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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

CALIFORNIA RENTERS LEGAL ADVOCACY & EDUCATION FUND and THDT INVESTMENT, INC.,

Petitioners,

v.

CITY OF HUNTINGTON BEACH,

Respondent.

Case No. 30-2020-01140855-CU-WM-CJC

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ISSUE WRIT OF MANDATE

Judge: Hon. Deborah Servino
Date: June 4, 2021
Time: 10:00 a.m.
Dept.: C21

ASSIGNED FOR ALL PURPOSES TO:
HON. DEBORAH SERVINO
DEPARTMENT C21

Reservation No.: 73478429

Action Filed: May 26, 2020

(Brief filed concurrently here and in Case No. 30-2019-01107760-CU-WM-CJC.)

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I. INTRODUCTION AND SUMMARY OF ARGUMENT[1]

California is experiencing what the state legislature describes as a "housing supply and affordability crisis of historic proportions." The crisis has been caused in part by "local governments that limit the approval of housing" and fail to pay "adequate attention to the economic, environmental, and social costs" of disapproving new housing.[2]

The City of Huntington Beach long ago identified the area around Beach Boulevard, Ellis Avenue, and Main Street for dense residential development. In 2017, petitioner THDT Development and its principal Tahir Salim answered the City's call and proposed to develop an underutilized site (currently home to a liquor store and part of a car wash) along that corridor into a multi-family housing development. After working closely with City staff to design a project that met all the City's standards, THDT proposed a 48-unit condominium project, including five units set aside for lower-income households. City staff confirmed that the project met all of the City's standards and recommended approval of the Project.

Nevertheless, the City's Planning Commission denied the project. In doing so, it violated the Housing Accountability Act ("HAA"), a critical part of the Legislature's multi-decade effort to address the housing crisis. The legislature has amended the HAA several times in the last few years to make it harder for local governments to deny housing projects and to require courts to apply a higher standard of review to denials of housing projects. Under the HAA, if a reasonable person could conclude that a housing project meets all of a city's applicable objective development standards, the city must generally approve the project. The only way for a city to disapprove such a project is if the city proves by a preponderance of the evidence that the project poses a specific, adverse public health impact and that the impact cannot reasonably be mitigated.

[1] Consistent with the Court's February 26, 2021 Minute Order, this Brief is being filed concurrently in Case Nos. 30-2019-01107760-CU-WM-CJC (the "Californians Matter") and 30-2020-01140855-CU-WM-CJC (the "CaRLA Matter"), which have been ordered related. Californians for Homeownership is filing as the Petitioner in the Californians Matter. THDT Development is filing as the Real Party In Interest in the Californians Matter and as Petitioner in the CaRLA Matter. California Renters Legal Advocacy & Education Fund ("CaRLA") is filing as Petitioner in the CaRLA matter.

[2] Gov. Code § 65589.5(a)(1)(D).

A specific, adverse health impact means a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete."[3]

The Legislature intentionally created a high bar for local governments to deny projects that could reasonably be found to meet all applicable, objective criteria. The legislature's goal was to give applicants "reasonable certainty" that if they spent time and money crafting a project that met all of a city's objective criteria, the city would not be able to deny the project at the eleventh hour with surprise rules or interpretations.[4] And by creating a high threshold for cities to disapprove projects based on health and safety impacts, the legislature intended to close the "loophole" by which cities used the pretext of health and safety concerns to deny projects for routinely occurring conditions.[5] Indeed, the legislature declared its intent that specific, adverse health and safety impacts should only be found "infrequently."[6]

The HAA, in other words, was designed to prevent exactly what the City of Huntington Beach did here. After City staff confirmed that the project met all of the City's objective standards, the Planning Commission denied the project by citing vague, subjective concerns about the Project. One Commissioner even commented on the fact that the project was consistent with the city's land use standards, but the standards themselves were "broken." The City Council only issued findings declaring that the project had an adverse health and safety impact after Petitioners informed the city that the Project could not legally be denied based on such subjective factors. But the health and safety impacts cited in the findings were still vague and speculative, so Petitioners again wrote to the City to explain that these findings were insufficient to sustain a denial under the HAA. In response, the City Council issued a third set of findings, this time citing two "expert" reports (purportedly prepared for litigation) in an effort to provide support for the conclusion that the project had a specific, adverse health and safety impact.

[3] Gov. Code § 65589.5(d)(2).
[4] RJN Ex. B at 4.
[5] RJN Ex. D at 3.
[6] Gov. Code § 65589.5(a)(3).

These new findings, including the expert reports provided at the last minute to rationalize the City's position, come nowhere close to meeting the City's burden of proof under the HAA. The City Council never identified any applicable, objective land use standards the project failed to meet—because the project met them all. Nor has the City ever identified any objective public health or safety standard that justifies denying the Project.

To the contrary, the record and the Findings actually demonstrate a total *absence* of any significant health or safety impact. Though the City Council made findings that the project would adversely affect traffic safety, it based that conclusion largely on a traffic study that repeatedly found the project would *not* have a significant traffic impact. The project's traffic impacts were so minimal that they did not even trigger any site-specific traffic mitigations under the city's land use regulations, other than a few minor driveway improvements. The traffic safety expert hired by the City to discover a traffic safety impact speculated that the project "could" result in more accidents, but that conclusion was not based on any objective public health and safety standard and was so vague that it could apply to any project on this site—or indeed any project on any site in the City. This is hardly the "infrequent" health and safety impact contemplated by the Legislature.

For all these reasons, the City has not met its burden of proof and its denial violated the HAA. Furthermore, because the denial was purely pretextual and in bad faith, the court should order the project approved.[7]

II. STATEMENT OF FACTS

A. The Beach And Edinger Corridors Specific Plan

The city of Huntington Beach enacted the Beach and Edinger Corridors Specific Plan ("BECSP") in 2010, and subsequently amended it in 2015. Request for Judicial Notice ("RJN") Ex. A. The BECSP refers to the area around the intersection of Beach Boulevard, Main Street, and Ellis Avenue, in which the project site at issue in this case is located, as the "Five Points District segment." *Id.* at 5. According to the BECSP, the Five Points District Segment is "envisioned to have greater development intensity than surrounding segments." *Id.* In the Five

[7] Gov. Code § 65589.5(k)(1)(a)(ii).

Points District segment, "[n]ew apartments, condominiums, and professional and medical office buildings would face public sidewalks with lobby entrances, shop fronts, and attractively detailed facades." *Id.* The BECSP also anticipates that buildings in the Five Points District segment "would be taller and development more compact in this segment compared to other City neighborhoods, providing the intensity and activity expected in a vibrant urban neighborhood." *Id.*

Accordingly, the parcels of land in the Five Points District segment, including the project site, are zoned under the specific plan to permit large multi-family buildings on compact sites with a conditional use permit. *Id.* at 14-15. (AR 1410-14.)

B. Staff Recommends Approval Of The Project, Finding That It Met All City Standards And Presented No Health Or Safety Concerns

In 2017, Petitioner THDT began working with staff at the city of Huntington Beach on the proposed development of a housing project at 8041 Ellis Avenue. (AR 3061-3160.) The Project would be located in the Five Points District segment, on Ellis Avenue between Beach Boulevard and Patterson Lane. The Project site currently contains a one-story liquor store and a residence and is located directly across the street from the Elan, a 6-story, 274-unit apartment building. (AR 1403, 1407, 1415.) In November 2018, after more than a year of collaboration with city staff, THDT filed an application to build a 4-story mixed-use project with 48 residential units, including 5 units set aside as housing affordable to lower-income households. (AR 1410.) The Project's density was reduced from the original proposed density of 51 units. (AR 3069.)

According to the City staff report recommending approval, the project included 2,700 square feet of public open space "to enhance the pedestrian and public experience," along with "enhanced landscaping, seating areas, and visually appealing amenities." (AR 1409.) The building was designed to "cater to the pedestrian scale," and included a small commercial space within close proximity to other commercial properties to reduce automobile use. *Id.* The mix of land uses would "encourage greater interaction" between developments and "further the vision and viability of the BECSP." *Id.* The application was deemed complete on April 1, 2019. (AR 1418.)

The project is situated as illustrated in this aerial view:

AR 2832 (annotated with project information).

The project was subject to numerous objective requirements in the BECSP, including among others: land use, height, length, bulk, setbacks, frontage, shadows and parking. The project met all of the objective requirements in the BECSP, as well as all other applicable objective general plan, zoning, and subdivision standards. (AR 1411-14.)

The application was comprehensively reviewed by the Huntington Beach planning staff, fire department, police department, public works department, and other staff for issues including but not limited to public health and safety, traffic, architecture, environmental impacts, site layout, vehicular access, affordable housing, and others. In a formal report prepared for the Planning Commission's review, staff confirmed that the project complied with all the city's objective land use standards. (AR 1410-14). The report identified no health or safety issues with the project.

With regard to traffic, the anticipated traffic volume generated by the project was so

minimal that it did not trigger any project-specific traffic mitigation measures other than "fair share" traffic fees imposed on all development projects in the BECSP, and some driveway improvements to ensure right turns in and out of the project. (AR 1364-65; 1406.) "The project does not result in other traffic related impacts requiring mitigation." (AR 1406.) The staff report went on to observe that, according to a study by the city Public Works Department, traffic accidents at relevant intersections near the project site had declined overall since the nearby Elan apartment building had become occupied with tenants (AR 1407; AR 1456.)

With regard to fire safety, the report observed that the project met all applicable standards, including standards for emergency vehicle access. (AR 1414; 1415-16.) In addition, a fire department representative testified at a Planning Commission hearing on May 14, 2019 that the project not only satisfied all fire standards, but actually went "above and beyond what's required by code" in providing an enhanced sprinkler system. (AR 1370-71; 1375-77.)

On the basis of the conclusion that the project met all the relevant standards and posed no health or safety hazards, the staff report recommended that the Planning Commission approve the project. The report also concluded that the project required no additional environmental review under the California Environmental Quality Act ("CEQA") because the project was covered under the "program" Environmental Impact Report for the BECSP, and was therefore statutorily exempt from CEQA as a project implementing a specific plan under CEQA Guidelines Section 15182 (AR 1417.) Suggested findings of approval were enclosed with the report. (AR 1419-29.)

C. <u>The Planning Commission Disapproves The Project Without Making Any Health Or Safety Findings</u>

On May 28, 2019, the Huntington Beach Planning Commission held a public hearing on the Project. At the May 28 hearing, the Planning Commissioners discussed the Project and several Commissioners indicated their intent to vote no on the project. The Commission then directed staff to return at the following Planning Commission meeting with proposed findings of denial. The hearing was continued until June 11, 2019. At the June 11 hearing, the Planning Commission voted to deny the project, and adopted the new proposed findings of denial prepared by the staff. (AR 1733-36.)

Over the course of two hearings discussing the project, the Planning Commission never identified any relevant city standard the project failed to meet. To the contrary, Commissioner Dan Kalmick observed that the Project met all the requirements in the BECSP, but voted to deny the project because in his view the Project was inconsistent with the "spirit" of the BECSP. As he stated, the Project "does meet the appropriate code guidelines" but "I think the spirit of the plan is not met." (AR 1625.) In addition, two Commissioners faulted the BECSP itself for apparently permitting projects like the one proposed by THDT. Commissioner Kalmick referred to the BECSP as "broken" (AR 1618) and stated that this project was "the result of a broken building code." (AR 1618.) Commissioner Michael Grant stated that the city needed to "fix" the BECSP, observing that it's "tough" for applicants like THDT to "get all the way down the line" with their development applications before getting rejected. (AR 1707.)

Instead of identifying any actual city standards the project failed to meet, several Commissioners identified subjective concerns that are not contained anywhere in the BECSP or any other written city standard:

- Commissioner Kalmick complained that the applicant did not offer to meet with the Planning Commissioners individually prior to the hearing or provide a virtual reality tour of the Project like some larger developers had done with other projects. (AR 1699.) Of course, there is no requirement to do so, and serial meetings of that kind risk triggering a Brown Act violation. *See* Gov. Code § 54952.2(b)(1).
- Commissioners said that the project was "too big, too bulky, too massive," even though the size and bulk of the project are expressly permitted by the BECSP. (AR 1610).
- Commissioners disliked the proportion of commercial uses in the project, the lot configuration, and numerous other attributes of the project, although the project conformed with the BECSP in all of these respects. (AR 1612; 1616-17; 1700).
- Finally, Commissioner Kalmick observed that Huntington Beach residents have made clear they don't like 4-story buildings on smaller lots with this sort of design, stating that "I don't know what they want more of, but they wanted less of this type of product." (AR 1701.)

1 Again, the height, bulk, design, lot size and lot configuration of the project are all consistent with
2 the requirements of the BECSP, as the staff report's detailed analysis demonstrated:

Provision	Town Center Neighborhood	Proposed Project
2.3.1 & 2.3.2 Height	Min. 2 story/ Max. 4 stories Ground floor retail - 14 ft. min. floor to ceiling Adjacent to housing	4 stories 14 ft. retail ceiling 45° slope complies
2.3.3 Building Length	Max. 300 ft.	54 ft. max
2.3.4 Special Building Length	Limited mid-block building - max. 80 ft.	54 ft
2.3.5 Building Massing	All other streets - 1L:3H to 3L:1H	Complies with massing range
2.4.1 Building Orientation	Orientation to street required	Building oriented to Ellis Ave.
2.4.2 Private Frontage	Various types including shopfront, corner entry, common lobby, etc.	Ellis Ave. elevation: Shopfront - 24 ft. long Internal elevation: Common Lobby Entry
2.4.3 Front Setback	All other streets - min. 30 ft. Upper story setback - 10 ft. along front and sides of a building for a depth of minimum 100 ft. for structures above the 3rd floor	30 ft. 4th floor: 11 ft. 1 in. setback for a depth of 101 ft. 10 in.
2.4.4 Side Setback	Min. w/living space windows - 10 ft.	West side: 10 ft. East side: 33 ft. 7 in
2.4.5 Rear Yard Setback	Min. 10 ft	15 ft. 7 in.

19 (AR 1411-12.)
20 The Chair of the Planning Commission Pat Garcia dissented from the commission's
21 decision, observing that the commission's reasons for denial were "vague," and therefore exposed
22 the city to legal liability. (AR 1711.)
23 Among the many issues raised, several Commissioners offhandedly expressed concerns
24 about traffic congestion and the need for a right turn in and out of the project site, although the
25 traffic study for the project demonstrated minimal anticipated traffic impacts and the access to and
26 from the project site was consistent with the BECSP. (AR 1706.) One Commissioner said the
27 traffic situation at the project site was "dangerous," speculating that drivers "in a hurry" would
28 "cut across traffic" to make a left turn, but cited no evidence to support this speculation.

(AR 1625.)

The findings of denial adopted by the planning commission repeated many of the subjective concerns raised by the Commissioners. The findings did not identify any objective standards with which the project failed to comply, nor did they identify any specific adverse health and safety impact based on an objective written public health and safety standard, policy or condition. The findings did not even assert the existence of any health or safety hazard at the site, noting only the possibility of traffic "conflicts." Finally, the findings did not discuss possible measures the Commission could have adopted to mitigate the identified impacts of the project. (AR 1733-36.)

D. The City Council Disapproves The Project Without Citing Any Objective Health Or Safety Standards

THDT appealed the Planning Commission's decision to the City Council. (AR 1886-1913.) In a good faith effort to address concerns raised by some of the Planning Commissioners about left turns out of the project site, the applicant also submitted an alternative site plan containing a raised "porkchop" barrier on the left side of the site exit to ensure drivers turned right out of the site. (AR 1913.) This was presented as a possible alternative design, to allow the City Council to approve whichever design it preferred.

In advance of the City Council's consideration of the Project, Petitioners Californians and CaRLA wrote letters to the City Council, stressing that because the Project complied with all objective land use standards, the Project could not be denied under the HAA unless the City Council made written findings proving by a preponderance of the evidence all of the following: 1) that the project has a specific adverse health and safety impact based on objective, written public health and safety standards, policies or conditions, and 2) that there are no feasible mitigation measures that could mitigate the health and safety impacts. (AR 1916-18 (CaRLA letter); AR 3509-13 (Californians letter).)

The City Council heard the appeal on September 3, 2019. Several Councilmembers expressed concern about fire vehicle access to the site if the "porkchop" design was added to the site. (AR 2304-2306.) The fire department representative recommended that the porkchop be

removed from the site plan. (AR 2306.) The fire department had previously determined that the original site plan without the porkchop was consistent with all fire standards, including access standards. (AR 1370-71; 1375-77; 1414; 1415-16.)

The Council voted to deny both versions of the Project and adopted findings of denial to replace the original proposed findings of denial from the Planning Commission. (AR 2009-2012.) The new findings asserted that the right-turn-only access at the site presented an adverse health and safety impact, but did not cite any objective written public health and safety standard, policy or condition to support that conclusion. (AR 2009.) The findings also did not discuss any measures the city could have adopted to address the right-turn-only access issue, other than the raised porkchop design. (AR 2009-10.)

E. The City Council Is Advised That The Project Cannot Be Denied Under The HAA And Agrees To Reconsider The Denial

Counsel for Californians then wrote a letter informing the City that the findings were insufficient under the HAA because they failed to quantify the traffic impacts, failed to identify any written public health or safety standard the project violated, and failed to discuss any potential mitigation measures aside from the porkchop. (AR 3514-18.) Californians advised that it intended to file suit if the City did not reconsider its denial. After receiving no response from the city, Californians filed suit on October 28, 2019.

On November 14, 2019, counsel for THDT and CaRLA wrote a letter to the City Council to advise that the denial violated the Housing Accountability Act because the City's findings failed to identify any written public health or safety standard to support the denial. The letter advised the City of their intent to file suit unless the City re-considered its denial. (AR 2403-2404).

Ultimately, the City agreed to reconsider the denial and scheduled a re-hearing for February 18, 2020. (AR 2368-71.)

F. The City Council Again Disapproves The Project Without Citing Any Objective Health Or Safety Standards

Prior to the February 2020 hearing, the City did not propose any mitigation measures or other conditions upon which the project might be approved. Instead, three days before the

scheduled re-hearing, the City posted new proposed findings of denial, citing two expert reports purportedly commissioned for the purpose of defending the City in the Californians litigation. (AR 2368-71; 2372-75; 2376-86; 2387-2402.)

Like the previous findings of denial, the new findings, including the expert reports, did not identify any objective land use standard the project failed to meet, or any objective, written public health or safety standard, policy or condition the project failed to meet. In addition, neither the new findings nor the expert reports considered any ways in which the impacts of the project could be mitigated, other than the proposed raised porkchop design. Prior to the hearing, Petitioners CaRLA and Californians both sent letters informing the City that, if adopted, these new findings would be insufficient under the HAA. (AR 2794-2796; 2802-3002.)

On February 18, 2020, the City Council held a brief hearing on the project, at which it voted to deny the project and adopt the new findings of denial. (AR 2372-2375 (hereinafter "Findings of Denial").) The findings are discussed in detail in Part III *infra.* On April 6, 2020, Californians amended its Petition to challenge the February 18 denial. THDT and CaRLA filed suit to challenge the denial on May 26, 2020.[8]

III. LEGAL BACKGROUND

A. The Housing Crisis And The Housing Accountability Act

The state legislature initially enacted the Housing Accountability Act in 1982, finding that the inadequate supply of housing had already become "a critical problem that threaten[ed] the economic, environmental, and social quality of life in California." Gov. Code § 65589.5(a)(1)A. As described below, the HAA places strict limits on the ability of local governments to deny

[8] By emergency order of the presiding judge of this court, all dates from April 27, 2020 to May 22, 2020 were deemed court holidays for purposes of computing filing deadlines. *See* In re: COVID Pandemic, Amended Third Implementation Order re: Emergency Order, https://www.occourts.org/media-relations/covid/2ndAmendedThridImplementationEmergencyOrder.pdf. On May 29, 2020, the Judicial council approved amended emergency rule 9, which tolled the statute of limitations for all civil actions and proceedings that are 180 days or less from April 6 to August 3, 2020. *See* Circulating Order Memorandum to the Judicial Council, Circulating Order Number: CO-20-09, https://jcc.legistar.com/View.ashx?M=A&ID=790621&GUID=A0ED0998-D827-4792-9BD1-A3A4FCF939AA.

housing projects that meet the city's applicable objective land use standards.

In the last few years, the Legislature has acted several times to strengthen the HAA in order to address what the Legislature has described as a "housing supply and affordability crisis of historic proportions." Gov. Code § 65589.5(a)(2)(J); Stats. 2016 c. 420 (A.B. 2584); Stats 2017 c. 378 (A.B. 1515); Stats. 2017 c. 368 (S.B. 167); Stats. 2019 c. 654 (S.B. 330). Among the HAA's comprehensive findings of fact are the following:

- California has accumulated an unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units annually to keep pace with growth through 2025. Gov. Code § 65589.5(a)(2)(D).
- California's overall homeownership rate is at its lowest level since the 1940s. The state ranks 49th out of the 50 states in homeownership rates as well as in the supply of housing per capita. Only one-half of California's households are able to afford the cost of housing in their local regions. Gov. Code § 65589.5(a)(2)(E).
- The majority of California renters, more than 3,000,000 households, pay more than 30 percent of their income toward rent and nearly one-third, and more than 1,500,000 households pay more than 50 percent of their income toward rent. Gov. Code § 65589.5(a)(2)(G).

The Legislature concluded that the shortage of housing was "hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." Gov. Code § 65589.5(a)(2)(A). It also found that the crisis has been caused in part by "local governments that limit the approval of housing" and fail to pay "adequate attention to the economic, environmental, and social costs" of disapproving new housing. Gov. Code § 65589.5(a)(1)(D).

B. The HAA Sets A High Bar For Disapproval Of A Housing Development

To address the role of local governments in driving the housing crisis, the HAA imposes several limitations on the ability of local governments to disapprove housing projects like the one

at issue in this case.[9] In general, subject to one narrow exception discussed below, the HAA prohibits cities from disapproving a project that meets all "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." Gov. Code § 65589.5(j)(1) (emphasis added). "Objective" means "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." Gov. Code § 65589.5(h)(8). This requirement provides certainty for developers that standards will be applied consistently, and also enables the state Department of Housing and Community Development to assess a city's housing plans for compliance with state housing law. *See* RJN Ex. B at 4; Gov. Code § 65585.

To provide additional certainty to developers, a project like the one proposed by THDT (150 or fewer units) is deemed compliant with all applicable land use standards if the local government fails to notify the applicant of non-compliance in writing within 30 days after the application is determined to be complete. Gov. Code § 65589.5(j)(2)(A)(i).

In addition, a project shall be deemed consistent with an applicable land use standard if there is "substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity." Gov. Code § 65589.5(f)(4).

When a project is consistent with the applicable objective general plan, zoning, and subdivision standards and criteria in place at the time the project was deemed complete, the city may only disapprove the project if it makes "written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:"

> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant,

[9] The HAA applies to all "housing development projects," which include "mixed use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use." Gov. Code § 65589.5(h)(2).

quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete; and

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

Gov. Code § 65589.5(j)(1)(A)-(B).

Recent amendments to the HAA have made clear that cities face a high bar in denying a project based on health and safety conditions. The legislature recently passed an amendment to the HAA expressing its intent that a "specific adverse impact upon the public health and safety" as described in the preceding paragraphs should be found "infrequently." Gov. Code § 65589.5(a)(3); Stats. 2018 c. 243 (AB 3194). The legislation's author emphasized that this statement of intent was designed to close the "loophole" in which cities characterized "regularly-occurring" conditions as health and safety concerns to improperly deny projects. *See* RJN Ex. D at 3.

The Legislature also amended the HAA recently to require that cities satisfy a higher standard of proof if they wish to deny a project based on health and safety conditions. Cities may now only deny a project that meets all applicable objective land use standards if they make the required health and safety findings described above and those findings are supported by a preponderance of the evidence. Gov. Code § 65589.5(j)(1); Stats. 2017 c. 368 (S.B. 167). Prior to SB 167, cities were only required to support their health and safety findings with substantial evidence, which is a lower standard. The author of SB 167 observed that the substantial evidence was "too deferential" to cities and a higher standard was necessary to "make it more difficult for local governments to disapprove, prolong, or reject proposed housing developments." RJN Ex. C at 5.

The Legislature further declared its intent that the HAA should be interpreted "in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." Gov. Code § 65589.5(a)(2)(L). Toward that end, in any action challenging the disapproval of a housing development project under the HAA, the local government bears the burden of proof that

1 its denial conformed to all of the conditions specified in the HAA. Gov. Code § 65589.6.

2 Housing organizations like Californians and CaRLA are entitled to statutory standing
3 under the HAA. Gov. Code §§ 65589.5(k)(1)(A)(i), (k)(2).

4 **C. The HAA Applies To Charter Cities Like Huntington Beach**

5 In its Answers, the city asserts as an affirmative defense that the HAA does not apply to
6 charter cities like Huntington Beach. Answer to Californians Matter Petition at Sixth Affirmative
7 Defense; Answer to CaRLA Matter Petition at Fifth Affirmative Defense. According to Gov.
8 Code § 65589.5(g), however, the HAA is applicable to charter cities because the shortage of
9 housing "is a critical statewide problem."

10 In recent years, the courts have consistently held that the state has the constitutional power
11 to preempt charter cities' land use regulations because those regulations touch on important
12 statewide concerns such as housing affordability and regional land use planning. The statewide
13 interest in housing is so significant that, in the recent case of *Anderson v. City of San Jose*, 42 Cal.
14 App. 5th 683, 698 (2019), the court upheld the constitutionality of the Surplus Land Act, Gov.
15 Code § 54220, et seq., which deprives charter cities of their autonomy to control the disposition of
16 their own city-owned property. *See also Coal. Advocating Legal Housing Options v. City of Santa*
17 *Monica*, 88 Cal.App.4th 451, 458 (2001) (charter city must comply with state accessory dwelling
18 unit law); *Bruce v. City of Alameda*, 166 Cal. App. 3d 18, 22 (1985) (state law barring housing
19 discrimination preempted local land use initiative because it addressed a "vital statewide
20 concern"); *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.*,175 Cal.
21 App. 3d 289, 307 (1985) (holding that charter city was required to conform its general plan to
22 statutory requirements); *City of Los Angeles v. State of California*, 138 Cal. App. 3d, 526, 532-33
23 (1982) (holding that charter city of Los Angeles was not immunized against a state legislative
24 requirement that the city conform its zoning regulation to a general plan); Stahl, *Home Rule and*
25 *State Preemption of Local Land Use Control* (2020) 50 URB. LAWYER 179, 183 ("[C]ourts have
26 consistently held that the state can preempt local land use authority because land use touches upon
27 issues of statewide concern like regional land use planning, environmental protection, and housing
28 affordability").

The HAA, which does not deprive any city of authority over its own property or funds, is far less intrusive upon local land use authority than the Surplus Land Act upheld in *Anderson*. It is, however, vital to accomplishing the legislature's objective to resolve the statewide housing supply crisis. The HAA addresses one of the root causes of that crisis—the reluctance of local governments to approve new housing—by making it harder for local governments to deny housing projects that comply with their own applicable objective land use standards. Therefore, the HAA can constitutionally preempt local land use authority.

In considering the constitutionality of a state enactment that preempts local authority, any "doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as strictly a municipal affair . . . must be resolved in favor of the legislative authority of the state." *Cal. Fed. Savings & Loan Ass'n. v. City of Los Angeles*, 54 Cal. 3d 1, 24 (1991) (quotation omitted).

Under the four-part test courts traditionally apply to determine the constitutionality of a state enactment that preempts local authority, the HAA is clearly constitutional as applied in this case. The factors are: (1) the nature of the "municipal affair"; (2) whether there is an actual conflict between the state law and the local ordinance; (3) whether the state law addresses a matter of "statewide concern;" and finally (4) whether the state law is "reasonably related" and "narrowly tailored" to the resolution of the statewide concern. *City of Huntington Beach v. Becerra*, 44 Cal. App. 5th 243, 255 (2020). As to the first factor, the HAA does not intrude into traditional municipal prerogatives such as how the city spends its own money. The HAA simply requires that, in most cases, cities follow their own applicable objective land use rules. The City cannot claim there is a significant municipal interest in disregarding its own stated objective rules absent a significant and unavoidable hazard to public health and safety.

As to the second factor, there is no conflict between the HAA and the city's land use regulations (specifically the BECSP) because all the HAA does is require that the city follow its own rules spelled out in the BECSP and elsewhere in the city's land use regulations.

Even if the HAA did entrench on a significant municipal interest here, the third and fourth

factors heavily weigh in favor of the law's constitutionality. With regard to the third factor, the state's interest in addressing the shortage of housing is incredibly significant. In enacting legislation such as the HAA, the legislature has made compelling findings of fact that the housing crisis is "hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." Gov. Code § 65589.5(a)(2)(A). These findings of fact must be given "great weight" by the court. *Bruce*, 166 Cal. App. 3d at 21.

Finally, the HAA easily satisfies the fourth factor. The California Supreme Court has found a state enactment to be sufficiently tailored when the interference in local affairs is "substantially coextensive with the state's underlying regulatory interest." *Cal. Fed*, 54 Cal. 3d at 25. Here, as discussed above, the state's regulatory interest is in addressing the statewide housing supply crisis. In its findings of fact, the legislature specifically found that the crisis was caused in part "by activities and policies of many local governments that limit the approval of housing…." Gov. Code § 65589.5(a)(1)(B). The legislature chose to resolve this problem in the most straightforward way possible, by making it harder for local governments to deny projects that meet their applicable objective land use standards. For that reason, the HAA is clearly coextensive with the state's underlying regulatory interest in addressing the supply crisis.

The HAA is also consistent with the somewhat more stringent definition of narrow tailoring imposed by some lower courts, which is that the state enactment must "limit the incursion into a city's municipal interest." *Anderson, supra*, 42 Cal. App. 5th at 716-17 (quotation omitted). In *Anderson*, the court held that the Surplus Land Act was narrowly tailored, despite the fact that it mandated how cities dispose of their surplus property, because local governments retained the authority to designate land as surplus and to decide whether to dispose of land for affordable housing; the state law only took effect in the event the local agency made both of those decisions. *Id.* at 678-79; *see also City of Huntington Beach*, 44 Cal. App. 5th at 277-79 (state law preempting certain local law enforcement activities related to immigration was sufficiently tailored because it left ample room for local law enforcement and prohibited only such law

enforcement activity as was necessary to resolve statewide concerns).

In this case, the HAA is a very limited imposition on local land use authority. The law does not impose any substantive statewide land use standards at all, but simply requires that local governments follow *their own* objective land use standards. Even then, cities can avoid following their own standards if they identify a substantial public health and safety hazard that meets the HAA's standards and cannot reasonably be mitigated. Therefore, the HAA is reasonably related and sufficiently tailored to the resolution of the statewide concern in addressing the housing supply crisis. For all these reasons, there is no question that the HAA is constitutional as applied in this case.

IV. ARGUMENT: THE CITY UNLAWFULLY DENIED THE PROJECT IN VIOLATION OF THE HAA

The City's denial of the project violated the HAA because the project was consistent with all of the City's objective development standards, and the City cannot prove by a preponderance of the evidence that the Project would have a specific, unavoidable adverse public health impact based on objective, written public health and safety standards in place at the time the application was deemed complete. The HAA deliberately places a heavy burden on cities that wish to deny housing projects, and the City cannot come anywhere close to meeting that burden.

A. The Project Met All Of The City's Objective Development Standards

The HAA's basic requirement is that a city approve a housing development project if the project "complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete," subject to a narrow exception for serious health and safety concerns. Gov. Code § 65589.5(j)(1). This limitation prohibits cities from doing exactly what the city of Huntington Beach did here: inducing a developer to spend significant time and sums of money crafting a project that complies with all of a city's applicable objective development standards, only to change the rules at the eleventh hour. The law's goal is to give "appropriate certainty" to housing developers that if they propose a housing project that could reasonably be found to be consistent with a city's objective standards, the city will not deny the project unless it identifies a significant

and unavoidable health and safety impact based on objective, written public health and safety standards. *See* RJN Ex. B at 4. If cities can simply change the rules after developers spend significant resources on a project, it would raise housing costs for consumers and worsen the state's already severe housing crisis. As described below, this project is and must be considered consistent with all the city's applicable objective standards.

1. <u>Because The City Did Not Timely Make Written Findings Under Subdivision (j)(2) Of The HAA, The Project Was Deemed Consistent With All Applicable Standards On May 2, 2019</u>

One way in which the HAA accomplishes its goal of providing certainty for developers and reducing housing costs for residents is by requiring cities to provide early notification of any objective land use standards with which a project is inconsistent, before the developer has made a significant investment in final development plans. For projects like this one, containing fewer than 150 units, a city must notify a developer of any non-compliance within 30 days of the application being determined to be complete. Gov. Code § 65589.5(j)(2)(A)(i). If the city fails to do so, the project is deemed in compliance with all applicable standards. Gov. Code § 65589.5(j)(2)(B).

In this case, the application to develop the Project was determined to be complete on April 1, 2019. (AR 1418.) Under subdivision (j)(2) of the HAA, the City was required to notify THDT in writing of any standard with which the project was inconsistent no later than May 1, 2019.

The City did not notify THDT of any standards with which the project was inconsistent. To the contrary, the staff report presented to the Planning Commission makes clear that the project met all applicable standards. (AR 1402-18.) Thus, on May 2, 2019, the Project was deemed consistent with all applicable standards for purposes of the HAA. Gov. Code § 65589.5(j)(2)(B).

2. <u>The City's Findings Of Denial Do Not Identify Any Objective Development Standards</u>

The HAA also provides certainty to applicants by preventing cities from denying a project based on vague, subjective standards. This is important because subjective standards can be interpreted to mean whatever the City needs them to mean in a particular case, to justify a denial.

Under the HAA, the City must generally approve a housing development project if the project "complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." Gov. Code § 65589.5(j)(1). "Objective" means "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." Gov. Code § 65589.5(h)(8).

In this case, the City never identified any applicable objective land use standard the Project failed to meet. Indeed, the city staff report prepared for the Planning Commission found that the project met all applicable land use standards. (AR 1402-18.) This conclusion was never contradicted by either the Planning Commission or the City Council, and several Planning Commissioners appeared to concede that the project was consistent with the City's objective, written land use standards. (AR 1618, 1625 ("While it does meet the appropriate code guidelines, I think the spirit of the plan is not met."), 1707.)

Instead, the City's Findings of Denial contend that the project is inconsistent with several quintessentially subjective standards. For example, the City cites the following standards:

> *Goal LU-1:* New commercial, industrial, and residential development is coordinated to ensure that the land use pattern is consistent with the overall goals and needs of the community.
>
> *Policy LU-1D:* Ensure that new development projects are of compatible proportion, scale and character to complement adjoining uses.
>
> *Goal LU-3:* Neighborhoods and attractions are connected and accessible to all residents, employees, and visitors.
>
> *Policy LU-3C:* Ensure connections are well maintained and safe for users.
>
> *Circulation Element*
>
> *Policy CIRC-1G:* Limit driveway access points, require driveways to be wide enough to accommodate traffic flow from and to arterial roadways, and establish mechanisms to consolidate driveways where feasible and necessary to minimize impacts to the smooth, efficient, and controlled flow of vehicles, bicycles, and pedestrians.

(AR 2374-75.)

These are all vague, subjective standards that cannot be applied to deny a housing development project under the HAA. The policies do not contain references to specific maximum or minimum values or other numerical standards a development must meet. Nor do they set forth specific features or characteristics a development must contain. None of these standards reference any "benchmark or criterion" that THDT could have used to conform its project to the standard. *See* Gov. Code § 65589.5(h)(8).

Instead, the standards cited by the City contain subjective "weasel words" and concepts, such as "compatibility" and "consistency" with other development, the "character" of the neighborhood, so on. Additionally, some of the standards are, by their express language, not mandatory. For example, Policy CIRC–1G indicates that driveways should be consolidated "where feasible." And in some cases, the cited provisions don't contain development standards at all, but rather general statements about benefits of certain features of development.

Perhaps the clearest illustration of the subjective nature of these standards is the fact that the City's own staff determined that the Project met all the standards. If these standards are really "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official," why were staff and the City's elected officials able to draw such different conclusions? *See* Gov. Code § 65589.5(h)(8). In sum, the land use standards cited by the City's Findings of Denial are not objective within the meaning of the HAA.

3. <u>Even If The City Had Identified Objective Development Standards, There Is Substantial Evidence For A Reasonable Person To Conclude That The Project Met Those Standards</u>

Even if the Court determines that the standards identified by the City in the Findings of Denial qualify as objective standards under the HAA, it must deem the Project consistent with those standards if "there is substantial evidence that would allow a reasonable person to conclude" that the Project is consistent. Gov. Code § 65589.5(f)(4). Once again, this provision is designed to give applicants "appropriate certainty" that if a project could reasonably be considered consistent with a city's standards, it is entitled to the protections of the HAA. *See* RJN Ex. B at 4.

The Project easily meets that test. In the staff report for the May 28, 2019 Planning

Commission meeting, the City's staff expertly explained how the Project meets all of the City's applicable land use standards. (AR 1402-18.) Among other findings, as to the issues eventually identified in the Findings of Denial, City staff specifically concluded that:

- The project met the city's land use goals and policies because it was "consistent with the Beach and Edinger Corridors Specific Plan which encourages buildings to orient towards streets, wider walkways, and large open space areas to enhance the pedestrian and public experience."
- The project met the city's circulation goals because "the proposed streetscape will create continuity with new and existing development along the Beach Boulevard corridor by providing a sidewalk with new landscaping to buffer pedestrians from the vehicular thoroughfare."
- The project had minimal traffic impacts and required no traffic mitigation measures other than "payment of fair share traffic fees and implementation of a right in, right out only driveway along with on-street striping and driveway improvements to supplement the right in/out only movements are the required traffic mitigations. The project does not result in other traffic related impacts requiring mitigation."
- "Adequate emergency access is provided in and around the site with the driveway from Ellis Ave., also functioning as the fire lane."

(AR 1406, 1409-10, 1414.)

The staff report did not identify any standards that the Project would not meet, nor did it identify any public health or safety concerns. The reasoning presented in the staff report alone therefore qualifies as "substantial evidence that would allow a reasonable person to conclude" that the project is consistent with all applicable standards. Gov. Code § 65589.5(f)(4). THDT relied on this reasoning as it worked to craft the development that would be considered by the City's elected officials. If the Court were to conclude now that no reasonable person could find the Project compliant, it would deprive THDT of the "appropriate certainty" that section(f)(4) was designed to provide. Therefore, the project is and must be considered consistent with all applicable, objective land use standards.

B. The City Cannot Meet Its Burden Of Proving That The Project Poses A Specific, Adverse Public Health And Safety Impact, Or That Any Impact Could Not Reasonably Be Mitigated

Under the HAA, where a project meets all of a city's applicable, objective land use standards, the city may only reject the project if it meets the high burden of proving by a preponderance of the evidence both of the following: 1) that the project poses a significant,

unavoidable public health and safety impact, based on objective, identified written public health and safety standards; and 2) that the impact cannot reasonably be mitigated. The Legislature has declared that this sort of significant, unavoidable health and safety impact should only be found "infrequently." Cities are deliberately held to a high standard of proof to prevent them from using pretextual claims of health and safety as a "loophole" to avoid the requirements of the HAA. RJN Ex. D at 3.

In this case, the City cannot meet its burden of proof. The City only issued findings asserting a health and safety impact *after* being advised that its initial proposed findings—which were based entirely on vague, subjective concerns and raised no health or safety issues—were insufficient to sustain a denial under the HAA. Unsurprisingly, the new pretextual findings do not come close to meeting the law's high standard.

1. The City Cannot Prove By A Preponderance Of The Evidence That The Project Would Result In A Significant, Quantifiable, Direct, and Unavoidable Impact On Public Health Or Safety, Based On Objective, Identified Written Public Health Or Safety Standards, Policies, Or Conditions As They Existed On The Date The Application Was Deemed Complete

Under the first prong of the health and safety analysis, a city must prove by a preponderance of the evidence that the project would have a "specific, adverse impact upon the public health or safety," meaning that it would have "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." Gov. Code § 65589.5(j)(1)(A) (emphasis added). In other words, the City must show each of the following:

- The impact is supported by an objective, identified written public health or safety standard, policy or condition that compels denial and was in place at the time the application was deemed complete;
- The impact is significant;
- The impact is quantifiable;
- The impact is direct; and
- The impact is unavoidable.

The City's purported health and safety findings cannot meet any of these standards, let alone all of them.

a. **The Findings Do Not Reference Any Written Health Or Safety Standards**

As discussed previously, the HAA's goal is to provide "appropriate certainty" to developers that standards will be applied consistently. For that reason, a City cannot deny a project based on an asserted health and safety impact unless its conclusion is based on an objective, identified written public health and safety standard, policy or condition that was in place at the time the project was deemed complete.

In this case, nowhere in its Findings of Denial does the City identify a single objective, written health or safety standard that the Project fails to meet. (*See* AR 2372-75.) While the findings speculate about the number of U-turns the project will generate, for example, at no time do the findings articulate a *standard* of how many U-turns should be considered unsafe, much less a standard that actually existed in writing at the time the application was deemed complete. If a city can simply reject a project by concluding it has "too many" U-turns without applying a written standard of how many U-turns is too many, it can pick and choose which projects to approve and which to reject on an ad hoc basis without providing any certainty for applicants. For this reason, the HAA requires health and safety findings to be based on objective, written standards. The City has identified no such standards, and therefore it cannot meet the burden of proving a specific, adverse public health and safety impact.[10] *See* Gov. Code § 65589.5(j)(1)(A).

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[10] The only objective standards mentioned in the findings are City Fire Specifications 401 and 403, regarding fire vehicle access. (AR 2373.) But the City discusses these standards in the context of an *alternative* "porkchop" design proposed by the applicant in response to concerns raised by the planning commission. The City did not identify any public health and safety standards violated by the applicant's *original* design. The City simply chose to focus on the one alternative design and ignore all other possible configurations. The HAA, however, requires the City to consider alternative designs that can mitigate any health and safety. Potential alternative designs and the city's obligation to consider reasonable mitigations is discussed in detail in Section IV.2.B. below.

b. The Impacts Are Not Significant

The City cannot meet its burden of proving that the impacts it cites are significant.

The City found that the project would have an adverse health and safety impact based on a predicted increase in the number of U-turns at the Ellis Avenue and Patterson Lane intersection, and predicted left turns from the Project site, across traffic. (AR 2372.) These findings were purportedly based on the Project's Traffic Impact Analysis (TIA), but the TIA directly contradicts the City's findings. The TIA repeatedly states that "the proposed Project ***will not*** significantly impact the five (5) key study intersections, when compared to the LOS [Level of Service] standards and significant impact criteria specified in this report." (AR 376-77 (emphasis in original).). The report concludes: "Given that there are no significant project impacts, no improvements are required of the proposed Project." (AR 377.) The TIA recommended only the installation of a stop sign at the project exit and signage to ensure right-turns only out of the site. *Id.*

Without citation, the Findings of Denial conclude that the two recommended mitigations identified in the TIA are "not adequate enough to improve safety," and suggest that the TIA "also recommends additional driveway treatments to further regulate the turn restrictions, such as the installation of raised pavement to physically prevent left turns out of the site." (AR 2372.)

Not so. The TIA did not find that its own recommended mitigations were "not adequate," nor did it "recommend" additional treatments. And raised pavements are not mentioned at all! Instead, the TIA simply says that the City "could" consider requiring a "treatment" to reduce left turns. (AR 377.) The TIA makes no assessment of what sort of treatment would be appropriate, and expresses no opinion about whether a treatment should be required.

In addition to the TIA, the City's staff report presented to the Planning Commission also concluded that the traffic impacts of the Project would not be significant. (AR 1406.) The impacts were so minimal, in fact, that the Project did not even require traffic mitigation measures such as roadway modifications or a site-specific impact fee. The staff report concluded that other than payment of fair-share traffic fees and some driveway improvements, "[t]he project does not result in other traffic related impacts requiring mitigation." *Id.* The staff report further observed

that the projected level of congestion at the project driveway site is Level of Service (LOS) B, which "is defined as 0.61 - 0.70 seconds of delay and is described as a very good traffic condition with short delays." *Id.* And it noted that the nearby Elan project had led to a decrease in the rate of collisions in the area. (AR 1407.)

The report of traffic consultant Mark Miller does not provide any further support for City's conclusion. Mr. Miller's report concludes that the Ellis Avenue and Patterson Lane intersection is much less dangerous than the average intersection of its type. (AR 2379.) But Mr. Miller claims that the project will increase congestion at the intersection, "which will lead to driver frustration and impatience, and could lead to additional collisions at this intersection . . . ." (AR 2381.) Aside from the fact that this conclusion is directly contradicted by both the TIA and the City staff report—which find that the project will not meaningfully increase congestion—the conclusion that the project "could" lead to some unspecified number of collisions is insufficient to prove that the project has a significant impact on public health and safety.

Of course, any new project *could* cause more collisions. Indeed, the report apparently assumes that any increase in congestion could lead to more accidents. (AR 2382.[11]) The exact same analysis could be used to reject the use of any property along Ellis Avenue (and many other streets in the City), for any purpose—hardly the "infrequent" health and safety impact the legislature contemplated. When set alongside the TIA and the City staff report, Mr. Miller's report cannot prove a significant health and safety impact by a preponderance of the evidence.

Finally, the clearest giveaway that the City's stated concerns are pretextual is that the City currently allows both U-turns at the intersection in question and left turns from the Project site

[11] Mr. Miller's only support for the claim that congestion leads to collisions is a misleading citation to a twenty year old AAA summary of decades-old "conventional wisdom" among planners. The AAA report does not endorse that "conventional wisdom," and modern research has suggested that the opposite is true for non-freeway congestion, because congestion leads to slower speeds and less risky collisions. *See, e.g.*, https://www.roads.maryland.gov/OPR_Research/MD-03-SP308B46-Congestion-Vs-Accidents-Report.pdf ("The estimation results, based on the available sample data, reveal that accident rates on local arterials tend to decrease with an increase in traffic volume."), cited at AR 2803. Indeed, the only collision that Mr. Miller describes in detail happened outside of the high-congestion times identified in his report. (AR 2380-81.)

(which is used as a high-traffic retail business) into traffic. These are not substantial health and safety impacts.

c. The Impacts Are Not Quantified

The City cannot prove by a preponderance of the evidence that the project has quantifiable public health and safety impacts. Mr. Miller's traffic report makes no attempt to quantify the actual health and safety impacts arising from the project or how they compare to the current use of the site or other potential uses of the site – unlike the TIA, which did compare the project to current conditions and concluded the project would have no significant traffic impacts. Mr. Miller does not consider the level of projected traffic from the project, how that number compares to the total traffic on Ellis Avenue, or how it compares to the current use of the site as a carryout retail store with no turning restriction at its entrance. Nor does he attempt to quantify the additional collisions that he claims would be precipitated by the Project, or the increase in injuries or property damage that would come from the change in collision types that might be brought on by the Project, if any.

Because of this flaw, it is impossible to use Mr. Miller's analysis to determine that the Project would cause a safety hazard relative to the current use of the property or any other use of the property. Indeed, at the September 3, 2019 City Council meeting, City staff conceded that the City currently allows left turns out of the project site (despite the purported danger) and that the City has not analyzed the impact of the project relative to the current use of the site. (AR 2305:20-2306:13.) Mr. Miller's report does not provide any additional analysis on this issue.

The result is a claimed "impact" that is unquantified and untethered to a meaningful definition of "substantial." According to Mr. Miller, when congestion is present, a new land use begets more traffic, which begets more collisions. The same basic analysis used by Mr. Miller could be used to justify rejecting all sorts of projects on sites throughout the City. That is just the sort of vague, underspecified impact analysis that the HAA is designed to reject.

The only seemingly quantified finding the City made was that the Project will create "222 additional U-turns" at the intersection over some unspecified time period. This appears to be an erroneous reference to City calculations, which found that it would result in an additional 111 U-

turns. (*See* AR 2378.) It remains unclear what time period those 111 U-turns would occur over, how the City made that calculation, or how those additional U-turns would compare with the current level of U-turn activity at the intersection.

In any event, although the City may have quantified something about the number of U-turns at one intersection, this is not a quantifiable health and safety impact. The City has not attempted to quantify impacts of these U-turns, such as additional collisions, additional injuries or property damage, or some other factor that makes the U-turns unsafe. The report of the City's traffic safety consultant, Mark H. Miller, does not attempt to quantify these outcomes. The City simply has no factual basis for its finding that more U-turns—legal U-turns that the City has chosen to allow—will result in more collisions.

And perhaps most tellingly of all, the City continues to allow U-turns at the intersection.

d. The Impacts Are Not Direct

The City cannot meet its burden of proving that the Project's impacts are direct. Much of the City's Findings and Mr. Miller's report are devoted to discussing the City's poor roadway design, traffic conflicts created by the nearby Elan project, and the congested state of Ellis Avenue. (*See* AR 2372, 2378-82.) The City suggests that, because these conditions exist, any use of the project site will result in additional traffic conflicts. (AR 2372.)

But that is not the Project's fault. If the roadway problems identified by the City and in Mr. Miller's report do exist, the City can address those problems through changes to its roadway design. But it cannot use them as an excuse to reject a housing development project, because they do not directly result from that project. If a City could reject a project because of health and safety impacts caused by general traffic conditions in the area rather than the specific circumstances of the particular project, it would create an enormous loophole in the HAA whereby cities could use their own inadequate infrastructure as a pretext to deny projects they don't like. The legislature created a high bar for denials based on health and safety impacts to avoid precisely that loophole and ensure such denials occurred only "infrequently." Gov. Code § 65589.5(a)(3).

Nor can the City use its regret about impacts from a much bigger project that the City did approve, like the Elan project across the street, to justify rejecting a much smaller project with

none of the same projected impacts. If the Elan project is causing traffic impacts, the City should take that up with the owner of that project, not use it as an excuse for rejecting THDT's Project. (AR 2372; 2380-82 (discussing traffic collisions after Elan project).)

e. The Impacts Are Not Unavoidable

For the reasons explained in further detail below, even if the impacts identified by the City met the other requirements for rejecting a project under the HAA, they are mitigable, and therefore not unavoidable. As for the specific concerns raised by Mr. Miller, he determined that the concerns could be avoided using the two mitigation techniques recommended in his report. (AR 2382.)

2. Even If The City's Health Or Safety Findings Met The Basic Requirements Under The HAA, The City Failed To Consider Basic Mitigation Measures That Would Have Eliminated The Impacts

Even if the City identifies legally sufficient health and safety concerns about a project, it may only reject the project if it finds, based on a preponderance of the evidence, that "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." Gov. Code § 65589.5(j)(1)(B). Thus, before rejecting a project, the City must consider all reasonable measures that could be used to mitigate the impact at issue.

In its Findings—and throughout the administrative process—the City made no meaningful attempt to discuss mitigation measures to address its concerns, save for one. The Findings focused entirely on the possibility of adding a concrete "porkchop" to the entrance of the project to prevent left turns. (AR 2373.) This was a strawman. Believing the Planning Commission's denial to be a genuine effort to engage in a productive dialogue, THDT proposed the porkchop design as an alternative that might address the Planning Commission's stated concern about left turns out of the site. The City seized on one version of that concept (made of concrete), found that the concrete version would impede fire access, and decided its work to consider potential mitigations was complete.

Not so. There are many other mitigations that the City needs to consider, including

variations on the porkchop design that do not impede fire department access. For example, in correspondence immediately after the first City Council decision denying the Project and again immediately before the City Council meeting at which the Project was denied a second time, Californians raised the possibility of creating a porkchop design using plastic channelizers. (AR 2810, 3516.) Plastic channelizers do not limit fire department access because they can be safely overrun, but they do provide a strong disincentive to a driver considering an illegal turn based on the perception that they will cause vehicular damage. Modern channelizer and bollard designs can appear very substantial but provide no risk when overrun by fire equipment. Despite Californians' repeated demands that the City consider this option, it never did—presumably because it could not explain how that approach would impede access to the site.

There are many other obvious and reasonable mitigations that the City could have considered, but did not. If the City were genuinely concerned about U-turns at the intersection of Ellis Avenue and Paterson, for example, it could start by making U-turns illegal there. This would reduce the vehicle movements the City finds problematic, and the restriction could be enforced the restriction through signage, roadway markings, hard barriers (such as a median), or soft barriers (such as plastic channelizers).

That is just the tip of the iceberg. In its letter to the City Council in advance of its February 18, 2020 meeting, Californians identified a variety of other mitigations that would address the City's concerns, with pictures and diagrams illustrating the proposed mitigations. (AR 2810-14.) Some additional examples include:

Measures for increasing safety at the Project entrance

- *The use of a "pork chop" made of a low concrete curb.* A low concrete curb does not limit access to heavy duty vehicles like fire equipment, but does provide a strong disincentive to a driver considering an illegal turn in a passenger automobile.
- *Separation of Ellis Avenue using plastic channelizers (see, e.g., CA MUTCD[12] Fig.*

[12] California Manual on Uniform Traffic Control Devices, 2014 Edition, Rev. 4, available at https://dot.ca.gov/-/media/dot-media/programs/safety-programs/documents/ca-mutcd/rev6/camutcd2014-rev6.pdf

3H-101 (CA)), plastic bollards, or a low concrete curb. This would provide a strong disincentive to a driver considering an illegal turn across the roadway centerline, while allowing fire department access across the center line.

- *The use of a stop sign, traffic signal, or other traffic control device to reduce conflicts at the Project entrance.* This would reduce frustration for drivers exiting the Project as well as the risk of broadside accidents or other traffic conflicts.
- *The use of marked speed humps or rumble strips along Ellis Avenue before the entrance (see CA MUTCD Fig. 3B-29).* Speed humps and rumble strips increase the attentiveness of roadway users and decrease speed, reducing the risk of conflicts with vehicles entering the roadway from the Project. Advance markings can be added for additional driver awareness (*see* CA MUTCD Fig. 3B-31).

Measures for increasing safety at the Ellis Avenue / Patterson Lane intersection

- *The use of stop signs, signals, or another traffic control device at the intersection.* Compared to the current unsignalized intersection, this would reduce the risk of collisions. The signalization could incorporate a protected left turn cycle to eliminate the risk of conflicts caused by left turns and U-turns.
- *Addition of marked crosswalks at the intersection.* Currently, it is legal for pedestrians to cross Ellis Avenue at Patterson Lane, but there is no crosswalk. (AR 2382.) Adding a crosswalk would improve pedestrian safety and increase overall driver awareness in the vicinity of the project entrance. For added safety, the crosswalks could be enhanced with signage and roadway markings (*see* CA MUTCD Fig. 3B-17), a hybrid beacon system (*see* CA MUTCD Chapter 4F), a marked speed table (*see* CA MUTCD Fig. 3B-30) or in-roadway warning lights (*see* CA MUTCD Fig. 4N-101 (CA)).

Traffic calming measures to increase safety along Ellis Avenue

- *Elimination of the continuous central turning lane and the addition of landscaped medians with discrete turning areas and gaps as needed.* This would eliminate the risk of collisions within the turn lane.
- *Reduction of speeds by reducing the speed limit, using advisory speed limit signs,*

or using a radar feedback speed indication system. This would reduce the risk of collisions and other traffic conflicts along Ellis Avenue.

The City was required to consider all reasonable mitigation measures, including these and the other mitigation techniques identified in Californians' letter, before rejecting the project based on health and safety concerns.

3. The Expert Report of James F. McMullen Does Not Provide Any Additional Support For The Denial

With the exception of a passing reference, the City's written Findings of Denial do not reference findings from the expert report of James F. McMullen, and Mr. McMullen's conclusions do not appear to have served as the basis for the City's denial of the Project. (AR 2372.)

But if the City attempts to belatedly rely on Mr. McMullen's analysis, that effort will fail. Mr. McMullen's report is the result of an attempt by the City to manufacture fire safety concerns that were long ago resolved by the City's professional fire safety staff. Although his report was prepared at a time when the City had complete and detailed plans for the Project, Mr. McMullen was given access to "minimal information," including only "incomplete" and "conceptual" plans for the project. (AR 2388-89.) He concedes that the information he was given was "inadequate for a complete fire protection evaluation." (AR 2388.) Remarkably, although flying nearly blind, Mr. McMullen criticizes the results of the detailed fire department plan check performed by the City's own award-winning fire department staff member. (AR 2389-90.)

Because he did not get complete information, or much information at all, Mr. McMullen's report is an exercise in blind speculation about how the project *might* be configured, what materials it *might* be constructed out of, and the like. (*See* AR 2389 ("A substantial amount of information and specifications are missing which are addressed in this report."); *Id.* ("It is unknown how much detailed information has actually been provided to the city or if the city's initial comments reflect preliminary or general type requirements."); AR 2390 ("The level of fire resistive construction for the parking garage and occupying fire separation assembly should be identified as it is imperative that the occupants of the building above are adequately protected from fire and smoke."); AR 2390-91 ("While it will be up to the Building Official to make a final

determination, the current design appears to include some other un-described uses within the parking garage that may not be permitted by the California/City's Building Codes.").)

It's not surprising, then, that Mr. McMullen's report contains glaring inaccuracies. For example, the report suggests that that THDT provided only one fire safety improvement to mitigate the long fire hose line distance required by the project's design, concluding (without explanation) that that single mitigation was inadequate. (AR 2389-90.) But at the September 3, 2019 City Council meeting, the City's professional fire staff person explained that the applicant had agreed to *four* mitigation measures, and that he deemed them adequate in his professional judgment. (AR 2308:3-22.)

As another example, Mr. McMullen's report incorrectly suggests that the Project does not meet City Specification No. 401, which specifies the required turning radius for fire equipment. (AR 2391.) In fact, the City's own traffic safety expert, Mr. Miller, conducted a detailed review of access to the Project by fire equipment, including developing a diagram depicting the turning arrangement. (AR 2384.) Mr. Miller determined that the Project's driveway "will accommodate City-required fire apparatus for both left and right turns into the project from Ellis Avenue" based on the detailed Project plans he reviewed. (AR 2380.) Mr. Miller's detailed analysis and diagram, based on complete information, demonstrate the inaccuracy of Mr. McMullen's analysis based on incomplete information.

In any event, the concerns raised by Mr. McMullen fall far short of the standards required for health and safety findings in the HAA. Most critically of all, none of the issues raised by Mr. McMullen are unmitigable. Indeed, the City's professional fire staff already carefully analyzed the Project's potential fire safety impacts based on a far more detailed analysis than Mr. McMullen's, and determined that any impacts could be mitigated through a set of four fire safety mitigations that THDT agreed to undertake. (AR 2308:3-22.) In advance of the May 28, 2019 Planning Commission meeting, City staff prepared detailed conditions of approval that would have required these and other fire safety conditions, and determined that

> [t]he project's access points have been designed to comply with the requirements of the BECSP and respond to the Fire Department's request for emergency access. The site includes a fire truck turnabout and marked fire lanes. The project has

> proposed an Alternate Means & Methods (AM&M) strategy to satisfy exterior hose pull distance requirements. The AM&M has been reviewed and conceptually approved by the HBFD.

(AR 1416.)

If the City developed additional concerns based on the recommendations in Mr. McMullen's report, it could have simply conditioned approval of the Project on the adoption of those recommendations. In fact, that is exactly what Mr. McMullen concludes by suggesting. (AR 2391.) Mr. McMullen does not conclude that the Project's fire safety impacts are unmitigable or that the Project must be rejected.

C. Because The City's Denial Was Done In Bad Faith, The Court Should Order The Approval Of The Project

The HAA permits the court to order a housing project approved if it finds that a local government acted in bad faith when disapproving the project in violation of the HAA. Gov. Code § 65589.5(k)(1)(A)(ii). The court should issue such an order here, because the Findings of Denial adopted by the City Council were clearly pretextual and the denial was done in bad faith.

In this case, the City's health and safety findings and the expert reports supporting them were manufactured post hoc to provide a pretextual rationale for a decision the City knew was unlawful. City Staff thoroughly reviewed the project and found it met all the City's objective land use standards and would have no adverse health and safety impacts. The Planning Commission plainly agreed, because it denied the project without citing any objective standards the project failed to meet, or any adverse health and safety impacts. To the contrary, the Commissioners conceded the Project met all the land use standards in the code but said the code itself was "broken," apparently because city residents dislike dense housing projects in the very places where the city has decided they are appropriate. (AR 1618, 1625, 1707.)

It was only after the City was informed by the Petitioners that the Project could not be denied absent a specific, adverse health and safety impact that the City suddenly discovered health and safety impacts that had never been identified before. To make those findings, it hired outside consultants to second-guess its own staff's conclusions, based on incomplete information. But even these consultants could not identify legally sufficient health and safety concerns to justify

denying the Project, instead concluding that the Project's impacts could be mitigated through basic mitigation measures.

What's more, the City used the Petitioners' good faith offer to reconsider the case and avoid litigation as a cynical opportunity to bolster its findings with expert reports. So the City has already had two bites at the apple, and twice it has failed to comply with the HAA in denying the Project.

For these reasons, the court should issue an order requiring approval of the Project.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court (1) grant the Petitions; (2) issue an order under Government Code Section 65589.5(k)(1)(A)(ii) requiring approval of the Project; and (3) determine that Petitioners are entitled to attorney's fees and costs of suit under subdivisions (k)(1)(A)(ii) and (k)(2) of Government Code Section 65589.5 and order further briefing to determine the amount of fees and costs to be awarded.

Dated: April 5, 2021

MILLER STARR REGALIA

By:

Kenneth A. Stahl
Attorneys for Petitioner CALIFORNIA RENTERS LEGAL ADVOCACY & EDUCATION FUND and Petitioner \ Real Party In Interest THDT INVESTMENT, INC.

Dated: April 5, 2021

CALIFORNIANS FOR HOMEOWNERSHIP, INC.

By:

Matthew P. Gelfand
Attorneys for Petitioner CALIFORNIANS FOR HOMEOWNERSHIP, INC.

PROOF OF SERVICE

California Renters Legal Advocacy and Education Fund, and THDT Investment, Inc. v. City of Huntington Beach
Orange County Superior Court, Case No. 30-2020-01140855-CU-WM-CJC

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

On April 5, 2021, I served true copies of the following document(s) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ISSUE WRIT OF MANDATE** on the interested parties in this action as follows:

Matthew Gelfand 525 S. Virgil Ave. Los Angeles, CA 90020 Tel: 213-739-8206 Fax: 213-480-7724 matt@caforhomes.org *Attorneys for Petitioner in related case Californians for Homeownership*	Brian Williams Chris Kelemen Michael Gates Jemma Dunn City of Huntington Beach 2000 Main St. Huntington Beach, CA 92648 Tel: 714-536-5555 Fax: 714-374-1590 brian.williams@surfcity-hb.org chris@surfcity-hb.org michael.gates@surfcity-hb.org jemma.dunn@surfcity-hb.org *Attorneys for Respondent, City of Huntington Beach*

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the One Legal system. Participants in the case who are registered users will be served by the One Legal system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 5, 2021, at Martinez, California.

Karen L. Irias