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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO – UNLIMITED JURISDICTION

SAN FRANCISCO BAY AREA RENTERS FEDERATION, CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, VICTORIA FIERCE, and JOHN MOON,

Petitioners,

vs.

CITY OF SAN MATEO, SAN MATEO CITY COUNCIL, and CITY OF SAN MATEO PLANNING COMMISSION,

Respondents,

TONY MEHMET GUNDOGDU and AYNUR V. GUNDOGDU,

Real Parties in Interest.

CASE NO. 18CIV02105

PETITIONERS' OPENING BRIEF

(CCP § 1094.5; Govt. Code § 65589.5)



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## I. INTRODUCTION

California's housing shortage has "reached a crisis of historic proportions." (Gov. Code § 65589.5(a)(2)(J).) Yet attempts to build housing are routinely opposed by neighbors, NIMBYs,[1] and local municipalities. Here, the City of San Mateo illegally denied a local property owner's proposal to build ten new housing units (the "Project") on a lot that is zoned for residential use. San Mateo's own Planning Division determined that the Project was code-compliant and recommended approval. However, in response to neighbors' opposition, the City yielded to political pressure and used a spurious basis to deny the Project.

This is a case study of the precise situation the California legislature sought to prevent in enacting, and subsequently strengthening, the Housing Accountability Act ("HAA," Gov't Code § 65589.5). The HAA – often referred to as the "Anti-NIMBY law" – compels local agencies to approve code-compliant housing development projects, unless specific health and safety findings are made. The HAA promotes new housing by restricting local agencies' discretion to deny or condition housing development projects.

The Project is code-compliant, and the HAA compels approval. (*Schellinger Bros. v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1253, fn. 9.)The Petitioners seek an order reversing San Mateo's wrongful denial of the Project and directing the City to approve the Project as proposed.

## II. FACTS

On February 23, 2015, Tony and Aynur Gundogdu (the "Real Parties"), a local couple who live in San Mateo county, submitted an application to construct a new, 15,322 square foot, 10-unit residential condominium project at 4 West Santa Inez and 1 Engle Road. (#PA15-104, AR, 1254.) The San Mateo General Plan designates the Project parcel as "High Density Multi-Family," and the Zoning Code land designation is R4 – "Multiple Family High Density." (AR, 886.)

After years of discussions with City Planning staff, and revisions in response to staff's requests, the Project was presented to the City Planning Commission on August 8, 2017. The Staff

[1] "Not In My Backyard."

Report recommended approval of the Project. (AR, 885.) The proposed "Findings for Approval" (AR, 891–907) state that the Project:

> meets all applicable standards as adopted by the Planning Commission and City Council, conforms to the General Plan, and will correct any violations to the Uniform Building Code, Zoning Code, and or municipal codes in that:
>
> a) The project meets the development standards of the R4 zoning district with respect to density, setbacks, floor area, building height, and vehicular parking and bicycle parking;
>
> b) The project complies with the City's Multi-Family Dwelling Design Guidelines;
>
> c) The project complies with the recommendations of the City's Design Review consultant, as conditioned; and
>
> d) The project will be constructed to meet all applicable provisions of the Uniform Building Code.

(AR, 896.)

At the August 8, 2017 Planning Commission hearing, neighbors spoke in opposition to the Project. One neighbor proposed a list of conditions for approval of the project, and presented it to the Real Parties shortly before the hearing commenced. (AR, 1199.) The Project architect stated that the conditions proposed by the neighbor were generally acceptable, and that the Real Parties were "willing to work with city staff to meet the spirit of those conditions." (AR, 1214-15.) The City Attorney stated that the Planning Commission could either "approve the Project with the understanding that city staff will be working with the applicant to finalize the conditions [of approval]," or continue the hearing "until all the conditions of approval have been hammered out." (AR, 1215.)

At the August 8 meeting, there was no suggestion from staff or the Planning Commission that the Project failed to comply with any applicable requirement. The Planning Commission continued the hearing so that the Real Parties could continue this discussion with the neighbors, and passed a motion to "limit the public comment at that future meeting to only the conditions of approval." (AR, 1237.) In other words, at the close of this meeting, the only outstanding issues related to the conditions attached to the approval, rather than whether the Project should be approved.

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Further Planning Commission meetings were held on September 26, and October 10, 2017. At the September 26 meeting, Planning staff *again* recommended approval of the Project, with revised conditions of approval to address the neighbors' concerns. (AR, 574.) However, caving to pressure from neighbors, the Planning Commission contrived subjective concerns regarding neighborhood compatibility. The City's General Plan and Planning Code contain no objective standards that would allow denial of a project on this basis, but the Planning Commission nevertheless voted to deny the Project and directed Staff to "prepare findings for denial" to be presented at a future meeting. (AR, 871.)

On October 10, 2017, the Planning Commission denied the Project based on subjective criteria such as "neighborhood character." For example, the Planning Commission's findings asserted that the Project is "not harmonious with the character of the neighborhood" and objected to the size of the building. (AR, 523.)

Real Parties appealed to the San Mateo City Council. At the appeal hearing on February 5, 2018, Petitioners highlighted the City's "obligation to follow housing law, in particular the Housing Accountability Act." (AR, 461.) At the appeal hearing, the City Attorney advised that subjective criteria such as neighborhood "compatibility" or "suitability" are not permissible grounds for denial of the Project. (AR, 485.) The City Attorney stated that the only "objective" standard that had been found by City staff as a basis for Project denial was the following Multi-Family Design Guideline:

> Height. Most multi-family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, a transition or step in height is necessary.

The City Council claimed that, because there is a two-story height differential between the Project and a nearby single-family home, the Project does not comply with this guideline. (AR, 30.) However, this guideline is not a "standard" that the HAA permits as a basis to deny the Project. Nor is it "objective." In any event, there is ample substantial evidence that the Project complies with this guideline, including the conclusions of the City's own design review expert (AR, 147), the "Findings for Approval" prepared by Planning staff (AR, 886), and statements by the City's Mayor on the record (AR, 490–92). Nevertheless, the City Council voted to deny Real Parties' appeal.

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## III. ARGUMENT

### A. The Housing Accountability Act Requires Approval of Housing Development Projects.

California's Housing Accountability Act (Gov. Code § 65589.5 *et seq.*) was enacted to "limit the ability of local governments to reject or render infeasible housing developments . . . without a thorough analysis of the 'economic, social, and environmental effects of the action . . . .'" (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, citing Gov. Code § 65589.5, subd. (b).) Pursuant to recent amendments which took effect on January 1, 2018, the HAA imposes significant limitations on cities' discretion to deny permits for housing. The HAA requires, inter alia:

> 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 housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by 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.
> (Gov. Code § 65589.5(j).)

This means that in order to deny a housing development project, a city has the burden of either proving that the "proposed project in some manner fails to comply with 'applicable, objective general plan and zoning standards and criteria, including design review standards . . .'" or making the health-and-safety findings required by the HAA. (*Honchariw v. County of Stanislaus* (2011)

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200 Cal.App.4th 1066, 1081.) A project must be deemed compliant "if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, or in conformity." (Gov. Code § 65889.5(f)(4).) If a project is improperly denied, the Court may order approval of the Project and impose monetary penalties on a city that continues to violate its duties under the HAA. (Gov. Code § 65589.5(k).)

**B. Standard of Review and Burden of Proof**

**1. Standard of Review**

The HAA is enforced by a petition for writ of administrative mandate. (*Honchariw, supra,* 200 Cal.App.4th at 1072, citing Gov. Code § 65589.5(m).) The inquiry in such a case shall extend to the questions of whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. (CCP § 1094.5(b).) Abuse of discretion is established if, in denying the Project, the City has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (*Honchariw, supra*, 200 Cal.App.4th at 1072; CCP § 1094.5.)

Challenges involving the interpretation and applicability of a statute raise questions of law requiring an independent determination by the reviewing court. (*Harroman Co. v. Town of Tiburon* (1991) 235 Cal.App.3d 388, 392.) If an agency violates the HAA by failing to approve a code-compliant housing development project, it has failed to proceed in the manner required by law. Here, the record shows that in response to political pressure from neighbors, the City relied on an impermissible pretext to deny the Project. Accordingly, the City violated the HAA and did not proceed in the manner required by law.

**2. In an HAA Case, the City bears the Burden of Proof**

Where a petitioner alleges that an agency's findings are not supported by evidence, the agency's decision will normally be upheld if its findings are supported by substantial evidence in the record. (Code Civ. Proc., § 1094.5(b); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 149; *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 767, 772.) However, in HAA cases involving the denial of a project, the "substantial evidence" standard

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of review is *reversed* to favor the petitioner. Here, if there is "substantial evidence that would allow a reasonable person to conclude" that the Project is code-compliant, it **must be deemed compliant.** (Gov. Code § 65889.5(f)(4).)

In HAA lawsuits, **the respondent agency bears the burden of proof** and is not afforded the deference that is usually granted to local agencies in administrative writ cases. Gov. Code § 65589.6 provides that:

> in any action taken to challenge the validity of a decision by a city, county, or city and county to disapprove a project . . . pursuant to Section 65589.5, the city . . . shall bear the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5.
> (Honchariw, *supra*, 200 Cal.App.4th at 1079)

That is, the City bears the burden of proving that the Project failed to comply with "applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application [was] determined to be complete." (*Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1081.) In particular, **the City must prove that there is *no* substantial evidence that would allow a reasonable person to conclude that the Project complies with applicable objective standards.** (Gov. Code § 65889.5(f)(4).) If San Mateo fails to do so, it "'has not proceeded in the manner required by law' (Code Civ. Proc., § 1094.5, subd. (b)), in denying approval of [Real Parties'] proposed housing development project . . . ." (*Honchariw, supra*, 200 Cal.App.4th at 1081.)

### C. San Mateo Violated the Housing Accountability Act by Disapproving the Project Without Making the Required Findings

#### 1. There is Substantial Evidence that Would Allow a Reasonable Person to Conclude that the Project is Code-Compliant

If there is substantial evidence that "would allow a reasonable person to conclude that the housing development project" is code-compliant, the HAA directs that it "shall be deemed" compliant. (Gov. Code § 65889.5(f)(4).) The Project complies with all objective general plan and zoning standards and criteria, including design review standards, and there is substantial evidence in the administrative record that would allow a reasonable person to reach this conclusion. On that basis, the HAA compels approval of the Project.

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First, San Mateo Planning Staff determined that the Project is compliant with all objective standards and criteria, and recommended approval of the Project, on two separate occasions. (AR, 885, 574.) The Administrative Report and Findings for Approval prepared for the August 8, 2017 Planning Commission meeting found, inter alia, that:

- The Project conforms to the General Plan, which "designates [the Project] parcel as High Density Multi-Family." (AR, 886, 899–907.)
- The Zoning Code designates the parcel as R4 (Multiple Family High Density) and "[t]he factual data sheet . . . shows compliance with all Zoning Code development standards." (AR, 886.)
- The "sidewalk design is consistent with the Citywide Pedestrian Master Plan and improves the existing sidewalk conditions." (AR, 886.)
- With certain modifications that were included as a condition of approval, "the project is consistent with the Multi-Family Design Guidelines and the policies of the General Plan." (AR, 886.) (The modifications that were recommended as conditions of approval were based on subjective design guidelines that could not be invoked to deny the Project.)
- The Project is categorically exempt from CEQA. (AR, 888-89.)

The Administrative Report prepared for the September 26, 2017 Planning Commission meeting again recommended approval of the Project (AR, 574) and included Findings for Approval that were identical to the Findings prepared for the August meeting. (AR, 576.) Further, the "Multi-Family Residential Data Form" prepared by Planning Staff verified the Project's compliance with all objective standards. (AR, 953.)

Additionally, the City engaged a design review consultant, Larry Cannon, to assess the Project "for consistency with the City's Multi-Family Design Guidelines and General Plan Urban Design Element." (AR, 886.) Mr. Cannon's review noted that the Project is "well designed" and "has a relatively small footprint." (AR, 145.) Mr. Cannon went on to state that:

> the building mass has been articulated to relate to the smaller scale of the adjacent single family neighborhood with horizontal facade plane changes that break the building up into components that are similar to the module of the smaller homes . . . The only area that I was able to

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> identify as problematical is the Engle Road elevation which has a two-story height differential between this project and the immediately adjacent single family home. **However in my judgment, the large trees proposed at the west property line and the street trees will substantially mitigate this height differential.**
>
> (AR, 147, emphasis added.)

That is, the City's own expert explicitly identified the issue that was later used as a pretext to deny the Project – the height differential between the Project and one adjacent building – and found a sufficient transition to mitigate the differential, so that no revisions were necessary. The only recommended revisions were related to the balconies and top floor trellises. (AR, 149.)

Throughout the hearings for the Project, various San Mateo staff members and decision-makers confirmed that the Project is code-Compliant (e.g. at AR, 840: "Planning has reviewed this project and it does meet the City Codes.") And the City Attorney noted at the August 2017 hearing that the Project was categorically exempt from CEQA under the Class 32 "In-Fill Development" exemption. (AR, 1198; Cal. Code Regs. § 15332.) Importantly, the categorical exemption for infill development applies only if a project is "consistent with the applicable general plan designation and all applicable general plan policies, as well as the applicable zoning designation and regulations." (*Id.*) The determination by Planning Staff and the City Attorney that the Project is exempt from CEQA under this exemption is in itself substantial evidence that the Project complies with "all applicable general plan policies."

Finally, the Mayor of San Mateo, who voted in favor of the Project, made comments that would enable a reasonable person to conclude the Project is Code-compliant, noting (at AR, 504):

> . . . I had a problem finding many objective standards really in the findings for denial. And when I looked at the findings for approval, which were what was recommended just a month or two before the findings for denial came about, I saw what looked really objective based on the City standards. . . . If you look at the City's data sheet, it actually complies with all of those requirements.

Accordingly, there is more than enough substantial evidence, including Planning staff reports, statements made by City staff and decision-makers at the hearings, and the fact the Project qualified for the infill development Categorical Exemption, that would enable a reasonable person to conclude that the Project is code-compliant.

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The City's findings for denial present no evidence, much less substantial evidence, that contradicts this conclusion. To the contrary, the City's findings are riddled with subjective, discretionary language that is prohibited by the HAA. The findings for denial include the following:

> 1. The structures, site plan, and landscaping are not in scale and are not harmonious with the character of the neighborhood, in that:
>
> a. The bulk and massing are out of scale with the surrounding and immediately adjacent single-family neighborhood . . . ;
>
> b. The design of the building is not harmonious with that of the single-family dwelling character of the adjacent neighborhood and is not respectful of the neighborhood . . . ;
>
> c. The development is not set back enough along El Camino Real and is visually intrusive from certain vantage points; and
>
> d. The building is too tall, specifically the fourth floor.
>
> . . .
>
> 4. The project is inconsistent with "Major Proposals of the General Plan" [because] the proposed project is not harmonious with the character of the adjacent single-family neighborhood and is of a size and scale that is not in scale with the surrounding area.
>
> 5. The project is not consistent with the following General Plan policy:
>
> UD 2.1: Multi-Family Design. As noted in the Site Plan and Architectural Review (SPAR) findings 1.a. - 1.d above, the proposed project is not harmonious with the character of the adjacent residential neighborhood and is of a size and scale that is not in scale and character with the surrounding area.
>
> 6. The project is not in substantial compliance with the City's Multi-Family Design Guideline, including the following:
>
> Height. Most multi-family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, a transition or step in height is necessary.
>
> (AR, 29-31, emphasis added.)

The repeated references to harmoniousness with the character of the neighborhood reveal the true impetus for the Project denial. The City (and neighborhood opponents) subjectively felt that the Project is "out of character" with the neighborhood, despite the fact that it complies with all objective standards and criteria. Several members of the Planning Commission and City Council gave wholly subjective reasons for voting to deny the Project. For instance, one Planning Commissioner opined that the Project "feels too big. It feels like the top floor should go away . . . .

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That means reducing the number of units and I know that." (AR, 854.) Another member of the Commission acknowledged that the Project "meets all our zoning requirements" but voted for denial on the basis the Project is not "harmonious with the character of the neighborhood." (AR, 860–61.)

The HAA does not allow subjective reasons related to neighborhood character or the aesthetic appearance of a project to be invoked to deny or reduce its density. (*Honchariw, supra*, 200 Cal.App.4th at 1076.) As the City Attorney himself acknowledged, standards based on compatibility or suitability "are not objective standards. Those involve the exercise of discretion." (AR, 485.) The only issue asserted by the City Attorney as an "objective" basis for denial of the Project was the height guideline. (AR, 486–487.) In other words, the height guideline was the only basis for denial of the Project that the City Attorney thought might satisfy the HAA. Indeed, this is the only MFDG identified in the City Council's denial resolution. (AR, 30–31.)

However, as discussed below, the height guideline is not an objective standard or criterion. The reasons advanced by the City to deny the Project are clearly impermissible under the HAA, and the City violated the HAA, abused its discretion, and did not proceed in the manner required by law in denying the Project. Even if the height guideline were an objective standard or criterion, there is clearly substantial evidence "that would allow a reasonable person to conclude" the Project is code-compliant. (Gov. Code § 65889.5(f)(4).)

**2. The MFDGs are not Applicable Objective General Plan, Zoning or Subdivision Standards or Criteria.**

The HAA draws a distinction between mandatory *standards and criteria* that are contained in a city's General Plan or codes, and discretionary *guidelines* that are not. Only the former may be used to deny a project under the HAA. Here, the City's Multi-Family Design Guidelines ("MFDGs") cannot be characterized as "standards and criteria."

First, the MFD Guidelines are not part of the City's "general plan, zoning, [or] subdivision codes." Nor are they applicable "design review standards" for the purposes of the HAA. (§ 65589.5(j)(1).) Crucially, a design review standard can only be used to deny a Project if it is included in an applicable General Plan, zoning code, or subdivision code. (*Honchariw supra*, 200 Cal.App.4th at 1077: "we interpret [(§ 65589.5(j)(1)] to mean design review standards that are part

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of 'applicable, objective general plan and zoning standards and criteria.'") Here, the MFDGs are not incorporated into San Mateo's General Plan or codes, but were adopted as a separate guidance document. (AR, 2.) They cannot be said to be "part of" the General Plan or applicable codes.

Similarly, there is an important distinction between guidelines, such as the MFDGs, and "standards and criteria." A project *must* comply with standards and criteria, whereas guidelines are discretionary. The City Attorney acknowledged this at the February 2018 appeal hearing, noting that objective standards mean "checking the box," as opposed to the "exercise of discretion." (AR, 485.)

In this context, the MFD *Guidelines* are distinct from the City's *Standards* for R4-zoned multiple family dwellings (Municipal Code, Chapter 27.24). The City's Urban Design Policy simply recommends that projects "substantially conform" to the MFDGs; they are not a mandatory checklist (U.D 2.1). Similarly, the 2014 Housing Element notes that compliance with guidelines "increases a project's chance of receiving approval" (at p. 68). In short, the MFDGs are not mandatory "standards and criteria" that can be invoked to circumvent the HAA because a project can be approved even if it does not comply with the MFDGs.

**3. Even if the MFDGs were Applicable Objective Standards, the "Height" Guideline Relied on by San Mateo to Deny The Project is not Objective.**

**i. An "Objective" Standard Must be Uniformly Verifiable and Involve No Subjective Judgment.**

Even if, arguendo, some of the MFDGs were "standards and criteria" as defined by the HAA, the specific guideline invoked by the City is *not* an applicable, objective standard or criterion. The HAA does not define "objective," but as the HAA is a remedial statute, it must be interpreted in a way that effectuates its purpose and suppresses the mischief at which it is directed. (*East West Bank v. Rio School District* (Cal. App. 2d Dist. 2015) 235 Cal.App.4th 742, 748.) Here, the purpose of the HAA is to promote the construction of housing at all income levels. (Gov. Code § 65589.5(a)(1)(K).) The HAA itself states that it is to be construed "to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(1)(L).) In *Honchariw*, the Court of Appeal noted that the word "objective" was inserted to:

> strengthen the law by taking away an agency's ability to use what might be called a "subjective" development "policy" (for example,

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"suitability") to exempt a proposed housing development project from the reach of subdivision (j).
(*Honchariw, supra*, 200 Cal.App.4th at 1076.)

Moreover, a definition for "objective" does appear in Gov. Code § 65913.4, which was enacted by SB-35 to streamline the approval process for new housing. (Ch. 366, Statutes of 2017.) SB-35 amended Gov. Code § 65913.4 to provide that:

> 'objective zoning standards' and 'objective design review standards' mean standards that involve **no personal or subjective judgment** by a public official and are **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 prior to submittal . . . .
>
> (Gov. Code § 65913.4(a)(5), emphasis added.)

Although this definition is expressed as applying only to § 65913.4, it nevertheless provides useful guidance as to how the word "objective" should be interpreted for the purposes of the HAA. In *Northcross v. Board of Education* (1973) 412 U.S. 427, the Supreme Court held that where similar language appears in two different statutes, this is "a strong indication that the two statutes should be interpreted *pari passu,*" particularly where the two provisions shared "a common raison d'etre." (*Northcross v. Board of Education, supra*, 428.) The Supreme Court's reasoning applies with equal force here. The HAA and SB-35 contain very similar language and were both enacted for the same purpose – to promote the construction of housing. SB-35 was also enacted at the same time as SB-167, which strengthened the HAA. This means that the definition in Gov. Code § 65913.4(a)(5) can and should be applied in HAA cases.[2]

**ii. The "Height" Guideline is Subjective and Discretionary, and Cannot be Invoked to Deny the Project.**

The City relied on the following design guideline to deny the Project:

> Height. Most multi-family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, a transition or step in height is necessary.
> (AR, 10.)

[2] Indeed, the City's attorneys have stated that "Although SB-35 states that this definition is confined to that statute, courts may reference this definition in interpreting the HAA." (Goldfarb & Lipman LLP, *Recent Developments in California Housing Law - Summary Of 2017 Housing Legislation* (October 20, 2017, available at https://goldfarblipman.com/wp-content/uploads/2017/11/Recent-Developments-in-California-Housing-Legislation-10-2017.pdf.)

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This is not an objective standard or criterion. It was drafted – according to the guideline's own language – to keep the scale of a new project "compatible and visually interesting." Put another way, the purpose of this guideline is to achieve "compatibility" with the neighborhood. This is a blatantly subjective concept, and it represents the exact type of mischief that the HAA seeks to suppress. That HAA does not allow denial of a Project based on amorphous and subjective concepts such as neighborhood compatibility. (*Honchariw, supra*, 200 Cal.App.4th at 1076.)

At the City Council hearing, the City Attorney discussed the "step in height" element and asserted the Project is non-compliant because there is a two-story height differential between the Project and the neighboring house on Engle Road. This analysis is incorrect. The "height" guideline does not set out any uniform criteria regarding how, or the extent to which, the upper levels of a project must be set back or stepped down. The guideline goes on to recommend (as a "Design Objective") that projects "avoid changes in building height greater than one story from adjacent structures. If changes are greater, step back upper floors to ease the transition." (AR, 10.) That is, the guideline does not require the height differential to be reduced to one story; it merely suggests a step-down. **A step-down is provided by the Project**, as the fourth floor of the Project is set back into the roof form. (AR, 145.)

Further, a step-down in height is one of two possible ways to satisfy the guideline, which requires a "transition **or** step in height" (emphasis added). No step down is needed if there is a "transition" between neighboring buildings of disparate height. "Transition" is not defined, and there are no criteria set out to determine whether a transition complies with the guideline. In this case, the City's expert found that "the large trees proposed at the west property line and the street trees will substantially mitigate" the height differential. (AR, 147.) Similarly, the City's Mayor stated that the large trees and the 40' gap between the Project and the nearby one-story house provided an acceptable "transition." (AR, 492.) In response to a question from the Mayor, the City Attorney acknowledged that the City would need to consider these factors "with respect to the need for transition." (*Id.*)

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Therefore, the height guideline can only be characterized as subjective and discretionary. Because compliance with this guideline involves the exercise of subjective judgment about the visual impact of the "transition" between two buildings, it is impossible for a project applicant to know in advance whether a project will satisfy the guideline The City Council's findings solely involved a subjective design issue, and the guideline relied on to find the project non-compliant was not an objective standard. The City's decision clearly violates the HAA.

**4. In any Event, There is Clearly "Substantial Evidence That Would Allow a Reasonable Person to Conclude" that the Project Complies with the Height Guideline**

The HAA provides that a housing development project 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 . . . is consistent, compliant, or in conformity."
> (Gov. Code, § 65889.5(f)(4).)

Even if the height guideline were an "objective," applicable standard, there is substantial evidence that would enable a reasonable person to conclude that the Project complies with it and all other MFDGs. First, the Project incorporates a step-down, as the fourth floor is set back into the roof form. (AR, 145.) As the City's expert notes, the "building mass has been articulated to relate to the smaller scale of the adjacent single family neighborhood." (AR, 147.) The closest house adjacent to the Project is two stories high, which means the height differential is reduced to one story by the setback at the fourth floor of the Project. (AR, 492, 1816.)

There is also a "transition" between the Project and the second-closest house to the Project, provided by large trees on the property line, street trees, *and a 40' gap* between the Project structure and the neighbor's house. (AR, 490–492.) As noted above, the City's expert found that the existing and proposed trees "substantially mitigate [the] height differential." (AR, 147.) Moreover, the height of the Project is consistent with the scale of the surrounding neighborhood. As the Real Parties' architect noted on the record, directly across the street from the Project there is a "large three-story condominium complex and there are two additional buildings within the block . . . comparable in size and height if not larger." (AR, 131.)

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Finally, neither of the Administrative Reports prepared for the August and September 2017 Planning Commission hearings identified the height guideline as a problem, or suggested any modifications to the building height or setbacks. To the contrary, these Reports found that the Project complies with all MFDGs and recommended approval. (AR, 574, 885.) And the entire focus of the September 2017 hearing was to discuss the appropriate conditions of approval for the Project. (AR, 574, 799, 1237.) If the height transition was a legitimate issue – rather than a pretext to deny the Project – this surely would have been raised in these reports, along with the other staff recommendations. Instead, the height guideline was raised for the first time in the Administrative Report for the October 2017 meeting, *after* the Planning Commission voted to deny the Project and instructed staff to "prepare findings for denial." (AR, 871.) It can only be seen as an improper "post hoc rationalization for a decision already made." (*Bam, Inc. v. Board of Police Com'rs* (1992) 7 Cal.App.4th 1343, 1346.)

There is substantial evidence, including evidence produced by the City's own staff and experts, that would allow a reasonable person to conclude the Project complies with the height guidelines. The Project is fully code-compliant, and the City had no basis to deny it under the HAA. In denying the Project based on an obviously contrived rationale – clearly violating the HAA – the City acted in bad faith.

## IV. CONCLUSION

The HAA must be interpreted in a way that gives full effect to its purpose. The Project proposes to build ten units of sorely-needed housing, in an area of Silicon Valley that is fast becoming unaffordable. In enacting and strengthening the HAA, the California legislature mandated that cities like San Mateo approve code-compliant housing projects and gave the judiciary the tools to enforce that mandate. The HAA compels approval of this Project. Petitioners respectfully seek reversal of the City's resolution denying the Project, and an order that the Project be approved.

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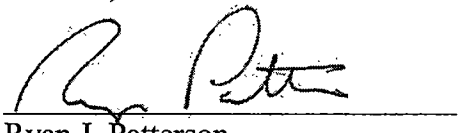

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