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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO – UNLIMITED CIVIL JURISDICTION

CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, SAN FRANCISCO BAY AREA RENTERS FEDERATION, VICTORIA FIERCE, SONJA TRAUSS, 227 BRAZIL DEVELOPMENT LLC, 228 BRAZIL DEVELOPMENT LLC, and N. WILLIAM JASPER, JR., individually and as Trustee of the N. W. JASPER JR. 2004 IRREVOCABLE TRUST,

Petitioners,

vs.

CITY OF SONOMA and SONOMA CITY COUNCIL,

Respondents.

CASE NO. : SCV-262716

Assigned for all purposes to
Hon. Arthur A. Wick, Department 17

PETITIONERS' OPPOSITION TO RESPONDENTS' DEMURRER TO PETITION FOR WRIT OF ADMINISTRATIVE MANDATE

[CCP § 1085; Gov't Code § 65852.2]

Date: June 12, 2019
Time: 3:00 p.m.
Dept.: 17
Judge: Honorable Arthur A. Wick

Action Filed: June 29, 2018

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I. INTRODUCTION

This case concerns three single-family homes proposed for construction on residentially zoned lots (the "Houses") in the City of Sonoma (the "City"), which were approved by the City's Planning Commission. The Planning Commission's approval decisions were appealed to the City Council (the "Council"), which then capitulated to anti-development politics and denied the applications (the "Denial Resolutions").

The City's Denial Resolutions violate both the California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.,*"CEQA") and the Housing Accountability Act (Gov. Code § 65589.5 *et seq.,* "HAA"). Without basis, the City asserted CEQA impacts when these alleged impacts had already been properly analyzed and determined not to exist. The City violated the HAA by denying the Houses on the basis of alleged noncompliance with a discretionary, subjective guideline (which is prohibited by the HAA). Moreover, the City violated the applicant's right – and the public's right – to a fair hearing.

The City now seeks to avoid judicial review of the project denial. In short, the City's demurrer asserts that a denial of a project application on the basis of erroneous CEQA findings: 1) can never be challenged under CEQA, because a project is not subject to CEQA after the project is denied, and 2) can never be challenged under the HAA, even when the project is denied on the basis of HAA-prohibited findings, because an HAA claim is unripe until the project's CEQA determination is approved. This argument is circular and, frankly, bizarre. If it were true, the HAA would be a dead letter, and the state's housing crisis would continue unabated. Cities could deny any housing development project with impunity simply by including an erroneous CEQA finding in the project denial – an absurd result that the legislature could not have intended.

II. FACTS

On March 9, August 10, and September 14, 2017, the Sonoma Planning Commission conducted public hearings and heard evidence in relation to the Houses. (Petition at ¶¶ 29, 32.) Although the Houses were categorically exempt from CEQA because they proposed the construction of single-family homes, the Planning Commission directed the preparation of Initial Studies to address potential grading, drainage, erosion, and aesthetic impacts. (*Id*. at ¶¶ 16, 17, 25.)

The Planning Department recommended the adoption of a Mitigated Negative Declaration ("MND") for each House. (*Id*. at ¶ 26.) The Planning Commission's Staff Reports determined that the Houses were consistent with Sonoma's General Plan and the Sonoma Municipal Code. (*Id*. at ¶¶ 27, 32.) <u>The Planning Commission adopted the MNDs and approved the applications for all three Houses</u>. (*Id*. at ¶¶ 30, 34.)

On August 25 and September 29, 2017, opponents of the Houses appealed the House approvals to the Council. (*Id*. at ¶¶ 36-37.) The opposition was largely driven by an anti-development group that sought to prevent any new development in the hillside area where the Houses would be located. These opponents launched a public campaign against the Houses and disseminated misinformation about them. (*Id*. at ¶ 39.) The Council conducted public hearings on March 1 and April 9, 2018, at which all three appeals were heard. (*Id*. at ¶ 45.) Prior to the quasi-judicial hearing of the appeals, City Council member Amy Harrington gathered her own evidence and engaged in ex parte communications with opponents of the Houses. (*Id*. at ¶ 42.) She did not disclose these communications. (*Id*. at ¶ 43.)

At the April 9, 2018 hearing, a member of the public named Joe Aaron attempted to raise his concerns about Council Member Harrington's improper ex parte communications. In response, Mayor Madolyn Agrimonti prevented him from speaking by interrupting him and prematurely cutting off his public comment period. Mayor Agrimonti suggested that she knew what he was about to say, and stated she would not allow it to be said. (*Id*. at ¶ 46.) After closing public comment, the Council granted the appeals and denied the House applications, and directed City staff to prepare resolutions to this effect. (*Id*. at ¶ 47.) On May 30, 2018, the Council adopted resolutions granting the appeals and denying the House applications. (*Id*. at ¶ 49.) On June 27, 2018, Petitioners filed a Petition for Writ of Mandate to compel the City to comply with state law and approve the Houses. (Petition)

III. ARGUMENT

A. <u>STANDARD OF REVIEW</u>

As against a demurrer, a complaint must be liberally construed to determine if it states a cause of action entitling a plaintiff to any relief – legal, equitable or extraordinary. (*Wilson v. Transit Authority of City of Sacramento* (1962) 199 Cal.App.2d 716, 720–21.) "Pleadings must be reasonably

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1 interpreted; they must be read as a whole and each part must be given the meaning that it derives from
2 the context wherein it appears." (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42.) All
3 that is necessary as against a demurrer is to plead facts entitling the plaintiff to some relief. (*Tristam*
4 *v. Marques* (1931) 117 Cal.App. 393, 397.)

5 **B. <u>PETITIONERS HAVE STATED A CEQA CAUSE OF ACTION</u>**

6 **<u>1. Respondents Misstate the Nature of Petitioners' Claim and the Scope of the Relief Sought.</u>**

7 Respondents' demurrer alleges that the Petition does not state a claim for relief, because it
8 includes a request that the City be ordered to approve the Houses. Respondents are wrong. First,
9 praying for relief that may not be obtainable is not grounds for a demurrer. (*Augustine v. Trucco*
10 (1954) 124 Cal.App.2d 229, 236.) Second, this Court has authority to order the City to set aside a
11 decision if that decision is an abuse of discretion, i.e., the findings are not supported by substantial
12 evidence or the City did not proceed in the manner required by law. (Code Civ. Pro. § 1094.5.)
13 Additionally, upon a determination of a CEQA violation, the Court may "mandate that the public
14 agency take specific action as may be necessary to bring the determination, finding, or decision into
15 compliance" with CEQA. (Pub. Res. Code §21168.9(a)(3))

16 Here, the City failed to comply with CEQA by rejecting the Houses based on findings about
17 the content of the Initial Studies that are unsupported by the evidence. Petitioners' first cause of
18 action alleges that the findings made by the City under CEQA are not supported by substantial
19 evidence. If the Petitioners prevail on this argument, the Court has the authority to set aside the City's
20 defective findings. (*Ibid.*; Code of Civ. Pro. § 1094.5) That is, if the City's findings are reversed or
21 voided, the MNDs approved by the Planning Commission would stand and the CEQA process would
22 be concluded. At that point, the HAA would compel approval of the Houses. The very section relied
23 on by Respondents – Pub. Res. Code § 21168.9 – supports this conclusion.

24 The cases relied on by the City are inapposite. In *Schellinger Brothers v. City of Sebastopol*
25 (2009) 179 Cal.App.4th 1245 (*Schellinger Bros.*), the public agency had not made any final CEQA or
26 use permit determination regarding the proposed project. Rather, it had ordered that a draft EIR be
27 recirculated. (*Id.* at p. 1251.) The petitioner invoked the Permit Streamlining Act and the HAA to
28 short-circuit the CEQA environmental review process <u>before</u> any final decision had been made

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regarding its project. In that case, the Court held that the HAA "cannot be used to halt the decision-making process specified by CEQA that is still on-going." (*Id.* at p. 1249.) This is not what occurred here. Rather, the City purported to conclude the CEQA process based on erroneous CEQA findings to deny the Houses – findings it now asserts are immune from review.

Even assuming, arguendo, that the Court does not have authority to order the approval of the Houses based on CEQA, both paragraph 53 of the Petition (CEQA Cause of Action) and the Prayer for Relief are phrased in the alternative. Each also requests that the Denial Resolutions be reversed pursuant to Code Civ. Pro. §1094.5. As noted above, praying for relief that may not be obtainable is not grounds for a demurrer. (*Augustine, supra,*124 Cal.App.2d at p. 236.)

In demurring on this basis, the City ignores the full scope of the relief sought by Petitioners, and wrongly argues that if one element of the relief sought is unavailable, the entire cause of action should be thrown out. In fact, the Court does have the authority, as with any administrative mandamus matter, to grant the writ, overturn the findings, and remand the matter. Therefore, the City's argument fails.

2. Pub. Res. Code §21080(b)(5) Does Not Insulate the City from Its Mandatory CEQA Duties.

The City argues that erroneous CEQA findings cannot be challenged if a project is denied – even if it is denied on the basis of those erroneous findings – because a denied project has no need for environmental review. This argument mischaracterizes the plain language and purpose of Pub. Res. Code § 21080(b)(5), which provides that CEQA does not apply to projects that a public agency rejects or disapproves. There is a circularity to the City's argument. If a petitioner cannot challenge erroneous CEQA findings that are used as the basis for project denial, then no negative CEQA determination could ever be challenged.

The City's reliance on Pub. Res. Code § 21080(b)(5), which creates a categorical exemption from CEQA for "projects which a public agency rejects or disapproves," is misplaced. The City's interpretation of this section is based on an incorrect reading of § 21080(b)(5). The intent of § 21080(b)(5) is to avoid the expense and time associated with environmental review if the project is going to be denied for other reasons, i.e., regardless of what an environmental review might reveal. As the Court of Appeal held in one of the cases cited by the City, § 21080(b)(5) is "intended

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to allow an initial screening of projects on the merits for quick disapprovals **prior to the initiation of the CEQA process** where the agency can determine that the project cannot be approved." (*Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.* (1993) 12 Cal.App.4th 1371, 1380, emphasis added.)

In short, this section means that CEQA findings are not required in order to deny a Project on non-CEQA grounds. It does *not* say that when CEQA review takes place and a project is denied on erroneous CEQA grounds, a petitioner has no right to challenge the error. Here, Petitioners are not challenging a failure to conduct CEQA review for a project that was denied. Rather, Petitioners are challenging the CEQA review that *did* occur, and which was used as an excuse to deny the Houses.

In both of the cases cited by Respondents, the agency chose not to approve the project based on policy reasons – not on the basis of CEQA findings – and the petitioners in those cases sought to compel completion of the environmental review process. In *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 906, the county chose not to reissue a use permit because the airport was no longer compatible with its surroundings. This case is inapposite; the holding was simply that the denial of a permit renewal was not a "project" under CEQA. Its only relevance is that it includes language that CEQA does not require environmental analysis for a project that is "slated for rejection," confirming that the primary purpose of § 21080(b)(5) is to prevent an agency from being compelled to undertake environmental review. (*Id.* at p. 909.) In *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 844, the city terminated the environmental review of a 5,000-unit development for policy reasons. In neither case were the projects denied based on CEQA findings.

Here, as admitted by the City in its demurrer, it denied the Houses based upon its own perceived failure to comply with CEQA. The Petitioners are not asking for further environmental review to be conducted. Rather, Petitioners allege that the MNDs were properly approved by the Sonoma Planning Commission, and the Council wrongly overturned them based on erroneous CEQA findings. The Council had no evidence, much less substantial evidence, before it that justified reversal of the Planning Commission's decision. Numerous expert reports found that the Houses would have

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no significant environmental impact (cumulatively or otherwise), and were sited in such a way that they would be virtually invisible from public rights-of-way.

By finding the environmental review inadequate and then denying the Houses, the City also violated its mandatory duty to complete CEQA review in a timely manner. Pub. Res. Code §21151.5 requires an EIR to be completed and certified within one year from a complete application or within 180 days of an adequate negative declaration. Under CEQA, a lead agency is responsible for determining whether an EIR is required for a project and, if so, for preparing the EIR and including it in any report on the project. (*Friends of Cuyamaca Valley v. Lake Cuyamaca Recreation & Park Dist.* (1994) 28 Cal.App.4th 419, 426.) At a minimum, the City's obligation was to make adequate CEQA findings, not deny a project on the basis of its own purportedly inadequate environmental review. That is precisely the holding of *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 221, cited by the City. A city cannot abdicate its mandatory CEQA duties by simply finding that it failed to complete an adequate CEQA review – thereby foreclosing any opportunity for applicants to seek judicial review.

Accordingly, CEQA allows an agency to deny a project without the benefit of environmental review, and provides that an agency cannot be compelled to undertake environmental review before denying a project. But if an agency makes findings under CEQA, they must be consistent with CEQA and supported by substantial evidence. The City's interpretation of § 21080(b)(5) would completely inoculate agencies from any CEQA review of a project denial. Regardless of how arbitrary or baseless the CEQA findings may be, an applicant would be left without any remedy following project denial. This would create a staggering asymmetry in the application of CEQA – wherein agencies are held to rigorous standards in order to approve a project, but are not required to comply with CEQA in denying a project, <u>even if the denial is based on CEQA findings</u>. This would also undermine the HAA by allowing cities to use CEQA as a pretext to avoid their obligation to approve housing development projects under the HAA.

This interpretation is not only absurd, it also conflicts with established authority. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1999) 76 Cal.App.4th 713, 722 ["administrative

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mandamus is the exclusive means for challenging compliance with CEQA."], overruled on other grounds in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.)

Having undertaken CEQA review of the Houses, made CEQA findings in relation to this review, and denied the Houses on the basis of those CEQA findings, Respondents cannot now claim their CEQA findings are exempt from scrutiny. Their demurrer on this basis cannot be sustained.

3. Assuming, Arguendo, That the City Can Deny a Project Without CEQA Review, It Cannot Deny a Project Based on CEQA Findings That Are Not Supported by Substantial Evidence and Are Contrary to Law.

The Petition states a claim that the City's findings and project denials are contrary to law and are not supported by substantial evidence. The City cannot use the guise of a CEQA evaluation as a substitute for a proper application of the law and its findings. (*Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 98.) Respondents are making the same argument that was rejected in *Gabric v. City of Rancho Palos Verdes* (1973) 73 Cal.App.3d 183, 188–89, that is, "it did the right thing simply because it had the power to do the right thing." But there, as here, the record clearly disclosed that the City ignored the facts and misapplied the law. In *Gabric*, the City essentially imposed a prohibition against building, which it had the power to do, but not under the guise of CEQA. The Court observed:

> . . . the City Council abused the appeal hearing process by (1) using the occasion of the hearing to decide whether the building of petitioner's home would or would not have a 'significant impact on the environment' and (2) by using this decision to justify its denial of a permit simply because of the probable future, but yet undetermined, zoning action of the City.
> (*Gabric, supra,* 73 Cal.App.3d at 189.)

As alleged in the Petition (at ¶ 57), the Houses were denied based upon the findings of the City that the Initial Studies for the Houses did not demonstrate there would be no impacts. It is a misapplication of the law and an abuse of CEQA to use an initial study as subterfuge for denial.[1] The purposes of the initial study are set forth in CEQA Guidelines §15063, and include providing the lead agency "with information to use as the basis for deciding whether to prepare an EIR or

[1] There is something fundamentally wrong with the City basing a denial of a project on claimed inadequacies in a document the City prepared. An Initial Study is a city document. (*Nelson v. County of Kern* (2010) 190, Cal.App.4th 252, 270.) "The lead agency is ultimately responsible for the accuracy and adequacy of an initial study." (2 Kostka & Zischke, Practice Under the Cal. Environmental Act (Cont. Ed. Bar 2011) §6.15, p. 318: "Initial study' means a preliminary analysis **prepared by the lead agency** to determine whether an EIR or a negative declaration must be prepared …" (emphasis added. See also CEQA Guidelines §15365).)

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negative declaration," facilitating environmental assessment "early in the design of a project," and eliminating "unnecessary EIRs." Conspicuous in its absence from § 15063 is forming a basis for denying a project. If an initial study prepared by the City does not provide the required information, then requesting revision and additional study would have been within the City's discretion. Denial based on the Initial Study is not.

CEQA is steeped in procedural compliance. If the initial study reveals that the project will not have a significant environmental effect, the agency must prepare a negative declaration, briefly describing the reasons supporting that determination. (Guidelines §§15063(b)(2), 15070; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 389–390.) Otherwise, the next step in the process is to prepare a full Environmental Impact Report (EIR) for the proposed project. (Pub. Res. Code §§21100, 21151. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 113.) CEQA makes clear that the rationale of an initial study is to guide the environmental review, not provide a basis to deny a project. (Guidelines §15063(b)(1).) The City is obligated to make its determination based on the entire record. (Pub. Res. Code §§21080(c)-(d), 21082.2; Guidelines §15064(f).) The City has turned the initial study phase of CEQA review on its head. It is not designed to provide evidence to support a denial.

A cause of action is stated pursuant to Code Civ. Pro. §1094.5 if it is alleged that the agency has prejudicially abused its discretion; that is, whether the agency action was arbitrary, capricious, in excess of its jurisdiction, entirely lacking in evidentiary support, or without reasonable or rational basis as a matter of law. (Code Civ. Proc. §1094.5(b) & (c); *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 673.) A prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law, if its decision is not supported by findings, or if its findings are not supported by substantial evidence in the record. (*Id*. at p. 674.) "Furthermore, 'when an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision-making and informed public participation. Case law is clear that, in such cases, the error is prejudicial." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.) The third inquiry under Code Civ. Pro. §1094.5(b), is broad and includes whether the agency followed the law. (*Friends of Outlet Creek v. Mendocino*

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County Air Quality Management Dist. (2017) 11 Cal.App.5th 1235, 1244.) Proceeding pursuant to an incorrect legal interpretation is "not proceed[ing] in the manner required by law." (*Hawthorne Savings & Loan Assn. v. City of Signal Hill* (1993) 19 Cal.App.4th 148, 157.

It is well-settled that the court, in an administrative mandamus proceeding, may review the validity of an agency's interpretation of statutory provisions. (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 678; *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440.) Here, the Petition seeks review of the City's application of the initial study in the review process. Indeed, the Court of Appeal has affirmed that administrative mandamus is the "exclusive means" by which an applicant may attack an agency's compliance with CEQA. (*Mission Oaks Ranch, supra,* 76 Cal.App.4th 713.)

Accordingly, the City's CEQA findings, and the propriety of its reliance on the Initial Studies to deny the Houses, are subject to review by a petition for writ of mandate.

C. PETITIONERS HAVE STATED A CLAIM FOR RELIEF UNDER THE HOUSING ACCOUNTABILITY ACT ("HAA")

1. The Housing Accountability Act Compels Approval of Housing Development Projects

It is undisputed that California faces a housing crisis. Yet attempts to build housing are routinely opposed by neighbors, NIMBYs, and local governments. The HAA (Gov. Code § 65589.5) was enacted to curtail cities' discretion to deny housing, by "limit[ing] the ability of local governments to reject or render infeasible housing developments." (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, citing Gov. Code § 65589.5(b).) In short, the HAA compels local agencies to approve any housing development project that "complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards," unless the agency finds that the project would have a "specific, adverse impact upon the public health or safety" that cannot be satisfactorily mitigated. (Gov. Code § 65589.5(j)(1); *Schellinger Bros., supra,* 179 Cal.App.4th 1245, 1253, fn. 9.) A violation of the HAA arises when a city denies a housing application without making the required 'health and safety' findings.

Here, the Houses comply with all applicable, objective standards. However, in addition to its CEQA findings, the City based its denial on findings regarding the Houses' compliance with non-objective standards. This is prohibited by the HAA.

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2. Petitioners' HAA Claim is Ripe

i. The City Made a Final Decision under the HAA

Code of Civil Procedure § 1094.5(a) allows a Petitioner to challenge "any final administrative order or decision" made by an agency following a hearing. In the context of a petition for writ of mandate, an agency's decision is ripe for adjudication after ". . . the administrative process is completed and the agency makes a final decision that results in a direct and immediate impact on the parties." (*Santa Barbara County Flower and Nursery Growers Ass'n, Inc. v. County of Santa Barbara* (2004) Cal.App.4th p. 875; see also *Arviv Enterprises, Inc. v. South Valley Area Planning Com.* (2002) 125 Cal.Rptr.2d 140, 148 fn 4.)

Here, it is clear that the City's denial resolutions constitute a final decision for the purposes of § 1094.5. The decision to deny the Houses was made as a result of a proceeding in which by law a hearing was required to be given and evidence required to be taken (Sonoma Mun. Code §§ 1.24.050, 19.84.040 and 19.88), and discretion in determination of facts is vested in the City Council. Further, the decision had a direct and immediate impact on the applicant, in that his Project was denied. The Sonoma Municipal Code expressly states that the City Council's decisions on an appeal are "final." (Mun. Code §§ 19.84.040(D)(2)(b), and 19.88.080 (Petitioners' RJN, Exh. A.)).

ii. In its Final Decision, the City Made Findings that are Reviewable Under the HAA

The basis for the City's denial of the Houses was two-pronged. The City denied the Houses under CEQA, and it denied the Houses based on "Use Permit" findings. (Respondents' RJN, p. 70.) The Use Permit findings resulted in a determination that the Houses were not consistent with the City's General Plan or Development Code. (Respondents' RJN, pp. 70 – 74.) These findings fall squarely within the ambit of the HAA.

A claim is ripe under the HAA when a local agency has voted to disapprove a housing development project. (Gov. Code §§ 65589.5 (h)(5)(A) & (k)(1)(A).) The Petitioners' HAA claim is ripe because the City made a final determination regarding the Houses' alleged noncompliance with City codes, and voted to issue a final decision denying the Houses on that basis. Having made findings that directly implicate the HAA, and having relied on them in its denial of the Houses, the City cannot now avoid review of its own findings.

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The City relies heavily on *Schellinger Bros.,* but that case is distinguishable. As noted above, in that case the petitioner invoked the HAA to circumvent the environmental review process, *before* any final decision had been made (under CEQA or otherwise). The Court held that the HAA "cannot be used to halt the decision-making process specified by CEQA that is still on-going." (*Schellinger Bros., supra,* 179 Cal.App.4th, 1249.) Rather, the HAA "specifically pegs its applicability to the approval, **denial** or conditional approval of a housing development project . . . ." (*Id.* at p. 1262, emphasis added.)

That is, in *Schellinger Bros.* the developer's HAA claim was denied because the project was still undergoing CEQA review, and no final decision had been made. That is not what occurred in this case. Here, the City denied the Houses based on its CEQA findings and its Use Permit findings. Both bases for denial are properly subject to review under §1094.5. The City could have remanded the Houses back to its staff for further environmental review, targeted at the alleged deficiencies in the MNDs, but it did not. Rather, the City simply denied the Houses. Under the City's approach, a public agency could indefinitely evade HAA review by rejecting a project on spurious CEQA grounds. This creates a dangerous circularity that would eviscerate the HAA.

iii. In Any Event, the Ripeness Requirement Does Not Apply Under These Circumstances

The ripeness requirement "cannot be used to require that property owners resort to 'piecemeal litigation or otherwise unfair procedures.'" (*Calprop Corp. v. City of San Diego* (2000) 77 Cal.App.4th 582, 593, citing *MacDonald v. Yolo County* (1986) 477 U.S. 340, 350, fn. 7; *Del Monte Dunes v. City of Monterey* (9th Cir.1990) 920 F.2d 1496, 1501). Put another way, the submission of a further project application is excused if such an application would be an "idle and futile act." (*Martino v. Santa Clara Valley Water Dist.* (9th Cir.1983) 703 F.2d 1141, 1146, fn. 2.) Here, the Applicant made numerous revisions to the Houses to address the City's concerns, but the City made it clear that the Houses would not be approved unless they complied with the City's new interpretation of certain guidelines – an interpretation which conflicts with all precedents.

In this case, if the Petitioners are granted relief under CEQA, but the Court does not address the HAA issues, the City would be free to make identical Use Permit findings and again deny the Houses. It would be futile for the Applicant to submit new applications to the City without clear

direction from the Court regarding the application of the HAA to the Houses. Petitioners would need to engage in piecemeal litigation to ultimately obtain approval of the Houses. Accordingly, even if the HAA claim were unripe, the ripeness requirement should not be invoked here to prevent the Court from determining whether Respondents complied with the HAA.

3. The HAA Applies to Single Family Homes

Respondents argue that the HAA's definition of a "housing development project" only includes projects with housing units (plural) and not a housing unit (singular). This is a misreading of the statute, and it also conflicts with basic rules of statutory construction. (Gov. Code § 13: "The singular number includes the plural, and the plural the singular.") Moreover, the Respondents' interpretation conflicts with the HAA's core purpose – to promote the construction of housing at all income levels. (Gov. Code § 65589.5(a)(1)(K).)

The Court's "fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute." (*Day v. City of Fontana* (2001) 25 Cal.4th.268, 272.) The HAA was enacted to:

> 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.
> (Gov. Code § 65589.5(a)(1)(K).)

The HAA is a remedial statute and must be construed broadly and "consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians." (Gov. Code § 65589(d); *Bunner v. Imperial Ins. Co*. (1986) 181 Cal.App.3d 14, 20–21: A remedial statute should be liberally construed to promote its underlying public policy.) Indeed, the HAA specifically requires that it be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5k.) This is the lens through which the HAA must be interpreted.

The City asserts that the HAA's definition of "housing development project" excludes single family homes. Government Code § 65589.5(h)(2) states:

> (2) "Housing development project" means a use consisting of any of the following:
> (A) Residential units only.

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(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.

While it is true that the HAA's definition of "housing development project" includes residential unit**s**, it also includes mixed-used development**s**. Both "units" and "developments" are expressed in the plural, and the entire definition section should therefore be interpreted as referring generally to the housing development categories covered by the HAA, rather than mandating a minimum number of housing units for a project to qualify for approval under the HAA. § 65589.5(h)(2)(B) does not require a minimum number of residential units in a mixed-use development, but instead refers to "residential use." Excluding single family home projects from subsection (2)(A) would create an absurd inconsistency, whereby the HAA would apply to a mixed-use development with one residential unit, but not to a single-family home by itself. The legislature was clearly concerned with the approval of residential use, not non-residential use.

A simplistic reading might say that because "units" is plural, a housing development project must comprise at least two units. However, the canons of statutory interpretation do not support such a reading. As a fundamental principle, words in the plural form may apply to a single subject when necessary to effectuate the Legislature's intent. "[T]he English language does not always carefully differentiate between singular and plural word forms, and especially in the abstract, such as in legislation prescribing a general rule for future application." (2A Singer, Sutherland Statutory Construction (7th ed. 2015) § 47.34.) Moreover, "A litigant may not make a 'fortress out of the dictionary'" to subvert the purpose of a statute. (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 183, cit. omit.)

In this regard, it is a "basic rule that unless the provision or context otherwise requires, **the singular number includes the plural and the plural the singular**. . . ." (*San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748, 758, citing Gov't Code §§ 5, 13, emphasis added.)

At most, it could be said that the definition of "housing development" is ambiguous. But when ambiguity arises, a remedial statute 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.).

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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 statute itself states 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 order to effectuate the purpose of the HAA, its definition of "housing development project" should be interpreted liberally to include single family homes. The City's demurrer instead makes a "fortress out of the dictionary" to artificially narrow the HAA. Indeed, the City's approach would exclude any district zoned for single family homes only – including the zoning district in which the Houses are proposed – from the HAA. (Mun. Code § 19.10.020. Petitioners' RJN, Exh B.) The City is effectively asserting that it can use restrictive zoning rules to circumvent the HAA, undermining the purpose and spirit of the statute.

The City's reliance on the HAA's prohibition against approving housing at a lower density is similarly misplaced. The City suggests that density is "not a relevant consideration" for single family homes, so they must not be subject to the HAA. Again, the City ignores the HAA's own definition of the relevant term. In the context of the HAA, "lower density" includes any conditions that "impact . . . the ability of the project to provide housing." (Gov. Code § 65589.5(i).) This certainly applies to single family homes.

In any event, **<u>there are three residential units at issue in this case</u>**. Importantly, the Court of Appeal has explicitly held that the HAA applies to the construction of single-family homes on separate lots, as is proposed here. In *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, the project that was the subject of the HAA claim involved the construction of eight single-family homes on separate lots. The Court of Appeal held that the HAA definition of "housing development project" is "clear and unambiguous," noting:

> There is no dispute that the project envisions only a single-family dwelling to ultimately be constructed on each of the eight proposed lots. The anticipated use is thus "[r]esidential units only" (§ 65589.5, subd. (h)(2)(A)), and the proposed project is therefore a "proposed housing development project" within the meaning of section 65589.5(j).
>
> (*Honchariw*, *supra*, at p. 1074.)

Honchariw is directly on point. The Petitioner Jasper applied to build three single-family homes, on three separate lots. The only possible difference from *Honchariw* is that in this case, an

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application was submitted for each proposed project, rather than one application spanning all three. Refusing to apply the HAA on the basis that the applicant filled out three forms, instead of one, would literally elevate form over substance. Although there were three separate initial studies, the Houses were analyzed together, presented together, appealed together, and heard together. Petition, ¶ 22 – 25, 29, 45)

The City's argument is internally inconsistent. On the one hand, the Houses were denied under CEQA because the City determined they are effectively a single Project. Yet when it suits the City, it treats the Houses as three separate projects in an attempt to circumvent the HAA.

D. PETITIONERS HAVE STATED A CAUSE OF ACTION UNDER § 1094.5

Finally, the City claims that Petitioners' third cause of action is uncertain. This cause of action alleges that the City did not conduct a fair hearing before it denied the Houses. The Court's review of an agency decision under § 1094.5 includes an inquiry into "whether there was a fair trial." (Code Civ. Proc. § 1094.5(b).) The requirement of a "fair trial" in administrative proceedings means that there must have been a fair administrative hearing. (*Doe v. Regents of University of California* (App. 4 Dist. 2016) 210 Cal.Rptr.3d 479.) When a petitioner alleges that a fair hearing was not conducted, the petitioner is entitled to an independent judicial determination of the issue. (*Sinaiko v. Superior Court* (3d Dist. 2004) 122 Cal. App. 4th 1133.) For example, a Petitioner may be denied a fair hearing if the decision-maker exhibits bias or fails to comply with procedural due process requirements (*Clark v. City of Hermosa Beach* (2d Dist. 1996) 48 Cal. App. 4th 1152.)

That is, the "fair hearing" question is a standalone issue under § 1094.5 and does not need to be linked to the statute under which the decision was made. Rather, the question is whether, in making the challenged decision, the public agency has conducted a fair hearing. Here, the Petition alleges that the City failed to provide a fair hearing. This is a properly pled cause of action.

IV. CONCLUSION

For the foregoing reasons, the Court should overrule the demurrer. The case should proceed to a substantive consideration of the City's denial of the Houses. If demurrer is granted, the Petitioners request leave to amend.

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Dated: May 30, 2019

Respectfully submitted,

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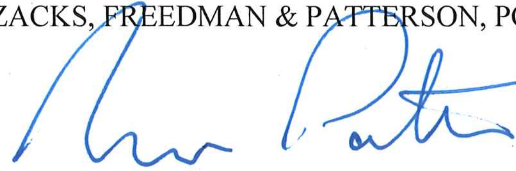

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