Nos. A159320 & 159658

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

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

vs.

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

San Mateo County Superior Court, Case No. 18CIV02105
Honorable George A. Miram, Judge

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON BEHALF OF LAW PROFESSORS AND IN SUPPORT OF PETITIONERS CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, ET AL; PROPOSED AMICI CURIAE BRIEF OF LAW PROFESSORS CHRISTOPHER S. ELMENDORF, MICHELLE WILDE ANDERSON, ANIKA SINGH LEMAR, DAVE OWEN, DARIEN SHANSKE, AND KENNETH STAHL

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE PRESIDING JUSTICE OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT:

Pursuant to Rule 8.200(c) of the California Rules of Court, the undersigned law professors collectively request leave to file the accompanying Brief of Amici Curiae on behalf of ourselves and in support of Petitioners California Renters Legal Advocacy and Education Fund, *et al.* This brief is being timely filed within fourteen days of the filing of Appellant's Reply brief, filed on March 17, 2021.

STATEMENT OF INTEREST

Amici are six law professors who study and teach state and local government law, land use law, property law, and administrative law. We have no personal interest in this case, but submit this brief as concerned citizens with relevant professional expertise. The brief does not represent any position of the institutions with which we are affiliated.

Christopher S. Elmendorf is Martin Luther King, Jr. Professor of Law at UC Davis. He is the author of several recent or forthcoming articles about California's planning-for-housing framework. His work has been published in top journals in law and political science, including the *University of Chicago Law Review*, the *Columbia Law Review*, the *Yale Law Journal*, the *American Journal of Political Science*, and many others. He received his J.D. from the Yale Law School.

Michelle Wilde Anderson, Professor of Law and Robert E. Paradise Faculty Fellow at Stanford Law School, is a scholar of state and local government law whose research focuses on concentrated poverty and municipal finance and restructuring. Her work has been published in the *Yale Law Journal, Stanford Law Review, California Law Review, UCLA Law*

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Anika Singh Lemar is a Clinical Professor at Yale Law School. She teaches the Community and Economic Development clinic (CED), which provides transactional legal services to organizations seeking to advance economic opportunity. CED's clients include affordable housing developers, community development financial institutions, farms and farmer's markets, fair housing advocates, and neighborhood associations. In additional to her clinical work, she has published a number of articles in top law journals about land use law and procedure, and the role of the states in remediating local barriers to housing supply. She received her J.D. from New York University School of Law.

Dave Owen serves as the Harry D. Sunderland Professor of Real Property Law at the University of California, Hastings. He has taught courses in statutory interpretation and land use in addition to a range of administrative and environmental law courses. He has papers published or forthcoming in the *Stanford Law Review* and *UCLA Law Review*, among other leading journals. He received his J.D. from Berkeley Law.

Darien Shanske is a Professor at the University of California, Davis, School of Law. He is the primary author of the sections on local government, taxation and public finance in the only treatise on the California Constitution, and he has published numerous articles on state and local government in leading law reviews. He received his J.D. from Stanford Law School and his Ph.D. from UC Berkeley.

Kenneth Stahl is a Professor of Law and Director of the Environmental, Land Use, and Real Estate Law program at Chapman University Fowler School of Law. He has published many articles about land use, property, and state and local government law in journals such as the

University of Pennsylvania Law Review, the *George Washington Law Review*, and the *Urban Lawyer* (published by the state and local government section of the American Bar Association.) He received his J.D. from Yale Law School. Note: Professor Stahl currently represents the petitioner California Renters Legal Advocacy and Education Fund in unrelated litigation involving the Housing Accountability Act.

STATEMENT OF HOW THE PROPOSED AMICI CURIAE BRIEF WILL ASSIST THE COURT

Amici submit this brief with the goal of clarifying what the Housing Accountability Act (HAA) does, and how it fits into the larger landscape of state efforts both to countermand exclusionary zoning and to make the housing development process more predictable.

The superior court evidently thought the HAA quite strange, most especially its "reasonable person" standard for evaluating the consistency of a housing proposal with local requirements. We show it is not. The HAA's strategy for making the rules of the housing-development game more transparent and predictable builds on longstanding ideas in the law of real property; has near analogues in other state land-use laws; and represents a modest alternative to the kind of uniformity-imposing statute that California and other states have enacted when variegated and unpredictable municipal regulations operate as a drag on commercial activity that the state wants to promote. Nor does applying the HAA's reasonable-person standard to questions about the meaning of local ordinances traduce background principles of statutory interpretation, as Respondents suggest.

The other contribution of this brief is to correct a misunderstanding about the "narrow tailoring" prong of home-rule doctrine. The superior court and Respondents treat it as prescribing judicial inquiry into whether the Legislature chose the least restrictive means to advance the state's interests.

This is incorrect. In the very case that created the narrow-tailoring prong, the California Supreme Court called for deference to the Legislature's judgment about means. Deference is especially warranted when the Legislature acts to ensure an adequate statewide or regional supply of housing, because, as our brief shows, this interest circumscribes the municipal police power even in the absence of legislative interventions.

STATEMENT REGARDING PREPARATION OF THE BRIEF

Pursuant to California Rules of Court, Rule 8.200(c)(3), *amici* confirm that they authored the proposed amicus brief in its entirety and did not receive any monetary contribution to fund the preparation or submission of the brief.

Respectfully submitted,

Dated: March 29, 2021 By: _____

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with rule 8.208 of the California Rules of Court, the undersigned certifies that he knows of no other persons or entities with a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: March 29, 2021

By _____
Christopher S. Elmendorf

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Department of Housing and Community Development (HCD), Housing Accountability Act Technical Assistance Advisory (Sept. 15, 2020), <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos.shtml> 21

Department of Housing and Community Development (HCD), California's 2017 Housing Package, <https://www.hcd.ca.gov/policy-research/lhp.shtml> 22

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Glaeser & Gottlieb, *The Wealth of Cities: Agglomeration Economies and Spatial Equilibrium in the United States* (2009) 47 J. Economic Literature 983 18

Legislative Analyst Office (LAO), California's High Housing Costs: Causes and Consequences (Mar. 16, 2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> 19

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O'Neill et al, *Sustainable Development or the Next Urban Renewal?*(forthcoming) 47 Ecology L.Q. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532672> 20

Schwartz, *The Logic of Home Rule and the Private Law Exception* (1973) 20 UCLA L.Rev. 670 38

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Sen. Rules Com., Off. of Sen. Floor Analyses, 3d Reading Analysis of Sen. Bill No. 1515, as amended July 13, 2017 ..... 27, 30

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INTRODUCTION

There are two substantial legal questions in this case. One is whether the HAA's "reasonable person" standard for gauging a project's compliance with applicable standards limits judicial deference to local governments on the meaning of local zoning and design regulations. The other is whether that standard unconstitutionally infringes on charter cities' home-rule authority.

The HAA prevents local governments from denying housing projects on the basis of surprise interpretations of local standards. The superior court reached the contrary conclusion by distinguishing legal questions from factual questions, and deferring to the city on the law. This was error. The structure, text, and legislative history of the HAA reveal that the reasonable-person standard governs the whole of the mixed law-and-fact question of whether a project conforms to applicable standards.

As to the constitutional question, we make three points. First, the "narrow tailoring" requirement of home-rule doctrine does not license the kind of less-restrictive-alternative analysis that the superior court used to justify its decision. Second, the legislative judgments embodied in the HAA are owed a special measure of deference in light of *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 588 (*Livermore*), which holds that the municipal police power reaches an outer limit insofar as it impinges on the regional supply of housing. Third, the HAA is, in fact, a less-restrictive alternative to the kind of uniformity statute that state legislatures commonly adopt when an effusion of varying local requirements makes the ground rules for commerce too costly to discern and comply with.

If absolute uniformity of regulation in the interest of commerce satisfies the narrow-tailoring test (see *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1 [*Cal Fed*]), then so too does the far less restrictive HAA.

I. THE HOUSING ACCOUNTABILITY ACT FORECLOSES JUDICIAL DEFERENCE TO A LOCAL GOVERNMENT'S BELATED INTERPRETATION OF ITS DEVELOPMENT STANDARDS

San *Mateo's* Multi-Family Design Guidelines provide, "If height varies by more than 1 story between buildings, a transition or step in height is necessary." AR/10. The city officials and consultant who reviewed the instant project thought its landscaping, fourth-story stepback, and distance from the neighboring building satisfied this guidepost. But after the planning commission voted to deny the project, city staff interpreted the Multi-Family Design Guidelines to require stepbacks on *every* upper-floor elevation facing a shorter building, apparently without regard to distance, landscaping, or the project's overall compatibility with the Guidelines. AR/486-87.

This belated interpretation came as a surprise. No one at the planning commission hearing ventured that the Guidelines required stepbacks on every higher floor. AR/821-56.[1]

The HAA presumptively disallows local governments from denying housing projects if there is substantial evidence in the record that would *allow* (not require) a reasonable person to conclude that the project complies with applicable objective standards. (Gov. Code, § 65589.5, subds. (f)(4) & (j).) The fact that the planners, the consultant, and even the mayor deemed

[1] The Guidelines were briefly mentioned in connection with a trellis and balcony modification that the city's design consultant had suggested but which Commissioner Whitaker said she disfavored. AR/847-48. Whitaker voted to approve the project. None of the commissioners who voted against it mentioned the Guidelines. AR/ 834-52.

this project compliant certainly suggests that a reasonable person could conclude that it does in fact comply. Yet the superior court disagreed.

To justify its decision, the court conceptualized project-compliance determinations as consisting of distinct "law questions" (what the development standards mean) and "fact questions" (what the developer proposes to construct). The court presumed that the traditional norm of judicial deference to local governments continues to govern the former questions, notwithstanding subdivision (f)(4). (Order Denying Petition for Writ of Administrative Mandate (Nov. 7, 2019) at pp. 3-4.)

To explain the superior court's error, we start by situating the HAA within the California housing framework writ large, and then we discuss the function of subdivision (f)(4) within the HAA. This will make clear just how thoroughly the superior court's seemingly innocuous law vs. fact distinction would—if correct in this context—gut the HAA and, by extension, California's framework for redressing regional housing shortages. We then show that the superior court's reading of subdivision (f)(4) goes against the text and legislative history of the provision. Finally, we revisit the principle of "situational" deference to agencies under *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 and square it with the HAA.

A. The Mischief the HAA Combats: Restrictions on Housing Development Which Are Illegible to Outsiders

In 1980, the Legislature enacted a planning regime to determine, allocate, and enable production of the amount of new housing needed in each region of the state. The Department of Housing and Community Development (HCD) makes regional need determinations; regional councils of governments then allocate the housing target among member governments; and finally each local government enacts the "housing element" of its general plan, through which the locality shows how it will accommodate its share of the regional target. Housing elements are reviewed

and approved by HCD. The entire process repeats on a 5-8 year cycle. (See Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts* (2019) 71 Hastings L.J. 79, 100-103 (*Beyond the Double Veto*).)

This framework was a laudable effort to solve a serious collective action problem among local governments. Each city in a metro region benefits when other cities add to their supply of housing. The expansion of a productive region's housing stock brings down prices and allows more workers to access the regional labor market. This in turn provides what economists call "agglomeration" benefits: the higher wages, innovation, specialization, and de facto labor insurance that result when lots of people and firms cluster near one another. (See Glaeser & Gottlieb, *The Wealth of Cities: Agglomeration Economies and Spatial Equilibrium in the United States* (2009) 47 J. Economic Literature 983.) But within any given city—and especially within desirable neighborhoods within a city—the local case for more and denser housing looks much less appealing. New housing means construction noise, street congestion, taxes for new infrastructure, and new neighbors who may not look, think, act, or vote like longtime residents of the community. Moreover, in suburbs whose politics are dominated by homeowners, the very notion that lower housing prices could be a good thing is often anathema. (See Nall & Marble, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development* (forthcoming) J. Politics <https://doi.org/10.1086/711717>.) The upshot is that when each city is left to its own devices, too little housing gets approved.

Solving this collective action problem is tough. Looking back in 2015, the Legislative Analyst's Office (LAO) concluded that California's regional planning framework had not gotten the job done. The LAO estimated that developers would have needed to build 2.7 million more

homes from 1980 to 2010—roughly double the actual rate of production—to have kept the real price of housing from escalating beyond the already-expensive levels of 1980. (LAO, California's High Housing Costs: Causes and Consequences (Mar. 16, 2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> at pp. 20-24.)

In 2017, the Legislature ratified the LAO's call to massively ramp up housing production (Sen. Bill No. 167, 2017-2018 Reg. Sess.; Gov. Code, § 65589.5, subd. (a)(2)), and began a concerted push to strengthen the housing framework on multiple fronts. (See Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework* (forthcoming) 46 Ecology L.Q. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500139>.) Reinforcements to the HAA, including the new "reasonable person" standard and a potent notice requirement, were at the center of this effort.

For California to solve its housing crisis without entirely preempting control over land use, municipal regulations must be rendered legible to two audiences: (1) the developers deciding where and how much to invest in site acquisition and the design of housing projects; (2) the state officials tasked with determining whether a city's housing element reasonably accommodates its share of regional need. This is the essential function of the HAA. It aims to provide "reasonable certainty . . . to all stakeholders" about what may be built on a site. (Assem., 3d reading analysis of Assem. Bill No. 1515, as amended May 1, 2017, p. 2.)

A municipality's housing element or zoning map may *say* that certain parcels may be developed for residential use at specified densities, but is it prudent for HCD to approve a housing element or for a developer to invest her money believing this to be true? The answer for too long was "No." The reason is that since the 1970s, local land-use law has become ever more

complex and discretionary. (See Selmi, *The Contract Transformation in Land Use Regulation* (2011) 63 Stan. L.Rev. 591.) The best evidence on point comes from an ongoing UC Berkeley study of the development-entitlement process in sixteen California cities. The researchers found that nearly all multifamily housing projects undergo some form of discretionary review by the local government. (O'Neill et al, *Developing Policy from the Ground Up: Examining Entitlement to Inform Policy and Process* (2019) 25 Hastings Environmental L.J. 1, 49 [all proposed developments of five or more units in Bay Area jurisdictions underwent discretionary review]; O'Neill et al, *Sustainable Development or the Next Urban Renewal?* (forthcoming) 47 Ecology L.Q. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532672> [across all sixteen cities, 82% of multifamily projects were subject to discretionary review].)

In this new world of discretionary permitting, developers trying to figure out what can be built have to learn the byways, conventions, and preferences of the actors who exercise the discretion. This benefits insiders over outsiders, reducing competition in the land-development market. And even for insiders, permitting remains unpredictable when city councils take their cues from neighborhood voices that may or may not mobilize against any given project. The resulting uncertainty also incentivizes developers to site projects in lower-income neighborhoods where renters predominate, since "homeowners are more likely to make comments related to land use policies than are renters . . . [and] homeowners are much more active in local politics when questions of land use are on the agenda." (Yoder, *Does Property Ownership Lead to Participation in Local Politics? Evidence from Property Records and Meeting Minutes?* (2020) 114 American Political Science Rev. 1213, 1219-20; see also Einstein et al., Neighborhood Defenders: Participatory Politics and America's Housing Crisis (2019)

[using public-meeting minutes to document outsized influence of affluent homeowners over fate of nearby development proposals].)

B. How the HAA Works

The Housing Accountability Act makes local development standards more legible to outsiders by circumscribing what qualifies as enforceable municipal law for the purpose of denying or reducing the density of a proposed housing project.

In general, a denial or density reduction must be based on zoning standards and criteria that are "objective"; that were "in effect at the time that the … project's application [was] determined to be complete"; and that were identified in a written explanation provided by the local government to the applicant within 30-60 days of the date on which the application was determined to be complete. (Gov. Code, § 65589.5, subd. (j); HCD, "Housing Accountability Act Technical Assistance Advisory" (Sept. 15, 2020), <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos.shtml>.)

A project is deemed to comply with objective standards that the local government failed to identify in the 30-60 day notice.[2] (Gov. Code, § 65589.5, subd. (j)(2)(B).) There is a safety valve, however, if the project would have "a specific, adverse impact upon the public health or safety." (*Id.*, subd. (j)(1).)

To be clear, the HAA does not prohibit review on the basis of subjective standards. Local governments remain free to impose conditions of approval that would make a project better conform to eye-of-the-beholder standards. But denials and density reductions are foreclosed.

[2] It would seem that the plaintiff could have litigated this case in the court below on the theory that the city failed to provide timely notice of the alleged Multi-Family Design Guidelines violation.

The HAA's notice requirement and deemed-to-comply proviso were added as part of a fifteen-bill housing package in 2017. (HCD, California's 2017 Housing Package, <https://www.hcd.ca.gov/policy-research/lhp.shtml>.) At the same time, the Legislature reinforced the HAA's objective standards requirement with the new reasonable-person test for resolving disputes over whether a project is consistent with applicable standards: a project must be judged consistent "if there is substantial evidence that would allow a reasonable person to conclude" that the project complies. (Gov. Code, § 65589.5, subd. (f)(4), emphasis added; Assem. Bill No. 1515 (2017-2018 Reg. Sess.) § 1.5.)

The 2017 HAA amendments were a "game changer" (Sen. Comm. on Transportation and Housing, analysis of AB 3194, as amended June 20, 2018, p. 3.), but the statute as amended is not an aberrant growth in the body of our law. On the contrary, the HAA's core requirements have deep roots in Anglo-American property law and the traditions of California and other states. The statute's anti-retroactivity norm echoes the vesting-date provisions found in California's subdivision statute (Gov. Code, § 66498.1, subd. (b)) and the laws of at least eleven other states (4 Salkin, American Law of Zoning § 32:3 (5th ed. 2015)). The statute's notice requirement can be seen as a public-law counterpart to recording acts and marketable title statutes, which require persons who have a legal right to restrict the use of a parcel of land to provide clear, timely notice of the restriction or forfeit their right to enforce it against subsequent purchasers.[3] And the HAA's deemed-

[3] To be sure, there's a substantial difference in the type of notice required. In the private law of property, reasonable servitudes only need to be recorded, whereas under the HAA, a city must provide actual, written notice to the developer of the specific standards that the developer's proposal is said to violate. (Gov. Code, § 65589.5, subd. (j)(2).) The HAA's amped-up notice requirement is a reasonable response to the baffling complexity of land-use regulation.

to-comply proviso has near counterparts in the constructive-approval provisions found in the land use codes of nearly half of the states (Brooker & Cole, *Automatic Approval Statutes: Escape Hatches and Pitfalls* (1997) 29 Urban Lawyer 439), as well as California's Permit Streamlining Act (Gov. Code, § 65956, subd. (b)).

Finally, and of most relevance to the present case, the HAA's reasonable-person definition of consistency builds on old currents in the law of real property. Functionally, municipal land use codes are like restrictive servitudes, in that they determine what may be built where. When a private party seeks to enforce an ambiguous servitude against the successor to the original servient estate, should the servitude be interpreted from the point of view of the original grantor and grantee, or from the point of view of the now-owner of the servient estate, who was not a party to the deal and may be quite unfamiliar with the thinking of the original parties? Relatedly, should the court rely on parole evidence to determine the scope of the servitude, or should the court instead use default rules established as a matter of law?

Courts approach these questions in different ways, but one prominent perspective in the caselaw and secondary literature holds that judges should interpret property instruments from the point of view of third parties, relying exclusively on the terms of the written instrument, supplemented, where necessary, by default rules. Other courts prioritize the intentions of the grantor. (See Carloni, *The Use of Extrinsic Evidence to Interpret Real Property Conveyances: A Suggested Limitation* (1977) 65 Cal. L.Rev. 897; cf. Merrill & Smith, *The Property/Contract Interface* (2001), 101 Colum. L.Rev. 773.)

The old debate in property law over interpretive perspectives is analogous to the debate now unfolding through the HAA in public land-use law. The four-corners-of-the-instrument approach in private law has widely

recognized benefits: It provides certainty for buyers, reducing search costs and encouraging reliance on the public records. But it has downsides too, making it harder for drafters of property conveyances to achieve their intended effect. The same goes for the HAA's reasonable-person standard. It increases certainty for downstream property owners, allowing them to rely on the zoning code as written. A developer thinking about buying a site doesn't have to pay an expensive lawyer to excavate the code's legislative history or hire consultants who have "relationships" with city officials, and the developer needn't fear surprise code interpretations. The downside is that city councils have to draft more precisely and exercise more foresight when writing land use codes.

Weighing such tradeoffs is a job for the Legislature. With the HAA amendments of 2017, the Legislature came down firmly on the side of the developer, as was its prerogative in deciding how to reasonably limit the extraterritorial effects of municipal land use restrictions.

C. The Superior Court's Gloss on Subdivision (f)(4) Would Gut the HAA's Objectivity and Anti-Retroactivity Norms

The problem with deferring to a local government's belated interpretation of its development standards—as the superior court did—is that any mushy standard can be made clear cut after the fact, with "objectifying" interpretations offered by an agency charged with its application.

The facts of this case make the point. Again, after the planning commission voted to deny the project, city staff interpreted the Multi-Family Design Guidelines to require stepbacks on every upper-floor elevation facing a shorter building, apparently without regard to distance, landscaping, or other "transition." AR/487.

This interpretation of the Design Guidelines did make them more objective. (And presumably the city could have gone even further—say, interpreting the Guidelines to require a stepback of at least X feet on every floor that faces a shorter building less than Y feet away.) But there's no way that a developer or an HCD staffer reading the Multi-Family Design Guidelines, let alone the zoning code, could foretell that such an interpretation would be adopted.

If cities received deference on time-of-denial interpretations of their development standards, the structure of the HAA would fall apart. The prohibition against denying projects on the basis of subjective standards would be for naught, since most any subjective standard could be made temporarily "objective" with a newly announced, time-of-denial construction. So too, such deference would defeat the prohibition against denying projects on the basis of standards not in existence when the developer's application was deemed complete. A single, vague, all-purpose standard—e.g., "every project must be reasonably compatible with the character of the surrounding neighborhood"—could be flexibly deployed with crisp time-of-denial interpretations against any project that neighborhood agitators oppose.

D. The Text and Legislative History of Subdivision (f)(4) Cut Against the Superior Court's Construction

The argument from structure and purpose against the superior court's gloss on the HAA's reasonable-person standard draws reinforcement from the text and legislative history of subdivision (f)(4) itself. Start with the text:

> [A project] shall be deemed consistent, compliant, and in conformity with [applicable standards] if there is substantial evidence that would allow a reasonable person *to conclude* that the housing development project . . . is consistent, compliant, or in conformity.

(Gov. Code, § 65589.5, subd. (f)(4), emphasis added.) The ultimate question under (f)(4) is not whether a reasonable person could deem the local decisionmaker's factual findings to be adequately supported by the evidence; rather, it's whether a reasonable person could conclude that the project is compliant. In lawyerly parlance, we often speak of adjudicators making "findings" about facts, whereas "conclusions" are about questions of law or mixed questions of fact and law. That (f)(4) asks whether a reasonable person could "conclude" that the project complies suggests that the reasonable-person standard governs the mixed fact-and-law question of the project's consistency with applicable standards.

The legislative history of Assembly Bill 1515, which added subdivision (f)(4), confirms as much. Proponents were laser-focused on the meaning of consistency:

> The HAA's intent is to provide appropriate certainty to all stakeholders in the local approval process . . . . Unfortunately, NIMBY forces often mobilize anti-housing sentiment, and local governments then refuse to extend HAA's protections to projects *that could reasonably be found to be consistent* with the local planning rules. This creates far too much latitude for anti-housing and development sentiments to thwart reasonable and much-needed housing.
>
> It is still too easy for NIMBY's to oppose projects and avoid the HAA based on *highly debatable claims of inconsistency* with local planning and [zoning] ordinances.

(Assem. Com. on Housing & Community Development, Assem. Bill No. 1515 Bill Summary (2017-2018 Reg. Sess.) Apr. 26, 2017, p. 4-5, emphasis added.)

A leading opponent, the American Planning Association, also thought the bill would wipe out cities' interpretive discretion. (Assem., 3d reading analysis of Assem. Bill No. 1515, as amended May 1, 2017, p. 4 [quoting the

APA's complaint that "a project would have to be found consistent with local plans if there's any evidence *or strained interpretation* supporting a finding of consistency"], emphasis added.)

In the Senate, proponents of AB 1515's companion bill argued that state courts had become "too deferential," accepting almost "any justification" for denying housing projects. (Sen. Com. on Transportation & Housing, Rep. on Sen. Bill No. 167 (2017-2018 Reg. Sess.) Apr. 4, 2017, p. 5.) No one advanced the incongruous position that courts were giving too much deference to cities on questions of fact but properly deferring on questions about the meaning of local ordinances.

The simple change effected by AB 1515 was clearly explained by the Senate Rules Committee. Under then-current law, "a local government's decision will be upheld [by the courts] unless no reasonable person could have made the same decision." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1515, as amended July 13, 2017, p. 4 [citing *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648].) "This bill … changes the standard of review by providing that a project is consistent if there is substantial evidence that would allow a reasonable person to find it consistent." (*Ibid.*) In short, instead of asking whether a reasonable person *could agree with the city's decision* about a project's consistency, courts are now to ask whether a reasonable person *could agree that the project itself is consistent*, regardless of what the city decided.

This simple change was profound, and the Legislature knew it. When the Legislature revisited the HAA a year later, it called the (f)(4) consistency standard a "game changer." (Sen. Comm. on Transportation and Housing, analysis of AB 3194, as amended June 20, 2018, p. 3.) Of course, subdivision (f)(4) wouldn't have been a game changer, and it wouldn't achieve the Legislature's goal of providing "certainty to all stakeholders" (Assem., 3d

reading analysis of Assem. Bill No. 1515, as amended May 1, 2017, p. 2), if cities remained free to reject projects on the basis of surprise, time-of-denial interpretations of their land use codes.

Finally, should any doubts persist as to the scope of subdivision (f)(4), it must be remembered that "this section should 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, § 65589.5, subd. (a)(2)(L).)

E. Subdivision (f)(4) as Applied to Mixed Questions of Fact and Law Coheres with *Yamaha*

Respondents argue that applying (f)(4) to questions about the meaning of local ordinances would transgress the foundational precepts of statutory interpretation articulated in *Yamaha*, *supra*, 19 Cal.4th 1, and regularly invoked by lower courts to justify deferring to cities' interpretations of their land use codes. (Respondents' Brief in Opposition to Appellants' Opening Brief, at pp. 35-37, 49-51.)

Not so. The HAA meshes easily with the *Yamaha* framework, and usefully guides its application. Under *Yamaha*, courts interpreting a statute or ordinance that an administrative body has already glossed must exercise "independent judgment," while giving "consideration and respect" to the agency's interpretation. (19 Cal. 4th 1 at p. 7.) The administrative construction, though not "bind[ing]" on the courts, may "persuade" in the right circumstances. [4] (*Ibid*.)

> Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent — the "weight" it should be given — is thus fundamentally situational. A court assessing

[4] Unless it is a "quasi-legislative regulation[] adopted by an agency to which the Legislature has confided the power to 'make law,'" in which case it is binding. (19 Cal. 4th 1 at p.71.)

> the value of an interpretation must consider complex factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command. [There are] two broad categories of factors relevant to a court's assessment of the weight due an agency's interpretation: those "indicating that the agency has a comparative interpretive advantage over the courts," and those "indicating that the interpretation in question is probably correct."

(*Yamaha, supra,* 19 Cal.4th 1 at p. 12 [quoting Professor Michael Asimow]).

As Respondents point out, courts have often thought that cities have a comparative interpretive advantage when it comes to land use, because cities are "likely to be intimately familiar with regulations [they] authored and sensitive to the practical implications of one interpretation over another." (Respondents' Brief in Opposition to Appellants' Opening Brief, at p. 37, quoting *J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486.)

But the Legislature is also owed "consideration and respect," which must inform the "situational" inquiry under *Yamaha*. As noted, the Legislature declared through AB 1515 and SB 167 that state courts were "too deferential" in accepting "any justification" cities offered for denying housing projects. (Sen. Com. on Transportation & Housing, Analysis of Sen. Bill No. 167 (2017-2018 Reg. Sess.) Apr. 4, 2017, p. 5.) The old judicial assumption about local agencies' comparative interpretive advantage did not take into account that local agencies are also political entities and that they might wield their interpretive powers in unexpected ways that systematically hurt outside stakeholders. (See Assem. Com. on Housing & Community Development, Rep. on Assem. Bill No. 1515 (2017-2018 Reg. Sess.) Apr. 26, 2017, p. 4-5 [finding that "NIMBY forces … mobilizing anti-housing sentiment" cause the denial of "much-needed" housing projects that "could reasonably be found to be consistent with the local planning rules"].)

The Legislature therefore undertook to "provide the courts with clear standards for interpreting the HAA [local ordinances[5]] in favor of building housing." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1515, as amended July 13, 2017, p. 5, emphasis added.) The standard the Legislature chose—"could [the project] reasonably be found to be consistent with the local planning rules" (Assem. Com. on Housing & Community Development, Rep. on Assem. Bill No. 1515 (2017-2018 Reg. Sess.) Apr. 26, 2017, pp. 4-5)—must inform any *Yamaha* analysis. (See also *San Francisco Fire Fighters Loc. 798 v. City & Cty. of San Francisco* (2006) 38 Cal.4th 653, 669 ["the discretion granted an agency by the legislation authorizing its duties, and hence the appropriate standard of review, may vary depending on the language and intent of that legislation"].) Applying these principles, a court should give "weight" to a city's interpretation of its standards, in the context of a specific project, insofar as the city points to factors indicating that no reasonable person could disagree with it.

To be sure, the analysis could come out differently if the city had established its interpretation—in manner consistent with the HAA's transparency and antiretroactivity norms—prior to the applicant's submission of her project. For example, a city could authorize its planning department to write interpretive rules fleshing out the city's land use code. If the department then published and indexed its interpretive rules, making them as accessible as the underlying "general plan, zoning, and subdivision standards and criteria" on which the HAA encourages developers to rely (Gov. Code, § 65589.5, subd. (j)(1)), the city could apply the interpretations

[5] The quoted passage uses the term "HAA," but from context, we think the author intended to write "local ordinances," not "HAA."

to subsequently submitted projects. An interpretation thus established is for all practical purposes a land use "standard," and if it was "in effect at the time that [a development] application was deemed complete," it may be used to deny or reduce the density of the project. (Gov. Code, § 65589.5, subd. (j)(1).)

In sum, the HAA channels, rather than forecloses, judicial deference to a city's interpretations of its land use ordinances. Interpretations established by rule, in advance of the developer's application, may warrant deference. Interpretations first announced during municipal review of a project application may be accepted only if no reasonable person would see the matter differently. This is just a version of *Yamaha*'s situational deference. The HAA, by prescribing a point of view (the reasonable person's) and foregrounding certain contextual factors (timing and notice), guides *Yamaha*'s application to municipal land use codes.

II. THE HOUSING ACCOUNTABILITY ACT DOES NOT UNCONSTITUTIONALLY INFRINGE ON CHARTER CITIES' HOME-RULE AUTHORITY

The superior court held in the alternative that if section 65589.5(f)(4) does not allow the City of San Mateo to deny the instant project on the basis of the city's belated interpretation of the Multi-Family Design Guidelines, then the HAA is unconstitutional.

There can be no serious dispute that cities have legitimate regulatory interests in residential development, or that the regional housing supply—impacted as it is by cities' collective action problem (see Part I, above)—is a matter of statewide concern. Nor can it be gainsaid that the HAA's effort to make local development restrictions more legible to developers and HCD alike is "reasonably related" to the state interests occasioned by California's housing shortages. (See Parts I.A & I.B, above.) The constitutional question

therefore turns on whether the HAA is "narrowly tailored" to the statewide concerns invoked to justify the statute's preemptive effect. (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 556.)

The court below judged the HAA inadequately tailored because it "is not limited to cities and counties that have a history of denying housing developments"; because it "applies to any project having two or more units," not just to "larger projects that may have a significant effect on housing availability"; and because it requires no showing of "bad faith by the municipal authority." (Order Denying Petition for Writ of Administrative Mandate (Nov. 7, 2019) at pp. 7-8.) The court also intimated that the HAA is not narrowly tailored because it applies to market-rate projects, not just subsidized, low-income housing. (Order Denying Motion to Vacate and Motion for a New Trial (Jan. 9, 2020) at pp. 7-8.) On appeal, Respondents makes no argument about the HAA as a whole but do assert that subdivision (f)(4) is not reasonably related or narrowly tailored to the state's interest because the state didn't present enough evidence about project denials as a barrier to housing supply, and because the state could have addressed the housing-supply problem in other ways (such as by reforming the California Environmental Quality Act or providing more money for subsidized housing). Respondents' Brief in Opposition to Intervenor's Opening Brief, at pp. 55-56, 62; Respondents' Brief in Response to Appellants' Opening Brief, at p. 13.

These critiques misunderstand what narrow tailoring requires vis-à-vis state efforts to ensure an adequate regional or statewide supply of housing. We make three points. First, narrow tailoring in the home rule context does not, as a general matter, license courts to displace reasonable legislative judgments about how to advance statewide interests. The Legislature chose to facilitate housing production by making local

development standards clearer and more predictable, and the fact that a judge or a city commends a different strategy is not grounds to set aside the Legislature's choice. Second, even if more exacting judicial scrutiny were warranted in some home-rule contexts, it's clearly unwarranted when the regional or statewide housing supply is at stake. This follows from the limitation on the municipal police power recognized in *Livermore, supra*, 18 Cal.3d 582, a limitation that requires classically legislative judgments about how best to balance municipal against regional interests. Third, assuming *arguendo* that our first two points are wrong, and that narrow tailoring in this context does encompass a least-restrictive-means inquiry, the HAA still passes muster. It is far less restrictive than the kind of uniformity-imposing measure the Legislature has previously adopted—and courts have accepted—when a panoply of varying local regulations operates as a drag on commercial activity.

A. The Doctrinal Requirement that Preemptive State Legislation Be "Narrowly Tailored" to Matters of Extramural Concern Does Not License Judicial Second-Guessing of Reasonable Legislative Judgments

The first and only case in which the California Supreme Court has applied the narrow-tailoring requirement in the home-rule context is *Cal Fed, supra*, 54 Cal.3d 1. *Cal Fed* disavows the searching inquiry into less restrictive alternatives that the superior court pursued in this case.[6]

At issue in *Cal* Fed was a state statute that established a single, uniform tax on financial institutions, preempting all municipal fees and taxes as applied to these institutions. Los Angeles argued that the state law was too sweeping because the state's interest in the financial health of savings-

[6] Narrow tailoring always requires some degree of means-ends fit, but the closeness of judicial scrutiny differs greatly from one narrow-tailoring context to the next. Compare, e.g., *Johnson v. California* (2005), 543 U.S. 499, 502 with *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 799.

and-loan institutions could be adequately served by a less-restrictive "offset" model of taxation. (*Cal Fed*, *supra*, 54 Cal.3d at p. 23.) The California Supreme Court disagreed with Los Angeles about the efficacy of the offset alternative, but ultimately this was beside the point:

> The question is not whether the [preemptive state statute] was prudent public policy or whether the municipal tax burden on savings banks has sufficient impact on the industry's financial health to make the [state statute] an advisable or effective measure. The issue is whether the income tax burden on financial corporations . . . is of sufficient extramural dimension to support legislative measures reasonably related to its resolution. We conclude that it is, ending the inquiry.

(*Cal Fed*, *supra*, 54 Cal.3d at pp. 23-24, emphasis added, internal citations and punctuation omitted.) The court went on to state that its holding was based on "deference" to state legislative judgments, observing that any doubt as to the power of the state to interfere in matters traditionally viewed as purely municipal "must be resolved in favor of the legislative authority of the state." (*Ibid.)*

But what of narrow tailoring? It's a cipher in *Cal Fed*, mentioned only in a conclusory statement in the next paragraph of the Court's opinion. (54 Cal.3d at p. 24.) To be sure, *Cal Fed* does reiterate that "the sweep of the state's protective measures may be no broader than its interest," *Cal Fed*, *supra*, 54 Cal.3d at p. 24. Presumably the state could not have preempted municipal taxes on all businesses (not just financial institutions) in order to guard the health of financial institutions. So too, it would likely be unconstitutional to preempt municipal regulation of all development (not just residential development) in order to serve the state interest in an adequate supply of housing. But unless the legislative response is preposterously overbroad, courts must defer to it.

Deference is appropriate at the "narrow tailoring" prong because by this stage in the analysis, a court has already established that there *is* a statewide interest by means of a more probing analysis. (See *Johnson v. Bradley* (1992) 4 Cal. 4th 389, 405 ["our inquiry regarding statewide concern focuses . . . on the identification of a convincing basis for legislative action originating in extramunicipal concerns"], internal citation and quotation marks omitted.) And deference on the question of tailoring does not prevent a court from invalidating, as unreasonable, a preemptive measure that plainly undermines the interests said to justify it. (See *id.* at 410 ["Petitioners cite nothing to support the proposition that [the state's] ban on public funding of political campaigns advances in any way the goal of enhancing the integrity of the electoral process. In fact, the opposite appears to be true."].)

But because California clearly needs more housing regionally and statewide, and because the HAA's reasonable-person standard plausibly advances that legitimate state interest by making the ground rules for development more predictable (see Part I, above), there is no warrant in the California Supreme Court's jurisprudence for invalidating the HAA's standard because a judge speculates that the Legislature could have pursued its objective in some other, less intrusive manner.

B. *Livermore* Reinforces the Need for Judicial Deference to Legislative Judgments About What Is Reasonably Necessary to Achieve an Adequate Supply of Housing

The propriety of judicial deference to the Legislature in this case is reinforced by *Livermore*, *supra*, 18 Cal.3d 582. Not only did the *Livermore* court confirm that regional interests in an adequate supply of housing circumscribe the municipal police power, the court also prescribed a balancing test that entails classically legislative judgments about how best to reconcile the interests of insiders and outsiders. If it is appropriate for a court

to make such policy judgments, as it is, then *a fortiori*, it is appropriate for the Legislature to do so.

Livermore concerned a local ballot measure that conditioned the availability of housing permits on the existence of adequate public infrastructure to serve new development. (*Livermore, supra*, 18 Cal.3d at p. 590.) The measure was reasonable on its face, yet the plaintiffs said it would shut down housing production in the city indefinitely, materially diminishing the regional supply of housing. (*Id*. at pp. 600, 610.) This put the court in a bind. Simply deferring to the judgment of the city's electorate seemed wrong, given the measure's potential effect on "the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative." (*Id*. at p. 607, emphasis added.) Yet decades of precedent had endowed local zoning restrictions with a strong presumption of validity, and the fact that the city's ordinance was alleged to have extraterritorial effects hardly made it unusual. (*Id*. at p. 603.)

The *Livermore* court's solution was to replace the usual presumption of validity with an empirically-minded balancing test for land use regulations that "may strongly influence the supply and distribution of housing for an entire metropolitan region." (*Livermore*, *supra*, 18 Cal.3d at p. 607.) Trial courts were asked to "forecast the probable effect and duration of the [land-use] restriction"; to "identif[y] and weigh[] the competing interests"; and finally to determine whether the ordinance, "in light of its probable impact, represents a reasonable accommodation of the competing interests." (*Id*. at pp. 608-609.)

If judges may invalidate municipal land use regulations on the ground that the regulation's probable adverse effect on the regional supply of housing outweighs the benefits it provides to incumbent city residents, then surely the Legislature may do the same. After all, in our democratic political order, responsibility for finding a "reasonable accommodation" among "the

competing interests" in what *Livermore* rightly called an "area [of] deep social antagonisms" (18 Cal.3d at p. 608), is a classically legislative responsibility. City councils cannot be expected to give equal weight to the interests of nonresidents and residents, as *Livermore* pointed out, but that doesn't make the task of reconciling competing interests any less a legislative responsibility. It merely suggests that the legislative body doing the work should be the Legislature, not a city council.

There are important practical advantages to reconciling insiders' and outsiders' interests legislatively or administratively, rather than judicially. Whereas constitutional challenges to exclusionary zoning inevitably concern a discrete ordinance or practice, see *Northwood Homes, Inc. v. Town of Moraga* (1989), 216 Cal.App.3d 1197, 1201-04 (declining to consider cumulative effects of related ordinances in a regional-welfare challenge), the Legislature can take a broader perspective, addressing the cumulative effect of a panoply of local practices. And that's exactly what the Legislature did with the HAA amendments of 2017. The Legislature found that housing development was being held back not by one specific ordinance, or even one type of ordinance, but by the accumulation of uncertainties, all exacerbated by judicial deference to local governments. (See Part I, above.)

Here's another way to put the point: evaluated in isolation from everything else, San Mateo's Multi-Family Design Guidelines probably would not be judged to have a significant effect on the regional supply of housing. But in a world where housing projects can be denied on the basis of surprise interpretations of development standards, the cumulative effect on the regional supply of housing of San Mateo's Multi-Family Design Guidelines, together with similarly open-ended standards in other parts of the city's land-use code, and similarly open-ended provisions in every other Bay Area city's code, may well be massive. Yet this would never come to light in a *Livermore*-type challenge, because the mechanics of litigation simply do

not allow plaintiffs to attack in a single case *every* somewhat-discretionary development standard which now exists or may be adopted in the future in *every* Bay Area municipality. Only the Legislature can tackle this question.

C. The HAA's Reasonable-Person Standard Is a Less Restrictive Alternative to the Type of Uniformity-Imposing Legislation that the California Supreme Court Has Previously Upheld

For the reasons explained above, we do not think courts may invalidate reasonable housing legislation on the ground that some less restrictive alternative might also serve the state's legitimate interests pretty well. But assuming *arguendo* that we're wrong, the "reasonable person" standard of subdivision (f)(4) should nonetheless be upheld for it is, in fact, vastly less restrictive than the type of legislation which the state has enacted on other occasions in the interest of regulatory certainty, and because it is integral to the operation of the HAA.

Consider *Cal Fed* again. There, the state preempted all municipal fees and taxes as applied to financial institutions in order to create a more certain, predictable environment. (*Cal Fed*, *supra*, 54 Cal.3d at p. 10.) That was not idiosyncratic. The Legislature has acted repeatedly to create uniform rules for commercial transactions, and the courts have consistently given effect to legislative judgments about whether uniformity in the interest of commerce is warranted. (See, e.g., *Lippman v. City of Oakland* (2017) 19 Cal.App.5th 750, 764 ["[W]e conclude the Legislature intended to preempt local government's power to legislate in the field of housing building standards, except as specifically permitted by state statutes"]; *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1256 ["[I]t is beyond peradventure that effective regulation of mortgage lending … requires uniform treatment throughout the state," quotations omitted]; *Isaac v. City of Los Angeles* (1998) 66 Cal.App.4th 586, 600 ["[S]tatewide uniformity in lien priority is essential"]; see also Schwartz, *The Logic of*

Home Rule and the Private Law Exception (1973) 20 UCLA L.Rev. 670 [arguing that local governments lack authority to establish rules of contract, property, or tort, because local variation in private law would create excessive information costs for commercial actors].)

There is no reason to think that the existing patchwork of zoning and design standards is any less "costly for the construction industry" than the building-code patchwork that led the Legislature to occupy that field. (See *Danville Fire Protection Dist. v. Duffel Financial and Constr. Co.* (1978) 58 Cal.App.3d 241, 248 ["A patchwork of varying [building] code regulations would be extremely costly for the construction industry, particularly in metropolitan areas"].) But instead of quieting the buzzing complexity of municipal land use regulation with a uniform state zoning code, the HAA just requires local governments to mean what they say when it comes to housing development, and to say it clearly and promptly.

As we explained in Part I, above, the core of the HAA consists of (1) a notice requirement (local governments must inform developers within 30-60 days of objective standards that a project violates, on pain of the project being "deemed to comply"); (2) a definition of consistency (a project is consistent with applicable standards if a reasonable person could deem it so); and (3) an anti-retroactivity norm (projects may not be denied on the basis of standards established after the developer's application was determined to be complete). (Gov't Code, § 65589.5, subds. (f)(4) & (j).)

By framing their constitutional attack as merely concerned with the HAA's definition of consistency, Respondents imply that subdivision (f)(4) can somehow be severed from the statute or narrowed by judicial construction while leaving the HAA's basic function intact. (Respondents' Brief in Opposition to Intervenor's Opening Brief, at p. 45.) This is false. If the reasonable-person definition of consistency did not cover the whole of the mixed law-and-fact question of whether a project complies with

applicable standards, cities could easily evade the HAA's anti-retroactivity and objectivity norms with surprise, time-of-denial constructions of the relevant standards. (See Part I.C, above.) Whatever narrow tailoring may require in the home-rule context, surely it is not an occasion for judges to "narrow" the Legislature's reasonable remedy for a serious statewide problem to the point of nullification.

The HAA's reasonable-person definition of consistency also solves an enduring difficulty with objectivity requirements. As an Oregon adjudicator put it, "few tasks are less clear or more subjective than attempting to determine whether a particular land use approval criterion is clear and objective." *Rogue Valley Ass'n of Realtors v. City of Ashland* (Oregon Land Use Board of Appeals, Sept. 24, 1998) No. 97-260, at p. 17. Objectivity is a matter of degree. To ask whether standard regulating residential development is objective as a matter of law is to ask whether it is sufficiently or reasonably objective, given the purposes at hand and the fallibility of human foresight.

The HAA's reasonable-person test represents a double-barreled solution to this line-drawing problem. First, it incentivizes local governments to adopt very clear standards. This is so because "if a local government chooses to employ mushy standards, it will have enormous difficulty denying any project, as the very mushiness of the standards means there will almost always be enough evidence to allow (not require) a reasonable person to conclude that the standards were met." (*Beyond the Double Veto*, *supra*, 71 Hastings L.J. at p. 121.) Second, the HAA's new evidentiary standard lowers the stakes of the threshold, "Is this standard objective?" question. If a court gets that question wrong—finding a too-fuzzy standard to be objective—it's still very unlikely that the project will be permissibly denied on the basis of the standard. Again, the fuzzier the

standard, the more implausible the assertion that no reasonable person could deem the project to comply with it.

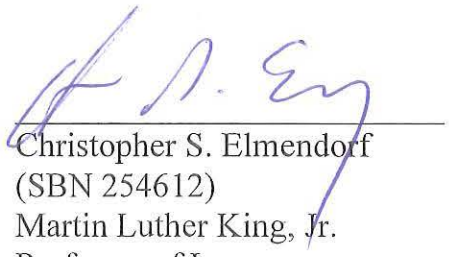
Finally, it bears emphasis that the HAA, including subdivision (f)(4), is a less restrictive alternative to requiring ministerial review of zoning-compliant projects, because the HAA lets cities impose discretionary conditions of approval that do not reduce density. A holding that the HAA is unconstitutional would call into doubt a number of recent statutes that require ministerial review of certain projects or rezoning for by-right development. (See Senate Bill 35 (2017-2018 Reg. Sess.) (Gov. Code, § 65913.4) [requiring jurisdictions that are falling short of their housing targets to review certain zoning-compliant projects ministerially]; Assembly Bill 68 (2019-2020 Reg. Sess.) (Gov. Code, § 65852.2, subd. (e)) [requiring all jurisdictions to ministerially approve accessory dwelling unit projects that conform to the bill's standards]; Assembly Bill 1397 (2017-2018 Reg. Sess.) (Gov. Code, § 65583.2, subd. (c)) [requiring local governments that want to reuse non-vacant parcels in their housing element site inventory to rezone them for by-right development].)

CONCLUSION

California's housing crisis developed over many decades. Unwinding the housing crisis is a many-decades proposition too. It may well require further and quite substantial reallocations of land use authority to state-level and regional institutions. The Legislature's recent efforts to make local development regulations more transparent, and to keep cities from improvising and changing the rules as a project advances through the permitting process, represent important, and limited, initial steps. It is the Legislature's prerogative to take these incremental steps. To the extent that the HAA alters the way the development game is played in California, the Act may lessen the need for more intrusive state action.

Respectfully submitted,

Dated: March 29, 2021

By: 

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Dated: March 29, 2021

By: _____
Christopher S. Elmendorf

PROOF OF SERVICE

The undersigned declares under penalty of perjury that an electronic copy of the foregoing brief was served on March 29, 2021 via TrueFiling on all registered parties.

On March 29, 2021, the undersigned also sent as required by Rule 8.212, subdivision (c)(1) a copy of the above, via overnight mail to the following:

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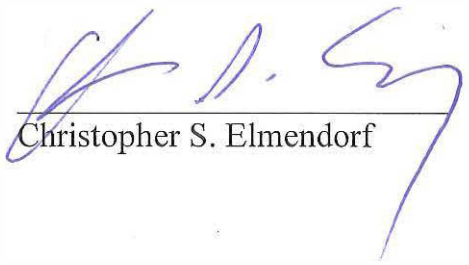
Dated: March 29, 2021 By: 
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