Civil No. A159320 and A159658
[*San Mateo County Superior Court Case No. 18-CIV-02105*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
FOURTH DIVISION

CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, ET AL.,

Petitioners and Appellants,

v.

CITY OF SAN MATEO, ET AL.,

Defendants and Respondents;

APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SAN MATEO
Honorable George A. Miram

RESPONDENTS' BRIEF IN RESPONSE TO APPELLANTS' OPENING BRIEF

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Respondents the City of San Mateo, the San Mateo City Council, and the City of San Mateo Planning Commission (collectively, the City) submit the following Brief in response to the Appellants' Opening Brief.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

As a straightforward matter of statutory interpretation, the trial court upheld the San Mateo City Council's decision to deny an application to build an expensive market-rate housing project. The project violated a simple and quantitative stepback rule in the City's mandatory Design Guidelines. The City Attorney advised the City Council about the meaning of the Guideline, as well as about the requirements of the Housing Accountability Act (HAA), Government Code section 65589.5 *et seq*. After hearing from the City Attorney, the City Council, after discussion, denied the project without prejudice, stressing its interest in seeing development on the site, and inviting a quick redesign to address the violation of the design rules. Instead, Appellants filed this lawsuit, thereby substantially delaying the construction of any housing on the site.

The Court need not reach any constitutional issues and should affirm the trial court's decision on statutory interpretation grounds alone. On appeal, constitutional arguments should be addressed only if necessary, and not if the case can be decided on any other ground. (Eisenberg et al., *Cal. Practice Guide: Civil Appeals and Writs* (The Rutter Group 2020) § 8:204 (Eisenberg).) Not only was the trial court absolutely correct in deciding the

statutory interpretation issue in Respondents' favor, but Appellants have waived all constitutional arguments.

Although ordered by the trial court to address the enforceability, i.e., the constitutionality, of a controversial new burden-shifting provision in the HAA (Gov. Code § 65589.5(f)(4)), Appellants entirely failed to do so. The new provision states that if there is substantial evidence that would allow a reasonable person to conclude that a housing project complies with a city's objective standards, then a project is "deemed" to comply. Appellants, in a sweeping and illogical interpretation of the rule, argued that given this provision, it was "absurd" for the City to suggest that the City Council was the final arbiter of code compliance. (Joint Appendix (JA) 1:150.) The trial court, understandably troubled by Appellants' extreme position, ordered supplemental briefing on the enforceability, i.e., the constitutionality, of section 65589.5(f)(4)[1], as interpreted by Appellants. Critically, the trial court did not ask for, and Respondents did not provide, any argument as to the constitutionality of the HAA as a whole. Instead, the trial court focused solely on the unusual new "deeming" provision.

Despite the trial court's orders, Appellants failed to make any constitutional arguments whatsoever. Respondents, in contrast, argued that Appellants' extreme and overbroad reading of section 65589.5(f)(4) led to three constitutional problems: (1) an unlawful delegation of municipal functions to private parties;

[1] All unlabeled statutory references are to the Government Code.

(2) a procedural due process violation; and (3) an infringement upon San Mateo's home rule power as a charter city.

The trial court decided in Respondents' favor. The first ground was that, in exercising its independent judgment, the court agreed with the City's legal interpretation of the design rule because the meaning of the design standard presented a question of law, the trial court, applying the fundamental principle that a "substantial evidence" standard has no relevance to a purely legal question of statutory interpretation, correctly held that section 65589.5(f)(4) did not apply to the court's threshold determination of a specific legal question. In arguing that this was error, Appellants demonstrate profound confusion about the difference between factual and legal questions. It is only after the meaning of a law is settled that the issue of substantial evidence of compliance or non-compliance comes into play. Appellants' view also presents impossible consistency problems. If one applies a substantial evidence standard to the question of a law's meaning, then the law could mean one thing in one case and another thing in a different case, depending upon the strength of the often self-serving "substantial" evidence presented by project proponents.

The trial court, recognizing that planning and zoning are a function of local government under the Constitution's grant of the police power, went on to independently hold that Appellants' interpretation of section 65589.5(f)(4) led to home rule and unlawful delegation problems. Although the trial court briefly referred in passing to the HAA in general, the constitutionality of

the HAA as a whole was never an issue in the case. Rather, the court's holding was restricted to the issues which the court had ordered the parties to brief. Any reference in the Order to the constitutionality of the HAA as a whole is dicta, pure and simple.[2]

Now, on appeal, rather than focusing on the City's valid reasons for denying the Project, Appellants and the Intervenor extensively expound on the state's housing crisis, as well as the constitutionality of the HAA in its entirety. Appellants attempt to place the blame for the housing crisis squarely at the feet of cities like San Mateo, disingenuously ignoring other causes of the housing shortage, such as increased construction costs, misuse of the CEQA litigation process, and the state's abolition of redevelopment financing for affordable housing, which totaled approximately $1 billion per year. [3] They also studiously ignore San Mateo's strong record as a pro-housing city. (MJN Exs. A-F.) Further, and astonishingly, they continue their pattern of waiver from the trial court; they barely touch upon section 65589.5(f)(4) in their constitutional arguments. The failure to meaningfully address a point in the opening brief means that an appellant has waived the argument. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 (*Christoff*); *Stoll v. Shuff* (1994)

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[2] As noted by the Attorney General: "The discussion of the constitutional-law issues, in particular, may have been meant to be just observations, not holdings." (Intervenor's Opening Brief (IOB) 15, fn. 3.)

[3] See pages 19-21, *infra.*

22 Cal.App.4th 22, 25, fn. 1 (*Stoll*) as modified on denial of reh'g (Feb 25, 1994); Eisenberg, *supra*, § 9:7.)

Ironically, in their briefs, Appellants and the Intervenor also misleadingly have taken on the mantle of affordable housing advocacy. This high-end market-rate project at issue had nothing whatsoever to do with affordable housing. As aptly noted by the trial court in denying Appellants' Motion for New Trial:

> There is no showing that low income housing has been affected by the denial of [this project] in any way, shape, or form. (JA 2:704.)

For all of these reasons, Respondents respectfully request that this Court affirm the trial court's decision.

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Factual Background

1. The Developers Apply to Build Ten Spacious Market-Rate Units on a Site Surrounded by Single-Family Homes.

Tony and Aynur Gundogdu (the Developers) applied for a use permit allowing the construction of a ten-unit market-rate development (the Project). In 2006, the City had approved a proposal for a six-unit building on the Project site; that project was never built. (Administrative Record (AR) 574.) For the Project at issue, the Developers sought a use permit allowing the construction of six spacious three-bedroom units, three two-bedroom units, and one one-bedroom unit. (AR 48, 402.) None of the units were proposed to be affordable to low, very low, or moderate income households.

Given Appellants' and the Intervenor's repeated references to the state's affordable housing shortage, it is notable that this Project did not contain any affordable units. Indeed, had the Developers converted just one of the proposed ten units from market-rate to affordable, they could have taken advantage of the state's Density Bonus Law, Government Code section 65915 et seq. Under the Density Bonus Law, a development may be more dense than what the zoning permits, if some of the units are affordable. (Gov. Code § 65915(b).) A project that receives a density bonus can also obtain concessions or waivers of development standards. (Gov. Code § 65915(e), (k).) In this case, the Developers could have obtained a waiver of the design standard that they have challenged in this lawsuit, if they had proposed just one unit of affordable housing—yet they chose not to do so.

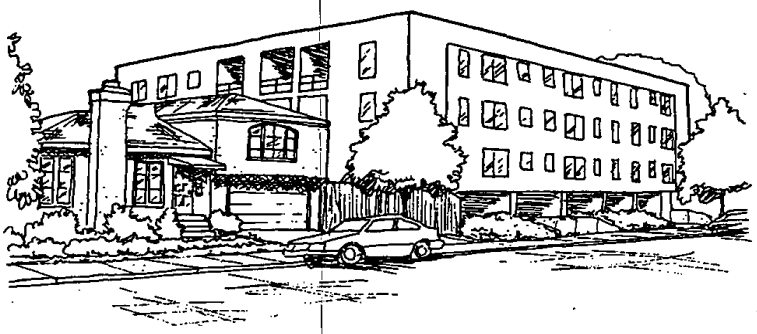
The Project site was bordered by El Camino Real and two small side-streets, West Santa Inez Avenue and Engle Road. (AR 52.) Although zoned R-4, the Project site is adjacent to single-family zones. (AR 39.) The Project, unlike all of the buildings around it, was to be four stories in height. (AR 39.) The plans called for the fourth floor of the Project to be set back, but not the third floor. (AR 61) (bottom elevation along Engle Road (west side.)) This meant that, along Engle Road, a small side street consisting of single-story homes, an impermissible two-story height differential would exist. (AR 31, 51, 61.)

The City requires that multi-family housing projects conform to the mandatory Multi-Family Design Guidelines (the

Guidelines.): "new development on multifamily zoned parcels. . . is required to conform with the following design guidelines…" (AR 6.) One of the Guidelines requires that new projects:

> Avoid changes in building height greater than one story from adjacent structures. *If changes are greater, stepback upper floors to ease the transition."* (AR 10; emphasis added.) Moreover, "[i]f height varies by more than 1 story between buildings, a transition or step in height is *necessary*." (*Ibid.*; emphasis added; hereafter referred to as the "Stepback Requirement".) (AR 10.)

The Stepback Requirement is accompanied by an illustration of the type of height discrepancy that developers must avoid (AR 10):



Not Appropriate:
Single and multi family building where height and width scales are incompatible.

A two-story differential between an existing home and an unbroken wall is exactly the condition illustrated in the "Not Appropriate" drawing, above. Design review consultant Larry Cannon identified the solid three-story wall along the Engle Road elevation as a violation:

> The only area I was able to identify as problematical is the Engle Road elevation which has a two-story height differential between this project and the immediately adjacent single-family home. (Emphasis added.) (AR 147.)

Notably, Mr. Cannon characterized the house next door on Engle Avenue as "immediately adjacent", and consequently, the three-story solid wall was "problematic," given the Stepback Requirement. Although Mr. Cannon stated that in his judgment, trees could help hide, or "mitigate" the violation, he at no time opined that the violation did not exist.

Before a final decision by the City Council, the Planning Commission considered the Project. (AR 529-562; 781-858; 1093-1223.) Major issues were the failure to comply with both the Stepback Requirement, and the City's parking standards. *(Id.)* Although staff initially recommended approval, staff later concluded that the Project violated the Stepback Requirement, and recommended denial. (AR 39,519.) Many speakers at the August 8 hearing expressed concern about the looming size of the building in relation to the one-story homes surrounding the Project. (AR 116.) A number of speakers also stated that the Project's "mechanical lift" parking system did not comply with City standards. (*Id.*)

At the Planning Commission, the developers refused to agree to the proposed conditions of approval suggested by staff. In light of this, and due to the strong opposition to the Project expressed at the hearing, the Planning Commission decided to continue the Project for further consideration at a subsequent meeting. (AR 117.)

Thereafter, staff immediately prepared findings for denial. (AR 521-22.) One of the findings was that the Project violated

the Design Guidelines because the third floor was not stepped back. (AR 522 .)

At the October 10 Planning Commission meeting, one of the commissioners read into the record a letter from Jack Matthews, the developers' architect, requesting that any denial be without prejudice so that the applicants could quickly make changes to the current design to address the City's concerns. (AR 530.) The Planning Commission agreed to this request and denied the application without prejudice, on the understanding that the applicants would submit a revised design stepping back the third floor, among other requested design changes, to quickly obtain Project approval. (AR 406-07; 525-26.)

Unfortunately, the Developers did not revise the Project plans to incorporate the Planning Commission's concerns, in spite of repeated representations that they would do so. Instead, they appealed to the City Council. (AR 128.)

The City Council heard the Project de novo. Staff recommended to that the Project be denied, citing the violation of the Stepback Requirement as a ground for denial. (AR 39.) At the City Council hearing, the City Attorney carefully reminded the Council that the HAA required that any denial or reduction in density of the Project must be based upon a violation of an objective standard or criteria, unless certain public health and safety findings could be made:

> One of the speakers addressed the Housing Accountability Act and I do want to review that with the Council because it is State legislation that significantly limits the Council's decision making discretion on this matter
>
> . . . .

When a proposed housing development project complies with. . . applicable objective general plan zoning and subdivision standards and criteria, including design review standards, but the local agency proposes to disapprove 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, which that language was added by the Legislature in 2017, that both of the following conditions exist. The first, that the housing development project would have a specific adverse impact upon the public health or safety unless the project is disapproved or approved with fewer units.

. . . . What is an objective general plan zoning or subdivision standard and criteria? I believe those such standards are standards that as one speaker said checking the box. An objective standard is checking the box. It's a height standard. It's a setback standard. It's a density standard. It's an FAR requirement, floor area ratio. It is not a standard like compatibility, suitability, fits in well.

. . . .

Now, the applicants' attorney argued that the project complies with all applicable standards and design review standards. <u>And the planning commission did not find that that was the case and they did identify an objective design review standard.</u> The standard was—is quoted, required is the link between the general plan and a particular development application project that requires that development application projects be consistent with the applicable multi-family design guidelines. There is a guideline respecting height and I'll read the key language of this provision.

"Most multi-family neighborhoods in San Mateo are one to four stories in height. When the changes in the height are gradual, the scale is compatible and visually interesting. If height varies by more than one story between buildings, a transition or step in height is necessary." . . . Design objectives under this guideline say "avoid changes in building height greater than one story from adjacent structures. If changes are greater, step back upper floors to ease the transition."

In this case, the Engle house is a single story house and the adjacent part of the project is four stories. So

> you've got more than one story between--in terms of change. My understanding is it does step back at the fourth level but the second and third are not stepped back and it's that standard which I believe is an objective standard, that is the basis of the finding for denial that's in your packet. (Emphasis added.) (AR 483-88.)

The Chief of Planning also opined that the Stepback Requirement was a "quantitative standard that this project does not meet," noting that the City's design consultant had also identified the three-story unbroken wall on Engle Road elevation as problematic. (AR 489-90.) A councilmember stated that in his view the Project did not comply with the Design Guidelines, "with regard to transitions." (AR 497.)

Three of the four councilmembers present stated that they wanted to see housing development on the site and encouraged the Developers to come back quickly with a redesign, as their architect represented they would do in case of a denial. (AR 500-02; 506.)

The City Council voted to deny the Project and adopted findings for denial, which included the failure to comply with the Stepback Requirement as an express ground for denial. (AR 510, 522.) The City Council denied the Project without prejudice, in the expectation that the Developers would submit a revised design with the third floor stepped back, so that the Project could be quickly approved. Instead, Appellants filed this lawsuit. (JA1:3-11.)

2. The City's Multi-Family Design Guidelines are "Applicable Objective General Plan and Zoning Standards and Criteria, Including Design Review Standards," Within the Meaning of the Housing Accountability Act.

New construction in the City is required to conform with the City's Multi-Family Design Guidelines (the Guidelines). The Guidelines specifically address particular building design features, with the goal of regulating building scale, materials, and quality of construction. (AR 3-26.) In enacting the Guidelines, San Mateo undertook the arduous task of objectifying and enumerating specific, required design features for proposed projects related to scale, relationship of a proposed building to the street and adjacent homes, and other architectural features, in order to remove ambiguity and subjective opinion, and to provide objective criteria for determining conformity with the Guidelines. This effort was in exact conformance with the letter and spirit of the HAA and its emphasis on "objective" standards and criteria. The City's General Plan requires compliance with the Guidelines, and the Guidelines are intended to implement a number of General Plan policies. (See, e.g., AR 5.)

The Housing Element of the City's General Plan states that the City must:

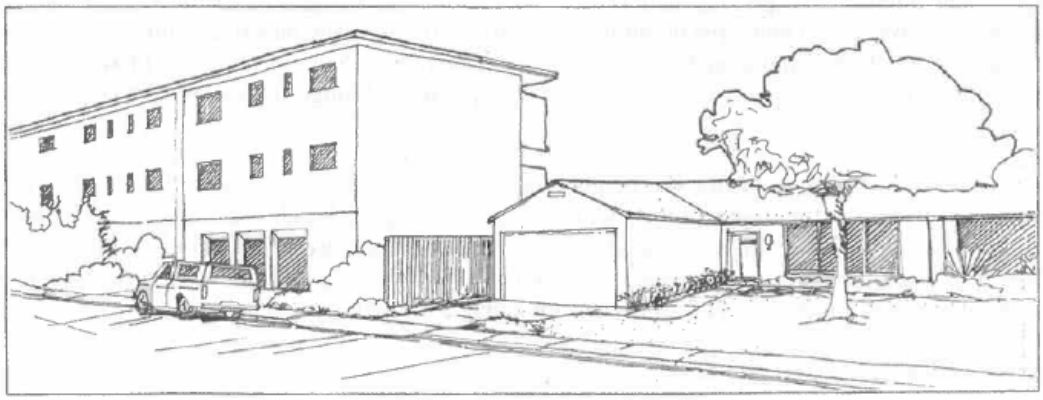
> (4) Review development proposals for conformance to the City's multi-family design guidelines for sites located in areas that contain substantial numbers of single-family homes to achieve projects more in keeping with the design character of single-family dwellings. (JA1:089.) (Emphasis added.)
>
> Likewise, Program H 1.1: Residential Protection states as a policy:

> Consider policy during the design review process with respect to the review of development proposals for conformance with design guidelines. (JA1:090.) (Emphasis added.)

The Stepback Requirement is also tied to the Urban Design Element of the City's General Plan. In discussing "Scale of Buildings", it states:

> When a building maintains the neighborhood by visually breaking up the building face it complements and strengthens the neighborhood. This can be accomplished by stepping the building back. The scale could be further matched by providing a reduced street-wall height along the street frontage to match the neighborhood. (JA1:094.) __ (Emphasis added.)

A picture appears on the same page, illustrating two adjacent buildings with conflicting scales, one single-family, one multi-family, that violate this "Scale of Buildings" principle (JA1:094):



Single and multi-family buildings with conflicting scales

This illustration portrays the exact problem with this Project—a one-story single-family home adjacent to a three-story

solid wall, the scenario that not only the Design Guideline, but also the City's General Plan, states must be avoided.[4]

It cannot seriously be argued that the Project complied with the Stepback Requirement because the Project does not contain design features that "avoid changes in building height greater than one story." Despite a height discrepancy of more than one story between the Project and the house next door on Engle Road, the Project design does not include the *necessary* stepbacks of the third and fourth floors to transition between it and the adjacent one-story home, so that the building heights would not vary "by more than 1 story between the buildings."

Although not specifically mentioned by the City as a ground for denial, the Project also did not comply with the City's objective parking standards, as numerous opponents to the project pointed out at the public hearings. (E.g. AR 444-46; 814-17.) The parking standards are detailed in San Mateo's Zoning Code at Chapter 27.64. (JA 1:103-131.) Zoning Code Section 27.64.120 states that parking dimensions must conform to the City's "Standard Drawings and Specifications." (JA1:110; 126-132.) Together, the Zoning Code and Standard Drawings specify precise dimensions for parking stalls. The Project did not meet the code's requirements. The width requirement for this Project was, for three cars side-by-side, at least 26.5 feet, and for four

[4] The Design Guidelines also complement the City's Zoning ordinance. The Guidelines state: "Zoning Code. The Zoning Code addresses development controls regarding height, bulk, setbacks, parking and various other controls. The design guidelines are intended to complement the Zoning Code to ensure that quality developments are built." (AR 6.)

cars side-by-side, at least 35 feet. (AR 488-89; JA1:72.).) The stalls in the proposed mechanical lift system fell short by several feet; only 23.6 feet were available for three cars, and 33 feet for four cars. (AR 53.)

The City Council did not specifically call out the parking non-compliance as a ground for denial; for that reason, the trial court held that had it disagreed with the City that the Project violated the Stepback Requirement (which it did not), the trial court would have remanded the project for further consideration of the parking issue. (JA2:433.)

Both the City's Stepback Requirement and the City's parking standards are applicable, objective standards within the meaning of the HAA.

B. Procedural History

Appellants filed this action for an alleged violation of the HAA in denying the Project. Appellants filed an Opening Brief, arguing that the Design Guidelines were not "objective general plan or zoning standards or criteria, including design review standards" within the meaning of the HAA. In the trial court, Appellants made the same arguments that they make in this Court: that there was substantial evidence of compliance with objective standards, pointing primarily to staff's early conclusion (which was later changed (AR 42)) that the Project complied with objective standards, the Mayor's minority opinion in favor of the Project, and consultant Larry Cannon's statement that trees "mitigated" the Project's problematic violation of the Stepback Requirement. (JA 1:037-055.)

Respondents argued that compliance with the Design Guidelines was required, and that even under section 65589.5(f)(4)'s new and untested standard of whether there was any substantial evidence in the record that would allow a reasonable person to conclude that the Project complied with objective standards, the City Council's conclusion was correct. (JA1:062-083.) Respondents also argued that appellants' overbroad interpretation of the HAA created severe consistency problems and necessarily involved an unlawful delegation of legislative power, because the City Council's decision-making authority would effectively be delegated to others. (JA1:078-079.) Appellants filed a Reply, which failed to address Respondents' unlawful delegation argument. (JA1:143-57.)

Shortly before the merits hearing, the Court continued the hearing and ordered supplemental briefing on the following issues, among others:

> If either party contends that some aspect of Government Code § 65589.5(f)(4) is or is not enforceable or is or is not applicable to this action, the parties are ordered to provide all authority supporting that contention.
>
> . . . .
>
> If either party contends that a Superior Court ruling on a Petition for Writ of Mandate alleging a violation of Government Code § 65589.5(f)(4) by a government entity must or must not give any deference to the Government entities' findings, the parties are ordered to provide all authority supporting that contention. (JA 1:158-59; emphasis added.)

The Court did not order the parties to address the enforceability of the HAA as a whole, but only section 65589.5(f)(4), which was clearly troubling to the Court.

Appellants, however, entirely failed to address the enforceability of section 65589.5(f)(4), in spite of the Court's Order that they do so. (JA160-179.) Indeed, appellants made none of the constitutional arguments raised either in the Appellants' Opening Brief, or in the Intervenor's Brief. (*Id.*)

In the Supplemental Brief, Respondents argued that section 65589.5(f)(4)'s "deeming" effect was patently not applicable to the purely legal question of the meaning of the City's Stepback Requirement. Further, according to bedrock case law, the City was entitled to deference in the legal interpretation of its own municipal rules. (JA1:225-38.) Respondents also argued that under Appellants' untenable reading of section 65589.5(f)(4) alone, the statute raised constitutional due process, home rule and unlawful delegation concerns. (JA1:238-49.)

At the hearing, Appellants reserved time for rebuttal, yet failed to address the constitutional issues raised in Respondent's Supplemental Brief. In her portion of the oral argument, Respondents' counsel responded only to the statutory interpretation issues raised by Appellants' counsel in his argument. (RT 11-18.)

The court denied the Petition. Exercising its independent judgment, it agreed with the City's decision that the Project failed to satisfy the Stepback Requirement. (AR 2:432-35.) The trial court exercised independent judgment as to the legal interpretation of the Stepback Requirement, while giving the required deference to the City's own legal interpretation. (*Id.*) It held that the Guidelines were objective standards and criteria

within the meaning of the HAA, and that section 65589.5(f)(4) did not apply to the determination of purely legal interpretive issues. The court also held that, given the legal interpretation of the Stepback Requirement, the City's decision to deny the Project did not violate the HAA. (*Ibid.*)

Although the City had presented substantial evidence that the Project did not comply with the parking standards, the Court held that, had it made a finding that the City had violated the HAA in denying the Project, it still would have remanded the action to the City for further consideration of the parking issue. (JA2:433.)

The court repeatedly noted that the Appellants had failed to address the issues that the trial court had ordered the parties to address. (JA2:434-39.) The trial court agreed with the City that, under Appellants' overbroad reading of the provision, section 65589.5(f)(4) violated the City's charter city/home rule authority, and involved an unconstitutional delegation of power. (JA2:436-39.) The trial court did not reach the City's procedural due process argument.

Although the Court briefly referred to the constitutionality of the HAA as a whole, the reference was dicta—and was unnecessary to the court's decision. (*Stockton Theatres, Inc. v. Palermo* (1956) 47 Cal.2d 469, 474.) To be clear, the City has not and does not contend that the HAA as a whole is unconstitutional. Nor did the lower court ever ask the parties to address the constitutionality of the HAA as a whole.

Appellants moved for a new trial and to vacate the Judgment, belatedly raising some enforceability issues. (JA2:479-574.) Their briefing on the constitutional issues of violation of the home rule doctrine and the unlawful delegation of municipal functions was terse at best. In duplicative "briefs" setting forth contentions in numbered paragraphs, Appellants by rote stated "The Court was wrong to find…" listing the court's findings, and then cited cases and statutes, with no substantive legal analysis. (JA 2:479-486, 2:487-94.)

At the January 9, 2020 oral argument on the motions, the trial court asked that the parties address *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, *review denied (Mar. 11, 2020)* – decided after the trial court's Order denying the Petition. In spite of the court's request, Appellants' counsel referred to Appellants' briefing on the case, and stated that she had nothing of substance to add. (RT 30:4-16.)

On January 17, 2020, the trial court denied Appellants' motions for new trial and to vacate the judgment. As relevant here, as to Appellants' contention of irregularity of proceedings because the trial court refused to allow either party to file a reply brief to the ordered supplemental briefing, the trial court pointed to the extensive briefing in the case, the multiple briefs filed by Appellants, and the failure of Appellants to show any prejudice from the fact that neither party was allowed to file a reply brief

to the supplemental briefing ordered. (JA 2:701.) [5] The trial court concluded:

> . . . [Appellants] failed to provide a brief regarding Government Code § 65589.5(f)(4) and its enforceability, despite the court's request. Each party was afforded an opportunity in oral argument to address the issue. The fact that [Appellants] are now unhappy with the depth and breadth with which they addressed the issue is not a basis for a new trial.

(JA 2:701.)

Appellants' "Procedural History" (AOB 26-29) is riddled with inaccuracies and omissions from the trial court proceedings. Appellants failed to respond to the trial court's order to address whether (f)(4) was or was not enforceable. Moreover, Appellants have no excuse for their failure to raise the constitutional issues in the trial court, since they had at least three opportunities to do so, before judgment was entered. And additionally, it is black letter law that statutes are enforceable unless they are declared unconstitutional by a court. (Cal. Const., art. III, § 3.5; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1094-95.) Appellants cannot therefore claim that a trial court order for briefing on the enforceability of a statute did not involve the issue of the constitutionality of that statute.

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[5] Without any citation to authority, Appellants vaguely insinuate that they should have been allowed to file a Reply to Respondents' Supplemental Brief. In the Opening Brief, they fail to provide any argument or authority in support of that idea. They have therefore waived the argument. (*Christoff, supra,* 134 Cal.App.4th at 125; *Stoll, supra,* 22 Cal.App.4th at 25.*)*

C. The Context of California's Housing Shortage

Given Appellants' failure to preserve points for appeal, it is no wonder that they are attempting to shift the focus in this case from the City's legally correct decision to deny the Project, to California's housing crisis as a whole, at the same time painting local government as the villainous cause of the problem. Appellants chastise cities for not "building" housing (AOB 13,18)—yet ***cities do not build housing.*** That is the role of the private sector, i.e., landowners, developers, contractors, banks, architects and other players. No matter how many housing projects cities approve, without property owners willing to sell land, banks willing to lend money, construction workers available to build, and purchasers who can afford to pay for homes, housing will not be built.

To give just one example, despite a need for millions more units, the total of building permits issued statewide *declined* from 113,000 homes in 2018, to 110,000 homes in 2019. (AOB 17.) There is no evidence whatsoever that this decline was due to any reduction in the number of project approvals, or to local laws making housing approvals more difficult. Indeed, exactly the opposite is true—several bills attempting to constrain local government's ability to deny projects, including the bill adopting section 65589.5(f)(4), went into effect on January 1, 2018—yet the number of issued building permits still declined after that date.

In fact, high land costs, high material and labor costs, a construction labor shortage, massive wildfires destroying thousands of homes, state laws such as the California

Environmental Quality Act (CEQA), as well as funding gaps for affordable housing, are all prime contributors to the shortage. Indeed, over the past decade, the per-square-foot costs of constructing multifamily housing has increased twenty-five percent. (Raetz et al., *The Hard Costs of Construction: Recent Trends in Labor and Materials Costs for Apartment Buildings in California* (2020) Terner Center Report, p. 5. [http://ternercenter.berkeley.edu/uploads/Hard_Construction_Costs_March_2020.pdf]) It is well known that labor, materials, and government fees are all higher in California than in the rest of the country; California's labor costs alone are twenty percent higher. California's building codes and standards, imposed by the State, also require more expensive materials and labor. (Taylor, *California's High Housing Costs Causes and Consequences* (2015) Legislative Analyst's Office, p.13. [https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf])[6]

As argued by Appellants' counsel, compliance with CEQA, as well as CEQA litigation challenges, significantly lengthen the time it takes to get a project approved and built. Housing is one of the top three development types most likely to be challenged

[6] A top concern for developers is the shortage of construction workers (Raetz et al, *supra,* p. 9); California lost 365,000 construction workers after the Great Recession and needs another 200,000 workers to construct the housing the state needs. (Scott Littlehale, *Rebuilding California: The Golden State's Housing Workforce Reckoning* (2019) pp. 4-5. [https://www.smartcitiesprevail.org/wp-content/uploads/2019/01/SCP_HousingReport.0118_2.pdf])

with a CEQA lawsuit. To date, the Legislature has been unwilling to make significant changes to the Act, in order to facilitate the construction of more housing. (Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis* (2018) 24, Hastings Envtl. L.J. 21, 26.) Further, with the state electing to dissolve redevelopment agencies in 2012, one billion dollars per year for affordable housing was lost. (Lynch, *Redevelopment 2.0: Existing Laws, Pending Legislation and Legal Theory* (2019) League of California Cities, p. 3. [https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/2019-Annual-Conference/10-2019-AC;-Lynch-Morales-Redevelopment-2-0-Existi.aspx])

In sum, Appellants' myopic and self-serving attempt to blame cities for not building more housing misses the mark. Cities do not ***build*** housing; the private sector does. Tellingly, Appellants have not provided any actual evidence, other than anecdotes and opinions, that local government denials of housing projects have created the housing shortage.

Appellants' misguided attempt to blame cities for the shortage is particularly unfair when it comes to San Mateo. The City has regularly supported and promoted housing development. For example, between 2015 and 2019, the City issued building permits for 1,711 units, including 282 affordable units. (MJN Ex. E (City of San Mateo 2019 Annual Progress Report Tab B.)) The City also recently provided City-owned land in its downtown for an affordable housing project. Indeed, for that project, the City

Council asked the developer to take advantage of the state Density bonus law amendments to increase the number of units by one-third, from 164 to 225 units. (MJN Ex. D (Meeting Minutes, San Mateo City Council Special Meeting, February 3, 2020); Clark, Zachary, *High Praise for New Housing in Downtown San Mateo*, The San Mateo Daily Journal, May 1, 2020. [https://www.smdailyjournal.com/news/local/high-praise-for-new-housing-in-downtown-san-mateo/article_ef17dc6c-8b60-11ea-92ff-87eab97bc94b.html])

The City also adopted an inclusionary, Below Market Rate housing program by voter initiative decades ago; in 2004 the voters also approved an extension to the Below Market Rate Program. (MJN Ex. A.) The ordinance requires that 10 to 15 percent of the units in projects with more than ten units be affordable. The City has also reduced requirements to obtain park impact fee credits for 100 percent affordable housing projects, thereby lowering the cost of constructing affordable housing (MJN Ex. B), and has encouraged greater density of affordable housing. (MJN Exs. C and D.) Further, in 2016 and 2018, the City issued building permits for multiple housing developments, resulting in the construction of more than 900 units. (MJN Ex. E, F; (2019 Housing Element Annual Progress Report, Tab D, Table Row 33.))

These examples demonstrate that the City has a record of approving and providing financial assistance for more housing. Appellants have provided no evidence to the contrary. And, as pointed out above, the City Council, at the applicant's request,

denied the Project without prejudice, stressing its interest in seeing development on the site, on the understanding that the Real Parties would quickly submit a modified design so that the project could be approved. (AR 406-07; 525-26; 530.)

III. STANDARD OF REVIEW

A. The Trial Court Judgment, and Administrative Findings, are Presumed Correct.

The most fundamental principle of appellate review is that the appealed judgment is presumed correct. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608–09; Eisenberg, *supra*, § 8:15.) Further, in a case like this one challenging governmental action, it is also presumed that administrative findings are correct, and that official duty has been regularly performed. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812; Evid. Code § 664.)

The appellate court should adopt all inferences necessary to affirm the judgment. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) If the trial court ruling is correct on any theory, the judgment should be affirmed; appellate courts will not review the reasons for the trial court's decision. (Eisenberg, *supra*, § 8:214; citing *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252.) The Court of Appeal views the record in the light most favorable to respondent; all evidentiary conflicts, and all ambiguities, must be resolved in support of the judgment. (*Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, 308; *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631, as modified Jan. 7, 1999 (*Winograd*).)

B. **Appellants Have Failed to Meet Their Burden of Overcoming the Presumption of Correctness, and Presenting Argument on Each Point Raised**.

An appellant has the burden of overcoming the presumption of correctness, which includes the obligation to present argument and legal authority on each point raised. (*Christoff, supra,* 134 Cal.App.4th at 125.) Failure to do so means that the point has been waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Relatedly, a failure to discuss a point in the opening brief means that the appellant has waived the argument. (*Christoff, supra,* 134 Cal.App.4th at 125; *Stoll, supra,* 22 Cal.App.4th at 25, n. 1.)

Applying this principle to the present case, Appellants have failed to address the trial court's holdings on the constitutionality of section 65589.5(f)(4) in particular, instead irrelevantly focusing their arguments on the constitutionality of the HAA as a whole. In fact, section 65589.5(f)(4) is barely mentioned in the Appellants' Opening Brief. That failure, coupled with the failure to make any constitutional arguments in the trial court, means that Appellants have waived any argument that the court's holdings as to the constitutionality of section 65589.5(f)(4) were incorrect.

C. **A City is Entitled to Deference in the Interpretation of its Own Laws.**

An agency's resolution of issues of law is subject to independent review by the courts, giving deference to an agency's interpretation of its own rules. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 (*Yamaha*).). The deference principle applies equally to a local agency's

interpretation of its own ordinances, including local land use regulations. (*Ocean Park Associates v. Santa Monica Rent Control Bd.,* (2004) 114 Cal.App.4th 1050 ("*Ocean Park*"); *Harrington v. City of Davis* (2017) 16 Cal.App.5th 420 ("*Harrington*").) In this case, the trial court properly gave deference to the City's interpretation of the Stepback Requirement, which the City Attorney analyzed for the City Council at the hearing on the Project. (AR 483-88.)

Appellants wrongly assert that the City sought deference as to its interpretation of state law, not local law. (AOB 44.) This demonstrates a fundamental misunderstanding of Respondents' argument, and of the trial court's holding: that the City was entitled to deference in the interpretation of its own laws. This is particularly true when the interpretation is supported by a reasoned analysis by senior officials, including the City Attorney. (*Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 890–891; *Harrington*, *supra,* 16 Cal.App.5th at 435.)

As the California Supreme Court has explained:

> When an agency is not exercising a discretionary rulemaking power but merely construing a controlling statute, ' "[t]he appropriate mode of review. . .is one in which the judiciary, although taking ultimate responsibility for construction of the statute, accords great weight and respect to the administrative construction.

(*Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 911 (*Boling*).)

While the application of law to undisputed facts ordinarily presents a legal question that is reviewed independently, when

the matter falls within the agency's area of expertise, the deferential standard of a review for an agency's factual findings applies to its legal determinations. (*Id.* at 913.) Moreover, under the "conflicting inference" rule, the appellate court must make all reasonable inferences that may be deduced from the facts in support of the party that prevailed in the trial court:

> Even if the facts were admitted or uncontradicted, the appellate court will not substitute its deductions for the reasonable inferences actually or presumptively drawn by the trial court.

(Eisenberg, *supra,* § 8:60 (citing *Boling, supra,* 5 Cal.5th at 913); *Mah See v. North American Acc. Ins. Co. of Chicago, Ill.* (1923) 190 Cal. 421, 426).)

When reviewing a determination of law, the appellate court gives deference to a local agency's interpretation of its own ordinances:

> Though we independently judge the text of the Municipal Code, we give appropriate respect to a government entity's interpretation of its own laws. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8 [citation omitted].) We are inclined to defer to a government entity's interpretation of its own regulation "since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (*Ibid.*)

(*J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486; accord *Harrington*, *supra,* 16 Cal.App.5th at 434-435.)[7]

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[7] Although the resolutions of questions of law are reviewed de novo, factual findings are reviewed for substantial evidence. (*Winograd*, *supra*, 68 Cal.App.4th at 632.) When there is substantial evidence in support of the court's decision, the

D. This Court Should Refuse to Address Issues Whose Resolution is Not Required for Disposition of the Appeal.

An appellate court generally will not reach issues it does not need to reach in order to resolve the appeal. (*Palermo v. Stockton Theatres,* (1948) 32 Cal.2d 53, 65 "*Palermo*".) This principle is especially favored for appeals raising constitutional issues. Constitutional arguments should be addressed on appeal only if "absolutely necessary", and not if the case can be decided on any other ground. (Eisenberg, *supra,* § *8*:204; *Palermo*, *supra*, 32 Cal.2d at 65.) "We are constrained to avoid constitutional questions where other grounds are available and dispositive." *Id.* at 66. "If reasonably possible, statutory provisions should be interpreted in a manner that avoids serious constitutional questions". (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1197.)

The trial court's initial holding was that, exercising its independent judgment, and giving required deference to the City's interpretation of its own guidelines, the guidelines qualified as applicable, objective general plan and zoning standards and criteria within the meaning of the HAA. The trial court further held that under the City's interpretation of its own guidelines, the Project did not comply with the Stepback Requirement. (JA 2:434-45.) The trial court correctly decided that these issues were issues of law, not fact, to which section

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reviewing court has no power to substitute its own deductions from the evidence. (*Id.* at 874.)

65589.5(f)(4)'s substantial evidence standard of review did not apply. (*Id.*; see *Center for Public Interest Law v. Fair Political Practices Com.* (1989) 210 Cal.App.3d 1476, 1487 "*Center for Public Interest*".) This court should affirm the decision on that ground, without reaching any constitutional issues. Indeed, as noted by the Intervenor, the discussion of the constitutional issues in the trial court's Order is dicta. (IOB 15, n.11.) Not only have appellants waived the constitutional arguments, but it is not necessary to reach any of them.

IV. LEGAL ANALYSIS

A. The Trial Court Correctly Held that the Stepback Requirement is an Objective Design Review Standard within the Meaning of the HAA.

The trial court first held:

> Exercising its independent judgment, and giving [deference] to the city's interpretation of its own Multi-Family Design Guidelines, this court finds that the Multi-Family Design Guidelines qualify as "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 was determined to be complete." (*Honchariw v. County of Stanislaus*, 200 Cal.App.4th at 1066 1081.) This court finds this issue to be an issue of pure law and that the reasonable interpretation/substantial evidence standard provided in Government Code § 65589.5(f)(4) does not apply to this court's determination of this specific legal issue.
>
> Accordingly, the Petition for Writ of Mandate is DENIED because the city did not violate the HAA when it denied approval of the project because the project failed to satisfy the Multi-Family Design Guidelines, as interpreted by the city and confirmed by this court in the exercise of its independent judgment. (JA2:434-45.)

What the HAA prohibits is the denial of a proposed housing development project that "complies with *applicable, objective* general plan, zoning, and subdivision standards and criteria, including design review standards" unless a city can find that the project would have a "specific, adverse impact upon the public health or safety." (65589.5(j)(1)) (emphasis added.) Thus, the Court's inquiry includes: (1) whether the community has adopted a standard that is applicable to the project; (2) whether the standard is "objective"; and (3) if the standard is both applicable and objective, whether the proposed project complies with the standard. In this case the City, as the trial court found, satisfied all of these elements.

1. The Multi-Family Design Guidelines Are "Design Review Standards" as Provided in the Housing Accountability Act and Are Applicable to the Project.

Appellants contend that the Guidelines are not "design review standards" applicable to the project because they are not "part of" the City's general plan, zoning, and subdivision standards and criteria. As a consequence, they may not justify project denial. (AOB 49-50).

In fact, the requirement to comply with the Guidelines is incorporated into both the adopted Housing Element of the City's General Plan:

> Policy H 1.1:
>
> 4. Review development proposals for conformance to the City's multi-family design guidelines for sites located in areas that contain substantial numbers of single-family homes… (JA 1:089.)

and the Urban Design Element of the General Plan, which also incorporates drawings from the Guidelines (JA 1:092-97):

> Policy UD 2.1: **Multi-Family Design**. Ensure that new multi-family developments substantially conform to the City's Multi-family and Small Lot Multi-family Design Guidelines… (JA 1:098.)

The Guidelines certainly are "standards or criteria"; they implement no fewer than six General Plan policies—and were expressly designed to implement those policies. ("The following are General Plan policies addressing multi-family design which these guidelines implement. . ." AR 5.)

Appellants rely on dicta in *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1077 (*Honchariw*), where the Court interpreted subsection (j)(1) to mean that "design review standards" must be "part of" applicable general plan and zoning standards and criteria,[8] although this statement played no part in the Court's resolution of the case. Based on no authority, Appellants expand this language to assert that the City must "adopt" the Guidelines as part of its General Plan or zoning to enforce them under the HAA. (AOB 50.) But here, the Guidelines by reference are fully incorporated into the City's General Plan and are undeniably "criteria, including design review standards" within the meaning of the HAA. For all of these reasons, the trial court was correct in holding that the Design Guidelines were "applicable, objective… standards and criteria" within the meaning of the HAA.

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[8] Section 65589.5(j)(1) was amended in 2017 to add "subdivision" standards and criteria. SB 167, AB 678 and AB 1515 (2017 Cal Stats. ch. 368, 2017 Cal Stats. ch. 373, 2017 Cal Stats. ch. 378).

2. The Multi-Family Design Guidelines are Mandatory and Applicable to the Project.

There is no legitimate dispute that compliance with the Guidelines is mandatory. The Guidelines state that new development on parcels zoned R-4, like the Project, is "*required*" to conform to the Guidelines. (AR 6; emphasis added.) They also state: "The Guidelines represent *minimum criteria* for acceptable development". (AR 7; emphasis added.)

Appellants, however, characterize the Guidelines as "non-binding *guidelines*" because they provide discretion to the City to determine whether or not to *excuse* a project from compliance and because the Urban Design Element policy cited above requires "substantial compliance" with the Guidelines. The ability for decision-makers to exercise any discretion, Appellants argue, converts all objective standards to subjective ones. (AOB 50-52.)

But as the Design Guidelines provide, compliance is mandatory *unless excused*. Appellants' incomplete quotation from the Guidelines implies that the decision-maker's ability to excuse compliance is unconstrained. In fact, a decision-maker may approve projects not in compliance with the Guidelines only if it finds that "unusual characteristics of the project, such as unique site configuration, or unique scale or character of development in the surrounding area, make the use of the guidelines inappropriate" and must further determine that "other solutions to the design issues addressed in the Guidelines better conform with the General Plan." (AR 6.)

Providing an avenue to *excuse* compliance does not convert mandatory guidelines into optional requirements. Both state law

and the City's Municipal Code contain procedures to allow an applicant to request relief from the strict terms of zoning ordinances, with findings similar to those required for a waiver from the Guidelines, yet this does not convert objective zoning requirements to subjective standards (*see* Gov. Code § 65906 (providing for variances from zoning provisions); San Mateo Municipal Code section 27.78.020(a)(1) (variances may be granted only where there are "exceptional or extraordinary circumstances or conditions applicable to the property.")). (JA 1:424.)

This discretionary authority does not somehow transform objective design and zoning standards into subjective ones. Should this Court accept Appellants' view of the ability to excuse compliance, cities would need to make every standard compulsory to have any enforceable standards whatsoever, allowing no relief from a guideline or ordinance provision except a modification of the ordinance or guideline itself.

The HAA is to "be interpreted…to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (§65589.5 (a)(2)(L).) Allowing flexibility to meet individual project needs is most consistent with the approval and provision of housing.

3. The Stepback Requirement is Objective.

At the time the City Council considered this project, the HAA contained no definition of "objective." In 2019, after the City's decision on the Project, the Legislature amended the HAA to incorporate the definition of "objective" from Section 65913.4:

> …involving no personal or subjective judgment by a public official and being uniformly verifiable by

> reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official. (2019 Cal Stats. ch. 665).

Because this definition became effective on January 1, 2020, it was not in effect at the time of the City's decision and did not apply to the City's decision. Under any definition of the term, however, the Stepback Requirement is objective. For example, Black's Law Dictionary (11th ed. 2019) defines "objective" as:

> Objective, *adj.* **1.** Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions, **2.** Without bias or prejudice; disinterested. Cf. SUBJECTIVE.

In the abstract, "height" and "scale" could be subjective concepts (a building is too tall or too big). But when measurable and quantified, both height and scale are objective standards. The Guidelines perform this exact function, providing specific metrics to quantify and measure height and scale. (AR 8-16.)

The Stepback Requirement states clearly:

> If height varies by more than 1 story between buildings, a transition or step in height is necessary. . . . If changes are greater [than one story], stepback upper floors to ease the transition. (AR 10.)

The illustrations appearing on the same page of the Guidelines as the Stepback Requirement remove any doubt that a four-story building with no stepback immediately adjacent to a two-story home results in a two-story height differential—and so is labeled "Not Appropriate." [9] This contrasts with the illustration of a single-story home adjacent to a multi-story building, where the nearest portion of the building has two-

[9] See drawing on page 7, *infra*.

stories, and the third- and fourth-stories are successively stepped back, so there is no height differential greater than one story. (AR 10.) This stepback is exactly what the applicants did not include in the Project design.

Honchariw, *supra*, 200 Cal.App.4th supports Respondents' position, not Appellants'. In *Honchariw*, a County rejected a subdivision proposal because the proposal was "not physically suitable," citing the rule that "all lots of a subdivision shall be connected to a public water system. . . whenever available." (*Id.* at 1078.) The Court concluded that a "physical suitability" standard was too subjective. (*Id.* at 1080.) Yet unlike in *Honchariw*, in this case, the City did not rely upon an abstract concept of "suitability" in denying the Project, but instead pointed to specific, objective, and concrete design standards that the Project violated.

The Stepback Requirement contains no vague reference to "compatibility" or "suitability." Rather, it is a specific numerical standard, and it was repeatedly and specifically cited as the City's reason for denial of the Project. (AR 28-31; 521-22.)

The Appellants misleadingly seek to demonstrate that the Stepback Requirement is subjective by selectively quoting from the Guidelines and completely misstating facts that were not in dispute in the trial court. (AOB 53-56.) For instance, Appellant states that the Project steps back every upper floor, when in fact only the fourth floor is stepped back, citing an elevation that is not the one at issue (AR 947). They cite the Stepback Requirement as applying to "immediately adjacent" structures,

when "immediately" is not used in the Guidelines;[10] and they misstate the height differential (AOB 55; see adjacent homes AR 939.) Appellants also claim there is a 40-foot space between the Project and the adjacent Engle Road home, citing to nothing but opinion as to the distance. (AR 504-05.) Even if there were a 40-foot distance (which is nowhere shown on the plans), the Engle Road home is still considered "adjacent" because it is the house next door—a reasonable meaning of the term, applied by the design consultant who worked on the Project. (AR 144,147.) The plain

They also misleadingly refer to a nearby two-story house, falsely insinuating that this is the adjacent structure at issue, rather than the Engle Road one-story home, that actually created the stepback issue. (AOB 52.)

Appellants claim that there was a "transition" within the meaning of the Guideline, created by trees. Yet the City Council interpreted the Requirement as meaning that the required transition must be a step in height on the building face. This meaning, to which the City is entitled to deference, is supported by the plain language of the Stepback Requirement ("Avoid changes in building height greater than one story from adjacent structures. If changes are greater, step back upper floors to ease the transition." (AR 10; emphasis added.) Significantly, the Guideline states that "floors" plural should be stepped back, for height differentials greater than one story. It also states that the

[10] Although the City's design consultant found the closet single story home to be "immediately adjacent." (AR 144.)

stepback should ease the "transition"—thereby implying that the stepback (not trees) is the required transition. In any case, the City Council, upon its attorney's advice, interpreted the requirement to mean that the required transition must be a stepback, and the trial court upheld that reasonable interpretation. So should this court.[11]

Further, although Appellant suggests that there would have been no dispute had the City adopted a more objective standard (AOB 53), the dispute over the Project's compliance with the City's parking standards demonstrates that it is always possible to create ambiguity. While it is difficult to imagine standards more "objective" than the City's parking standards, which include precise dimensions and diagrams showing the design of spaces (JA 1:103-132), and the Project clearly did not comply with the precise dimensions required (JA 1:071-73), nonetheless, Appellant and even City staff attempted to "interpret" the standard to find compliance. (JA 1:154; AR 822.) If some ambiguity is determined to render a standard "subjective," few local standards will remain.

As explained by the *Honchariw* court:

> The [HAA's] purpose was 'to assure that local governments did not ignore their own housing development policies and general plans when reviewing housing development proposals.' (*Id.* at 1075.)

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[11] Mystifyingly, Appellants insinuate that a garden trellis separate from the building created another stepback. (AOB 54.) Yet the trellis is not part of the building—and in fact, brings the Project even closer to the adjacent single-family home, instead of stepping back.

The trial court was correct to hold that the Stepback Requirement was an objective standard, preserving the City's ability to apply its own housing development policies and general plan in considering this Project.

B. The Trial Court Correctly Held that Respondents Complied with the HAA Because the Project Violated the Stepback Requirement.

The threshold issue in this Court is whether the trial court correctly upheld the City's interpretation of its own Stepback Requirement. This involves a pure question of law. In reaching its decision, the trial court properly gave deference to the City's interpretation of its own laws, and upheld the City Council's decision, on undisputed facts, that the Project did not comply with the Stepback Requirement.

The City Attorney advised the City Council that the Stepback Requirement was an objective standard within the meaning of the HAA, and that the rule required a transition, or step in height, if, as with this Project, the height varied by more than one story between buildings. (AR 487.) The City Attorney advised, and the City Council decided, that the standard meant that when a multiple story building is adjacent to a single-story building, all floors exceeding a height differential of more than one story needed to be stepped back. Appellants have not and cannot seriously contend that, under this interpretation, the Project met the standard. In the trial court, it was entirely undisputed that the fourth floor, but not the third floor, was stepped back. (JA1: 037-55;143-157.) Any belated argument to the contrary in this Court has been waived. Consequently, the

Council denied the Project—because it was indisputable that under any standard of review, the Project did not meet the standard. (AR 28-31.)

In arguing that section 65589.5(f)(4)'s "reverse substantial evidence" standard applies to the legal question of the meaning of the Stepback Requirement, Appellants reveal a fundamental misunderstanding of the difference between a question of a law's meaning, and its application to a particular set of facts. It is hornbook law that a substantial evidence standard of review does not apply to the resolution of legal, as opposed to factual, questions. (*Center for Public Interest Law*, *supra*, 210 Cal.App.3d at 1487 ("The issue is a matter of law, not one of fact; thus the substantial evidence test is not relevant"); *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 108 ("Further, to the extent we are called upon to interpret statutes or rules...such issues involve pure questions of law which we resolve de novo. In light of the foregoing, we find without merit respondent's contention that the trial court's judgment should be reviewed under the substantial evidence test"); *Carlson v. Assessment Appeals Bd. I* (1985) 167 Cal.App.3d 1004, 1009.)

As discussed above, a city's legal interpretation of its own ordinances is given great weight:

> We exercise independent judgment on legal issues, including the interpretation of municipal ordinances. (*Horwitz v. City of Los Angeles*, *supra,* 124 Cal.App.4th at p. 1354.) "Courts interpret municipal ordinances in the same manner and pursuant to the same rules applicable to the interpretation of statutes." (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1087.) That said, a city's interpretation of its own ordinance is "'entitled to deference' in our independent review of the meaning and application of the law." (*Id.* at p. 1091; see

> *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193 ["'an agency's view of the meaning and scope of its own [] ordinance is entitled to great weight unless it is clearly erroneous or unauthorized'"].)

(*Harrington, supra,* 16 Cal.App.5th at 434; see also *Ocean Park Associates*, *supra*, 114 Cal.App.4th at 1062.)

Nothing in the HAA changes the deference due agencies in deciding the meaning of their own rules. *Association of Irritated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1494–95, is instructive. There, this Court considered whether an administrative climate change plan complied with authorizing legislation. (*Id*. at 1491-93.) Citing *Yamaha, supra,* the Court reasoned that when agencies are granted substantial rulemaking power, so long as the administrative rule is within the lawmaking authority of the agency and it is reasonably necessary to implement a statutory purpose, judicial review is "at an end." (*Id.* at 1494.)

This highly deferential standard has been repeatedly applied in land use cases. (*Harrington*, *supra,* 16 Cal.App.5th; *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204 (a hearing officer's interpretation of the City of San Jose's mobile home rent control ordinance is entitled to deference); *Ocean Park, supra,* 114 Cal.App.4th, (Court of Appeal gave deference to City of Santa Monica's interpretation of the City's rent control ordinance).) As recently stated by the Sixth District:

> Though we independently judge the text of the Municipal Code, we give appropriate respect to a government entity's interpretation of its own laws. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 [citation

> omitted].) We are inclined to defer to a government entity's interpretation of its own regulation "since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (*Ibid.*)

(*J. Arthur Properties II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486.)

Deference to a city in interpreting its own land use ordinances is particularly appropriate. In enacting the Planning and Zoning Law, the Legislature has declared that its intention was "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.) As the Fourth District very recently stated, authority for planning and zoning decisions is not delegated to cities and counties by the state, but derives from a local government's "inherent police power"; consequently, planning and zoning laws are intended to provide minimal control, without changing the municipal nature of these decisions. (*Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 704-705 citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782 (planning law "incorporates the state's interest in placing some minimal regulation on what remains essentially locally determined land use decisions."))

Applying these principles to the present case, the City interpreted the Stepback Requirement to mandate that all upper floors of a project should be stepped back, if there is a discrepancy of more than one story between the proposed building and a neighboring one. The City's interpretation should be given

deference. Indeed, it is indisputable that the City's interpretation is a reasonable one, consistent with the provision's plain and simple meaning ("[a]void changes in building height greater than one story from adjacent structures. If changes are greater, stepback upper floors to ease the transition.")

It was only after the meaning of the Stepback Requirement was determined that the issue of whether the Council's decision to deny the project was supported by substantial evidence came into play. And, if the Court, as it should, accepts the City's interpretation of the Stepback Requirement, then, under any substantial evidence standard, whether the (f)(4) or not, there simply is no substantial evidence that the Project complied with the Stepback Requirement because the fact of the matter is, it did not. In the trial court, it was undisputed that only the fourth floor, not the third floor, was stepped back. Appellants never argued to the contrary. (JA 1:037-55; 143-157.)[12]

On review, a court cannot substitute its discretion for that of the agency's. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 48.) Threshold legal issues are reviewed under an independent judgment standard. For questions reviewable under a substantial evidence standard, a reviewing court may not reweigh the evidence, and is bound to consider the facts in the light most favorable to the administrative decision, giving that decision every reasonable inference and resolving all conflicts in

[12] Although unclear, in this Court, Appellants may be attempting to make a new and unsupported factual assertion that the third floor was stepped back. (AOB 55.) Any such baseless claim has been waived.

the decision's favor. (*Amerco Real Estate Co. v. West Sacramento* (2014) 224 Cal.App.4th 778, 786.). This principle applies regardless of the standard of review applicable in the trial court. Nothing in the text of section 65589.5(f)(4), or the legislative history of the statute, changes that principle.

In sum, Appellants are improperly attempting to skip a step and apply (f)(4) to threshold legal issues involving the meaning of the City's own requirements. This is not only wrong, but would lead to mass confusion in the form of vastly different interpretations of the same rule, depending on the strength or weakness of the "substantial" evidence introduced in particular cases. Even assuming that (f)(4) is enforceable, it can only come into play when evaluating findings about a particular project, after the legal meaning of the applicable standards is settled.

C. This Court Need Not Reach Any Constitutional Issues in Affirming the Trial Court's Decision.

1. Appellants Have Waived All Constitutional Arguments.

Respondents respectfully request that this Court affirm on statutory interpretation grounds, and apply the fundamental principle of appellate review that constitutional issues should be avoided if a case can be decided on any other ground. (*Palermo, supra,* 32 Cal.2d at 66.) This is particularly true here, because Appellants have waived all constitutional arguments. Despite having multiple opportunities to address the enforceability of section 65589.5(f)(4) in the trial court, Appellants steadfastly refused to do so. As the trial court correctly concluded in the Order denying the post-trial motions:

> Furthermore, [Appellants] failed to provide a brief regarding Government Code § 65589.5(f)(4) and its enforceability, despite the court's request. Each party was afforded an opportunity in oral argument to address the issue. The fact that [Appellants] are now unhappy with the depth and breadth with which they addressed the issue is not a basis for a new trial.

(JA 1:701.)

Not only did Appellants fail to make any arguments as to the constitutionality of (f)(4) in the trial court, but they have also failed to make such arguments in the Opening Brief in this Court, instead irrelevantly focusing on the constitutionality of the HAA as a whole. Appellants there waived the right to claim that the trial court erred in its holdings that, as applied to the facts of this case, section 65589.5(f)(4) violates procedural due process and the home rule doctrine, and constitutes an unlawful delegation of municipal functions. Moreover, for the reasons discussed below, this court should not exercise its discretion to consider these issues, under any of the limited exceptions to the waiver rule.

2. Appellants Waived the Claim of Error to Challenge the Trial Court's Rulings on the Unenforceability of Subsection (f)(4) on Constitutional Grounds.

In the trial court, Appellants failed to provide a brief or any oral argument about the enforceability of section (f)(4), including on constitutional grounds. They have continued the pattern of waiver by barely addressing any of the trial court's holdings on the constitutionality of section 65589.5(f)(4) in particular. Instead, they focus on the constitutionality of the HAA as a whole—which has never been an issue in the case. Because, in this Court and in the court below, Appellants never address the

constitutionality of the new and untested burden-shifting provision contained in (f)(4), they have waived any challenge to the trial court's rulings on this issue.

"Appellants normally cannot assert error for which they bear some responsibility: They … may be held to have *waived* a claim of error by affirmative conduct or inaction." (Eisenberg, *supra,* §§ *8*:244, 8:249 ("Appellants may be held to have *waived* a claim of error either by affirmative conduct or by failure to take proper steps in the trial court to avoid or cure the error."); *Id.* § 8:264, ("A claim of error may also be waived through *inaction* which prevented the trial court from avoiding or curing the error.") (emphasis in original.)) Appellants' *inaction,* i.e., their failure to address the enforceability of (f)(4) on any grounds in the trial court and in this Court, constitutes a forfeiture of any claim of error in the Court of Appeal. Indeed, "inaction" is this case is an understatement – Appellants ignored a direct order from the trial court to brief the issue of enforceability of Subsection (f)(4) and did not argue the issue at the hearing on the merits. Under these authorities, and for the reasons discussed below, this Court should hold that Appellants have waived any claim of error to challenge the trial court's rulings on the unenforceability of Subsection (f)(4) on constitutional grounds.

First, the waiver/forfeiture rule applies in all civil and criminal proceedings and is designed to deter gamesmanship. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal, as appellate courts "are

loath to reverse a judgment" on such new theories on appeal, as unfair bait and switch. (See *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) Appellants' arguments in its Opening Brief constitute new theories, which Respondents had no opportunity to rebut in the trial court. Appellants should not be permitted this second bite at the apple, especially when the trial court directly ordered the parties to brief the enforceability issue in supplemental briefs. (*Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 961 (unfair to permit "second chance" to one party akin to dealing itself "a hole card to be disclosed only if he loses").)

Second, the general rule applicable in civil cases is that a constitutional question must be raised at the earliest opportunity, or it will be considered waived. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394, superseded by statute on other grounds (*Hale*); *Jenner v. City Council* (1958) 164 Cal.App.2d 490, 498 (*Jenner*).) Appellants failed to raise the enforceability of Subsection (f)(4) on the first opportunity (*i.e.*, in response to Respondent's argument in its first brief that Appellants' overbroad position would constitute an unlawful delegation of municipal powers), on the second opportunity (*i.e.*, in their supplemental brief, despite the trial court's express order for briefing on the issue), on the third opportunity (*i.e.*, at oral argument on the merits), as well as on their fourth opportunity

(*i.e.*, the Appellants' Opening Brief.) No further chances should be permitted.[13]

Third, this Court should follow the "fundamental and longstanding principle of judicial restraint" that "'we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us.'" (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486, quoting *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230.) Because these new constitutional issues are not essential to the Court's decision, this case should be decided solely on statutory grounds.

For all these reasons, Respondents respectfully submit that this Court should hold that Appellants waived the claim of error to challenge the trial court's rulings on the unenforceability of subsection (f)(4) on constitutional grounds.

3. This Court Should Not Exercise Its Discretion to Consider Waived Issues.

A constitutional question must be raised at the earliest opportunity, or it will be considered waived. (*Jenner, supra*, 164 Cal.App.2d at 498.) Appellate courts have discretion, however, to consider an issue waived by a party in the trial court, where the

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[13] Appellants' belated argument in the post-trial motions that section (f)(4) was enforceable as constitutional (bereft of substantive legal analysis in the motion briefs and then not addressed in oral argument despite the trial court's explicit request for argument) do not revive those issues for appeal where, as here, the trial court denied the post-trial motions for new trial and to vacate the judgment. (*Neal v. Montgomery Elevator Co.* (1992) 7 Cal.App.4th 1194, 1198.)

issue presents a pure question of law on undisputed evidence, or involves a matter affecting the public interest or administration of justice. (Eisenberg, *supra*, § 8:272; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316-17 (*Brown*); *Hale*, 22 Cal.3d at 394.) But courts are loath to exercise that discretion to reverse a judgment on grounds that the opposing party did not have the opportunity to argue, and the trial court did not have an opportunity to consider. (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 ("*JRS Products*"), citing to *Brown, supra,* 74 Cal.App.4th.)

"Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too burdened to retry cases on theories that could have been raised earlier." (*JRS Products, supra*, 115 Cal.App.4th at 178.) Respondents respectfully submit that this Court should not exercise its discretion to consider Appellants' belatedly raised constitutional contentions, because none of these exceptions apply here.

Significantly, Appellants' and the Intervenor's contentions rely on new evidence and authorities not raised in the trial court, namely extensive factual evidence about the state's housing crisis, never introduced in the trial court. The existence of new factual evidence and arguments based on that evidence prevents Appellants from raising its contentions on constitutional issues for the first time on appeal. (*McDonald's Corp. v. Board of Supervisors* (1998) 63 Cal.App.4th 612, 618.)

In this regard, as the trial court held in its order denying Appellants' post-trial motions, Appellants made no showing that Respondent's denial of the project had any effect on the number of residential housing units that could be constructed on the property:

> However, there has been no showing that the housing at issue in this case has been prohibited, nor is there a showing that low income housing is affected. The units in question are to be sold at market-rate. There is no showing that the City has allowed fewer units than that for which the property is zoned. There is no showing that the denial of the plan will limit the number of units available for sale on the property. There is no showing that low income housing has been affected by the denial of the plan in any way, shape, or form. (JA 2:703-704.)

Even if the Court finds that Appellants' new arguments raised pure issues of law, the Court is not required to apply this exception; rather, whether to do so is within the court's discretion. "Merely because an issue is one of law, does not give a party license to raise it for the first time on appeal ... Whether an appellate court will entertain a belatedly raised legal issue always rests within the court's discretion." (*Farrar v. Direct Commerce, Inc.* (2017) 9 CA 5th 1257, 1275.) This Court should exercise this discretion and refuse to consider Appellants' belatedly raised constitutional contentions. This is especially true here, where the Appellants' Opening Brief raises entirely new issues the Appellants never raised in the trial court.

Finally, although the creation of affordable housing is an important public policy issue, this case does not involve affordable housing. The Project contemplated the construction of ten market-rate residential units. There was no showing that

Appellants could not construct ten residential units on the site, and, there was no showing that Respondents' zoning restricted the number of units that could be constructed on the site to less than ten. Rather, Appellants appear to be contending that the HAA mandated that Respondents approve the Project, solely because Appellants contend that the Project complied with the Guidelines. But there has been no showing that complying with the guidelines would make a ten-unit project infeasible, or even add to the cost of the Project. Consequently, there are no "important issue of public policy" implicated here.

Appellants waived the enforceability contentions on constitutional grounds by failing to obey the trial court's express order to brief those issues, and by failing to argue those issues at the hearing. In the Opening Brief, they have failed to address the constitutionality of section 65589.5(f)(4) in particular. Failure to make an argument in the Opening Brief means that the point is waived. (*Christoff,* 134 Cal.App.4th at 125; *Stoll, supra,* 22 Cal.App.4th at 25, fn. 1.) Respondents respectfully submit that this Court should decline to exercise its discretion to consider the constitutional issues that Appellants have entirely failed to raise in this Court, and in the trial court.

D. If the Court is Inclined to Reach any Constitutional Issues, It Should Hold that Appellants' Extreme Interpretation of Section 65589.5(f)(4) Violates the California Constitution.

The City's constitutional arguments are set forth in detail in its Brief filed in response to the Intervenor's Opening Brief. For brevity's sake, they will not be repeated here. In considering

the constitutionality of section 65589.5(f)(4), it is critical to understand the effect of "deeming" a project consistent with objective local standards. Once it is determined that a project is consistent, then the project is effectively approved. If a project is deemed consistent with city standards, the only way a project may be denied is if the project would have a specific, adverse impact upon the public health or safety, which impact cannot be satisfactorily mitigated—an extremely difficult showing to make. (Section 65589.5(j)(1)(A-B).) Thus, the use of the word "deemed" in 65589.5 (f)(4) arguably renders any local government review a useless exercise. Unusually, and in violation of procedural due process, the section seems to require a finding of consistency by operation of law, rather than by setting forth a standard of review for a local agency to apply is considering a project. Black's Law Dictionary defines "deem" as:

> …to treat (something) as if (1) it were really something else; or (2) it has qualities that it does not have.

Black's quotes G.C. Thornton, "Legislative Drafting 99" (1996) Bloomsbury:

> "Deem" has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by deeming something to be what it is not or negatively by deeming something not to be what it is. . .All other uses of the word should be avoided…. "Deeming" creates an artificiality and artificiality should not be resorted to if it can be avoided.

As the trial court held, under the interpretation of (f)(4) urged by Appellants in the trial court, "deeming" a market rate

housing project consistent with local standards by operation of law infringes upon the home rule powers of a charter city like San Mateo. It also unlawfully delegates the core decisionmaking function of the elected city council to others. And, for all of the reasons set forth in the companion Brief, (f)(4), as interpreted by the Appellants and the Intervenor, violates procedural due process because it makes the governmental hearing on the project a meaningless exercise; its outcome has been predetermined. For these reasons, if the court is inclined to reach the constitutional issues, it should uphold the trial court's decision that Appellants' extreme interpretation of (f)(4) violates home rule, and involves an unlawful delegation of municipal functions, as well as infringes upon the procedural rights of neighboring property owners.

E. If a Writ of Mandate Should Issue, the Appropriate Remedy is and Order Compelling Compliance with the HAA.

If, despite all of the above, this Court decides that the City's reliance upon the Stepback Requirement violated the HAA, then the appropriate remedy is an order remanding the matter for further consideration. The City would then reconsider the Project and determine whether it complied with all relevant standards and criteria, including the parking ordinance. Petitioners' assertions to the contrary, there is no authority, either within or outside the HAA, that would preclude the City from considering the Project under all objective standards and criteria, including the parking ordinance. The overwhelming weight of authority is that a local government is not estopped

from relying upon applicable land use requirements that it may have missed in an earlier review of a proposed project. (E.g. *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321-322.) Finally, there can be no doubt that the parking width requirement is a clearcut, numerical objective standard. Put simply, the Project as currently designed does not comply with the standard.

Finally, if the Court were to order a remand, the City would be required to evaluate the Project once again under CEQA. Critically, the HAA states on its face that nothing in it should be interpreted to interfere in any way with the CEQA process:

> [Nothing]. . . 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 (Division 13 (commencing with Section 21000 of the Public Resources Code). (Section 65589.5(e))

(See generally *Schellinger Bros. v. City of Sebastopol* (2009) 179 Cal.App.4th 1245.) This is another reason that an order of approval is not available; it is possible that further CEQA review could result in required changes to the Project.

V. CONCLUSION

For all of these reasons, Respondents respectfully request that this Court affirm the trial court's decision.

DATED: December 2, 2020 GOLDFARB & LIPMAN LLP

By: /s/
DOLORES BASTIAN DALTON
Attorney for Respondents

CERTIFICATE OF CONFORMITY

In accordance with this Court's order under Rule 8.204(c)(5) of the California Rules of Court, I certify under penalty of perjury that the Brief of Respondents City of San Mateo, San Mateo City Council and City of San Mateo Planning Commission does not exceed 14,000 words, including footnotes and uses a 13-point Century Schoolbook font, exclusive of tables of contents and authorities, the cover page, the signature blocks and this Certificate. According to the word count function on the word processing program I used, this brief contains 13,403 words, exclusive of tables of contents and authorities, the cover page, the signature block and this certificate.

Executed on December 2, 2020, at Forestville, California.

/s/
DOLORES BASTIAN DALTON

CERTIFICATE OF SERVICE

San Francisco Bay Area Renters Federation v. City of San Mateo
Court of Appeal Case No. A159320 (Consolidated with A159658)
(San Mateo Superior Court Case No.: 18-CIV-02105)

I, Konni S. Stalica, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. My business email address is kstalica@goldfarblipman.com. On December 2, 2020, I served the document(s) described as: **RESPONDENTS' BRIEF IN RESPONSE TO APPELLANTS' OPENING BRIEF** on the interested party(ies) in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **BY MAIL: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

☒ BY ELECTRONIC SERVICE: I caused the above-listed document(s) to be served electronically by:

☒ Sending it/them to the email address(es) listed in this Proof of Service either as an attachment OR as a clickable link to an online file-hosting folder controlled by Goldfarb & Lipman that contains the document(s).

☒ Sending it/them electronically to the above-named parties using the email address(es) listed in this Proof of Service, via electronic filing and service provider TRUEFILING, which has been approved by the court to file and transmit the documents to opposing parties.

☒ [State] I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 2, 2020, at Martinez, California.

Konni S. Stalica

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