Case Nos. A1596580 and A159320

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

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

v.

CITY OF SAN MATEO, et al.,
Respondents;

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS CITY OF SAN MATEO, ET AL.

On Appeal from the San Mateo County Superior Court
Case No. 18CIV02105
The Honorable George Miram

Arthur J. Wylene (SBN 222792)
General Counsel
Rural County Representatives of California
1215 K Street, Suite 1650
Sacramento, CA 95814
Tel: (916) 447-4806
awylene@rcrcnet.org

Jennifer B. Henning (SBN 193915)
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7535
jhenning@counties.org

Attorneys for Amicus Curiae California State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES....3

I. INTRODUCTION AND SUMMARY OF ARGUMENT....7

II. "MATTERS IN LAW THE JUDGES OUGHT TO DECIDE AND DISCUSS": SECTION 65589.5(f)(4) HAS NO APPLICATION TO THE INTERPRETATION OF ENACTMENTS....9

III. THE HARD TASK OF JUDGING: WHAT STANDARDS ARE PROPERLY "OBJECTIVE" UNDER THE HOUSING ACCOUNTABILITY ACT?....24

IV. "THE ANTITHESIS OF DUE PROCESS": "SUBSTANTIAL EVIDENCE" AS THE INITIAL STANDARD FOR AN ADJUDICATION....32

V. CONCLUSION....44

CERTIFICATION OF COMPLIANCE....45

TABLE OF AUTHORITIES

Cases

Bauer v. City of San Diego (1999) 75 Cal.App.4th 1281 23

Beaudreau v. Superior Court (1975) 14 Cal.3d 448 ..... 36, 40

Bell v. Burson (1971) 402 U.S. 535 36

Berkeley Hills Watershed Coalition v. City of Berkeley (2019) 31 Cal.App.5th 880 11

Berry v. American Express Publishing (2007) 147 Cal.App.4th 224 28

Bohannan v. City of San Diego (1973) 30 Cal.App.3d 416 31

Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal.App.4th 95 13

Brown v. Fauver (3rd Cir. 1987) 819 F.2d 395 38

Bullock v. City and County of San Francisco (1990) 221 Cal.App.3d 1072 13

Butler v. Oak Creek-Franklin Sch. Dist. (E.D.Wis. 2001) 172 F.Supp.2d 1102 ..... 33, 38

California Building Industry Assn. v. State Water Resources Control Bd. (2018) 4 Cal.5th 1032 14

California Native Plant Soc'y v. City of Rancho Cordova (2009) 172 Cal.App.4th 603 ..... 14, 16, 17

Carlson v. Assessment Appeals Bd. I (1985) 167 Cal.App.3d 1004 13

Center for Public Interest Law v. Fair Political Practices Com (1989) 210 Cal.App.3d 1476 13

Citizens for Responsible Equitable Environmental Development v. City of San Diego (2010) 184 Cal.App.4th 1032 12

Cleveland National Forest Foundation v. County of San Diego (2019) 37 Cal.App.5th 1021 23

Communications Satellite Corp. v. Franchise Tax Bd. (1984) 156 Cal.App.3d 726 21

Conway v. State Bar (1989) 47 Cal.3d 1107 35

Drum v. Fresno County Dept. of Public Works (1983) 144 Cal.App.3d 777 35

Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379 32

East Sacramento Partnerships for a Livable City v. City of Sacramento (2016) 5 Cal.App.5th 281 ..... 14, 15

Endangered Habitats League, Inc. v. County of Orange (2005) 131 Cal.App.4th 777 16

Golden Door Properties, LLC v. County of San Diego (2020) 50 Cal. App. 5th 467 14

Greer v. Board of Education (1975) 47 Cal.App.3d 98 36

Harrington v. City of Davis (2017) 16 Cal.App.5th 420 ..... 10, 11, 15

HGST, Inc. v. County of Santa Clara (2020) 45 Cal. App. 5th 934 39

Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066 . 29, 30, 31

Horn v. County of Ventura (1979) 24 Cal.3d 605 34

Horwitz v. City of Los Angeles (2004) 124 Cal.App.4th 1344 ..... 20, 21, 26

J. Arthur Properties, II, LLC v. City of San Jose (2018) 21 Cal.App.5th 480 ..... 11, 15, 22

Lee v. Rhode Island (D.RI 1996) 942 F.Supp. 750 36

Lockaway Storage v. County of Alameda (2013) 216 Cal.App.4th 161 23

Marbury v. Madison (1803) 5 U.S. 137 12

Martis Camp Commmunity Assn. v. County of Placer (2020) 53 Cal.App.5th 569 13

Morrissey v. Brewer (1972) 408 U.S. 471 35

Natural Resources Defense Council v. Fish & Game Com. (1994) 28 Cal.App.4th 1104 ..... 34, 36, 42

Nisei Farmers League v. Labor & Workforce Development Agency (2019) 30 Cal.App.5th 997 25

No Oil v. City of L.A. (1987) 196 Cal.App.3d 223 17

People v. Soto (2011) 51 Cal.4th 229 28

Pocket Protectors v. City of Sacramento (2004) 124 Cal.App.4th 903 ..... 17, 18

San Diegans for Open Government v. City of San Diego (2016) 245 Cal.App.4th 736 ..... 10, 12

San Francisco Tomorrow v. City and County of San Francisco (2014) 229 Cal.App.4th 498 15

Scott v. City of Indian Wells (1972) 6 Cal.3d 541 34

Selinger v. City Council (1989) 216 Cal.App.3d 259 34

Stolman v. City of Los Angeles (2003) 114 Cal.App.4th 916.....20

TG Oceanside, L.P. v. City of Oceanside (2007) 156 Cal.App.4th 1355 ...10

Tower Lane Properties v. City of Los Angeles (2014) 224 Cal.App.4th 262.....20

Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th.....11, 20

Yumori-Kaku v. City of Santa Clara (2020) 59 Cal.App.5th 385.....23

Statutes

Code Civ. Proc., § 1094.5 35

Evid. Code, § 310.....11

Gov. Code, § 65589.5.....passim

Gov. Code, § 65906.....26

Treatises

1 Coke, Institutes of the Lawes of England (1628) § 234, p. 155b.....10

Regulations

Cal. Code Regs., tit. 14, § 15128.....43

Legislative Committee Reports

Assem. Comm. on Hous. & Com. Dev., analysis of Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as amended Apr. 17, 2017.....19, 40

Assem. Comm. on Hous. & Com. Dev., analysis of Sen. Bill No. 1721 (2001-2002 Reg. Sess.) as amended May 29, 2002.....32

Assem. Comm. on Hous. & Com. Dev., analysis of Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended Jun. 13, 2019 28

Assem. Comm. on Local Gov., analysis of Sen. Bill No. 167 (2017-2018 Reg. Sess.) as amended Jul. 3, 2017.....32

Sen. Hous. & Com. Dev. Comm., analysis of Sen. Bill No. 1721 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002 31

Legislation

Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as amended May 1, 2017 19

Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as introduced Feb. 17, 2017.....18

Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended Jul. 3, 2019 28
Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended Jun. 13, 2019 28

I. INTRODUCTION AND SUMMARY OF ARGUMENT

While Petitioners' briefing promises a titanic constitutional clash between local interests and statewide concerns, this case actually resolves on rather mundane – and fairly straightforward – questions of statutory interpretation.

Government Code section 65589.5, subdivision (f)(4),[1] part of the Housing Accountability Act ("HAA"), provides that "a housing development project...shall be deemed consistent, compliant, and in conformity with an applicable...standard...if there is substantial evidence that would allow a reasonable person to conclude that the housing development project...is consistent, compliant, or in conformity."

As the reference to "substantial *evidence*" may suggest, this provision establishes a standard of decision for *factual* questions. It has no application to *questions of law*, such as interpretation of the local agency "standard" against which evidence in the record is to be measured. Administrative decisions are quite commonly reviewed for substantial evidence, and the uniform rule in such cases is that interpretation of the underlying enactment remains a question of law for the court's independent judgment. There is nothing in the plain language of Section 65589.5, subdivision (f)(4) to suggest anything different here – and the legislative

[1] All further undesignated references are to the Government Code.

history confirms that this "substantial evidence" provision was intended to "conform with the existing standard as it applies to local governments."

The foregoing disposes of the central issues in this case, as there is no relevant conflict in the evidence here, and thus Section 65589.5, subdivision (f)(4) simply never comes into play. The location and design of the project and surrounding buildings are not in dispute. The only dispute concerns the interpretation and application of the City's Multi Family Design Guidelines, a classic question of law, resolvable through conventional tools of statutory construction. Petitioners' remaining arguments, that the Guidelines are not "objective" standards properly applicable to the project under the Housing Accountability Act, likewise present pure questions of law – and, as will appear, are equally misplaced.

Finally, while the court need not reach the constitutionality of Section 65589.5, subdivision (f)(4), the novel standard of decision set forth in that provision is indeed suspect. The statute appears to contemplate an adjudicatory land use hearing at which one party's evidence is made conclusive, thereby depriving the legislative body of any ability to consider contrary evidence from other interested parties. Those parties are given notice, they may perhaps speak, but the decision-maker may not listen. Due process does not tolerate such mockery, and instead requires a *meaningful* opportunity to be heard. As Section 65589.5, subdivision (f)(4) would have the purpose and effect of denying that opportunity, it is unconstitutional.

For all of these reasons, as explained in greater detail below, the judgment of the Superior Court should be affirmed.

II. "MATTERS IN LAW THE JUDGES OUGHT TO DECIDE AND DISCUSS": SECTION 65589.5(f)(4) HAS NO APPLICATION TO THE INTERPRETATION OF ENACTMENTS

Petitioners' arguments are entirely premised on the belief that Section 65589.5, subdivision (f)(4) resolves *any* potential dispute relating to a housing project – and hands victory to the proponent if there is any reasonable argument, of any kind, that the development should be approved. This thoroughly confuses the factual and legal aspects of land use decision-making, and misconstrues the statute. As Petitioners' briefing (and that of the Intervenor) consistently conflates the relevant legal concepts, it is appropriate to begin with an examination of the legal framework for planning and zoning decisions, within which Section 65589.5, subdivision (f)(4) must operate.

As the courts have long recognized, local land use decisions often involve both questions of *fact* and questions of *law*. (See, e.g., *Harroman Co. v. Town of Tiburon* (1991) 235 Cal.App.3d 388, 392-393.) Much like a court itself, the local legislative body must determine what the applicable rules mean, and then ascertain the relevant facts to which these rules must apply. The distinction between the two is an ancient feature of Anglo-

American law (dating back at least to Lord Coke[2]), and familiar to most law students.

Questions of law and fact are often intertwined in land use decision-making – indeed, any final determination that a proposal complies with the applicable rules will necessarily include some of each. However, decades of case law provide clear guidance for distinguishing and separating such issues for analysis – and articulate correspondingly different standards of review.

Traditionally, the local legislative body's factual determinations are reviewed by the courts for substantial evidence. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434.) However, it is equally well-established that even where factual determinations are reviewed for substantial evidence, the courts "exercise independent judgment on legal issues, including the interpretation of municipal ordinances." (*Ibid.* See also *San Diegans for Open Government v. City of San Diego* (2016) 245 Cal.App.4th 736, 740-741; *TG Oceanside, L.P. v. City of Oceanside* (2007) 156 Cal.App.4th 1355, 1371.) This principle is specifically enshrined in statute. "All questions of law (including but not limited to questions concerning *the construction of statutes* and other writings, the admissibility

[2] "The most usuall triall of matters of fact is by 12 such men, for *ad questionem facti non respondent Iudices*. And matters in Law the Judges ought to decide and discusse, for *Ad questionem iuris non respondent Iuratores*." (1 Coke, Institutes of the Lawes of England (1628) § 234, p. 155b.)

of evidence, and other rules of evidence) *are to be decided by the court*."

(Evid. Code, § 310, subd. (a).)

"Local government laws are interpreted consistent with the general rules of statutory interpretation." (*J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486.) Among these rules is a principle of deference:

> [A] city's interpretation of its own ordinance is entitled to deference in our independent review of the meaning or application of the law . . . In reviewing the City's interpretation of the Municipal Code, we apply the framework developed in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, in which our Supreme Court explained that the degree of deference accorded an agency's interpretation is not susceptible of precise formulation, but lies somewhere along a continuum, or, in other words, is 'situational.' Greater deference should be given to an agency's interpretation where the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. Greater deference is also appropriate where there are indications of careful consideration by senior agency officials.

(*Harrington, supra, 16* Cal.App.5th at p. 435. See also *J. Arthur Properties, supra,* 21 Cal.App.5th at p. 486; *Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 896.)[3]

[3] Petitioners oddly argue that "[c]ourts do not defer to local interpretations of laws that are intended to be statewide in scope . . . The City is not charged with the enforcement of the HAA; it is charged with complying with the HAA." (App. Opn. Brief, pp. 44-45.) This misses the point entirely. The City did not request – and the trial court did not grant – any

Nonetheless, such deference is neither blind nor unbounded:

> Where the meaning and legal effect of a statute or ordinance is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, "The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."

(*San Diegans for Open Government, supra,* 245 Cal.App.4th at p. 741 quoting *Yamaha, supra,* 19 Cal.4th at pp. 7–8.)

All of this is exceedingly well-settled. The only question is whether Section 65589.5, subdivision (f)(4) was intended to alter the courts' interpretive function – the foundational "province and duty of the judicial department"[4] – in Housing Accountability Act cases.

There is nothing in the plain language of the provision to suggest this. Section 65589.5, subdivision (f)(4) turns upon the existence of

---

deference in interpreting *the HAA*. Rather, the only deference requested, due, or given was in the interpretation of *the City's own Guidelines*. Such interpretation obviously has an effect upon the City's ultimate compliance with the HAA, but that is hardly unique to this issue or this case. Questions regarding the interpretation of local ordinance often arise in context of claims that the local agency has violated state law in some manner. (See, e.g., *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032.) These disputes are *the reason* that our deference precedents developed, not cause to reject them.

[4] *Marbury v. Madison* (1803) 5 U.S. 137, 177.

"substantial evidence," a common legal term referring exclusively to factual determinations. It is black letter law that "the substantial evidence test is not relevant" and "not applicable" to questions of law. (*Center for Public Interest Law v. Fair Political Practices Com* (1989) 210 Cal.App.3d 1476, 1487; *Carlson v. Assessment Appeals Bd. I* (1985) 167 Cal.App.3d 1004, 1009. See also *Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 108.) The subdivision's reference to "a reasonable person" likewise merely reflects the traditional formulation of the substantial evidence standard (*Martis Camp Commmunity Assn. v. County of Placer* (2020) 53 Cal.App.5th 569, 595), having no application to questions of law.

"[T]he Legislature is presumed to have been aware of existing judicial and statutory constructions of terms, and to have adopted those meanings in framing subsequent statutes." (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1096.) The manifest conclusion here is that the standard of decision set forth in Section 65589.5, subdivision (f)(4) applies, like all "substantial evidence" standards, to determinations of *fact*, and has no effect whatsoever upon the judicial function of interpreting the law – or the ordinary rules applied in such interpretation.

Petitioners' assertion that "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" (App. Rep. at p.

20.) is simply not a correct statement of law. To begin with, the two cases cited by Petitioners for this proposition, *California Native Plant Soc'y v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 and *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, did not actually consider the issue relevant here, i.e., whether interpretive questions may be reviewed for "substantial evidence." "It is axiomatic that cases are not authority for propositions that are not considered." (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.) Nonetheless, these cases are somewhat instructive – but they teach a lesson quite different from what Petitioners might suggest.

California Native Plant Soc'y and *East Sacramento Partnerships* arose in a very different context, i.e., determination of general plan consistency under the Planning and Zoning Law. One will not find the standard of review articulated for such determinations repeated in cases (like this one) involving strictly interpretive issues, and for good reason: General Plan consistency determinations are primarily exercises in policy-making, not legal interpretation. (See, e.g., *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal. App. 5th 467, 499 ["Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of

the plan's purposes. A reviewing court's role is simply to decide whether the governing body officials considered the applicable policies and the extent to which the proposed project conforms with those policies"]; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 513-514.)[5]

The governing body's function when making such "weighing and balancing" determinations under the Planning and Zoning Law obviously bears little resemblance to the ordinary interpretive questions present here and addressed in *Harrington, J. Arthur Properties*, and similar cases – and it is therefore unsurprising to find differing formulations of the judicial standard of review.

Perhaps more importantly for current purposes, even in the specialized area of General Plan consistency determinations, where the distinction between factual and legal (and policy-making) elements is *actually relevant*, the case law makes it clear that the "substantial evidence"

[5] *East Sacramento Partnerships* provides an excellent illustration of this. The challengers in that case alleged inconsistency with a variety of "transportation policies, transit policies, policies promoting health and well-being, and noise policies." Several of these alleged inconsistencies had become moot due to changes in the general plan, and the remainder were dismissed in deference to the City Council's *policy-making* determinations because "a project need not be in perfect conformity with each and every general plan policy," "the governmental agency must be allowed to weigh and balance the plan's policies when applying them," and "[w]hether further mitigation was feasible...was a decision within the discretion of City." (*East Sacramento Partnerships, supra,* 5 Cal.App.5th at pp. 305-308.) Neither the legal analysis for interpretive questions nor the quantum of evidence for any factual findings was relevant to these determinations.

test applies to the factual rather than interpretive components.

California Native Plant Society itself delved into the various formulations of the applicable standard of review for consistency determinations, and concluded that they were all effectively the same *for factual matters*: "[W]e defer to an agency's *factual finding* of consistency unless no reasonable person could have reached the same conclusion on the evidence before it...Under the substantial evidence prong, a common formulation asks if a reasonable person could have reached the same conclusion on the evidence...this is the same test used under the arbitrary and capricious standard for *factual findings*..." (*California Native Plant Soc'y, supra,* 172 Cal.App.4th at p. 637. See also *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782, fn. 3.)

Consistent with this observation that "substantial evidence" refers to "factual findings," the distinction between factual and interpretive issues was clearly evident (if not specifically articulated) in the *California Native Plant Society* court's own analysis. That case involved four alleged inconsistencies with the city general plan, two factual matters (whether the project's mitigation measures included adequate "interconnections with other habitat areas…" and required mitigation sufficient to ensure the Project did "not contribute to the decline of the affected species…") and two legal questions (interpretation of the general plan provisions requiring the city to "consult" and "coordinate" with resource agencies). The

California Native Plant Society court evaluated the substantiality of the evidence *only* with regard to the former, but analyzed the latter as a matter of law utilizing such traditional interpretive tools as dictionary definitions, contextual analysis, and legislative intent – with no reference to "evidence" of any kind. (*California Native Plant Soc'y, supra,* 172 Cal.App.4th at pp. 638-642.)

Other courts, likewise, when faced with distinct interpretive questions in this context, have treated them as questions of law, using legal rather than evidentiary tools and standards. (See, e.g., *No Oil v. City of L.A.* (1987) 196 Cal.App.3d 223, 242-249.) As here, these standards include acknowledgement that such interpretation is ultimately "an exercise of the judicial power," with due (but not undue) deference given to the local agency – and do not treat such interpretive questions as matters of "substantial evidence."

The cases cited by Petitioners for the proposition that "substantial evidence" review may extend to legal interpretive questions, and that Section 65589.5, subdivision (f)(4) should thus be construed, in fact demonstrate just the opposite.[6] In any context, including this one,

[6] Petitioners' reliance on *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903 (App. Rep. at p. 21) is equally misplaced. Aside from the fact that this case concerned a different legal standard (fair argument) that the Legislature did *not* use in Section 65589.5, subdivision (f)(4), Petitioners' argument is based on misquoting the opinion. Contrary to Petitioners' brief, *Pocket Protectors* did not hold (or say) that "*questions of*

"substantial evidence" is a standard for *factual determinations*, not legal questions. That was the law before Section 65589.5, subdivision (f)(4) was adopted, and remains the law today.

While the analysis could end there, the legislative history behind Section 65589.5, subdivision (f)(4) confirms the foregoing conclusion. As originally proposed in early 2017, the language for this provision read: "[A] housing development project...shall be deemed consistent with an applicable...standard...if there is *sufficient evidence* that would lead a reasonable person to conclude that the housing development project or emergency shelter is consistent." (Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as introduced Feb. 17, 2017; Mot. For Jud. Not., exh. "A".) The Assembly Committee on Housing and Community Development analysis noted that other provisions of the HAA (at the time) required findings based on "*substantial evidence*," and recommended "changing this bill's standard from 'sufficient evidence' to 'substantial evidence' *to clarify the standard of review and better conform with the existing standard as it applies to*

---

interpretation about local plans are resolved under the fair argument test," but rather that "[b]ecause the land use policies at issue were adopted at least in part to avoid or mitigate environmental effects, we consider *their applicability* under the fair argument test with no presumption in favor of the City." (*Id*. at p. 934.) Just sentences later, the court clarifies the type of "applicability" questions thus reviewed, noting that "[h]ere, the planning commission made *findings of fact*, specifying the elements of the proposed project which clashed with the policies." (*Ibid*.) To the extent the *Pocket Protectors* court actually considered this issue (which, as with Petitioners' other authorities, is not at all clear), that decision supports precisely the opposite of Petitioners' contention.

local governments." (Assem. Comm. on Hous. & Com. Dev., analysis of Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as amended Apr. 17, 2017; Joint Appx., vol. 1, p. 186.) That amendment was duly made to the bill, resulting in the "substantial evidence" language ultimately enacted. (Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as amended May 1, 2017; Mot. For Jud. Not., exh. "B".)

From the foregoing, it is quite clear that the Legislature intended "substantial evidence" to have its ordinary meaning, "conform[ing] with the existing standard as it applies to local governments." Section 65589.5, subdivision (f)(4) was meant to reverse the ordinary application of this evidentiary standard, but it remains an *evidentiary* standard for resolution of factual questions – not a rule of legal interpretation.

In sum, the trial court's conclusion that "Government Code § 65589.5(f)(4) does not apply" to "an issue of pure law," and its application of ordinary interpretive principles to the City's Multi Family Housing Guidelines – including *Yamaha* deference – were correct as a matter of law.

The parade of horribles envisioned by Petitioners from this result – that "cities could escape the effect of Paragraph (f)(4) by providing a new 'legal' interpretation of their code at the very end of the review process" (App. Opn. Brief, pp. 45-46; App. Rep., pp. 11, 19, 24) – completely misunderstands the applicable standard of review. Final responsibility for interpreting municipal codes lies with the *courts*, not the local agency.

While an agency's interpretation of its own enactments is generally entitled to some deference, the principles outlined in *Yamaha* are specifically designed to ferret out such specious and vacillating positions (*Yamaha, supra,* 19 Cal.4th at p. 13), and the courts are fully capable of rejecting, where appropriate, transparently results-oriented agency interpretations of the nature Petitioners fear. (See, e.g., *Horwitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344; *Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 278; *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 927-929.) By contrast, where the local agency's interpretation *does* meet the ordinary criteria for deference, there is no reason in policy – and no warrant in law – to discount it as a factor in the court's own independent review.[7]

Finally, it is worth noting that applying Section 65589.5, subdivision (f)(4) as suggested by Petitioners (and Intervenor) would lead to absurd results. In their view, if a reasonable person could interpret the applicable

[7] Petitioners make several representations regarding the City's supposedly vacillating interpretation of the Guidelines in this case (see, e.g., App. Opn. Brief, pp. 45-48), the significance of which the City vigorously disputes. Regardless, even if these representations were accepted, they merely go to the *weight* given to the City's final interpretation, and do not dictate the outcome of the court's independent review. Phrased differently, even if the City's interpretation was entitled to no deference, that would not necessarily make it wrong – and would not make Petitioners right. It would simply require the court to resort to other tools of statutory construction – such as reading the Guidelines' potentially ambiguous language in light of the illustrative diagrams on the same page.

standard in a manner to render the project compliant, that interpretation must be accepted – by both the legislative body and the courts on review.[8] Under this construct, the same ordinance text could mean one thing when convenient for one project, and something different when convenient for the next, so long as both interpretations are "reasonable."[9]

---

[8] Petitioners and Intervenor never quite come out and say this, preferring to elide the relevant distinction with such conglomerated phrasing as "Paragraph (f)(4) is correctly applied to govern all aspects of a project's consistency with objective standards" (App. Rep., p. 11), and "the HAA unequivocally requires the local agency and reviewing courts to adhere to an objective reasonable person standard *in toto*." (Interv. Rep., p. 12.) However, that is the only way to understand their argument. Intervenor's posit that "a *reasonable person very well could have believed* that there was substantial evidence that the proposal in question did not need to comply…" (Interv. Opn. Brief., p. 19) necessarily refers to interpretation of the Guidelines, especially where, as here, the quantum of evidence in the record is not in dispute. Similarly, Petitioners' recitation of the ostensible "evidence in the record to *lead a reasonable person...to conclude* that the Project provided a sufficient transition or steps in height between height differentials to comply with the Guideline" (App. Opn. Brief, pp. 52-53) consists entirely of *legal interpretations* offered by various parties – which is not, of course, "evidence" in the legal sense. (See, e.g., *Communications Satellite Corp. v. Franchise Tax Bd.* (1984) 156 Cal.App.3d 726, 747.) Petitioners' and Intervenor's briefing may conflate the factual and legal aspects of the court's review, but this does not obscure the true thrust of their argument, nor its defects.

[9] *Horwitz, supra,* 124 Cal.App.4th at pp. 1348-1349 provides an instructive example. That case involved a dispute over the interpretation of a setback requirement measured in feet "from the property line at the street to the closest existing building." There, it would have been beneficial for the homebuilder to interpret "building" to include detached garages (which the court rejected); however, it might easily be beneficial for homebuilders in other cases to construe "building" to mean only the house, not the garage. Constantly altering the meaning and content of a setback requirement in that manner from case-to-case would be chaotic, unfair, and anathema to the basic concept of having a "standard." The *Horwitz* court scorned such

The Kafkaesque idea that an adopted standard means one thing today and another tomorrow is profoundly inconsistent with our understanding of the rule of law, which depends upon enactments having an objectively ascertainable meaning. Moreover, the principle that all persons, properties, and projects are judged by the same standards is core to such concepts as due process and equal protection of laws. A statute may require judicial interpretation to ascertain its true meaning and application, but there is one correct answer, to which everyone is subject.[10]

Section 65589.5, subdivision (f)(4) worked no such jurisprudential revolution. Local standards, such as the City's Guidelines, are interpreted not based upon what "a reasonable person very well could have believed," but with longstanding judicial tools designed "to ascertain the intent of the legislative body to effectuate the purpose of the law." (*J. Arthur Properties, supra,* 21 Cal.App.5th at p. 486.) Only then can the factual inquiry to which

---

an outcome, and for good reason.

[10] Petitioners respond to this rather evident problem with their position by asserting that "[t]he clarity provided by Paragraph (f)(4) prevents *cities* from applying vastly different interpretations of the same rule." (App. Rep., p. 24.) This is doubly wrong. To being with, it is not the HAA that precludes local agencies from "applying vastly different interpretations of the same rule," but rather the ordinary principles of judicial review discussed above. More fundamentally, Petitioners' construct would allow *developers* to apply vastly different interpretations of the same rule, and would *affirmatively compel* the city to do the same.

Section 65589.5, subdivision (f)(4) is addressed take place.[11]

In this case, the first step is dispositive. If the trial court (and City) correctly interpreted the Guidelines as imposing a mandatory requirement that "all floors of a proposed building that exceeded the height of a neighboring structure needed to be stepped back" (Ord. Denying Petition, p. 3), that is the end of the matter. There is absolutely no evidence in the record – substantial or otherwise – that the project here actually incorporates such a step back – nor do Petitioners advance any such

[11] Describing compliance determinations under the HAA as "legal issues...entwined with issues of fact" (App. Rep., p. 20) or "mixed questions of fact and law" (Law Profs. Brief, pp. 20, 39), does not aid Petitioners here. In the land use context, as elsewhere, it is well-settled that the interpretive aspects of such "mixed" or "entwined" questions – i.e., "selection of the applicable legal principles" – present issues of law for the court's independent review. (See, e.g., *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 183; *Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1293-1296, fn. 15; *Cleveland National Forest Foundation v. County of San Diego* (2019) 37 Cal.App.5th 1021, 1040-1041. See *also Yumori-Kaku v. City of Santa Clara* (2020) 59 Cal.App.5th 385, 409-410 ["Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. *Questions of law relate to the selection of a rule; their resolution is reviewed independently.* Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied"].) Consequently, even where the compliance inquiry truly does involve such mixed questions, it is only the *factual* aspects that are – or ever were – governed by a substantial evidence standard. Historically, this standard was applied in favor of the local government's resolution of such questions "concern[ing] the establishment of historical or physical facts," and Section 65589.5, subdivision (f)(4) would reverse the application of this standard – but it remains a standard for *factual determinations*, not legal ones. (That is doubly true in this case where, as noted below, there are no disputed factual issues – and thus no truly "mixed" question in the first place.)

argument. On the other hand, if the trial court erred in this interpretation, and the Guidelines are not mandatory or do not require such a step back, that is likewise conclusive *without factual dispute*. Either way, Section 65589.5, subdivision (f)(4) simply never comes into play. Howsoever this court may resolve the actual issues in this case, Section 65589.5, subdivision (f)(4) is not part of the answer.[12]

III. THE HARD TASK OF JUDGING: WHAT STANDARDS ARE PROPERLY "OBJECTIVE" UNDER THE HOUSING ACCOUNTABILITY ACT?

Intermixed with Petitioners' (and Intervenor's) arguments regarding the effects of Section 65589.5, subdivision (f)(4) are a series of contentions that the City's Multi Family Design Guidelines do not qualify as "objective" standards that may permissibly be applied to the project. As above, these present pure questions of law, to which Section 65589.5, subdivision (f)(4) is not relevant. Many of these contentions are premised upon interpretation of the Guidelines themselves, and have been fully addressed in the City's briefing. However, Petitioners also make several general arguments regarding the HAA that warrant further response.

Most notably, Petitioners claim that "[a]n 'objective' standard . . . should be a standard about which reasonable persons cannot disagree. But if reasonable minds can disagree about whether a standard is satisfied, then

[12] For the reasons set forth in the Respondents' briefs, the City has the better argument on these issues. However, those matters are ably presented in the City's own briefing and will not be repeated at length here.

it is not 'objective' for purposes of the HAA." (App. Opn. Brief, pp. 22-23; App. Rep., p. 24.) This is profoundly mistaken – and indeed, few enactments would ever survive such scrutiny.[13]

"Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear." (*Nisei Farmers League v. Labor & Workforce Development Agency* (2019) 30 Cal.App.5th 997, 1012.) The fact that some judicial construction may be required to ascertain the content and effect of a standard does not make those matters *un*objective. An ordinance requiring that roads be designed to support a "25 ton" load might need some judicial interpretation to determine whether the City Council meant *short tons, long tons, or metric tons*; however, it cannot reasonably be argued that this is not an objective standard within the meaning of Section 65589.5.[14]

---

[13] It is worth noting that the California Building Standards Code – perhaps the paradigmatic example of objective ministerial standards – nonetheless has an official Code Interpretations Committee within the State Fire Marshal's Office to render interpretations on potentially ambiguous provisions. (See Code Interpretations <https://osfm.fire.ca.gov/divisions/code-development-and-analysis/code-interpretations/> [as of Jan. 8, 2021].) At the risk of stating the obvious, if the technical building codes are not sufficiently "objective," nothing is.

[14] Under Petitioners' construct, the meaning of "ton" could vary from project to project, depending upon which interpretation was most favorable to the developer – all untethered from whatever the enacting legislative body actually intended – or perhaps the City could enforce no design standard at all for housing projects, if "25 tons" was truly found to be unobjective.

Nothing in the HAA changes this. Section 65589.5, subdivision (h)(8) requires that local standards must "involv[e] no personal or subjective judgment by a public official" and be "uniformly verifiable by reference to an external and uniform benchmark or criterion."[15] A standard whose meaning is ascertainable through the ordinary tools of statutory interpretation fits this definition. Reasonable minds may differ on questions of law, including the interpretation of local standards – that is why appellate courts exist – but there is nonetheless an ascertainable answer.[16] The HAA does not require inhumanly perfect drafting. If the standard, properly construed, is objective, the HAA is satisfied.

Next, Petitioners argue that because the City has the power to excuse compliance with the Guidelines when there are "unusual characteristics of the project," this renders the Guidelines discretionary and subjective. (App. Opn. Brief, p. 51.) However, this merely reflects the commonplace planning mechanism of the Variance, enshrined in state law (§ 65906) and virtually universal in land use practice. The ability to deviate from an otherwise mandatory standard in limited conditions does not render the

[15] As the City notes, there is some uncertainty regarding whether this specific definition applies to local actions taken prior to its enactment; however, it is unnecessary to resolve that question in this case.

[16] *Horwitz, supra,* 24 Cal.App.4th at pp. 1348-1348 again provides an instructive real-life example. While the key phrase there, "closest existing building," was arguably ambiguous on its face, the court had no difficulty whatsoever ascertaining the correct – and utterly objective – meaning.

standard as whole discretionary – particularly where, as here, those conditions are not met.

Indeed, taken to its logical conclusion, under Petitioners' argument no zoning standard could *ever* be "objective," as nearly any zoning provision may potentially be excused through the discretionary mechanism in Section 65906. That is an absurd result, which would clearly conflict with the HAA's allowance of "zoning . . . standards and criteria." (§ 65589.5, subd. (j)(1).) The analysis does not change simply because the City elected to incorporate an essentially identical mechanism into the organic text of its Guidelines.[17]

Moreover, Petitioners are seeking to achieve through litigation that which they could not through legislation. In 2019, there was a legislative proposal to amend the HAA in precisely the manner requested by Petitioners, to provide that "a general plan, zoning, or subdivision standard or criterion is not 'applicable' if its applicability to a housing development project is discretionary or if the project could be approved without the

[17] Moreover, as the City notes, Petitioners' construction would have the perverse effect of discouraging local agencies from including such "relief valves" in their standards, thereby making it *more difficult* to approve housing projects. This may be convenient for Petitioners here, but would be devastating for others statewide. That is assuredly not what the Legislature meant when instructing that the HAA 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." (§ 65589.5, subd. (a)(2)(L).)

standard or criterion being met." (Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended Jun. 13, 2019; Mot. For Jud. Not., exh. "C".)

However, this proposal did not last long. The Assembly Committee on Housing and Community Development analysis observed that "[s]ignificant concerns have been raised with this clause and that it would *eliminate all planning and zoning regulations*, since applicants can always request ordinance amendments *or variances*. The committee may wish to consider deleting this language." (Assem. Comm. on Hous. & Com. Dev., analysis of Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended Jun. 13, 2019, p. 8; Mot. For Jud. Not., exh. "D".) The proposal was promptly removed from the bill.[18] (Sen. Bill No. 592 (2019-2020 Reg. Sess.) as amended Jul. 3, 2019; Mot. For Jud. Not., exh. "E".)

"The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision." (*People v. Soto* (2011) 51 Cal.4th 229, 245.) "The simple reason for this canon is that a court should not grant through litigation what could not be achieved through legislation. Thus, courts must not interpret a statute to include terms the Legislature deleted from earlier drafts." (*Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 230-231.) This

[18] Petitioners should be well aware of this fact, as California Renters Legal Advocacy and Education Fund was among the principal supporters of the bill. (*Id.,* at p. 11.)

principle is most compelling where, as here, the reason for the Legislature's disapproval is explicitly set forth in the legislative history. Petitioners' effort to judicially amend the statute in this manner must therefore be rejected.

Lastly, Petitioners claim that the City's Guidelines may not form the basis for project denial under Section 65589.5, subdivision (j)(1) because they were not "adopt[ed] . . . into their general plan or zoning code" or "'part of' the General Plan." (App. Opn. Brief, pp. 49-50.) The only support for this contention is a citation to *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1077, which interpreted the allowance for "design review standards" in that subdivision "to mean design review standards that are part of applicable, objective general plan and zoning standards and criteria."

This argument suffers from multiple errors. To begin with, nothing in *Honchariw* suggests that design review standards must be physically incorporated or annexed into a local agency's General Plan document in order to be "general plan...standards and criteria." Petitioners would read the words "standards and criteria" right out of the statute (and *Honchariw*), leaving the case to read "part of applicable, objective general plan and zoning[.]" – which is not, of course, what either the Legislature or the court actually said. Phrased differently, "general plan...*standards and criteria*" – of which design review standards may be a part – is entirely broad enough

to include standards and criteria adopted to implement the General Plan, pursuant to the express command of specific General Plan policies.[19]

Further, while *Honchariw* expressed "doubts" (explicitly in dicta) that the subdivision ordinance in that case met the foregoing criteria, that is both unhelpful to Petitioners and unsurprising. Section 65589.5, subdivision (j) did not – at that time – include "*subdivision* standards,"[20] and unlike here, there was no indication that the ordinance was adopted pursuant to any provision of the County's General Plan or Zoning ordinance.

More broadly, the constricted reading of Section 65589.5, subdivision (j) suggested by Petitioners ignores both the common realities of planning practice and the statutory context. General Plans and zoning ordinances frequently provide for adoption of design review standards, without incorporating those standards *in toto* into the General Plan document or ordinance text. (See, e.g., *Bohannan v. City of San Diego*

[19] To the extent that grammatical analysis of the *Honchiraw* opinion is necessary, it worth noting that "part of" modifies "design review standards," requiring that they be *part of* "general plan and zoning standards and criteria." It does *not* modify "standards and criteria" to require that any standards and criteria must themselves be "part of" general plan and zoning documents.

[20] As the City notes, express allowance for "*subdivision* standards and criteria" was added to the statute in 2017 (see Brief in Resp. to Appellants, p. 41) – an addition that presumably would have been unnecessary had subdivision ordinances *per se* clearly been included at the time *Honchariw* was decided.

(1973) 30 Cal.App.3d 416, 424-425 [upholding zoning ordinance requiring compliance with building design standards "approved by resolution of the city council"].)

Moreover, the statutory, as well as practical, context must be taken into account. As expounded by the parties at length, the purpose of the HAA is to compel approval of housing projects that *comply* with objective local requirements, and deter *illegitimate* disapproval decisions. The HAA was not intended to force approval of *noncompliant* market rate projects, or generate creative loopholes to challenge *legitimate* decisions. Indeed, the HAA specifically provides that "nothing in this section shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies..." (§ 65589.5, subd. (f)(1).) Consistent with this, while there is, as *Honchariw* noted, limited legislative history behind the relevant language in Section 65589.5, subdivision (j), what there is indicates a singular focus on ensuring that local standards of every nature are *objective*, rather than the particular form, manner, or document into which such standards are adopted.[21]

[21] See *Honchariw, supra,* 200 Cal.App.4th at p. 1076 [[1999 amendment "appears to have been intended to strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')"]; Sen. Hous. & Com. Dev. Comm., analysis of Sen. Bill No. 1721 (2001-2002 Reg. Sess.) as amended Apr. 10, 2002; Mot. For Jud. Not., exh. "F" [addition of "design review standards"];

The construction suggested by Petitioners is thus contrary to statutory text, legislative history, common practice, and common sense.[22] To the extent *Honchariw* could be read to subscribe to that interpretation, it was wrongly decided – but there is no reason to ascribe such error to that decision. Petitioners are simply mistaken.

In sum, as with the interpretation of the Guidelines, determination of whether those Guidelines are appropriately objective and applicable under Section 65589.5, subdivision (j) is a pure question of law, to which "substantial evidence" is not relevant. Properly construed, the Guidelines are indeed objective within the meaning of the HAA, and were properly applied by the City in this case. The matter can and should end there.

IV. "THE ANTITHESIS OF DUE PROCESS": "SUBSTANTIAL EVIDENCE" AS THE INITIAL STANDARD FOR AN ADJUDICATION

Assem. Comm. on Hous. & Com. Dev., analysis of Sen. Bill No. 1721 (2001-2002 Reg. Sess.) as amended May 29, 2002 [same]; Mot. For Jud. Not., exh. "G"; (Assem. Comm. on Local Gov., analysis of Sen. Bill No. 167 (2017-2018 Reg. Sess.) as amended Jul. 3, 2017, at p. 7; Mot. For Jud. Not., exh. "H" [subdivision standards].)

[22] The court may also consider the practical consequences that would flow from a particular interpretation. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) In this case, requiring that design review standards must be "adopted into" a General Plan document or zoning ordinance would simply result in 58 counties and 482 cities adopting ordinances to add their existing standards to the Zoning Code. Such an expensive paper chase merely wastes public resources, and plainly does nothing to promote housing construction. While this "gotcha" might provide a windfall for this particular 10-unit market rate project, it does not serve the policies of the HAA in the slightest.

As noted, Section 65589.5, subdivision (f)(4) does not factor into cases, like this one, presenting no factual issues – and therefore the court need not and should not reach any of the constitutional issues raised by the parties. Nonetheless, given Petitioners' and Intervenor's extensive reliance on that provision, there is one constitutional concern of sufficient gravity to warrant further discussion.

As correctly applied, Section 65589.5, subdivision (f)(4) directs the legislative body to find for the project proponent on any factual question relating to compliance upon which the proponent adduces substantial evidence. Under Petitioners' construction, the tables are tilted even farther, requiring the legislative body – and any reviewing court – to accept *both* the proponents' legal interpretations of the applicable standards (if anyone might find them reasonable) *and* their factual submissions based on those interpretations, regardless of the weight of countervailing arguments or evidence.

Contrary to the language sometimes used by the parties, this is not truly a standard of *review*. Rather, it is a substantive rule of decision applied to the *initial adjudication* of potentially disputed issues. "[S]tandards of review and standards of proof serve different purposes and address different questions." (*Butler v. Oak Creek-Franklin Sch. Dist.* (E.D.Wis. 2001) 172 F.Supp.2d 1102, 1118.) There is little precedent for a "substantial evidence" standard of *proof* in Anglo-American jurisprudence

– and for good reason, as will appear.

The inherent vice of such an approach was succinctly summed up by the appellant in *Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104, 1126 ("NRDC"):

> [A] substantial evidence standard is perfectly appropriate for judicial review, but as applied to the initial adjudication decision of a tribunal or agency, a standard that provides that if the petitioner adduces substantial evidence it wins, no matter how compelling the contrary evidence, is the antithesis of due process. Such a process hardly satisfies the due process requirement that affected property owners have the opportunity to be heard at a meaningful time and in a meaningful manner.

It is well-established that "procedural due process requires that in adjudicatory land use decisions . . . reasonable notice and an opportunity to be heard must be afforded to adjacent landowners before they are deprived of a significant property interest." (*Selinger v. City Council* (1989) 216 Cal.App.3d 259, 273.) Residential project approvals have repeatedly been held to trigger due process requirements – including for projects smaller than the one at issue in this case. (*Selinger, supra,* 216 Cal.App.3d at p. 274; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549.) It is equally well-settled that a local agency may raise such due process concerns on behalf of its affected constituents. (*Selinger, supra,* 216 Cal.App.3d at p. 271.)[23]

[23] It is somewhat surprising that the Attorney General's briefing on this point (Interv. Rep, p. 15, fn. 4) fails to cite or discuss *Selinger* (and *Drum v.*

There can be little dispute that City's proceedings here, and similar housing project approvals under the HAA, are the type of adjudicatory land use hearings subject to the constraints of procedural due process. Aside from the foregoing authorities, one need look no further than Section 65589.5, subdivision (m), providing that "[a]ny action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure." The latter statute is expressly applicable to "a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." (Code Civ. Proc., § 1094.5, subd. (a).)

"Once it is determined that due process applies, the question remains what process is due." (*Conway v. State Bar* (1989) 47 Cal.3d 1107, 1113 quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) Applied here, the question is whether a standard requiring the initial decision-maker to rule based solely upon evidence proffered by one side to a dispute, regardless of the quantum or weight of evidence submitted by the other, comports with due process. As will appear, it does not.

The *NRDC* court eschewed such a decision-making standard, interpreting the statute at issue there to require "a meaningful opportunity

---

Fresno County Dept. of Public Works (1983) 144 Cal.App.3d 777, 781), which are directly on point and controlling.

to present evidence contrary to the petition and a meaningful consideration of that evidence." (*NRDC, supra,* 28 Cal.App.4th at p. 1126.) Nonetheless, the court's statutory analysis turned upon some of the same concerns underlying the due process issue. Among the reasons given for rejecting use of "substantial evidence" as "essentially a standard describing a burden of proof" for initial decisions was its fundamental inconsistency with quasi-adjudicatory decision-making, and with the type of proceeding contemplated by Code of Civil Procedure 1094.5. (*Id.* at p. 1116.)

While the *NRDC* court was able to avoid finally resolving the due process question, examination of the authorities relied upon provides a clear answer. *NRDC* cited *Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, which held that "in every case, the hearing required by the Due Process Clause must be meaningful and appropriate to the nature of the case. *It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision does not meet this standard*." (*Id.* at p. 458 quoting *Bell v. Burson* (1971) 402 U.S. 535, 541-542. See also *Greer v. Board of Education* (1975) 47 Cal.App.3d 98, 114 ["A hearing which does not consider essential issues is not adequate"].) For this reason, courts have consistently disapproved hearing procedures that do not afford affected parties a meaningful opportunity to present evidence on such critical elements. (See also *Lee v. Rhode Island* (D.RI 1996) 942 F.Supp. 750, 755-756.)

It can hardly be denied that whether a proposed housing project is "consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision" is an "element essential" to the approval decision under the HAA. That is the critical factor in whether the project may be approved or denied, how it will be conditioned, and whether the local agency is obligated to make "specific adverse impact" findings under Section 65589.5, subdivision (j). Indeed, the Legislature enacted Section 65589.5, subdivision (f)(4) precisely *because* of the centrality of this determination.

However, Section 65589.5, subdivision (f)(4) effectively precludes interested parties from presenting evidence that the project does not, in fact, comply – and explicitly prevents the decision-making body from considering such evidence – so long as the proponent has presented some evidence of compliance. No matter how strong the evidence of noncompliance, the decision-maker may not consider it, and must base its decision only on the evidence submitted in favor of the project. This plainly does not provide other interested parties – or, indeed, anyone other than the proponent – with a "meaningful" hearing. From the neighbor's perspective, it is little more than a farce.

While the minimum constitutionally permissible standard of proof for an initial decision has not been definitively settled, it is quite clear that compulsory acceptance of one side's substantial evidence will not suffice.

As one District Court observed:

> [N]o lower a standard of proof than "preponderance of the evidence" could be acceptable. Under this standard, the relevant facts must be determined to be more likely than not. Therefore, by definition, any lesser standard of proof (such as "some evidence" or even "substantial evidence") *would allow government officials to make decisions that they themselves believe are more likely than not wrong*.

(*Butler, supra,* 72 F.Supp.2d at p. 1119. See also and *Brown v. Fauver* (3rd Cir. 1987) 819 F.2d 395, 398-399, fn. 4 ["If...section 9.15(a) provides for a burden of proof lower than a preponderance of the evidence, then it follows that an inmate can be punished for acts which he in all probability did not commit. We have grave doubts about the constitutionality of such a regulation"].)

Section 65589.5, subdivision (f)(4) fails to provide due process for the same reasons. By requiring the local agency to find a project compliant based on mere substantial evidence of compliance, without allowing consideration of contrary evidence, the stature not merely allows but *requires* "government officials to make decisions that they themselves believe are more likely than not wrong." Under the statute *no one*, not the legislative body nor a reviewing court, need be convinced that the project actually complies. Indeed, every official decision-maker may be convinced that it does not, but they are nonetheless obligated to credit the proponent's evidence and that evidence alone. The Legislature could, perhaps, wholly waive compliance with a particular standard, thereby removing it as an

element of decision. However, it cannot constitutionally make compliance the *sine qua non* of project approval, and then deny affected parties a meaningful hearing on that issue.[24]

Petitioners do not seriously dispute that land use hearings under the HAA are "adjudicatory" matters subject to the strictures of procedural due process, nor could they. As the Attorney General expressly recognizes, the Legislature "did not compel cities to ministerially approve all qualified housing projects under the HAA..." (Interv. Rep. at p. 30.) Their Reply does briefly suggest that *one element* to be addressed at that hearing – i.e., compliance with standards – is not *independently* adjudicatory, and has thus been surgically removed from due process protections. (App. Rep. at pp. 34-35.) That is not how it works.

Due process is a constitutional guarantee. When it applies to a *decision* (or, more precisely, a proposed deprivation of life, liberty, or

[24] Both Petitioners and the Attorney General suggest that due process is satisfied because interested parties may still contest whether the project proponents have produced substantial evidence of compliance. (App. Rep., pp. 33-34; Interv. Rep., pp. 16-17.) Due process is not so meager. What Section 65589.5, subdivision (f)(4) would do is prevent interested parties from proving that the proponents are actually *wrong*, that their evidence of compliance is flawed or outweighed by other evidence placed in the record. Substantial evidence may consist of as little as one witness' statement (*HGST, Inc. v. County of Santa Clara* (2020) 45 Cal. App. 5th 934, 945), but Section 65589.5, subdivision (f)(4) would preclude any showing that this witness was self-interested, mistaken, lying, or contradicted by other evidence. To suggest that this is adequate to meet due process would deprive the requirement for a "meaningful" hearing itself of all meaning.

property), the Legislature's freedom to manipulate or curtail that guarantee is limited. The suggestion that the Legislature may selectively exempt *components* of such a decision from the requisite notice and "meaningful" hearing runs directly contrary to the Supreme Court's admonition that "a hearing which *excludes consideration of an element* essential to the decision does not meet" the requirements of due process. (*Beaudreau, supra,* 14 Cal.3d at p. 458.)

Section 65589.5, subdivision (f)(4) was, somewhat unusually, enacted for the specific purpose of denying certain parties an opportunity to influence decision-makers:

> It is still too easy for NIMBYs to oppose projects and avoid the HAA based on highly debatable claims of inconsistency with local planning and ordinances. In supporters' view, enacting this bill will better allow housing projects to be afforded the protections of the HAA, despite NIMBY objections and judges' inclination to defer to the judgement of the locality."

(Assem. Comm. on Hous. & Com. Dev., analysis of Assem. Bill No. 1515 (2017-2018 Reg. Sess.) as amended Apr. 17, 2017; Joint Appx., vol. 1, p. 187.)

The Legislature's frustration with "NIMBYs" is longstanding and perhaps understandable, but denying parties with constitutionally protected property interests the opportunity to make "objections" and raise "debatable claims" is not an appropriate and permissible tool to resolve these concerns. In short, Section 65589.5, subdivision (f)(4) violates the procedural due

process rights of interested parties, and is therefore unconstitutional.[25]

Petitioners' briefing on this issue persistently mischaracterizes the effect of Section 65589.5, subdivision (f)(4) – while nonetheless endeavoring to take advantage of its benefits. When it suits their argument, Petitioners will make assertions like "Paragraph (f)(4) merely provides a relatively favorable standard of review *for litigants* who challenge an agency's argument that a project violated objective standards" (App. Opn., p. 42), and "[a] standard of review, of course, merely establishes the burden that a party must meet to prevail on a particular legal issue *in litigation*." (App. Rep., p. 29. See also App. Opn., p 13; App. Rep., pp. 10, 31.)

However, this provision does not merely establish judicial review standards for "a court" or "litigants," but rather applies to – and dictates the outcome of – the local agency's *initial decision* on the project, which the Attorney General freely acknowledges (Interv. Rep., pp. 7, 10), and which Petitioners surely understand. (See, e.g., App. Opn. Brief, p. 43 ["The HAA . . . merely limits—but does not eliminate—the discretion *the city has* to deny projects"].) As noted above, there is a substantial difference, both in law and in effect, between "standards of review" in litigation and

[25] These constitutional defects are obviously magnified under Petitioners' construction of Section 65589.5, subdivision (f)(4), under which interested parties would be denied the opportunity to meaningfully heard on the law, as well as the facts. Their legal arguments, as well as evidence, could not be considered regardless of their merits. A "hearing" in which affected parties cannot be heard on issues of either fact or law is no hearing at all. Due process clearly will not tolerate this result.

"standards of proof" for initial decision-makers.[26]

Petitioners' attempts to compare the "substantial evidence" standard in Section 65589.5, subdivision (f)(4) to the familiar "fair argument" standard under the California Environmental Quality Act (CEQA) are wholly misguided. As the City notes, CEQA's fair argument standard "does not mandate an end result" (Brief in Resp. to Intervenor, p. 40) – and the *NRDC* court similarly distinguished the standards applicable to CEQA's "study process" requirements from those appropriate to a "substantive determination." (*NRDC, supra,* 28 Cal.App.4th at p. 1120.)[27]

---

[26] Petitioners so badly mischaracterize the City's position on this issue that one wonders if we are reading the same briefs. Nowhere does the City (or its amici) argue that "the California Constitution forbids the Legislature from establishing a standard of review in litigation that fails to defer to municipal governments." (App. Rep., p. 11, 29.) If Section 65589.5, subdivision (f)(4) merely provided for the court to exercise its independent judgment when reviewing local agency decisions under the HAA, without deference, there would be no constitutional objection. Indeed, such standards are quite common. The Legislature might even place the burden of producing evidence (before the agency, or in court) on project opponents. What it cannot do is *preclude* opponents from producing evidence and deprive them of any decision-maker to whom they may offer proof. However, that is exactly what Section 65589.5, subdivision (f)(4) does, by debarring either the local agency or the court from any ability to credit and weigh evidence, no matter how strong, that the project does not actually comply with applicable objective standards.

[27] As elsewhere, Petitioner's briefing on this subject confuses *litigation* results (which the fair argument standard unquestionably impacts) with substantive project decisions (i.e., the kind that can affect property rights of interested parties). (App. Rep., pp. 31-32.) The fair argument standard does not compel results that impair constitutionally protected property interests, whereas Section 65589.5, subdivision (f)(4) purports to do precisely that.

More fundamentally, not only does CEQA's fair argument standard not dictate any substantive result, it also does not purport to constrain the ultimate determination of any question of fact. The existence of a fair argument regarding any possible environmental impact at the initial study stage does not preclude the lead agency from determining, in the EIR, that there is, in fact, no such impact based upon all of the evidence in the record. (See Cal. Code Regs., tit. 14, § 15128.) Substantial evidence adduced to support a fair argument may compel a more elaborate fact-finding process, but critically does not preclude the decision-maker from considering opposing evidence, and making an ultimate determination based upon the weight of that evidence. In short, there is no comparison here. [28]

Section 65589.5, subdivision (f)(4) was designed to deprive disfavored parties of a meaningful opportunity to be heard, and would effectively do so. Should the court reach the issue, it must conclude that this provision violates due process and therefore cannot be constitutionally

[28] For Petitioners' analogy to be valid, the initial showing of "substantial evidence to support a fair argument" regarding an environmental impact would have to compel an ultimate finding that such impact truly exists – regardless of contrary evidence developed during the EIR process – thereby mandating the lead agency to either find overriding considerations or disapprove the project. CEQA, of course, requires no such thing. Conversely, if Section 65589.5, subdivision (f)(4) merely required the legislative body to conduct a more detailed fact-finding process before rejecting a proponents' proffered evidence – similar to how CEQA's fair argument standard actually works – this case likely would not be before the court.

applied to this case or any other. [29]

V. CONCLUSION

Section 65589.5, subdivision (f)(4) does not apply to this case, and if applicable, would violate the constitutional rights of affected parties. The trial court's conclusions on these points were correct, as was its interpretation and application of the City's Guidelines. The judgment of the Superior Court should therefore be AFFIRMED.

Dated: March 31, 2021

Respectfully submitted,

/s/
By _____
Jennifer B. Henning, SBN 193915

Attorney for Amicus Curiae
California State Association of Counties

[29] Petitioner's effort to analogize Section 65589.5, subdivision (f)(4) to the "rational basis" standard of review (App. Rep., p. 32, fn. 16) is likewise particularly difficult to follow. "Rational basis" review is highly *deferential* to the governmental decision-maker (regardless of whether the challenger is another public agency, or a private party) – and, more importantly, is purely a standard for judicial review. No governmental entity is *compelled* to take an action simply because there is a rational basis for doing so. It is only once a governmental decision-maker has independently decided to act that the rational basis standard may apply to insulate that decision from legal challenge. It has no relationship, and no relevance, to a decision-making standard that dictates governmental actions affecting interested parties' property rights.

CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 9,930 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31st day of March, 2021 in Sacramento, California.

Respectfully submitted,

/s/

By: _____
JENNIFER B. HENNING

Attorney for Amicus Curiae
California State Association of Counties