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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF ALAMEDA – UNLIMITED CIVIL JURISDICTION**

SAN FRANCISCO BAY AREA RENTERS FEDERATION, CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, SONJA TRAUSS, and DIEGO AGUILAR-CANABAL,

Petitioners,

vs.

BERKELEY CITY COUNCIL, CITY OF BERKELEY, a municipal corporation, and DOES 1-25,

Respondents.

BARAN STUDIO ARCHITECTURE, a California corporation, and CS DEVELOPMENT & CONSTRUCTION INC, a California corporation,

Real Parties in Interest.

Case No.: RG16834448

**PETITIONERS' REPLY IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT (CCP § 664.6)**

Reservation number 1857327

Date: June 20, 2017
Time: 9:00 a.m.
Dept: 511
Judge: Hon. Kimberly Colwell

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## I. INTRODUCTION

It takes "a fair amount of chutzpah" to violate state law, stipulate to a court order rescinding the violation and compelling compliance with the law, and then repeat the exact same violation three months later. (Harris v. Wachovia Mortg., FSB (2010) 185 Cal.App.4th 1018, 1026)

The City failed to make the findings required by the Housing Accountability Act ("HAA," Gov. Code § 65589.5) prior to voting to deny the "housing development project" at 1310 Haskell Street (the "Project"). The City's action violated this Court's November 10, 2016 order, which rescinded the City's previous vote to deny the Project and mandated compliance with the HAA.

In its opposition brief, the City argues that it was not required to comply with the HAA because the Project cannot be built without demolishing an existing structure at the Project site, and a demolition permit is therefore required for the Project. By the City's logic, the demolition permit is a discretionary approval, and the HAA only applies to "objective general plan and zoning standards and criteria, including design review standards." (Gov. Code § 65589.5(j)(1) (emphasis added))

This position is simply incorrect. The HAA requires approval (or specific findings for disapproval) of "a proposed housing development project [that] complies with applicable, objective general plan and zoning standards and criteria." (Gov. Code § 65589.5) If a project exceeds or otherwise fails to meet applicable, objective standards, then the HAA does not apply. The City, on the other hand, is taking the position that the HAA *only applies to* "objective general plan and zoning standards and criteria." In other words, the City interprets the HAA backwards.

Importantly, the City Attorney advised City Council that the Petitioners' interpretation is correct:

> The City's general plan and zoning ordinance contain "objective general plan and zoning standards and criteria", such as lot development standards and in some cases density or building intensity standards. Section 65589.5(j) does not override these lot development standards; nor does it compel approval of projects

> that require discretionary approvals ***to exceed these standards***, such as reductions in setbacks or additional stories. Rather, it overrides the use of policies like neighborhood compatibility or detriment when a project complies with all applicable lot development standards.

(City Attorney's Memorandum Re: Housing Accountability Act, p. 3, attached as Exh. A to Petitioners' Request for Judicial Notice In Support of Motion (emphasis added))

Unfortunately, City Council disregarded the City Attorney's advice and relied on "policies like neighborhood compatibility or detriment" as an excuse to deny the Project, in violation of the HAA.

## II. ARGUMENT

### A. Honchariw Confirms That The HAA Applies To A "Housing Development Project," Not Merely A Building Permit

Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066 ("Honchariw") is clearly on point and governs, despite the City's argument that Petitioners are maximally interpreting it. In Honchariw, the developer proposed to divide a 33.7-acre parcel into 8 parcels ranging from 0.5 to 5 acres. The project, which was opposed by neighbors, needed several key approvals: 1) subdivision approval; 2) water hookup approval (or exemption); and 3) building approval. The county wanted to disapprove the project and did so by refusing to issue the subdivision approval on the grounds that the builder had not shown that he could hook the units up to a water supply. (Honchariw, supra, 200 Cal.App.4th at 1070-1071, 1080-1081) Indeed, there were a number of issues that had to be resolved before the units could be inhabited. The subdivision approval in Honchariw is akin to the demolition permit in this case. That is, subdivision approval was an ancillary permit, necessary for the project; there is no point to a building permit without a cleared lot.

Even though the HAA does not mention subdivision approval, the Court of Appeal in Honchariw applied the HAA as it was plainly written and required the county to either show the project did not comply with applicable, objective general plan, zoning, and design review standards, make the required HAA findings, or approve the project. (Honchariw, supra, 200 Cal.App.4th at 1080) Nothing in Honchariw stands for the proposition that a standard or

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requirement may be used to disapprove a qualifying project because that standard or requirement is not specifically mentioned in the HAA. Obviously, the HAA does not mention water hookup permits (as required by Stanislaus County Code § 20.52.210) or subdivision approvals. If the City's position were correct, Honchariw would have come out the other way.

As for the City's repeated argument that the permits in Honchariw and Cancun HOA[1] were part of the projects in those cases – but the demolition permit is not part of the Project in this case – that argument makes no sense. The argument seems to be in search of a relevant legal point, which is nowhere to be found. The demolition permit here was only sought as part of, and to enable, the housing development project Berkeley seeks to quash, and was considered as part of the entire application. (Petitioners' opening RJN, Exhs. B-E) Indeed, the City Council denied the demolition permit as part of its consideration of the Project as a whole. That is, the City used the ancillary demolition permit requirement as a 'hook' to justify avoiding the requirements of the HAA. If Real Parties were not seeking to construct a housing development project, and simply wanted to spend a lot of money to build a vacant lot, the City would have a point – the existence of the HAA would not enable them to do so as a matter of right; the HAA only overrides discretionary requirements where the HAA applies. (Cf. Pick v. Cohen (2000) 83 Cal.App.4th Supp. 6, 12-13)

**B. Demolition Permits Are Not Exempt From The HAA's Requirements**

If the legislature had intended to exempt demolition permits from the HAA, it would have said so. Ironically, after making a big deal about not interpreting a statute literally if that would result in an absurdity, the City then interprets the HAA in such a way that any municipality could thwart it simply by requiring a discretionary permit to do anything to the land that is necessary to build the proposed housing and requiring that permit be sought independently of the rest of the project. Here, the HAA states that it does not obviate compliance with certain codes, including CEQA. (Gov. Code § 65589.5(e)) It also does not require compliance with other

---

[1] Cancun Homeowners Ass'n v. City of San Juan Capistrano (1989) 215 Cal.App.3d 1352. Petitioners acknowledge that Cancun HOA is not an HAA case, and it was not cited as an HAA case. It was simply cited to support the position that grading permits are discretionary.



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statutes that would apply absent the HAA nor does it exempt demolition permits. The City's interpretation violates the concept of *expressio unius est exclusio alterius*. "Under that canon of statutory construction, 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed,' absent 'a discernible and contrary legislative intent.'" (People v. Galambos (2002) 104 Cal.App.4th 1147, 1161)

Indeed, there are many things the HAA does not mention. "Legislatures 'likely cannot[ ] anticipate all circumstances in which a general policy must be given specific effect.' [cite] Consequently, most statutes 'are written in general terms and do not undertake to specify all the occasions that they are meant to cover . . . .'" (People v. Bell (2015) 241 Cal.App.4th 315, 344) Instead of focusing on what the HAA does not mention, this Court should focus on what it does mention: if the threshold compliance standards of the HAA are met and if the municipality denies approval for reasons other than compliance with "applicable, objective general plan and zoning standards and criteria, including design review standards, in effect when the application is deemed complete," then the municipality must approve the project or make the required findings. (Honchariw, supra, 200 Cal.App.4th at 1079; Gov. Code § 65589.5(j)) The HAA bars municipalities from denying project approval except under certain circumstances: 1) the project does not comply with certain objective standards; or 2) it does so comply but the municipality can then make the necessary findings under the HAA. Indeed, Honchariw also contains the same "avoid absurdity in interpretation" language Berkeley relies on. It would be absurd to interpret the HAA to allow municipalities to impose a discretionary permit requirement for site preparation – whether demolition, grading, or anything else fertile NIMBY minds might conceive of – and then avoid making HAA findings on the basis that since the discretionary permit is not issued, the HAA does not apply.

**C. The City's Discussion Of Affordable Housing Construction Is Irrelevant**

The HAA applies to below-market ("affordable") housing, as well as market-rate housing. (Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066) In its opposition brief and exhibits, the City devotes extensive discussion to its compliance with regional affordable-housing mandates – but this is entirely irrelevant to the case at hand. In this case, the

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Project is a market-rate housing development project. Compliance with affordable housing mandates falls under a *different* section of the HAA (Gov. Code § 65589.5(d)).

**D. There Is No Conflict Between The HAA And CEQA**

There is no conflict between the HAA and the California Environmental Quality Act ("CEQA"). The City's hypothetical position is plainly erroneous; the HAA does not exempt qualifying projects from CEQA analysis: "Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act . . . ." (Gov. Code § 65589.5(e))

Moreover, CEQA is a procedural law – not substantive. It does not mandate the approval or denial of any project. "The environmental review contemplated by CEQA serves an informational purpose. This review does not impose conditions or mandate how a project should be run. It simply explains the effects of the project, reasonable alternatives, and possible mitigation measures 'so that the public can help guide decision makers about environmental choices.'" (County of Amador v. El Dorado County Water Agency (1999) 76 Cal.App.4th 931, 961, cit. om.)

**E. There Is No Conflict Between The HAA And Historic Preservation**

The City's opposition brief imagines a parade of horribles, including the specter of unrestricted demolition of historical treasures such as "Julia Morgan's finest work." (Oppo at 6) However, such demolition would *not* be "mandated by the HAA." (Id. at 6) To the contrary, objective historic preservation requirements would supersede the HAA per the plain language of HAA section (j)[2]. Moreover, even if preservation standards were not "objective," a city is authorized to impose design review standards and other conditions (such as the preservation of a historically significant façade) that do not amount to a denial of the project application or a reduction of its density. (Gov. Code § 65589.5(j)) In any event, historic preservation is not at

[2] The HAA requires approval (or specific findings for disapproval) only if "a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards." (Gov. Code § 65589.5(j))



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issue in this case. As the parties agree, 1310 Haskell Street "is not a designated historic resource . . ." (Oppo at 6, fn 18) Therefore, the Court does not need to resolve this hypothetical issue.

Similarly, the City's opposition brief imagines the scenario of "demolish[ing] a 100-unit apartment building in order to allow construction of a 10 unit luxury condominium project." (Oppo at 7) In any event, this scenario is also not at issue in this case. To the contrary, 1310 Haskell Street presently contains only one housing unit – vacant and dilapidated – and the Project proposes the construction of three housing units. (ZAB Staff Report, p. 1, attached as Exh. B to Request for Judicial Notice In Support of Opening Brief) Moreover, the City could avoid undesirable outcomes by imposing *objective* demolition standards, such as a requirement that more housing units be constructed than demolished. In fact, the City Attorney agreed with the Petitioners' interpretation of this issue, and he recommended creating objective standards as a means of avoiding the HAA overriding non-objective permit requirements in the future. As he advised the City Council in preparation for the March 28, 2017 hearing:

> A few possible approaches to addressing the potential impacts of Section 65589.5(j) are:
>
> - Amend the General Plan and Zoning Ordinance to adopt numerical density and/or building intensity standards that can be applied on a parcel-by-parcel basis in an easy and predictable manner. These would constitute reliable and understandable "objective general plan and zoning standards" that would establish known maximum densities. This could be done across the board or for specified districts.
> - Devise and adopt "objective, identified written public health or safety standards" applicable to new housing development projects.
> - Adopt "design review standards that are part of 'applicable, objective general plan and zoning standards and criteria".

(City Attorney Memorandum to City Council Re: Housing Accountability Act, p. 3, Exh. A to RJN In Support of Reply Brief)

If it were necessary to resolve these hypothetical issues today (it is not necessary), the issues would be easy to resolve. There are two ways to view ancillary permits that are necessary for the construction of a housing development project, such as demolition permits to clear land for construction. First, ancillary permits for a housing development project could be viewed as

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standards or criteria that are *separate and distinct from* the housing development project. Under this interpretation, the HAA always compels approval of a project if the HAA's conditions are met, even if a city wishes to deny an ancillary permit. This interpretation is consistent with the legislature's goal to increase the supply of housing statewide by enacting the HAA.

Alternatively, ancillary permits could be viewed as *part of* the housing development project. The standards and criteria for granting the ancillary permit should then be treated the same under the HAA as the standards and criteria for the overall housing development project (*i.e.*, it cannot be denied without making specific health, safety, and non-mitigability findings).

The HAA is clear about how this works:

> When a proposed housing development project complies with applicable, **objective** general plan and zoning 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 disapprove the project or to approve it upon the 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 substantial evidence on the record that both of the following conditions exist . . . .

(Gov. Code § 65589.5 (emphasis added))

A housing development project need only comply with "objective" standards and criteria; subjective (*i.e.*, discretionary) standards are disregarded by the HAA. This disregard for discretionary standards is by design: "The change appears to have been intended to strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability') to exempt a proposed housing development project from the reach of subdivision (j)." (Honchariw, supra, 200 Cal.App.4th at 1076 (discussing 1999 amendments to the HAA))

In this case, the City based its denial of a housing development project on subjective, discretionary demolition policies. Given that the Project complied with all "applicable, objective standards," the City was required to either approve the Project or make specific findings. It failed to do so (again). As the City agrees, 1310 Haskell Street does not contain a historic resource.

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**F. The City's Interpretation Would Gut The HAA**

If the City's interpretation were correct, it would be extremely easy to thwart the HAA and avoid mandatory approval of housing development projects. A city need only enact two requirements: 1) a discretionary permit requirement to demolish existing structures, and 2) a discretionary permit requirement to grade vacant land/prepare it for construction. Thereafter, every housing development project application would be subject to one of these two discretionary requirements. Under the City's interpretation, the HAA would therefore *never* apply to a housing development project. This interpretation is patently absurd, and it would render the entire HAA meaningless.[3]

**G. The Remedy Sought By Petitioners Is Specifically Authorized By The HAA**

Government Code Section 65589.5(k)(1) provides as follows:

> "If the court determines that its order or judgment has not been carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of this section are fulfilled, including, but not limited to, an order to vacate the decision of the local agency, in which case the application for the project, as constituted at the time the local agency took the initial action determined to be in violation of this section, along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects, **shall be deemed approved** unless the applicant consents to a different decision or action by the local agency."

(Gov. Code § 65589.5(k)(1) (emphasis added))

This is the second time the City has violated the HAA in denying the 1310 Haskell Street project application without making the required findings. Importantly, the City failed to carry out the Court's order (regarding the City's first HAA violation) within 60 days. Therefore, the Petitioners request that the Court issue "an order to vacate the decision of the local agency, in which case the application for the project . . . shall be deemed approved." (Id.) (The Project applicant could theoretically consent to a different action if it wished. To the best of counsel's

[3] It is worth noting that as vacant land becomes scarcer over time, the demolition permit requirement will apply to a larger and larger percentage of housing development projects.

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knowledge, the Project applicant's only desire is to obtain the requested entitlements and build the Project.)

## III. CONCLUSION

For the foregoing reasons, the motion should be granted.

Date: June 13, 2017

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By: _____

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