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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

CALIFORNIA RENTERS LEGAL ADVOCACY & EDUCATION FUND and THDT INVESTMENT, INC.,

Petitioners,

v.

CITY OF HUNTINGTON BEACH,

Respondent.

Case No. 30-2020-01140855-CU-WM-CJC

REPLY IN SUPPORT OF MOTION TO ISSUE WRIT OF MANDATE

Judge: Hon. Deborah Servino
Date: June 4, 2021
Time: 10:00 a.m.
Dept.: C21

ASSIGNED FOR ALL PURPOSES TO: HON. DEBORAH SERVINO DEPARTMENT C21

Reservation No.: 73478429

Action Filed: May 26, 2020

(Brief filed concurrently here and in Case No. 30-2019-01107760-CU-WM-CJC.)

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page

I. INTRODUCTION[1]

The City's Opposition brief fails—in fact, it barely even tries—to prove that the City's denial of THDT's Project was lawful under the Housing Accountability Act ("HAA"), or to counter any of the substantive arguments in Petitioners' opening brief. The City's failure is fatal to its case because the City bears the burden of proof here. Gov. Code §§ 65589.6 ("[T]he city . . . shall bear the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5.") The City dedicates only 3 pages of its 26-page Opposition to defending its purported health and safety reasons for rejecting petitioner THDT's Project. Nowhere in those 3 pages or anywhere else does it cite any objective, written health and safety standards that the Project fails to meet (as the HAA requires), or provide any other lawful basis for rejecting it.

Instead of meaningfully attempting to meet its burden under the HAA, the City focuses on two diversions that it hopes will distract from its failure to meet its burden. First, the City argues for an extraordinary form of deference to its decision to deny the Project, erroneously citing case law regarding ordinary writ actions against local agencies. This is not an ordinary writ action; it is an HAA case. The HAA provides drastically different standards of review from ordinary writ actions, with much less deference to local agency decisions. The HAA was deliberately designed to reverse the traditional deferential standard of review and make it harder for cities to reject housing projects like this one.

Second, the City argues that one provision of the HAA, subdivision (f)(4) of Government Code Section 65589.5, is unconstitutional. Subdivision (f)(4) provides that a project must be considered consistent with a city's applicable objective development standards if there is substantial evidence that would allow a reasonable person to conclude that the project is consistent with those standards. However, subdivision (f)(4) is totally immaterial to the outcome of this case. Petitioners' opening brief only discussed this provision for a single page as an argument in the *alternative*. Subdivision (f)(4) is irrelevant because Petitioners don't even need subdivision

[1] Consistent with the Court's February 26, 2021 Minute Order, this Brief is being filed concurrently in Case Nos. 30-2019-01107760-CU-WM-CJC (the "Californians Matter") and 30-2020-01140855-CU-WM-CJC (the "CaRLA Matter"), which have been ordered related. The parties are filing in their respective roles in each case.

(f)(4)'s generous standard of review to prevail in this case. The City has not identified a single applicable, objective development standard that this project fails to meet, so there's no need to consider what a "reasonable person" would think. In any event, under subdivision (j)(2) of the HAA, it is far too late for the City to raise alleged inconsistencies with its development standards.

Nevertheless, subdivision (f)(4) is not unconstitutional. All of the City's constitutional arguments rest on a blatant mischaracterization of subdivision (f)(4). The Opposition argues repeatedly that subdivision (f)(4) deprives the City of the power to meaningfully review projects once a reasonable person could consider the project compliant with all applicable, objective standards. But that is untrue. Even if a project is deemed compliant under subdivision (f)(4), the city retains the power to deny or condition the project if it can prove by a preponderance of the evidence that the project has a significant, unavoidable health and safety impact. In addition, even if an applicant presents substantial evidence that would lead a reasonable person to consider a project compliant, subdivision (f)(4) permits cities to rebut that evidence with evidence to the contrary, and the city can still deny the project if the record as a whole demonstrates that no reasonable person would consider the project compliant. Subdivision (f)(4) is, in other words, simply a standard of review that places a stringent burden of proof on the City, and in that respect it is similar to many other legislatively-established standards of review that courts have upheld.

In any event, even if the Court defers to all of the City's factual findings and declines to apply subdivision (f)(4) of the HAA, the City cannot overcome one basic problem: it simply has not identified any legal justification for rejecting the Project consistent with the requirements of the HAA. The Petitions should be granted and the Court should order approval of the Project.

II. STANDARD OF REVIEW: THE HAA PROVIDES DIFFERENT STANDARDS OF REVIEW AND BURDENS OF PROOF THAN THOSE THAT APPLY IN ORDINARY WRIT LITIGATION

Throughout its Opposition, the City argues that its decision is entitled to various forms of deference, and the Petitions should be denied for that reason. The City's argument erroneously assumes that this case is governed by the standards of review that apply in certain ordinary writ actions, which are deferential towards local administrative decisions. But this is not an ordinary writ proceeding, it is a case brought under the Housing Accountability Act. The HAA

intentionally reverses the deferential standard of review applicable in ordinary writ cases and applies a standard of review that is much more favorable to *petitioners*. Gov. Code §§ 65589.5(j)(1); 65589.6. a The law does not require the court to presume the correctness of the City's action or draw any inferences in its favor. To the contrary, the City bears the burden of proof in this case, and has not met it.

More specifically, the City argues that "[c]ourts presume that administrative decisions are correct and that City Council regularly performed its official duty," citing three cases involving ordinary writ actions. Opp. at 10. One of these cases, *Clary v. City of Crescent City*, 11 Cal. App. 5th 274 (2017), explains that the petitioner in a typical writ case "ha[s] the burden to demonstrate that the City Council's decision was invalid and should be set aside, because we presume that the City Council regularly performed its official duty." 11 Cal. App. 5th at 285. In an HAA case, however, the City bears the burden of proving that its decision met the standards in the HAA. Gov. Code § 65589.6. Because the City bears the burden of proof, the City's decision is not entitled to a presumption of correctness. Instead, the City must affirmatively prove it was correct.

The City also makes the extraordinary argument that the Court must resolve all evidentiary conflicts and draw all inferences in its favor, that the Court cannot substitute its discretion for the City's, and that the Court may not reweigh evidence. Opp. at 10. For these propositions, the City cites a string of cases involving writ actions governed by the "substantial evidence" standard of review, including one depublished case.[2] Without citation, the City argues that "[w]hile the HAA requires local agencies to support a denial of a housing project with support by a preponderance of the evidence, the local agency is still entitled to" these presumptions. Opp. at 10-11.

Not so. These presumptions only apply in writ actions governed by the "substantial evidence" standard of review, and they derive from the extraordinarily deferential nature of that standard of review. *Amerco Real Estate Co. v. City of W. Sacramento,* 224 Cal.App.4th at 786 (2014) ("Under the substantial evidence standard of review . . . [the court] may not reweigh the evidence, and is bound to consider the facts in the light most favorable to the administrative

[2] *Cty. of Los Angeles v. Los Angeles Cty. Civ. Serv. Com.*, 231 Cal. Rptr. 3d 493 (2018) (ordered depublished Aug. 15, 2018)

decision . . . .") (emphasis added). Because the City bears the burden of proof in this case, these presumptions regarding the City's factual findings simply do not apply. *See* Gov. Code §§ 65589.5(j)(1) & (k)(1)(A)(i)(II). Indeed, that is precisely why the Legislature changed the standard of review applicable to HAA cases in 2017. *See* Opening Br. at 19; Opening RJN Ex. C at 5 ("State courts are often too deferential to localities in accepting any justification to deny a good housing project . . . .").

The City's erroneous views about the standard of review in this case pervade the City's substantive argument throughout its opposition papers. In its later discussion of the City's Findings of Denial, the City asserts that the City Council's (incorrect) determination that Project would create significant health and safety issues "cannot be overturned unless it is determined that the City acted arbitrary and capriciously" and that the Court must uphold the City's determination that the issues met the HAA's requirements. Opp. at 13. Later, in discussing the purported traffic impacts that might be created by the Project, the City asserts that the decision should be given deference and that the weight of the evidence and any inferences should be made in favor of the City. Opp. at 16. This misses the mark. Under the HAA, the City must affirmatively prove that its findings met all six of the requirements under the HAA, by a preponderance of the evidence. Gov. Code §§ 65589.5(j)(1), 65589.6. It cannot—as the City attempts to do in its opposition papers—simply sit back on its laurels and rely on inapplicable presumptions of correctness.

III. THE CITY HAS NOT IDENTIFIED ANY LEGALLY SUFFICIENT REASON FOR DENYING THE PROJECT

Under the HAA, the City is only permitted to deny the Project if it can prove, by a preponderance of the evidence, one of the following:

> 1. The Project is inconsistent with the City's applicable, objective development standards in effect at the time the application to develop the Project was deemed complete, Gov. Code § 65589.5(j)(1), and the City notified THDT of the inconsistency within 30 days of the application, Gov. Code § 65589.5(j)(2)(A); or
>
> 2. The Project (1) would have a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete, Gov. Code § 65589.5(j)(1)(A), and (2) there is no feasible method to satisfactorily mitigate or avoid the impact, Gov. Code § 65589.5(j)(1)(B).

The City apparently concedes that it has not met the first requirement, and makes no meaningful attempt to demonstrate that it has met the second requirement. Indeed, beyond a few conclusory references, the City's brief does not mention these HAA requirements at all.

A. The Project Met All Of The City's Objective Development Standards

In order to reject a housing development project for failing to comply with local development standards, the City must identify applicable objective development standards with which the application is inconsistent, and also notify the applicant of all such inconsistencies within a short, 30-day time period after the application has been deemed complete. Gov. Code §§ 65589.5(j)(1), (j)(2)(A). Under the HAA, a standard qualifies as objective only if it "involv[es] no personal or subjective judgment by a public official and [is] uniformly verifiable by reference to an external and uniform benchmark or criterion available [to] and knowable by both the development applicant or proponent and the public official." Gov. Code § 65589.5(h)(8). This objectivity requirement applies to any development standard the City intends to use to reject the project, including subdivision standards. Gov. Code § 65589.5(j)(1); *Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066, 1077-81 (2011).

As Petitioners explained in detail in their opening brief, the City's Findings of Denial did not identify any applicable, objective development standards that the Project failed to meet, as required by subdivision (j)(1). Opening Br. at 24-27. Nor did the City timely inform THDT of any inconsistencies between the Project and the City's standards, as required by subdivision (j)(2). Opening Br. at 24. In its Opposition, the City appears to have conceded these points. The City's brief does not identify any objective development standards the project failed to meet. While it does recite some of the Findings of Denial, it does not even attempt to argue that those findings qualify as "objective" or otherwise place them within the framework required by the HAA.

In the time since the Petitioners submitted their opening brief, the Court of Appeal decided an important case that directly addresses a city's obligation to identify objective criteria to reject a project under California's stringent new housing laws. *Ruegg & Ellsworth v. City of Berkeley*, ___ Cal. App. 5th ___, No. A159218, 2021 WL 1541065 (Apr. 20, 2021), involved Government Code Section 65913.4 (known as "SB 35") which was adopted contemporaneously with the 2017

HAA Amendments.[3] Like the HAA, Section 65913.4 requires cities to identify objective land use standards, within a certain period, in order to reject a project. Gov. Code §§ 65913.4(c)(1); (c)(2).

In *Ruegg & Ellsworth*, the City of Berkeley attempted to justify its denial of a 260-unit mixed-income housing project by pointing to the project's purported traffic impacts. Like Huntington Beach in this case, Berkeley failed to identify any inconsistency with a traffic standard within the time period allowed by Section 65913.4. And even in litigation, Berkeley could only point to general statements in its Traffic Guidelines rather than specific, numerical criteria that the project could not meet. The Court held that each of those errors meant that Berkeley could not rely on traffic impacts to deny the project. 2021 WL 1541065, at *28-29. In this case, likewise, even if the City had attempted to argue that the Project is inconsistent with objective development standards, it would be barred from doing so based on its failure to timely notify THDT.

B. The City Has Not Identified Any Adverse Public Health And Safety Impact Meeting The Standards Of The HAA

Petitioners' opening brief details the stringent standards required to reject a project based on health and safety impacts under the HAA. To reiterate, the City must prove each of the following by a preponderance of the evidence: (1) the impact is supported by an objective, identified written public health or safety standard, policy or condition that compels denial and was in place at the time the application was deemed complete; (2) the impact is significant; (3) the impact is quantifiable; (4) the impact is direct; (5) the impact is unavoidable; and (6) there is no feasible method to satisfactorily mitigate or avoid the adverse impact other than the disapproval of the housing development project. Gov. Code §§ 65589.5(j)(1)(A), (B).

In its Opposition, the City makes no meaningful effort to prove that the Project would have health and safety impacts meeting these criteria. Of the 26 pages in its brief, the City devotes only three pages to actually discussing the project's supposed health and safety impacts, principally citing reports it commissioned from fire and traffic safety experts in order to rationalize its denial. It put these reports into the record at the Project's rehearing, after the City Council had already

[3] The *Ruegg & Ellsworth* decision is expected to be final at the time of the hearing in this matter, and has been certified for publication. *See* C.R.C. 8.264(b)(1).

denied the Project once and Petitioner Californians for Homeownership had filed its lawsuit. Opp. at 14-16. The City's cursory discussion of these reports falls far short of meeting its burden.[4]

1. The City Has Not Cited Any Legitimate Fire Safety Concern Regarding The Project

The City first argues that the Project is a fire hazard, based on impacts discussed in a report from James F. McMullen. Opp. at 14-15. But these impacts fall far short of the HAA's standards.

a. The McMullen Report Lacks Evidentiary Value And Its Findings Were Not Cited In The City's Findings Of Denial

As Petitioners' opening brief extensively detailed, Mr. McMullen's report has very little evidentiary value. Mr. McMullen was given incomplete information about the Project and his analysis is rife with inaccuracies—for example, Mr. McMullen's description of the fire mitigation plan for the Project omits three of the four mitigation measures agreed between the City and THDT. *See* Opening Br. at 38; (AR 2308:3-22; 2389-90.) Indeed, the report reads more like a serious of unanswered questions than a criticism of the Project. On the other hand, the City's own award-winning fire staffer conducted a thorough review of the project and determined that all fire safety standards were met or exceeded. *See* Opening Br. at 11; (AR 1370:-71; 1375-77.)

Mr. McMullen's report was so unhelpful that the City did not cite its conclusions in the Findings of Denial. In fact, the City did not cite *any fire safety hazards at all* in the Findings, other than one finding related to an alternative design of the project that is not at issue in this litigation. For that reason alone, the City should be barred from raising those impacts now.

b. The City Has Not Identified Any Objective, Written Fire Safety Standard That Supports Denial.

The most critical requirement for a health and safety impact finding under the HAA is that

[4] The City's brief appears to fault Petitioners for not coming forward with new expert evidence in litigation. Opp. at 15-16. But the parties here are limited to the administrative record. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 79 n. 6 (1974), and the City can only use its "expert reports" because it disclosed the reports for the rehearing. To be clear, Petitioners have not relied on their own "layman self-interested, biased opinion" in this case. *See* Opp. at 15. Instead, Petitioners have cited expert evidence from the record, such as statements by the City's professional staff, the Project's Traffic Impact Analysis, and the City's own expert reports.

it must be tied to an objective, written public health or safety standard that supports the denial. Gov. Code § 65589.5(j)(1)(A). The City cites two written regulations, but neither is a written health or safety standard that the Project fails to meet.

The first is California Fire Code Section 1.11.2.4, which the City describes as a standard "regarding standpipe connections." Opp at 14. But Section 1.11.2.4 is not a standard for standpipe connections, or a public health and safety "standard" at all. Instead, it describes the *procedures* for obtaining authorization for use of an alternative means of compliance to meet certain fire code standards. Reply Request for Judicial Notice, Ex. E. Nevertheless, the City argues that the project does not meet Section 1.11.2.4 because Mr. McMullen's report states, without any explanation, that the location of the standpipe for the Project does not meet the criteria of Section 1.11.2.4. (AR 2389-90.) This is a puzzling conclusion because the City's Fire Department did, in fact, approve a method of compliance with the City's standpipe requirements, pursuant to Section 1.11.2.4. (AR 1416, 1846, 2308:3-22.) Mr. McMullen apparently disagrees with the City's decision, but he does not say *why* he disagrees or explain what alternative he would prefer. And, as described above, Mr. McMullen's conclusion appears to be based on incomplete information about the four-method compliance plan agreed to by the City and THDT.

The second written standard referenced by the City is Specification No. 401. Opp. at 14. As the Opposition concedes, the City had Mr. McMullen review an alternative version of the Project—which is not at issue in this litigation—for compliance with this standard. *Id.* ("Mr. McMullen states that the proposed alternate design of the Project violates City Specification No. 401, which identified an outer radius of 45-feet for emergency access.") (emphasis added). The Project, as proposed, does meet this requirement. Indeed, the City's own traffic safety expert, Mr. Miller, conducted a detailed review of fire access to the Project, including developing a diagram depicting the turning arrangement. (AR 2384.) Mr. Miller determined that the Project's driveway "will accommodate City-required fire apparatus for both left and right turns into the project from Ellis Avenue" based on the detailed Project plans he reviewed. (AR 2380.) Mr. Miller's review included City Specification No. 401. (AR 2377.) The City's fire staff also confirmed that the Project's proposed design complied, and that the turning radius concerns related only to the

alternative design. (AR 2304:24-2305:18.) Because Petitioners are not asking for approval of the alternative design for the Project, Specification No. 401 is not at issue.

Finally, the City's brief makes a vague reference to concerns about the use of ground ladders for rescues at the Project. Opp. at 14. Neither the City's brief nor Mr. McMullen's report references a specific, written standard regarding ladder use that the Project fails to meet, so this does not meet the HAA's standards. *See* Gov. Code § 65589.5(j)(1)(A). In any event, the City's brief ignores the established ground ladder access plan for the site. (*See* AR 1407; 1597:8-20.)

c. The Concerns Identified By The City Are Not Unavoidable Because They Can Easily Be Mitigated Through Conditions Of Approval Related To The Final Design Of The Project.

Perhaps more fundamentally, the plans for the Project are not final, and any concerns the City has can be resolved through conditions of approval.

In order to meet the standards of the HAA, the City must show that the fire safety concerns it has identified are unavoidable and must prove that there is no feasible method to satisfactorily mitigate them. Gov. Code §§ 65589.5(j)(1)(A, (B). The City cannot meet this requirement because, even if it had identified legitimate fire safety concerns about the preliminary design of the Project, it could address those concerns through conditions of approval related to the final design.

In fact, the original proposed conditions of approval for the Project would have done just that. (AR 1427-28.) For example, as to the standpipe issue, the conditions would have required that "[t]he conceptual Alternative Materials and Methods Strategy shall be finalized to demonstrate compliance with exterior hose pull distance requirements," and included on a final Fire Master Plan to be approved by the Fire Department. *Id.* As to Specification No. 401, the conditions of approval would have required Fire Department approval of "[f]ire lane locations, dimensions, lengths, turning radii at corners and circles/cul-dee-sacs." (AR 1427.) The City Council could have simply adopted these conditions of approval and City fire staff would have had all the tools they needed to ensure that the final design of the Project was safe.

Indeed, the City appears to agree that it is still early enough in the process to impose conditions of approval rather than denying the project! In defending the vagueness of Mr. McMullen's report, the City argues the plans for the project "are not complete, which is typical at

this phase of the development process." Opp. at 14-15. It is odd that the City believes this argument helps its case. On the one hand, the City argues that the Project was at too early a stage to provide detailed information to Mr. McMullen.[5] Yet the City also argues that the plans were so concrete that it was able to deny the entitlements for the Project on fire safety grounds.

2. The Purported Traffic-Related Impacts Described By The City Lack Evidentiary Support, Do Not Meet The Standards Required By The HAA, And Can Be Mitigated.

The City's discussion of purported traffic impacts of the Project is just as uncompelling and untethered to the requirements in the HAA. The City ties its traffic safety concerns to the report of Mark H. Miller, but its concerns are based on a mischaracterization of Mr. Miller's report. Mr. Miller did not, as the City suggests, find that Project will result in additional collisions occurring if the Project was built. Opp. at 15. Instead, Mr. Miller opines that the Project could result in collisions of a particular type, given the existing roadway configuration. (AR 2381.) That is why Mr. Miller suggests two simple mitigation measures for the Project, which the City could incorporate into conditions of approval. (AR 2382.) Nowhere does Mr. Miller's report conclude that the impacts from the Project cannot be mitigated, or that they require denial.

Except for a conclusory statement, the City makes no attempt to prove any valid traffic safety concern within the framework provided by the HAA. Instead, the City argues that its decision is entitled to extreme deference. Opp. at 16. But this form of deference does not apply to decisions reviewed under the HAA. *See supra* Section II. Instead, the City bears the burden of proving, by a preponderance of the evidence, that the impacts it has identified meet each of the six requirements in the HAA. Gov. Code §§ 65589.5(j)(1), 65589.6. It has failed on all six counts.

a. Most Critically, The Traffic Impacts Cited By The City Are Not Tied To Any Objective, Identified Written Public Health Or Safety Standard

The City's brief does not reference any written standards regarding traffic safety. *See* Opp.

[5] To be clear, the City's professional fire staff did have access to detailed information, and they concluded based on a detailed analysis of that information that the Project meets the City's fire safety standards. (*See* AR 1407, 1416, 1842-1853.) Mr. McMullen's report does not rebut the well supported conclusions of the City's own fire staff. But even if it did, the solution would be to condition the approval of the Project on a final design that addresses the City's concerns.

at 15-16. Nor does Mr. Miller's report. *See* Opening Br. at 29.

b. The Traffic Impacts Cited By The City Do Not Qualify As Significant

The analysis in Mr. Miller's report does not compare the traffic impact of the Project to the current use of the Project site or any other potential use of the site. The report is agnostic about the actual Project being proposed, instead focusing on the state of the surrounding roadways. *See* Opening Br. at 31. Because the same analysis could be used to reject any project at the site, the City cannot use the analysis to demonstrate that the impact is significant. And Mr. Miller's report makes no attempt to compare the impact of the Project to any benchmark of significance.

The City's response appears to be that the City Council is entitled to determine what qualifies as "significant," that it determined these impacts qualified, and the Court must accept that determination. Opp. at 16. That approach would render the HAA's strict standards meaningless.

c. The Traffic Impacts Cited By The City Do Not Qualify As Quantifiable

Neither Mr. Miller's report nor the City's brief attempt to quantify the additional collisions that would be precipitated by the Project, if any, or the increase in injuries or property damage that would come from the change in collision types that might be brought on by the Project, if any.

There are two "quantities" mentioned in the City's brief, but neither constitutes a "quantification" of the impacts the City is citing. First, puzzlingly, the City's brief repeatedly references the erroneous 222 U-turns figure cited in the City's Findings of Denial, which the City's own expert Mr. Miller determined was incorrect. Opp. at 3, 5, 8-9. (*See* AR 2378.) Whatever the correct figure, merely quantifying additional U-turns (which the City could choose to disallow) is not the same as quantifying the impact of the Project on health and safety. Second, the City references that the light timing on Ellis Avenue and the City's decision not to signalize or sign the Ellis Avenue and Patterson Lane intersection have resulted in the intersection being blocked a number of times in one hour. Opp. at 15. Again, this is not a quantification of the impact of the Project—it is just a measure of the failures of the City's light timing and roadway design. Nor could the City explain how the Project's expected trip generation—at most one car

per light cycle—would negatively impact this condition. (*See* AR 1457.)

d. The Traffic Impacts Cited By The City Do Not Qualify As Direct

It is telling that the City focuses its brief on the state of congestion along Ellis Avenue—and in particular the failure of the City's light timing to accommodate traffic demand. Opp. at 15. In essence, the City appears to be arguing that its own roadway deficiencies justify rejecting the Project, because the safety of cars moving in or out of the Project might be impacted by those deficiencies. But that impact is, at best, indirect, so it does not meet the standards of the HAA.

e. The Traffic Impacts Cited By The City Do Not Qualify As Unavoidable, And The City Cannot Prove That They Cannot Be Mitigated

Even if the City had identified a traffic safety impact that met the HAA's standards, the HAA requires the City to prove, by a preponderance of the evidence, that "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . ." Gov. Code § 65589.5(j)(1)(B). Thus, before rejecting the Project, the City was required to consider all reasonable measures that could be used to mitigate the impacts. The City scoffs at the idea of doing so, arguing that it should not have to "redesign a road to accommodate a flawed Project." Opp. at 15.

First, this is a mischaracterization of Petitioners' argument. Many of the mitigation measures proposed by Petitioners would not require the City to "redesign" Ellis Avenue. For example, Petitioners have repeatedly identified one on-site mitigation that would reduce unlawful left turns without impacting fire access: the use of a "porkchop" made of plastic channelizers. Opening Br. at 34-35. (AR 2810, 3516.) The City has consistently ignored this simple solution.

Second, there is nothing surprising about the idea that the City must consider reasonable mitigations before rejecting a 48-unit mixed-income housing project during a housing crisis. The HAA requires the City, which zoned this site for high-density housing as part of its housing planning obligations, to live up to its zoning if the Project can be reasonably accommodated.

Petitioners' opening brief sets forth numerous potential techniques that the City could have considered to mitigate any traffic impacts of the Project, including techniques proposed by the City's own traffic expert, Mr. Miller. Opening Br. at 34-37. The City's brief ignores these potential mitigations entirely. Among other things, the City has never considered prohibiting U-

turns at the Ellis Avenue and Patterson Lane intersection (despite insisting that those U-turns are dangerous), or upgrading the intersection with crosswalks, stop signs, or signals. And the City continues to allow left turns into and out of the retail business currently located at the Project site, despite insisting that those same turns would be dangerous at the Project. (AR 2305:20-2306:9.)

There is also nothing unusual about making minor changes to roadways to accommodate new development projects. Indeed, it is such a universal part of development in Huntington Beach that the City requires development projects to pay "fair share" traffic fees to offset the work the City must do to address traffic. (*See* AR 1672.) And the City has the option of charging a site-specific fee for roadway accommodations if needed for a specific project.

The City's failure to address potential mitigations at the administrative level and before the Court demonstrates that it is not genuinely interested in finding a solution to the impacts it claims to have identified. These claimed impacts are just a pretext for rejecting the Project.

IV. GOVERNMENT CODE SECTION 65589.5(F)(4) IS IRRELEVANT TO THE OUTCOME OF THIS CASE

Recognizing that it cannot prevail on the merits of this case, the City attempts to obfuscate the matter by focusing most of its opposition brief on one irrelevant legal question: the constitutionality of Government Code Section 65589.5(f)(4).

Subdivision (f)(4) states that a project must be deemed consistent with all applicable development standards under the HAA if there is substantial evidence to allow a reasonable person to conclude the project is consistent with all such standards. The Court need not reach the issue of the constitutionality of subdivision (f)(4) because Petitioners easily prevail in this case regardless of subdivision (f)(4). Indeed, Petitioners' opening brief only discussed subdivision (f)(4) for a single page, and then only as an argument in the *alternative*. Opening Br. at 26-27.

Subdivision (f)(4) is immaterial to the outcome of this case for several reasons:

- First, under Government Code Section 65589.6, the City still has the burden of proving that it has complied with all the provisions of the HAA, and it has not done so.
- Second, under Government Code Section 65589.5(j)(2), the Project was deemed consistent with all applicable objective development standards because the City failed to

notify THDT within 30 days of the application being deemed complete of any standards the Project did not meet. Opening Br. at 24.

- Third, as discussed above and regardless of both subdivisions (j)(2) and (f)(4), the application in fact met all of the City's objective development standards, and the City has identified no evidence to the contrary. The City's brief does not even attempt to identify a single objective development standard the Project failed to meet.

For these reasons, Petitioners do not need to rely on subdivision (f)(4)'s generous presumption in their favor to prevail in this case.[6]

V. EVEN IF SUBDIVISION (F)(4) WERE RELEVANT HERE, IT IS CONSTITUTIONAL AND APPLIES TO CHARTER CITIES

The HAA expressly applies to all jurisdictions, including charter cities like Huntington Beach. Gov. Code § 65589.5(g). Subdivision (f)(4) is plainly a constitutional exercise of the state's power to preempt local land use regulation, and therefore applies to charter cities.

All of the City's constitutional arguments rest on a total mischaracterization of subdivision (f)(4) and of Petitioners' argument. The City repeatedly argues that subdivision (f)(4) "strips" the City's elected officials of their power to make land use decisions. Opp. at 12, 17-18. As explained below, this is untrue—subdivision (f)(4) merely places the burden of proof on the City to prove that no reasonable person could find a project compliant with all of the City's objective development standards. And even if the City cannot meet that burden, the City can still deny or condition a project if it can prove the project has a significant, unavoidable health and safety impact. Therefore, the law has no constitutional infirmities.

[6] It appears the only reason the City is hinging its case on the constitutionality of subdivision (f)(4) is so that it can cite a trial court opinion, currently on appeal, finding subdivision (f)(4) to be unconstitutional. Respondent's Request for Judicial Notice, Exhibit C. Indeed, whole portions of the City's brief have been lifted verbatim from the City of San Mateo's appellate brief in that case. Opp. at 17:12-18:11, 18:17-19:1, 19:13-20:21, 20:26-21:11, 24:25-25:1. Aside from the fact that it is improper for the City to cite a trial court opinion, the San Mateo case has no bearing here. In that case, there was a live dispute about whether the applicant met a particular development standard and whether the disputed standard was objective. There is no such dispute here—the City has not even attempted to identify a single objective development standard the applicant did not meet, and in any event it's time to do so under subdivision (j)(2) has passed.

A. Subdivision (f)(4) Does Not Violate Due Process

The City argues that subdivision (f)(4) violates due process because it deprives the public of a right to a meaningful hearing prior to a final decision on a project. Opp. at 17-18. In fact, subdivision (f)(4) does no such thing, and the City's argument is based on a mischaracterization of the HAA and of Petitioners' argument.

The City argues:

> Under Petitioners' interpretation of (f)(4), any person, (not the governing body of the City, not even City Staff), no matter how financially interested, who submits "substantial evidence" of compliance with objective standards would always win, no matter how compelling the contrary evidence submitted by the neighboring landowners, and no matter what deprivations of property rights might be suffered by those other property owners. Opp. at 18.

Petitioners have argued nothing of this sort, and this is not what the HAA actually says. Subdivision (f)(4) states that a project must be deemed in compliance with all objective standards if there is substantial evidence that would allow a reasonable person to conclude that the project complies with those standards.

Based on this language, and viewed in concert with other provisions of the HAA, the petitioner does not automatically "win" the case once someone submits substantial evidence of compliance. First of all, even if a project is deemed compliant under subdivision (f)(4), or subdivision (j)(2) for that matter, the city still has the power under subdivision (j)(1) to deny or condition the project if it can prove by a preponderance of the evidence that the project poses a significant, unavoidable health and safety impact. Members of the public can weigh in at a hearing as to whether the project has such an impact, and their testimony becomes part of the record that the city can use to meet its burden of proof. In this case, indeed, the City held three such hearings that are all part of the record before the court. But no member of the public ever identified a significant, unavoidable public health and safety impact at any of those hearings.

Second, with regard to subdivision (f)(4) specifically, an application would only be deemed compliant if the administrative record *as a whole* provides substantial evidence that would allow a reasonable person to conclude that the project is compliant. If an applicant submits substantial evidence of compliance to the city, that would merely put the burden on the city to

contest the applicant's evidence with persuasive evidence to the contrary—that is, evidence that would be sufficient to demonstrate that no reasonable person could determine that the project met the standard. The city would presumably—as Huntington Beach did here—hold a hearing where city officials and members of the public could present evidence that the project was not compliant. If the city denied the project and a lawsuit resulted, the court would then review the full record and determine whether there is substantial evidence in the record as a whole to permit a reasonable person to conclude that the project is compliant.

For example, suppose an applicant provided a report from its architect showing that a project met an applicable height limit of 22 feet. The architect's conclusion would not necessarily be determinative. Members of the public would have the opportunity at a public hearing to introduce evidence that the architect was wrong and had mismeasured the project in her CAD software. The city could then deny the project if it made findings of fact showing that no reasonable person would find that the project was under 22 feet.

In this case, of course, the City never presented any evidence or made any findings of fact to contradict the conclusion of its own staff that the project met all the applicable, objective development standards. For that reason, Petitioners don't even need subdivision (f)(4)'s "reasonable person" standard to prevail in this case—there simply is no dispute that all the applicable, objective development standards were met.

It is also important to remember that subdivision (f)(4) merely requires the City to comply with a reasonable interpretation of its own development standards. The process for developing those standards through zoning ordinances and general plan amendments is accomplished through public hearings at which members of the public can be heard on the merits of those standards.

Therefore, subdivision (f)(4) does not in any way deprive the public of a right to a meaningful hearing before a final decision on a project.

B. Subdivision (f)(4) is Not an Invalid "Private Delegation"

The City also argues that subdivision (f)(4)'s "reasonable person" standard is an unconstitutional delegation of power to private parties. Opp. at 19-20.

This argument makes no sense. The primary authority cited by the City, *County of*

Riverside v. Superior Court, 30 Cal.4th 278, 292-93 (2003), held unconstitutional a statute that fully delegated to private arbitrators the ability "actually to set [county] employee salaries," robbing a municipality of its authority to set its own workers' salaries. The City argues that subdivision (f)(4) is comparable because "the HAA vests final decision-making power in any person who can point to 'substantial evidence' of consistency, regardless of the weight of the evidence, the bias of the person, or his or her accountability to the public." Opp. at 19.

This is completely wrong. To begin with, this case does not present the issue of private delegation, because here it was not private parties but the City's own staff who supplied substantial evidence that the Project complied with the applicable objective standards. *See* Opening Br. at 25-27. More importantly, as discussed just above, subdivision (f)(4) does not give any decisionmaking power to anyone, or make any person's view of the evidence determinative. Section (f)(4) is merely a *standard of review* that requires a court to consider the record as a whole and determine if there is substantial evidence that would allow a reasonable person to conclude that the project meets all applicable standards. That standard of review is undoubtedly *favorable* to the applicant, but it does not make the applicant's view of the evidence dispositive. Once an applicant presents evidence that the project is compliant, the city can still present contrary evidence to show that no reasonable person could consider the project compliant. And even if the project is deemed compliant with all applicable objective standards, the city still has the authority to deny the project if it proves by a preponderance of the evidence the existence of a significant, unavoidable health and safety impact.

In other words, subdivision (f)(4) is just a standard of review that is somewhat less deferential than the standard municipalities have historically been accustomed to. But courts have long acknowledged the Legislature's ability to enact standards of review. See, e.g., *Buena Vista Gardens Apartment Assn. v. City of San Diego Planning Dept.*, 175 Cal. App. 3d 289, 297-98 (1985). These standards do not become "delegations" merely because they call for a legal issue to be determined under a "reasonable person" standard, or merely because they are less deferential to agencies than the usual test.

Indeed, the legislature has frequently created—and courts have frequently applied—

standards of review that are very unfavorable to municipalities. For example, the "fair argument" standard in California Environmental Quality Act ("CEQA") litigation provides a highly non-deferential standard when a private party sues a city for approving a project on the basis of a negative declaration. If a litigant suing a city can cite any substantial evidence supporting a fair argument that a project may have a significant environmental impact, this minimal showing prevails against all of the city's stronger evidence to the contrary, the city loses the lawsuit, and the city's action approving the project is set aside as unlawful. *See Pocket Protectors v. City of Sacramento,* 124 Cal. App. 4th 903, 933 (2004). This highly non-deferential standard of review reflects the limited discretion a city has to approve a project without preparing an environmental impact report ("EIR"). Here, likewise, subdivision (f)(4)'s non-deferential standard was specifically intended by the Legislature to make it harder for cities like Huntington Beach to deny housing projects. *See* Opening Br. at 19; Opening RJN Ex. C at 5 ("State courts are often too deferential to localities in accepting any justification to deny a good housing project . . . .").

C. Subdivision (f)(4) Constitutionally Preempts Land Use Regulation By Charter Cities Because It Is Narrowly Tailored To Accomplish A Statewide Objective

In their opening brief, Petitioners established that the HAA as a whole is clearly constitutional as applied to charter cities like Huntington Beach because it falls within a long tradition of state laws that courts have held may constitutionally preempt local land use authority in furtherance of important statewide policies such as the need to address a severe housing shortage. Opening Br. At 20-23.

In fact, in the short time since the opening brief was filed, there has been an important published appellate court decision in which the court held that a state law very closely related to the HAA permissibly preempted local land use control. In *Ruegg & Ellsworth v. City of Berkeley,* 2021 WL 541065, *supra*, the Court of Appeal upheld the constitutionality of Government Code Section 65913.4 (known as "SB 35"), a law that was enacted contemporaneously with the recent amendments to the HAA and was similarly intended to constrain the discretion of cities to deny projects that meet all of a city's objective development standards in certain circumstances. The court analyzed SB 35 and the HAA in tandem, and held that, under the California Supreme

Court's test for determining the constitutionality of preempting state legislation, SB 35 addressed a matter of significant statewide concern because the HAA's findings of facts demonstrated the existence of a housing crisis and the Legislature determined that "legislation including [SB 35] and the HAA is intended to address that crisis by encouraging and facilitating the construction of housing in general and affordable housing in particular." *Id.* at *17. The court further found that SB 35 was appropriately tailored to that statewide interest, and did not unduly interfere with local land use control, even though it completely eliminated local discretion to deny housing projects that meet certain criteria. In light of the legislative findings in SB 35 and the HAA demonstrating the "Legislature's long history of attempting to address the state's housing crisis and frustration with local governments' interference with that goal," the court held that eliminating local governments' ability to deny projects for subjective reasons in some circumstances was necessary to achieve the state's purposes. *Id.* at *20.

In its Opposition, the City claims that subdivision (f)(4) intrudes upon its home rule powers as a charter city because it "cherry-picks which land use standards the city can enforce." Opp. at 22-23. Specifically, while cities can enforce objective standards, they cannot deny a project based on subjective criteria. But the *Ruegg & Ellsworth* court specifically held that a state law preempting denials based on subjective criteria was constitutional because it was necessary to achieve the Legislature's goal of preventing local governments from frustrating state housing goals, and based that holding on the HAA's own findings of fact.

For these reasons, the City does not come close to demonstrating that subdivision (f)(4) is unconstitutional under the California Supreme Court's four-factor test. First, the city has no significant municipal interest in denying a project that meets all of its objective standards and poses no significant health or safety hazard.[7] Second, assuming there is some conflict between the state law and the City's local regulations, subdivision (f)(4) serves the important state goals of

[7] Though the City cites several cases for the proposition that "zoning and land use are core municipal functions," Opp. at 22, it fails to note that none of these cases uphold local land use regulation in the face of preempting state legislation. Indeed, when there is a clear legislative intent to preempt local land use control, the courts have consistently held that cities—including charter cities—have no immunity against preemption. Opening Br. at 20 (citing cases).

addressing the state housing crisis by making it harder for cities to deny projects that meet all of their objective standards, and providing appropriate certainty for applicants. Third and finally, the law is appropriately tailored to serve those state goals because it directly addresses the legislature's concern with local obstruction of state housing objectives, and only applies where the project can reasonably be understood by an applicant, based on all the available evidence, to meet a city's objective standards—and even then the city can still deny the project if it proves by a preponderance of the evidence the existence of a significant, unavoidable health and safety impact.

VI. THE CITY'S OPPOSITION BRIEF ITSELF MAKES CLEAR THE DENIAL WAS PRETEXTUAL AND IN BAD FAITH

As explained at length in the opening brief, the City's denial was in bad faith. The City never had any genuine health and safety concerns with this project, but manufactured pretextual concerns at the eleventh hour to justify its decision to deny the project for subjective reasons, in violation of the HAA. The clearest evidence of the pretextual nature of the denial is the City's Opposition brief itself, which fails to articulate even a single objective standard this project failed to meet, and which makes only a perfunctory effort to defend the substance of the City's denial. Instead, the City resorts to a series of distractions because its decision is indefensible.

VII. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant the relief requested in the Petitions and in Petitioners' Opening Brief.

Dated: May 14, 2021

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PROOF OF SERVICE

California Renters Legal Advocacy and Education Fund, and THDT Investment, Inc. v. City of Huntington Beach
Orange County Superior Court, Case No. 30-2020-01140855-CU-WM-CJC

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

On May 14, 2021, I served true copies of the following document(s) described as **REPLY IN SUPPORT OF MOTION TO ISSUE WRIT OF MANDATE** on the interested parties in this action as follows:

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BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the One Legal system. Participants in the case who are registered users will be served by the One Legal system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 14, 2021, at Martinez, California.

Karen L. Irias