is submitted.

§65589.5(o)(i). This regulatory freeze includes housing elements. §65589.5(o)(4) (frozen "'ordinances, policies, and standards' includes general plan"); §65582(e) (housing element "means the housing element of the community's general plan"). The freezing of development standards and ordinances at the time a preliminary application is submitted allows the development community to rely on the state of the regulatory regime in place so that it can safely and confidently commit resources to development. "[T]he private sector should be able to rely" on a preliminary application "prior to expending resources and incurring liabilities without the risk of having the project frustrated by subsequent action by the approving local agency...." Kaufman & Broad Central Valley, Inc. v. City of Modesto, (1994) 25 Cal.App.4th 1577, 1588 (concerning vesting of tentative tract maps under section 66498.9(b)).

NCD argues that the City's development standards were frozen when its July 21, 2022 preliminary application was submitted. §65589.5(o)(1). The City's housing element was non-compliant at that time, and it did not attain a presumption of compliance until HCD approved it on September 1, 2022. Under the HAA standard of review, the City could not make the written finding, based upon a preponderance of the evidence, under section 65589.5(d)(5) that it was substantially compliant with the Housing Element Law as of that date. Therefore, the City could not deny the Project under section 65589.5(d)(5) as a matter of law. Yet, the City Council's July 5, 2022 Resolution makes an unsupported conclusion that its housing element substantially complies with the Housing Element Law. Pet. Op. Br. at 15-16.

The City argues that it adopted its housing element on July 5, 2022 and that it complied with the Housing Element Law at that time. AR 333-41. NCD submitted its preliminary application on July 21, 2022 (R 726) and submitted its formal application on November 10, 2022. AR 370-89. The City did not change or amend its housing element between the July 5 adoption and HCD's September 1 222 certification letter. AR 1270. HCD's certification letter did not require the City to take further action or that its housing element only became valid once certified by HCD. Instead, HCD found the City's "adopted housing element in full compliance with State Housing Element Law...." AR 366. Thus, the housing element fully complied with state law as of its adoption on July 5, 2022. Opp. at 14.

In support of its position, NCD relies on an October 5, 2022 HCD technical letter which is in the administrative record. In the technical letter, HCD stated that, if a project application is submitted "at a time when the jurisdiction does not have a compliant housing element, any potential benefits afforded to the applicant as a result of the jurisdiction's noncompliant status would remain throughout the entitlement process even if the jurisdiction subsequently achieves compliance...." AR 682-83. This statement is entitled to deference. Reddell v. California Coastal Com., (2009) 180 Cal.App.4th 956, 965 (courts generally defer to an agency's interpretation when that agency possesses special familiarity with the legal and regulatory issues at issue). Pet. Op. Br. at 15-16.[6]

The HCD letter supports the conclusion that a project application submitted before a local agency's housing element substantially complies with the Housing Element Law remains subject to the HAA's builder's remedy. It does not, however, support a conclusion that the local agency's housing element must be approved by HCD before it can be considered substantially compliant.

[6] The court has declined to judicially notice a separate HCD memorandum opining that a housing element is in compliance with the Housing Element Law only after HCD certifies it. NCD RJN Ex. 2. Therefore, the court need not consider the City's arguments that HCD's statutory interpretation is in error. Opp. at 14.

For the latter conclusion, NCD relies on the language of the Housing Element Law. Section 65585 governs the process for local jurisdictions to prepare and submit housing elements to the HCD for compliance certification. At least 90 days prior to adoption of a revision of its housing element, the local jurisdiction shall submit a draft element revision to HCD. §65585(b)(1). HCD shall review the draft and report its written findings whether the draft element substantially complies with the Housing Element Law within 90 days of its receipt. §65585(b)(3), (d). Prior to the adoption of its draft element, the legislative body shall consider the findings made by HCD if they are timely made. §65585(e). If HCD finds that the draft element does not substantially comply, the legislative body shall either change the draft element to comply or adopt the draft element without changes. §65585(f). If the legislative body adopts without changes, it shall include in its resolution of adoption written findings that explain why it believes the draft element substantially complies with the Housing Element Law despite HCD's findings. §65585(f)(2). The planning agency shall submit a copy to HCD promptly after adopting the element. §65585(g).

NCD summarizes the housing element procedure as follows: (a) the submittal of a draft housing element to HCD at least 90 days prior to adoption; (b) review by HCD of the draft and preparation of the HCD's compliance findings within at least 60 days of the receipt; (c) consideration by the local government of the findings made by the HCD prior to adoption; and (d) inclusion in the local government's resolution written findings which explain the reasons why the legislative body believes that the draft element substantially complies with the Housing Element Law despite HCD's findings. These steps are mandatory.

The court agrees with NCD (Reply at 9) that the City had not followed this procedure as of the July 21. 2022 preliminary application. The City Council's Resolution No. CC-2207-048 shows that its draft housing element had undergone various iterations and submissions to HCD. AR 334-37. Resolution No. CC-2207-048 adopted the revised housing element, but it clearly was intended to be submitted to HCD as a draft element revision under section 65585(b)(1). Resolution No. CC-2207-048 adopted HCD's April 12, 2022 suggested changes (AR 338) and did not consider any other HCD findings pursuant to section 65585(e). Nor did Resolution No. CC-2207-048 contain the findings required by section 65585(f)(2) for the City to override HCD. Consequently, the City still needed to submit the revised housing element to HCD for a final compliance determination. §65585(g). The City did so, obtaining HCD's findings of compliance on September 1, 2022, but this occurred after NCD's July 21 2022 preliminary application.

Additionally, the HAA places the burden on the City to prove that its housing element was in compliance with the Housing Element Law at the time of submittal of the preliminary application. §65589.5(i). That burden cannot be satisfied except by "written findings, based upon a preponderance of the evidence in the record." §65589.5(d). The City never made any findings that its housing element substantially complied with the Housing Element Law as of July 5, 2022.

In sum, the procedure necessary for substantial compliance had not been met by the date of NCD's preliminary application.[7] Under the HAA, NCD may invoke the builder's remedy in section

[7] This conclusion is supported by other parts of the Housing Element Law devising a rezoning deadline penalty for late housing element adoption. For an adopted housing element to be timely, sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i) require that a city's housing element be found by HCD to be in substantial compliance with the Housing Element Law. Without such a finding, the city must complete rezoning within a year from the statutory deadline. §§ 65583(c)(1)(A)), §65583.2(c), 65588(e)(4)(C)(i). Additionally, the city's housing element cannot be found to be in substantial compliance until it has completed the rezoning. §65588(e)(4)(C)(iii).

6589.5(d). In doing so, the City still can require NCD's Project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need. §65589.5(f)(1).

2. The Coastal Act

Nothing in the HAA relieves the local agency from complying with, *inter alia*, the Coastal Act. §65589.5(e). Unlike the HAA, NCD bears the burden of proving that the Project complies with the Coastal Act.

The Coastal Act requires each local government within the coastal zone to prepare and submit an LCP to the Coastal Commission. Pub. Res. Code §30500(a). An LCP is comprised of a land use plan, which functions as the general plan for property in the coastal zone, and a local implementation plan, which includes zoning designations, zoning maps, and other implementing actions. Pub. Res. Code §§ 30108.5, 30108.6. Once an LCP is approved, the local government is statutorily delegated the review authority for development within that portion of the coastal zone. Pub. Res. Code §30519(a).

The City has a certified LCP, which includes the implementing Coastal Ordinance intended to "protect and promote the public health, safety, and general welfare" and provide a precise guide for the growth and development of the City in order to carry out the Coastal Act as applied to the City in its LUP. RBMC §10-5.102 (AR 1576). The zoning regulations in the Coastal Ordinance apply to all land within the City's coastal zone except for public streets and rights-of-way. RBMC §10-5.201(a) (AR 1578). No development shall occur, no land shall be used, and no structure shall be constructed, occupied, enlarged, altered, demolished, or moved in any zone except in accordance with the provisions of Chapter 10 of the RBMC. RBMC §10-5.201(b) (AR 1578).

The applicant seeking to develop pursuant to the Coastal Ordinance shall file a completed CDP application with the Department. RBMC §10-5.2210(a)(1) (AR 1828). The CDP application will not be determined to be complete and shall not be filed until and unless the applicable requirements of RBMC section 10-5.2210 are met. RBMC §10-5.2210(c) (AR 1830). The application must include specific information as well as any such other data as may be required to demonstrate that the project is consistent with the finding required under RBMC section 10-5.2218. RBMC §10-5.2210(b)(19) (AR 1829-30). The application shall not be approved unless the decision-making body finds, *inter alia*, that the proposed development is in conformity with the City's LCP. RBMC §10-5.2218(c)(1) (AR 1836).

The City's rejection of NCD's application as incomplete was principally based on its failure to comply with the LCP and Coastal Ordinance. The staff report noted that the HAA expressly states it does not relieve the City from its obligation to comply with the Coastal Act and that the City has in place the LCP and Coastal Ordinance. AR 729. The staff report repeated the Department Director's conclusion that the Project application would have been complete if NCD had filed applications for a general plan amendment, LCP amendment, and zoning amendment. AR 726-27. It

At the appeal hearing, the Department Director argued that the HAA does not excuse the City's obligation to comply with the Coastal Act. AR 1203. The City's CDP application procedures have specific instructions for determining if an application is complete, and it is incomplete if it does not meet all requirements under RBMC section 10-5.2210. AR 1204. This includes a requirement to provide any data required to show the project is consistent with the

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It would not make sense to require HCD approval of a housing element's substantial compliance to avoid late penalties but not for substantial compliance generally.

findings required for approval pursuant to RBMC section 10-5.2218. AR 1204. RBMC section 10-5.2218(c)(1) requires the proposed development to be in conformity with the LCP. AR 1204. NCD's application acknowledged that the Project does not conform to the LCP and Coastal Ordinance because CC-4 zones do not allow residential development. AR 1204-05.

While the City Council's Resolution denying NCD's appeal summarily stated that the City's housing element substantially complies with state law as HCD also has concluded (AR 1174), the bulk of the Resolution's recitals concerned the LCP and Coastal Ordinance requirements. AR 1174. The City has an obligation to ensure compliance with the Coastal Act. AR 1175. Accordingly, the City Council upheld the Department Director's determination that the Project application was incomplete and could not be processed. AR 1175.

NCD argues that the Coastal Act states that coastal access is for people of all income categories. *See* Pub. Res. Code §30001(d) (future developments consistent with the policies of this division are essential to the economic and social well-being of the people of this state). "It is important for the commission to encourage . . . the provision of new affordable housing opportunities for persons of low and moderate income in the coastal zone." Pub. Res. Code §30604(g). The Coastal Act also states that nothing in its provisions "shall exempt local governments from meeting the requirements of state and federal law with respect to providing low- and moderate-income housing...imposed by existing law or any law hereafter enacted. Pub. Res. Code §30007.[8] Pet. Op. Br. at 17-18.

NCD notes that the Coastal Act authorizes local governments to issue CDPs, but the Coastal Commission maintains ultimate authority to ensure local coastal development policies mesh with the overarching state policies of the Coastal Act. Charles A. Pratt Construction Co., Inc. v. California Coastal Com., ("Charles A. Pratt") (2008) 162 Cal.App.4th 1068, 1075. To that end, the HAA and the Coastal Act must be applied in harmony. "Every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." Mejia v. Reed, (2003) 31 Cal.4th 657, 663 (*quoting* Moore v. Panish, (1982) 32 Cal.3d 535, 541). While the HAA does not relieve local jurisdictions from complying with the Coastal Act, it does require them to fashion compliance in a manner that does not render the affordable housing project infeasible absent written findings that project denial is required by state law. *See* §65589.5(d)(3), (e). The City's implicit argument that the Coastal Act somehow overrides the HAA is unsupported. No conclusion that one statute repeals another unless there is no rational basis for harmonizing the conflicting statutes and they are so clearly inconsistent that they cannot operate in unison. Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, (2012) 55 Cal.4th 783, 805. Pet. Op. Br. at 18.

Given the Coastal Act's repeated encouragement of low- and moderate-income housing in the coastal zone, a harmonized reading of the two statutes supports the conclusion that the HAA's builder's remedy is just as necessary in the coastal zone as it is in non-coastal areas. Honoring both is critical to effectuate the legislative intent and purpose of both statutes. *See* Pub. Res. Code, §§ 30007, 30604(g). This conclusion accords with the HAA's urgent policy declarations about California's affordable housing crisis. *See* §65589.5(a)(1)(B), (a)(2)(K). Pet. Op. Br. at 18-19.

NCD contends that the Resolution's conclusory assertion that rejection of the Project application is necessary to fulfill the City's obligation to ensure compliance with the Coastal Act

[8] The State Housing Law also states: "New housing developments constructed within the coastal zone shall, where feasible, provide housing units for person and families of low or moderate income...." §65590(d).

arises solely from the Project's inconsistency with the zoning and land-use designation in the LCP. This inconsistency is overcome because the Project properly invokes the builder's remedy to secure approvals of affordable housing projects regardless of otherwise applicable zoning. It would be against logic, public policy, and basic canons of statutory construction to find an exemption for the coastal zone when no such exemption appears in the HAA or the Coastal Act. Pet. Op. Br. at 19.

As the City argues (Opp. at 15-16), the crux of NCD's position is that the HAA allows NCD to ignore the City's LCP and build a project that is inconsistent with it. NCD's argument is based on a false premise that the Coastal Act requirement that a housing project in the coastal zone -- including low- and moderate-income housing projects – must have a CDP pursuant to the City's certified LCP and Coastal Ordinance is somehow inconsistent with the HAA. It is not.

NCD's Project is in the coastal zone and, as a result, NCD applied for a CDP. The Coastal Act requires all CDPs to conform to the certified LCP. Pub. Res. Code §30604(b). The City's LCP does not permit any residential uses with the Coastal Commercial land use designation or C-4 zone, and NCD admits as much. Nothing in the Coastal Act authorizes the City to issue a CDP that is non-compliant with the LCP and Coastal Ordinance. The Coastal Act does not contemplate that residential uses will occur within the coastal zone on land not designated for residential uses. In fact, it expressly references the HAA, and encourages low- and moderate- income housing to be built in the coastal zone, but only on sites zoned for residential uses as permitted by the LCP and Coastal Ordinance. If the use is authorized, the issuing local agency (or the Commission on appeal) may not reduce the density of low- or moderate-income housing projects if the density sought by applicant is within the permitted density or range of density established by local zoning. Pub. Res. Code §30604(f). In other words, a local jurisdiction is not free to disregard a low- or moderate-income housing project's conformity with its certified LCP and the attendant allowable land uses and zoning in the coastal zone.

The City properly relies on Kalnel Gardens, LLC v. City of Los Angeles, ("Kalnel") (2016) 3 Cal.App.5th 927. There, the court considered the relationship of the Coastal Act to state laws intended to foster housing development. Id. at 935. A developer proposed a project that would demolish an existing three-unit apartment building in the Venice area of Los Angeles and build a total of 15 housing units. Id. The project would include two units designated for very low-income households and qualified under the HAA, Density Bonus Law (§65915), and Mello Act (§65590) to exceed the applicable density restrictions and height limitations. Ibid. The planning commission found that the development did not conform to the Coastal Act due to the project's size, height, bulk, mass, and scale which were incompatible with and harmful to the surrounding neighborhood. Id. at 937. The developer appealed to the city council, which affirmed the denial on the same grounds. Ibid. The developer sued for administrative mandamus and the trial court found that the city violated certain provisions of the HAA but also that the three housing laws (HAA, Density Bonus Law, and Mello Act) were subordinate to the Coastal Act. Id. The trial court also found that substantial evidence supported the city's findings that the project was inconsistent with the certified Venice LUP. Ibid.

On appeal, the primary issue was "whether the Coastal Act in fact takes precedence over the various housing density provisions." Ibid. The appellate court held that the Density Bonus Act and Mello Act are subordinate to the Coastal Act. Id. at 943-46. The court did not reach the issue whether the HAA also is subordinate to the Coastal Act because the developer failed to perfect its appeal on the HAA claim. However, the court stated: "Because the HAA similarly provides that it shall not be construed to relieve local agencies from complying with the Coastal

Act (§65589.5(e)), if we were to reach that issue we would likely conclude that it too was subordinate to the Coastal Act." Id. at 944, n. 9.

Taken together, section 65589.5(e) (HAA does not relief local agency from complying with the Coastal Act),[9] the Coastal Act (Pub. Res. Code §30604), and Kalnel all lead to the conclusion that NCD cannot ignore the City's certified LCP under the auspices of HAA's builder's remedy. As one Councilmember stated during the appeal hearing, "I think I have a pretty good sense that harmonizing doesn't mean ignoring zoning." AR 1265. *See* Opp. at 17.

The court need not find that the HAA is subordinate to the Coastal Act because the two can be harmonized. Within the coastal zone, the LCP and Coastal Ordinance embody state public policy. *See* Charles A. Pratt, *supra,* 162 Cal.App.4th at 1075. If NCD owned property in a residential area of the coastal zone, it could apply for a CDP for a low- or moderate-income housing project. For its Property, NCD was required either to propose a project consistent with the land uses and zoning set forth in the LCP and Coastal Ordinance or propose amendments to change the allowable land uses on the site. Since it did neither, the City Council correctly determined that the Project application was incomplete under the Coastal Act.

NCD makes no attempt to distinguish Kalnel. Instead, it argues that legislative changes were enacted in response to Kalnel which require harmonization of the Density Bonus Law (§65915) and the Coastal Act. AB 2797, signed in September of 2018, enacted changes to the Density Bonus Law to ensure that any density bonus and/or development standard waivers and incentives "shall be permitted in a manner that is consistent" with the Coastal Act. 2018 Cal. Legis. Serv. Ch. 904 (AB 2797). The Legislature recognized the potential chilling effect of Kalnel and took prompt action to address the "decision's implied repeal of the [Density Bonus Law] in the coastal zone" and mandate that the "the two statutes be harmonized so as to achieve the goal of increasing the supply of affordable housing in the coastal zone." 2018 Cal. Legis. Serv. Ch. 904 (AB 2797). Reply at 4-5.

NCD concludes that the HAA similarly should be harmonized with the Coastal Act to facilitate the construction of affordable housing in the coastal zone. To that end, the Legislature enacted SB 167, signed in September of 2017, which made further declarations concerning the housing crisis, specifically that, it "is the policy of the state" that the HAA "should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision, of housing." 2017 Cal. Legis. Serv. Ch. 368 (SB 167); §65589.5(a)(2)(L). In no instance can harmonization mean writing whole sections of the HAA out of existence. Gonzales & Co. v. Department of Alcoholic Bev. Control, (1984) 151 Cal.App.3d 172, 178 (interpretations rendering statutory provisions nugatory are to be avoided). Reply at 5.

Apart from NCD's failure to cite a codified provision for the Density Bonus Law, its argument is a strawman. Nothing in the Coastal Act, the LCP, and the Coastal Ordinance prevents low- and moderate-income housing from being built in the coastal zone. In fact, such housing is encouraged. But it must be based in residential zones within the coastal zone. NCD presents no evidence or argument that this Coastal Act requirement presents a *de facto* ban on low- or moderate-income housing in the City's coastal area.

NCD argues that the City's position is antithetical to the purpose of the builder's remedy, which was expressly enacted to (1) relieve qualifying projects from the usual zoning consistency requirement and (2) restrict local agencies' ability to reject such projects, all as a consequence for failing to timely

[9] As the City argues, the language of section 65589.5(e) has not changed since Kalnel, even as other provisions of the HAA were strengthened to support housing development. Opp. at 16-18.

adopt a legally-compliant housing element. Reply at 4. NCD ignores the fact that the Coastal Act merely prevents NCD from applying the builder's remedy in coastal zone areas not available for residential use. Before the City's housing element was approved by HCD, NCD was free to apply the builder's remedy anywhere in the coastal zone where the LCP and Coastal Ordinance permitted residential housing.

Finally, NCD relies on public policy to argue that nothing in the state housing laws or the Coastal Act supports the gigantic exception that the HAA does not apply in the coastal zone. Such an exception cannot be countenanced due to the glaring public policy problems of a *de facto* privileged zone along the entirety of the State's coast where affordable housing development obligations can be ignored. The Coastal Act provides the opposite. Pub. Res. Code section 30007. Reply at 4.

Public policy does not support NCD's argument. The LCP and Coastal Ordinance embody state public policy in the coastal zone. *See* Charles A. Pratt, *supra,* 162 Cal.App.4th at 1075. As the City argues, NCD's position would mean that any portion of the coastal zone, including areas dedicated to visitor-serving commercial and recreational uses, could be redeveloped to low- and moderate-cost housing without any compliance with Coastal Act policies. This would eviscerate the protections afforded to California's coastal zone. Opp. at 18.[10]

F. Conclusion

The Petition is denied. The City's counsel is ordered to prepare a proposed judgment, serve it on NCD's counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for March ~~13~~ 14, 2024 at 9:30 a.m.

[10] Finally, NCD argues that the City rejected NCD's Project in bad faith and the HAA authorizes the court to order the City in the first instance to approve the Project. §65589.5(k)(1)(A)(ii). Evidence of the City's bad faith includes (a) its summary repudiation of NCD's builder's remedy right; (b) its self-declared, legally unsupported exemption of the City's coastal areas from the housing laws; (c) attempting to disguise a denial of a builder's remedy project as a notice of incomplete application; (d) failing to acknowledge its burden of proof under the HAA; and (e) flouting the fact that the Housing Element was not in compliance at the time of preliminary application submittal. Reply at 11.

Aside from the facts that NCD's claims lack merit and that its bad faith argument may be waived as raised for the first time in reply (*see* Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333), the City is correct that NCD could not be entitled to a writ ordering the City to approve the Project. Opp. at 18-19. A mandamus judgment "will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner." County of Los Angeles v. City of Los Angeles, (2013) 214 Cal.App.4th 643, 654.