



**TOWN OF LOS GATOS
SPECIAL JOINT MEETING OF THE TOWN COUNCIL AND PLANNING
COMMISSION
STUDY SESSION AGENDA
SEPTEMBER 12, 2023
110 EAST MAIN STREET AND VIA TELECONFERENCE
LOS GATOS, CA
7:00 PM**

*Maria Ristow, Mayor
Mary Badame, Vice Mayor
Matthew Hudes, Council Member
Rob Moore, Council Member
Rob Rennie, Council Member*

*Jeffery Barnett, Chair
Steven Raspe, Vice Chair
Susan Burnett, Commissioner
Kathryn Janoff, Commissioner
Melanie Hanssen, Commissioner
Emily Thomas, Commissioner*

PARTICIPATION IN THE PUBLIC PROCESS

How to participate: The Town of Los Gatos strongly encourages your active participation in the public process, which is the cornerstone of democracy. If you wish to speak to an item on the agenda, please follow the participation instructions on page 2 of this agenda. If you wish to speak to an item NOT on the agenda, you may do so during the “Verbal Communications” period, by following the participation instructions on page 2 of this agenda. The time allocated to speakers may change to better facilitate the Town Council meeting.

Effective Proceedings: The purpose of the Town Council meeting is to conduct the business of the community in an effective and efficient manner. For the benefit of the community, the Town of Los Gatos asks that you follow the Town’s meeting guidelines while attending Town Council meetings and treat everyone with respect and dignity. This is done by following meeting guidelines set forth in State law and in the Town Code. Disruptive conduct is not tolerated, including but not limited to: addressing the Town Council without first being recognized; interrupting speakers, Town Council or Town staff; continuing to speak after the allotted time has expired; failing to relinquish the podium when directed to do so; and repetitiously addressing the same subject.

Deadlines for Public Comment and Presentations are as follows:

- Persons wishing to make an audio/visual presentation on any agenda item must submit the presentation electronically, either in person or via email, to the Clerk’s Office no later than 3:00 p.m. on the day of the Council meeting.
- Persons wishing to submit written comments to be included in the materials provided to Town Council must provide the comments as follows:
 - For inclusion in any Addendum: by 11:00 a.m. the Monday before the Council meeting
 - For inclusion in any Desk Item: by 11:00 a.m. on the day of the Council Meeting

***Town Council Meetings Broadcast Live on KCAT, Channel 15 (on Comcast) on the 1st and 3rd Tuesdays at 7:00 p.m.
Rebroadcast of Town Council Meetings on the 2nd and 4th Mondays at 7:00 p.m.
Live & Archived Council Meetings can be viewed by going to:
www.LosGatosCA.gov/TownYouTube***

IN COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT, IF YOU NEED SPECIAL ASSISTANCE TO PARTICIPATE IN THIS MEETING, PLEASE CONTACT THE CLERK DEPARTMENT AT (408) 354-6834. NOTIFICATION 48 HOURS BEFORE THE MEETING WILL ENABLE THE TOWN TO MAKE REASONABLE ARRANGEMENTS TO ENSURE ACCESSIBILITY TO THIS MEETING [28 CFR §35.102-35.104]

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SPECIAL JOINT MEETING OF THE TOWN COUNCIL AND PLANNING COMMISSION -
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IMPORTANT NOTICE

This is a hybrid meeting and will be held in-person at the Town Council Chambers at 110 E. Main Street and virtually through the Zoom webinar application (log-in information provided below). Members of the public may provide public comments for agenda items in-person or virtually through the Zoom webinar by following the instructions listed below. The live stream of the meeting may be viewed on television and/or online at www.LosGatosCA.gov/TownYouTube.

PARTICIPATION

To provide oral comments in real-time during the meeting:

- Zoom webinar: Join from a PC, Mac, iPad, iPhone or Android device: Please click this URL to join: <https://losgatosca.gov.zoom.us/j/82368611139?pwd=NW1gazZwWjZMQ1Q2VHZwMk5JbmZUdz09>
Passcode: 147042 You can also type in 823 6861 1139 in the “Join a Meeting” page on the Zoom website at <https://zoom.us/join>.
 - When the Mayor announces the item for which you wish to speak, click the “raise hand” feature in Zoom. If you are participating by phone on the Zoom app, press *9 on your telephone keypad to raise your hand.
- Join by telephone: Join by Telephone: Dial: USA 877 336 1839 US Toll-free or 636 651 0008 US Toll. Conference code: 686100
 - If you are participating by calling in, press #2 on your telephone keypad to raise your hand.
- In-Person: If you wish to speak during the meeting, please complete a “speaker’s card” located on the back of the chamber benches and return it to the Town Clerk. If you wish to speak to an item on the agenda, please list the item number. The time allocated to speakers may change to better facilitate the Town Council meeting.

When called to speak, you may be asked to provide your full name and your town/city of residence. This identifying information is optional and not a requirement for participation. Please limit your comments to three (3) minutes, or such other time as the Mayor may decide, consistent with the time limit for speakers at a Council meeting.

If you are unable to participate in real-time, you may email to Clerk@losgatosca.gov the subject line “Public Comment Item #__” (insert the item number relevant to your comment). Comments received by 11:00 a.m. the day of the meeting will be reviewed and distributed before the meeting.

MEETING CALLED TO ORDER

ROLL CALL

APPROVE REMOTE PARTICIPATION *(This item is listed on the agenda in the event there is an emergency circumstance requiring a Council Member or Commissioner to participate remotely under AB 2449 (Government Code 54953)).*

RULES OF DECORUM AND CIVILITY

To conduct the business of the community in an effective and efficient manner, please follow the meeting guidelines set forth in the Town Code and State law.

The Town does not tolerate disruptive conduct, which includes but is not limited to:

- Addressing the Town Council or Planning Commission without first being recognized;
- Interrupting speakers, Town Council members, Planning Commissioners, or Town staff;
- Continuing to speak after the allotted time has expired;
- Failing to relinquish the microphone when directed to do so;
- Repetitiously addressing the same subject.

Town Policy does not allow speakers to cede their commenting time to another speaker.

VERBAL COMMUNICATIONS *(As a Special Meeting, members of the public may address the Town Council and Planning Commission only on the agenda items. Unless additional time is authorized by the Mayor, remarks shall be limited to three minutes.)*

OTHER BUSINESS *(Up to three minutes may be allotted to each speaker on any of the following items.)*

1. Receive and Discuss Information Regarding Statewide Housing Laws that Apply to Applications for Housing Development Projects in the Town.

ADJOURNMENT

Writings related to an item on the Town Council meeting agenda distributed to members of the Council within 72 hours of the meeting are available for public inspection at the front desk of the Los Gatos Town Library, located at 100 Villa Avenue, and are also available for review on the official Town of Los Gatos website. Copies of desk items distributed to members of the Council at the meeting are available for review in the Town Council Chambers.

Note: The Town of Los Gatos has adopted the provisions of Code of Civil Procedure §1094.6; litigation challenging a decision of the Town Council must be brought within 90 days after the decision is announced unless a shorter time is required by State or Federal law.



**TOWN OF LOS GATOS
COUNCIL STUDY SESSION
REPORT**

MEETING DATE: 09/12/2023

ITEM NO: 1

DATE: September 7, 2023
TO: Mayor and Town Council
Planning Commission
FROM: Gabrielle Whelan, Town Attorney
SUBJECT: Receive and Discuss Information Regarding Statewide Housing Laws that
Apply to Applications for Housing Development Projects in the Town

RECOMMENDATION:

Receive and discuss information regarding statewide housing laws that apply to applications for housing development projects in the Town.

BACKGROUND:

The Town has received several questions regarding the impacts of State housing laws on the Town. This study session has been scheduled for the Town Council and Planning Commission to provide an opportunity to hear from statewide housing law expert, Barbara Kautz. Ms. Kautz will discuss the statewide housing laws that apply to projects in the Town and answer questions from the community. Barbara Kautz practices housing law with the firm of Goldfarb & Lipman, and before law school, she served as Community Development Director for the City of San Mateo. She has litigated many housing law issues in the State of California.

DISCUSSION:

The discussion will focus on the following State housing laws:

- 1) Senate Bill 330, which:
 - a. vests applicants who submit "SB 330 preliminary applications" to zoning standards in existence at the time the preliminary application is deemed submitted;
 - b. states that SB 330 preliminary applications are "deemed submitted" when the information required per state checklist of 17 items has been provided; and

PREPARED BY: Gabrielle Whelan
Town Attorney

Reviewed by: Town Manager, Assistant Town Manager, and Community Development Director

DISCUSSION (continued):

- c. limits the Town to no more five hearings on the project, including appeals.
- 2) The “Builder’s Remedy,” which precludes jurisdictions from denying projects based on nonconformity with zoning requirements if that jurisdiction does not have a Housing Element that was adopted in substantial compliance with State law.
- 3) Density Bonus Law, which authorizes applicants to seek a density bonus and incentives/concessions or waivers of development standards in exchange for providing the requisite percentages of affordable housing.
 - a. A “density bonus” is a density increase over the otherwise maximum allowable density. An applicant need not seek a density bonus in order to request incentives/concessions or waivers in exchange for providing the required percentages of affordable housing units.
 - b. “Incentives/concessions” are defined as a reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission. Examples are reductions in setback and square footage requirements and in the number of vehicular parking spaces that would otherwise be required; approval of mixed-use zoning; or other proposals that result in identifiable and actual cost reductions to provide for affordable units (Gov. Code Section 65915(k)). The statute limits a jurisdiction’s ability to deny a requested incentive/concession. A requested incentive/concession may be denied on the following grounds:
 - i. The requested incentive or concession would have a specific, adverse impact upon health or safety, for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. Such a denial must be based on an adopted, objective standard.
 - ii. The requested incentive or concession would have an adverse impact on any real property that is listed in the California Register of Historical Resources.
 - iii. The requested incentive or concession is contrary to State or Federal law.
 - c. “Waivers of development standards” are defined as waivers of any development standard that will have the effect of physically precluding the construction of a development meeting the criteria [State density bonus law]. (Gov. Code Section 65915(e)) The statute limits a jurisdiction’s ability to deny a requested waiver. The permissible grounds for denial of a requested “waiver” is that the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of [Section 65589.5](#), upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the

DISCUSSION (continued):

specific adverse impact. The health and safety standard needs to be an adopted, objective standard.

4) The California Environmental Quality Act ("CEQA"):

- a. Requires jurisdictions to analyze the environmental impacts of proposed projects, continues to apply to all development proposals.
- b. In some instances, the California Environmental Quality Act will provide that a project is statutorily or categorically exempt from CEQA and no further analysis will be required.

CONCLUSION:

Staff looks forward to this discussion of statewide housing laws.

COORDINATION:

This report was coordinated with the Town Manager's Office and the Community Development Department.

FISCAL IMPACT:

This study session will have no fiscal impact.

ENVIRONMENTAL ASSESSMENT:

This study session is not a project subject to CEQA, and no further action is required.

Attachment:

1. PowerPoint Presentation



California's Housing Laws

Barbara E. Kautz
Goldfarb & Lipman LLP

Town of Los Gatos Joint Town Council and
Planning Commission Meeting
September 12, 2023

Presentation Overview

- Introduction: State Housing Policy
- The Builder's Remedy
- Application and Process: Effect of Preliminary Applications
- Other Key Laws: Density Bonuses, SB 35, AB 2011, and Others
- Litigation, HCD, and the Courts

State Housing Policy

Making It Hard to Deny Housing Projects

“The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval & construction of new housing for all economic segments of California’s communities by meaningfully and effectively *curbing the capability of local governments to deny, reduce the density of, or render infeasible housing development projects*. This intent has not been fulfilled.”

The Builder's Remedy

Key Provisions



Applies to “affordable” projects with:

- 20% of the total units affordable to lower-income households, *or*
- 100% of the units affordable to moderate-income households

The Builder's Remedy Provision

Additional finding to deny “affordable” projects:

- Town meeting RHNA numbers;
- Specific adverse impact to public health and safety;
- Deny to comply with state or federal law;
- Proposed on agricultural land or water/sewer inadequate, OR
- **Inconsistent with Zoning Ordinance & GP land use designation; BUT must have a housing element in substantial conformance with state law, and not on a site designated in housing element for lower or moderate income housing.**

Why Now?

- Enacted in **1982** as part of Housing Accountability Act; but **no published cases**
- **Many more cities not approved by HCD in sixth cycle; much harder to be compliant**
 - Applies when Housing Element is not substantially compliant with case law
- Publicized by UC Davis law professor; used in Santa Monica; extensively publicized

Application and Process: The Effect of Preliminary Applications

Preliminary Applications (“SB 330 Applications”)

“Preliminary application” freezes development standards as of date all required info was submitted

- But project must meet these timelines:
 - Project application must be filed within 180 days
 - Applicant must complete application within 90 days of receiving incomplete letter
- Can change project by up to 20% of square footage or number of units or invoking density bonus and still rely on initial preliminary application
- BUT: Conditions and ordinances may be applied to mitigate environmental impacts
- Can be submitted for ANY housing project.

Preliminary Applications & Builder's Remedy

Issue: Does the preliminary application freeze the adequacy of the housing element at the time the application was submitted?

- Not clear if housing element was inadequate when preliminary application submitted, but adequate when project reviewed
- Is element adequate when adopted or when HCD certifies?
 - HCD has opined that adequacy is frozen and HCD certification required.
 - But HCD's determinations are only its opinions, not law.

Other Key Processing Provisions

- Formal application subject to Permit Streamlining Act
 - Must review for completeness within 30 days of **each** submittal, or “deemed complete”
- Once complete, staff must notify applicant in short time (30 or 60 days) if there are any “inconsistencies” - or “deemed consistent” with all Town standards
 - If “deemed consistent,” can probably not be denied for inconsistency

Other Key Processing Provisions

- Assumed to be consistent if “substantial evidence would allow a reasonable person to assume consistency”
- No rezoning required if general plan is “inconsistent” with zoning
 - Once project shown as suitable for lower or moderate income housing in housing element, housing element densities apply even if zoning has not been adopted.

CEQA

If project requires discretionary approval, CEQA still applies

- Many exemptions require general plan conformance
- Mitigation measures can be imposed
- But grounds for denial unclear



Five-Meeting Limit

Project limited to 5 public meetings organized by Town

- **Exceptions:**
 - Meetings held before application is complete.
 - Project not consistent with objective standards.
 - **Builder's Remedy projects?**
 - Projects that require legislative approvals.
 - Additional meetings required by CEQA (such as a scoping hearing).
 - Meetings not conducted by the Town.

Other Key Laws: Density Bonuses, SB 35, “By Right” Approval, AB 2011

Density Bonus Law

- Eligible project: 5% to 100% affordable housing
- Eligible projects entitled to receive:
 - A **density bonus** [20 - 80%, or unlimited];
 - 1 - 4 “**incentives / concessions**” [reduce costs]
 - **Unlimited waivers** of development standards
 - Reduced **parking** requirements.
- Density Bonus project = consistent with Town standards

Density Bonus Law

- Inclusionary units can qualify project for density bonus (*Latino Unidos v. County of Napa*)
- Example:
 - Town requires 10% to 20% lower or moderate income units in projects with 5 or more units
 - All of these projects are eligible for a density bonus (plus parking reductions, one or more concessions, and unlimited waivers)



SB 35 Projects (“Streamlined Review Process”)

Qualifying Projects:

- Multifamily residential with **50% lower income** in Los Gatos
- 2/3 residential square footage
- General plan or zoning allows residential or mixed use
- No housing occupied by tenants within last 10 years
- **More than 10 units = prevailing wages**
- Consistent with objective standards; but can request density bonus waivers if not

SB 35 Projects (“Streamlined Review Process”)

- Consistency review in 60 - 90 days after submittal
- Design review and decision in 90 - 180 Days
- Can only apply standard conditions

‘By Right’ Approvals

- No CEQA review
- Only objective design review; may impose conditions
- Applies to:
 - Certain **housing element sites** designated for lower income housing if project has 20% lower income units and no subdivision is needed.
 - Certain supportive housing developments.
 - Low barrier navigation centers.
- No accelerated timelines

Residential Development in Commercial Zones

AB 2011 and SB 6 allow multi-family residential development where it may not have been permitted previously:

- Applies in zones where commercial, retail or parking are principally permitted uses
- AB 2011: SB 35 timelines
- SB 6 allows SB 35 to be used on sites zoned commercial, with only 50% residential
- Effective July 1, 2023

Implications for Los Gatos

- Town is required to accept and approve plans that conform with state law
 - Even if inconsistent with Town's adopted policies
 - Regardless of Town or community concerns

Litigation, HCD, and the Courts

HCD and Attorney General Enforcement

- HCD Housing Accountability Unit with at least 25 staff
- Broader and broader authority
- Letters of Technical Advice
- Notices of Violation
- Referral to Attorney General
- Attorney General has 12-person strike force that acts independently

Active Third-Party Litigants

- Have sued at least 10 SoCal cities and 12 Bay Area cities (Californians for Homeownership, YIMBY, California Housing Defense Fund) on housing elements
- Often join in, or are plaintiffs, in litigation related to denials of housing development

Housing Cases in General

- Courts:
 - Generally very pro-housing
 - Uphold housing approvals
 - Overturn denials
- Town risks:
 - Significant attorneys fees exposure
 - High defense costs
 - Possible damages



Thank You!



**TOWN OF LOS GATOS
COUNCIL STUDY SESSION
REPORT**

MEETING DATE: 09/12/2023

ITEM NO: 1

DESK ITEM

DATE: September 12, 2023
TO: Mayor and Town Council
Planning Commission
FROM: Gabrielle Whelan, Town Attorney
SUBJECT: Receive and Discuss Information Regarding Statewide Housing Laws that
Apply to Applications for Housing Development Projects in the Town

REMARKS:

Attachment 2 contains public comments received before 11:01 a.m. on Tuesday, September 12, 2023.

Attachment Previously Received with the Staff Report:

1. PowerPoint Presentation

Attachment Received with this Desk Item:

2. Public Comments

Reviewed by: Town Manager, Assistant Town Manager, and Community Development Director

From: Phil Koen

Sent: Tuesday, September 12, 2023 12:56 AM

To: Gabrielle Whelan <GWhelan@losgatosca.gov>

Cc: Wendy Wood <WWood@losgatosca.gov>; Laurel Prevetti <LPrevetti@losgatosca.gov>; [bkautz](mailto:bkautz@losgatosca.gov)
Maria Ristow <MRistow@losgatosca.gov>; Mary Badame <MBadame@losgatosca.gov>; Matthew Hudes
<MHudes@losgatosca.gov>; Rob Rennie <RRennie@losgatosca.gov>; Rob Moore
<RMoore@losgatosca.gov>; [jvannada](mailto:jvannada@losgatosca.gov); Rick Van Hoesen

Subject: Special Joint Meeting of Town Council and Planning Commission - Agenda Item #1

[EXTERNAL SENDER]

Hello Gabrielle,

Would you please include the attached material in the information package to be distributed to the Town Council, Planning Commission, and make it available on the Town's website prior to Tuesday's meeting.

The material is directly related to the topics being discussed at the study session, namely the Builder's Remedy (Gov Code Section 65589.5 (d), recent court ruling regarding the Builder's Remedy (Californians for Homeownership v. City of La Canada Flintridge – LA Sup. Ct. July 11, 2023) and recently filed litigation regarding a denial of a builder's remedy application (600 Foothill Owner LP v. City of La Canada Flintridge).

Additionally, the Notice of Violation Letter issued by HCD to the City of La Canada Flintridge directly discusses a similar fact pattern the Town of Los Gatos is facing regarding "self-certification" of the Housing Element and the legal position HCD has taken. The HCD letter is very informative in that it directly addresses housing element compliance and the vesting right arising from a Builder's Remedy.

I would hope that during Ms. Kautz discussion of current litigation, court rulings and HCD, she can directly discuss the attached material, particularly the issue of "self-certification" of the Town's Housing Element in an effort to avoid builder's remedy development applications. The core issue the Town is dealing with is whether the Housing Element adopted by the Town Council on January 30, 2023, substantially complies with State Housing Law. All the issues regarding builder's remedy applications flow directly from this. You have publicly taken the position that the adopted Housing Element does substantially comply, which sets the Town up for a potential legal challenge similar to the legal challenge the City of La Canada Flintridge is now experiencing. As Ms. Kautz notes in her presentation there are substantial risks to the Town namely, high defense costs, possible damages, and significant attorney fees exposure. The residents need to be educated as to what this all means.

What makes the Town's use case so troubling is that on two occasions HCD has clearly stated that the adopted Housing Element does not comply. Worse in HCD's April 14, 2023, comment letter (copy attached), HCD left no doubt that the findings pursuant to GC section 65585, sub (f)(2) made by the Town Council are "inadequate to demonstrate compliance with statutory

requirements". This leaves the Town in a very precarious position which Ms. Kautz is in a perfect position to provide more clarity.

In Ms. Kautz presentation she mentions that HCD's determination are only its opinions, not law. However, the courts have conveyed a reluctance to disturb HCD's determinations on housing elements as long as some record of evidence allows the court to discern the department's rationale. It appears that only where that rationale was both unexplained and inexplicable was the court willing to intervene. This is an area which hopefully Ms. Kautz could discuss as well.

We look forward to a complete, balanced, and open discussion of these issues. Much is riding on this. Hopefully, the additional material will contribute to a constructive and educational discussion.

Thank you,

Phil Koen

Cal. Gov. Code § 65589.5

Section 65589.5 - Housing Accountability Act

(a)

(1) The Legislature finds and declares all of the following:

(A) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.

(B) California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.

(C) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.

(D) Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects.

(2) In enacting the amendments made to this section by the act adding this paragraph, the Legislature further finds and declares the following:

(A) California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives.

(B) While the causes of this crisis are multiple and complex, the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor.

(C) The crisis has grown so acute in California that supply, demand, and affordability fundamentals are characterized in the negative: underserved demands, constrained supply, and protracted unaffordability.

(D) According to reports and data, California has accumulated an unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units annually to keep pace with growth through 2025.

(E) California's overall homeownership rate is at its lowest level since the 1940s. The state ranks 49th out of the 50 states in homeownership rates as well as in the supply of

housing per capita. Only one-half of California's households are able to afford the cost of housing in their local regions.

(F) Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.

(G) The majority of California renters, more than 3,000,000 households, pay more than 30 percent of their income toward rent and nearly one-third, more than 1,500,000 households, pay more than 50 percent of their income toward rent.

(H) When Californians have access to safe and affordable housing, they have more money for food and health care; they are less likely to become homeless and in need of government-subsidized services; their children do better in school; and businesses have an easier time recruiting and retaining employees.

(I) An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's cumulative housing shortfall therefore has not only national but international environmental consequences.

(J) California's housing picture has reached a crisis of historic proportions despite the fact that, for decades, the Legislature has enacted numerous statutes intended to significantly increase the approval, development, and affordability of housing for all income levels, including this section.

(K) The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled.

(L) It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.

(3) It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety, as described in paragraph (2) of subdivision (d) and paragraph (1) of subdivision (j), arise infrequently.

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

(c) The Legislature also recognizes that premature and unnecessary development of agricultural lands for urban uses continues to have adverse effects on the availability of those lands for food and fiber production and on the economy of the state. Furthermore, it is

the policy of the state that development should be guided away from prime agricultural lands; therefore, in implementing this section, local jurisdictions should encourage, to the maximum extent practicable, in filling existing urban areas.

(d) A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (h) of Section 50199.7 of the Health and Safety Code, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:

(1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation pursuant to Section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by Section 65008. If the housing development project includes a mix of income categories, and the jurisdiction has not met or exceeded its share of the regional housing need for one or more of those categories, then this paragraph shall not be used to disapprove or conditionally approve the housing development project. The share of the regional housing need met by the jurisdiction shall be calculated consistently with the forms and definitions that may be adopted by the Department of Housing and Community Development pursuant to Section 65400. In the case of an emergency shelter, the jurisdiction shall have met or exceeded the need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. Any disapproval or conditional approval pursuant to this paragraph shall be in accordance with applicable law, rule, or standards.

(2) The housing development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. The following shall not constitute a specific, adverse impact upon the public health or safety:

(A) Inconsistency with the zoning ordinance or general plan land use designation.

(B) The eligibility to claim a welfare exemption under subdivision (g) of Section 214 of the Revenue and Taxation Code.

(3) The denial of the housing development project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(4) The housing development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.

(5) The housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article. For purposes of this section, a change to the zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete shall not constitute a valid basis to disapprove or condition approval of the housing development project or emergency shelter.

(A) This paragraph cannot be utilized to disapprove or conditionally approve a housing development project if the housing development project is proposed on a site that is identified as suitable or available for very low, low-, or moderate-income households in the jurisdiction's housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation.

(B) If the local agency has failed to identify in the inventory of land in its housing element sites that can be developed for housing within the planning period and are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels pursuant to Section 65584, then this paragraph shall not be utilized to disapprove or conditionally approve a housing development project proposed for a site designated in any element of the general plan for residential uses or designated in any element of the general plan for commercial uses if residential uses are permitted or conditionally permitted within commercial designations. In any action in court, the burden of proof shall be on the local agency to show that its housing element does identify adequate sites with appropriate zoning and development standards and with services and facilities to accommodate the local agency's share of the regional housing need for the very low, low-, and moderate-income categories.

(C) If the local agency has failed to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit, has failed to demonstrate that the identified zone or zones include sufficient capacity to accommodate the need for emergency shelter identified in paragraph (7) of subdivision (a) of Section 65583, or has failed to demonstrate that the identified zone or zones can accommodate at least one emergency shelter, as required by paragraph (4) of subdivision (a) of Section 65583, then this paragraph shall not be utilized to disapprove or conditionally approve an emergency shelter proposed for a site designated in any element of the general plan for industrial, commercial, or multifamily residential uses. In any action in court, the burden of proof shall be on the local agency to show that its housing element does satisfy the requirements of paragraph (4) of subdivision (a) of Section 65583.

(e) Nothing in this section shall be construed to relieve the local agency from complying with the congestion management program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7 or the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(f)

(1) Except as provided in subdivision (o), nothing in this section shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development.

(2) Except as provided in subdivision (o), nothing in this section shall be construed to prohibit a local agency from requiring an emergency shelter project to comply with objective, quantifiable, written development standards, conditions, and policies that are consistent with paragraph (4) of subdivision (a) of Section 65583 and appropriate to, and consistent with, meeting the jurisdiction's need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. However, the development standards, conditions, and policies shall be applied by the local agency to facilitate and accommodate the development of the emergency shelter project.

(3) Except as provided in subdivision (o), nothing in this section shall be construed to prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the housing development project or emergency shelter.

(4) For purposes of this section, a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity.

(g) This section shall be applicable to charter cities because the Legislature finds that the lack of housing, including emergency shelter, is a critical statewide problem.

(h) The following definitions apply for the purposes of this section:

(1) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.

(2) "Housing development project" means a use consisting of any of the following:

(A) Residential units only.

(B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.

(C) Transitional housing or supportive housing.

(3) "Housing for very low, low-, or moderate-income households" means that either (A) at least 20 percent of the total units shall be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of this code. Housing units targeted for lower income households shall be made available at a monthly housing cost that does not exceed 30 percent of 60 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the lower income eligibility limits are based. Housing units targeted for persons and families of moderate income shall be made available at a monthly housing cost that does not exceed 30 percent of 100 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the moderate-income eligibility limits are based.

(4) "Area median income" means area median income as periodically established by the Department of Housing and Community Development pursuant to Section 50093 of the Health and Safety Code. The developer shall provide sufficient legal commitments to ensure continued availability of units for very low or low-income households in accordance with the provisions of this subdivision for 30 years.

(5) Notwithstanding any other law, until January 1, 2030, "deemed complete" means that the applicant has submitted a preliminary application pursuant to Section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a complete application pursuant to Section 65943.

(6) "Disapprove the housing development project" includes any instance in which a local agency does any of the following:

(A) Votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit.

(B) Fails to comply with the time periods specified in subdivision (a) of Section 65950. An extension of time pursuant to Article 5 (commencing with Section 65950) shall be deemed to be an extension of time pursuant to this paragraph.

(C) Fails to meet the time limits specified in Section 65913.3.

(7) "Lower density" includes any conditions that have the same effect or impact on the ability of the project to provide housing.

(8) Until January 1, 2030, "objective" means 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.

(9) Notwithstanding any other law, until January 1, 2030, "determined to be complete" means that the applicant has submitted a complete application pursuant to Section 65943.

(i) If any city, county, or city and county denies approval or imposes conditions, including design changes, lower density, or a reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the housing development project's application is complete, that have a substantial adverse effect on the viability or affordability of a housing development for very low, low-, or moderate-income households, and the denial of the development or the imposition of conditions on the development is the subject of a court action which challenges the denial or the imposition of conditions, then the burden of proof shall be on the local legislative body to show that its decision is consistent with the findings as described in subdivision (d), and that the findings are supported by a preponderance of the evidence in the record, and with the requirements of subdivision (o).

(j)

(1) When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, 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 on the record that both of the following conditions exist:

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

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

(2)

(A) If the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows:

(i) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units.

(ii) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units.

(B) If the local agency fails to provide the required documentation pursuant to subparagraph (A), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.

(3) For purposes of this section, the receipt of a density bonus, incentive, concession, waiver, or reduction of development standards pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision specified in this subdivision.

(4) For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan. If the local agency has complied with paragraph (2), the local agency may require the proposed housing development project to comply with the objective standards and criteria of the zoning which is consistent with the general plan, however, the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project.

(k)

(1)

(A)

(i) The applicant, a person who would be eligible to apply for residency in the housing development project or emergency shelter, or a housing organization may bring an action to enforce this section. If, in any action brought to enforce this section, a court finds that any of the following are met, the court shall issue an order pursuant to clause (ii):

(I) The local agency, in violation of subdivision (d), disapproved a housing development project or conditioned its approval in a manner rendering it infeasible for the development of an emergency shelter, or housing for very low, low-, or moderate-income households, including farmworker housing, without making the findings required by this section or without making findings supported by a preponderance of the evidence.

(II) The local agency, in violation of subdivision (j), disapproved a housing development project complying with applicable, objective general plan and zoning standards and criteria, or imposed a condition that the project be developed at a lower density, without making the findings required by this section or without making findings supported by a preponderance of the evidence.

(III)

(ia) Subject to sub-subclause (ib), the local agency, in violation of subdivision (o), required or attempted to require a housing development project to comply with an ordinance, policy, or standard not adopted and in effect when a preliminary application was submitted.

(ib) This subclause shall become inoperative on January 1, 2030.

(ii) If the court finds that one of the conditions in clause (i) is met, the court shall issue an order or judgment compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the housing development project or emergency shelter. The court may issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section. The court shall retain jurisdiction to ensure that its order or judgment is carried out and shall award reasonable attorney's fees and costs of suit to the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section.

(B) Upon a determination that the local agency has failed to comply with the order or judgment compelling compliance with this section within 60 days issued pursuant to subparagraph (A), the court shall impose fines on a local agency that has violated this section and require the local agency to deposit any fine levied pursuant to this subdivision into a local housing trust fund. The local agency may elect to instead deposit the fine into the Building Homes and Jobs Trust Fund. The fine shall be in a minimum amount of ten thousand dollars (\$10,000) per housing unit in the housing development project on the date the application was deemed complete pursuant to Section 65943. In determining the amount of fine to impose, the court shall consider the local agency's progress in attaining its target allocation of the regional housing need pursuant to Section 65584 and any prior violations of this section. Fines shall not be paid out of funds already dedicated to affordable housing, including, but not limited to, Low and Moderate Income Housing Asset Funds, funds dedicated to housing for very low, low-, and moderate-income households, and federal HOME Investment Partnerships Program and Community Development Block Grant Program funds. The local agency shall commit and expend the money in the local housing trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low, very low, or low-income households. After five years, if the funds have not been expended, the money shall revert to the state and be deposited in the Building Homes and Jobs Trust Fund for the sole purpose of financing newly

constructed housing units affordable to extremely low, very low, or low-income households.

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

(2) For purposes of this subdivision, "housing organization" means a trade or industry group whose local members are primarily engaged in the construction or management of housing units or a nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households and have filed written or oral comments with the local agency prior to action on the housing development project. A housing organization may only file an action pursuant to this section to challenge the disapproval of a housing development by a local agency. A housing organization shall be entitled to reasonable attorney's fees and costs if it is the prevailing party in an action to enforce this section.

(l) If the court finds that the local agency (1) acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section and (2) failed to carry out the court's order or judgment within 60 days as described in subdivision (k), the court, in addition to any other remedies provided by this section, shall multiply the fine determined pursuant to subparagraph (B) of paragraph (1) of subdivision (k) by a factor of five. For purposes of this section, "bad faith" includes, but is not limited to, an action that is frivolous or otherwise entirely without merit.

(m) Any action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure, and the local agency shall prepare and certify the record of proceedings in accordance with subdivision (c) of Section 1094.6 of the Code of Civil Procedure no later than 30 days after the petition is served, provided that the cost of preparation of the record shall be borne by the local agency, unless the petitioner elects to prepare the record as provided in subdivision (n) of this section. A petition to enforce the provisions of this section shall be filed and served no later than 90 days from the later of (1) the effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project or (2) the expiration of the time periods specified in subparagraph (B) of paragraph (5) of subdivision (h). Upon entry of the trial court's order, a party may, in order to obtain appellate review of the order, file a petition within 20 days after service upon it of a written notice of the entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow, or may appeal the judgment or order of the trial court under Section 904.1 of the Code of Civil Procedure. If the local agency appeals the judgment of

the trial court, the local agency shall post a bond, in an amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant.

(n) In any action, the record of the proceedings before the local agency shall be filed as expeditiously as possible and, notwithstanding Section 1094.6 of the Code of Civil Procedure or subdivision (m) of this section, all or part of the record may be prepared (1) by the petitioner with the petition or petitioner's points and authorities, (2) by the respondent with respondent's points and authorities, (3) after payment of costs by the petitioner, or (4) as otherwise directed by the court. If the expense of preparing the record has been borne by the petitioner and the petitioner is the prevailing party, the expense shall be taxable as costs.

(o)

(1) Subject to paragraphs (2), (6), and (7), and subdivision (d) of Section 65941.1, a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application including all of the information required by subdivision (a) of Section 65941.1 was submitted.

(2) Paragraph (1) shall not prohibit a housing development project from being subject to ordinances, policies, and standards adopted after the preliminary application was submitted pursuant to Section 65941.1 in the following circumstances:

(A) In the case of a fee, charge, or other monetary exaction, to an increase resulting from an automatic annual adjustment based on an independently published cost index that is referenced in the ordinance or resolution establishing the fee or other monetary exaction.

(B) A preponderance of the evidence in the record establishes that subjecting the housing development project to an ordinance, policy, or standard beyond those in effect when a preliminary application was submitted is necessary to mitigate or avoid a specific, adverse impact upon the public health or safety, as defined in subparagraph (A) of paragraph (1) of subdivision (j), and there is no feasible alternative method to satisfactorily mitigate or avoid the adverse impact.

(C) Subjecting the housing development project to an ordinance, policy, standard, or any other measure, beyond those in effect when a preliminary application was submitted is necessary to avoid or substantially lessen an impact of the project under the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(D) The housing development project has not commenced construction within two and one-half years, or three and one-half years for an affordable housing project, following the date that the project received final approval. For purposes of this subparagraph:

(i) "Affordable housing project" means a housing development that satisfies both of the following requirements:

(I) Units within the development are subject to a recorded affordability restriction for at least 55 years for rental housing and 45 years for owner-occupied housing, or the first purchaser of each unit participates in an equity sharing agreement as described in subparagraph (C) of paragraph (2) of subdivision (c) of Section 65915.

(II) All of the units within the development, excluding managers' units, are dedicated to lower income households, as defined by Section 50079.5 of the Health and Safety Code.

(ii) "Final approval" means that the housing development project has received all necessary approvals to be eligible to apply for, and obtain, a building permit or permits and either of the following is met:

(I) The expiration of all applicable appeal periods, petition periods, reconsideration periods, or statute of limitations for challenging that final approval without an appeal, petition, request for reconsideration, or legal challenge having been filed.

(II) If a challenge is filed, that challenge is fully resolved or settled in favor of the housing development project.

(E) The housing development project is revised following submittal of a preliminary application pursuant to Section 65941.1 such that the number of residential units or square footage of construction changes by 20 percent or more, exclusive of any increase resulting from the receipt of a density bonus, incentive, concession, waiver, or similar provision, including any other locally authorized program that offers additional density or other development bonuses when affordable housing is provided. For purposes of this subdivision, "square footage of construction" means the building area, as defined by the California Building Standards Code (Title 24 of the California Code of Regulations).

(3) This subdivision does not prevent a local agency from subjecting the additional units or square footage of construction that result from project revisions occurring after a preliminary application is submitted pursuant to Section 65941.1 to the ordinances, policies, and standards adopted and in effect when the preliminary application was submitted.

(4) For purposes of this subdivision, "ordinances, policies, and standards" includes general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency, as defined in Section 66000, including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions.

(5) This subdivision shall not be construed in a manner that would lessen the restrictions imposed on a local agency, or lessen the protections afforded to a housing development project, that are established by any other law, including any other part of this section.

(6) This subdivision shall not restrict the authority of a public agency or local agency to require mitigation measures to lessen the impacts of a housing development project under the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(7) With respect to completed residential units for which the project approval process is complete and a certificate of occupancy has been issued, nothing in this subdivision shall

limit the application of later enacted ordinances, policies, and standards that regulate the use and occupancy of those residential units, such as ordinances relating to rental housing inspection, rent stabilization, restrictions on short-term renting, and business licensing requirements for owners of rental housing.

(8)

(A) This subdivision shall apply to a housing development project that submits a preliminary application pursuant to Section 65941.1 before January 1, 2030.

(B) This subdivision shall become inoperative on January 1, 2034.

(p) This section shall be known, and may be cited, as the Housing Accountability Act.

Ca. Gov. Code § 65589.5

Amended by Stats 2022 ch 651 (AB 2234),s 1, eff. 1/1/2023.

Amended by Stats 2022 ch 632 (SB 1252),s 2, eff. 1/1/2023.

Amended by Stats 2021 ch 360 (AB 1584),s 8, eff. 1/1/2022.

Amended by Stats 2021 ch 161 (SB 8),s 1, eff. 1/1/2022.

Amended by Stats 2020 ch 165 (SB 1030),s 5, eff. 9/25/2020.

Amended by Stats 2019 ch 665 (AB 1743),s 3.1, eff. 1/1/2020.

Amended by Stats 2019 ch 654 (SB 330),s 3, eff. 1/1/2020.

Amended by Stats 2018 ch 243 (AB 3194),s 1, eff. 1/1/2019.

Amended by Stats 2018 ch 92 (SB 1289),s 114, eff. 1/1/2019.

Amended by Stats 2017 ch 378 (AB 1515),s 1.5, eff. 1/1/2018.

Amended by Stats 2017 ch 373 (AB 678),s 1, eff. 1/1/2018.

Amended by Stats 2017 ch 368 (SB 167),s 1, eff. 1/1/2018.

Amended by Stats 2016 ch 420 (AB 2584),s 1, eff. 1/1/2017.

Amended by Stats 2015 ch 349 (AB 1516),s 2, eff. 1/1/2016.

Amended by Stats 2010 ch 610 (AB 2762),s 2, eff. 1/1/2011.

Amended by Stats 2007 ch 633 (SB 2),s 4, eff. 1/1/2008.

Amended by Stats 2006 ch 888 (AB 2511),s 5, eff. 1/1/2007.

Amended by Stats 2005 ch 601 (SB 575),s 1, eff. 1/1/2006

Amended by Stats 2004 ch 724 (AB 2348),s 4, eff. 1/1/2005

Amended by Stats 2003 ch 793 (SB 619), s 3, eff. 1/1/2004.

Amended by Stats 2002 ch 147 (SB 1721), s 1, eff. 1/1/2003.

Amended by Stats 2001 ch 237 (AB 369), s 1, eff. 1/1/2002.

Previously Amended October 10, 1999 (Bill Number: SB 948) (Chapter 968).

Housing Element Non-Compliance Spurs Builder's Remedy Projects

[August 31, 2023](#)

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September 2023

By Justin A. Zucker

In 1969, the Legislature enacted California's Housing Element Law.[1] Since then, local governments (cities and counties) must periodically adopt a housing element, which is a plan to accommodate their fair share of the "regional housing need" in their community.[2] In a two-step process, the California Department of Housing and Community Development (HCD) establishes the amount of housing at varying affordability levels for each locality. First, HCD establishes an amount needed for each region in the state. Second, the regional councils of governments apply a methodology to allocate the regional housing need to local governments.[3] The amount of housing each locality must plan for is known as its Regional Housing Needs Allocation (RHNA; pronounced ree-nah).

Housing elements must be updated every eight years, or five years for some rural areas.[4] Housing elements must identify and analyze existing and projected housing needs and include goals, policies, quantified objectives, financial resources, and programs for the preservation and development of housing. [5] California is in its sixth statewide housing element update cycle.

To be compliant, each of the 539 local jurisdictions in California must obtain certification of substantial compliance with its housing element from HCD. This means that HCD has completed its review of the jurisdiction's adopted housing element and issued a review letter finding the element in compliance with the Housing Element Law.

A local jurisdiction's failure to adopt a substantially compliant housing element results in several repercussions. One is commonly known as the "builder's remedy," which was previously a little-known provision added to the Housing Accountability Act (HAA) in 1990.[6] The builder's remedy removes a jurisdiction's local control over certain low-income housing development projects, specifically those providing either 20% of the units as lower income (80% area mean income (AMI)) or 100% of the units as moderate income (120% AMI).[7]

A local jurisdiction without a compliant adopted housing element cannot use its general plan and zoning standards to reject builder's remedy projects. Only if specific findings of adverse impacts to health or safety are found can a local jurisdiction apply local zoning development controls.

Up until the most recent housing element cycle, local jurisdictions have easily achieved compliance. Starting in 2017, a spate of legislative changes to the Housing Element Law, however, changed that

paradigm. Compliance with the Housing Element Law became no longer a check-the-box exercise, resulting in numerous jurisdictions across the state failing to timely adopt a substantially compliant housing element during the sixth cycle. As of August 24, 2023, of California's 539 jurisdictions, 198 had not adopted a substantially compliant housing element. Consequently, builder's remedy projects have popped up across the state, including in the coastal towns of Santa Monica, Redondo Beach, and Claremont, and the ritzy Beverly Hills down south, as well as Mountain View, San Jose, Los Gatos, and San Rafael in the San Francisco Bay Area and Davis and beyond.

A case this summer tested whether a local jurisdiction could achieve certification of substantial compliance of its housing element by other means.[8] *Californians for Homeownership v. City of La Canada Flintridge* is the first trial court case this author is aware of addressing attempts by local jurisdictions to self-certify their own housing elements. In *Californians for Homeownership*, the court held the City of La Canada Flintridge failed to timely adopt a housing element and could not self-certify its housing element to avoid penalties like the builder's remedy, which are intended to incentivize compliance.[9]

A mere 10 days after the *Californians for Homeownership* decision was published, a developer sued La Canada Flintridge for denying its builder's remedy application in May 2023.[10] Four days later, a housing advocacy organization sued La Canada Flintridge for denial of the same project. How things play out in La Canada Flintridge and across California with respect to builder's remedy projects is yet to be seen, but it will certainly be an interesting saga to pay attention to.

[Justin A. Zucker](#) is on the Executive Committee of the Environmental Law Section of both the [California Lawyer's Association](#) and the [Bar Association of San Francisco](#). He is an attorney at [Reuben, Junius & Rose, LLP](#), where his practice focuses on land use, environmental, and administrative law, concentrating on urban in-fill multi-family and mixed-use development. He is also Vice Chair of the [Piedmont Planning Commission](#) and Board Member of the [Housing Action Coalition](#).

[1] Cal. Gov't Code §§ 65580, *et seq.* (West 2023).

[2] Cal. Gov't Code § 65584.01 (West 2023).

[3] Cal. Gov't Code § 65584(d) (West 2023).

[4] Cal. Gov't Code § 65588 (West 2023).

[5] Cal. Gov't Code § 65583 (West 2023).

[6] S.B. 2011, 1990-1991 Reg., Legis. Sess. (Cal. 1990), now codified as Cal. Gov't Code § 65589.5(d).

[7] Cal. Gov't Code § 65595.5(d)(5) (West 2023).

[8] *Californians for Homeownership v. City of La Canada Flintridge* (LA Sup.Ct. July 11, 2023) Case No. 23STCP00699.

[9] *Id.* at *29.

[10] *600 Foothill Owner LP v. City of La Cañada Flintridge* (LA Sup.Ct., filed July 21, 2023) Case No. 23STCP02575.

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**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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June 8, 2023

Mark R. Alexander, City Manager
City of La Cañada Flintridge
One Civic Center Drive
La Cañada Flintridge, CA 91011

Dear Mark R. Alexander:

**RE: City of La Cañada Flintridge Denial of 600 Foothill Boulevard Housing Project
– Notice of Violation**

The California Department of Housing and Community Development (HCD) writes to notify the City of La Cañada Flintridge (City), and its City Council, that it is in violation of State Housing Element Law and the Housing Accountability Act (HAA) (Gov. Code, § 65589.5). This violation occurred when the City, despite technical assistance from HCD, denied an appeal related to the application of the housing project at 600 Foothill Boulevard (Project). The City did so by adopting Resolution 23-14, which purports to uphold the Planning Division's incompleteness determination for the Project application, issued on March 1, 2023.

The basis for the City's denial includes, among other findings:

1. that Government Code section 65589.5, subdivision (d)(5), colloquially referred to as the Builder's Remedy, does not apply and is not available for the Project; and
2. that the Project did not "vest" as a Builder's Remedy project as alleged in the Project's preliminary application because the City's housing element, adopted on October 4, 2022 (October 4, 2022, Adopted Housing Element), was in compliance with State Housing Element Law (Gov. Code, § 65580 et seq.).

Based on HCD's review of pertinent information in the City's own staff report, these findings are flawed. The City cannot "backdate" its housing element compliance date to an earlier date so as to avoid approving a Builder's Remedy application. In short, the October 4, 2022 Adopted Housing Element did not substantially comply with State Housing Element Law, regardless of any declaration by the City. Therefore, the Builder's Remedy applies, and the City's denial of the Project application based on inconsistency with zoning and land use designation is a violation of the HAA.

HCD further reminds the City that, as of the date of this letter, the City remains out of compliance with Housing Element Law unless and until it completes statutorily required rezoning.


Background

The Project is proposed as an 80-unit mixed-use project where 20 percent of the units (16 units) will be affordable to lower-income households. The residential portion equates to approximately 89 percent of the Project; therefore, the Project qualifies as a “housing development project” under the HAA (Gov. Code, § 65589.5, subd. (h)(2)(B)). The base density proposed for this Project is approximately 40.5 units per acre before the application of density bonus under State Density Bonus Law (Gov. Code, §§ 65915-65918). HCD understands the timeline for the Project as follows:

- On November 11, 2022, pursuant to Government Code section 65941.1, the Project applicant submitted a preliminary application that was vested on November 14, 2023, after payment of application fees.
- A full application was submitted to the City for the Project on January 13, 2023, and fees were paid on the invoice on January 31, 2023. By submitting this full application within the 180-day period prescribed by Government Code section 65941.1, subdivision (d)(1), the applicant established November 14, 2023 (the date it submitted the preliminary application) as the vesting date of the application.
- On February 10, 2023, the City’s planning division issued the first incompleteness letter on this application, which cited information required for the site plan, floor plan, elevation, landscape plans, grading plans, and the density bonus application, among other things. The letter did not comment on density or development standards relating to the Mixed-Use 2 designation.
- On March 1, 2023, the City’s planning division issued a second incompleteness letter that further found that the Builder’s Remedy would not apply to the Project, that the Project was therefore inconsistent with the Mixed-Use 2 designation, and that the applicant must submit revised plans and materials based on a density of 12-15 units per acre.
- On March 9, 2023, the applicant appealed this incompleteness letter to the City Council.
- On March 22, 2023, HCD provided a Letter of Technical Assistance to the City to help with decision-making related to this appeal.
- On May 1, 2023, the City Council heard and denied the appeal by adopting Resolution 23-14. The Resolution found the following:
 - the Builder’s Remedy under the HAA did not apply and is not available for the Project; and
 - the Project did not “vest” as a Builder’s Remedy project as alleged in the Project’s SB 330 Preliminary Application (submitted November 14, 2022) because the City’s October 4, 2022 Adopted Housing Element was in substantial compliance with State Housing Element Law, regardless of HCD’s finding to the contrary.

Housing Element Compliance

The City's determination that the October 4, 2022 Adopted Housing Element was in substantial compliance with State Housing Element Law is incorrect and unsupported by law. Pursuant to Government Code section 65585, a local jurisdiction must first submit a draft housing element to HCD and receive HCD's findings before formally adopting a revised housing element. If HCD finds the draft element is not substantially compliant, the local jurisdiction must revise the draft to address any findings by HCD (Gov. Code, § 65585, subd. (f)(1)) or adopt the housing element without changes and include written findings explaining why the local jurisdiction believes that the draft substantially complies (Gov. Code, § 65585, subd. (f)(2)). Promptly following adoption, the local jurisdiction must submit the adopted housing element to HCD (Gov. Code, § 65585, subd. (g)) and receive findings on the adopted element from HCD (Gov. Code, § 65585, subd. (h)). The following represents the record of housing element submittals to HCD and HCD's formal responses.

- October 6, 2021 – The City submitted the initial draft housing element to HCD.
- October 15, 2021 – Due date of 6th cycle housing element per State Housing Element Law.
- December 3, 2021 – Pursuant to Government Code section 65585, subdivision (b), HCD found the draft housing element required significant revisions to substantially comply with State Housing Element Law.
- October 4, 2022 – The City adopted a housing element that failed to address adequately the findings in HCD's letter of December 3, 2021. The resolution adopting the housing element made none of the findings required by Government Code section 65585, subdivision (f)(2). 
- October 7, 2022 – The City submitted the October 4, 2022 Adopted Housing Element for HCD's review.
- December 6, 2022 – HCD found the October 4, 2022 Adopted Housing Element required critical revisions to comply with state law, including additional analysis to demonstrate the adequacy of the sites included in its site inventory and policy and programmatic changes pursuant to Government Code section 65585, subdivision (h).
- February 21, 2023 – The City adopted a housing element which addressed adequately the findings in HCD's December 6, 2022 letter. As part of this adoption, the City further stated that the City's housing element was in substantial compliance with State Housing Element law as of the October 4, 2022 Adopted Housing Element.
- February 23, 2023 – The City submitted the revised, adopted housing element for HCD's review.
- April 24, 2023 – HCD found the revised adopted housing element was not in substantial compliance pursuant to Government Code section 65585, subdivision (b). HCD made this finding because the City adopted the element on February 21, 2023, more than one year past the statutory due date of October 15, 2021. As a result, and pursuant to Government Code section

65588, subdivision (e)(4)(C)(iii), the City must complete required rezones in Program 1 (Adequate Residential Sites to Accommodate the Regional Housing Needs Allocation (RHNA), Program 4 (Downtown Village Specific Plan), Program 5 (Religious Institution Housing Overlay), and Program 6 (By Right Approval for Projects with 20 percent Affordable Units) prior to being found in substantial compliance.

A local jurisdiction has no authority to determine that its adopted element is in substantial compliance with State Housing Element Law.¹ It may, however, provide reasoning why HCD should make a finding of substantial compliance (Gov. Code, § 65585, subd. (f)(2)). As stated in HCD's letter dated March 22, 2023, a local jurisdiction is "in compliance" as of the date of HCD's letter finding the adopted element in substantial compliance. A local jurisdiction cannot "backdate" compliance to the date of its adoption of a housing element.² Moreover, by revising its October 4, 2022 Adopted Housing Element (in response to HCD's findings made on December 6, 2022), the City directly contradicted its declaration that that Adopted Housing Element substantially complied with State Housing Element Law. In short, the October 4, 2022 Adopted Housing Element did not substantially comply with State Housing Element Law, regardless of any declaration by the City.

Housing Accountability Act (HAA)

Resolution 23-14 improperly blocks the Project applicant from utilizing protections provided in the HAA. Pursuant to Government Code section 65589.5, subdivision (d), a jurisdiction shall not disapprove a housing development project for very low-, low-, or moderate-income households³ or condition approval in a manner that renders the housing development project infeasible unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of five findings in subdivision (d).

If HCD does not find a local jurisdiction's adopted housing element in substantial compliance by the statutory deadline, the jurisdiction cannot use subdivision (d)(5) of Government Code section 65589.5 (inconsistency with zoning and general plan standards) as a basis to deny a qualifying affordable housing project.

¹ See "Housing Compliance Memo," State Department of Housing and Community Development, March 16, 2023. <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/memos/HousingElementComplianceMemo03162023.pdf>.

² Ibid.

³ "Housing for very low-, low-, or moderate-income households" means that either (A) at least 20 percent of the total units shall be sold or rented to lower-income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of this code (Gov. Code, § 65589.5, subd. (h)(3)).

Government Code section 65589.5, subdivision (d)(5), allows a local agency to disapprove an affordable housing project that “is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation as specified in any element of the general plan” *if* “the jurisdiction has adopted a revised housing element ... that is in substantial compliance....” Here, because the City does not have a substantially compliant housing element, it may not disapprove an affordable housing project for inconsistency with the zoning and land use designation.

Pursuant to Government Code section 65941.1, subdivision (a), the submittal of a complete preliminary application vests the right to develop a housing development project in accordance with the ordinances, policies, and standards in effect when a preliminary application is submitted (Gov. Code, § 65589.5, subd. (o)(1)). Therefore, if the preliminary application submittal occurs at a time when the jurisdiction does not have a compliant housing element, and the development submittal occurs within the 180-day required period thereafter (Gov. Code, § 65941.1, subd. (d)(1)), the jurisdiction cannot rely upon zoning and land use standards to deny an affordable housing project because the jurisdiction’s noncompliant status was vested, and shall remain, throughout the entitlement process. This rule applies even if the jurisdiction subsequently achieves compliance.

As the adopted housing element was not in substantial compliance as of November 14, 2022 (the date of preliminary application submittal), the City cannot use Government Code section 65589.5, subdivision (d)(5), to deny the project.

Yet on March 1, 2023, the City issued an incompleteness letter that found that the Builder’s Remedy would not apply to the Project, that the Project was therefore inconsistent with the land use designation, and that as a result, the applicant must submit revised plans.⁴ On May 1, 2023, the City Council denied the applicant’s appeal by adopting Resolution 23-14, which found that the Builder’s Remedy did not apply. Although the City Council did not directly vote on or deny a proposed housing development on the site, Resolution 23-14 upheld the planning division’s March 1, 2023 letter, which denied the 80-unit Project as submitted and directed the applicant to submit new site plans and a new project consistent with the Mixed-Use 2 zone density of 12-15 units per acre.

The City’s adoption of Resolution 23-14 therefore effectively denied the Project as proposed in violation of the HAA (Gov. Code, § 65589.5, subds. (d) and (h)(6)(A)).

⁴ The City’s March 1, 2023, letter appears to incorrectly determine the Project application was incomplete because the Project was inconsistent with zoning standards. Inconsistency with local zoning standards is a reason to *deny* an application in some circumstances, but it is not a basis for deeming an application incomplete. The City’s finding therefore conflicts with the Permit Streamlining Act (Gov. Code, § 65943, subd. (a)) and the HAA (Gov. Code, § 65941.1, subd. (d)(1)).

Conclusion

The City violated state law by claiming, without any factual or legal justification, that the Builder's Remedy did not apply to the Project application (Gov. Code, § 65589.5, subd. (d)(5)). In addition, pursuant to HCD's housing element findings letter dated April 24, 2023, the City remains out of compliance with State Housing Element Law. Please note HCD's review of the May 1, 2023, action to deny the appeal of the March 1, 2023 letter was made in furtherance of, and limited to, a determination of the City's compliance with State Housing Element Law and the HAA. Accordingly, HCD expresses no opinion as to whether the City has complied with, or is excused from, any other provisions of the Government Code governing review and approval of development applications.

Under Government Code section 65585, HCD must review any action or failure to act that it determines to be inconsistent with either an adopted housing element or Government Code section 65583. HCD must then issue written findings to the local government (Gov. Code, § 65585, subd. (i)). Additionally, HCD must notify a local government when that local government takes actions that violate Government Code sections 65589.5 and 65583 and may notify the California Office of the Attorney General (Gov. Code, § 65585, subds. (i)(1) and (j)). By this letter, HCD has done so.

The City has until June 22, 2023, to provide a written response to this Notice. HCD will consider any written response before taking further action authorized by Government Code section 65585, subdivision (j), including, but not limited to, referral to the California Office of the Attorney General. If you have any questions or need additional information, please contact melinda.coy@hcd.ca.gov.

Sincerely,



David Zisser
Assistant Deputy Director
Local Government Relations and Accountability



Melinda Coy
Proactive Housing Accountability Chief

cc: David Pai, Supervising Deputy Attorney General, California Department of Justice (via email)
Susan Koleda, AICP, Community Development Director (via email)

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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April 14, 2023

Laurel Prevetti, City Manager
Town of Los Gatos
110 E Main Street
Los Gatos, CA 95030

Dear Laurel Prevetti:

RE: Town of Los Gatos' 6th Cycle (2023-2031) Adopted Housing Element

Thank you for submitting the Town of Los Gatos' (Town) adopted housing element received for review on February 13, 2023. In addition, the Town submitted draft revisions on March 31, 2023. However, these revisions are not considered as part of this review. The Town, in adopting the element, also made findings pursuant to Government Code section 65585, subdivision (f)(2). These findings appear intended to explain the reasoning the element substantially complies with State Housing Element Law (Article 10.6 of the Gov. Code) despite findings made by the California Department of Housing and Community Development (HCD) in its January 12, 2023 prior review. However, the Town's findings are inadequate to demonstrate compliance with statutory requirements, and revisions to the element continue to be necessary to comply with State Housing Element Law. Pursuant to Government Code section 65585, subdivision (h), HCD is reporting the results of its review:

- **Local Findings of Substantial Compliance:** The Town prepared findings that appear intended to explain the reasoning the element substantially complies with State Housing Element Law despite HCD findings in the prior review. However, these findings do not provide content, reasoning, or response to HCD's findings that the prior draft element does not substantially comply with State Housing Element Law. For example, HCD's prior review has various findings regarding an assessment of fair housing and appropriate policies and programs to affirmatively further fair housing (AFFH). The Town's findings do not address this essential statutory requirement. Similar issues persist throughout the Town's findings where statutory requirements are not addressed in any meaningful way or where broad statements of statutory requirements are made but no content, reasoning, or response is provided in regard to these statutory requirements or HCD's prior findings.

The Town's findings only appear to make an attempt at meeting statutory requirements related to calculations of realistic residential capacity, suitability of

sites, and potential for redevelopment on nonvacant sites—narrow issues among many statutory requirements. However, these findings do not address the full extent of statutory requirements and HCD's prior findings.

Regarding the calculation of realistic residential capacity, the Town appears to be using minimum densities, which is an acceptable approach. However, the element and the findings do not appear to clarify or commit to this approach. The element simply changes the calculations, but there is no explanation that minimum densities are required or programmatic commitment to the minimum densities utilized. For example, for the North Forty Specific Plan, Program D (Additional Housing Capacity) does not commit to minimum densities, and minimum and maximum densities seem to be coterminous, which is generally considered a constraint on development. Also, the element does not make a commitment to require residential uses in zones that allow 100 percent non-residential uses so the element and findings are not responsive to HCD's findings regarding the likelihood of residential development.

Regarding suitability of sites and redevelopment potential on nonvacant sites in the planning period, the Town's findings explain that a few sites are added and simply mention that existing uses do not constitute an impediment to planned residential development in the planning period due to the submittal of property owner interest forms. First, this finding does not address that the use will likely discontinue during the planning period as required by statute. Second, the Town's finding does not address several other statutory areas of HCD's findings such as replacement requirements, small sites, appropriate zoning for lower-income households, infrastructure, and zoning for a variety of housing types. Third, simply stating a property owner submitted an interest form is not an affirmative demonstration of interest in residential development in the planning period. There is no discussion of the form and methods of gathering the information. Finally, but not exhaustively, many identified sites do not describe owner interest, and there is no other information or reasoning to explain how the Town complies with these requirements despite HCD's findings.

For these and many other reasons, the Town's findings do not explain the reasoning as to how the element substantially complies with State Housing Element Law despite HCD's findings in the prior review.

- *Adopted Housing Element and HCD's Findings:* The Town's adopted element essentially contains no revisions to address HCD's prior findings. The adopted element contains minimal revisions regarding utilizing minimum densities (although not consistently) to calculate residential capacity and adds a few sites but otherwise provides no content to address HCD's January 12, 2023 review. For these reasons, HCD will not repeat its findings and refers the Town to HCD's prior review.

- *Revisions Submitted for HCD's Review:* The Town submitted revisions to HCD on March 31, 2023. These revisions have not been considered in this review for various reasons, including the timing of the submittal as well as the importance of responding directly to the Town's findings pursuant to Government Code section 65585, subdivision (f)(2). HCD has considered these revisions as a separate submission and will be reviewed expeditiously, to the extent possible. HCD recognizes the Town's commitment to address HCD's findings as noted in Resolution 2023-006 and fully appreciates the opportunity to cooperate with the Town to help the Town meet statutory requirements and substantially comply with State Housing Element Law.

For your information, pursuant to Assembly Bill 1398 (Chapter 358, Statutes of 2021), if a local government fails to adopt a compliant housing element within 120 days of the statutory deadline (January 31, 2023), then any rezoning to make prior identified sites available or accommodate the regional housing needs allocation (RHNA) shall be completed no later than one year from the statutory deadline pursuant to Government Code sections 65583, subdivision (c) and 65583.2, subdivision (c). Otherwise, the local government's housing element will no longer comply with State Housing Element Law, and HCD may revoke its finding of substantial compliance pursuant to Government Code section 65585, subdivision (i). Please be aware, if the Town fails to adopt a compliant housing element within one year from the statutory deadline, the element cannot be found in substantial compliance until these rezones are completed.

Please be aware that AB 2339, codified in Government Code section 65583 adds specificity on how cities and counties plan for emergency shelters and ensure sufficient and suitable capacity. Future submittals of the housing element may need to address these statutory requirements. For additional information and timing requirements, please see HCD's memo at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/ab2339-notice.pdf>.

Public participation in the development, adoption, and implementation of the housing element is essential to effective housing planning. Throughout the housing element process, the Town should continue to engage the community, including organizations that represent lower-income and special needs households, by making information regularly available and considering and incorporating comments where appropriate. Please be aware, any revisions to the element must be posted on the local government's website, and a link to the revisions must be emailed to all individuals and organizations that have previously requested notices relating to the local government's housing element at least seven days before submitting to HCD.

Several federal, state, and regional funding programs consider housing element compliance as an eligibility or ranking criteria. For example, the CalTrans Senate Bill (SB) 1 Sustainable Communities grant, the Strategic Growth Council and HCD's Affordable Housing and Sustainable Communities programs, and HCD's Permanent Local Housing Allocation consider housing element compliance and/or annual reporting

requirements pursuant to Government Code section 65400. With a compliant housing element, the Town will meet housing element requirements for these and other funding sources.

For your information, some general plan element updates are triggered by housing element adoption. HCD reminds the Town to consider timing provisions and welcomes the opportunity to provide assistance. For information, please see the Technical Advisories issued by the Governor's Office of Planning and Research at:
<https://www.opr.ca.gov/planning/general-plan/guidelines.html>.

We are committed to assist the Town in addressing all statutory requirements of State Housing Element Law. If you have any questions or need additional technical assistance, please contact Jose Armando Jauregui, of our staff, at
jose.jauregui@hca.ca.gov.

Sincerely,



Paul McDougall
Senior Program Manager

Californians for Homeownership, Inc. v. City of La Cañada Flintridge, 23STCP00699

Tentative decisions on (1) motion for judgment: granted on second cause; motion for judgment on the pleadings: denied; (3) motion to strike: granted

FILED
JUL 11 2023

David W. Slayton, Executive Officer/Clerk of Court
By: A. Barton, Deputy

In cross-motions, Petitioner Californians for Homeownership ("CFH") moves for judgment pursuant to CCP section 1094 and Respondent City of La Cañada Flintridge separately moves for judgment on the pleadings. The City also moves to strike portions of the Petition's prayer for relief.

The court has read and considered the moving papers, opposition, and reply,¹ and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner CFH filed the Petition on March 3, 2023, alleging causes of action for writ of traditional mandamus to compel (1) compliance with the Housing Element Law, Government Code² sections 65587 and 65751; and (2) rezoning under section 65587. The Petition alleges in pertinent part as follows.

The Regional Housing Needs Allocation ("RHNA") system is a process to assess and allocate housing targets on a periodic basis, generally every eight years. Pet., ¶16. The Department of Housing and Community Development ("HCD") performs an assessment of statewide housing needs and allocates them on a region-by-region basis at different levels of affordability, based on established criteria. Pet., ¶16. This need is meted out to individual localities by a regional council of governments. Pet., ¶16. These localities must then develop an action plan -- the housing element -- to enact land use policies that will produce enough housing to meet their RHNA. Pet., ¶17.

The state is in the middle of the sixth statewide housing element update cycle. For the City's region, this cycle covers a planning period beginning October 15, 2021, by which time the City was required to update its housing element. Pet., ¶31. Under section 65589.5(d)(1), if a city does not have a compliant adopted housing element, it cannot use its general plan and zoning standards to reject certain housing development projects. Pet., ¶23.

Under sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i), if the HCD has not certified a city's adopted housing element by October 15, 2022, the city must complete all required rezoning by then. Pet., ¶24. The failure to do so bars the city from disapproving a housing development project on a site designated for rezoning by the housing element if the project complies with the objective zoning standards that would apply once the site is properly rezoned and meets certain additional requirements. Pet., ¶25. That city also cannot have a housing element found to be in substantial compliance until after the city has completed its rezoning. Pet., ¶26.

In an action for traditional mandamus, if a city's housing element does not substantially comply with state law, the court must order the city to bring it into compliance within 120 days.

¹ The court ordered that CFH's opposition would double as the moving papers for its motion for judgment under CCP section 1094, the City's reply would double as its opposition to CFH's motion, and CFH would not be permitted a reply.

² All statutory citations are to the Government Code unless otherwise specified.

Pet., ¶29. After the city adopts a compliant element, it then has 120 days to rezone to obtain consistency with the new housing element. Pet., ¶29.

Instead of adopting a compliant housing element by October 15, 2021, the City submitted a draft housing element to HCD on October 6, 2021. Pet., ¶32. In a letter dated December 3, 2021, HCD responded that the draft needed specific changes to comply with state law. Pet., ¶33.

On October 4, 2022, the City Council adopted a housing element that failed to remedy the deficiencies identified by HCD. Pet., ¶34. HCD confirmed this in a letter dated December 6, 2022, which again asserted that the City needed to provide more information on the realistic capacity for development on the City's listed sites and the suitability of the listed non-vacant sites. Pet., ¶¶ 36-37.

In early 2023, the City published a draft amendment to the sixth cycle housing element update. Pet., ¶40. The City asserted that this amendment resolved the issues HCD had identified. Pet., ¶40. The 2023 amendment relies on non-vacant sites to satisfy more than 50% of the City's lower-income RHNA, without any evidence that the existing uses on each of these sites will be discontinued during the planning period. Pet., ¶44. The 2023 draft element's sites inventory fails to account for the impediment created by the existing uses, including the possibility that a site will be maintained in its current use rather than redeveloped during the planning period. Pet., ¶43. Because it fails to make the analysis required under section 65583.2(g)(1), the City did not make the findings required under section 65583.2(g)(2). Pet., ¶45.

The 2023 housing element also does not identify any basis for the City's assumptions as to the realistic capacity of the listed sites for residential development. Pet., ¶46. The City fails to demonstrate that it will affirmatively further fair housing under section 65583(c)(10). Pet., ¶47. The City also fails to assess the relationship between that goal and the sites identified for housing development as required under section 65583(a)(3). Pet., ¶47.

On February 21, 2023, CFH sent a letter to the City identifying deficiencies in the draft amended housing element. The City adopted the 2023 housing element later that day. Pet., ¶41.

The City has failed to complete its required rezoning by the deadlines in sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i). Pet., ¶48. The 2023 housing element does not substantially comply with state law and the City has not complied with the rezoning requirement and deadline in section 65583(c)(1)(A). Pet., ¶¶ 54, 62.

CFH seeks (1) a writ of mandate compelling the City to adopt a revised housing element and complete the required rezoning and (2) an injunction. Pet. Prayer for Relief, ¶¶ 1-3. CFH also seeks a declaration that (1) the 2023 element does not substantially comply with state law, (2) the City has not had a compliant housing element from October 16, 2021 until the City passes a compliant one, (3) under section 65589.5(d)(1) and (d)(5), the City may not disapprove a housing development project where either at least 20% of the total units will be sold or rented to lower income households or 100% to moderate income households, or condition its approval in a manner that makes it infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, and (4) section 65583(g) applies to the City because it did not timely complete required rezoning. Pet. Prayer for Relief, ¶4. CFH will also seek attorney's fees under CCP section 1021.5 and costs. Pet. Prayer for Relief, ¶¶ 5-6.

2. Course of Proceedings

On March 6, 2023, the City served the City with the Petition.

On April 25, 2023, the court set the instant hearing date for cross-motions for judgment pursuant to CCP section 1094, with instructions for the parties to stipulate to a briefing schedule.

B. Applicable Procedure

1. Motion for Judgment

A motion for judgment under section 1094 is a mechanism to obtain a streamlined review on a particular undisputed issue based on undisputed facts or the administrative record. Dunn v. County of Santa Barbara, (2006) 135 Cal.App.4th 1281, 1293. See also 2 CEB California Administrative Mandamus §13.23 (3d ed. 2007).

When a question of fact is raised by the respondent's answer, the petitioner has the right to countervail it with proof. CCP §1091; Lassen v. City of Alameda, (1957) 150 Cal.App.2d 44, 47. If the facts are undisputed or only a question of law is raised, the court may hear the matter upon the papers filed and argument. Id. at 47. The petitioner also may waive the right to present evidence and the matter may be heard under CCP section 1094. Ibid. If a question of fact is raised by the answer, a CCP section 1094 motion is not appropriate, and the matter must be heard at trial. See id. at 48.

In denying a CCP section 1094 motion, the court may decide that the facts are disputed and hence the motion is procedurally defective, or it may decide that the undisputed facts/record show the moving party cannot prevail on that issue.

2. Motion for Judgment on the Pleadings

A motion for judgment on the pleadings has the same function as a general demurrer, but it is made after the time for demurrer has expired. Weil & Brown, Civil Proceedings Before Trial, (1998) §7:275.

The rules governing demurrers apply to statutory motions for judgment on the pleadings except as provided by CCP section 438. Cloud v. Northrop Grumman Corp., ("Cloud") (1998) 67 Cal.App.4th 995, 999; Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America, ("Lance") (1996) 44 Cal.App.4th 194, 198. A motion by defendant can be made on the ground that (1) the court lacks jurisdiction of the subject of one or more of the causes of action alleged or (2) the complaint (or any cause of action) does not state facts sufficient to state a cause of action. CCP §438(c). Except with leave of court, a motion for judgment on the pleadings cannot be made after entry of a pretrial conference order or 30 days before the initial trial date, whichever is later. CCP §438(e).

A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. See, e.g., Weil & Brown, Civil Procedure Before Trial, (1998) §§ 7:275, 7:322; Lance, *supra*, 44 Cal.App.4th at 198. Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings. Cloud, *supra*, 67 Cal.App.4th at 999. Both a demurrer and a motion for judgment on the pleadings accept as true all material factual allegations of the challenged pleading, unless contrary to law or to facts of which a court may take judicial notice. The sole issue is whether the complaint, as it stands, states a cause of action as a matter of law. Mechanical Contractors Assn. v. Greater Bay Area Assn., (1998) 66 Cal.App.4th 672, 677; Edwards v. Centex Real Estate Corp., (1997) 53 Cal.App.4th 15, 27. On a motion for judgment on the pleadings, a court may take judicial notice of something that cannot reasonably be controverted even if it negates an express allegation of the pleading. See Columbia Casualty Co. v. Northwestern Nat. Ins. Co., (1991) 231 Cal.App.3d 457; Evans v. California Trailer Court, Inc., (1994) 28 Cal.App.4th 540, 549.

In addition to statutory grounds, a motion for judgment on the pleadings may be made under the common law at any time either prior to or at the trial itself. *See Stoops v. Abbassi*, (2002) 100 Cal.App.4th 644, 650; Weil & Brown, Civil Proceedings Before Trial, (2015) §7:277.

C. Governing Law

1. The General Plan

In 1965, the Legislature enacted the Planning and Zoning Law (§65000 *et seq.*). County of Santa Barbara v. Purcell, Inc., (1967) 251 Cal.App.2d 169, 174. That law declares:

“The Legislature [...] finds that decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors.” §65030.1 (emphasis added).

Under the Planning and Zoning Law, each city has a planning agency (or may choose its city council to play that role). §65100. Each city must “adopt a comprehensive, long-term general plan for the physical development of the city.” §65300. A general plan consists of a “statement of development policies [...] setting forth objectives, principles, standards, and plan proposals.” §65302.) A general plan includes multiple elements: land use, circulation (movement of people and vehicles), housing, conservation, open space, noise, safety, and environmental justice. *Ibid.* The city’s planning agency must implement (§65103) and administer (§65400 *et seq.*) the general plan.

In 1971, the Legislature required general law cities’ zoning ordinances to be consistent with their general plans. §65067. Before that, a general plan was considered “merely an ‘interesting study.’” DeVita v. County of Napa, (“DeVita”) (1995) 9 Cal.4th 763, 772 (quoting City of Santa Ana v. City of Garden Grove, (1979) 100 Cal.App.3d 521, 532). The Legislature subsequently enacted statutes aimed at requiring cities to act consistently with their general and specific plans. *See* §65300.5 (requiring that city’s general plan and elements “comprise an integrated, internally consistent, and compatible statement of policies”); §65301.5 (subjecting adoption of general plan or amendment to mandamus challenge); §65359 (requiring city’s specific plan to be consistent with general plan); §65450 (similar); §65454 (similar); §65455 (requiring local public works projects, tentative maps, parcel maps, and zoning ordinances to be consistent with specific plan); and §65460.8 (consistency requirement for transit villages).

Also in 1971, the Legislature mandated that charter cities, not just general law cities, adopt general plans with the mandatory elements. DeVita, *supra*, 9 Cal.4th at 772; *see* §65300.5. In 1979, the Legislature extended the general plan consistency requirement to charter cities with more than two million people (*i.e.*, Los Angeles). City of Los Angeles v. State of California, (1982) 138 Cal.App.3d 526, 531. All jurisdictions, including charter cities, must include a housing element in the general plan. §65302(c); Building Industry Assn. v. Marin Mun. Water Dist., (1991) 235 Cal.App.3d 1641, 1650.

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In taking actions pursuant to the planning and zoning laws, a city, county, or local agency³ cannot prohibit or discriminate against any residential development or emergency shelter based on: (1) method of financing; (2) the occupation, age (except housing for older persons), race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information of owners or intended occupants; (3) income level of intended residents; or (4) status as a multifamily residential project that is consistent with both the jurisdiction's zoning ordinance and general plan as they existed on the date the application was deemed complete. §65308(b). Prohibited discrimination includes the denial or conditioning of residential development or shelter because of the method of financing or occupancy by those against whom discrimination is prohibited. §65308(c).

3. The Housing Element Law

In 1969, the Legislature enacted the Housing Element Law. §65580 *et seq.* The Housing Element Law declares that the state has a housing supply and affordability crisis of historic proportions. §65589.5(a)(2)(A). The “availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian is a priority of the highest order.” §65580. The Housing Element Law recognizes the shared responsibility of state and local government to facilitate housing development for “all economic segments of the community” (§65580(b), (d)), and the need for “cooperation of all levels of government” for the provision of low- and moderate-income housing (§65580(c)).

The Legislature declared that “[d]esignating and maintaining a supply of land and adequate sites suitable, feasible, and available for the development of housing sufficient to meet the locality’s housing need for all income levels is essential to achieving the state’s housing goals....” §65580(f). “It is the intent of the Legislature in enacting this article [to] assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal.” §65581; *see also San Franciscans for Livable Neighborhoods v. City and County of San Francisco*, (2018) 26 Cal.App.5th 596, 609 (discussing purpose of Housing Element Law).

The housing element of a general plan must contain four basic sections: (1) an assessment of housing needs and an inventory of the resources and constraints relevant to meeting those needs (§65583(a)); (2) a statement of the city’s goals, objectives, and policies relative to maintenance, preservation, improvement, and development of housing (§65583(b)); (3) a five-year schedule of action to achieve the goals and objectives (§65583(c)); and (4) a review and evaluation of the prior element (§65583(d)). The housing element must be consistent with the policies identified in the general plan. §§ 65300, 65582(f). To plan for the community’s share of the state housing needs, a housing element must include an assessment of the existing and projected housing need for each income level, identify resources and constraints relevant to meeting that need, and implement programs to address the need. §65583(a), (c).

The five-year schedule of action must list actions that will be taken to make sites available during the planning period with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city’s share of the regional housing need for each income level that could not be accommodated on sites identified in the inventory without rezoning. §65583(c)(1). This program shall identify sites as needed to affirmatively further fair housing and

³ For convenience, the court will refer to cities and not counties or other local agencies in discussing the Housing Element Law.

to facilitate and encourage the development of a variety of types of housing for all income levels, including multi-family rental housing, factory-built housing, mobile homes, housing for agricultural employees, supportive housing, single-room occupancy units, emergency shelters, and transitional housing. §65583(c)(1). When this inventory does not identify adequate sites to accommodate the need for groups of all household income levels, rezoning shall be completed no later than three years after either the adoption of the housing element or 90 days after receipt of comments from the relevant department. §65583(c)(1)(A).

Notwithstanding the foregoing, a city that fails to adopt a housing element that HCD has found to be in substantial compliance with the Housing Element Law within 120 days of the statutory deadline for adoption of the housing element shall complete rezoning of those sites no later than one year from the statutory deadline in Section 65588 for adoption of the housing element. §65583(c)(1)(A).

At least 90 days before the city adopts a housing element, or at least 60 before adoption of an amendment to the housing element, it must be submitted to HCD to review whether it complies with the Housing Element Law. §65585(b)(1). A city also must regularly review and revise its housing element to make sure that it continues to advance the city's goals, objectives, and policies. §65588(e)(4).

Each year, the city must report to both the Governor's Office of Planning & Research and HCD the progress made in implementing the programs of the housing element. §65400. Based on that report, HCD has the power to find that a housing element is not in compliance with the city's general plan. §65585(d). In such an instance, HCD may refer the matter to the Office of the Attorney General for an enforcement action. §65585(i), (j).

Cities are required to periodically update their housing element consistent with the schedule set forth by the Legislature. §65588(e).

4. Contents of the Housing Element

Every eight years, HCD, relying on data supplied by the Department of Finance, assigns a target number or goal for additional housing units in each region of the state in a RHNA divided into four income levels: very low, low, moderate, and above moderate income. §65584(a)(1), (f). HCD, in consultation with the regional council of governments, allocates a share of the regional housing need for each income level to each city and county in its region. §§ 65584.01, 65584.05.

The city must prepare a housing element that accommodates its allocated share of the RHNA. See §§ 65583, 65583.2. The city shall consider HCD-adopted guidelines in preparation of the housing element. §65585(a). HCD is required to review the drafts and make written findings whether the draft substantially complies with state law. §65585(b), (d). The city shall consider HCD's findings in adopting its housing element. §65585(e). In any action challenging the housing element, there is a rebuttable presumption of its validity if HCD has made a finding that the housing element substantially complies with the Housing Element Law. §65589.3.

A city's housing element shall include an inventory of sites suitable and available for residential development during the planning period. §§ 65583(a)(3), 65583.2(a). The inventory must detail information about the sites -- such as size and type of zoning -- as well as a determination of what portion of the RHNA each site can accommodate by income level. §65583.2(b), (c). To aid this determination, the Housing Element Law provides set densities (housing units per acre) deemed appropriate to accommodate lower-income housing. §65583.2(c)(3)(B). For jurisdictions in a metropolitan county, sites allowing at least 30 units per acre represent the appropriate density to facilitate lower-income development. §65583.2(c)(3)(B)(iv).

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When a jurisdiction's inventory lacks the sites to accommodate its full RHNA allocation, its housing element must include a program to rezone and make additional sites available within three years to accommodate any unmet RHNA. §65583(c)(1)(A).

The inventory of land shall include, *inter alia*, a listing of properties by assessor parcel number, the size of each property and its zoning, and a map of their location. §65583.2(b). For non-vacant sites, the inventory shall also include a description of the existing use of each property. §65583.2(b)(3). If the site is owned by the city or county, the description shall also include whether there are any plans to dispose of the property during the planning period and how the city or county will comply with the Government Code's provisions on surplus lands (§54220 *et seq.*) §65583.2(b)(3).

5. The 2017 Amendment to Section 65583.2

On September 15, 2017, the Assembly released an Assembly Floor Analysis of AB 1397, which would modify elements of the Housing Element Law. RJN 754. The author of AB 1397 made the following observation about the then-existing site inventory requirements in state Housing Element Law:

“[C]urrent law has a number of gaps that allow jurisdictions to circumvent this critical planning obligation, relying on sites that aren't truly available or feasible for residential development, especially multifamily development. For example, the law permits local governments to...designate non-vacant sites with an ongoing commercial or residential use, even though the current use is expected to continue indefinitely. Even after many years of relying on these sites that never end up as new housing, the law allows jurisdictions to continue to count them as a potential location for housing. RJN 759 (emphasis added).

The adopted AB 1397 made changes to the Housing Element Law, including imposing more specific requirements on housing element sites inventories and including a new requirement codified in section 65583.2(g)(2):

“[W]hen a city or county is relying on nonvacant sites...to accommodate 50 percent or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use...does not constitute an impediment to additional residential development during the period covered by the housing element. An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period.

As adopted, section 65583.2 provides in pertinent part as follows. The city shall specify the additional development potential for each non-vacant site within the planning period and shall provide an explanation of the methodology used to determine the development potential. §65583.2(g)(1). The methodology shall consider factors that include the extent to which existing uses may constitute an impediment to additional residential development, the city's or county's past experience with converting existing uses to higher density residential development, the current market demand for the existing use, an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential

development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites. §65583.2(g)(1).

When the city or county is relying on non-vacant sites to accommodate 50% or more of its housing need for lower income households, the methodology shall demonstrate that the existing use does not constitute an impediment to additional residential development during the period covered by the housing element. §65583.2(g)(2). An existing use is presumed to impede additional residential development absent contrary findings based on substantial evidence that the use is likely to be discontinued during the planning period. §65583.2(g)(2).

6. The Penalty for Untimely Compliance

Historically, there was no statutory penalty for a city's failure to timely adopt a housing element. In 2008, the Legislature modified the update schedule for housing elements and added a penalty provision. Under the new schedule, housing elements were required to be updated every eight years, but tardy local governments were subject to a new requirement for a mid-cycle housing element update after four years. Stats. 2008, ch. 728 (SB 375). This schedule and penalty provision lasted through the fifth housing element update cycle.

On July 5, 2021, AB 1398 proposed to amend section 65588 to state that if a jurisdiction adopts a housing element more than one year after the statutory deadline, HCD shall not find that jurisdiction's housing element in substantial compliance per section 65585 until all required rezoning is complete. RJN 775.

On September 9, 2021, the Assembly released an Assembly Floor Analysis of AB 1398. RJN 762. This bill added a new penalty to the Housing Element Law. RJN 762. Until then, local governments that failed to timely update housing elements would have to pass such updates every four years instead of eight. RJN 762. That approach had failed to facilitate housing production despite requiring a substantial amount of additional work for local governments and the HCD. RJN 762. Per AB 1398, a city that adopted its housing element over 120 days late would be required to complete all housing element rezonings within one year of the housing element deadline rather than the more than three years afforded to cities that timely adopt housing elements. RJN 762.

The Assembly analysis explained:

"This bill would revise the penalty for failure to adopt a housing element in a timely way. It removes the existing requirement that non-compliant local governments update their housing element approximately every four years...."

"In place of the existing requirement, this bill would require that any local government that fails to adopt its housing element within 120 days of the statutory deadline would only have one year from the housing element's statutory deadline to complete any required rezonings, instead of the current allotment of three years and 120 days...."

"This bill also adds that, to avoid the expedited timeline, the housing element must be determined by HCD to be substantially compliant with Housing Element Law. This change removes the circumstances where jurisdictions adopt non-compliant housing elements to avoid penalties." RJN 762-63 (emphasis added).

As provided in AB 1398, for the sixth revision thereafter, a local government that does not

adopt a housing element that HCD has found to be in substantial compliance within 120 days of the applicable deadline shall comply with sections 65583(c)(1)(A) and 65583.2(c) within one year of the statutory deadline to revise the housing element. §65588(e)(4)(C)(i).

If a city adopts a housing element more than one year after the statutory deadline, it is not in substantial compliance until it has completed the rezoning required by sections 65583(c)(1)(A) and 65583.2(c). §65588(e)(4)(C)(iii).

This new penalty applied to all housing element updates developed as part of the sixth housing element cycle, including housing elements in Southern California. After the law was passed, Southern California jurisdictions expressed concerns that it heightened the penalty for late adoption close to the due date for sixth cycle housing elements in that region. Southern California successfully lobbied for a limited exception that was enacted in 2022. As codified in section 65583.4(a), a city qualifies for an exception to the section 65588(e)(4)(C)(iii) penalty if it “adopts a sixth revision of the housing element and the department finds the adopted element to be in substantial compliance with this article within one year of the statutory deadline established pursuant to Section 65888 for adoption of the housing element”. §65583.4(a)(3) (emphasis added).

7. The Builder’s Remedy

Where a city fails to timely complete required zoning, it may not disapprove a project that is on a site required to be rezoned and complies with the applicable objective general plan and zoning standards and criteria. §65583(g)(1).

A city may not disapprove a housing development project for very low, low-, or moderate-income households unless it makes written findings based upon a preponderance of evidence as to one of five conclusions. §65589.5(d).

One such conclusion is that the city has adopted a housing element that has been revised in accordance with section 65588, the housing element complies with the Housing Element Law, and the city has met or exceeded its share of the regional housing need allocation pursuant to Section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by Section 65008. §65589.5(d)(1).

Alternatively, the city may find that the housing development project or emergency shelter is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the city has adopted a revised housing element in accordance with section 65588 that is in substantial compliance with the Housing Element Law. §65589.5(d)(5).

8. Judicial Review

Any judicial review of a housing element under the Housing Element Law shall be brought as traditional mandamus pursuant to CCP section 1085 and shall extend to whether the housing element or portion thereof or revision thereto substantially complies with the requirements therein. §65587(b).

D. Statement of Facts⁴

⁴ The City requests judicial notice of (1) City Resolution No. 22-35 adopted by the City Council on October 4, 2022 (City RJN Ex. 1) and (2) Resolution No. 23-08 adopted by the City Council on February 21, 2023 (City RJN Ex. 2). The requests are granted. Evid. Code §452(b).

1. The City's Evidence

California is currently in its sixth housing-element update cycle. For cities within the Southern California Association of Governments ("SCAG") region, the statutory deadline was October 15, 2021 for adoption of the sixth revision of the housing element for the October 15, 2021-October 15, 2029 planning period. §65588(e)(3)(A) (deadline is eight years after deadline for the fifth cycle, which was October 15, 2013). Various extensions have been granted provided cities meet rezoning requirements. *See* City Mot. at 11.

2. The October 2022 Housing Element

On October 3, 2021, the City submitted a draft of its 2021-2029 housing element to HCD. RJN 5. On December 3, 2021, HCD provided the City with a comment letter on this draft. RJN 5. The City revised the proposed housing element to comply with the Housing Element Law and HCD's comments. RJN 5.

On August 25, 2022, the City Council adopted Resolution No. 22-51 to recommend approval of the City's housing element. RJN 11. The City Council held duly noticed public hearings for interested parties to comment on the 2021-2029 housing element. RJN 12. On October 4, 2022, the City Council passed Resolution No. 22-35 adopting the housing element. RJN 12.

3. The 2023 Housing Element

On February 21, 2023, the City Council passed Resolution No. 23-08 adopting a revised version of the housing element. RJN 11, 16. The recitals acknowledge that the October 4, 2022 housing element had been submitted to HCD and that the City received a comment letter from HCD on December 6, 2022. RJN 12. The recitals assert that, on January 12, 2023, the City and HCD had a technical discussion of the items identified in HCD's letter. RJN 12. During this discussion, HCD representatives determined that the October 2022 housing element required no substantive changes or new data or policy decisions, and the City only needed to provide clarifications about the existing information in the housing element. RJN 12.

The 2023 housing element provides these clarifications without substantive policy changes. RJN 12. The 2023 element explains that there are limited opportunities for new housing in the City due to the small amount of undeveloped land, the 3-4% commercial vacancy rate, the narrow commercial panels that make redevelopment difficult, the fact that single family homes have never been redeveloped to multi-family, the use of open spaces as joint use facilities by other entities, and the lack of any land zoned for industrial use. RJN 12, 15-16. The 2023 housing element explains that the City contacted all commercial property owners and religious institutions and removed sites whose owners reported insurmountable impediments from the inventory. RJN 13, 15.

CFH requests judicial notice of (1) the September 15, 2017 Assembly Floor Analysis of AB 1397 (CFH RJN Ex. 1), (2) the September 9, 2021 Assembly Floor Analysis of AB 1398 (CFH RJN Ex. 2), and (3) the bill text of AB 1398 as of July 5, 2021 (CFH RJN Ex. 3). The requests are granted. Evid. Code §§ 452(b), (c).

The parties have paginated the RJNs such that CFH's numbering begins where the City's ended and these pages are included in the appendix lodged with the court. The court will refer to the RJN page numbering without reference to the exhibit.

The Resolution's recitals state that the October 2022 housing element was already substantially compliant with Housing Element Law and the 2023 version only clarifies existing information. RJN 14.

Because more than 50% of the parcels in the City's site inventory are non-vacant, the City adopted a finding that the existing uses will likely be discontinued during the planning period and the development potential on these nonvacant sites would not constitute an impediment to future housing development. RJN 15 (§4). There is substantial evidence in housing element section 9.4 and Appendix C to support this finding. RJN 15.

In selecting the parcels included on the site inventory, the City contacted all commercial property owners and religious institutions and removed from the inventory those that requested it or reported insurmountable impediments. RJN 15. It increased the minimum density for lower income units based on an economic development analysis. RJN 15. As to religious institution overlay sites, the City only included 50% of the parking area and currently undeveloped areas. RJN 15. As to other areas, the City considered the small amount of undeveloped land, the 3-4% commercial vacancy rate, small and narrow commercial parcels that make redevelopment difficult, the fact that there is no history of single-family homes being redeveloped to multifamily homes, the use of open spaces as joint use facilities by other entities, and the lack of any land zoned for industrial use. RJN 15-16.

a. Housing Element Section 9.4

Housing element section 9.4 discusses how the City identified housing opportunities and resources for this cycle. RJN 105-24. Section 9.4.1.2 notes that the City has approved 35 housing units as of July 1, 2021, and has 91 units in various stages of review and approval. RJN 107-08. Outside agencies still need to approve the units, and the City has no control over that timeline. RJN 108. After accounting for units approved and pending approval, a remaining need for 486 units exists. RJN 108. *See* RJN 109.

Section 9.4.1.3 explains that the City has very little vacant land left and it had to identify vacant properties and underutilized sites to fulfill its RHNA obligations. RJN 109. The City's strategy is to identify such properties by primarily focusing on the Foothill Boulevard corridor. RJN 109.

The University of California at Berkeley ("UC Berkeley") has developed a methodology for the State of California Business, Transportation, and Housing Agency ("BTHA") that uses the ratio of land improvements to land value (sometimes, "ILR") to facilitate identification of underutilized sites with potential for infill or redevelopment at a higher density residential. RJN 110. Based on this measure, properties in non-single-family areas are underutilized if the total value of improvements on the site is less than the total value of the underlying land. RJN 110.

Additionally, section 9.4.1.3 notes the national trend for online shopping with a consequent decline in demand for commercial business areas. RJN 110. There is a need to provide greater flexibility in land use, including mixed use development and even stand-alone uses in traditional commercial areas. RJN 110. Additionally, there are many underutilized parcels in the City constructed prior to the 1980s, with 1953 as the median year for construction of these older parcels. RJN 110. Many are antiquated commercial uses with significant amounts of surface parking. RJN 110. These properties have similar characteristics as other properties that were redeveloped in the past, including the Town Center project. RJN 110.

Section 9.4.1.4 provides an overview of each zone and residential use. RJN 111-20. It also calculates the development potential based on the lower limit of development density. RJN

111. To estimate development potential, the lower limit of development density was used rather than maximum density. RJN 111. The City met with developers and identified development standards that can facilitate R-3 and mixed-use development at the target density, which is a component of the program. RJN 111.

Section 9.4.1.4's discussion of a proposed religious institution overlay zone asserted that the existing development on religious institution parcels will not impede development of housing. RJN 116. The acreage identified on the sites inventory is limited to 50% of the parking area and open space areas of these institutions which allows existing buildings to remain. RJN 116.

The number of constructed accessory dwelling units ("ADU") per year drastically increased: five in 2018, two in 2019, 13 in 2020, and ten in 2021. RJN 118. The City issued 24 permits for ADUs and junior ADUs ("JADU") in just the first six months of 2022. RJN 118-19. The City estimates approval of 15 ADUs annually, a total of 120 ADUs over the eight-year planning period. RJN 119-20.

Section 9.4.1.6 summarizes the adequacy of the site inventory to meet the City's RHNA share. RJN 120. Table HE-48 summarizes the City's accommodation of the RHNA for all income groups by zone -- a total of 689 units across all income groups and 483 units for lower-income groups. RJN 120. Table HE-49 calculates a surplus of 323 units in the lower income category. RJN 120-21.⁵

b. Housing Element Section 9.5

Section 9.5 focuses on the housing plan and outlines goals and policies the City wants to implement to address important housing-related issues during the 2021-2029 planning period. RJN 125. Goals include providing a wide variety of housing types to meet the needs of existing and future residents, ensuring maintenance and preservation of existing housing, facilitating housing for low- and moderate-income households and those with special needs, ensuring compatibility with the natural and built environment and the safety of persons and property, and promoting equal housing opportunity. RJN 125-26.

Section 9.5.1.5 cites AB 686, which creates an obligation to affirmatively further fair housing through the housing elements. RJN 130. To make adequate provision for the housing needs of all segments of the community, the City must ensure equal and fair housing opportunities are available to all residents through its policies and programs. RJN 131.

Section 9.5.2 lists the programs that define specific activities for the City to achieve the goals and policies of the 2023 housing element. RJN 131-32. Program 1 admits that the City's rezoning of adequate sites was due October 15, 2022. RJN 132. The City sought to adopt the housing element in October 2022 and was actively pursuing the implementation of the rezoning program. RJN 132. After it adopts the housing element, it plans to amend the land use element to redesignate and amend the Zoning Map to rezone the properties identified in the sites inventory to accommodate the RHNA by October 2023. RJN 132.

⁵ Appendix C is a site inventory spreadsheet that details each parcel's parcel number, size, general plan and zoning, existing uses on non-vacant sites, realistic capacity, and level of affordability by income group, as well as address, consolidation potential, density range and density factor, unit potential, year built, whether the ILR exceeds 1.0, and criteria for including the site. RJN 633-46. Under "Criteria," many of the entries state that the site is currently underutilized based on its ILR, its buildings are over 30 years old, and/or has antiquated commercial uses with significant surface parking. RJN 634-40.

Program 3 commits the City to addressing governmental constraints to development of multifamily and affordable housing. RJN 134. It provides ten quantified objectives and associated timeframes to meet this requirement, mostly through modifications to the City's zoning code. RJN 134-35.

Program 4 focuses on changes to the Downtown Village Specific Plan ("DVSP"), including rezonings, revisions to development standards, and allowing residential uses in the DVSP ministerially. RJN 135-36.

Program 5 involves adoption of a religious institution housing overlay zone that would encourage churches to build or partner with others to build affordable housing by-right. RJN 137. The use of church land for affordable housing helps affordable housing developers by minimize the cost for land, risk, and time to process development applications. RJN 137. The overlay would require units to be affordable to extremely low- and lower-income households, or to moderate-income households, at a percentage to be determined. RJN 137-38.

Program 6 amends the Zoning Code to require by-right approval of a housing development that includes 20% of the units as housing affordable to lower income households. RJN 138.

Program 8 includes several programs to encourage development of ADUs and JADUs. RJN 139. The City would develop and advertise programs that facilitate the development of a minimum of 15 ADUs/JADUs per year with immediate implementation. RJN 139. It would also develop a monitoring program to ensure the City is on track to meeting ADU construction goals in advance of the 2023 Annual Progress Report that must be submitted to HCD. RJN 140. The monitoring program would include questions about proposed rent on the ADU building permit application. RJN 140. Another program would provide incentives to those who participate in the ADU Amnesty Program if they commit to renting to extremely low-income households. RJN 140.

Program 13 focuses on upgrading and repairing apartment buildings to provide more multi-family housing. RJN 144-45. The City plans to fund this through continued participation in the San Gabriel Valley Regional Housing Trust Fund. RJN 144.

Program 23 commits the City to promoting housing opportunities for all people and explains that the City will be engaged in a variety of activities and programs to achieve this. RJN 151. Table HE-50 highlights actions to address priority issues, programs and objectives, specific commitments, timeline, geographic targeting, and metrics. RJN 152-55. Table HE-51 summarizes quantified objectives for the planning period by income level, including the number of units to be constructed and rehabilitated, at-risk units to be preserved, and households to be assisted. RJN 157.

c. Housing Element Assessment of Fair Housing

Appendix D contains the City's Assessment of Fair Housing. RJN 648-719. Section D.2.3 presents Housing and Urban Development ("HUD") information on racially or ethnically concentrated areas of poverty in the vicinity of the City. RJN 673. There are none in the City itself, with the closest area to the south and west in the City of Los Angeles. RJN 673.

Section D.3 discusses access to opportunity based on race or ethnicity and poverty status. RJN 678. The Tax Credit Allocation Committee ("TCAC") found that the entire City was in a "Highest Resource" area. RJN 681. The section also summarizes the City's economic, education, environmental health, and transportation access scores. RJN 684.

Section D.4 summarizes housing problems by ethnicity, tenure, and location. RJN 692-701. Housing problems include housing, overcrowding, and cost burden. RJN 692. Figure D-23

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shows that no sensitive communities within the City were vulnerable, or at risk of displacement. RJN 704.

Section D.5 describes the history of residential development in La Cañada Flintridge, including key factors that influenced the patterns and types of housing constructed in the City. RJN 705-06. This includes Home Owners' Loan Corporation Neighborhood Redlining Grade maps, historical socioeconomic factors, and topographic and fire challenges that have influenced development in the City. RJN 705-06.

Section D.6 summarizes the sites inventory by neighborhood. RJN 707. It emphasizes the Foothill Boulevard Corridor as the only area in the City with both sewer and access to public transportation. RJN 707. Figure D-25 shows the geographic distribution of sites in the sites inventory by census tract and income category. RJN 710.

Section D.7 and Table D-24 summarize fair housing issues and group them based on whether they concern enforcement and outreach, integration and segregation, racially or ethnically concentrated areas of poverty, access to opportunities, and disproportionate housing needs. RJN 715-16.

Section D.8 identifies and prioritizes key contributing factors that affect fair housing choices. RJN 717-19. These include insufficient or inaccessible outreach and enforcement, concentration of senior population, lack of income diversity, displacement risk to low-income households due to economic pressures, and lack of affordable housing. RJN 717-19.

2. CFH's Evidence

On July 15, 2022, HCD sent an email to the City and other jurisdictions in SCAG that had not been found in substantial compliance with the Housing Element Law. Coy Decl., ¶11. The letter outlined the compliance timeline under section 65583.4(a). Coy Decl., ¶11. If HCD found an adopted housing element in compliance by October 15, 2022, that jurisdiction may maintain the three-year rezoning deadline. Coy Decl., ¶11. A housing element is only "in compliance" once HCD has completed its review of the adopted element and issued a review letter finding the element in compliance with Housing Element Law. Coy Decl., ¶11. HCD later posted the same information on its website. Coy Decl., ¶11.

On October 7, 2022, HCD received the City's October 2022 sixth cycle housing element update. Coy Decl., ¶6. On December 6, 2022, after review of the element, HCD determined that that it was not in substantial compliance with the Housing Element Law under section 65585. Coy Decl., ¶6. The October 2022 element needed critical revisions, including additional analysis to demonstrate the adequacy of the sites included in its site inventory and policy and programmatic changes. Coy Decl., ¶6.

On January 12, 2023, HCD and City staff met to discuss HCD's review of the October 2022 housing element. Coy Decl., ¶7. The City has called this a "technical discussion" where the HCD said that the City did not need to make substantive changes or provide new data or policy decisions and just needed to clarify the information already in the element. Coy Decl., ¶7. This description is inaccurate. Coy Decl., ¶8. In truth, HCD offered advice on additional analysis the City could include to demonstrate compliance with sites inventory and to further fair housing requirements. Coy Decl., ¶8. HCD also suggested potential policy and program changes. Coy Decl., ¶8.

On February 23, 2023, the City sent HCD the 2023 housing element. Coy Decl., ¶9. On April 24, 2023, after review of the 2023 element, HCD determined that it could not find the City's element in substantial compliance with the Housing Element Law. Coy Decl., ¶9. Pursuant to

section 65588(e)(4)(C)(iii), HCD remains unable to certify the housing element or any subsequent revision until the City completes all the rezoning required. Coy Decl., ¶9.

The City's adopted housing element provides minimal analysis of the impediment that existing uses on the City's non-vacant housing element sites presents. Gelfand Decl., ¶3. By comparison, cities like South Pasadena provide details like whether a property owner has expressed interest in developing higher density housing during the planning period. Gelfand Decl., ¶3.

On May 1, 2023, the City Council considered an appeal related to a proposed builder's remedy project. Gelfand Decl., ¶4, Ex. A. The project had 80 units, 20% of which would be for low-income residents. Gelfand Decl., ¶4, Ex. A. The City determined that the builder's remedy under the HAA is not available to applicants pursuing housing projects in the City since October 4, 2022. Gelfand Decl., ¶4, Ex. A.

Because HCD did not determine that the City's housing element was in substantial compliance by October 15, 2022, the City cannot rely on the three-year deadline to rezone. Coy Decl., ¶11. Contrary to the City's contention, cities can and have completed required rezoning prior to or simultaneously with adopting housing element updates and have achieved HCD certification in that approach. Coy Decl., ¶12.

D. Analysis

Petitioner CFH moves for judgment under CCP section 1094. Respondent City moves for judgment on the pleadings for both causes of action of the Petition. The City also moves to strike portions of the Petition's prayer for declaratory relief.

1. Meet and Confer

The rules governing demurrers apply to statutory motions for judgment on the pleadings except as provided by CCP section 438. *Cloud, supra*, 67 Cal.App.4th at 999. The City presents evidence that it complied with the requirement to meet and confer before filing this motion. *See* CCP §430.41(a).

On March 29, 2023, the City's counsel contacted CFH's counsel to schedule a meet and confer. Villareal Decl., ¶2. During a call later that day, the City asserted that the Petition's conclusory statements about the City's housing element are insufficient to support the Petition's two causes of action and requested declaratory relief. Villareal Decl., ¶¶ 2-4. CFH disagreed. Villareal Decl., ¶¶ 3-4. Subsequent meet and confer efforts in April 2023 failed to resolve the dispute. Villareal Decl., ¶5. The City filed a demurrer and motion to strike, but the court then ordered the parties to instead submit cross-motions for judgment on the pleadings because the matter presents only an issue of law. Villareal Decl., ¶¶ 6-7.⁶

The City has complied with its meet and confer requirement. No meet and confer is required for a CCP section 1094 motion for judgment.

2. Improper Evidence

⁶ This is incorrect. The court permitted motions for judgment pursuant to CCP section 1094.

The City asks the court to disregard the two declarations supporting CFH's motion. Mot. at 2.⁷ The City asserts that a motion for judgment on the pleadings is limited to judicially noticeable matters and those on the face of the Petition. Id.; Cloud v. Northrop Grumman Corp. (1998) 67 Cal.App.4th 995, 999.

The City confuses CFH's motion for judgment with a motion for judgment on the pleadings. On April 25, 2023, the court permitted the parties to file cross-motions for judgment under CCP section 1094. If a petition for writ of mandate presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ. CCP §1094. CCP section 1094 expressly permits use of either the administrative record or undisputed facts.

There is only one piece of disputed evidence. Resolution No. 23-08 asserts that during a discussion between the City and HCD on January 12, 2023, HCD representatives determined that the October 2022 housing element required no substantive changes or new data or policy decisions. RJN 12. A HCD employee asserts that Resolution No. 23-08 mischaracterizes the conversation. Coy Decl., ¶7. In the January 12, 2023 conversation, HCD both suggested policy and program changes and offered advice on additional analysis to demonstrate compliance with sites inventory and to further fair housing requirements. Coy Decl., ¶8. As this evidence is disputed, the court cannot consider it for CFH's motion for judgment.

With the exception of this disputed evidence, the City's written objection is overruled for CFH's motion for judgment. CFH's evidence will not be considered for the City's motion for judgment on the pleadings.

3. First Cause of Action

a. The Housing Element and Judicial Review

The court's role in a challenge to a city's housing element is to determine whether it substantially complies with the requirements of the Housing Element Law. Fonseca v. City of Gilroy, ("Fonseca") (1174) 148 Cal.App.4th 1174, 1191. "Substantial compliance" refers to actual compliance with respect to the substance essential to every reasonable objective of the statute and disregards simple technical imperfections of form. Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept., (1985) 175 Cal.App.3d 289, 297-298. A city's adoption of a housing element is a legislative act entitled to some deference and there is a presumption it is valid. Fonseca, supra, 148 Cal.App.4th at 1191. The burden is on the challenger to demonstrate that the housing element is inadequate. Id. If the city substantially complies with statutory requirements by containing the elements mandated by the statute, the legislative action will not be set aside unless arbitrary, capricious, or entirely lacking in evidentiary support. Id.

Judicial review of a housing element does not examine the merits of the element or the wisdom of the city's determination of policy. Id. at 298. The burden is on the challenger to demonstrate that the housing element is inadequate. Fonseca, 148 Cal.App.4th at 1191. In this regard, HCD's recommendations are advisory. §65585(a); Fonseca, supra, 148 Cal.App.4th at 1193. Although courts generally will not depart from the HCD determination unless clearly erroneous or unauthorized, its informal interpretation of statutory requirements is not binding on the court and any deference due to the HCD's interpretation may be overcome by the plain meaning of the statute's text. Martinez v. City of Clovis, ("Martinez") (2023) 90 Cal.App.5th 193, 243

⁷ The court will cite to the City's motion as "Mot.", CFH's motion and opposition as "Opp.", and the City's opposition and reply as "Reply".

(interpreting section 65583.2(h) to impose a minimum density requirement when a jurisdiction is required to rezone and finding that while RHN overlay satisfied this density, base zoning did not).

A housing element's site inventory shall include a description of the existing use of each non-vacant site. §65583.2(b)(3). The city shall specify the additional development potential for each non-vacant site within the planning period and shall provide an explanation of the methodology used to determine the development potential. §65583.2(g)(1). The methodology shall consider factors that include the extent to which existing uses may constitute an impediment to additional residential development, the city's or county's past experience with converting existing uses to higher density residential development, the current market demand for the existing use, an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites. §65583.2(g)(1).

When the city or county is relying on non-vacant sites to accommodate 50% or more of its housing need for lower income households, the methodology shall demonstrate that the existing use does not constitute an impediment to additional residential development during the period covered by the housing element. §65583.2(g)(2). An existing use is presumed to impede additional residential development absent contrary findings based on substantial evidence that the use is likely to be discontinued during the planning period. §65583.2(g)(2).

b. The Scope of CFH's Motion on the First Cause of Action

The Petition's first cause of action generally asserts that the City's 2023 housing element does not substantially comply with the Housing Element Law. Pet., ¶54. The 2023 housing element relies on non-vacant sites to satisfy more than 50% of the City's lower-income RHNA without any evidence that the existing uses on each of these sites will be discontinued during the planning period. Pet., ¶44. The 2023 element's sites inventory fails to account for the impediment created by the existing uses, including the possibility that a site will be maintained in its current use rather than redeveloped during the planning period. Pet., ¶43. Because it fails to make the analysis required under section 65583.2(g)(1), the City did not make the findings required under section 65583.2(g)(2). Pet., ¶45. The 2023 element also does not identify any basis for the City's assumptions as to the realistic capacity of the listed sites for residential development. Pet., ¶46. The City fails to demonstrate that it will affirmatively further fair housing under section 65583(c)(10). Pet., ¶47. The City also fails to assess the relationship between that goal and the sites identified for housing development during the planning period as required under section 65583(a)(3). Pet., ¶47.

The City first argues that the Petition lays out an incorrect—and impossible—standard by alleging that the City failed to identify any evidence that the existing uses on each of these sites will be discontinued during the planning period. Although section 65583.2(g)(2) states that an “existing use shall be presumed to impede additional residential development,” the City is not required demonstrate that such use will be discontinued, only that the use is likely to be discontinued. The Petition's interpretation of the statutory language imposes on the City the impossible burden of predicting and guaranteeing what the private market will do. This interpretation of section 65583.2(g)(2) would unduly punish built out cities such as the City, which have no surplus land and must rely solely on nonvacant sites to comply with the Housing Element Law. As such, this unreasonable standard would fail a rational basis test. Nor is it a proper interpretation of the statute. See CCP §1858 (“the office of the Judge is simply to ascertain and

declare what is in terms or in substance contained [in a statute], not to insert what has been omitted, or to omit what has been inserted”). Mot. at 13-14.

The court and CFH agree (Opp. at 13) that the plain language of section 65583.2(g)(2) does not require the City to guarantee that each site in its site inventory will be redeveloped by 2029. Section 65583.2(g)(2) only requires the City to provide evidence that each non-vacant low-income site “is likely to be discontinued during the planning period”—i.e., by October 15, 2029.

CFH adds that this requires hard work, but it is attainable even though private parties ultimately control how their property will be developed in the City because other cities have risen to the challenge. *See* Gelfand Decl., ¶3. If the City cannot obtain appropriate evidence about a particular parcel, it should be removed from the non-vacant sites relied on to accommodate the housing need for lower income households. If this results in the elimination of needed sites, the City must rezone to increase the density on more plausible sites to account for the lost units. Nothing about this is impossible. Opp. at 13-14.

The City argues that it specified the additional development potential within the planning period of each non-vacant site and provided an explanation of the methodology used to determine the development potential as required by section 65583.2(g)(1) and adopted findings supported by substantial evidence that the existing use is likely to be discontinued during the planning period as required by section 65583.2(g)(2). RJN 15-16 (§4). The explanation of methodology, findings, and evidence are contained within Housing Element section 9.4 and Appendix C. AR 105-24, 633-46. Specifically, the City determined that, because more than 50% of the parcels included in the housing element sites inventory are non-vacant, the existing sites identified are likely to be discontinued during the 2021-2029 planning period, and the development potential on these non-vacant sites would not constitute an impediment to future housing development. Section 9.4 and Appendix C identify the City’s site inventory, which identifies over 115 sites and includes an analysis of each. *Id.* Mot. at 14-15.

The Petition also alleges that the housing element does not identify any basis for the City’s assumptions about the realistic capacity of the listed sites for residential development, including the expected income levels of the housing anticipated on those sites. Pet., ¶46. This is a reference to section 65583.2(c)(2)’s requirement that the number of units for development shall be adjusted in part by the realistic development capacity for the site. The City argues that the Petition’s allegation is not true. Section 9.4 provides a parcel specific analysis on properties within the City to identify vacant and underutilized properties according to methodology developed by the UC Berkeley for BTHA, the ratio of land improvements to land value, which can facilitate identification of underutilized sites with potential for infill or redevelopment with higher density residential and/or mixed-use developments. RJN 105-24. Therefore, the housing element outlines the bases for the realistic capacity of the sites identified to be developed. Mot. at 15.

The City also considered the expected income levels of housing occupants anticipated for those sites by analyzing the adequacy of the City’s site inventory to meet the City’s RHNA share by income level as required by section 65583.2(c). RJN 120 (Tables HE-48, HE-49); RJN 633-64 (Tables HE-A1 through HE-A5 depict the location of pertinent parcels in Table HE-49). Mot. at 15.

The Petition includes broad allegations that the housing element does not comply with the City’s obligation to demonstrate that it will affirmatively further fair housing (sometimes, “AFFH”) under section 65583(c)(10) and will assess the relationship between that obligation and the sites it has identified for housing development as required by section 65583(a)(3). Pet., ¶47. Housing element section 9.5 specifically analyzes the City’s obligation for AFFH. RJN 125-57.

HE Policy 5.1 is the City's policy for AFFH, and it promote equal housing opportunities for persons of all socioeconomic segments. RJN 130-31. Appendix D contains the City's Assessment of Fair Housing. RJN 648-719. The City's housing plan includes programs and objectives that address all the issues identified in the housing element, including those to mitigate AFFH issues identified in Appendix D. Figure D-25 shows the geographic distribution of the Sites Inventory by Census tract. RJN 170. Table HE-50, the City's AFFH Meaningful Actions Matrix, highlights the City's meaningful actions to address the priority issues identified in Appendix D, including the programs/objectives, specific commitments, timeline, geographic targeting, and metrics. RJN 152-55. Therefore, the City has complied with its obligation to demonstrate that it will affirmatively further fair housing. City Mot. at 16.

CFH does not respond to the City's arguments about the realistic capacity of the listed sites for residential development, the expected income levels of housing occupants, and AFFH. As a result, those issues are conceded for purposes of the parties' motions. CFH limits the dispute to whether the use of non-vacant sites for over 50% of the site inventory complies with the Housing Element Law, in particular sections 65583.2(g)(1)-(2). Opp. at 1, 12-17.

c. Martinez

The City relies on the recent decision of Martinez, *supra*, 90 Cal.App.5th at 193. City Mot. at 14.

In Martinez, the court addressed in part the City of Clovis' housing element's inventory of non-vacant sites and compliance with section 65583.2(g)(1). *Id.* at 246-47. First, the court concluded that section 65583.2(g)(1) does not require the city to specify the additional development potential of each non-vacant site and provide an explanation for the methodology used to determine development potential in the housing element itself. *Id.* at 247-49. It is sufficient if that information is provided in separate documents. The court declined to add language to the statute that is not present. CCP §1858. *Id.* This approach is supported by section 65583.2(b), which explicitly identifies what "[t]he inventory of land shall include" and demonstrates the Legislature knew how to express an intention that information be provided in a particular document. *Id.* at 248.

Second, the court addressed whether the city substantially complied with section 65583.2(g)(1)'s requirements for information about the development potential of two specific sites. *Id.* The first site (No. 3) was ten developable acres with access to two streets and would be available in the planning period. *Id.* at 249. Letters showed that the site was owned by a university which was not interested in rezoning the site for residential purposes because it was being used for agricultural education. *Ibid.* The city asserted that its discussions with university staff showed that it was supportive of rezoning the land. *Ibid.* The city concluded that, even though the university was immune from the city's zoning regulations, it was not required to make arrangement with the university to develop its property prior to making zone changes to satisfy its RHNA allocation, and the fact remained that the site could easily be developed for affordable housing which satisfied the law. *Ibid.* HCD impliedly agreed with the city in concluded that the housing element complied with the Housing Element Law. *Id.* at 249-50. The court agreed. *Id.* at 250. Although there was missing information of other factors in section 65583.2(g)(1), this was at most a technical imperfection and not a substantial failure to comply with the law. *Id.* at 250.

The second site (No. 8) was 2.3 developable acres owned by the city. *Id.* at 250. The site inventory stated that the property would be marketed to housing developers as potential sites for affordable housing. *Id.* HCD impliedly agreed that the information provided fulfilled its

obligation to address the site's development potential. *Id.* at 251. HCD's finding of compliance is presumptively valid and petitioner had not rebutted it. *Id.*

The *Martinez* court concluded that the city's information substantially complied with the statutory requirements and the judiciary's role does not extend to whether the sites are adequate to meet program objectives. *Id.*

CFH argues that the City's reliance on *Martinez* is misplaced for three reasons. First, the petitioners in *Martinez* sought to enforce the requirements of subdivision (g)(1), not subdivision (g)(2). Subdivision (g)(2) did not apply to the city's housing element because the city used vacant sites to accommodate most of its low-income RHNA allocation. *Id.* at 247, n. 19. While subdivision (g)(1) requires local governments to identify a "methodology used to determine the development potential" of the non-vacant parcels listed in the sites inventory, it does not require them to make specific findings or identify specific evidence. In contrast, subdivision (g)(2) creates a presumption that a non-vacant site is inappropriate for inclusion unless the local government makes "findings based on substantial evidence that the use [of the site] is likely to be discontinued during the planning period." While these findings can be made outside of the four corners of the housing element—e.g., in a City Council adopting resolution—they must be made somewhere. *Opp.* at 16-17.

Second, *Martinez* relied heavily on the presumption of compliance resulting from HCD's certification of Clovis' housing element in analyzing its compliance with section 65583.2(g)(1). *Id.* at 249-51. *See* §65589.3. The City is not entitled to this presumption because its housing element has not been certified by HCD. *Coy Decl.*, ¶¶ 9-10. *Opp.* at 17.

Third, although Clovis was only required to comply with 65583.2(g)(1), the analyses conducted by that city and endorsed by *Martinez* for the two sites at issue were more robust and site-specific than the City's repetitious references to building age and assessed value. *Compare id.* at 249-51 *with* RJN 634-40. *Opp.* at 17.

The City replies that it cited *Martinez* for the proposition that the section 65583.2(g)(1) and (g)(2) analysis need not be contained within the housing element itself. The Petition alleges that the City failed to comply with both subdivisions. There also is no reason why *Martinez*'s holding regarding the location of the (g)(1) analysis should not also apply to the (g)(2) analysis. Subdivision (g)(2) specifically imposes additional requirements for the "methodology" used in the "analysis" required by paragraph (g)(1). *Reply* at 5-6.

Both parties are correct. *Martinez* is distinguishable, but it stands for the propositions that (a) section 65583.2(g)(1) does not require a city to specify the additional development potential of each non-vacant site, and provide an explanation for the methodology used to determine development potential, in the housing element itself, a proposition that applies equally to (g)(2) and (b) a city substantially complies with section 65583.2(g)(1)'s requirements for information about the development potential of non-vacant inventory sites when its evidence of one or more of the statute's factors show that substantial compliance, even though not all factors were considered.

d. Merits

CFH argues that the City has not made the findings supported by substantial evidence as required by section 65583.2(g)(2) for non-vacant low-income sites. All but 19 of the low- and very low-income units planned in the housing element are attributed to non-vacant parcels. Thus, the City is relying on non-vacant sites to provide well over 50% of the City's RHNA allocation of

387 units in these income categories. As a result, the City is subject to section 65583.2(g)(2). Opp. at 13.

CFH argues that the City does not have substantial evidence that the existing uses on the non-vacant low-income sites are likely to be discontinued during the planning period. The City's site inventory is Appendix C. RJN 633-46. Under "Criteria," Appendix C lists the evidence that each site is likely to experience redevelopment and that the existing use is likely to be discontinued by 2029. A small number of these sites are properly supported by the City's evidence. For example, the La Cañada United Methodist Church is in active discussions with a multifamily residential developer regarding the redevelopment of its property (APN 5823-001-016). But the evidence for the remaining sites has no obvious relationship with section 65583.2(g)(2)'s requirement. The listed factors may be evidence of something, but the City has not presented evidence that they show the existing use on each site is "likely to be discontinued during the planning period." Opp. at 14.

CFH criticizes Appendix C's use of the following factors:

(1). The presence of buildings older than 30 years.

CFH criticizes the City's failure to cite any evidence that building age is indicative of a likelihood that the existing use will be discontinued, as well as its failure to provide evidence supporting the mid-1990s cut-off. The mere presence of many buildings over 30 years old appears to demonstrate that such buildings are regularly maintained in their existing use and the properties will not be redeveloped.

(2). Improvement-to-land-value ratio less than 1.0.

CFH argues that this metric appears focused on the potential for economically beneficial development, rather than the likelihood that the existing use will be discontinued. The City has not presented any evidence to support its use as a metric for likely discontinuation of use. Nor has it provided evidence of the City's arbitrary use of a 1.0 ratio. Additionally, due to Prop 13's limits on assessment and reassessment, comparisons using the Tax Assessor's assessment figures have limited value.

(3). Lack of recent reassessment.

CFH contends that, due to the Prop 13 limits on property tax reassessment, this does not appear to be a measure of anything meaningful other than the date of the last sale transaction between parties who failed to avoid reassessment.

(4). The presence of "antiquated commercial uses with significant surface parking."

CFH notes that this is a qualitative assessment and the City's definition of "antiquated commercial uses" appears to include established national chain businesses with long-term leases. The City has not included any analysis whether the parking is needed to serve these commercial uses. Opp. at 14-15.

CFH contends that the City's housing element does not distinguish between its analysis under section 65583.2(g)(1) and (g)(2), and the factors it used generally seem focused on the development potential of sites once their existing uses have been discontinued. The Legislature expressly distinguished between the requirement to analyze new development potential which applies to all cities under section 65583.2(g)(1)), and the requirement to show evidence of likely discontinuation of use which applies to a narrower set of cities under section 65583.2(g)(2). The Legislature adopted section 65583.2(g)(2)'s requirement to combat the practice by cities of relying on sites with continuing uses, recognizing that a parcel that might otherwise be attractive for residential development will be unlikely to overcome an established use -- such as a retail tenant with a long-term lease or a well-attended, built-out private school. See RJN 759. Opp. at 15.

The City's housing element relies on just those sorts of inappropriate sites, despite evidence for a number of inventory sites that the existing use will continue throughout the planning period. CHP provides three examples. Opp. at 15.

First, the City received a letter from the owner of a preschool (App. C site #59) indicating that the current existing use of the school will not be discontinued during the planning period. RJN 623 ("Although the City wishes to include my site..., the school has a long and successful history and there is no intention of discontinuing the current use of this property during the next eight-year planning period. As such, we do not intend to redevelop my property, or any portion thereof, into housing within the next eight (8) year planning period."). The City declined to remove this site from its inventory. Opp. at 15.

Second, the owner of several contiguous sites (App. C sites #86-89) informed the City that the property is under a 20-year lease to a major retailer, Big Lots, with two ten-year extension options, and the owner has no intention of discontinuing the existing commercial use. RJN 625. The City kept these sites in the inventory, albeit with an acknowledgment that two of the four parcels are "not currently available." RJN 638-39.

Third, the City concedes that the sites currently occupied by JOANN Fabric and Crafts store (App. C sites #98 and 99) are "not currently available." RJN 639-40. Yet, it retained "not currently available" sites on the inventory as a "buffer". *Id.* CFH argues that there is no law permitting buffer sites to be listed with a lessened evidentiary requirement. Opp. at 15-16.

CHP concludes that the City's minimal site-specific analysis falls far short of the kind of analysis required to overcome the presumption that an existing use is presumed to impede additional residential development under section 65583.2(g)(2). The City has no evidence that the existing uses on these sites are likely to discontinue and has for some sites compelling evidence that these uses will continue. Opp. at 16.

The City replies that its housing element unequivocally demonstrates that the City has substantially complied with the analysis required under section 65583.2(g)(2). The City Council's Resolution 23-08, adopted on February 21, 2023, adopted findings that housing element section 9.4 and Appendix C contain substantial evidence that the site inventory's existing uses are not impediments to accommodate new housing and will likely be discontinued during the 2021-2029 planning period. RJN 15-16(§4). This meets the requirements of section 65583.2(g)(1) and (2). The identified criteria used to determine likelihood of discontinued use include underutilization of the site, the age of current buildings, and the owner's interest to redevelop the site. RJN 633-46.

The City notes that the Petition alleges that the City's housing element did not identify any evidence that the existing uses at each of the non-vacant site will be discontinued during the planning period (Pet., ¶44), and that the housing element does not contain the analysis required under section 65583.2(g)(1) and (g)(2). Pet., ¶45. The fallacy of both contentions is rebutted by Appendix C. Reply at 5.

The City contends that CFH now argues that the housing element includes only a minimal section 65583.2(g)(2) analysis.⁸ Section 65583.2(g)(2) only requires substantial evidence of the

⁸ The City argues that CFH's argument that the housing element contains only a minimal section 65583.2(g)(2) is outside the scope of the Petition, which alleged that the housing element did not identify any evidence that the existing uses at each of the non-vacant site will be discontinued during the planning period (Pet., ¶44), and does not contain the analysis required under section 65583.2(g)(1) and (g)(2). Pet., ¶45. Reply at 5. The court does not agree. CFH's contention of insufficient analysis and evidence is subsumed within the Petition's allegations..

likely discontinuance of a site's current use and does not outline any specific factors that a city must consider. CFH offers no legal authority why the criteria used for the City's analysis is insufficient, only arguing that the analysis falls short for some specific sites. This runs afoul of what is statutorily required. The court is not required to engage in a site-specific analysis regarding "the merits of the element or to interfere with the exercise of the locality's discretion in making substantive determinations and conclusions." *Martinez, supra*, 90 Cal.App.5th at 237. Section 65583.2(b) is explicit about what the site inventory "shall include" and any other requirements are not supported by the statute. Reply at 5.

CFH has the burden to show that the City does not have substantial evidence that the existing uses of the non-vacant sites listed in the site inventory are likely to be discontinued during the planning period. The City relies solely on Resolution Nos. 22-35 and 23-08, the 2023 housing element, and its appendices. RJN 11-16, 105-57, 633-46, 648-719. If these documents do not demonstrate substantial evidence to support a finding that existing uses will discontinue during the planning period, then the 2023 housing element does not comply with section 65583.2(g)(2).

CFH's attack on the City's compliance is focused on the criteria that the City principally relied upon in Appendix C to show that the existing uses are not an impediment to additional residential development under section 65583.2(g)(2). Those criteria are: (1) the presence of buildings older than 30 years; (2) improvement-to-land-value ratio less than 1.0; (3) lack of recent reassessment; and (4) the presence of "antiquated commercial uses with significant surface parking." CFH's criticism of these criteria is mostly based on a lack of evidence that these criteria are significant, the arbitrary nature of their selection, and what they appear to demonstrate.

This is insufficient to show that the criteria are inappropriate. There is nothing in section 65583.2(g)(1) or (2) that expressly requires the criteria used to evaluate the extent to which existing uses may constitute an impediment to residential development to be itself supported by substantial evidence. The appropriateness of the criteria is a matter to be demonstrated at trial with expert or other witness declarations.

Section 65583.2(g)(1) does require that the City "provide an explanation of the methodology used to determine the developmental potential, including the extent to which existing uses may constitute an impediment to additional residential development." Additionally, section 65583.2(g)(2) requires the City, which is relying on more than 50% of non-vacant sites for its RHNA share, to demonstrate in its methodology that the existing uses are not an impediment to residential development. Therefore, the City must discuss its methodology and how it demonstrates that the existing uses are not an impediment to residential development. This is not a site-specific analysis but rather an analysis of the methodology used. It is in the course of this discussion that the criteria should be addressed.

In purported compliance with this requirement, the housing element notes in Section 9.4.1.3 that the City has very little vacant land left and it had to identify underutilized sites to fulfill its RHNA obligations. RJN 109. The City's strategy is to identify such properties by primarily focusing on the Foothill Boulevard corridor. RJN 109. UC Berkeley has developed a methodology for BTHA that uses the ratio of land improvements to land value to facilitate identification of underutilized sites with potential for infill or redevelopment at a higher density residential. RJN 110. Based on this measure, properties in non-single-family areas are underutilized if the total value of improvements on the site is less than the total value of the underlying land. RJN 110.

Additionally, section 9.4.1.3 notes the national trend for online shopping with a consequent decline in demand for commercial business areas. RJN 110. There is a need to provide greater flexibility in land use, including mixed use development and even stand-alone uses in traditional

commercial areas. RJN 110. Additionally, there are many underutilized parcels in the City constructed prior to the 1980s, with 1953 as the median year for construction of these older parcels. RJN 110. Many are antiquated commercial uses with significant amounts of surface parking. RJN 110. These properties have similar characteristics as other properties that were redeveloped in the past, including the Town Center project. RJN 110.

This analysis of the City's methodology may or may not comply with section 65583.2(g)(1) and (2). As CFH does not expressly attack the housing element's methodology discussion, only attacking the narrower issue of the criteria used for that methodology, the court need not decide this issue for purposes of CFH's motion.

On the other hand, CFH's criticisms of the criteria have some facial validity. The City has not shown a causal link between these factors and the probability that a property's current use will be discontinued during the cycle's planning period. Although the City relies on the Resolution No. 23-08 finding that in section 9.4 and Appendix C contain substantial evidence that the existing uses are not impediments to new housing and are likely to be discontinued during the planning period (AR 15), this is a mere conclusion that is not necessarily supported by section 9.4 and Appendix C.

Additionally, CFH provides examples of sites that should not have been included in the site inventory. These examples can be used to illustrate that the City has not substantially complied with the Housing Element Law because the use of examples is not the same as a site-specific analysis. The inclusion in the site inventory of properties whose owner has expressed disinterest in redevelopment may be used to aid CFH in demonstrating the City's non-compliance with section 65583.2(g)(2). If the City's reasons fail for specific sites, that fact is some evidence undermining the City's assertion that the analysis is compliant with section 65583.2(g)(2).

e. Conclusion

CFH criticizes the criteria used to show that the existing uses are not an impediment to additional residential development under section 65583.2(g)(2). CFH's criticism and examples are insufficient to warrant a CCP section 1094 judgment on the first cause of action. An evaluation of the appropriateness of the criteria must occur in an examination of the City's methodology required by section 65583.2(g)(1) and (g)(2), and is a matter for expert or other witness declaration. The City's demonstration of its methodology may or may not meet the requirements of section 65583.2(g)(1) and (2), but that is a matter for trial.

Conversely, the Petition sufficiently alleges that the City's site inventory does not account for the possibility that a site will remain in its current use (Pet. ¶43), that the City's criteria for concluding that the existing uses are not an impediment to residential development are suspect, that the housing element does not contain the analysis required under section 65583.2(g)(1) (Pet. ¶45), and that the housing element did not make the findings required by section 65583.2(g)(2) (Id.). The facts judicially noticed at the City's request do not show otherwise.

Therefore, both motions are denied on the Petition's first cause of action alleging that the City's adopted housing element does not substantially comply with the Housing Element Law.

4. Second Cause of Action

a. The Penalty for Untimely Housing Element Approval

A city that fails to adopt a housing element that HCD has found to be in substantial compliance with the Housing Element Law within 120 days of the statutory deadline for adoption

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of the housing element shall complete rezoning of those sites no later than one year from the statutory deadline in Section 65588 for adoption of the housing element. §65583(c)(1)(A).

If a city fails to adopt a housing element that HCD has found to be in substantial compliance with state law within 120 days of the statutory deadline, rezoning shall be completed no later than one year from that statutory deadline. §65583.2(c).

As provided in AB 1398, for the sixth revision thereafter, a local government that does not adopt a housing element that HCD has found to be in substantial compliance within 120 days of the applicable deadline shall comply with sections 65583(c)(1)(A) and 65583.2(c) within one year of the statutory deadline to revise the housing element. §65588(e)(4)(C)(i).

If a city adopts a housing element more than one year after the statutory deadline, it is not in substantial compliance until it has completed the rezoning required by sections 65583(c)(1)(A) and 65583.2(c). §65588(e)(4)(C)(iii).

Notwithstanding sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C), a local government shall have three years and 120 days from the statutory deadline for adoption of the housing element to complete any rezoning if (1) the deadline was in 2021, (2) the local government failed to adopt an element that the HCD found to be in substantial compliance with the Housing Element Law within 120 days of the deadline, and (3) it did adopt an element that the HCD found to be in substantial compliance with the Housing Element Law within one year of the deadline. §65583.4(a).

b. The Second Cause of Action

The Petition's second cause of action seeks a writ of mandate to compel the City's compliance with the rezoning deadlines. The Petition alleges that, under sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i), if the HCD has not certified a city's adopted housing element by October 15, 2022, the city must complete all required rezoning by that date. Pet., ¶24. The City failed to complete its required rezoning by the October 15, 2022 deadline. Pet., ¶48. This bars the City from disapproving a housing development project on a site designated for rezoning by the housing element if the project complies with the applicable objective zoning standards that would apply once the site is properly rezoned and meets certain additional requirements. Pet., ¶25.

c. Merits

The City submitted its initial draft housing element to HCD on October 3, 2021. HCD provided its review on December 3, 2021. The City adopted its housing element on October 4, 2022. On December 6, 2022, HCD issued its determination that the City's adopted housing element was legally inadequate. The parties dispute whether HCD's finding of inadequacy was substantive or merely technical.

On February 21, 2023, the City adopted the amended housing element which is the subject of this litigation. The February 2023 housing element requires that the City rezone parcels in order to meet the City's obligations under Housing Element Law. The document acknowledges that the deadline to complete these required rezonings was October 15, 2022. RJN 132. The City has not completed this rezoning process.

On April 24, 2023, after review of the 2023 element, HCD determined that it could not find the City's element in substantial compliance with the Housing Element Law. Coy Decl., ¶9. Pursuant to section 65588(e)(4)(C)(iii), HCD remains unable to certify the housing element or any subsequent revision until the City completes all the rezoning required. Coy Decl., ¶9.

The City acknowledges that October 15, 2021 was the SCAG region's statutory deadline for adoption of the sixth revision of the housing element for the planning period of October 15, 2021-October 15, 2029. *See* §65588. Section 65588(e)(4)(C)(i) provided a one-year extension to complete rezoning to October 15, 2022 for those cities that did not adopt a substantially compliant housing element within 120 days of October 15, 2021. Mot. at 16.

The City argues that it adopted a substantially compliant 2021-2029 housing element on October 4, 2022, which was subsequently updated on February 21, 2023 without substantive changes. RJN 11-16. The City is currently in the process of rezoning in accordance with its housing element, and the rezoning will be completed by October 2023. RJN 132. The City's housing element commits the City to implement its rezoning program by October 2023. The City's adopted housing element Program 1 is the City's identified program to rezone the properties identified in the site inventory. RJN 132. Program 1 states: "The rezoning of adequate sites is due October 15, 2022. The City is proposing to adopt the Housing Element in early October 2022, and is actively pursuing the implementation of the rezoning program. Following adoption of the Housing Element, the City will...rezone the properties identified in the Sites Inventory to accommodate the RHNA by October 2023." *Id.* Mot. at 18.

The City argues that its October 4, 2022 substantially compliant housing element was timely adopted within a year of the October 15, 2021 statutory deadline under section 65588(e)(4)(C)(i) (city must adopt housing element within a year of the statutory deadline). Section 65588(e)(4)(C)(iii), which requires completion of rezoning before a city's housing element can be determined to be in substantial compliance, applies only when a local agency adopts a housing element more than one year after the statutory deadline. Reply at 2-3.

These arguments are untenable because HCD has not found the October 2022 housing element to substantially comply with the Housing Element Law. For an adopted housing element to be timely, all of sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i) require that a city's housing element be found by HCD to be in substantial compliance with the Housing Element Law. Without such a finding, the city must complete rezoning within a year from the statutory deadline. §§ 65583(c)(1)(A)), §65583.2(c), 65588(e)(4)(C)(i). Additionally, the city's housing element cannot be found to be in substantial compliance until it has completed the rezoning. §65588(e)(4)(C)(iii).

As CFH responds (Opp. at 9), when the Legislature created the rezoning deadline penalty for late housing element adoption in 2021, it understood the risk that cities would attempt to adopt untimely housing elements without complying with the new punitive rezoning deadline. To combat this, the Legislature created a statutory bar to housing element compliance for cities that adopt housing elements after the rezoning deadline in section 65588(e)(4)(C)(iii), which provides: "A jurisdiction that adopts a housing element more than one year after the statutory deadline... shall not be found in substantial compliance with this article until it has completed the rezoning required" under Housing Element Law.

The language of section 65588(e)(4)(C)(iii) originally provided that "[i]f a jurisdiction adopts a housing element more than one year after the statutory deadline, the department shall not find that jurisdiction's housing element to be in substantial compliance with this article pursuant to Section 65585 until all required rezoning is complete." RJN 775 (emphasis added). In a September 3, 2021 amendment to section 65588(e)(4)(C)(iii), the reference to "the department" was removed and revised to mandate that the offending jurisdiction "shall not be found in substantial compliance" until it has completed the rezoning. This legislative history makes clear that the Legislature intended this statutory bar to apply not only to HCD's review of a local

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government's housing element, but also to judicial review. In other words, if the City's housing element is adopted more than one year after the section 65588 deadline, a court shall not find the city's housing element to be in substantial compliance with the Housing Element Law until the required rezoning is complete.

The City was required to update its housing element by October 15, 2021. Because the City did not adopt a housing element within 120 days from that date, it is subject to the section 65588(e)(4)(C)(i) penalty requiring it to complete its rezoning within one year of the statutory deadline—i.e., by October 15, 2022. The City's housing element acknowledges that it is subject to this penalty and that its rezoning was due by October 15, 2022. RJN 132. The City's challenged housing element was not adopted until February 21, 2023, over one year after the statutory deadline of October 15, 2021, and has not been certified by HCD. The City is therefore subject to the statutory bar in section 65588(e)(4)(C)(iii).

The City argues that it is subject to three year and 120 days exception to the rezoning penalty after adoption of the housing element that was provided to qualifying Southern California jurisdictions in section 65583.4(a). Mot. at 17.

This argument is at odds with the City's own housing element, which states that "[t]he rezoning of adequate sites is due October 15, 2022." RJN 132. It also is inconsistent with the plain meaning of the section 65583.4 exception, which is limited to circumstances where "[t]he local government adopts a sixth revision of the housing element and the department finds the adopted element to be in substantial compliance with this article within one year of the statutory deadline established pursuant to section 65888 for adoption of the housing element". §65583.4(a)(3) (emphasis added). This language plainly contains two elements: (a) an adopted housing element in substantial compliance with the Housing Element Law and (b) HCD approval. Only then is there an extension for the rezoning required by section 65583(c)(1)(A).

As the meaning of section 65583.4 is plain, there is no need to resort to its legislative history. MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, ("MCI") (2018) 28 Cal. App. 5th 635, 643 (no need to resort to legislative history if statute's words are clear and unambiguous); MacIsaac v. Waste Management Collection & Recycling, Inc., (2005) 134 Cal.App.4th 1076, 1082 (if a statute is ambiguous, the court may resort to extrinsic aids such as legislative history). To the extent that the court should resort to the legislative history or section 65583.4, it shows that the dual requirement of the adoption of a substantially compliant housing element and certification by HCD was no accident. "This bill also adds that, to avoid the expedited timeline, the housing element must be determined by HCD to be substantially compliant with Housing Element Law. This change removes the circumstances where jurisdictions adopt non-compliant housing elements to avoid penalties". RJN 763.

HCD reminded the City that it could obtain the three-year rezoning deadline only if its housing element is found to be in compliance by October 15, 2022. Coy Decl., ¶11. The City failed to adopt and submit its housing element to HCD on a timely basis. As a result, the penalty of section 65588(e)(4)(C)(iii) applies and the city's housing element will not be in substantial compliance with the Housing Element Law until the required rezoning is complete.

The City argues that it would be legally absurd to penalize a city which has adopted a substantially compliant housing element. A city must adopt a housing element before rezoning, and the imposition of section 65588(c)(4)(C)(iii)'s penalty would require late-adopting local governments to complete these steps in the wrong order. Mot. at 17.

Aside from the fact that neither HCD nor the court has found the City's housing element to be substantially compliant, the short answer is that the purpose of section 65588(c)(4)(C)(iii) is

to penalize cities which fail to timely comply with their housing element obligations and a city can avoid the rezoning penalty by timely complying. Moreover, the City operates under a false assumption that housing element approval must come before rezoning. The undisputed evidence is that other cities have performed rezoning in conjunction with housing element updates. Coy Decl., ¶12.

The City argues that CFH is not entitled to mandamus based on the City's failure to complete rezoning by October 15, 2022 because the timetables for housing element revision in the Housing Element Law are directory, not mandatory. See Fonseca, *supra*, 148 Cal.App.4th at 1184. To hold otherwise would render meaningless the one-year extension to adopt a substantially compliant housing element under section 65588(e)(4)(C)(i). A city cannot move forward with rezoning until it adopts a substantially compliant housing element. The Legislature recognized the impracticalities of a short turnaround to approve zoning code amendments and passed SB 197, codified in section 65583.4, which allows cities with a substantially compliant sixth revision of the housing element up to three years and 120 days from October 15, 2021 to complete rezoning. City Mot. at 16-17; Reply at 2-3.

In Fonseca, the plaintiffs challenged the City of Gilroy's 2002 housing element in part because it did not contain an inventory and analysis of residentially zoned land in violation of the relevant version of section 65583(a)(3) and violated former section 65583(c)(1)(A) in that it does not identify adequate housing sites to meet the city's allocated share of regional housing need at all income levels for the planning period. *Id.* at 1179. The court stated that, while many of plaintiff's arguments concerning the Housing Element Law were logical in terms of its goals of promoting affordable housing, their arguments would require the court to rewrite the law. *Id.* at 1180. In fact, recent amendments to the Housing Element Law appear to have addressed the issues raised by the plaintiffs. *Id.* The court rejected the plaintiffs' challenge. The court held that, prior to legislation in 2004, local governments were not required to include parcel-specific analyses as part of their housing elements. *Id.* at 1195-96.

As CFH correctly responds (Opp. at 11), Fonseca's 2002 analysis of the Housing Element Law's requirements in 2002 is of limited value. The Fonseca court acknowledged that the substantive housing element requirements had already been amended by the time of its decision. Over the last decade, the Legislature repeatedly has amended the Housing Element Law, transforming the housing element system into a highly specified process involving meaningful HCD review and strict requirements. More recent bills have amended the Housing Element Law to significantly increase a city's analytical and evidentiary obligations for housing elements and the penalties associated with non-compliance. Thus, Fonseca's discussion of section 65583 as it existed in 2002 does not significantly bear on the statute as it exists now.

The City argues that Fonseca is still good law and was cited extensively in Martinez's discussion of a city's substantial compliance with its housing element obligations. Reply at 2-3. However, the portions of Fonseca cited by Martinez concern the definition of substantial compliance and the scope of judicial review, not whether the timetables in section 65588 remain directory. 90 Cal. App. 5th at 237.

In discussing general Housing Element Law, the Fonseca court cited San Mateo County Coastal Landowners' Assn. v. County of San Mateo, ("San Mateo") (1995) 38 Cal. App. 4th 523, for the proposition that section 65588(e)'s schedule for a city or county's revision of its housing element was "directory, not mandatory, such that non-compliance with the schedule does not automatically invalidate a housing element or, by extension, a general plan. *Id.* at 544-45. The

City relies on this holding, adding that statutory time limits are usually deemed to be directory. Sunset Drive Corp. v. City of Redlands, (1999) 73 Cal.App.4th 215, 223. Reply at 3.

CFH responds that San Mateo's analysis of section 65588's housing element deadlines as directory also is outdated. At the time San Mateo was decided, there were no statutory penalties for failing to timely adopt a housing element and the court held that the absence of statutory penalties for non-compliance "strongly suggests that the provision is merely directory." 38 Cal.App.4th at 544-45 (citation omitted). Today, there are at least two significant penalties for failing to timely adopt a housing element. First, there is the rezoning penalty in section 65588(e)(4)(C)(iii) that is the subject of this litigation. Second, the HAA contains builder's remedy that limits a city's ability to deny a development for low-cost housing unless its housing element has been revised in accordance with section 65588 and is in substantial compliance with the Housing Element Law. §65589.5(d)(1), (d)(5). Opp. at 11.

An ordinance's mandatory language may be only directory. The "mandatory" or "directory" designation denotes "whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." City of Santa Monica v. Gonzalez, ("Gonzalez") (2008) 43 Cal.4th 905, 923. Courts determining whether an obligatory statutory provision should be given mandatory or directory effect by ascertaining the legislative intent. Id. at 924. In ascertaining the consequences of not obeying the obligation, the court should "look to the procedure's purpose or function. If the procedure is essential to promote the statutory design, it is 'mandatory' and noncompliance has an invalidating effect. If not, it is directory." Id.

The City was required to complete its sixth cycle housing element by October 15, 2022. If it failed to do so, section 65588(e)(4)(C)(iii) provides a penalty that the housing element will not be in substantial compliance until it has completed the rezoning required by sections 65583(c)(1)(A) and 65583.2(c). The HAA contains builder's remedy that limits a city's ability to deny a development for low-cost housing unless it has a substantially compliant housing element. §65589.5(d)(1), (d)(5). These penalties make all the difference in interpreting section 65583's deadlines, which are now mandatory and not directory.⁹

e. Conclusion

The City failed to adopt a ~~substantially compliant~~ housing element certified by HCD by October 15, 2022, and therefore the **statutory bar under section 65588(c)(4)(C)(iii) applies**. The City cannot be considered to be in substantial compliance until it has completed the rezoning required by sections 65583(c)(1)(A) and 65583.2(c).

⁹ CFH adds that, even if the deadlines in Housing Element Law are directory, the distinction between a mandatory and a directory rule applies only when a party is seeking to bar the enforcement of a policy that contravenes that rule. *See San Mateo, supra*, 38 Cal. App. 4th at 544-45 (attempt to bar the enforcement of county's general plan based on failure to timely update housing element). CFH notes that "even directory time limits may be enforced by a writ of mandate compelling the agency to act." Sunset Drive Corp. v. City of Redlands, (1999) 73 Cal.App.4th 215, 223 (quotation marks and citations omitted). Opp. at 11-12.

CFH is wrong that the mandatory versus directory rule only applies to enforcement actions. As discussed, it depends on the procedure's purpose. Nor is CFH seeking mandamus to compel the City to comply with Housing Element Law deadlines.

5. Declaratory Relief

The HAA contains builder's remedy that limits a city's ability to deny a development for low-cost housing unless its housing element has been revised in accordance with section 65588 and is in substantial compliance with the Housing Element Law. §65589.5(d)(1), (d)(5). Where a city fails to timely complete required zoning, it may not disapprove a project that is on a site required to be rezoned and complies with the applicable objective general plan and zoning standards and criteria. §65583(g)(1).

The Petition seeks a declaration that (1) the 2023 element does not substantially comply with state law, (2) the City has not had a section 65588 compliant housing element from October 16, 2021 until the City passes one, (3) pursuant to sections 65589.5(d)(1) and (d)(5), the City may not disapprove a housing development project where either at least 20% of the total units will be sold or rented to lower income households or 100% to moderate income households, or condition its approval in a manner that makes it infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, and (4) section 65583(g) applies to the City because it did not timely complete the required rezoning. Pet. Prayer for Relief, ¶4.

The City focuses on the prayed for declarations under section 65589.5(d)(1) and (5) and section 65583(g)(1). The City contends that such a declaration is not available under either of Petition's causes of action. The Petition's traditional mandamus claim is limited to an order that the City comply with specific sections of the Housing Element Law. The Petition does not include a separate declaratory relief claim. Therefore, the declaratory relief requested in Paragraph 4.a through 4.d of the Petition's Prayer exceeds the relief allowed under sections 65587, 65751, 65587(d), and CCP section 1085. The Petition also does not allege that CFH has applied to the City for a housing development project or intends to at any future date. Consequently, there is no controversy between the City and CFH about the applicability of section 65583. Mot. at 18-19.

"An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law." Alameda County Land Use Assn. v. City of Hayward, (1995) 38 Cal.App.4th 1716, 1723. The object of the declaratory relief statute is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for the determination of identical issues. California Ins. Guarantee Assn. v. Superior Court, (1991) 231 Cal.App.3d 1617, 1623-24. However, "[w]here the allegations of the mandamus petition are sufficient, declaratory relief may be awarded in a mandamus action." Malott v. Summerland Sanitary District, (2020) 55 Cal.App.5th 1102, 1109. "[J]udicial economy strongly favors the use of declaratory relief to avoid a multiplicity of actions to challenge [a city's] statutory interpretation or alleged policies." Venice Town Council, Inc. v. City of Los Angeles, (1996) 47 Cal. App. 4th 1547, 1566-67. "As against the piecemeal review of similar issues by individual challenges to specific permit applications," a request for declaratory relief "appears singularly economical." Id. at 1567.

CFH notes that declaratory relief determining that the City is subject to the limits in section 65589.5(d)(1) and (d)(5) of the HAA is commonly referred to as the "builder's remedy" because they permit builders of proposed mixed- and moderate-income housing developments to disregard some local development standards in cities that have not "adopted a revised housing element in accordance with Section 65588 that is in substantial compliance" with Housing Element Law. CFH's concern about the City's future compliance with the builder's remedy is real. While this case has been pending, the City Council determined that an 80-unit, 20% affordable project could not proceed under the builder's remedy based on the City's contention that its housing element is

substantially compliant. Gelfand Decl. ¶4. By issuing a declaratory judgment that the City is subject to the builder's remedy provisions, the court will reduce the risk that housing development applicants will be forced to litigate its applicability individually. Opp. at 18.

The City replies that, while a court may grant declaratory relief as part of a mandamus claim, the petitioner still must plead sufficient allegations to support a declaratory relief cause of action. See Malott v. Summerland Sanitary District, (2020) 55 Cal.App.5th 1102, 1109-10 ("Where a party mistakenly files a section 1094.5 petition, instead of traditional mandamus (§1085) or declaratory relief causes of action, relief will not be denied where the allegations of the section 1094.5 petition are sufficient to support the other two causes of action."). It is insufficient to simply ask for declaratory relief. CFH's Petition contains no allegations to support a declaration regarding a builder's remedy. CFH has not even pled allegations to support it has standing to bring such a claim as a developer applicant. Reply at 6.

The court agrees with the City. CFH has not sued under the HAA. The Petition's two causes of action are to compel compliance with the Housing Element Law and to compel rezoning. The first two prayers for relief are for a writ of mandate compelling the City to adopt a revised housing element and complete the required rezoning. Pet. Prayer, ¶¶ 1-2. The Petition does refer to the consequences of a city's failure to timely adopt a compliant housing element and complete rezoning as described in section 65589.5(d)(1), (d)(5), and section 65583(g)(1). Pet. ¶¶ 23, 25. But it does not allege that those consequences should apply to the City.

Nonetheless, the court would deem declaratory relief available under these statutes if the Petition alleged that CFH is a developer with a project subject to these remedial statutes. It does not. It may be economical to issue declaratory relief for a builder's remedy but it would not be lawful to expand the prayed for relief beyond the issues and facts alleged for the first and second cause of action. The builder's remedy under sections 65589.5(d)(1), (d)(5) and section 65583(g)(1) can be applied only in a subsequent lawsuit alleging appropriate facts. The City's motion to strike the Prayer paragraph 4c. and d. must be granted.

E. Conclusion

The City's motion for judgment on the pleadings is denied. The City's motion to strike the portions Prayer paragraph 4c. and d. is granted.

CFH's motion for judgment is granted for the second cause of action. The City failed to pass a substantially compliant housing element certified by HCD by October 15, 2022, and therefore the statutory bar under section 65588(c)(4)(C)(iii) applies. When final judgment is entered, a writ of mandate and injunction will issue pursuant to sections 65587(d)(1) and 65755 compelling the City to perform the required rezoning. CFH's motion for the first cause of action is denied. There is no need for the issuance of the declarations sought in Prayer paragraph 4a. and b.

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