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SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

RENE C. DAVIDSON COUNTY COURTHOUSE

SAN FRANCISCO BAY AREA RENTERS FEDERATION, CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, SONIA TRAUSS, and DIEGO AGUILAR-CANABAL, Petitioners, v. BERKELEY CITY COUNCIL, CITY OF BERKELEY and DOES 1-25. Respondents. BARAN STUDIO ARCHITECTURE and CS DEVELOPMENT & CONSTRUCTION INC., Real Parties in Interest.	NO. RG16 834448 ASSIGNED FOR ALL PURPOSES TO HON. KIMBERLY E. COLWELL DEPT. 511 **RESPONDENT CITY OF BERKELEY'S OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT / STIPULATED ORDER** Date: June 20, 2017 Time: 9:00 a.m. Dept: 511 Resv. #: R-1857327

I.

INTRODUCTION

Petitioners' motion presents a legal question of first impression that has significant statewide implications: does the Housing Accountability Act[1] require local agencies to permit the demolition of existing buildings (in this case, housing) in order to clear a site for new housing?

[1] Gov't Code § 65589.5 ("HAA").

II.

STATEMENT OF FACTS

The parties agree on the basic facts.[2] They also agree that:

- the HAA applies to permits for the approval of "housing development projects"; and
- the City did not make the findings required by the HAA to deny a "housing development project".[3]

What the parties disagree about is whether the HAA applies to demolition of existing housing and the appropriate remedy if the Court is inclined to grant this motion.

In brief, in 2016 the City denied an application to demolish an existing house and build three new houses at 1310 Haskell Street, without making any findings concerning the HAA. Petitioners challenged this decision under the HAA and the parties quickly agreed to resolve the case by stipulating to a remand for reconsideration in light of the HAA.[4]

The Berkeley City Council reconsidered the project on February 28, 2017, and again denied it. As petitioners correctly point out, the City Council considered the HAA, but concluded that it did not apply in this case because the project required, as a prerequisite, a discretionary permit to demolish an existing building. (*See* Mot. 1:24-27.)[5] Petitioners argue that as a matter of law, the City Council was incorrect.

III.

DISCUSSION

The City recognizes that the HAA applies to charter cities. (Gov't Code § 65589.5(g).) But even as to matters of law, context is important.

The legal context is that in preempting local governments' land use authority, the HAA is an exception to the rule:

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[2] The City does not object to Petitioners' Request for Judicial Notice (RJN).

[3] Accordingly there is no need to address Petitioners' argument that the City's findings do not satisfy the HAA (Mot. 8-11), and we do not do so.

[4] The City also committed that future staff reports about projects to which the HAA might apply include an analysis of the applicability of the HAA. Petitioners have not contested the City's compliance with this aspect of the settlement.

> The Legislature, in its zoning and planning legislation, has recognized the primacy of local control over land use. It has declared that in enacting zoning laws, "it is its intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." (Gov. Code, § 65800.) "The power of cities and counties to zone land use in accordance with local conditions is well entrenched. [Citations.] The Legislature has specified certain minimum standards for local zoning regulations [citation] but has carefully expressed its intent to retain the maximum degree of local control. . . ." (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89, 2 Cal.Rptr.2d 513, 820 P.2d 1023.)
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> The planning law does not alter this local control over land use matters. In enacting the law, the Legislature found "that the diversity of the state's communities and their residents requires planning agencies and legislative bodies to implement this article *in ways that accommodate local conditions and circumstances, while meeting its minimum requirements.*" (Gov. Code, § 65300.7, italics added.) In other words, the planning law incorporates the state's interest in placing some minimal regulation on what remains essentially locally determined land use decisions. "[T]he Legislature has been sensitive to the fact that planning and zoning in the conventional sense have traditionally been deemed municipal affairs. It has thus made no attempt to deprive local governments . . . of their right to manage and control such matters, but rather has attempted to impinge upon local control only to the limited degree necessary to further legitimate state interests." (*City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 533, 187 Cal.Rptr. 893.)

(*DeVita v. Cty. of Napa* (1995) 9 Cal.4th 763, 782 (emphasis in original).)

The factual context is that, like other desirable places to live in California and the Bay Area, Berkeley has a housing problem, especially an *affordable* housing problem. As a result, Berkeley has long had a number of programs directed at providing and preserving affordable housing. These are described in the accompanying Declaration of Kristen Lee, the City's Manager of Housing Services, but in a nutshell the City expends significant financial and staff resources in preserving and increasing the supply of affordable housing, and has managed to preserve or create hundreds of permanently affordable (*i.e.*, below market rate) dwelling units.[6] Unlike many developing or recently developed communities whose expansion was based on converting agricultural land, Berkeley also has a significant stock of existing housing. Preservation of this existing housing is an

[5] Petitioners refer to, but have not submitted, the Council's resolution. (Mot. 2:13.) For the convenience of the Court and the parties, a true and correct copy of Resolution No. 67,612-N.S.is attached as Exhibit H to the Declaration of Steven Buckley, the City's Land Use Planning Manager.

[6] Lee Decl., ¶ 7; Buckley Decl., ¶¶ 2-4 & 7-10.

important part of its affordable housing program, since such housing tends to be comparatively affordable simply due to its age.[7]

The City also views construction of new housing favorably, and has approved thousands of new units in the last few years.[8] In particular, it is important to note that the City has significantly exceeded its annualized regional housing needs allocation for above-moderate priced housing, especially compared to affordable housing.[9]

Finally, as an older city with a strong association with both the Arts and Crafts movement and notable California architects such as Bernard Maybeck and Julia Morgan, as well as the University of California, Berkeley, the City has a substantial number of historically or architecturally significant buildings, as well as residences and other buildings associated with the founders of the University of California.[10]

For these reasons, to preserve its stock of existing affordable housing and to protect its architectural and historic resources, Berkeley has long had regulatory controls on residential demolitions.[11]

The City's residential demolition controls are found in Chapter 23C.08 of the Berkeley Municipal Code (BMC).[12] The provision applicable to the existing house at 1310 Haskell Street provides in pertinent part that the City may approve a Use Permit for the elimination or demolition of a dwelling unit only if it finds that the elimination of the dwelling unit "would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City." (BMC § 23C.08.010.B.) This finding is not designed or intended to prevent the development of new housing, but to prevent the loss of older, more affordable housing. It also provides the authority for preventing or mitigating the loss of historic resources. (*See* BMC Ch. 3.24, esp. §§ 3.24.240 & 3.24.260.)[13]

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[7] Buckley Decl., Exh. D, H-7, H-8 & H-11; Exh. E, 79 & 83.
[8] Buckley Decl., ¶¶ 2-4 & 7-10.
[9] Buckley Decl., ¶ 7; Exhs. A & B.
[10] Buckley Decl., ¶¶ 13 - 17.
[11] These controls apply only to demolition of residential buildings, *not* commercial buildings.
[12] Buckley Decl., Exh. F.

In sum, the real-world environment in which Berkeley finds itself, and the local regulations it has adopted to deal with its situation in the region, including its demolition controls, form the factual and regulatory context in which this case must be resolved.

A. The HAA Does Not Override Controls on the Demolition of Existing Housing

The heart of Petitioners' case, and the crux of the issue presented for resolution by their motion[14], is their argument that the HAA overcomes any and all prerequisites to development approval, including demolition controls. Notably, however, *the HAA does not mention demolition or demolition controls*, and Petitioners have not argued that it does. Indeed, the HAA's definition of "disapproval" refers to a negative vote of "a proposed housing development project application…" (Gov't Code § 65589.5(g)(5).) It does not refer to votes on permits to allow projects other than housing development, as was the case here.

Petitioners cite *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, as authority for the proposition that the HAA overcomes any and all prerequisites to development approval. (Mot. 7:13-20.) *Honchariw* indeed has some broad language in it, but Petitioners ignore a key difference between it and this case, which compels a more nuanced approach here.

In *Honchariw*, Stanislaus County denied approval for a 33.7 acre subdivision on the ground the site was "not physically suitable" for development because, among other reasons, the local water agency had declined to provide water service and the proposed new lots would therefore have to be served by private wells. (200 Cal.App.4th at 1071 & 1078-79.) The court in *Honchariw* held that this finding under the local subdivision ordinance "does not relieve the County from compliance with section 65589.5(j) if the threshold compliance standards of that statute are met and if the County denies approval for reasons other than compliance with 'applicable, objective general plan and zoning standards and criteria' . . . ." (*Id*. at 1079.)[15]

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[13] Buckley Decl., Exh. G.

[14] The City agrees with Petitioners' implicit position that this is a purely legal issue that can be determined without a full administrative record of the City's decision. The City does not agree, however, that any additional inquiry can be resolved in this motion. Rather, any inquiry into the merits of the City's decision will require preparation and certification of the full record.

However the provision at issue in *Honchariw* was part and parcel of the application for permission to *develop* a housing project,[16] and the Court in that case was not required to resolve, and did not address, the question of whether the HAA applies to permits that do not involve *development* of housing projects but rather destruction of existing housing.[17] *Honchariw* is thus not authority for the proposition that the HAA preempts demolition controls, because it did not consider that issue. "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) To Petitioners, the fact that *Honchariw* did not address the applicability of the HAA demolition controls or the distinct issues implicates makes no difference. They argue that the HAA as construed by *Honchariw* applies broadly, with no exceptions for demolition permits or anything else. But this the HAA's application to demolition controls presents a very different set of policy considerations than those implicated by the rural subdivision in *Honchariw.*

Petitioners' maximal interpretation of *Honchariw* and the HAA is its own *reductio ad abusurdum*. Under their interpretation, the California equivalent of the birthplace of George Washington (let's say Julia Morgan's finest work) could be demolished in order to build, for instance, a single luxury house.[18] What is more, such demolition would be mandated by the HAA and therefore not subject to environmental review under the California Environmental Quality Act (Pub. Res. Code §§ 21000, *et seq*.), because that law does not apply to ministerial actions. (Pub. Res. Code § 21080(b)(1).) As a result, the local agency forced to approve the demolition would not

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[15] The court also held that trial court's determination that the project did not comply with the water service requirement was in error. (*Id*. at 1080.)

[16] *Honchariw* did not involve demolition of housing, since the one existing house on the area to be subdivided was to remain. (*Id*. at 1070-71.)

[17] *Cancun Homeowners Ass'n. v. City of San Juan Capistrano* (1989) 215 Cal.App.3d 1352, cited by Petitioners (Mot. 7:8-12), is irrelevant because it does not involve the HAA at all. But even if it were relevant, it is no help to Petitioners because the grading permit in that case was also an element of the development of the property. (*Id*. at 1354.)

[18] Petitioners are correct in their implication that the existing house at 1301 Haskell Street is not a designated historic resource, although it was built prior to 1925 and the "character-defining façade of the Craftsman-style dwelling has remained largely unaltered." (Pet. RJN, Exh. B, p. COB000159.). However the City's point here is that under their interpretation of the HAA, *it would make no difference if it were*. Is this really what the Legislature meant in adopting the HAA?

even be allowed to require a commemorative plaque, or photo documentation of the resource before demolition.

To take another example, under Petitioners' interpretation, the HAA would *require* a local government to demolish a 100-unit apartment building in order to allow construction of a 10 unit luxury condominium project. Is that really what the Legislature had in mind when it adopted the HAA to solve the state's longstanding shortage of housing?

Or an even more extreme example: does the HAA mandate that a local government approve the demolition of a block of modest and attractive, and perhaps historic, 1920's bungalows in order to make room for a "McMansion"?

Under Petitioners' interpretation, the operative language of the HAA leads to consequences that are manifestly not consonant with its stated purpose and lead to absurd and impractical results that are incompatible with both well-recognized local control over planning and zoning, and state policies for preservation of affordable housing (indeed, any existing housing) and historical and architectural resources.

It is difficult to believe that the Legislature mandated all of this *without saying so*, and indeed, while implicitly limiting the term "disapproval" to negative votes on applications to *develop* property. Rather – given the ambiguity created by its silence on this issue – the HAA "should be accorded a reasonable and commonsense interpretation avoiding absurd or impractical results." (*Dakin v. Dep't of Forestry and Fire Prot.* (1993) 17 Cal.App.4th 681, 686 (citing *Dyna–Med, Inc. v. Fair Emp't & Hous. Com.* (1987) 43 Cal.3d 1379, 1392 and *Webster v. Superior Court* (1988) 46 Cal.3d 338, 344, 250).) In general, it is not to be assumed that the Legislature intended absurd results or to contradict its own policies. In this case, it is simply not believable that the Legislature intended, without saying so, to override all local historic preservation protections throughout the state simply to allow housing to be built, without regard to any relevant circumstances, such as the number of units to be built, their price, or the significance of the historic resource to be demolished. The courts "consider the consequences which would flow from each interpretation and avoid constructions which defy common sense or which might lead to mischief or absurdity. [Citation.] By doing so, we give effect to the legislative intent even though it may be inconsistent with a strict,

literal reading of the statute." (*Friedman v. City of Beverly Hills* (1996) 47 Cal.App.4th 436, 442.) Their "primary goal is to implement the legislative purpose, and, to do so, [they] may refuse to enforce a literal interpretation of the enactment if that interpretation produces an absurd result at odds with the legislative goal." (*Honig v. San Francisco Planning Dep't* (2005) 127 Cal.App.4th 520, 527 (citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735); *People v. Belton* (1979) 23 Cal.3d 516, 526; *Lujan v. Minagar* (2004) 124 Cal.App.4th 1040, 1044.)[19]

The City submits that that is precisely the case here, and that it is necessary for the Court to formulate a practical, commonsense interpretation of the HAA that does not tread on the state's history of home rule more than necessary, or more than the Legislature actually intended.

As *Honchariw* says,

> The statute's purpose was "to assure that local governments did not ignore their own housing development policies and general plans when reviewing housing development proposals."

(200 Cal.App.4th at 1075 (quoting *North Pacifica LLC v. City of Pacifica* (N.D. Cal. 2002) 234 F.Supp.2d 1053).) Berkeley's most important housing development policies are the maintenance and enhancement of its existing residential neighborhoods, preservation of its existing housing stock, and provision of affordable housing. (City RJN, Exhs. C, D, E.) It cannot be said that by protecting an existing house at the expense of two (net) new, much more expensive dwellings, the City was "ignoring" its own housing policies. Quite the contrary – it was making the hard decision *not* to do so.

Accordingly, the motion should be denied.

B. The Remedy Sought By Petitioners Is Inappropriate

As discussed above, the Court should deny Petitioners' motion on the merits. However, in the event it agrees with Petitioners that the HAA preempts demolition controls, it should remand this matter back to the City Council with directions to vacate its decision and reconsider the 1310 Haskell project in light of its ruling.

[19] Petitioners claim that as "remedial legislation", the HAA is to be construed broadly. (Mot. 6:12-17.) But that is not the whole story. Like any other legislation, "remedial" statutes "…are to be scrutinized in the light of the legislative intent. [Citation.] And if possible statutes will be so

The City's normal procedure in that event would be to set this matter for a new public hearing. The Court may of course set a deadline for doing so, but the City notes that the Council will be on recess from July 26 until September 12.

Dated: June 7, 2017.

BERKELEY CITY ATTORNEY'S OFFICE

By: _____

ZACH COWAN, City Attorney
Attorney for Respondents Berkeley City Council and City of Berkeley

construed as to avoid absurd applications. [Citation.]" (*California Grape & Tree Fruit League v. Indus. Welfare Comm'n*, (1969) 268 Cal.App.2d 692, 698.)

PROOF OF SERVICE

I, the undersigned, certify that I am employed in the City of Berkeley, County of Alameda, California; that I am over the age of eighteen years and not a party to the within action; that my business address is 2180 Milvia Street, 4th Floor, Berkeley, California 94704. On this date, I served the following document(s):

RESPONDENT CITY OF BERKELEY'S OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT/STIPULATED ORDER

REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO MOTION TO ENFORCE

DECLARATION OF STEVEN BUCKLEY IN OPPOSITION TO MOTION TO ENFORCE, INCLUDING EXHIBITS A-H

DECLARATION OF KRISTEN LEE IN OPPOSITION TO MOTION TO ENFORCE

[PROPOSED] ORDER DENYING MOTION TO ENFORCE SETTLEMENT AGREEMENT/STIPULATED ORDER

on the parties stated below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

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X : By Overnight Courier - I caused each such envelope to be given to an overnight mail service at Berkeley, California, to be hand delivered to the office of the addressee on the next business day.

X : By Electronic Transmission - I caused each such documents to be transmitted to the email addressee above (CS Development and Baran Studio ONLY)

I declare under penalty of perjury that the foregoing is true and correct. Executed in Berkeley, California, on June 7, 2017.

Joanna K. Rudy