Case Nos. A159320 & 159658

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

CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, *et al.*,
Petitioners and Appellants,

v.

CITY OF SAN MATEO, *et al*.,
Defendants and Respondents;

On Appeal from an Order Denying Petition for Writ of Mandate, Judgment, and Order Denying Motion to Vacate/Motion for New Trial
Case No. 18-CIV-02105
The Superior Court of San Mateo County
Honorable George A. Miram, Judge

APPELLANTS' REPLY BRIEF

---

*HOLLAND & KNIGHT LLP
Jennifer L. Hernandez (SBN 114951)
jennifer.hernandez@hklaw.com
Daniel R. Golub (SBN 286729)
daniel.golub@hklaw.com
Emily M. Lieban (SBN 303079)
emily.lieban@hklaw.com
Emily Warfield (SBN 333878)
emily.warfield@hklaw.com
50 California Street, 28th Floor
San Francisco, California 94111
Tel: (415) 743-6900
Fax: (415) 743-6910

Attorneys for Petitioners and Appellants California Renters Legal Advocacy and Education Fund, Victoria Fierce and John Moon

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Legislative History Materials

Other Authorities

INTRODUCTION

According to one of the nation's leading scholars on housing policy, "the City of San Mateo continues to perpetuate the segregation of many of its white neighborhoods by prohibiting construction of anything but single-family homes…" Richard Rothstein, *The Black Lives Next Door*, N.Y. TIMES (Aug. 14, 2020).[1] This case exemplifies what happens when an applicant seeks to build a multifamily development in one of the few places where San Mateo *does* allow it. Years of work and countless dollars went into planning and designing new homes that were universally recognized by the city's staff and public officials to comply with every objective standard the city had enacted. But then, the Planning Commission bent to the wishes of neighboring homeowners who demanded that the project ("Project") provide fewer housing opportunities, and the Commission denied the Project for explicitly subjective reasons.

Respondents cannot defend the decision the Planning Commissioners made for the reasons they said they were making it. Instead, Respondents ask the Court to affirm on the basis of a *post hoc* rationalization provided only after the Commission voted to disapprove the Project: the contention that the Project violated an objective standard in the City's design guidelines. But if it were true that the Project violated an *objective* requirement, then the City was legally *prohibited from approving it*. And the City cannot seriously contend that the City lacked authority to approve the Project. The City tries to avoid this fatal flaw in its argument by noting that a city can always waive an otherwise applicable objective requirement. But the problem for Respondents is that the Applicant never sought any such waiver, and the City never at any point construed the

[1] *Available at* https://www.nytimes.com/2020/08/14/opinion/sunday/blm-residential-segregation.html.

project as requiring one. At all points, until after the Commission voted to deny the Project, the Project was understood by all parties to *comply* with the City's objective standards. The Commission and Council obviously could have lawfully approved the Project, without granting a waiver. Only on the basis of subjective criteria can the same project be approved as well as disapproved.

It is exactly for this reason that the Legislature enacted AB 1515 of 2017 ("AB 1515"): to establish that litigation over these types of questions be resolved under a standard that favors housing and does not defer to the locality. A city can deny a housing development project protected by the Housing Accountability Act ("HAA"), Gov. Code § 65589.5,[2] as long as it makes the findings in § 65589.5, subd. (j)(1). Even absent these findings, a city may still impose conditions on a project that do not reduce the project's density. But if a city decides to deny housing opportunities entirely, and does not make the required findings, the HAA requires that a city prove in any resulting litigation that there is no substantial evidence from which a reasonable person could conclude that the project complies with the city's objective standards. This standard of review preserves a city's authority to enforce truly objective standards such as numeric height and density limits, since reasonable persons cannot disagree about whether a project conflicts with those types of standards. However, section 65589.5, subd. (f)(4) (hereinafter, "Paragraph (f)(4)") curtails cities' ability to deny projects by citing a subjective design guideline with which numerous reasonable persons considered the Project to comply.

Since Respondents cannot meet the standard in Paragraph (f)(4), they ask the Court to rob the provision of its intended effect by interpreting

[2] Subsequent statutory citations are to the California Government Code except where otherwise stated.

it as applicable only to factual questions. This interpretation would allow cities to advance legal interpretations that render themselves immune from violating the HAA. But the text, purpose, and legislative history of Paragraph (f)(4) show that it was intended to definitively establish that courts should not defer to the City on *any* aspect of whether a project complies with applicable objective standards.

Once Paragraph (f)(4) is correctly applied to govern all aspects of a project's consistency with objective standards, the petition must be granted. Respondents make no argument that the City's action can be affirmed if the standard of review is applied to all aspects of a project's consistency with objective standards. Instead of defending the City's action under the applicable standard, Respondents resort to outlandish constitutional arguments and even more outlandish waiver arguments. Respondents advance the radical argument that the California Constitution prohibits the Legislature from establishing any standard of review in litigation that fails to defer to local governments. If the standard of review in Paragraph (f)(4) is unconstitutional, then so too are countless other standards of review, such as the fair argument standard applied in CEQA litigation. Standards of review often defer to a litigant challenging a local government, and impose significant burdens of proof on localities who litigate under them. But none of these standards are unconstitutional—and neither is Paragraph (f)(4).

As for waiver, it was *Respondents*, not Appellants, who failed to make constitutional arguments at their first, second, third or fourth opportunity, choosing instead to make them for the first time after Petitioners had already filed all of their permitted briefs. No authority supports Respondents' argument that Appellants are barred from defending the constitutionality of a statute they seek to enforce. Moreover, since the Attorney General has intervened to defend the statute, the constitutional issues are before the Court regardless.

Beyond that, Respondents resort to red herrings such as pointing out, irrelevantly, that the Project happens not to propose a deed restriction that would require some of its homes to be below market rate ("BMR") units. Respondents make this argument to suggest that their assault against the state's authority to enact effective housing laws will not imperil the many state housing laws that apply to developments with BMR homes. But nearly all of Respondents' constitutional and statutory arguments could be wielded to kill or weaken state housing laws that apply to projects with BMR homes—and the exact standard that Respondents challenge as unconstitutional also appears in § 65913.4, subd. (c)(3), a different state housing law used primarily by nonprofit organizations building projects with 100% BMR units. Respondents may feel that the Legislature should only advance its interest in housing supply by facilitating projects with BMR units, but the Legislature has made the judgment that increasing the supply of *all* housing is an important way to make housing more affordable for all.

In the end, Respondents give the game away by continually characterizing Paragraph (f)(4) as "controversial." Respondents' Brief in Opposition to Intervenor's Opening Brief ("RIOB") at pp. 11, 13; Respondents Brief in Opposition to Appellants' Opening Brief ("RAOB") at p. 11. Any "controversy" over the provision was considered, addressed and resolved in the proper place—the legislative process. This Court, of course, will not pass on whether the provision is "controversial"; it will apply the law in a manner that reflects the purpose of the Legislature in enacting it.

California historically allowed local governments to make most decisions about whether and how new homes can be built in their jurisdictions. But local government officials are understandably more responsive to the homeowners who elect them than to the many

Californians who cannot afford homes in their communities. "The necessary corrective is for states to take back some power from local bastions of privilege." Editorial, *The Cities We Need*, N.Y. TIMES (May 11, 2020).[3] At least in some cities, these local bastions of privilege do not recognize the right of the state's elected representatives to enact laws that meet the statewide interest in housing. Appellants respectfully request that this Court affirm the Legislature's right and authority to do so.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Very little of Respondents' counterstatement of the facts and statement of the case is relevant to the legal issues on this appeal. Nonetheless, a brief reply is in order.

I. The City's Record on Housing Shows the Need for Robust Housing Policy.

Respondents' efforts to paint San Mateo as a "pro-housing" city are indisputably irrelevant to this appeal. The City is required to comply with § 65589.5, subd. (j) irrespective of how much housing it has permitted. But it is notable that the best evidence the City could find to support its record as a "pro housing" city is a project that the City could only approve by *invoking state law to overcome its own restrictive regulations.* RAOB, at p. 13. To approve this project, the City was required to adopt an ordinance waiving its "difficult" park impact fee (Respondents' Motion for Judicial Notice ("RMJN"), Exh. B, at p. 19), and to use § 65915, the State Density Bonus Law, to circumvent its own bulk, building line, and setback requirements (*Id.*, Exh. C, at p. 28). This project also required the City to adopt a new ordinance, pursuant to Assembly Bill 1763, to accommodate

[3] *Available at* https://www.nytimes.com/2020/05/11/opinion/sunday/coronavirus-us-cities-inequality.html.

the project's height and density (*Id.*, Exh. D., at p. 42). All this was necessary for the City to approve a project the City itself sponsored—and it still took three years. RMJN, Exh. F, at pp. 65-66 (request for qualifications approved in 2016); *id.*, Exh. C, at p. 24 (resolution approving project in 2020). Projects not directly sponsored by the City face even greater challenges, as is apparent from the City's failure to come anywhere close to meeting its Regional Housing Needs Allocation. With the City required to permit 1,500 homes to meets its fair share of the regional need for housing, the City approved only ***45 new homes*** in 2019. RMJN, Exh. E, at pp. 55, 59.

That Respondents think this record makes the case for charter cities to be constitutionally exempt from complying with state housing law only shows how out of touch Respondents are with the scale and scope of the housing supply crisis. This evidence does demonstrate a point on which the City and housing advocates agree: "cities do not build housing." RAOB at pp. 30, 32. They most certainly do not. But many cities—especially San Mateo—do stand in the way of it being built.[4] To that end, the Legislative

[4] *See, e.g.*, AOB at pp. 23-26; Intervenor's Request for Judicial Notice ("IRJN"), Exh. 4, at pp. 38, 40, 46, 51, 116, and 119; Legis. Analyst, *California's High Housing Costs: Causes and Consequences* (2015) at p. 15 (listing "community resistance to new housing," and the fact that "local communities make most decisions about new housing" as the first of the most significant factors why California coastal areas underbuild), a*vailable at* https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf; *see also* McKinsey & Company, *A Tool Kit to Close California's Housing Gap: 3.5 Million Homes By 2025* (2016) ("McKinsey") at pp. 25-30 (documenting need to "incentivize local governments to approve already planned-for housing" and "accelerate [local] land-use approvals"), *available at* https://www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Urbanization/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.ashx. Since "California's land-use approval process is largely discretionary, with power resting in local government

Analyst's Office "continue[s] to recommend the Legislature look for ways to streamline local approvals" in order to "avoid compounding challenges for the many housing projects already facing lengthy reviews." Legis. Analyst, *Do Communities Adequately Plan for Housing?* (2017) at p. 11.[5] Modifications to the HAA, including Paragraph (f)(4), are merely the Legislature's latest effort "to respond to the creative ways in which local governments attempt to maintain the ability to deny projects." California Bill Analysis, Senate Committee on Governance and Finance, 2017-2018 Regular Session, Assembly Bill 3194, CA B. An., A.B. 3194, Sen. (June 26, 2018); Joint Appendix 1("JA")/191.[6]

II. The Project

Respondents make much of the fact that the Project does not impose a deed restriction requiring homes to be sold or rented at below market rates. This, too, is irrelevant, because § 65589.5, subd. (j) applies irrespective of whether a project has BMR units. *Honchariw v. Cty. of Stanislaus* (2011) 200 Cal.App.4th 1066, 1077. The Project does not have BMR homes because *the City chose* to only impose its inclusionary housing ordinance on projects with more than ten homes (RAOB at p. 33)—a typical threshold reflecting a common understanding that BMR requirements often render smaller developments like the Project infeasible to build.

The HAA imposes even *greater* limitations on local authority that apply to projects with BMR units (§ 65589.5, subd. (d)) as do many other state housing laws. *See, e.g.*, §§ 65913.4 & 65915. Respondents suggest

---

bodies," this "leads to a significantly longer and riskier entitlement process than in other jurisdictions." McKinsey, *supra*, at p. 27.

[5] *Available at* https://lao.ca.gov/reports/2017/3605/plan-for-housing-030817.pdf.

[6] *See* Petitioners' Request for Judicial Notice ("RJN"), Exh. B, at p. 3.

that they have no quarrel with such laws, and that their assault against state authority will not imperil the state's ability to promote developments with BMR homes. Respondents are wrong. Nearly all of Respondents' constitutional and statutory arguments could be wielded to kill or weaken state housing laws that apply to projects with BMR homes. In fact, the exact standard in Paragraph (f)(4) that Respondents challenge as unconstitutional also appears in § 65913.4, subd. (c)(3), a different state housing law that applies only to developments with BMR homes, and which is used primarily by nonprofit organizations building projects with 100% BMR units. *See* Kendall, *Is California's Most Controversial New Housing Production Law Working?*, SAN JOSE MERCURY NEWS, Nov. 24, 2019 (§ 65913.4 is a "a boon for affordable housing developers" by streamlining projects with "subsidized units for low-income renters")[7].

Respondents ask this Court to endorse their policy argument that the Legislature can only advance its interest in housing affordability by promoting developments with BMR units. But it is the Legislature's considered policy judgment that increasing the supply of *all types* of housing is an important way—indeed, the primary way—that California can make housing more affordable for everyone. *See* Appellants' Opening Brief ("AOB") at pp. 37-38 (citing § 65589.5, subd. (a)(2)(F) and Reid, *The Costs of Affordable Housing Production*, UC Berkeley Terner Center for Housing Innovation (March 2020)). For at least forty years, the Legislature

[7] *Available at* https://www.mercurynews.com/2019/11/24/is-californias-most-controversial-new-housing-production-law-working/ ; *see also* Niksa, *San Jose Has 451 Affordable Housing Units in the Works That Were Approved Under Two State Laws That Eased the Process*, SILICON VALLEY BUSINESS JOURNAL, Feb. 23, 2021, *available at* https://www.bizjournals.com/sanjose/news/2021/02/23/san-jose-affordable-housing-projects-sb35-ab-2162.html?ana=newsbreak (detailing BMR projects approved via § 65913.4).

has sought to improve housing affordability by advancing a "supply development program, and [to] maintain that program until the balance between supply and demand is restored," finding that "[i]n so doing, the state must and should rely primarily…[o]n the private sector to produce and otherwise provide and maintain the necessary increase in both market rate units, and nonmarket rate units." Stats. 1979, Ch. 1207, § 3; *see also* Legis. Analyst*, The 2016-17 Budget: Considering Changes to Streamline Local Housing Approvals* (2016) at p. 10. ("If the state's housing shortage is to be addressed, discretionary review likely will need to be scaled back for **all types** of housing development" (emphasis added)).[8]

III. The Commission and Council's Actions.

Respondents would have this Court believe that the City's decision to disapprove housing had something to do with a setback. It didn't.

Respondents strain to insist that the City merely made an "early conclusion" that the Project met the Multi-Family Design Guidelines ("MFDGs"), and later discovered this was not the case. RAOB at pp. 17, 24; RIOB at pp. 30, 34, 52, 62. This is a disingenuous reading of the history. Only *after* the Commission voted to disapprove the Project did staff for the first time announce its about-face on the Project's consistency with the MFDGs. This finding was a classic "*post hoc* rationalization for a decision already made." *Bam, Inc. v. Board of Police Com'rs* (1992) 7 Cal.App.4th 1343, 1346.

The record provides no support for Respondents' claim that Councilmembers disapproved the Project with the expectation that the Applicant would simply add a setback to the single elevation where it was

[8] *Available at* https://lao.ca.gov/reports/2016/3470/Streamline-Local-Housing-Approvals.pdf.

required, thereby achieving quick approval. RAOB at p. 20. If this is what the City wanted, the Commission and Council could have simply *approved* the Project on the condition a setback be added (provided that setback did not reduce the project's density). The neighbors' and the City's objections to the Project had nothing do with the lack of sufficient setbacks on one elevation of the building. This issue never came up when Planning Commissioners explained their reasons to disapprove the Project. AR/824-56. As City staff explained to the Council, the Commission's "vote of denial" was prompted by the Commission's subjective judgment that the Project was "was not in scale or harmonious with the single family nature of the existing neighborhood." AR/41. Councilmembers, too, raised no complaint about any missing setback when they voted to disapprove the Project, AR/494-51. To the extent any Councilmember or Commissioner expressed any expectation about a re-submitted version of the Project, it was that the Applicant should satisfy neighbors' complaints by reducing the height overall (AR/496, AR/499, AR/554 AR/837), or by "showing good faith in the community" by "trying to address the parking issue on the city streets." AR/508. The entire setback issue—the sole argument the City can muster to defend its otherwise indisputably unlawful action—was nothing but a fig leaf offered to mask the City's decision to bend to the wishes of the neighbors.

ARGUMENT

I. Since Section 65589.5(f)(4) Constitutionally Applies to All Aspects of a Project's Consistency with Objective Standards, the Petition Should Be Granted.

If Paragraph (f)(4) is applied as the Legislature intended, there is no dispute that the Petition should be granted. Respondents can only prevail if Paragraph (f)(4) is applied in a manner completely divorced from its text, history and purpose—or if the Court strikes down this key provision of the

State's Housing Element Law as unconstitutional. The Court should do neither. It should interpret the provision to effectuate the Legislature's intent, and affirm its constitutionality.

A. Section 65589.5(f)(4) Applies to All Aspects of Whether a Project Complies with Objective Standards.

When enacting AB 1515 of 2017, the Legislature confirmed that, under the HAA, a project's consistency with objective standards is governed by a standard of review that strictly limits, rather than to defers to, city decisions to deny housing. *See* 1JA/172-173, 1JA/183-186. Since Respondents cannot defend the City's actions under this standard, they argue that Paragraph (f)(4) should be given an impoverished interpretation in which it only applies to factual questions, but allows localities to advance legal interpretations that immunize themselves from HAA liability. If Respondents' interpretation were correct, AB 1515 would be completely ineffective at achieving its intended purpose to "strengthen the provisions of the HAA and provide the courts with clear standards for interpreting the Act in favor of building housing." California Bill Analysis, Assembly Committee, 2017-2018 Regular Session, Assembly Bill 1515, CA B. An., A.B. 1515, Assem. (Apr. 26, 2017); 1JA/185.[9] As this case shows, it will nearly always be possible for a city to adopt a legal interpretation that renders the city's code sufficiently objective to shield the city from liability.

Respondents do not dispute that the HAA is a "remedial statute" that "must be liberally construed to promote its purpose." *See* AOB at p. 46, citing *East West Bank v. Rio School Dist.* (2015) 235 Cal.App.4th 742, 748. Respondents avoid acknowledging the Legislature's specific direction to courts that the HAA must be interpreted "to afford the fullest possible weight to the interest of, and the approval and provision of, housing,"

[9] RJN, Exh. A, at p. 3.

§ 65589.5, subd. (a)(2)(L), and they make no attempt to explain how their scant reading of Paragraph (f)(4) meets this standard. For this reason alone, the Court should reject Respondents' interpretation as inconsistent with the Legislature's explicit instructions about how the HAA should be interpreted and applied.

As set forth in in more detail in Part II, *infra*, even without Paragraph (f)(4), deferring to the city about whether it has complied with the HAA would never be appropriate. Even when a statute is silent about the standard of review, the Supreme Court requires courts to adopt a rigorous non-deferential standard of review when considering whether a city has complied with a law like the HAA. But here, the Legislature did not remain silent. It enacted AB 1515, and in so doing removed any doubt about whether courts should defer to localities about whether they have complied with the HAA.

Respondents rely on case law outside of the planning and zoning context to argue that because Paragraph (f)(4) uses the term "substantial evidence," the Legislature had in mind a rigid distinction between factual and legal questions, and intended only to provide a non-deferential standard as to the former. But in the relevant case law governing planning and zoning, courts consistently describe the legal issues as "entwined with issues of *fact*, policy, and discretion." *Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 435 ("*Harrington*")(emphasis added) (quotation omitted); *see also Berkeley Hills Watershed Coal. v. City of Berkeley* (2019) 31 Cal.App.5th 880, 896 ("*Berkeley Hills*")(same). Accordingly, courts use the terms "substantial evidence" and "reasonable person" when referring to *all* aspects of planning and zoning consistency—the legal as well as the factual. *See, e.g., California Native Plant Soc'y v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637-42; *E. Sacramento*

Partnerships for a Livable City v. City of Sacramento (2016) 5 Cal.App.5th 281, 304-07.

"In enacting new legislation, of course, the Legislature is presumed to be familiar with relevant California judicial constructions." *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1142. Against the well-understood backdrop that legal as well as factual questions about planning and zoning are usually resolved under the "substantial evidence" and "reasonable person" standards, the Legislature used that same language, but reversed it to give clear direction that reviewing courts should defer in the direction of finding projects consistent with objective standards. The Legislature expected that its specific direction in this more limited context would override any general presumption of deference that might otherwise apply. *See* Code Civ. Proc. § 1859. For example, the CEQA "fair argument" standard, which provides that in the specific context of a negative declaration that "courts owe no deference to the lead agency's determination," has been held to prevail over the normal presumption of deference to the local agency on planning and zoning consistency decisions—*on interpretative questions as well as factual*. *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928, 934 ("*Pocket Protectors*") (holding that when determining if project would have "potential significant effects on the environment as to City land use policies and regulations," questions of interpretation about local plans are resolved "under the fair argument test with no presumption in favor of the City").

The history of the HAA is one of continual legislative frustration, as the Legislature has been forced to amend the statute over and over to "respond to the creative ways in which local governments attempt to maintain the ability to deny projects." California Bill Analysis, Senate Committee on Governance and Finance, 2017-2018 Regular Session, Assembly Bill 3194, CA B. An., A.B. 3194, Sen. (June 26, 2018);

1JA/191.[10] The Legislature first tried to limit local governments' authority to deny code-compliant housing development projects in 1982. AOB at pp. 21-22. When cities evaded this limitation by denying projects for subjective reasons, the Legislature amended the statute in 1999 to limit localities' authority to "objective" standards. AOB at pp. 21, 22. Only when this, too, failed to meet the Legislature's decades-long intent to "curb[] the capability of local governments to deny…projects," did the Legislature add § 65589.5, subd. (f)(2) to the statute to reinforce the limitation to those standards that are truly "objective." And even after this, cities like San Mateo argue that the Legislature cannot be allowed to have a statute that actually works to effectuate its purpose.

When interpreting the meaning of AB 1515 or any other statute, a court considers "the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." *DiCampli-Mintz v. Cty. of Santa Clara* (2012) 55 Cal.4th 983, 992 (citation omitted). There is no reason to think that in enacting AB 1515 the Legislature was specially and uniquely concerned with remedying only the evil of cities making improper *factual* conclusions related to zoning compliance. The object the Legislature sought to achieve in enacting AB 1515 was to advance housing production by reducing the capacity of cities to deny projects. Every other aspect of the statutory scheme points in this same direction.

As for legislative history, Respondents cite none that supports their view, because they know that the history belies their claims. Opponents of AB 1515—represented by the same counsel representing Respondents in

[10] *See* RJN, Exh. B, at p. 3.

this case—noted with alarm that the bill would have exactly the effect Respondents would now deny to the statute:

> The American Planning Association, California Chapter (APA), is concerned that this bill would essentially allow applicants to determine whether a project is consistent with planning and zoning. According to APA, the bill "takes away the local government's ability to decide that a project is inconsistent with its own plans based on substantial evidence. Under this bill, a project would have to be found consistent with local plans if there's any evidence *or strained interpretation* supporting a finding of consistency, regardless of circumstances to the contrary. Requiring a finding of inconsistency to be based on substantial evidence is a more-fair process."

1JA/186 (emphasis added). Opponents understood during the process that, if enacted, AB 1515 would apply not just to questions of "evidence" but also to questions of "interpretation" supporting a finding of consistency. *Ibid.* The same opponent asked the Legislature to rewrite the bill to add language stating that "the local agency's finding is assumed to be correct unless no reasonable person could reach that conclusion," because without such an amendment they believed the bill would "allow[] developers to begin making what are clearly local determinations or take a local agency to court over every finding." California Bill Analysis, Senate Committee on Transp. & Housing, 2017-2018 Regular Session, Assembly Bill 1515, CA B. An., A.B. 1515, Assem. (July 11, 2017).[11] The Legislature heard these contentions, declined to water down its chosen language, and decided to enact the law. Having failed to prevail in the political process, opponents are now turning to this Court for a second bite at the apple, asking this

[11] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB1515#.

Court to deprive AB 1515 of the effect the opponents knew it would have when they asked the Legislature not to enact it.

Respondents' final argument is that the Legislature could not have meant what it said in AB 1515 because the law will "lead to mass confusion in the form of vastly different interpretations of the same rule." RIOB at pp. 13-14. Exactly the opposite is true. The clarity provided by Paragraph (f)(4) *prevents* cities from applying vastly different interpretations of the same rule. In this case, because the City disregarded the HAA, it advanced vastly different interpretations of the same rule—first finding the Project to fully comply with the MFDGs and the Height Variation Guideline, and then later concluding that the same project failed to meet these same standards. The Legislature intended that AB 1515 put a stop to this by limiting local discretion to those standards that are objective and clear from the text of the standard itself.

An "objective" standard, such as the number of feet a building can reach in height, should be a standard about which reasonable persons cannot disagree. But if reasonable minds can disagree about whether a standard is satisfied, then it is not "objective" for purposes of the HAA. Paragraph (f)(4) is intended to provide a standard of review in litigation that reflects the HAA's already strict limitation to truly "objective" standards. This is the interpretation that "afford[s] the fullest possible weight to the interest of, and the approval and provision of, housing," § 65589.5, subd. (a)(2)(L), and is therefore the interpretation the Court should adopt.

B. The Court Should Reject Respondents' Constitutional Claims.

1. Respondents' Waiver Arguments Are Unserious.

Clearly lacking confidence they can defend the trial court's constitutional conclusions on the merits, Respondents spill much ink arguing that this Court should refuse to allow Appellants to contest the

grounds on which the trial court denied the petition. It is hard to understand the point of this argument. The Attorney General has intervened on appeal to defend the constitutionality of the statute, and so the constitutional issues are before this Court regardless.

Moreover, even when, unlike here, a question is raised for the first time on appeal, a court will still address "'a pure question of law which is presented by undisputed facts.'" *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1433, citing and quoting *People v. Hines* (1997) 15 Cal.4th 997, 1061. A court of appeal will also address a claim for the first time on appeal if it presents an issue of public interest. *See, e.g., Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 5-6.[12] Here, both criteria apply. This action—tried on an administrative record and subject to *de novo* review on appeal—is of unquestionably broad public interest, as the Attorney General's participation alone is sufficient to establish.

Even putting all of this aside, Respondents' waiver arguments are unserious. The waiver doctrine only holds that a party may "waive the right to *question* the constitutionality of a statute," 213 Cal.Jur.3d, Constitutional Law § 61 (emphasis added), and Respondents rely on case law in which appellants sought to *challenge* the constitutionality of a statute for the first

[12] Respondent cites *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178, for the proposition that courts are reluctant to exercise this discretion where it would result in an unfair "bait and switch" that deprives a party of an opportunity to be heard. But here, as in *JRS*, *supra,* 115 Cal.App.4th at p. 179, no such "bait and switch" has occurred. Respondents themselves raised the constitutional issues, and have now filed three briefs in support of them. They can claim no prejudice from allowing Appellants to refute Respondents' claims.

time on appeal.[13] Respondents do not cite a single case in which an appellant was barred from defending the constitutionality of a statute that it sought to enforce.

The waiver doctrine also only applies to "claims made for the first time on appeal which could have been, but were not presented, to the trial court…" *Truck Insurance Exchange v. AMCO Insurance Company* (2020) 56 Cal.App.5th 619, quoting *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 (emphasis added). Waiver applies if an "appellant failed to bring the error to the trial court's attention in an appropriate manner—e.g., by timely motion or objection." Eisenberg et al., Cal. Practice Guide: Civil, Appeals and Writs (The Rutter Group 2020), § 8:265. Here, constitutional issues were raised for the first time in Respondents' post-merits supplemental brief, to which Petitioner was allowed "no reply" (1JA/158), and Petitioner promptly filed a timely motion bringing the trial court's errors to its attention. 2JA/454-60; 2JA/481-85; 2JA/658-9; Reporter's Transcript ("RT") at 8-10. Respondents rely on cases in which an appellant was barred from *changing* its theories on appeal, or raising an entirely new theory never raised in the trial court record.[14] Nothing remotely comparable occurred here.

---

[13] *Jenner v. City Council* (1958) 164 Cal.App.2d 490, 498 (appellant waived the right to challenge the constitutionality of a statute for the first time on appeal); *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486 (same).

[14] *Curcio v. Svanevik* (1984) 155 Cal.App.3d 955, 961 (argument that defendant was an independent contractor waived where appellant stipulated at trial that defendant was employee); *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264 (appellant waived argument that method of jury polling was inadequate because appellant approved the method at the trial level); *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997-98 (issue of equitable estoppel waived because phrase was completely absent from the trial record).

It is only with an astonishing lack of self-awareness that Respondents argue that "constitutional question must be raised at the earliest opportunity." RAOB at p. 56. On this principle, it is Respondents who should not have been allowed to raise their constitutional claims. Respondents' "earliest opportunity" to argue that the law was unconstitutional was during the administrative process—since courts will not allow a mandamus respondent to advance a ground in litigation that it did not endorse in the record. *See* AOB at p. 57, citing, *e.g., SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 477, n.4 ("*SP Star*"). In the administrative record, the City explicitly acknowledged the statute's enforceability. AR/483. Respondents' second opportunity to raise constitutional defenses was in their first answer, and they failed to do so. *See* 1JA/021-27. Their third opportunity was in their amended and operative answer, in which they pled no constitutional defenses. 1JA/031-32. At this point, Respondents should not have been permitted to raise arguments at trial that they had neither endorsed in the record nor raised in the operative pleadings, *see* Code Civ. Proc., § 430.80; *SP Star, supra,* 173 Cal.App.4th, at p. 477, n.4, but putting this aside, Respondents then had a *fourth* opportunity to raise constitutional defenses in their merits brief. Only after letting all of these opportunities pass, and only after all of Petitioners' permitted briefs had been filed, did Respondents advance constitutional arguments. Respondents cannot with clean hands ask this Court to find their arguments immune from appellate review.

Contrary to Respondents' suggestion, the trial court's post-merits minute order did *not* ask for briefing on "constitutional" questions—it only asked for the parties to produce relevant authority about whether Paragraph (f)(4) is or is not "enforceable"—which Petitioner did. 1JA/158-59; 1JA/165-66. At that time, no court had ever declared any provision of the

HAA, or any other portion of the Housing Element Law, to be unconstitutional, and City staff had explicitly acknowledged in the record that the City believed the HAA to be enforceable. AR/483. It is frankly absurd for Respondents to suggest that Petitioner should have had the clairvoyance to anticipate and proactively brief specific due process, non-delegation and Home Rule Doctrine arguments that Respondents had neither pled nor argued, and which were neither mentioned in the minute order nor endorsed in any published opinion.

As for Respondents' contention that Appellants somehow waived arguments because their opening brief "irrelevantly focus[ed] on the constitutionality of the HAA as a whole," RAOB at p. 54, Appellants' Opening Brief addressed both the HAA and general *and* Paragraph (f)(4) in particular. *See* AOB at pp. 27, 40-42, 44 (discussing the constitutionality of Paragraph (f)(4) in particular). This was of course appropriate in light of the trial court's conclusion that "the HAA in general and Government Code §65589.5(f)(4) in particular" was unconstitutional. 2JA/439. The HAA as a whole is hardly "irrelevant" to the constitutionality of Paragraph (f)(4), since that provision must be understood in the context of the statute of which it is an integral part.[15]

---

[15] Without citation to authority, Respondents suggest Appellants have somehow waived arguments because some issues were briefed more deeply than others in AOB. Appellants could not have known until Respondents filed their response briefs which arguments Respondents would advance and which they would abandon. As it turned out, Respondents abandoned the equal protection argument they advanced below, refused to defend the trial court's conclusion that the HAA is unconstitutional "in general," and also completely abandoned the argument they had advanced below that the City can prevail on the basis of claimed noncompliance with a parking standard. Appellants raised each argument in their opening brief, but Respondents bear the burden of proof on each argument. Appellants has reserved this reply brief to rebut Respondents' attempts to meet their burden.

2. Respondents' Constitutional Arguments Are Meritless.

a. The Legislature Does Not Violate the Constitution by Enacting a Non-Deferential Standard of Review.

On Respondents' view, the California Constitution forbids the Legislature from establishing a standard of review in litigation that fails to defer to municipal governments. This is a truly radical proposition, which would require this Court to erase from the case law such well-established standards of review as the rational basis and fair argument standards of review. It is not surprising, therefore, that Respondents cannot cite a single case that has *ever* found a standard of review to be unconstitutional on these or any other grounds.

A standard of review, of course, merely establishes the burden that a party must meet to prevail on a particular legal issue in litigation. Although Paragraph (f)(4) is of relatively recent vintage, it follows a familiar model in which either the Legislature, or a court, establishes what type of judicial review is necessary to reflect "the scope of the City's discretion." *San Francisco Fire Fighters Local 798 v. City & Cty. of San Francisco* (2006) 38 Cal.4th 653, 669-70 ("*SFFF*"). It is similar to the "fair argument" standard in CEQA, in which a plaintiff suing a local government "has a much lower threshold to meet and [reviewing courts] do not defer to the lead agency's exercise of discretion." *Pocket Protectors, supra,* 124 Cal.App.4th at 933. The standard is not even unique. The identical standard also appears in § 65913.4, subd. (c)(3), a different state housing law that streamlines the approval of qualifying infill housing developments that provide deed-restricted BMR units.

Respondents bear the burden to "clearly show[]" the provision's "unconstitutionality," because all "doubts will be resolved in favor of…[a

statute's] validity.'" AOB at p. 30, citing *Lockyer v. City & Cty. of San Francisco* (2004) 33 Cal.4th 1055, 1086 (citing numerous authorities); *see also City of El Centro v. Lanier* (2016) 245 Cal.App.4th 1494, 1503 (quoting *Calif. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 253) (in municipal challenge, "'all intendments favor the exercise of the Legislature's plenary authority…any doubt as to the Legislature's power to act…should be resolved in favor of the Legislature's action'"). Respondents do not even acknowledge this burden, to say nothing of demonstrating that their arguments can be sustained under it.

If Paragraph (f)(4) violates due process, the non-delegation principle or the Home Rule Doctrine, then numerous well-established litigation standards of review—such as the "fair argument" standard in CEQA and the rational basis standard in equal protection case law—would also be unconstitutional.

The "fair argument" standard in CEQA litigation provides a highly non-deferential standard when a private party sues a city for approving a project on the basis of a negative declaration. If a litigant suing a city can cite any substantial evidence supporting a fair argument that a project may have a significant environmental impact, this minimal showing prevails against all of the city's stronger evidence to the contrary, the city loses the lawsuit, and the city's action approving the project are set aside as unlawful. This highly non-deferential standard of review is seen as necessary to reflect the limited discretion a city has to approve a project without preparing an EIR—just as Paragraph (f)(4)'s non-deferential standard is required "in order to prevent the City from circumventing what was intended to be a strict limitation on its authority." *SFFF, supra,* 38 Cal.4th at p. 669. Notably, the Legislature did not even enact the "fair argument" standard; the Supreme Court considered the standard to be necessary to "accomplish[]…the high objectives of [CEQA.]" *No Oil, Inc.*

*v. City of Los Angele*s, 13 Cal.3d 68, 75 (1974). If courts can infer such a standard from statutory text, certainly the Legislature can actually enact the standard as *part of* the statutory text.

Opponents of AB 1515—represented by the same counsel representing Respondents in this case—noted in the legislative process that "this new standard [Paragraph (f)(4)] is no different than the 'fair argument' standard applied in CEQA." California Bill Analysis, Senate Committee on Transp. & Housing, 2017-2018 Regular Session, Assembly Bill 1515, CA B. An., A.B. 1515, Assem. (July 11, 2017). Respondents' attempts to distinguish the fair argument standard now are unpersuasive. Respondents note that the fair argument standard is "an exception to the general rule of deference to lead agency decision-making, and only applies" to a specific decision, "the decision whether to prepare an original EIR or a negative declaration." RIOB at p. 40. But the same is true of Paragraph (f)(4). The provision is an exception to the general rule of dereference to local agency decision-making, and it only applies to a specific issue: whether a project covered by the HAA complies with objective standards. Respondents claim that the fair argument standard "does not mandate an end result"—but of course it does, in the sense that it conclusively establishes that the litigant suing the city prevails in its claims. If Respondents mean that the fair argument standard does not "mandate" any particular "end result" because the city still has options in deciding how and whether to proceed to consider the project, the same is true under the HAA. Paragraph (f)(4) merely dictates how a single question is resolved in litigation: whether a project complies with applicable objective standards. Even if a city fails to demonstrate that a project is inconsistent with objective standards, this does not mandate the "end result." The city can still deny the project if it makes the findings required by § 65589.5, subds. (j)(1)(A)-(B). And the city also has discretion to impose conditions on the project provided that those

conditions do not reduce the project's density. § 65589.5, subds. (j)(1)(A)-(B).[16]

All of Respondents' constitutional claims fail for this reason. Respondents argue that there is no "meaningful" hearing, in violation of due process, because "any person, no matter how financially interested, who submits 'substantial evidence' of compliance with objective standards would always win, no matter how compelling the contrary evidence submitted…" RIOB at p. 30. But under the "fair argument" standard, any project opponent, no matter how financially interested, who can meet the "fair argument" standard will always win, no matter how compelling the evidence to the contrary. Respondents argue that Paragraph (f)(4) delegates municipal authority because if "any person—whether developer, member of the public, consultant, or staff—enters into the record any evidence sufficient to convince a 'reasonable person' that the project is consistent, the City has no discretion to find a project inconsistent." RIOB at p. 35. Municipal authority is similarly undermined when a court finds a city has no discretion to approve a project merely because a project opponent has entered into the record minimal substantial evidence that a project may

[16] Nor can Respondents successfully distinguish the well-established "rational basis" standard of review, which makes it very difficult for a municipal litigant to establish the invalidity of a statute on equal protection grounds. Appellants try to avoid this result by suggesting that the rational basis standard is only applied in favor of cities and never against them. RIOB at p. 39. But that is not true; in fact it happened in this case! In the trial court, Respondents argued that Paragraph (f)(4) violated the equal protection clause. 1JA/245. Appellants explained that, under the applicable standard of review, the existence of any conceivable rational basis for the statute's distinctions defeats the City's defense. AOB at p. 42. Faced with this failure to meet their burden of proof under the applicable standard of review, Respondents declined to defend their equal protection argument, and they have now forfeited that defense. The existence of a rational basis was sufficient to defeat the City's equal protection defense.

have environmental impacts. Finally, Respondents argue that Paragraph (f)(4) violates the Home Rule Doctrine because it "remove[s] the ability of the City's decision-makers…to weigh the evidence when they elect to disapprove a housing development." RIOB at pp. 45-46. So, too, does the fair argument standard remove City decision-makers' ability to weigh the evidence when they elect to *approve* a development. Yet the fair argument standard, and similar standards such as the rational basis standard, are indisputably constitutional. So is Paragraph (f)(4).

The foregoing should suffice to explain why all of Respondents' constitutional arguments fall far short of "clearly show[ing]," *Lockyer, supra,* 33 Cal.4th, at p. 1086, the unconstitutionality of Paragraph (f)(4). The following additionally demonstrates why each of Respondents' constitutional claims fail when examined in isolation.

b. Respondents' Specific Constitutional Arguments Fail.

i. Paragraph f(4) Presents No Due Process Issue.

Respondents now make their primary constitutional argument a due process argument they only raised for the first time in their unrebutted post-merits brief, which the trial court never addressed at all. Respondents should have waived this defense, since they never raised it in the administrative record, never pled it, and the trial court never reached it. *See* Code Civ. Proc., § 430.80; AOB 57. But in any event, it is meritless.

Respondents claim that because the question of a project's compliance with objective standards is resolved under Paragraph (f)(4), this "render[s] any subsequent hearing on the project meaningless." RIOB at p. 14. That is simply not what the statute provides. To begin with, project opponents can still contest at the hearing whether a project complies with objective standards. If those opponents also choose to litigate the question,

they will face the same obstacles as are faced by any other party attempting to prove a legal issue with a high burden of proof. But opponents are not deprived of notice or a meaningful hearing to be heard on this question. For example, it is possible to imagine members of the public pointing out that City staff had erred in determining that a project met a numeric height standard. If the member of the public could show that the city staff's conclusion was "clearly erroneous or inaccurate," the staff conclusion would not qualify as "substantial evidence," Cal. Code Regs. tit. 14, § 15384, subd. (a), and therefore the member of the public could demonstrate that the project did not comply with an objective standard.

Moreover, even if a project is conclusively deemed to comply with objective standards, the hearing on the approval does not become "meaningless." The City still has appreciable discretion over the project, and all interested members of the public have their right to provide input into how the City exercises that discretion. Opponents can argue that the City should, if it can, make the findings that allow it to reject the project. § 65589.5, subd. (j)(1)(A)-(B). Opponents can also request that the city impose conditions on the Project to address their concerns—and as long as those conditions do not reduce the density of the project, the City has the discretion to take that action as well. Nothing in Paragraph (f)(4) denies members of the public the right to a hearing on these issues—which occurred in this case.

Respondents' due process argument relies primarily on *Horn v. Cty. of Ventura* (1979) 24 Cal.3d 605. But *Horn* recognized that "'ministerial' acts requir[e] no precedent notice or opportunity for hearing," 24 Cal.3d, at p. 615. The reason ministerial acts require no notice or hearing is that they are "nondiscretionary decisions *based only on fixed and objective standards…*" *Calvert v. Cty. of Yuba* (2006) 145 Cal.App.4th 613, 622 (emphasis added), citing *Horn*, 24 Cal.3d at p. 616; *see also* Cal. Code

Regs. tit. 14, § 15369 ("A ministerial decision involves only the use of fixed standards or objective measurements…"). And that is the exact inquiry governed by Paragraph (f)(4): whether a project "complies with applicable, objective…standards and criteria." § 65589.5, subd. (j)(1). Local governments are not required to provide notice and a hearing to solicit public input about whether a project complies with objective standards. If they were, then a hearing would be required before a city could even take a nondiscretionary ministerial action such as issuing a standard building permit.

ii. Paragraph f(4) Does Not Delegate Municipal Authority.

As Appellants have noted, it would be risible for any party to contend that by establishing a standard of review, the Legislature has effected a "delegation" of municipal authority. AOB at p. 42. Courts have long acknowledged the Legislature's ability to enact a specific standard of review (*Buena Vista Gardens Apartment Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 297-98 ["*Buena Vista*"]), and courts even establish such standards on their own authority. *No Oil, Inc.*, *supra*, 13 Cal.3d at p. 75. Standards of review refer to a hypothetical "reasonable person," but they obviously do not delegate substantive authority to any *actual* person. It is the sufficiency of the evidence, not the identity of the party offering the evidence, that matters.

Not one of Respondents' non-delegation cases involve a standard of review or any comparable statute governing litigation in court. Instead, in each of Respondents' cited cases, the final decision-making authority or municipal function was actually vested in a third party. *See People ex rel. Department of Public Works v. Los Angeles* (1960) 179 Cal.App.2d 558 (eminent domain powers vested with state highway commission); *City of Pasadena v. Chamberlain* (1928) 204 Cal. 653 (water utility operation

vested with water district); *Wilson v. City of San Bernardino* (1960) 186 Cal.App.2d 603 (same). Respondents again rely on *County of Riverside v. Superior Cour*t (2003) 30 Cal.4th 278, 292-93, in which the disputed statute fully delegated to private arbitrators the ability "actually to set [county] employee salaries." As the court explained, "regulating labor relations is one thing; depriving the county entirely of its authority to set employee salaries is quite another." *Id.* at pp. 287-88. By contrast, nothing in Paragraph (f)(4) deprives the Respondents of the authority to set objective standards. It merely establishes a standard of review for a court to apply when reviewing whether a project complies with these objective standards.

iii. The Home Rule Doctrine Does Not Prohibit the Legislature From Enacting Paragraph f(4).

The primary basis of the trial court's ruling was the trial court's conclusion that the HAA is unconstitutional as applied to charter cities. 2JA/439. Faced with Appellants' and Intervenor's showing that the HAA is tailored to the statewide interest in increasing housing supply, Respondents have fled from the trial court's conclusion that the HAA is "in general" unconstitutional. Therefore, in this appeal, it is undisputed that every provision of the HAA *other* than Paragraph (f)(4) is sufficiently tailored to a valid statewide concern. Respondents argue that even though the rest of the HAA is constitutionally tailored, when enacting Paragraph (f)(4), the Legislature—for the first time in the decades-long history of the Housing Element Law—selected an impermissible mean to achieve a concededly constitutional end.

Respondents' argument proceeds from two critical legal errors. *First*, Respondents try to collapse the inquiry so that it examines only Paragraph (f)(4) in isolation. But a charter-city home rule analysis is holistic, analyzing each provision in the context of the statute of which it is

a part. In *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 717 ("*Anderson*"), although only specific provisions of the Surplus Land Act were challenged as unconstitutional, the court looked to the entire statutory framework in order to determine the statewide interest and the role the challenged provision played in meeting that interest.

Second, by arguing that Paragraph (f)(4) is too "remote" from the state's interest, or too "substantive" to be constitutional, Respondents suggest a searching "least-restrictive means" type of judicial inquiry into the means the Legislature chooses to advance a statewide interest. Supreme Court case law calls for exactly the opposite. Where, as is conceded here, a statute aims at a matter of statewide concern, courts "defer to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution." *California Fed. Sav. & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 24; *see also City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 277 ("*Huntington Beach*") ("[a]ll that is required" under home-rule doctrine is a "direct, substantial connection between the rights provided…[by the statute] and the Legislature's asserted purpose") (citation omitted).

"Substance and procedure are not always dichotomous," but Paragraph (f)(4) is exactly the type of regulation held to be constitutionally applicable to charter cities, because its restrictions "arise only in select scenarios triggered by local agency determinations." *Anderson, supra*, 42 Cal.App.5th at pp. 675-66. The *Anderson* court held that "the affordable housing measures…are 'narrowly tailored'" because "whether land is deemed "surplus" is entirely within the local government's discretion," and "[t]he statutory provisions that encroach more acutely and impose substantive constraints" take effect only if "the local agency decides to sell or lease the land for that purpose [of providing affordable housing]." *Id.* at p. 678. Paragraph (f)(4) is the same type of provision, since it only applies

to areas the city itself has zoned and planned for housing, and further only applies to the specific question of how to decide, in litigation, whether a project complies with objective standards.

Respondents' argument that city approval processes do not contribute to the housing crisis is belied by thorough legislative findings to which a court must "accord…great weight." *Huntington Beach, supra,* 44 Cal.App.5th at p. 273.[17] But more importantly, this argument is beside the point. Respondents have *conceded* that the HAA as a whole aims at a valid statewide interest. They do not dispute that the Legislature can validly curtail charter cities' authority to disapprove housing developments that comply with "objective" standards. The only remaining question is whether the California Constitution forbids the Legislature from adopting a standard of review that reinforces this concededly constitutional provision. The Legislature only added Paragraph (f)(4) to the HAA after concluding on the basis of thorough findings that its decades of other efforts to "curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects…[had] not been fulfilled." Stats. 2017, Ch. 378, § 1 (enacting § 65589.5, subd. (a)(2)(K)). Resolving "[a]ny doubt…in favor of "'the legislative authority of the state," *Huntington Beach, supra,* 44 Cal.App.5th at p. 273, the Court should affirm the Legislature's authority to make this policy decision, and to apply it to charter cities.

[17] *See* AOB at pp. 15-19 (presenting history of state involvement in the housing crisis); AOB at pp. 37-38 (citing § 65589.5, subd. (a), which sets forth the legislative findings regarding the state's concern in enacting the HAA); IRJN, Exh. 4, at p. 43 (describing local decision-making at a barrier to housing production); *see also id*. at pp 45, 116, and 119.

3. The Doctrine of Constitutional Avoidance Does Not Apply.

Respondents ask the court to endorse an interpretation of Paragraph (f)4) that is divorced from its text, history, purpose, and they also ask the court to find that the California Constitution bars the Legislature from enacting any standard of review that fails to defer to local governments. Since neither argument is persuasive standing alone, Respondents hope that by invoking the canon of constitutional avoidance their arguments become worth more than the sum of its parts. But that is not the purpose of the doctrine.

Courts will not avoid unpersuasive constitutional arguments by adopting unpersuasive statutory interpretations. Here, Respondents distort the doctrine, hoping that if they can even conjure any constitutional "question" about the statute, the court will flee from this phantom threat and diminish the law that the Legislature passed. But "[t]he canon favoring constructions of statutes to avoid constitutional questions does not…license a court to usurp the policy-making and legislative functions of duly-elected representatives." *Heckler v. Mathews* (1984) 465 U.S. 728, 741. Only to "avoid[] a *serious* constitutional question" will a court invoke the doctrine, and even then only if a narrowing construction is "reasonably possible." *People v. Chandler* (2014) 60 Cal.4th 508, 524 (quotation omitted; emphasis added); cf. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1212 (adopting narrowing construction because of clear First Amendment issue that would be raised under alternative interpretation).

Nothing about the doctrine of constitutional avoidance relieves a litigant of its burden to "clearly show[] [a provision's] unconstitutionality," with all doubts resolved in favor of a statute's validity. *Lockyer, supra,* 33 Cal.4th, at p. 1086 (citing numerous authorities). For example, in *Marquez*

v. City of Long Beach (2019) 32 Cal.App.5th 552, 568, the Court of Appeal refused to adopt a narrowing construction that *both litigants* had proposed to avoid a "home rule" constitutional issue. The court proceeded to interpret the statute as it was intended to apply, and rejected the argument that it posed any home rule issue. This Court should do likewise.

In fact, Respondents' unpersuasive construction of Paragraph (f)(4) doesn't even perform any avoidance purpose. Respondents do not argue that Paragraph (f)(4) is facially unconstitutional; they propose that it be given a limited reading that only reverses the presumption of deference as to factual determinations. While this would conveniently assist Respondents in this case, this incorrect reading of the provision would *not* avoid any constitutional issue. All of the same (meritless) constitutional objections could be raised against Respondents' reading of the provision, because a statute reversing the standard of review on factual questions would implicate due process, home rule and non-delegation principles in the same way.

II. The Petition Should Be Granted Irrespective of Whether and How Paragraph (f)(4) Is Applied.

The Court can and should resolve this appeal by simply applying Paragraph (f)(4) in a manner consistent with its text and its purpose. But even if the Court were to decline to consider the scope and enforceability of this provision, this would not assist Respondents at all. The City can only prevail if the Court essentially defers to the City about whether it has complied with state law. Even before the Legislature added Paragraph (f)(4) to the statute, this type of deferential review is completely inconsistent with the HAA's text, purpose and history.

A. Courts Do Not Defer to a City About Whether The City Has Complied with a State Law Intended as a Limitation on Municipal Authority.

Respondents argue that the City is entitled to deference in interpreting its own ordinances, and that because Respondents' *post hoc* re-interpretation of its design guideline renders it "objective," the City did not violate state law.

When "the Legislature has enacted 'specific legislation' affecting the standard of review," courts simply apply that standard. *Buena Vista, supra,* 175 Cal.App.3d at p. 297. Since the Legislature has adopted Paragraph (f)(4) to apply a non-deferential standard of review, the Court should simply apply the Legislature's chosen standard. But even when a statute is silent about the applicable standard of review, reviewing courts infer an appropriate standard by considering "the discretion granted an agency by the legislation authorizing its duties." *SFFF, supra,* 38 Cal.4th at pp. 669-70. The same is true when a statute constrains the discretion that a city previously enjoyed. If a statute is intended to grant a city "considerable discretion," deferential review may be appropriate, but if a statute "gives the City very little discretion to determine what is necessary to ensure compliance, then some kind of more rigorous independent review would be required in order to prevent the City from circumventing what was intended to be a strict limitation on its authority." *Ibid.*

It cannot be denied that the HAA is intended as a "strict limitation" on the City's authority to deny housing projects. *See ibid.* Section 65589.6 explicitly shifts the burden of proof to the agency. The HAA must be interpreted "afford the fullest possible weight to…the approval and provision of, housing." § 65589.5, subd. (a)(2)(L), and the clear purpose of the statute is to significantly limit the City's discretion. Since these purposes "would not be served by a deferential standard of review," a

"rigorous independent review" is required. *SFFF*, *supra*, 38 Cal.4th at p. 670. Faced with a similar legislative directive that CEQA "be interpreted in such manner as to afford the fullest possible protection to the environment," the Supreme Court in *No Oil, Inc.* inferred the non-deferential "fair argument" standard of review. *No Oil, Inc.*, *supra*, 13 Cal.3d at p. 83. To apply a more deferential standard of review would "defeat the Legislature's objective" and "afford[] not the fullest, but the least possible" weight to the interest of housing. *Cf. id.* at pp. 84-85.

In their opening brief, Appellants cited numerous authorities that courts do not defer to cities on legal questions when the meaning of a state statute is at issue. AOB at pp. 44-45. Respondents do not distinguish any of these authorities, but continue to claim deference by relying entirely on cases involving *city-adopted* standards that the city was charged with administering.[18] In *Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 491-92, the Supreme Court rejected this argument. The county in that case claimed an entitlement to deference interpreting county regulations that interpreted the county's own

[18] *See, e.g.*, RAOB at pp. 35-37, 49-51 (citing *Ocean Park Associates v. Santa Monica Rent Control Board* (2004) 114 Cal.App.4th 1050 [cited for deference to city interpretation of city rent ordinance]); *Harrington, supra,* Cal.App.5th at p. 420 (cited for deference to city interpretation of use permit conditions); *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204 (cited for deference to city interpretation of city rent control ordinance); *Berkeley Hills, supra,* 31 Cal.App.5th at p. 880 (cited for deference to city interpretation of city use permit requirement); *J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486 (cited for deference to city interpretation of "medical office" under city code)]. The City's citations to *Association of Irritated Residents v. State Air Resources Board* (2012) 206 Cal.App.4th 1487, 1494-95 ("*AIR*") and *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898, 911, are completely off-point—both cases involve deference to *state agencies* delegated with broad authority by the Legislature.

code. But since those regulations incorporated by a reference a *state* standard, the Supreme Court held the local government's claim to deference was "misplaced" because "[i]t is the legal interpretation of…state standards that is at issue here." *Id.* at p. 499 (citations and quotations omitted; emphasis original). Here, too, state standards are the primary issue—namely what constitutes an "objective" standard under the HAA and what it means to be "consistent, compliant, and in conformity" with an objective standard under the HAA. This is not an action in which a petitioner sues a city merely for violating in its own laws. Petitioners challenge a city for violating a *state* law intended to proscribe local authority. Respondents' understanding of what is or is not "objective" within the meaning of this state statute is entitled to no weight.[19]

B. The Project Complies with All Objective Standards.

Unless the Court defers to the City about whether the City has complied with state law, neither the MFDGs as a whole, nor the Height Variation Guideline in particular, can be reasonably interpreted to impose any "objective" standard that the Project fails to meet.

1. To the Extent the MFDGs Are "Part of" the City's General Plan or Zoning Standards, the MFDGs Are Subjective Policies, Not "Objective" Standards.

As noted in AOB at pp. 49-50, it is questionable whether the MFDGs are "part of" the City's General Plan or zoning standards, as the HAA

[19] Moreover, even when city-adopted standards are the only issue, if "the City cannot point to a consistent and long-standing interpretation, its current interpretation is entitled to no deference." *Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 278. Not only has the City failed to point to any "consistent and long-standing interpretation," the "interpretation" at issue was a sudden about-face, directly contradicting its prior interpretation, and offered only to justify the decision the Planning Commission had already made to reject the Project. *Ibid.* This type of "interpretation" would never be entitled to deference in any circumstance.

requires. It is important to note that when the Legislature added the phrase "design review standards" to the HAA, it did so with the intent to further *limit* cities' authority to deny projects, not to expand their authority to do so. *See* 1JA/215-216 (California Bill Analysis, Senate Rules Committee, Floor Analysis, 2001-2002 Regular Session, Sen. Bill No. 1721, CA B. An., S. B. 1721, Sen. (June 20, 2002)).

But even accepting *arguendo* that the MFDGs are "part of" the City's General Plan, what the City's General Plan says about them is that it is City policy to "review" projects for "substantial conformance" with the MFDGs. AR/86. In City officials' own words, this means that the MFDGs give officials "discretion" to decide whether any particular provision is or is not "necessary to achieve conformance with the overall objectives of the design guidelines." AR/847-48. This can also be seen from the process the City's consultant and its staff used to assess the Project's "consistency with the City's Multi-Family Design Guidelines and General Plan Urban Design Element." AR/870. This analysis did not rigidly examine each and every guideline and confirm whether every single guideline was satisfied. Instead, the analysis reviewed the Project as a whole and the Guidelines as a whole, and rendered a broad subjective judgment that the Project met the overall objectives of the MFDGs. AR/145-47, 871, 881, 940-42.

If a project fails to meet any particular aspect of the MFDGs, the City does not require an applicant to seek a waiver of that requirement to achieve project approval. Instead, the City exercises subjective discretion to decide whether the project as designed is sufficiently in substantial conformance with the MFDGs as a whole. And it is undisputed that the Project complies with each and every provision of the MFDGs but for one. Unlike a standard zoning requirement such as a height or density limit—which is objectively required unless waived—the City does not require rigid conformance with every provision in the MFDGs. The City cannot

dispute that it had the authority to find the Project compliant with the MFDGs (without granting a waiver), and it therefore cannot contend that the Project violated any objective standard.

Of course, the City knows that its MFDGs are applied selectively and subjectively rather than in an objective process. Respondents' own motion for judicial notice reflects the City's understanding that the City's "quantitative" setback and buffer requirements are contained in its Zoning Code, not its design standards—and that the purpose of "design review" is to consider whether to impose additional setbacks and buffers that go *beyond* the City's quantitative standards:

> In multifamily zoned properties that abut single family zones, there are increased setbacks and buffers to ensure that the impact to single family neighborhoods are reduced. *Additional buffering above and beyond the quantitative requirements outlined in the Zoning Code is considered during the design review process*.

MRJN, Exh. E, at p. 53 (emphasis added).

Under any standard of review that gives weight to the Legislature's intent, the MFDGs cannot be considered "objective" standards.

2. The Project Complies With Every Aspect of the Height Variation Guideline That Could Possibly Be Construed as Objective.

Even if the City did require compliance with each and every guideline in the MFDGs (which it does not), the Project as proposed meets each and every provision of the Height Variation Guideline that could be construed as "objective."

To begin with, the Height Variation Guideline only requires a "transition *or* step in height." AR/10. (emphasis added). Since it is undisputed that the Project proposes a "transition" in the form of a forty-foot landscaped treatment separating the Project from the nearest single-story building, the Project meets the guideline.

Even accepting Respondents' attempt to read away the fact that *either* a transition or step in height is sufficient to meet the Height Variation Guideline, the later text of the guideline only requires that a project "stepback upper floors to ease the transition." And the Project indisputably does this. Contrary to Respondents' contentions (RAOB at p. 45), Petitioner did point out below that the Project contains "a stepback at every floor." RT 7; 2JA/539. And it clearly does: the depiction at AR/947 shows this.

Nothing in the guideline states *which* upper floors must step back, nor what type of setback is sufficient to "ease the transition." The City was certainly capable of writing such language: the MFDGs applicable to the Downtown Specific Plan require an 8-foot stepback for portions of buildings over specific heights. AR/24. No such clear and objective language is in the Height Variation Guideline, but Respondents now interpret the guideline as requiring that "all of the floors exceeding a one-story discrepancy…[must] be stepped back." RIOB at p. 22. Even accepting this *post hoc* litigation interpretation of the Height Variation Guideline, the Project meets this standard. *Every upper floor of the building is stepped back.* AR/947.

Elsewhere in their briefs, Respondents attempt to add important words to the Height Variation Guideline: that there must be a setback on each floor *and each elevation* of the building, and that these setbacks must be sufficient to reduce any height differential to a single story, as measured from the height of any nearby building—even a building that is forty feet away—and the height of the lowest setback on the elevation of the proposed building that faces the nearby building. But this language simply is not part of the Height Variation Guideline. It was offered as a completely new interpretation after the Commission had voted to disapprove the project for subjective reasons. The HAA does not allow cities to add new

and important provisions to its code long after an application is complete - and its purpose would be entirely frustrated if it did.

Respondents claim that "the City Council *interpreted the Requirement* as meaning that the required transition must be a step in height on the building face." RAOB at p. 46 (emphasis added). And that is exactly the problem: nothing on the face of the Guideline contains this requirement—it exists only in a non-codified "interpretation" the City offered to excuse the Planning Commission's unlawful decision to disapprove the Project. But the Legislature has stated clearly that cities can only apply standards "involving no personal or subjective judgment by a public official" that 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." § 65589.5, subd. (h)(8). The HAA further provides that projects may only be judged on the basis of standards as they exist at the time the application is considered complete—not later-adopted interpretations. § 65589.5, subd. (j)(1). Applying these requirements—along with the requirement that the statute must be interpreted to afford the fullest weight to housing, § 65589.5, subd. (a)(2)(L)—the Project meets every aspect of the Height Variation Guideline that qualifies as "objective."

III. The Proper Remedy Is A Writ of Mandate Directing the City to Comply with the HAA.

Appellants agree with Respondents that, if this Court reverses, the proper remedy is a writ of mandate directing the City to comply with the HAA. This Court should remand to the trial court with directions to grant the petition, and to enter an order and judgment finding that the City violated the HAA, directing the City to take appropriate action on the Project in compliance with the HAA, and to assume continuing jurisdiction

to ensure that its orders are followed and that the City take no further unlawful actions to preclude the development of the Project.[20]

CONCLUSION

Three decades ago, the Court of Appeal encountered another city that simply refused to comply with state housing law. The late Justice David Sills—a former Mayor—wrote for the court that "[t]he city appears to have chosen to ignore that state legislatures prevail over municipalities in the pecking order of governments." *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 546. That city, like San Mateo, invoked other values that it contended were more important than housing, but the court refused to bend the law to reflect those values. In that case, as here, "the fundamental value judgment at stake…was made by the Legislature in favor of housing." *Ibid.* The court closed with the following:

> We hope this case does not represent a trend on the part of local agencies to circumvent both the spirit and letter of state law. California municipalities are not fiefdoms unto their own. The governing bodies of cities are charged with the responsibility of *faithfully* executing the laws of the United States *and* State of California.

Id. at pp. 560-61 (emphases in the original).

The *Wilson* court's hopes have been disappointed. For the past several decades, some local governments have embarked on a concerted campaign to circumvent both the spirit and the letter of state housing law. This case is just the most recent of those efforts. Appellants seek to enforce the housing laws California's Legislature has enacted on behalf of the

---

[20] It is important to note that the Project is exempt from CEQA, AR/872-73, and in any event "CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws." Cal. Code Regs. tit. 14, § 15040(b). "The exercise of discretionary powers for environmental protection shall be consistent with express or implied limitations provided by other laws," Cal. Code Regs. tit. 14, § 15040(e), such as the HAA.

countless Californians whose interests are not represented by local governments but who are deeply affected by the state's housing supply crisis.

Petitioners and Appellants respectfully request that this Court reverse.

Dated: March 17, 2021 HOLLAND & KNIGHT LLP

By: */s/ Daniel R. Golub*
Daniel R. Golub
Attorneys for Petitioners-Appellants

CERTIFICATE OF WORD COUNT

California Rules of Court 8.204(c))

The text of this brief consists of 12,254 words, not including tables of contents and authorities, the cover information, the signature blocks and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: March 17, 2021 HOLLAND & KNIGHT LLP

By: */s/ Daniel R. Golub*
Daniel R. Golub
Attorneys for Petitioners-Appellants