



May 6, 2026

VIA E-MAIL cdd@sausalito.gov cc. cityclerk@sausalito.gov

City of Sausalito Community Development Department
City of Sausalito
c/o Community Development Director/Assistant City Manager (bhipps@sausalito.gov
cdd@sausalito.gov)
420 Litho St
Sausalito, CA 94965

Re: 215 Sausalito Boulevard, Sausalito, California — SB 35 Housing
Development — Notice of Improper Course of Conduct Under Gov. Code §
65589.5(h)(6)(E)

Dear Community Development Department:

Long Water Trust (“Owner”) and Christopher Sullivan (“Applicant”) provide this formal notice concerning the proposed SB 35 housing development at 215 Sausalito Boulevard in the City of Sausalito (variously the “Project”, or the “Development”). One unit, Unit 2, has been designated as the affordable unit & the applicant committed to record a deed. This notice is given pursuant to Government Code section 65589.5(h)(6)(E). As reflected in Exhibit A, the City’s handling of the Project has involved a course of conduct undertaken for an improper purpose in violation of Senate Bill (“SB”) 35 and the Housing Accountability Act (Gov. Code, § 65589.5 et seq.) (“HAA”). If the City does not cease that conduct, its continuation will constitute a further violation of the HAA. The Project is also entitled to the protections afforded by Government Code section 65589.5(d)(5).

The Processing Conduct Challenged by This Notice

Exhibit A identifies the specific 38 acts, and positions at issue. Exhibits B through K provide supporting statements from California Attorney General, California Housing and Community Development, and precedent. Taken together, the City's unsupported demands, shifting positions, and inconsistent directives amount to disapproval for purposes of the HAA and improperly interfere with the ministerial processing required for an SB 35 project. (Gov. Code, § 65589.5, subd. (h)(6)(E)(i); Gov. Code, § 65913.4, subd. (c)(1)(C).)

This notice is directed not to an isolated comment or single request, but to the broader pattern of improper processing conduct described in Exhibit A, explained and clarified in the supporting Exhibits, the specific conduct referenced, and the city's repeated failure to issue an approval letter for the development. Unless that conduct is stopped and corrected, the City will remain in violation of the HAA. (Gov. Code, § 65589.5, subd. (h)(6)(E)(v).)

The applicant is entitled to an approval and approval letter forthwith, inter alia, by each and all of:

1. When the development vested it was subject to the Builder's Remedy as the city had an adopted Housing Element but did not have a certified Housing Element at that time
2. The development complies with the General Plan, and the General plan and zoning standards are internally conflictive. The development is consistent with the standards set forth in the general plan. The development is thus deemed consistent with the objective zoning standards. (SB 35)
3. The city – by its own statement (HBR-74) - does not have any objective standards to apply to the streamlined development at the vesting date. Thus – there is nothing for the development to comply with
4. The standards that the city recites are not objective. Because they depend on the exercise of discretion. (Attorney General's letter)

5. The city did not respond in accordance with (c)(1)(c) and thus - in accordance with (c)(2) - the development is deemed to satisfy all objective planning standards by operation of law, irrespective of any factual position. This clause is described by a court as 'the specific procedure at the heart of statute that effectuates its purpose', and to ignore it 'would do violence to its very language and purpose', the court deeming that development thus satisfied the standards – by operation of law.

6. The development benefits from the “baby Builder’s Remedy” - it is listed in the city’s Housing Element as being housing for moderate income persons and consistent with the Housing Element density - it cannot be denied irrespective of the zoning ordinance

7. Each and every one of the prior submittals is deemed consistent with all objective planning standards for the same reasons – a constellation of ‘deemed to satisfy *all* objective planning standards’.

For each and all of 6 reasons the city had an obligation to carry out its ministerial duty to process and approve the development. It must now do so. Even if in the highly unlikely event – hypothetically – one (etc.) of the reasons fails, there are 5 independent and separate reasons that the city must still issue a written approval. The city simply has no plausible, actual or possible defenses.

Even if the city had objective standards applicable to the development (which it has told us it does not) it could not apply them as the development has already been deemed consistent by operation of law. Even if the city did respond timely to the resubmittal - it has no objective standards to apply and thus the development satisfies all standards. And even if the city did both have objective standards *and* provided a timely letter advising which of those standards apply (it has not and did not) it would not stop the development because the development has the benefit of the builder’s remedy and the baby builder’s remedy.

There are rumors that certain city members believe that the state housing laws are difficult to enforce because they are new – but the city should disenchant itself of that notion - because *Ruegg & Ellsworth v City of Berkeley*, *40 Main St Offices v City of Los Altos*, and *CARLA v City of San Mateo* (among others) clearly show otherwise. And the Attorney General has already given counsel on the pertinent subjects here to the city’s litigation firm Best and Best (attached) – the city doesn’t need to inappropriately use our taxpayers’ funds to decide that matter a second time.

The applicant can readily select a court (and fact decider) of competent jurisdiction – do not labor under any misconception about that – and, at the city’s considerable expense for both the city and the applicant’s attorney’s costs and fees.

We are entirely sure that the city has way better subjects (and subjects way more important to the city) to be spending meaningful time on, than to attempt to block a compliant residential development application of 3,521 sq ft.

The city must issue an approval letter forthwith

Obligations Triggered by Receipt of This Notice

Receipt of this notice triggers immediate statutory duties. The City must satisfy those duties while continuing to process the Project; **neither this notice, nor any Statute** authorizes the city to stop, or defer SB 35 processing. (Gov. Code, § 65913.4, subd. (c)(1)(C), (c)(2))

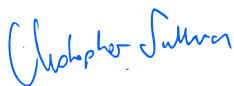
- Within five working days after receiving this notice (i.e., by May 13, 2026), the City shall post the notice in full on its internet website, furnish a copy to any person who has requested notice under subdivision (f) of Section 21167 of the Public Resources Code, and file the notice with the *county clerk* of each county in which the Project is located. (Gov. Code, § 65589.5, subd. (h)(6)(E)(ii).). The notice comprises 195 pages and the notice must be posted. **THUS - all 195 pages** – of the notice must be posted – both on the city’s website, and, on the county’s website (and furnished to any person who has requested notice). In the event that the city does not post all the pages of the one notice, or not provide the notice with all pages to the County for it to post the notice, the city will not have satisfied the requirements of the Housing Accountability Act.
- Then, within between 60 days and no later than 90 days after receipt of this notice (i.e., between July 6, 2026 and August 4, 2026) after considering all objections, comments, evidence, and concerns relating to the Project or this notice, must either issue a written statement that it will immediately stop the challenged conduct or adopt written findings that both (I) articulate an objective basis for each of the individual **38 acts** of challenged conduct, separately & why for each act the challenged course of conduct is necessary and (II) specify with clarity what the applicant must submit or supplement so the City can make a final determination regarding the next necessary approval or [if applicable] set the next hearing date. [These references to further documentation and to a hearing concern discretionary

processing, with projects in front of a commission, so are not directly applicable here, for this SB 35 Project]. (Gov. Code, § 65589.5, subds. (h)(6)(E)(iii)–(iv).)

* * *

We expect the city to comply promptly with these statutory duties. The city is further reminded that an improper disapproval of the Project under the HAA may subject it to a *minimum* fine of \$10,000 per unit in the housing development and, depending on the facts, a *minimum* fine of \$50,000 per unit if a court finds bad faith. (Gov. Code, § 65589.5, subds. (k)(1)(A)(ii), (k)(1)(B), (l).) Applicant is entitled to recover attorneys’ fees and costs. (Gov. Code, § 65589.5, subd. (k)(1)(A)(ii); Gov. Code, § 65914.2, subd. (b)(1).)

The applicant & owner reserve all rights.



Christopher Sullivan
For Long Water Trust
longwatertrust@gmail.com
Telephone:- (415) 754-8009

Exhibits:

- A. Challenged Course of Conduct Table
- B. City states it has no objective standards
- C. City *staff* state it does have objective standards
- D. Consistency review must be timely in each and every instance regardless
- E. City cannot require information that does not go to a reasonable person assessing compliance with the objective standards
- F. City can only apply standards consistent with meeting its RHNA allocation
- G. HCD requires city to remove these discretionary determinations
- H. Attorney General confirms that a standard that relies on the exercise of discretion cannot be used. City has an absolute requirement to timely document any inconsistencies
- I. Housing Elements are in force only after HCD certifies them
- J. Timely consistency letter is “the specific procedure is the heart of the Statute that effectuates its purpose”
- K. There is no such thing as “sufficiently objective”. Only standards that are consistently applied across the jurisdiction can be used by the city.

HBR-74 City of Sausalito Housing Element May 2025:

“The City’s Design Review provisions are subjective in nature and demonstrate preferences or characteristics for consideration while allowing discretion and flexibility, and as such, cannot be enforced through a streamlined, ministerial process. Consistent with existing State law, objective standards are those that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark. Sausalito is in the process of preparing Objective Design and Development Standards (ODDS) to allow eligible projects to be permitted through a streamlined, ministerial review”

As at May 2025, no Objective Design and Development Standards (ODDS) existed “to allow eligible projects to be permitted through a streamlined, ministerial review” (such is the review applicable here)

Exhibit A

Challenged Course of Conduct

215 Sausalito Blvd, Sausalito, CA 94965

The following conduct has been undertaken by city for an improper purpose, constitutes a disapproval of the application, and must cease:

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
1.	Applying non-objective standards to development	<u>Floor area standards, and coverage requirements</u> City states development doesn't comply/may not comply with <u>floor area standards, and coverage requirements</u>	10.56.050. Structures and buildings to be located in the public right-of-way shall be included in the coverage and FAR calculation But - 10.56.030 A. Community Development Director. The following encroachments shall be subject to Community Development Director review and recommendation 1. Major landscaping 2. Stairs not on grade; 3. Driveways , involving cut or fill of more than six feet ...7. Vehicular traffic safety guardrails deemed necessary by the City Engineer

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			B. Planning Commission. The Planning Commission <i>shall have the authority</i> to review and make recommendations on the following type of encroachments: 1. Garages... 3. Building and structures ...7. Retaining walls that exceed six feet in height. The standards for floor area ratio, coverage & impervious are NON-OBJECTIVE STANDARDS and thus CANNOT be applied to this SB 35 development as the city attempts to do. Floor area & coverage for this development is a non-objective standard – there is no access to the lot other than through a necessary encroachment including construction/structures in the public right of way, in part because of a steep slope at the Right of Way The city is prohibited, by SB 35, from applying standards the values for which are found from subjective criteria and discretionary processing.

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			Struhar. M writing for the Attorney General March 16, 2023 to Mayor of city of Elk Grove (attached) "The city's arguments in the Letter rely on the assumption that this ... restriction is an "objective standard" within the meaning of SB 35 and the HAA, <u>but it is not because its application depends on the exercise of discretion.</u>" Emphasis added. See Exhibits. If the city removed the calculation of floor area, lot coverage, and impervious area to that currently include the areas of encroachment into the public right of way, then it would move floor area, lot coverage and impervious area <i>closer</i> to being an actual objective standard. See HCD letter Exhibits -requiring Sausalito to remove these from its standards – the city refused to do so. Further, re June 3 2025 letter from city regarding providing better detail on impervious and lot coverage values (which had already been provided, and were completely findable by any planner in minutes) and that because they were stated to be not available the application

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			was incomplete, SB 35 prohibits the stopping of an application due to <i>requests for information that is not necessary to determine if an application is compliant with objective standards</i> (see code references elsewhere in this document) These zoning values are NOT objective - and despite the written insistence by HCD that they MUST be so. CEASE applying these discretionarily determined values to the development.
2.	Applying non-objective standards to development	<u>Impervious surface limits</u> Development doesn't/may not comply with impervious surface limits	10.40.050 C. Limit on.....impervious Surfaces. <i>All structures which count toward building coverage shall also count as impervious surface.</i> Impervious surface sq footage cannot be determined through objective standards (See description above on coverage) CEASE applying these discretionarily determined standards (and for which the numeric values are impossible to quantify objectively, and in advance) to the development
3.	Applying non-objective standards to development,	Front lot line (& connected to setbacks). <i>After applicant has</i>	1. SB 35. 300 (c)(2) "A locality shall not require a development

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	cease applying standards that are prohibited to be applied by SB 35	<i>completed design</i> and made submittal to city, Director wrote documenting <i>subjective</i> reasons for why Sausalito Blvd is front lot line, writing, in summary, that Director has chosen the lot line, and stating no objective reason for such. SMC 10.88 "Front property line means the line separating the parcel from the street. In case a lot abuts on more than one street, the parcel owner may elect any street parcel line as the front parcel line; provided, that such choice in the opinion of the Community Development Director will not be injurious to adjacent properties"	proponent to meet any standards for which the locality typically exercises subjective discretion, on a case-by-case basis". For the subject lot, the front lot line was suggested (and noted) by the Planning Commission by subjective discretion. Tentative map with only a 5' side yard at the south, and a 15' rear yard at the west AND NO FRONT PROPERTY LINES - was also approved 1/20/2010 by Planning Commission (& with no front lot line adjacent to Sausalito Boulevard). Further, in the approval there was NO height limit for first 15' from the noted front property line. A front lot line is marked at Marion Avenue in the prior architectural plans (and NOT at Sausalito Blvd as the Director after our design was complete insists it be) and approved. The Planning Commission did not apply any setback nor setback height requirements at the noted 'front lot line' - by its subjective

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			discretion. The city cannot apply different standards to this SB 35 development, nor apply <u>any standards</u> where subjective discretion is typically applied - as undeniably evident that it had here, and always is applied in processing development applications in the city. It is completely clear & incontrovertible that the city applies standards regarding designating property lines, and the setbacks required from them, on an entirely discretionary and subjective basis - and thus is and for that very reason prohibited from doing so under SB 35. 2. The lot was created, birthed, and approved – see specifically tentative map in the plans - as a lot having one 5' side yard setback, and one 15' rear yard setback (and with NO front lot lines) 3. Govt Code 65913.4 (i)(1) A local government shall not adopt or <i>impose any requirement....</i> that applies to a project solely or

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			partially on the basis that the project is eligible to receive ministerial or streamlined approval pursuant to this section [SB 35]" Govt Code 65913.4 (d)(1) "...and shall be broadly applicable to development within the jurisdiction". The non-objective standards that the city attempts to hold the applicant to are – as evidenced – NOT broadly applicable to development within the jurisdiction – in fact, those types of standards are not applicable to the project (and were determined discretionarily and subjectively to approve a prior development for a prior owner at the site). 4. Separately, and as a standalone point - the power to impose a discretionary requirement (in any event) <u>has been removed by the Statute</u>. The requirement the city attempts to impose is subjective – because (interalia) its application depends on the exercise of discretion (see Struhar, and others)

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			5. The subject parcel has a Right of Way/street on two sides. The city defines a corner lot in city code – one rear yard one side yard, no more (and which is explicitly confirmed in the documents creating the lot, including tentative map approved by the city on 1/20/2010, which approval created this lot). Whether the city agrees that it is a corner lot or not, the more important matter is the setbacks from the property lines. The development meets any and all applicable standards for setbacks. 6. Further, and overriding the city statements, the city has not identified/did not identify any city code that specifies that the subject lot is <i>not</i> a corner lot. 7. Further, (though the applicant does not need to place reliance on this) - the <i>street</i> at Marion Avenue is clearly shown at A1.1. (And – materially – access for automobiles on Marion Ave that would certainly already have been

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			built had the city not <i>unlawfully</i> denied the applicant's subdivision completion application in January 2023). 8. The development is subject to Builder's Remedy, where <i>no standards</i> other than unmitigable written & available before vesting, Health or Safety standards can be used to not approve the development – none such exist here, and, the city did not and cannot make that finding. And there are significant statutory penalties against a city for asserting that an application is not subject to Builder's Remedy, including applicant's attorney costs and fees. 9. “..deference does not assist the city here because the record does not show a long-standing and consistent interpretation of the Guidelines’ requirement ...” CARLA v City of San Mateo 2021 The city's argument (that the applicant must redesign the entire project because

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			the project doesn't meet the setback requirements from a front property line – advised by the Director AFTER the design was completed) fail on any one of the points raised above – in fact the city's argument fails on each and every one of the 9 rules referenced above. A Sausalito Planning Commissioner – the most experienced Planning Commissioner at that time - said to city staff, from the dais giving feedback – to city staff - on a proposed amendment to the code “we're creating <i>more chaos</i> in our ordinances and codes“
4.	Withholding written approval of March 20, 2026 development resubmittal	No written approval has been received following March 20, 2026 development resubmittal being deemed compliant by operation of law.	The city did not provide a consistency nor inconsistency determination by the deadline of April 20, 2026. Therefore, per Govt Code 65913.4 (c)(2) “If the local government's planning director or equivalent position fails to provide the required documentation pursuant to paragraph (1), the development shall be deemed to satisfy the objective planning standards specified in subdivision (a).

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			(3) For purposes of this section, a development is consistent with the objective planning standards specified in subdivision (a) if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards. The local government shall not determine that a development.. is in conflict with the objective planning standards on the basis that application materials are not included, if the application contains substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards.” SB 35 changes the completeness question. The issue is not even whether every item on a general discretionary planning checklist has been supplied. The issue is whether the application contains the information needed for a reasonable person to determine consistency with the applicable objective planning standards. And, materials that do not directly pertain to that review, or that relate instead to

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			later engineering, building, utility, encroachment, or post-entitlement permits, are not 'completeness' items for a SB 35 resubmittal. No further documentation was required for a reasonable person to conclude that the development is consistent with the objective planning standards. Including that – as confirmed by the city at HBR-74 Housing Element May 2025 – in the city's own words - "The City's Design Review provisions are subjective in nature and demonstrate preferences or characteristics for consideration while allowing discretion and flexibility, and as such, cannot be enforced through a streamlined, ministerial process. Therefore, issue the written approval forthwith.
5.	Side yard setbacks	City states does not comply with side yard setback	Sausalito code 10.40.90 D "Side Yard Structural Projections. Where a building wall is not parallel to a parcel line, or does not follow a continuous unbroken alignment, a portion of the building wall

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			may project into the required setback provided that: 1. The average depth or width of yard is at least equal to the required depth otherwise required. 2. No more than 50 percent of the building wall encroaches into the required setback. 3. The yard is not less than three feet in depth or width at any point. 4. The proposed side yard projection is subject to review and approval by the Planning Commission as governed by 10.54.050 Design Review Permits” The building wall in the applicant's plans does not follow a continuous unbroken alignment. The lot has two yards – one side yard, and one rear yard. And see sheet A 5.0 All of 1, 2, 3 above are met. The development meets the side yard setback requirement

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			The city MUST CEASE alleging that it does not.
6.	Does not meet rear yard requirement	Rear yard setback has been exceeded. Rear yard setback is 3.83' but rear yard setback is to be more than or equal to 15'	Rear yard is clearly shown in the submitted plans as equal to or more than 15' - rear yard setback is 42.62' City must CEASE stating that the rear yard setback is exceeded.
7.	Does not meet various height requirements	Building height has been exceeded as building height is measured from excavated grade below the building rather than natural grade	Sausalito code 10.40.060 B 1. "Standard Building Height. Building height is the vertical distance from the average level of the natural ground surface <i>under the building</i> to the highest point of the building or structure...." and continues "To determine the height of a building, the highest and lowest points of contact with the <i>natural grade</i> are identified and the average of these two elevations is the point from which the permitted maximum height is measured. The highest and lowest points of contact are determined where the maximum vertical projections of the perimeter walls of the building contact the <i>natural grade</i>"

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			The Sausalito code regarding height is internally conflictive - natural ground surface under the building v. contact with natural grade. In the first sentence, code states “height is.....distance from the average level of the natural ground surface under the building” - this is not definitive nor objective because it does not cover instances where a building is placed <i>below</i> natural grade i.e. when it is no longer <i>natural</i> grade – excavated grade is not natural grade in fact the opposite – the city code is thus incorrect and conflictive. (It legislates only for buildings that are at or above natural grade) But as it continues the code defines the rule from where building height is measured (average natural grade) There is a further issue – even if the above were clear, natural grade itself is a non-objective standard (height - see other section in this document).

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			The development complies with building height, having a height of 32' – the maximum height per Sausalito code, and, an absolute height from natural grade of 44'3" (maximum is stated in Sausalito code as 50') The city must CEASE writing, and attempting to block the approval of this compliant development, by quoting inapplicable, internally conflicting, non-objective municipal code
8.	Does not meet various height requirements (contd)	Building height has been exceeded	10.88 Definitions "Natural grade means the vertical location of the ground surface, also known as the existing grade, as determined by the established ground contours that existed in 1968. When a topographic survey of the site is required, the survey may be compared with the 1968 Photometric Maps of the City of Sausalito as a guide in determining major ground contour modifications" This is a non-objective standard.

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			The city (as California Housing and Community Development Department has also written) must CEASE using inapplicable standards to attempt to condition the development. The submitted development complies with building height - having a height of 32' – the maximum height per Sausalito code, and, an absolute height from natural grade of 44'3" (maximum absolute height per Sausalito code as 50')
9.	Sending purported consistency determinations under Govt 65913.4 (c) that do not meet the requirements of SB 35 and do not explain where the development diverges from objective standards		City did not send compliant consistency determinations under Govt Code 65913.4 (c)(1) nor (c)(1)(C). The applicant is owed approval for each event where city did not send compliant consistency determinations. Send an approval for March 20, 2026 submittal.
10.	Relying incorrectly on one sentence in an HCD email post-hoc regarding 'objective standards' (which appears to re-state city of Sausalito's question in any event)		Unlike discretionary processing, where many inputs can be taken in to aid processing, SB 35 cabins the consistency and inconsistency determination process to an exact time schedule (and instigates penalties against the local government if these are ignored)

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			Any raising of objective standards with which the development was purportedly not compliant was not fulfilled by the city - in relation to the sentence (which specifies no standards) that the Director now Assistant City Manager quotes from one sentence in one email from HCD/submittal. A consistency letter explaining how a development is not consistent with each objective standard, and an explanation in each case, must be provided by the <i>city</i> timely). In any event, later on, HCD analyzed that the development was subject to Builder's Remedy. It is clear that the development submitted February 15, 2023 vested when the city was prohibited by the Housing Accountability Act from applying any standard other than health and safety
11.	References to height limited to 32' within 15 feet of the property line, as measured from the centerline of the paved portion of the road opposite the	Measurement of Height. All portions of a building (including any portion of a floor, chimney or other appurtenance) shall be limited to 32 feet in height within the first 15 feet from the property line, as measured from the centerline of the paved	The lot was approved as a corner lot by city resolution number 2010-04. The tentative map has (only) one side yard (5'), and one rear yard (15'). This is consistent with Sausalito code 10.88 <i>"Property Lines</i> means the recorded

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	midpoint of the front parcel line.	portion of the road opposite the midpoint of the front parcel line.	boundaries of a lot of record, as follows:...3. "Side Property Lines" are recorded lot boundaries that are neither front nor rear property lines, which extend between front and rear property lines. On a corner lot, there will be one side parcel line and one rear property line." End No front parcel line is referenced in the definition of corner lot. Even if there were an objective definition of a corner lot in Sausalito code (which there is not) and it's four (plus) property lines & types, the standards could not be applied as the city promotes because SB 35 300 (c)(2) "A locality shall not require a development proponent to meet any standards for which the locality typically exercises subjective discretion, on a case-by-case basis". The city typically exercises subjective discretion for the identification of property line categorizations and discretionary set back distances, and did so for a design review permit for this particular lot, prior to the owner purchasing this lot. The city approved 35.5' height at 4' inside the property line

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			(on this lot) from the east property line (inside the lot) on 1/20/2010 as compared to 15' apparently stated in Sausalito code, and based on Marion Avenue being the front parcel line and in <i>discretionary</i> review. There is no external uniform benchmark for what a corner lot is, nor any other objective standards on this subject and the existence and use of an <i>external</i> benchmark would be the necessary starting point of applying the standard (see other disqualifying issues concerning this standard). Further, the city Director insists that <i>he</i> choose the front lot line discretionarily by subjective standards – and AFTER the time consuming and costly design has been completed. The process the city uses leads to a lack of resolution and a lack of approval. The point of <i>actual</i> objective standards is to create certainty ex ante for the applicant and thus increase housing production.

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			The sole definition concerning a corner lot is 10.88 Definitions “On a corner lot, there will be one side parcel line and one rear property line” is objective. It is to that definition that the applicant (of course) <i>must, and did, defer to</i>. See other sections also as to this subject And the city waives this requirement in discretionary processing. CEASE writing and applying this non-objective, non-applicable standard to this development
12.	City states has long standing objective standards	City staff state that city has longstanding objective standards	In fact the city fully understands that it's standards are not objective – the zoning code was created over a multi decade period during which the housing approval regime was desired by the city to be, and is, entirely, distinctly, intentionally discretionary and subjective – and was and is. This was the code regime when the applicant vested. The city has confirmed the subjectivity (and thus inapplicability) of its code on many separate occasions over the relevant period - on Jan 12, 2023 the city published

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			a document stating “Many of the City’s subjective review criteria which regulate building design...cannot easily be quantified to become objective standards” (see other references) Yet it is exactly those same standards that the city staff unremittingly attempts to burden the applicant with (that they are those standards is clear from this notice), staff even writing that the reason the development cannot be approved is because the city has long standing objective standards including height, floor area, coverage and so on. The city must cease doing so and process the development with only actual objective standards - which always have an external uniform (& absolutely unchanging) benchmark (the development is in fact subject to the baby Builder’s Remedy and Builder’s Remedy at all times). The city has made a definitive statement, in its May 2025 Housing Element, HBR-74

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			stating unequivocally that its standards are NOT objective: “The City’s Design Review provisions are subjective in nature and demonstrate preferences or characteristics for consideration while allowing discretion and flexibility, and as such, cannot be enforced through a streamlined, ministerial process. Consistent with existing State law, objective standards are those that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark. Sausalito is in the process of preparing Objective Design and Development Standards (ODDS) to allow eligible projects to be permitted through a streamlined, ministerial review” (Housing Element downloaded from city website January 29, 2026 11.20am) Staff in the Planning department must CEASE REPRESENTING – ORALLY AND IN WRITING - THAT STANDARDS THAT CAN ONLY BE APPLIED BY THE

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			EXERCISE OF DISCRETION ARE OBJECTIVE STANDARDS THAT ARE APPLIED TO THIS DEVELOPMENT. The city must cease attempting to impose double or triple standards that address the same subject but are conflictive <i>between themselves</i> (see for example height), and state <i>different</i> rules for the same standard within city code. It appears the city is nervous that other applicants will discover that the greatest majority of the city standards are not objective - and that thus the city will have to approve yet more housing development projects which - given it is a negative growth city is assumedly against its wishes - thus the city has attempted to disguise subjective standards and pretend that the standards are objective. But a standard is either objective, or it is not. The city is attempting to have the applicant – rather than the city - ‘pay the price’ for these city problems – which are entirely of its own making (and NOT the

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			applicants), and defer the approval letter, perhaps until the city has undertaken the enormous task of creating internally consistent & objective design standards, (which also don't downzone) when at which point the city will be 'back in control'. It seems the city considers itself in a weak position - and is flailing around. City staff must CEASE writing, inter alia in a spam like fashion, that this development cannot be approved because it doesn't meet (subjective) standards, stop applying personal or subjective judgment (and without regard to whether individuals in the city have a personal opinion that the project is 'not a good idea') & <u>ministerially approve</u> the development.
13.	City staff maintain that the city has long standing objective standards contd		Other representatives of the city – City Council members, Planning Commissioners, and city documents such as May 2025 Housing Element, such documents representing the cornerstones of the city's housing policy state categorically that the city does not have standards that are objective.

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			City staff <u>must provide a reasoned analysis (and not just a throwaway sentence or two), anchored in fact and objectivity</u>, that explains how each of the key zoning controls (see below) is objective and not found through the exercise of discretion as dictated by the ordinances, and is referenceable to an external unchanging and uniform benchmark (and, a reasoned analysis, that none of the other deemed compliants and conformant plan conditions outlined in detail in this document apply): Height, Floor Area, Floor Area Ratio, Setbacks, Impervious area, Coverage area, & Density Even if, by a miracle – staff could make this reasoned explanation - it is irrelevant, as the written approval needs to be made by the city on numerous other & independent bases outlined in this cease a course of conduct notice regardless of whether any quoted standards are objective.

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14.	Cease blocking the development		Since the city has no objective design standards by its own admission (at least not at any relevant time November 2022 – December 2025, and continuing beyond as the developments vested prior) the city has no path to block the development. It is simple logic that if a reasonable person on substantial evidence can consider the development conformant – because there are no objective standards - the city MUST MINISTERIALLY APPROVE the development. This is the status – in the city's own words. Issue a written approval letter for the March 20, 2026 development resubmittal
15.	City staff maintain that a development can be made on this odd shaped steeply sloped lot by simply applying the city's standards and that a home/(s) can be designed that meets all the city standards.		Govt Code 65913.4 (a)(5)(B) "In the event that objective zoning, general plan, subdivision, or design review standards are mutually inconsistent, a development shall be deemed consistent with the objective zoning and subdivision standards pursuant to this subdivision if

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	(Despite many public statements being made by city officials above the staff level to the contrary – “not all our lots are a square and on flat land” “how do we deal with the hillside lots – answer “some very complicated new code”(which has not been written) The city design review standards are replete with mutual inconsistencies (in the past, these were simply resolved eventually by discretionary decisions from the dais). One of the planning commissioners described these inconsistencies as ‘chaos in the code’		the development is consistent with the standards set forth in the general plan” As described in this notice, the zoning & design review standards fail due to multiple internal conflicts that exist for key zoning data – including measurement of height, designation of yards. And while <u>not being obligated to do so</u>, the applicant has, to address the city's stated concerns, ensured that the development conforms to the General Plan (and its elements), being:- Height – 32’ Floor Area – 3,521 sq ft Lot coverage 2% Impervious area 56% Setbacks – side 5’, and rear 15’ Dual family, w/ADU The applicants’ development – despite it not having to do so, and the applicant making significant concessions to the size of the development - IS A GENERAL PLAN COMPLIANT project.

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			The city must now step up and do the correct thing The city must issue an approval forthwith
16.	Sending documentation/stating an application incomplete by alleging that planning data is not in the development submittal when it is	The city writes to request clarifications regarding where steps lead and what function they serve City sends documentation stating that interior volumes above a specified height shall be counted 1.5 times and implying that the city has recalculated floor area	The plans clearly show where steps lead and what function they serve The correct calculations were made for floor area regarding this point and were submitted/resubmitted
17.	Stating or implying that the development is not subject to the Builder's Remedy		The development application was submitted on February 15, 2023 & March 29, 2023, when the city did not have a housing element certified by California Housing and Community Development Department. Thus, the development is subject to the Builder's Remedy. The city has not followed Statute requiring the city to process the development as a Builder's Remedy project

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			The development is subject to the provisions of Govt Code 65589.5 (d)(5) - codified as the Builder's Remedy. As the city could not and cannot make a finding that there are unmitigable known before vesting written Health or Safety standards that cannot be met by the development, the city must approve the development forthwith. If it does not approve the development, it is subject to (inter alia) penalties, fines, and applicant's attorney's fees and costs under the statutory scheme for Builder's Remedy. And, the development even complies with the General Plan – height, setbacks, floor area, impervious area, & lot coverage. Issue a ministerial approval for the March 20, 2026 development forthwith
18.	Writing that the city has always had a continuously compliant Housing Element during the relevant period (February 15, 2023)	Phipps "There has not been such a time where the City did not have a certified housing element" and "HCD.. further reiterated that the City has been in substantial compliance with housing element law since adoption of its original sixth cycle housing element in 2023"	This statement is completely untethered from the facts. The 1st 6th cycle Housing Element was compliant from April 28, 2023 (<u>not</u> from February 1, 2023). The development should have been approved, and is entitled to approval now.

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		(Adoption was January 30, 2023)	The Director (now Assistant City Manager) appears to make statements in an attempt to defeat State law – making out that the development was/is not subject to the Builder's remedy. His statements – again - are untethered from fact. The city's misrepresentations must CEASE, and the development must be approved, in writing. The applicant/owner has had one continuous application since February 15, 2023. Further, <u>the applicant has submitted Government Claims timely</u>, preserving its rights while the city has been processing multiple resubmittals of the development. Sausalito Planning Commission did not review the development Feb 14, 2024 for consistency with objective standards – it reviewed the development against wholly SUBJECTIVE standards. The city did not correct the process and set a new meeting as required under Correct & Cure, to undertake this duty. The city did

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			not respond at all to the resubmittal made on May 24, 2024 (thus deeming the development consistent – see SB 35 Guidelines on resubmittals being allowed) No new submittal/application was required in December 2024 - the scoping consultation had already concluded, no substantial change in the environment had occurred at the site which would be what requires a new scoping consult – the city was simply (and is simply) trying to defeat the application approval by gamesmanship, delays, obfuscations and intentional misinterpretations of city code – nothing more, and nothing less. And, upon a review of the whole record (per Housing Accountability Act) on the processing of this development, the city's non-compliant conduct (and at times egregious conduct) is very clear, and, it is clear from the whole record that the development must be approved.
19.	Following stated city policy of 'slow growth', rather than following State and local law, including the Housing Accountability Act	Some City Council members, who have been in offices in the city for more than 20 years state publicly that it is a 'slow growth' city 'this is how we decided to describe it' (In	Regardless of the policy of the city, City must follow the law, Director carry out his ministerial duty, and approve the compliant development

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		fact, the city has lost housing on a net basis over the last 20 years)	
20.	Failing to carry out mandatory ministerial duty	City did not send approval letters on multiple occasions – including December 2023 (submittal October 2023), July 2024 (resubmittal May 2024), February 2025 (resubmittal December 2024), July 2025 (started processing May 2025) and April 2026 (started processing March 2026)	City must follow the law, Director carry out his ministerial duty, and approve this compliant development forthwith The development, under the provisions of SB 35, the streamlined ministerial processing statutory scheme, has been deemed compliant by operation of law no less than 5 times. Send an approval letter forthwith
21.	City staff making statements, and writing to applicant using these statements, and to block the processing (example ‘we have long standing objective standards such as FAR, height, coverage, setbacks’’) which are diametrically opposed to the facts, and contradicting statements made by Council and Commission members	Cease making these representations which are untethered from the facts	Objective standards (such as they purportedly exist) by which the project/development is assessed are those in place on February 15, 2023 (& modified by Govt Code 65589.5(d)(5) A)Junius, Planning Commissioner and actively practicing land use lawyer, 3/29/2023 addressing Brown (responsible for objective standards) “you look at the Objective Design standards... what was that game..Sim City, right? Well, we don’t live in Sim City, we live in a very, you know, hilly, slopey, curvy streets, every lot’s not a square, right? So, so in some respects, there – I think there’s going to be

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			a lot. I think ...one of the things the staff is going to have to address almost immediately is what happens when somebody tries to apply the objective standards, and their lot doesn't fit (unclear) 17 of them, right?" Discussion followed. Brown: "So it doesn't take the place of this you, uh, large and probably complicated hillside ordinance that the city council has called for in your General Plan, but it does get you partway there at least" The hillside ordinance has not been created. b) 12/13/2023 Keller, Planning Commissioner "And, and for two and a half years, we've been requesting, you know, uh, funding for an initiative for the city to update all of our ordinances and codes, because some of these are, are, you know, very long in the tooth, you know, back to the 80s and 90s. And so they're not even, you know, uh, truthfully applicable or enforceable anymore" " Um, we have a lot of ordinances that, you know, um, you know are a little bit nonsensical or out of date. So look, I-I've

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			made my motion clear” Junius response “I think, I actually feel pretty bad for what the applicant has had to go through” c) Junius 7/7/2021 “So it's just a bit of a you know manpower issue grinding through the code and, and creating um, a framework to present you know, ultimately a new ordinance to the city council to adopt some, you know, real objective standards that comprehensively deal with the Code issues that’s the bigger piece” This code has not been produced, and certainly not prior to the vesting of the development. The standards referred to did not change through the entire operative period (February 2023, December 2024 etc) The city’s own Planning Commissioner, most qualified to opine as he is a land use lawyer in active practice in new State laws in the region, <u>states that the standards are not real objective standards</u>. That is an inflection point and moment. But it doesn’t stop there – on it goes:

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			d) 1/22/2024 Sobieski, Mayor addressing an applicant/project (including but not limited to specifically <u>side yard setback standards</u>) "I understand some of where the frustration and the anger comes from. It's a kind of maddening process not to have the ability to have some guidance on what's an approved design or approvable design uh, where I'm still, if I were the applicant, I'd be a little confused as to what the process is. Uh, I'd be very confused and frustrated.... leads to a kind of corrosion where there's a sort of controversy veto, that if uh, if uh, I can gum up the works because of t-this". The MAYOR of Sausalito states – I'd be very confused and frustrated. The MAYOR. e) Cox, responding to that position iterated in d): "I did wanna address the mayor's comment about how does an applicant know what to do? How do they know what's gonna pass or not pass? And that is one of the reasons we are working feverishly on our objective design standards so that it will be much more clear to all of our applicants, what does it

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			mean?... And so... we started this process.... to attempt to turn our standards, <i>make our standards more objective</i> and less subjective so that applicants are not in the dark about what will likely be approved or not. They can have a whole lot more certainty. And we're finally um, in the final stages five years later of uh, being provided with some objective design review standards to review. And so I regret that this applicant was not um, availed of those updated standards to <u>provide more certainty about what would be um, acceptable or not.</u>" The standards Cox refers to are the standards that the city attempts to block our SB 35 application with. It is these very same subjective standards that Cox refers to that <u>city staff</u> are unapologetically attempting to hold this streamlined, objective standards ONLY development to. The Mayor of Sausalito himself is very confused by the city's standards!

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			This must CEASE. The city must carry out its simple ministerial duty and issue the long, long overdue approval letter forthwith for this development.
22.	Claiming – both directly and indirectly that the housing development project did not vest on February 15, 2023 & March 29, 2023 Making written statements that adopt, repeat, flow from, or attempt to give effect to the City's erroneous position that the housing development project did not vest on February 15, 2023 and March 29, 2023		Definitive codification of <u>specifically SB 35 vesting:-</u> Govt Code 65913.4 (d) (1) review "strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction <u>before submission of a development application</u>, and shall be broadly applicable to development within the jurisdiction" SB 35 gives no ability for a city to simply deny an SB 35 project, close it out, completely ignore a valid correct & cure, and demand a new application (and with a new vesting date). Irrespective of what the city tried to impose on the applicant September – December 2024 – that a 'new application' had to be submitted following the city's unlawful behavior (though this was specifically contrary to

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			the explicit provisions in the SB 35 published Guidelines), this development is the same development/application that was submitted February 15, 2023. The city's unlawful acts in purporting that the Planning Commission reviewed the development for objective standards on February 14, 2024 which it DID NOT DO (it reviewed the development against wholly subjective standards), in no way excuses it from its obligations under SB 35 to approve the development. (The development has been resubmitted a number of times during the period, under the Statutory scheme) Administrative prevention doctrine determines that a party cannot benefit from its own wrong. It was the city (and not the applicant – in fact the applicant vociferously objected) that chose at that time not to continue processing the development – and that position was not in compliance with the law. When the applicant made changes to the development, SB 35 301(a)(3) applies..

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			"does not preclude the development proponent from correcting any deficiencies and resubmitting an application for streamlined review" March 2021 – or, simply resubmitting the development in response to the city writing under (c)(1) and (c)(1)(C). And in any event, the development is conformant with all city objective standards AND is conformant with the General Plan. Issue the approval letter
23.	Requesting additional & superfluous information that is not required, and using such request to (attempt to) stop processing the application	"Demonstrate that the existing site drainage system is in good condition" (– but this is a vacant lot) "please darken the outline of oval space covering the exterior deck on west side of the primary structure and show how that level interacts with the steel beams" "clarify where... the steps are leading" Provide "pedestrian pathways"	These are NOT the standards by which SB 35 developments are reviewed by a local government: Govt Code 65913.4 (f) (1) Govt <u>shall not require "Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development"</u> Govt Code 65913.4 (c)(3) "For purposes of this section, a development is consistent with the objective planning

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		The city continually raises minutiae and irrelevant points The city writes letters stating that they will not process the SB 35 development because application materials are not included	standards specified in subdivision (a) if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards. The local government shall not determine that a development... <u>is in conflict with the objective planning standards on the basis that application materials are not included</u>" The developments submitted contained substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards. The city – the Director or equivalent position - must now ministerially approve the development
24.	The city sends letter requesting unnecessary information before processing – including construction management plans, work with affected utility companies as “part of		See exhibit May 4, 2026 letter applicant to city. The review process is ministerial, cannot be blocked on the basis that application materials have not been submitted (see code citations), and shifted to a

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	the application's completeness review", applicant shall demonstrate existing site drainage system is in good condition (as part of completeness review)		reasonable person standard based on substantial evidence of consistency or inconsistency with objective standards that have external uniform benchmarks. Issue the approval letter
25.	Representing that the city can end the processing of an SB 35 project by alleging non-consistency & then purporting to deny the project and demanding the applicant start over with an original application (including after the 60 day (c)(1) period). Representing that an applicant cannot resubmit and processing be continued		Govt Code 65913.4(c)(1) "....Upon a determination that a development submitted pursuant to this section is in conflict with any of the objective planning standards specified in subdivision (a) , the local government staff or relevant local planning and permitting department that made the determination shall provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards and the applicant has an absolute right to resubmit. The city had no authorization to require that an applicant 'start again from the beginning' of the process- nor be subject to changed or significantly changed city planning standards since the applicant

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			designed the development and submitted its SB 35 application. By way of this section, the Statute provides (and the Legislature definitively intended) the absolute right to resubmit the application. If this were not so, a city could simply require that an applicant start at the back of the line again each time the city raised an issue – and the city could start its incomplete all over again, creating very extensive delays, and, restart its 'scoping consultation process' all over again etc., whereas SB 35 has been passed into law to <i>reduce</i> the time that housing developments are to be approved. (Stated Legislative intent) The city had no authority from the Statute to request that the applicant submit a new application in December 2024. As the applicant stated at the time and states now, the process of SB 35 for this development has been a single process, one continuous application since February 15, 2023.

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			SB 35 301 (a)(3) “does not preclude the development proponent from correcting any deficiencies and resubmitting an application for streamlined review” March, 2021 This development was submitted on February 15, 2023 as is only subject to the objective standards in ordinances in place at that time (and as modified by Govt Code 65589.5 (d)(5) and other related provisions of Builder's Remedy)
26.	Making <u>unsupported</u> statements about key zoning values in the application, square footage values, state that values exceed standards, and that are impossible for the applicant to replicate, and that are accompanied with no explanation whatsoever of how the city computes them	Calculation of floor area is purported to be 4,030 sq ft (rather than the applicant's lower number)	No explanation whatsoever is provided IF the city actually considered that the floor area, or other zoning values have been exceeded it must “provide the development proponent written documentation of which standard or standards the development conflicts with, and <u>an explanation</u> for the reason or reasons the development conflicts with that standard..” Govt Code 65913.4 (c)(1) Explain is “to make known, to make plain or understandable, to give the reason for or cause of, to show the logical

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			development or relationships of". Merriam-Webster. Letters that the city has sent alleging inconsistency do not meet this standard. They do not explain the reasons. SB 35 specifically provides that when a (proper) inconsistency letter has not been sent, and within the timeline, the development is deemed compliant with all the city's standards. The city hasn't even begun, hasn't even come close to fulfilling that requirement. The city knows that if it actually did that exercise, it would have to forthwith approve the development. Local governments must "carefully explain any determination that a proposed development conflicts with" SB 35's objective planning standards - Ruegg & Ellsworth v. City of Berkeley (2021) 63 Cal.App.5th 277, 318.) Kline,

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			as found <i>against</i> the errant City of Berkeley, directly across the water from Sausalito. (The city had speciously requested further information to assess whether the development met objective design standards) Further – (as the city knows) the development IS compliant with the city's objective standards. Issue the approval letter
27.	Requesting information that is for downstream/post entitlement permits	The city writes to request detail on proposed site drainage to the termination point, construction staging areas, & other post-entitlement matters. Despite not being required, the applicant has submitted a comprehensive civil engineering plan	Govt Code 65913.4 (f) "Notwithstanding any law, a local government shall not require any of the following prior to approving a development that meets the requirements of this section: (2) (A) Compliance with any standards necessary to receive a post entitlement permit" The civil engineering plan, which includes comprehensive detail on the proposed retaining walls, site access, access, and

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		incorporating utility planning, site access, site access retaining walls, site retaining wall detail, & grades etc., <u>on multiple prior occasions</u> Requesting structural data on the proposed structure	other customary details was first provided in October 2022, and on multiple occasions since then. It has only had completely inconsequential, and immaterial very small tweaks since then. This is a downstream requirement
28.	Representing that a city checklist form was in place at the time of resubmittal, and that all items on this form that was <u>not in effect</u> at the time of resubmittal – the city represents - is the controlling list	Applicant marked a check list form, which had the description: A TOPOGRAPHIC AND BOUNDARY SURVEY that is sealed/wet stamped and signed by a licensed surveyor or qualified registered civil engineer (a qualified registered civil engineer is someone who was licensed prior to 1982 with a license number no higher than 33965) <u>may be required</u> by City staff (emphasis the City's) Marked as N/A THEN (and he referring to the same development) Mandich of city staff sent a spurious email insisting that a	The applicant has provided on prior occasions a complete survey of the lot (though it was not obligated to do so) In any event, such a “wet stamped ..survey” is not mandated by the checklist, and is (in the context) not required to determine whether the development complies with objective standards. Further, height is not in fact an objective standard in this city's code, and neither is

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	City staff wrote to applicant insisting that an 'Encroachment Agreement' be submitted and until then, the application was incomplete	new (non applicable) checklist be followed with – very interestingly - an <i>altered</i> description: “A TOPOGRAPHIC AND BOUNDARY SURVEY that is sealed/wet stamped and signed by a licensed surveyor or qualified registered civil engineer (a qualified registered civil engineer is someone who was licensed prior to 1982 with a license number no higher than 33965).” June 3, 2025. With the underlined word <u>may</u> being removed by city staff. And – and this is one of the important parts - citing that until this is provided the application is 'incomplete' (thus attempting to stop the processing of this streamlined ministerial approval application AGAIN) Request for an 'Encroachment <u>Agreement</u>'	measurement of height (see city's attempt to base height on an adjusted excavated grade) City staff need to stop this gamesmanship and obfuscation and send a written approval letter. The city needs to stop this pretextual blocking of processing. The applicant -as the city well knows – does not have an 'encroachment agreement' as the city has unlawfully refused to issue an encroachment permit to date.

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	City staff wrote to applicant insisting that a title deed with easements be submitted and until then, the application was incomplete City wrote to applicant saying it cannot process the		The applicant has provided a title report to the city. The city well knows that there are no easements across the lot, including that the city itself created this new lot (and the city did not perform its duty in requiring that in the event that any were needed in the future, future easements be executed and recorded across the two lots that were created from the lot being split) There is more than adequate availability of space for all lots in the area to be served by the rights of way, and homes are directly next to those rights of way. (And, the city has prior processed this SB 35 application without these further documents) The city must cease requesting documents that are not required for SB 35 processing. A grading plan has been provided to the city on multiple occasions. As a grading plan is for downstream, postentitlement

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	application as it does not have a grading plan		processing, it cannot insist on such a plan. In any event a grading plan has been provided to the city on multiple occasions. The city must stop pretextually blocking the issuance of an approval letter
29.	Naming the project a 'special project'	City has published on its website that this is a ' special project ' – for approximately a year.	City ignored a cease and desist letter requiring it to take down that designation City is targeting the applicant and project, in part because it is a ministerial by-right project, which the city has no discretionary control over (except through published in advance reasonable objective standards), and city is incorrectly applying processes & standards specifically because it is an SB 35 project. This is <i>not</i> a <i>special</i> project. City must cease this conduct and take down that notice on the city's permitting look up.

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			This is simply a streamlined ministerially processed and approved under state housing reform laws.
30.	City has refused to process the approval for the necessary encroachment work for access to the project site	City states that a driveway(/street) is an accessory structure and requires a principal use.	A driveway/street in the public right of way is NOT an accessory structure. The city has had this application from November 2022, and it has been submitted to the city on multiple occasions since, and is an implicit part of the SB 35 application. The <i>same</i> driveway/street was submitted on February 15, 2023 as part of its SB 35 submittal. The city is unreasonably delaying approval of the work necessary in the right of way. Govt Code 65913.4 (i)(3)(C)(ii) - regarding application for a public improvement. Govt shall not (ii) "Unreasonably delay in its consideration, review, or approval of the application". <u>The city must write a letter of approval for the improvements proposed in the right of way, and forthwith.</u>
31.	ADU	The city requires a complete ADU application, then it changes its mind for a subsequent resubmittal and does NOT want a complete ADU	The city appears to be changing its review method on the fly to slow down or stop the SB 35 processing.

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
		application, then, it requires an ADU application etc. etc. etc.	SB 35 development needs to be processed and approved The development was processed without an ADU application prior. The manner in which the city processes ADU applications combined with material new construction is wholly undocumented, discretionary, subjective, and has been and is proactively used by the city to frustrate development applications. The city record is replete with other recent examples of such that are frankly disturbing. The city has failed, despite its obligation to do so, per Section 300(b) (section numbering has had changes as Guidelines have been updated), requiring information, in a manner readily accessible to the general public, about <u>the locality's process for applying and receiving ministerial approval, materials required for an application as defined in Section 102(q), and relevant objective</u>

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			standards to be used to evaluate the application” It's commitment – twice – in the Housing Elements – to do the same, with the most recent published commitment date in 2024 - was broken by the city. Issue the written approval for the SB 35 development
32.	Retaliation	Matthew Mandich & Brandon Phipps are intentionally obstructing the processing of this compliant SB 35 application	The applicant is being retaliated against because inter alia a) the applicant complained to California Housing and Community Development (HCD) about the city's unlawful actions and lack of compliance in not taking the actions required in the city's Housing Element and asked HCD to thus decertify the element b) because the applicant is using a ministerial non-discretionary process c) the city is offended that it has – at this time at least – lost its power to deny a development and it does not like the state housing reform laws in this regard (in fact, all it needs to do is create a set of objective design standards – that are

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			clean and without internal conflict - and it regains control) STOP retaliating against the applicant and issue an approval, to which the applicant is entitled as a Protected Property interest
33.	A City official states from the dais that subjective standards can be applied if <i>created</i> before 2019, but not subjective standards created from 2019		The City Council member misstates the law. IN FACT, from 2018 subjective standards WHENEVER they were created cannot be used to condition or deny housing developments City staff appear to be trying to follow this statement in their constant, endless processing loop using subjective standards
34.	Needlessly raising the cost of obtaining approvals	The city continually raises subjects in writing that do not conform to State law including the Housing Accountability Act (see the detail in this notice), and that often 'stop' processing of this streamlined ministerial application at the city	These subjects raised lead to the applicant engaging in extensive unnecessary work, and work that is not required by state law

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
35.	Cease delaying and blocking the processing of this housing development application by alleging that standards must be applied to the development		The development has the benefit of the “baby builder’s remedy”, codified at Govt Code 65589.5 (d)(5)(A) “(A) This paragraph shall not be utilized to disapprove or conditionally approve a housing development project proposed on a site, including a candidate site for rezoning, that is identified as suitable or available for very low, low-, or moderate-income households in the jurisdiction’s housing element if the housing development project is consistent with the density specified in the housing element, even though the housing development project was inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation on the date the application was deemed complete” P. 185 HBR-129 May 2025 Housing Element, quote “215 Sausalito Blvd, 065-263-10. A Preliminary SB 330 application has been submitted for a 3-unit project,

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			including 1 moderate income (deed-restricted) unit, on this vacant, 0.12-acre site. The required entitlements are approval of the SB 330 application and building permit”. Thus the city has identified the site as suitable or available for very low, low-, or moderate-income households in the jurisdiction's housing element P. 347 Housing Element. States that 215 Sausalito Blvd is R-2-2.5 P.110 Housing Element Medium High Density Residential (MHR) = Two-Family Residential (R-2-2.5). The development is two family residential. The application meets the simple tests of both the Housing Element density requirement, and, the requirement to be identified in the Housing Element as suitable or available for moderate-income households. If it is the position of the city that the development application does NOT meet

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			the objective standards, the city has to issue a written approval ANYWAY because the development application is subject to the "baby Builder's Remedy" (& under SB 35) The city cannot apply any standards to the development (other than findings of unmitigable health and safety). The city must issue a written approval for the housing development forthwith
36.	Failing to follow the processes outlined in Govt Code 65913.4. These are also described in the case law, including 40 Main Street Offices LLC v. City of Los Altos		See Exhibit A – Order Granting Consolidated Petitions for Writ of Mandate, 40 Main Street Offices, LLC v. City of Los Altos, Case No. 19CV349845 (County of Santa Clara, April 24, 2020). Judge H. Williams The development there was approved as the city had failed to issue a consistency/inconsistency letter under Govt Code 65913.4 (c)(1) ((b) at the time of the order, same clause later updated to (c))

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			The court stated that (c)(1) is the specific procedure at the heart of statute that effectuates its purpose
37.	Harassment of applicant	The conduct described in this notice	The conduct of the city, over the last 3 ½ years, constitutes harassment under Govt Code 65589.5 (h)(6)(e). City is required to STOP this harassment of the applicant forthwith
38.	City states – regarding December 5 2024 resubmittal - that under city code 10.50.170 incomplete applications in excess of 120 days are considered withdrawn		The city, by its letter of April 17, 2026 accedes the point that the application is not withdrawn. Cease alleging that the application has been withdrawn. The resubmittal made December 5, 2024 was not incomplete. Govt Code 65913.4 (f) (1) Govt <u>shall not require “Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development”</u>. Govt Code 65913.4 (f) “Notwithstanding any law, a local government shall not require any of the following prior to approving a

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			development that meets the requirements of this section: (2)(A):- Compliance with any standards necessary to receive a post entitlement permit” State law preempts local code, an unchallengeable constitutional principle. The city must cease attempting to send the applicant around an endless closed loop – applicant submits, city sends documents that submittal resubmittal not compliant with state law, city demands applicant start back at the beginning of the process, rinse, repeat, rinse repeat. The explicit provisions of SB 35 (and the official Guidelines) contemplate that gamesmanship - and are codified to defeat it. Further, SB 35 provides an absolute right to resubmit based on city's written feedback, at any time, and without time limitation. Govt Code 65913.4 (c)(1)(C). This overrides city code.

	Cease this conduct/cease attempting to apply:	City sent/sends documentation which states:	Applicant's response & statement
			See California's Attorney General's letter stating – "[the city] requested more information about whether the Project...Staff's request for additional information was not a determination that the project conflicted with the use restriction, and certainly did not reflect a "careful explanation" of any such determination.... the Project was deemed to satisfy the standard" The resubmittal December 5, 2024 was complete - and was deemed compliant by operation of law by/in July 2025. Further – putting aside operation of law - the development <u>IS in any event compliant with any standards that the city may have that are objective at development submittal dates (interalia) February 2023, March 2023, May 2024, December 2024, May 2025, and March 2026.</u>

For the avoidance of ANY doubt, it is the applicant's position that the development is subject to the provisions of 65589.5(d)(5)

EXHIBIT B

City of Sausalito Housing Element May
2025

City confirms it has no objective
standards but is in the process of
addressing that & preparing them

6TH CYCLE HOUSING ELEMENT BACKGROUND REPORT

that may constitute a household. With implementation of Program 16, the City's definition of household will therefore not be a constraint to housing for persons with disabilities.

Streamlined Review and Objective Design Standards

California legislation has been adopted to address the housing shortage within the State, requiring a streamlined, ministerial process for specific residential developments. SB 35 (Government Code Section 65913.4), which went into effect on January 1, 2018, was part of a comprehensive package aimed at addressing the State's housing shortage and high costs. SB 35 requires the availability of a streamlined, ministerial approval process for developments located in jurisdictions that have not yet made sufficient progress towards their required allocation of the regional housing need. For a project to be eligible for streamlining pursuant to SB 35 it must:

- Contain at least two multi-family units;
- Be located on an eligible site in an urbanized area or urban cluster;
- Comply with residential or mixed use General Plan and Zoning provisions;
- Provide a specified level of affordability; and
- Comply with other requirements, such as locational and/or demolition restrictions.

A streamlined, ministerial review per State legislation requires projects to be reviewed against existing objective standards, rather than through a discretionary entitlement process, in specified timeframes. Residential development that is a permitted use by right is not required to go through a discretionary process. However, there is potential for mixed use projects to be eligible for the streamlining provisions of SB 35 that require a degree of discretionary review under current zoning requirements, such as a CUP for certain mixed use projects in the CR, CC, and CN zoning districts or project's requiring Design Review. The City's Design Review provisions are subjective in nature and demonstrate preferences or characteristics for consideration while allowing discretion and flexibility, and as such, cannot be enforced through a streamlined, ministerial process. Consistent with existing State law, objective standards are those that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark.

Sausalito is in the process of preparing Objective Design and Development Standards (ODDS) to allow eligible projects to be permitted through a streamlined, ministerial review. A streamlined, ministerial review removes multiple constraints to residential development including financial, time, and environmental constraints. Program 16 (Zoning Code Amendments – Housing Constraints Program) in the Housing Plan provides for revisions to the Zoning Ordinance to identify a streamlined, ministerial approval process and adoption of the ODDS for eligible projects per Government Code Section 65913.4. Program 19 specifies that ODDS will be adopted to address multi-unit residential, mixed use, and single family residential projects to ensure consistent and objective review of residential development.

It is noted that until the ODDS are adopted, projects may submit an application for streamlined by-right review under State law and the only standards that the City may apply to such projects are

EXHIBIT C

City *staff* contradicting all other statements, representing it does have objective standards – blocks the application - but every other member of the city states it doesn't have objective standards

Subject: RE: 215 Sausalito Blvd – Notice of Incomplete Application

From: Matthew Mandich <mmandich@sausalito.gov>

Date: 12/12/23, 2:42 PM

To: Long Water Trust <longwatertrust@gmail.com>

CC: Brandon Phipps <bhipps@sausalito.gov>, Sergio Rudin <sergio.rudin@bbklaw.com>

Mr. Sullivan,

The City has longstanding objective development standards in its municipal code – e.g. height limit, required setbacks, building coverage limits, floor area ratio limits, impervious surface limits etc. These objective standards exist in the municipal code, have been identified and collated in Resolution 6059, and have been communicated to you on numerous occasions and in several formal letters.

We are awaiting a resubmission that complies with our objective development standards. Once submitted it will be processed ministerially.

Very best,



Matthew Mandich

Associate City Planner

City of Sausalito | Community Development Department

420 Litho Street, Sausalito, CA 94965

CDD: 415-289-4100 | Direct: 415-289-4135

EXHIBIT D

HCD technical assistance

Consistency review must timely in any
and every circumstance

Zoning data table provides the data
required a reasonable person to assess
consistency

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



March 11, 2019

Daniel Golub, Associate
Holland & Knight LLP
50 California Street, Suite 2899
San Francisco, CA 94111

RE: City of Los Altos SB 35 Application Technical Assistance

Dear Daniel Golb:

This letter is in response to your March 6, 2019 request for technical assistance regarding the requirements of Government Code § 65913.4 (SB 35, Chapter 366, Statutes of 2017) also known as the “Streamlined Ministerial Approval Process”. The Department of Housing and Community Development (HCD) is informed that Rhoades Planning Group submitted an SB 35 application to the City of Los Altos on behalf of 40 Main Street Offices, LLC on November 8, 2018 for a 15-unit project of which 10 percent of the units are affordable to lower-income households.

SB 35 was part of a 15-bill housing package aimed at addressing the state’s housing shortage and high housing costs. Specifically, it requires the availability of a Streamlined Ministerial Approval Process for developments in localities that have not yet made sufficient progress towards their allocation of the regional housing need. Government Code § 65913.4(l) states it is the policy of the state that section 65913.4 be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply. Approval of projects such as 40 Main Street fulfill this legislative intent.

Pursuant to Government Code § 65913.4(j), HCD, among other things, is responsible for reviewing, adopting, amending, and repealing guidelines to implement uniform standards or criteria that supplement or clarify the terms, reference, or standards set forth under Government Code § 65913.4. To that end, HCD released a series of Frequently Asked Questions in 2018 to facilitate implementation of the law. On November 29, 2018, HCD released guidelines pursuant to Government Code § 65913.4(j) which became effective January 1, 2019.

The following are HCD's responses to questions (*in italics*) posed in your March 6, 2019 request.

- 1) *In light of SB 35's requirement that a locality provide "the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standard," Government Code § 65913.4(b)(1); see also Guidelines, § 301(a)(3), can a locality deny an SB 35 application by issuing a written statement which claims that the project conflicts with an objective zoning standard, but does not cite the section or sections of the zoning ordinance containing the standard that the project supposedly violates?*

No. Pursuant to Government Code § 65913.4(b)(1), if a local government determines that a proposed development conflicts with any of the objective planning standards, it must provide the development proponent written documentation of which standard or standards the development conflicts with. This would include a specific reference to what the specific objective standard is and a citation to where it can be found. Without this citation, the specific standard is not verifiable and thus would not meet the definition of objective standard pursuant to Government Code § 65913.4 (a)(5).

- 2) *Can a locality deny a SB 35 application by stating, without citing any code section, that a project does not provide "adequate access/egress to the proposed off-street parking," or by referring to notes written by staff members which state that effects on parking spaces are not "acceptable" and that parking circulation is "inadequate"?*

No. Pursuant to Government Code § 65913.4 (a)(5) "objective zoning standards," "objective subdivision standards," and "objective design review standards" mean standards that involve no personal or subjective judgment and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal. Terms like "adequate", "acceptable", and "inadequate" imply a subjective determination if they are not accompanied with reference to the specific requirement not met.

- 3) *If the locality does not provide any written communication to the applicant citing any specific code section that the project violates within the applicable 60- or 90-day timeline from the date the application is submitted, is the project deemed to satisfy the objective standards?*

→ Yes. Pursuant to Government Code § 65913.4(b)(2), if the local government fails to provide the required documentation pursuant to Government Code § 65913.4(b)(1), the development shall be deemed to satisfy the objective planning standards.

→ 4) *Can a locality deny an SB 35 application on the grounds that the SB 35 application did not include the application material that the locality requires for complete discretionary Design Review and Use Permit applications?*

→ No. Pursuant to Government Code § 65913.4 (a)(5) the only objective standards that can apply to the project are those external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal. Discretionary design review would not apply. Specifically, Government Code § 65913.4 (c) states design review or public oversight shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects. Design review or public oversight can not in any way inhibit, chill, or preclude the streamlined ministerial approval process.

In addition, the Streamlined Ministerial Permit process is a ministerial process. The requirement to apply for use permits, which are by definition discretionary, would also not apply. As stated in the Department's FAQs, Government Code § 65913.4 specifically exempts developments from the conditional use permit process and they must be approved through a streamlined, ministerial approval process if they satisfy the objective planning standards. Pursuant to the Streamlined Ministerial Approval Guidelines, the locality's process and application requirements shall not in any way inhibit, chill, or preclude the ministerial approval process, which must be strictly focused on assessing compliance with the criteria required for streamlined projects.

HCD appreciates the opportunity to provide comments. If you have any questions, please contact me at (916) 263-7425.

Sincerely,

Melinda Coy
Senior Policy Specialist

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



January 7, 2020

Daniel Golub, Associate
Holland & Knight LLP
50 California Street, Suite 2899
San Francisco, CA 94111

RE: Streamlined Ministerial Approval Process (Government Code section 65913.4) Technical Assistance

Dear Daniel Golub:

This letter is in response to your December 17, 2019 and January 4, 2020 requests for technical assistance regarding the requirements of Government Code § 65913.4 also known as the "Streamlined Ministerial Approval Process" and the subsequent guidelines effective January 1, 2019.

Government Code § 65913.4 requires the availability of a Streamlined Ministerial Approval Process for developments in localities that have not yet made sufficient progress toward their allocation of the regional housing need. Gov. Code § 65913.4(l) states it is the policy of the state that section 65913.4 be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply. Approval of projects such as 40 Main Street fulfill this legislative intent.

Pursuant to Government Code § 65913.4(j), the California Department of Housing and Community Development (HCD), among other things, is responsible for reviewing, adopting, amending, and repealing guidelines to implement uniform standards or criteria that supplement or clarify the terms, reference, or standards set forth under Gov. Code § 65913.4. To that end, on November 29, 2018, HCD released guidelines which became effective January 1, 2019.

The following are HCD's responses to the questions (*in italics*) posed in your December 17, 2019 letter and further clarified in your January 4th request.

Section 300(a) of the Guidelines states that "[a] local government that has been designated as subject to the Streamlined Ministerial Approval Process by the Department shall provide information, in a manner readily accessible to the general public, about the locality's process for applying and receiving ministerial approval, materials required for an application as defined in Section 102(b), and relevant objective standards to be used to evaluate the application."



Section 102(b) in turn defines “Application” to “mean[] a submission containing such information necessary for the locality to determine whether the development complies with the criteria outlined in Article IV of these Guidelines. This may include a checklist or other application documents generated by the local government pursuant to Section 300(a) that specifies in detail the information required to be included in an application, provided that the information is only that required to determine compliance with objective standards and criteria outlined in article IV of these Guidelines.” Section 301(b)(1) also states that “[a]n application submitted hereunder shall be reviewed by the agency whether or not it contains all materials required by the agency for the proposed project, and it is not a basis to deny the project if either: (A) The application contains sufficient information for a reasonable person to determine whether the development is consistent, compliant, or in conformity with the requisite objective standards (outlined in Article IV of these Guidelines); or (B) The application contains all documents and other information required by the local government as referenced in section 300(a) of these Guidelines.”

- ➔ If a local government has not provided information to the general public about the “materials required for an application as defined in Section 102(b)” at the time a development proponent submits a proposal for a streamlined ministerial approval, can the local government lawfully refuse to grant the permit, by contending, without citing
- ➔ any objective planning standards with which the development conflicts, that in the city’s opinion the development proponent’s submission did not “contain[] such information necessary for the locality to determine whether the development complies with the criteria outlined in Article IV of these Guidelines” or did not “contain[] sufficient information for a reasonable person to determine whether the development is consistent, compliant, or in conformity with the requisite objective standards”?

➔ No. As stated in section 300(a), the jurisdiction must provide information in a manner readily accessible to the public, the objective standards and requirements for an application. However, if a jurisdiction has failed to make that information readily available, the jurisdiction is not excused from considering a Streamlined Approval Process application. Absent specific information provided by the jurisdiction, pursuant to section 301(b), a jurisdiction is still required to review the project application and cannot deny a project if the application includes information demonstrating the project meets the requirements of Gov. Code § 65913.4. The information contained in the application, of course, must be sufficient for a reasonable person to determine whether the development is consistent, compliant, or in conformity with objective standards.

➔ Pursuant to section 301(b)(2)(C), the jurisdiction must provide documentation of inconsistencies with objective standards within the required 60 or 90 days of submission. If the local government fails to provide the required documentation determining consistency within these timeframes, the development shall be deemed to satisfy the objective planning standards.

→ *Does anything in the Guidelines sections 102(b) or 301(b)(1) relieve a local government in this situation of its statutory responsibility to identify, within 60 or 90 days of submission, specific objective planning standards with which the development conflicts? Gov. Code § 65913.4(b).*

The purpose of the guidelines is to implement, interpret, and make specific Gov. Code § 65913.4. Nothing in the guidelines relieves the jurisdiction of its obligation to follow state law relating to the availability of the Streamlined Ministerial Process. Furthermore, nothing in the guidelines condition receipt of an application for the Streamlined Ministerial Process on the jurisdiction posting its objective standards. Absent posting of these standards, state law controls. Thus, as long as, the development application contains information showing how the development meets the requirements of Gov. Code § 65913.4 (e.g. an application includes a list of the standards and describes how the development meets those standards) the jurisdiction has 60 to 90 days from submission to evaluate the application pursuant to state law standards, provide the developer with a written determination of consistency, and detail any inconsistencies.

HCD appreciates the opportunity to provide comments. If you have any questions, please contact me at (916) 263-7425.

Sincerely,



Melinda Coy
Senior Policy Specialist

EXHIBIT E

Letter from applicant to city addressing that it requested information that is not required for the reasonable person determination standard



Long Water Trust

May 4, 2026

To: Community Development Department

City of Sausalito,

420 Litho St

Sausalito, CA 94965

Dear Community Development Department

215 Sausalito Blvd, Sausalito - 'completeness'

We are in receipt of the City's April 17, 2026 'notice of incomplete' following our March 20, 2026 resubmittal under Government Code section 65913.4(c)(1)(C). That resubmittal responded to the City's June 3, 2025 communication. This letter addresses only the completeness subject.

Our March 20, 2026 resubmittal was complete for SB 35 review. The items identified in the April 17 letter were already provided, are not required under the applicable vested submittal materials, not required under SB 35 for consistency review, or relate to later permitting and implementation rather than SB 35 consistency, and are not required for a reasonable person to determine whether the development meets the objective planning standards.

Completeness under SB 35

Our March 20, 2026 resubmittal provided the substantial evidence needed for the City to review the development for consistency under SB 35. The plans include the information needed to review height, setbacks, lot coverage, floor area, floor area ratio, access, fire access, impervious surface, lot size, metes and bounds, elevations, all other relevant physical features of the proposed development, and all required zoning data (and

containing exactly the same level of detail as when the city had processed prior iterations of the development under SB 35 for consistency with objective standards)

SB 35 changes the completeness question. The issue is not whether every item on a general discretionary planning checklist has been supplied. The issue is whether the application contains the information needed for a reasonable person to determine consistency with the applicable objective planning standards. And, materials that do not directly pertain to that review, or that relate instead to later engineering, building, utility, encroachment, or post-entitlement permits, are *not* ‘completeness’ items for a SB 35 resubmittal.

The city’s April 17, 2026 letter only identifies items that are either already in the City’s possession, not required under the applicable vested materials, not required for SB 35 consistency review, and relevant only to later permit processing. Those items do not make the March 20, 2026 resubmittal incomplete for purposes of SB 35 consistency and inconsistency review.

The code references explaining this completeness framework are set out at the end of this letter.

ADU

The City does not require a separate ADU application to process this SB 35 application. In October 2023, the City processed this same SB 35 development, which included an ADU, without requiring a separate ADU application. At that time, the City stated that it would not process an ADU application because a primary use had not yet been established. No new ordinance, published processing requirement, or applicable checklist requirement has been identified that changes that completeness position for this vested application.

The city did not identify any ordinance or published processing requirement, applicable to this SB 35 submittal, that requires a separate ADU application as a *completeness item*.

‘Encroachment Agreement’

The City letter of April 17, 2026 states that a checkbox ‘encroachment agreement’ must be checked. For reasons outlined below, this is not required nor is it a ‘completeness’ requirement.

This development vested on February 15, 2023, with further resubmittals including on December 5, 2024. The fees requested are not applicable - these new fees requested were passed by ordinance much later - effective July 1, 2025, more than two years after vesting. That data is readily ascertainable from the fee schedules of the city. (This is not about the money - it is about process)

Further, the process for obtaining a permit for undertaking works in the public right of way is laid out by the city in SMC 10.54, and 10.54.040 (& subject to the provisions of SB 35). Upon approval - this results in an approval of the encroachment *permit* (not 'Encroachment Agreement'). This *permit* is a prerequisite (according to Sausalito code) for an encroachment *agreement*. The term encroachment agreement is used extensively in Sausalito municipal code to refer to café seating, signage in the public right of way downtown & including similar preexisting uses & in similar circumstances. And for construction related matters, after the issuance of the planning *approval* - per SMC 10.56.110 "Prior to any construction and improvement within public lands or rights-of-way, an encroachment *agreement* must be issued by the Engineering Division on forms furnished by the City Engineer". The encroachment *agreement* is plainly a downstream requirement beyond the planning permit - the submitted development includes all detail required to review the driveway/street for a planning *permit* (or 'encroachment *permit*') - as in fact it has done for the same driveway/street since November 2022.

Title Report

A title report has already been provided. And, the data per Sausalito checklist for title report has been provided. Long Water Trust is the vestee, and the metes and bounds are clearly described on multiple pages of the plans. Sausalito (itself) created this lot by Resolution of the Planning Commission - and is more than familiar with its mapped boundaries.

The form submitted in the applicant's resubmittal on December 5, 2024 reads

"TITLE REPORT: verifying the description and vestees (not required if use is to be conducted in existing structure and no structural changes are proposed, otherwise, this report is required)"

But, Sausalito presented a *new* form in April 17, 2026 with *new* requirements – the new form added verbiage regarding encumbrances and exceptions etc. which the city now cites as being required for this resubmittal - but importantly this is not the form at February 15, 2023. It is not possible to ascertain when this form came into existence – the form being undated – but it is inapplicable to this development. Only forms (and such relevant parts of a checklist, & further subject to the preemptive mandates of SB 35) that are in place at the time of vesting are to be used.

Further, the city failed to identify the objective standards in the city code that necessitate the provision of this data.

Survey

The checklist states that survey MAY be required. The applicant has provided a survey on multiple occasions prior. Further, the city passed a Resolution creating this lot based on the survey. It approved the tentative map based on the survey, and then approved a final map based on survey, which was signed and sealed by the city engineer – based on the survey.

Electrical undergrounding

The March 20, 2026 site plan states: “Electrical service undergrounded.” That supplies the relevant planning-level information.

To the extent utility-company coordination, or utility construction plans are later required, those are implementation materials. They are not completeness items for the SB 35 planning resubmittal.

Site drainage/Site plan

Site drainage is shown in the civil engineering materials already provided (though it was not required). The applicant has submitted civil plans addressing drainage for this small site on multiple occasions.

Walls and fences are clearly shown on the resubmitted site plan A1.1. Access is clearly shown. There is no requirement for a construction management plan for a planning permit review. Landscaping plans showing lighting have already been provided.

To the extent further drainage & construction management plans are required for engineering, building, or construction review, those are later permit materials. They are not missing ‘completeness’ items for the SB 35 resubmittal.

Elevations

A full set of elevations were (again) provided to the city in the resubmittal on March 20, 2026. There is no objective standard, & neither one that is uniformly applied throughout the city, that can be applied to the development that necessitates a height restriction from ‘centerline of street’ – and the city has simply applied subjective determinations for setbacks project by project. There were two meetings held, including with the city attorney, on this subject during which the applicant demonstrated this point clearly and definitively (though the applicant had no burden to do so).

Grading plan

Grading plans are post entitlement requirements, and for permits issued by building departments (not planning departments). And, the applicant has provided a grading plan on multiple occasions, and since November 2022 in fact, and the grading plan has remained very very substantively the same during that entire period.

Further, the city processed earlier plan sets with (only) the same comprehensive zoning data items provided, from October 2023.

Establishment of city's streamlined ministerial process requirements

Further, and of great significance in this matter, the city *still* lacks the streamlined ministerial process & procedures guide for use by SB 35 applicants – despite its promises to produce it that it made in January, 2023, and did not do so, and its most recent commitment & promise in its 2nd version of its Housing Element, at Page reference H-31 “By no later than December 2024, develop procedures to address the streamlining requirements of SB 35 and similar state laws” which was also completely ignored by the city. (ODDS published December 2025 are proposed development *standards* - *not procedures*). The complete lack of these procedures is construed against the city, it cannot benefit from its failure, and cannot rely on its own failure to act as a basis for asserting incompleteness. As just one example – this set of procedures could have documented what ADU application requirements actually are for an SB 35 permit. This point is in addition to the separate completeness points raised by us above, each of which independently clearly demonstrate the conclusion that the March 20, 2026 resubmittal was complete for SB 35 consistency review.

The resubmittal, made on March 20, 2026 – under SB 35 – Government Code 65913.4 - fulfilled all conditions for the city to be able to determine whether the development is consistent with the objective planning standards. And - in any event - the development is subject to the Housing Accountability Act provisions, as enumerated at Government Code 65589.5 (c) & (d).

For the reasons above, the March 20, 2026 resubmittal provided the information needed for SB 35 consistency review. The items listed in the April 17, 2026 letter are not missing completeness items. They are either already supplied, not required under the applicable vested materials, not required under SB 35, or related to later permit processing.



Chris Sullivan

For Long Water Trust

(415) 754-8009 longwatertrust@gmail.com

Code references

Government Code 65913.4(f)(1):

“A local government shall not require any of the following prior to approving a development that meets the requirements of this section: (1) Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development.”

Government Code 65913.4(f)(2):

“A local government shall not require any of the following prior to approving a development that meets the requirements of this section: ... (2)(A) Compliance with any standards necessary to receive a postentitlement permit.”

Because compliance with standards necessary to receive a postentitlement permit is not required at this stage, those materials that do not directly pertain to determining whether the development is consistent with objective planning standards for SB 35 consistency review do not constitute incompleteness.

Government Code 65913.4(c)(3):

“For purposes of this section, a development is consistent with the objective planning standards specified in subdivision (a) if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards. The local government shall not determine that a development, including an application for a modification under subdivision (h), is in conflict with the objective planning standards on the basis that application materials are not included, if the application contains substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards.”

Government Code 65589.5(o)(1):

A housing development project is subject only to the ordinances, policies, and standards adopted and in effect when the preliminary application was submitted.

Government Code 65589.5(o)(4):

“Ordinances, policies, and standards” includes general plan, zoning, design review standards, subdivision standards, and any other rules, regulations, requirements, and policies of a local agency, including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions.

Government Code 65913.4(d)(1):

Design review must be objective and strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution before submission of the development application.

EXHIBIT F

HCD letter to Sausalito

Implement Program 19 for streamlined processing

Can only apply standards consistent with meeting jurisdictions share of RHNA

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



April 5, 2024

Chris Zapata, City Manager
City of Sausalito
420 Lithho Street
Sausalito, CA 94965

Dear Chris Zapata:

RE: 6th Cycle Housing Element Program 19 (Objective Design and Development Standards) – Letter of Inquiry and Technical Assistance

The California Department of Housing and Community Development (HCD) is writing to inquire about the implementation of the City of Sausalito (City) 6th Cycle Housing Element Program 19. As you are aware, the City adopted timelines for Program 19, Bullet 1 and Bullet 4 implementation of streamlining procedures and Objective Design and Development Standards (ODDS) by November 2023 and January 2024, respectively. Noted in HCD's April 28, 2023 letter finding the City's housing element substantially complied with State Housing Element Law¹, the City must timely and effectively implement all programs, including Program 19. HCD is aware that the City has yet to adopt and implement this program.

HCD requests that the City provide a specific timeline for implementation of Program 19, Bullets 1 and 4 by Monday, May 6, 2024, along with the requested information detailed under "Conclusion and Next Steps" below.

Housing Element and Program 19

The City's Regional Housing Needs Allocation (RHNA) approach shown in the Housing Element, Table 1 (RHNA Sites Strategy)², indicates that Opportunity Sites are anticipated to provide 647 units (71 percent) of the City's total capacity to accommodate new housing units in its 6th Cycle. To permit the capacities shown for the Opportunity Sites, the City is required to amend its land use, density, and zoning development standards. In addition, the City is required to address and remove governmental and nongovernmental constraints to the maintenance, improvement, and development of housing³.

¹ Gov. Code, § 65580 et seq.

² January 30, 2023. City of Sausalito Adopted 6th Cycle Housing Element, p. 11.

<https://www.sausalito.gov/home/showpublisheddocument/32446/638188850327870000>

³ Gov. Code § 65583, subd. (c)(3)

As identified in the housing element, the lack of certainty in the permitting process as well as subjective standards of review pose constraints to the development of housing in the City. Accordingly, Housing Element Program 19 (Development Review Procedures) commits the City to adopt ODDS that would accommodate the maximum densities proposed to meet its RHNA and streamline the approval process for housing developments.

- **Bullet 1 of Program 19** outlines a plan to: (1) Develop streamlining procedures for multifamily and mixed-use development projects that are required to be allowed by-right under state law; and (2) Develop ODDS that include objective findings for floor area ratio, unit size, height, setbacks, parking requirements, and provide flexibility with the design of building types and units to accommodate irregular lots and steep slopes. Bullet 1 was committed to be implemented no later than November 2023.
- **Bullet 4 of Program 19** commits the City to complete a review of the decision timelines of all discretionary applications for a new residential unit or remodel of a residential unit processed since 2015 within one year of housing element adoption (January 2024), and to revise permit processing procedures within three months (April 2024) if the decision timelines do not conform to the Permit Streamlining Act (PSA). This task is to be facilitated by Bullet 3 of Program 19, in which the City establishes a permit tracking database that includes application timeline and workflow information.

ODDS and Potential Inconsistency with Housing Element Law and Housing Crisis Act

On March 7, 2024, HCD advised the City in an email to Director Brandon Phipps that the Housing Crisis Act (HCA) prohibits a local agency from enacting a development policy, standard, or condition that would reduce residential development capacity individually or cumulatively without concurrently increasing residential intensity elsewhere (See Enclosure, email to Director Brandon Phipps).⁴ In adoption of the ODDS, the City must demonstrate that the resulting form-based code does not reduce a site's residential development capacity, including—but not limited to—reduced height, density, floor area ratio, or lot coverage, nor create new or increased requirements for open space, lot size, setbacks, or frontage. Subsequently on March 19, 2024, the City Council received a presentation and provided direction to staff on the 152-page draft Sausalito Municipal Code (SMC) Title 10A: Objective Design and Development Standards.

HCD continues to have significant concerns about the City's proposed ODDS, its ability to facilitate and not constrain a development from achieving maximum allowable density, and compliance with the HCA.

⁴ Gov. Code, § 66300, subd. (b)(1)(A).

- **Average Unit Size.** The proposed zoning standards assume average unit sizes of 600 square feet to “determine the *minimum development standards* necessary to achieve the pre-determined unit counts from the adopted Housing Element” and “achieve the adopted *maximum unit counts* for many of the parcels” [emphasis added].⁵ Government Code section 65583.2, subdivision (c), requires local governments to calculate the projected residential development capacity of the sites identified in the housing element that can be realistically achieved. Please be advised that by assuming an average unit size that is inconsistent with typical local unit mix and unit sizes, the City’s proposed ODDS would result in a constrained zoning envelope that does not achieve the realistic capacities proposed in the City’s housing element, and thereby jeopardizes the City’s housing element compliance. Furthermore, the City cannot assume that projects will utilize State Density Bonus waivers and concessions; the underlying (base) density must be appropriate to accommodate the RHNA.⁶
- **Building Stories and Height Limits.** At the City Council study session on March 19, 2024, the City’s consultant presented slides on the necessary number of stories to achieve the unit count for each Opportunity Site, as well as a sampling of the relationship in other jurisdictions between zoned maximum density and height limits.⁷ Despite calculation using a minimal 600 square foot average unit size, several of the housing element opportunity sites require up to five stories to achieve the assumed unit capacity whereas the proposed objective standards limit buildings to four stories on housing opportunity sites. In addition, the table comparing maximum densities and height limits makes clear that the City’s proposed zoning is an outlier among neighboring jurisdictions. Please be advised that, prior to adoption, the City would be required to demonstrate the zoning appropriateness of pairing a maximum density of 70 units per acre with a height limit of 45 feet and 4 stories by providing information gathered from recent residential projects, including affordable housing.
- **View Preservation and Architectural Design Standards.** While regulations for view preservation and architectural design standards were not proposed in the March 19, 2024 staff presentation, HCD is aware that the City Council requested staff to further analyze and consider incorporation of these standards, including considerations for reducing number of stories and requiring flat roofs. Please be advised that the City would be required to demonstrate that the resulting view preservation and architectural design standards do not reduce the intensity of land use, including its height and floor area ratio.

⁵ March 19, 2024. Sausalito City Council Agenda Item 5.A. Staff Report, p. 9. https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2503141/Staff_Report.pdf

⁶ June 10, 2020. HCD Housing Element Sites Inventory Guidebook, p. 14. https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/sites_inventory_memo_final06102020.pdf

⁷ March 19, 2024. Sausalito City Council Agenda Item 5.A. Attachment 5 – Presentation, slides 25-26. https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2503148/Attachment_5_-_Presentation.pdf

Under Housing Element Program 10 (Affordable Housing Development Assistance), the City commits to establishing financial and regulatory incentives by July 2024. The incentives include reduced development standards to accommodate maximum permitted densities. Instead, the City's proposed ODDS introduce new design standards that limit building types, maximum building sizes and dimensions, and parking locations, while also increasing the number of prescriptive requirements such as streetscape frontage standards, pedestrian access paths, and eligibility for attached wing structures.

Implementing the ODDS and form-based code as currently proposed may constitute a violation of the HCA, if the added regulations individually or cumulatively reduce residential development capacity below what was otherwise applicable on January 1, 2018. In addition, the cumulative application of these standards could constrain or inhibit a housing development project from achieving maximum densities which would undermine the purpose of Program 19 to address and remove governmental constraints.

ODDS and Housing Accountability Act

Under the Housing Accountability Act (HAA), a city may be able to deny a proposed housing development project if the project does not meet objective development standards. However, the City can only apply objective development standards appropriate to, and consistent with, meeting the jurisdiction's share of the RHNA.⁸ In addition, the development standards, conditions, and policies shall be applied in a manner to facilitate and accommodate development at the density permitted on the site and proposed by the development.

As a result, in the future, if the City denies a project on the basis of the non-conformance with objective development standards but those standards are found to not facilitate the development of a project within the allowable densities or are inconsistent with the City's ability to meet the RHNA, then the City could violate the HAA.

ODDS and Affirmatively Furthering Fair Housing (AFFH)

Jurisdictions in California have obligations to AFFH, including a duty to "overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity base on protected characteristics."⁹ HCD has concerns about the inconsistency between the City's proposed ODDS and form-based code with the City's housing element AFFH commitments (Goal H-4) to promote equal housing for all residents.

- **Policy H-4.4 Female-Headed Households with Children and Large Family Housing.** The City has a policy to support families and single heads of household with children by encouraging the development of larger rental and ownership housing units for families with children. In order to conform with the proposed minimal zoning envelope and produce the maximal units anticipated in

⁸ Gov. Code, § 65589.5, subd. (f),

⁹ Gov. Code, § 8899.50, subd. (a)(1)

the housing element, the City's proposed ODDS may actually discourage the development of larger rental and ownership housing units.

- **Program 22. Affirmatively Further Fair Housing.** The City commits to providing a range of housing types at prices suitable for lower-income households. However, the proposed ODDS equate a smaller average unit size with higher affordability, which assumes that lower-income households would occupy smaller units. This rationale runs counter to the City's AFFH goals to offer a range of affordable housing types.

Development Review Procedures and the Permit Streamlining Act (PSA)

As the City notes in its adopted housing element, the current design review process includes subjective terminology and may constitute a constraint to development.¹⁰ Program 19, Bullet 1 includes development of streamlining procedures for multifamily and mixed-use development projects that are required to be allowed by-right under state law. HCD is concerned that the proposed SMC Section 10.A.07.020 Application Procedures merely refers to administrative processes that are already in place in SMC Title 10, Division IV (Permit Procedures) and Division V (Zoning Administration)¹¹ and does not create streamlining procedures for development projects that must be approved ministerially or by-right.

In addition, Bullet 4 of Program 19 commits the City to complete a review of the decision timelines of all discretionary applications for a new residential unit or remodel of a residential unit processed since 2015 and to revise permit processing procedures if the decision timelines do not conform to the PSA. HCD requests that the City provide an update on the status of this program bullet. HCD notes that Program 10 also includes a commitment by July 2024 for expedited processing of projects with 20 percent or more of units affordable to very low- or low-income households or for special needs households.

Consequences of Failure to Implement Program 19

HCD has enforcement authority over the HCA, AFFH, PSA, and State Housing Element Law, among other state laws. HCD will consider any written response before taking further action authorized by Government Code section 65585, subdivisions (i) or (j), including issuance of written findings (Corrective Action Letter) and revocation of HCD's finding of housing element compliance. Various consequences may apply if the City does not have a housing element in compliance with State Housing Element Law, including ineligibility or delay in receiving certain state funds, referral to the California Office of the Attorney General, court-imposed financial penalties, the loss of local land use authority to a court-appointed agent, and the application of the "builder's remedy."¹²

¹⁰ January 30, 2023. City of Sausalito Adopted 6th Cycle Housing Element, p. 90.

¹¹ February 7, 2024. Sausalito City Council Agenda Item 5.A. Attachment 1 – Draft ODDS (Title 10A), p. 129. https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/2503143/Attachment_1_-_Draft_ODDS_Title_10A.pdf

¹² Gov. Code, §§ 65585, subds. (j), (l)(1), (i), 65589.5, subd. (d)(5).

Conclusion and Next Steps

The City has until May 6, 2024 to provide a written response to this Letter, including a specific timeline with public hearing dates to implement Program 19, Bullet 1 and Bullet 4. For HCD to evaluate the proposed ODDS and recent processing procedure timelines, the City's written response must contain a list of all *submitted* housing project applications containing a total of two or more units since January 1, 2015. Please include the following information for each project on the list:

1. Project address(es) and assessor parcel number (APN),
2. Date of application submittal,
3. Date of project entitlement, if applicable,
4. Total number of housing units listed in project application,
5. Total number of accessory dwelling units, if applicable,
6. Percentage of affordable units proposed,
7. Tenure of proposed housing project (for-sale or for rent),
8. Proposed project density (units per acre),
9. Proposed average unit size (total gross square footage divided by total number of units listed in project application), and
10. Proposed project maximum height (measured from grade to top of roof).

HCD looks forward to receiving your written response to this inquiry. If you have any questions or would like to discuss the content of this letter, please contact Grace Wu at Grace.Wu@hcd.ca.gov.

Sincerely,



Melinda Coy
Proactive Housing Accountability Chief
Division of Housing Policy Development

ENCLOSURE

March 7, 2024. HCD email to Director Brandon Phipps.

EXHIBIT G

HCD communication to Sausalito

requiring it remove discretionary
determinations for standards. It did not.

From: [Wu, Grace@HCD](mailto:Wu_Grace@HCD)
To: [Brandon Phipps](#)
Cc: [Coy, Melinda@HCD](mailto:Coy_Melinda@HCD); [Sergio Rudin](#); [Matthew Mandich](#)
Subject: Technical Assistance - 215 Sausalito (HAU 720)
Date: Thursday, March 7, 2024 9:23:00 AM

Dear Brandon Phipps,

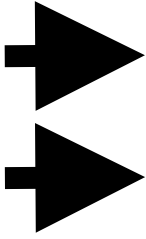
The California Department of Housing and Community Development (HCD) Housing Accountability Unit (HAU) received a request for technical assistance from Chris Sullivan of Long Water Trust (Requestor) regarding the application of state streamlined ministerial approval law (Government Code §§ 65913—65914.5) and Housing Element Law (Government Code §§ 65580—65589.11) for the proposed housing project to be located at 215 Sausalito Blvd. (HAU Case No. 720). HCD staff met with the Requestor on February 13, 2024, and with City staff on February 28, 2024. This email provides technical assistance for the benefit of both the City of Sausalito (City) and the Requestor.

HCD understands the application proposes a development project containing two units and one accessory dwelling unit (ADU) on a vacant lot. The project application was filed under state streamlined ministerial approval law. One of the three proposed units is to be deed-restricted for a moderate income household, although the precise unit is unspecified. On February 7, 2024, the Requestor reached out to HCD for technical assistance. On February 14, 2024, the City's Planning Commission conducted a design review hearing and denied the project on the sole basis that the project did not meet all the City's applicable objective standards.

Issue 1 – Objective Standards. The City's zoning code contains objective standards, and the proposed project does not comply with all applicable objective standards. However, the City must ensure that any measurement or determination of an objective standard does not involve personal or subjective judgement by a public official.

To be eligible for streamlined, ministerial approval under Government Code §§ 65913 – 65914.5, the project must be consistent with objective zoning standards, objective subdivision standards, and objective design review standards in effect at the time that the development is submitted to the local government (Gov. Code, § 65913.4, subd. (a)(5).) In 2021, the City adopted Resolution 6059 and its Exhibit A, identifying pre-existing applicable objective design and development standards for the review of qualifying streamlined and ministerial projects. The project at 215 Sausalito was reviewed for consistency with applicable objective standards for R-2-2.5 zoning and found to be inconsistent with the objective standards by exceeding lot coverage, impervious surface, height, and floor area ratio, and is located within the minimum north side and rear setback area.

However, Exhibit A of Resolution 6059 fails to exclude a number of subsections within the Sausalito Municipal Code (SMC) that may require discretionary interpretation for the basis of measuring and determining objective standards. City staff confirmed that the proposed project did not involve any encroachments, the only viable front property line was Sausalito Blvd., and height was verified solely based on the applicant's elevation plans so that no potentially discretionary interpretations were applied to the project. Nevertheless, HCD advises that any discretionary approvals as they relate to defining and measuring objective standards shall be explicitly excluded in Exhibit A, including:



- SMC [10.40.120\(A\)\(I\)](#) Driveway Design – Design Review approval.
- SMC [10.56.030](#) Encroachment - Design Review approval.
- SMC [10.40.060\(C\)\(1\)\(c\)](#) Height Requirements (Sloped and Level Parcels, Uphill) - Design Review approval.
- SMC [10.88.040](#) “Property Lines” - Community Development Director opinion.
- SMC [10.88.040](#) “Natural Grade” – May be compared with 1968 Photometric Maps.

Issue 2 – Public Oversight. A local jurisdiction may conduct design review by a board or commission for a streamlined, ministerial application, but the review is strictly based on objective criteria. Any action by a legislative body, including approval of a ministerial project, is subject to the Brown Act and requires notice and opportunity for public comment (Gov. Code, §§ 54950 – 54963).

Senate Bill (SB) 423 amended Government Code Section 65913.4, subdivision (d)(1) to remove the phrase “public oversight” so that the paragraph now starts with: *“Any design review of the development may be conducted by the local government’s planning commission or any equivalent board or commission responsible for design review. That design review shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction.”*

By removing the term “public oversight,” SB 423 prohibits any public meeting where there is no action being taken on the project, such as a City Council study session or a public workshop. The Sausalito planning commission may conduct design review based on objective criteria and, as a legislative body, is subject to the Brown Act for noticing requirements and for providing opportunity to hear public comment prior to taking action.

Issue 3 – Housing Element Implementation. The City has not met its timeline for Program 19, Bullet 1 implementation of Objective Design and Development Standards (ODDS) for streamlined projects. HCD advises that the City ensure that the ODDS does not result in net loss of residential capacity or other infractions of the Housing Crisis Act of 2019 (HCA).

On April 28, 2023, HCD found the City’s housing element in substantial compliance with State Housing Element Law. HCD based its compliance findings on, among other measures, a commitment to implement Program 19 Development Review Procedures in accordance with Government Code section 65583, subdivision (c). However, the City has failed to develop procedures for streamlined approval and adopt ODDs for by-right multi-family residential and mixed use development by November 2023 as indicated in its Housing Element.

HCD understands that the City has released a Draft Environmental Impact Report ([Draft EIR](#)) according to CEQA requirements to evaluate the potential environmental impacts associated with the implementation of several Housing Element Programs, including Program 19 and the proposed ODDS as they apply to Housing Opportunity Sites Overlay districts. HCD will closely monitor future actions and milestones.

Please be advised that the HCA prohibits a local agency from enacting a development policy, standard, or condition that would reduce residential development capacity individually or cumulatively without concurrently increasing residential intensity elsewhere. (Gov. Code, § 66300, subd. (b)(1)(A).) In adoption of the ODDs, the City must demonstrate that the resulting form-based code does not reduce a site's residential development capacity, including—but not limited to—reduced height, density, floor area ratio, or lot coverage, nor create new or increased requirements for open space, lot size, setbacks, or frontage.

If you have questions or need additional information, please do not hesitate to contact me directly.

Sincerely,

Grace

cc: Sergio Rudin, City Attorney, City of Sausalito
Matthew Mandich, Assistant City Planner, City of Sausalito
Melinda Coy, Proactive Housing Accountability Chief, HCD



Grace Wu, AICP

Senior Housing Policy Specialist, Housing Policy Development Division
Housing and Community Development
2020 W. El Camino Avenue, Suite 500 | Sacramento, CA 95833
Email: grace.wu@hcd.ca.gov | Phone: (916) 292-2039

EXHIBIT H

Letter from California Attorney General

A standard that is found by discretionary determination is not a standard that can be used in SB 35

Absolute requirement to document any inconsistencies within 30/60 days.

CANNOT simply ask for more information otherwise application deemed consistent by law

ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 210-7246
Facsimile: (916) 327-2319
E-Mail: Matthew.Struhar@doj.ca.gov

March 16, 2023

Mayor Bobbie Singh-Allen
City of Elk Grove
8401 Laguna Palms Way
Elk Grove, CA 95758
(916) 691-2489
bsinghallen@elkgrovecity.org

RE: DISAPPROVAL OF OAK ROSE APARTMENTS

Dear Mayor Singh-Allen:

We write regarding the City Council of Elk Grove's July 27, 2022 denial of the Oak Rose Apartments (the Project), a proposed supportive housing project in the City's Old Town Special Planning Area (the OTSPA). The proposed project would have added 66 units of supportive housing for lower-income households at risk of homelessness, in a jurisdiction in dire need of low-income housing opportunities. The Council denied the Project on the basis that it did not meet the city's objective zoning standards and was therefore ineligible for Senate Bill (SB) 35 ministerial review.

In response to the City Council's action, the California Department of Housing and Community Development (HCD) issued a Notice of Violation finding the City in violation of SB 35 (section 65913.4 of the Government Code), the Housing Accountability Act (the HAA), the Nondiscrimination in Land Use Law (Section 65008), the Affirmatively Furthering Fair Housing Statute (the AFFH Statute), and the Housing Element Law. The City responded to HCD's Notice of Violation on November 10, 2022.

Our office has reviewed the Notice of Violation and the City's November 10 response letter (the Letter). We agree with HCD's conclusion that the City's denial of the Project violated state law. We urge the City to reconsider and take prompt action to conform with state law.

I. THE GROUND FLOOR USE RESTRICTION IS NOT AN "OBJECTIVE STANDARD" UNDER EITHER SB 35 OR THE HAA

SB 35 requires local governments to provide streamlined, ministerial (nondiscretionary) approval of projects that are consistent with objective zoning standards. (Gov. Code, § 65913.4,

subd. (a)(5).¹ To qualify as an “objective standard” under SB 35, a local zoning policy must “involve *no* personal or subjective judgment by a public official.” (*Ibid.*, italics added.) That definition is also in the HAA. (Compare § 65913.4, subd. (a)(5) with § 65589.5, subd. (h)(8).) This requirement ensures that the application of local standards is predictable. (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 850.)

The City contends that the Project does not qualify for ministerial approval under SB 35 because it conflicts with the following use restriction from the OTSPA: “Buildings used for 2nd and 3rd floor residential must be used for pedestrian oriented commercial uses on the ground floor (i.e., retail, restaurant, or office).” (OTSPA at p. 13.) The City’s arguments in the Letter rely on the assumption that this use restriction is an “objective standard” within the meaning of SB 35 and the HAA, but it is not because its application depends on the exercise of discretion. Indeed the City itself acknowledges that its OTSPA standards—including the ground floor use restriction—involve discretion, noting that the City “has a mechanism to deviate from development standards under the OTSPA for projects that meet the goals of the OTSPA.” (Letter at p. 15.) That mechanism allows considering the compatibility of a project with community character, which demonstrates that the OTSPA use restriction is not objective. Because the HAA and SB 35 prohibit the application of a standard that involves *any* discretionary application, the City cannot rely on OTSPA use restriction as a basis to deny the Project.

II. SB 35 AND THE HAA REQUIRE THE CITY TO TREAT THE PROJECT AS CONSISTENT WITH THE USE RESTRICTION

A. The Use Restriction “Relates to” Housing Density Under SB 35

Even if the OTSPA use restriction were an “objective standard” within the meaning of SB 35, the City was still required to approve the project because the use restriction is “related to housing density” and the project is compliant with maximum allowed density.

Under SB 35, a “development shall be deemed consistent with the objective zoning standards *related to housing density*, as applicable, if the density proposed is compliant with the maximum density allowed within that land use designation, notwithstanding any specified maximum unit allocation that may result in fewer units of housing permitted.” (§ 65913.4, subd. (a)(5), emphasis added.) The City argues that the OTSPA use restriction does not “relate to housing density” within the meaning of SB 35 because it does not numerically establish the allowable units onsite.

In arguing that the use restriction is not strictly a density standard, the City ignores the broad interpretation of the term “related to” under SB 35. Importantly, the phrase “related to” must be interpreted broadly here given SB 35’s admonition that the statute “be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval

¹ All statutory references are to the Government Code unless otherwise noted.

and provision of, increased housing supply.” (§ 65913.4, subd. (n).) More broadly under state law, the meaning of “related to” includes “both logical and causal connections.” (*Bay Cities Paving & Grading, Inc. v. Lawyers’ Mutual Ins. Co.* (1993) 5 Cal.4th 854, 873; see also *Chawanakee Unified School District v. County of Madera* (2011) 196 Cal.App.4th 1016, 1028 [distinguishing the broader term “related to” from the narrower term “on”].)

Here, the OTSPA use restriction can be reasonably read as requiring *some* ground floor commercial uses, but not *entirely* commercial uses. Requiring solely commercial uses on the ground floor of otherwise residential buildings (i.e., prohibiting ground floor residential units) restricts the Project’s ability to supply housing at the density allowable under the applicable land use designation and the Density Bonus Law. Such a prohibition *directly regulates* housing density at the Project site, because it restricts the feasible development of new housing to a level below what the general plan, coupled with the Density Bonus Law, allow. And to the extent the use restriction actually prohibits ground floor residential units, it is unquestionably a “zoning standard related to housing density” in both logical and practical effect. Therefore, the Project is deemed consistent with the use restriction and thus subject to ministerial approval under SB 35. (*Id.*, subd. (a)(5).)

B. The City Did Not Timely Determine That the Project Violated the Use Restriction Due to Its Inclusion of Ground Floor Residential Units

Further, even if the Project was inconsistent with the OTSPA use restriction, the City failed to timely notify the project proponent as required by SB 35.

→ To find proposed new housing inconsistent with SB 35’s objective planning standards, a local government “must provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards” within proscribed time periods. (*Id.*, subd. (c)(1).) Local governments must “carefully explain any determination that a proposed development conflicts with” SB 35’s objective planning standards. (*Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 318.) Here, the City was required to do so within 60 days of application submission. (See § 65913.4, subd. (c)(1)(A).)

→ The City provided a letter to the Project developer on April 15, 2022, which was within 60 days, but that letter failed to make a clear determination that the project conflicted with local zoning standards. Rather, it requested “more information to know if the Project will be consistent with the standards.” (Letter at p. 4.) In particular, it requested more information about whether the Project would have a pedestrian-oriented commercial use on the ground floor. Staff’s request for additional information was not a determination that the project conflicted with the use restriction, and certainly did not reflect a “careful explanation” of any such determination. .
→ Because the City failed to determine in a timely and adequate manner that the Project conflicted with the use restriction , the Project was deemed to satisfy the standard. (§ 65913.4, subd. (c)(2).)

In fact, the City ultimately determined that the Project *did* have a pedestrian-oriented commercial use on the ground floor, obviating its denial. It denied the project on a basis—the

presence of residential units on the ground floor—that was never articulated in the April 15 determination letter. (See June 2 Planning Staff Report at p. 10.) Because that determination was not made until 90 days after the project submission, on June 2, 2022, it was an untimely basis for denial. This is exactly the shifting goalposts that the SB 35 determination deadline is meant to avoid.

For those reasons, the City was required to treat the Project as consistent with the use restriction.

III. THE CITY VIOLATED THE HOUSING ACCOUNTABILITY ACT BY ENFORCING THE USE RESTRICTION

Even if the use restriction was objective and the City timely asserted its application, the HAA requires more of local planning decisions than simply applying objective standards. When the general plan authorizes a certain maximum residential density, the HAA requires the zoning and development standards to facilitate development at that density in order to accommodate the jurisdiction's regional housing need.



The local government must apply objective standards “appropriate to, and consistent with, meeting the jurisdiction’s share of the regional housing need However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development.” (§ 65589.5, subd. (f)(1); see also *California Renters*, *supra*, 68 Cal.App.5th at p. 850.) Here, the City’s application of the use restriction to the Project is not consistent with meeting its fair share of the regional housing need. The City is in its second consecutive cycle of failing to meet its need for low- and very low-income households, and the Project would have provided 66 units of lower-income housing.

Similarly, under the HAA, the City could only enforce the use restriction in a manner “to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project.” (§ 65589.5, subd. (j)(4).) Here, the Project falls within the density allowable under the general plan. Any zoning standard that the City would enforce against the Project must facilitate development at that proposed density. Yet the City enforced the use restriction to prevent such development, in violation of the HAA.

IV. THE CITY VIOLATED FAIR HOUSING LAWS

In its Notice of Violation, HCD charged the City with violating two important fair housing laws: Section 65008 and the AFFH Statute. Both of these statutes prohibit the City from engaging in discriminatory land use practices that disproportionately harm lower-income households. The City’s denial of the project based on the use restriction constituted a discriminatory land use practice.

A. The City Violated Section 65008

Local governments violate Section 65008 whenever a land use decision is based on discriminatory intent *or* has a discriminatory effect. Here, there is evidence of both. First, the City's dissimilar treatment of a market-rate housing development, the Elk Grove Railroad Courtyards Project, evidences discriminatory intent. As the City admits in the Letter, Railroad Courtyards "is a multifamily, market-rate project that is located within the OTSPA and contains ground floor residential units." (Letter at p. 14.) Despite the presence of ground floor residential units, the City found that Railroad Courtyards was consistent with planning standards, and completely avoided any discussion of the use restriction. (See May 5 Planning Staff Report for Railroad Courtyards at p. 3.)²

With the Project, however, the City reached a different conclusion. There, the City adopted a strict interpretation of the use restriction as outright prohibiting ground floor residential units. The City thus adopted two conflicting interpretations of the OTSPA use restriction for two similarly situated projects serving different populations. It applied a more permissive interpretation to approve a lower density market-rate project, and it applied a stricter interpretation to disapprove the Project, a higher density lower-income supportive housing project. That conduct is impermissible under Section 65008.

In addition, the City's denial of the Project has a discriminatory effect and no compelling purpose to override that effect. The City applied the use restriction to disapprove an application to develop low-income housing in a jurisdiction that badly needs it. The residents who would benefit from the housing would be forced to look elsewhere for similar housing opportunities. That suffices to show a discriminatory effect. (See *Keith v. Volpe* (1988) 858 F.2d 467, 485 [holding that a City land use decision that adversely affect only low-income persons violated section 65008].)

The City's application of the use restriction was not necessary to achieve a legitimate policy goal, such as would override the discriminatory effect. To the contrary, on June 2, 2022, the Planning Commission, in adopting staff's findings, found that the Project would be consistent with the City policy of promoting "a greater concentration of high-density residential, office commercial or mixed-use sites" at "appropriate locations." (See June 2 Staff Report at p. 6.) Planning staff also found that the Project would be consistent with a City policy of providing "an increase of housing diversity and promot[ing] walkability with the Project in close proximity to other commercial businesses on Elk Grove Boulevard," and therefore "the proposed Project will be generally consistent with the General Plan." (*Ibid.*)

² In fact, because the City relied on CEQA's exemption for infill housing development, it had to find consistency with local planning and zoning laws. (*Id.* at p. 9; see CEQA Guidelines, § 15332.)

The City's discriminatory intent and the discriminatory effect of its actions violated Section 65008.

B. The City Violated the AFFH Statute by Applying the Use Restriction

Under the AFFH Statute, the City must “administer its programs and activities”—all of them—“relating to housing and community development in a manner to affirmatively further fair housing,” and the City may “take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” (§ 8899.50, subd. (b)(1).) The AFFH Statute thus applies to the local enforcement of zoning standards in the context of both SB 35 and the HAA.

The City takes the position that AFFH compliance depends on all of the City's actions related to housing. In making this argument, the City cites subdivision (d) of the AFFH Statute, which provides that in “selecting meaningful actions to affirmatively further fair housing, this section does not require a public agency to take, or prohibit a public agency from taking, one particular action.” (*Id.*, subd. (d).) That subdivision only speaks to the City's obligation to select meaningful actions to affirmatively further fair housing. It says nothing about the City's parallel obligation to avoid taking any action that is materially inconsistent with its mandatory duty to affirmatively further fair housing. (*Id.*, subd. (b)(1).) Here, the City's action was contrary to AFFH because it applied the OTSPA use restriction in a subjective and discriminatory manner. For that reason, the City's legal argument that its Project-specific decision making is beyond the reach of the AFFH Statute is without merit.

V. HCD's FINDINGS UNDER THE HOUSING ELEMENT LAW ARE ENTITLED TO GREAT WEIGHT

According to the City, a single “decision on one project cannot form the basis for a determination that the city is not implementing its Housing Element.” (Letter at p. 17.) The City cites no authority for this proposition. Nor could it, as HCD may review “*any* action or failure to act” by the City that HCD “determines is inconsistent with the housing element or Section 65583.” (§ 65589.5, subd. (i)(1)(A), *italics added.*) A single action can, in fact, bring the City out of substantial compliance with the Housing Element Law. (See *id.*, subd. (i)(1)(B).) If HCD finds that *any action* violates the Housing Element Law, it may revoke its compliance findings until it determines that the locality has taken appropriate corrective action. (*Ibid.*)

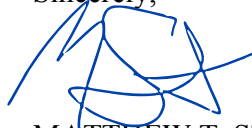
The law vests HCD with the authority to review any action, including a project disapproval, for noncompliance with the Housing Element Law. Here, HCD's review found that the City's actions regarding the Project violated the Housing Element Law. The City should give great weight to that determination and review its actions in light of HCD's findings.

March 16, 2023

Page 7

We urge the City to reconsider the Project in light of HCD's guidance and the legal analysis set forth in this letter. If the City does not make efforts to remediate its actions within 30 days, this Office is ready to enforce California's housing laws in court. Please feel free to contact me to discuss this matter.

Sincerely,



MATTHEW T. STRUHAR
Deputy Attorney General

For ROB BONTA
Attorney General

Cc: Elk Grove City Council
Jonathan P. Hobbs, City Attorney
Lauren Langer, Best Best & Krieger
Martin Carr, California Department of Housing and Community Development

EXHIBIT I

HCD to Redondo Beach

Housing Elements are in force only when
HCD certifies them

HCD Technical Assistance

Again, Housing Elements are in force only
when HCD certifies them

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



May 8, 2023

City of Redondo Beach
Mayor and City Council Members
415 Diamond Street
Redondo Beach, CA 90277

Dear Mayor Bill Brand, Council Member Nils Nehrenheim, Council Member Todd Loewenstein, Council Member Paige Kaluderovic, Council Member Zein Obagi, Jr., and Council Member Scott Behrendt:

RE: City of Redondo Beach 1100 N. Harbor Drive – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) understands the City of Redondo Beach (City) City Council will consider an appeal of the application of the proposed housing project on the former AES Power Plant Facility located at 1100 N. Harbor Drive (Project). The purpose of this letter is to assist the City with its decision-making by providing technical assistance related to State Housing Element Law (Gov. Code, § 65580 et seq.) and the Housing Accountability Act (Gov. Code, § 65589.5). HCD recognizes the challenge of interpreting ever-changing housing and land use laws and appreciates the opportunity to provide technical assistance.

Background

HCD understands the Project would result in 2,700 housing units (2,160 market rate units and 540 units available to low-income households), 300 hotel rooms, 550,000 square feet of office space and 160,000 square feet of retail space. The City will hear an appeal to its March 3, 2023, letter to 9300 Wilshire, LLC. (Applicant) that determined the development application for the Project was incomplete. The City's incomplete letter provided the Applicant with a comprehensive list of items required to process the application. The City's determination was fundamentally based on the conclusion that the housing element adopted on July 5, 2022, was substantially compliant with State Housing Element Law, and; therefore, the Project was not entitled to the protections granted under Government Code section 65589.5, subdivision (d)(5) (colloquially referred to as the "Builder's Remedy").

The following are key dates related to the Project and the City's 6th Cycle Housing Element:

- July 5, 2022 – The City adopted its 6th Cycle Housing Element.

- August 12, 2022 – The Applicant submitted its Preliminary Application.
- August 15, 2022 – The Applicant submitted an updated Preliminary Application and architectural plan set.
- September 1, 2022 – HCD issued a letter finding the City's July 5, 2022, adopted 6th Cycle Housing Element to be in substantial compliance.¹
- February 6, 2023 – The Applicant submitted its development application.

Housing Element Compliance

Pursuant to Government Code Section 65585, a local jurisdiction must submit a draft housing element to HCD and receive HCD's findings. If HCD finds the draft element is not substantially compliant, the local jurisdiction must revise the draft to address any findings by HCD (Gov. Code, § 65585, subd. (f)(2)). Promptly following adoption, the local jurisdiction must submit the adopted housing element to HCD (Gov. Code, § 65585, subd. (h)).

In other words, a local jurisdiction does not have the authority to determine that its adopted element is in substantial compliance. A local jurisdiction is "in compliance" as of the date of HCD's letter finding the adopted element in substantial compliance.² A local jurisdiction cannot "backdate" compliance to the date of adoption of a housing element. For the City of Redondo Beach, the housing element was found by HCD to be in substantial compliance on September 1, 2022.

Housing Accountability Act (HAA)

Pursuant to Government Code section 65589.5, subdivision (d), a jurisdiction shall not disapprove a housing development project for very low-, low-, or moderate-income households³ or condition approval in a manner that renders the housing development project infeasible for development for the use of very low-, low-, or moderate-income households unless it makes written findings, based upon a preponderance of evidence in the record, as to one of five findings in subdivision (d).

¹ HCD Approval Letter - Redondo Beach's 6th Cycle (2021-2029) Adopted Housing Element, dated September 1, 2022. Attached.

² HCD, Memorandum - Summary and Clarification of Requirements for Housing Element Compliance, dated March 16, 2023. Attached.

³ "Housing for very low, low-, or moderate-income households" means that either (A) at least 20 percent of the total units shall be sold or rented to lower-income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of this code (Gov. Code, § 65589.5, subd. (h)(3)).

If a local jurisdiction's adopted housing element is not found substantially compliant by HCD as of the jurisdiction's statutory deadline, the jurisdiction may not use subdivision (d)(5) of Government Code section 65589.5, inconsistency with zoning and general plan standards, as a basis to lawfully deny qualifying an affordable housing project. Again, subdivision (d)(4) is colloquially referred to as the "Builder's Remedy." Alternative means of denial may be available, such as subdivisions (d)(2) through (d)(4), and under subdivision (e), jurisdictions are still required to comply with both California Environmental Quality Act (CEQA) and the California Coastal Act,⁴ as applicable.

Preliminary Application

Pursuant to Government Code section 65941.1, subdivision (a), the submittal of a complete Preliminary Application vests the right to develop a housing development project in accordance with the ordinances, policies, and standards in effect when a preliminary application is submitted. (Gov. Code §65589.5, subd. (o)(1)).

The central point of contention between the City and the Applicant is as follows:

Can the Project utilize "Builder's Remedy" if the Applicant submitted a complete preliminary application after the City adopted a housing element, but before HCD has found the housing element to be in substantial compliance?

The answer is "yes." The submittal of a complete preliminary application pursuant to Government Code section 65941.1 vests the right to develop a housing development project in accordance with the ordinances, policies, and standards in effect when a preliminary application is submitted. (Gov. Code § 65589.5, subd. (o)(1)). Therefore, if the preliminary application submittal occurs at a time when the jurisdiction does not have a compliant housing element, and the development submittal occurs within the 180-day required period⁵, any potential benefits afforded to the applicant resulting from the jurisdiction's noncompliant status would remain throughout the entitlement process even if the jurisdiction subsequently achieves compliance.

Conclusion

Notwithstanding the unique environmental circumstances of this Project site, the City should remain mindful of its obligations under the HAA as it considers the appeal of the

⁴ "Nothing in this section shall be construed to relieve the local agency from complying with the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code) or from making one or more findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resource Code)." (Gov. Code, § 65589.5, subd. (e)).

⁵ Gov. Code § 65941.1, subd. (d)(1)

Project application. Because the City had not attained substantial compliance with the State Housing Element Law until September 1, 2022, the City may not deny the Project pursuant to Government Code section 65589.5, subdivision (d)(5). HCD would also like to remind the City that HCD has enforcement authority over the HAA, among other state housing laws. Accordingly, HCD may notify the California Office of the Attorney General that a local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

HCD remains committed to supporting Redondo Beach in achieving housing objectives across all income categories and hopes the City finds this clarification helpful. If you have any questions or need additional information, please contact Gabriel A. Pena-Lora, of our staff, at gabriel.pena-lora@hcd.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannan West". The signature is fluid and cursive, with the first name "Shannan" written in a larger, more prominent script than the last name "West".

Shannan West
Housing Accountability Unit Chief

cc: Brandy Forbs, AICP, Community Development Director

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

**MEMORANDUM**

DATE: March 16, 2023

TO: Planning Directors and Interested Parties

FROM: Megan Kirkeby, Deputy Director
Division of Housing Policy Development

SUBJECT: Summary and Clarification of Requirements for Housing Element Compliance

HCD is committed to diligently reviewing all 539 local jurisdictions' housing elements for substantial compliance with State Housing Element Law. To comply with State Housing Element Law and avoid the consequences of noncompliance, a local jurisdiction must, among other things:

1. Submit a draft housing element to HCD at least 90 days before adoption¹ and receive findings from HCD determining whether the draft element is substantially compliant,² and consider HCD's findings before adopting the draft element.³

In other words, where a jurisdiction submits an "adopted" housing element before submitting an initial draft or before considering HCD's findings on an initial draft, HCD will consider the "adopted" to be an initial draft for purposes of both HCD's review and the jurisdiction's statutory compliance.

2. If HCD finds the draft element is not substantially compliant, revise the draft to address any findings by HCD⁴ or adopt without changes and include written findings explaining why the jurisdiction believes that the draft substantially complies.⁵ Promptly following adoption, submit the adopted housing element to HCD⁶ and receive findings on the adopted element from HCD.⁷

¹ Gov. Code, § 65585, subd. (b)(1)

² Gov. Code, § 65585, subds. (b)(3), (d)

³ Gov. Code, § 65585, subd. (e)

⁴ Gov. Code, § 65585, subd. (f)(1)

⁵ Gov. Code, § 65585, subd. (f)(2)

⁶ Gov. Code, § 65585, subd. (g)

⁷ Gov. Code, § 65585, subd. (h)

In other words, a jurisdiction does not have the authority to determine that its adopted element is in substantial compliance but may provide reasoning why HCD should make a finding of substantial compliance.

- — ► In addition, a jurisdiction is “in compliance” as of the date of HCD’s letter finding the adopted element in substantial compliance. Any other letters are not a finding of substantial compliance.**

HCD recommends that a jurisdiction adopt only after receiving a letter from HCD finding the draft meets statutory requirements.

For more detailed information about this process, please visit HCD’s [Housing Elements webpage](#) and [Housing Elements Building Blocks](#).

EXHIBIT J

40 Main St Offices v City of Los Altos

Consistency clause requiring response in 30/60 days from a city is “the specific procedure at the heart of the Statute that effectuates its purpose”

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

40 MAIN STREET OFFICES, LLC,

Petitioner,

vs.

CITY OF LOS ALTOS, et al.,

Respondents.

Case No. 19CV349845 (Lead case,
consol. with Case No. 19CV350422)

ORDER GRANTING CONSOLIDATED
PETITIONS FOR WRIT OF MANDATE

CALIFORNIA RENTERS LEGAL
ADVOCACY & EDUCATION FUND, et al.,

Petitioners,

vs.

CITY OF LOS ALTOS, et al.,

Respondents.

ORDER ON SUBMITTED MATTER

These consolidated petitions for writ of mandate came on for hearing before the
Honorable Helen E. Williams on January 15, 2020, at 9:00 a.m. in Department 10 of the court.
Daniel R. Golub and Genna Yarkin of Holland & Knight appeared for petitioner 40 Main Street
Offices, LLC (Developer); Emily L. Brough of Zacks, Freedman & Patterson appeared for

1 petitioners California Renters Legal Advocacy & Education Fund, San Francisco Bay Area
2 Renters Federation, Victoria Fierce, and Sonja Trauss (collectively, Renters); Arthur J. Friedman
3 of Sheppard Mullin Richter & Hampton LLP appeared for respondents the City of Los Altos, the
4 City of Los Altos City Council, and the City of Los Altos Community Development Department
5 (collectively, the City). The matter having been argued and submitted after the filing of post-
6 hearing supplemental briefing, no party having requested a statement of decision under Code of
7 Civil Procedure section 632 and rule 3.1590 of the California Rules of Court in this hearing
8 lasting less than eight hours, and the Court having carefully considered the pleadings, the papers
9 filed by the parties, the matters of which the Court takes judicial notice, the record received into
10 evidence, the arguments of counsel, and the applicable law, Court finds and orders as follows:

11 *I. Statement of the Case*

12 The lead case of these two consolidated actions is one for relief in mandate brought under
13 Code of Civil Procedure sections 1085 and 1094.5 (first-third causes of action), as well as for
14 declaratory relief (fourth cause of action). It is brought by Developer against the City. Developer
15 has been trying to develop a mixed-use building in downtown Los Altos for many years, having
16 previously submitted multiple proposals all subject to discretionary review by the City.
17 Developer primarily alleges in its petition that the City unlawfully rejected its latest proposal
18 submitted under new, streamlined procedures established by Senate Bill 35 (Govt. Code,
19 § 65913.4, hereafter section 65913.4 or SB 35; further unspecified statutory references are to the
20 Govt. Code), remedial legislation enacted to promote the construction of housing within
21 California. Developer further alleges that in rejecting the proposal, the City also violated the state
22 Density Bonus Law (§ 65915) and the Housing Accountability Act (§ 65589.5), the provisions of
23 both of which may be invoked, as they were here, in a development application submitted under
24 SB 35.

25 Renters separately filed their petition challenging the City's course of conduct with
26 respect to Developers' proposed project (Case No. 19CV350422). They allege their own direct
27 and beneficial interests having been harmed in the City's denial of Developer's application for
28 streamlined approval. This separate action against the City, commenced one day before

1 Developer's action, has since been consolidated with Developer's action. Renters' petition in
2 mandate is also brought under Code of Civil Procedure sections 1085 and 1094.5, and seeks
3 relief in the first cause of action for the City's alleged violations of SB 35 and the Housing
4 Accountability Act. The second cause of action is for declaratory relief. Thus, Developer's and
5 Renters' claims for relief against the City essentially overlap.

6 *A. Summary of Administrative Record*

7 *1. Developer Applies for Streamlined Review*

8 On November 8, 2018, Developer applied for permission to construct a mixed-use
9 building with office space on the ground floor and residential units on the floors above at
10 40 Main Street in downtown Los Altos. (AR000001–AR000126 [application].) On the
11 application cover sheet—a City form entitled “City of Los Altos General Application”—
12 Developer checked boxes indicating that the “type of review requested” was
13 “Commercial/Multi-Family” and “Use Permit.” (AR000004.) The City had no other application
14 form cover sheet specific to a streamlined SB 35 application. In Developer's application, it stated
15 that it sought and qualified for streamlined review of its proposed development under SB 35.
16 (AR000006–AR000017.) Developer's application included a project summary, a discussion of
17 and chart detailing the proposed development's compliance with objective standards, renderings,
18 blueprints, proposed landscaping, a preliminary plan to manage construction, and a title report.
19 (AR000006–AR000126.)

20 *2. The City's Initial Response*

21 On December 7, 2018, the City—acting through Community Development Director Joe
22 Biggs—sent Developer correspondence in which it expressed its refusal to conduct either a
23 further streamlined or standard, discretionary review. (AR000127–AR000149.) The
24 correspondence reflects that the City appeared to treat Developer's single development
25 application as two distinct “applications submitted on November 8, 2018”—one for streamlined
26 review under SB 35 and one for standard, discretionary review—which perceived dual
27 applications purportedly could not be concurrently processed. (AR000129, AR000127.) In this
28

1 regard, the City said, “this application results in two applications that have been submitted for
2 this site. One or the other of the projects must be withdrawn.” (AR000127.)

3 As for the City’s direct response to the application for streamlined review—a letter that
4 contained within its subject line the reference “SB 35 Determination” and which letter
5 specifically referenced SB 35—the City stated that it had conducted a review, made a decision,
6 and determined that the proposed development did not qualify for streamlined review under
7 section 65913.4. The letter enumerated two reasons for the City’s denial decision. First, “the
8 project does not provide the percentage of affordable dwelling units required by the State
9 regulations.” (AR000127.) The City cited section 65913.4, subdivisions (a)(4)(A) and (B)(ii) and
10 a document prepared by California’s Department of Housing and Community Development
11 (HCD). (AR000127.) The HCD report lists Los Altos as a municipality in which streamlining
12 applications can be submitted for proposed developments with “≥ 50% affordability” due to the
13 failure to meet the [Regional Housing Needs Allocation or Assessment (RHNA), per § 65580 et
14 seq.] for low income households as compared to the “≥ 10% affordability” threshold for
15 streamlining applicable to municipalities that missed their targets for both low *and* moderate
16 income households. (AR000127, citing HCD Determination Summary (Jan. 31, 2018)
17 <[https://www.hcd.ca.gov/community-development/housing-](https://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf)
18 [element/docs/SB35_StatewideDeterminationSummary01312018.pdf](https://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf)> [as of Mar. 2, 2020].)
19 Second, the City cited section 65913.4, subdivision (a)(5)—the provision of SB 35 requiring
20 consistency with objective zoning standards and objective design review standards¹—and stated
21 that the project lacked “the required number of off-street residential and visitor parking spaces”
22
23
24

25 ¹ Under section 65913.4, subdivision (a)(5): “ ‘objective zoning standards’ and ‘objective
26 design review standards’ mean standards that involve no personal or subjective judgment by a
27 public official and are uniformly verifiable by reference to an external and uniform benchmark or
28 criterion available and knowable by both the development applicant or proponent and the public
official before submittal. These standards may be embodied in alternative objective land use
specifications adopted by a city or county, and may include, but are not limited to, housing
overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances”

1 and “adequate access/egress to the proposed off-street parking.” (AR000127.) The City did not
2 identify what these parking standards were or where they could be located.

3 The letter concluded by saying, “If you elect to pursue *other* approval/permit avenues for
4 the project that is the subject of this notice, the applications, fees, deposits, studies, and
5 information contained in the attached Notice of Incomplete Application are required to continue
6 an evaluation of the project.” (AR000128, italics added.) The letter did not say that Developer’s
7 submitted SB 35 application was perceived to be incomplete, or suggest that the City’s further
8 review of Developer’s SB 35 application was conditioned on receipt of additional specified
9 materials or information. Rather, the letter denied that application for the reasons stated.

10 As for the purported discretionary application, the City declined to review it on the
11 asserted basis that it was “incomplete.” (AR000128.) The City’s letter, titled “Notice of
12 Incomplete Application” and which omitted SB 35 in the subject line, listed 24 items that
13 Developer needed to submit before the City would treat the application as complete and consider
14 it on its merits. (AR000129–AR000132.) For example, the City asserted that Developer had not
15 submitted complete documentation to substantiate its density-bonus request. (AR000148.) The
16 City indicated that the additional materials had to be provided within 180 days—by June 6,
17 2019—or the application would be deemed expired. (AR000129.)

18 3. *Developer Responds*

19 On January 10, 2019, Developer wrote to the City to point out perceived errors in the
20 City’s correspondence rejecting the application for streamlined review under SB 35.
21 (AR000150–AR000166.) Developer argued that the City’s stated reasons for its decision were
22 facially inadequate and substantively incorrect. (AR000151.) Developer stated that because the
23 City had not “validly” identified a conflict with applicable statutory objective standards and
24 could no longer do so within the statutory SB 35 statutory timeframe, the project was deemed to
25 comply and therefore qualified for streamlined review and permitting. (AR000151.)

26 In support, as for the City’s first stated basis for denial, Developer explained that the City
27 had improperly relied on an outdated HCD determination of the municipalities subject to
28 streamlining. (AR000151.) Developer pointed out that while the City had relied on a January

1 2018 determination, HCD had updated its determination in June 2018. (AR000151.) The June
2 2018 determination said that the City's threshold for streamlining is the more inclusive, 10
3 percent threshold. (AR000151, AR000161.) On this basis, Developer asserted that the City had
4 erroneously determined that it was only subject to the streamlining process for projects with 50
5 percent as compared to 10 percent affordability. (AR000151–AR000152.)

6 Next, as for the City's second stated reason for the denial—insufficient parking spaces
7 and “adequate access/egress to the proposed off-street parking”—Developer asserted that the
8 City had failed to identify the objective standards with which the project conflicted; relied in part
9 on a subjective, discretionary standard; and was otherwise incorrect. (AR000152–AR000154.)
10 Developer elaborated that no standard addressing ingress and egress from the parking area was
11 identified in the City's decision and that the adequacy of ingress and egress was not an objective
12 standard that could be evaluated in the course of streamlined review. (AR000154.) Developer
13 also pointed out that section 65913.4, subdivision (d)(2) prohibited the City from requiring more
14 than one parking space per unit of housing. (AR000153.) According to Developer, it had
15 proposed more than adequate parking because it planned to develop 18 parking spaces for only
16 15 units of housing and was not required to develop additional parking for the offices due to the
17 City's public parking district. (AR000153–AR000154; AR000166 [architect statement on
18 parking compliance, including ADA].)

19 Developer also asserted that the City had not made the requisite findings for having
20 rejected the project under section 65589.5, the Housing Accountability Act. (AR000155.) Then,
21 Developer remarked that, based on the City's own representations in the incomplete notice, that
22 notice was immaterial to the application for streamlined review and the points it contained solely
23 concerned issues that might be addressed in a standard, discretionary review process.
24 (AR000156–AR000157.) Developer concluded by asserting its expectation that any streamlined
25 public oversight must be completed by February 6, 2019, in accordance with the section 65589.5
26 90-day deadline.

1 5. *Developer States Intent to Pursue Legal Action*

2 On February 19, 2019, Developer countered the City's response in a letter documenting
3 the problems with and inconsistencies between the City's initial action on December 7, 2018,
4 and how it had attempted to recharacterize that action in the February 6th letter. (AR000172–
5 AR000182.) Developer recounted the history of its attempts to develop the project through the
6 discretionary review process since 2013 and the purpose of section 65913.4, emphasizing the
7 ways in which the statute was designed to remedy precisely the type of agency conduct at issue
8 here. (AR000175–AR000176.) Developer also addressed the specific legal issues raised in the
9 parties' preceding correspondence. (AR000177–AR000181.)

10 In concluding, Developer observed that the City appeared to be unwilling to follow the
11 law or work with Developer on approving the SB 35 proposal, leaving it with no option other
12 than legal action. (AR000181.) Developer said that it did not appear there was any available
13 administrative remedy, such as an appeal, to be exhausted before commencing suit. (AR000181.)
14 Nevertheless, Developer indicated that it had submitted a claim³ to the City Clerk under the
15 Government Claims Act (§ 900 et seq.) out of an abundance of caution and invited the City to
16 advise if it concluded that some applicable administrative procedure, in fact, existed that
17 Developer should pursue before initiating legal action. (AR000181.) Developer offered that it
18 remained open to discussing alternatives to litigation but otherwise intended to file suit within 90
19 days of the City's February 6th letter. (AR000181.)

20 6. *Developer Administratively Appeals*

21 On February 21, 2019, the City informed Developer by email and through written
22 delivery of the same that its SB 35 denial *was* subject to an administrative appeal. (AR001203–
23 AR001206.) The City insisted an administrative appeal was required despite acknowledging that
24 Los Altos Municipal Code section 1.12.020, entitled "No appeal from ministerial acts," provides
25 that appeal procedures do not apply when an act or decision is ministerial. The City informed
26 Developer that if it wished to "challenge the City's decision on this matter, an appeal must be
27

28 ³ Developer's claim appears in the record at AR001201–AR001202.

1 filed by no later than fifteen calendar (15) days from the date of the [February-6] letter, by the
2 close of business 4:30 pm on THURSDAY FEBRUARY 21, 2019." (AR001205.) The City
3 provided Developer with the mandatory application form for the appeal and stated that "[f]ailure
4 to timely appeal will preclude you, or any interested party, from challenging the City's decision
5 in court." (AR001205–AR001207.)

6 In other words, the City gave Developer less than eight hours' notice of its interpretation
7 of the Los Altos Municipal Code and position that an administrative appeal was required.

8 That same day, Developer submitted its appeal form along with a statement of the
9 grounds for its appeal and the record on which it was relying (including the correspondence
10 summarized above).⁴ (AR001208–AR001210.) In the weeks that followed, Developer frequently
11 corresponded with the City in an effort to ascertain what the process for the appeal would be and
12 when it would be heard. (AR001311–AR001328.)

13 On March 26, 2019, the City noticed the appeal for a public hearing before the City
14 Council to be held on April 9, 2019.⁵ (AR001216.) In correspondence from counsel for the City
15 to Developer the week before the hearing, it was asserted that the appeal was required because
16 the decision that the project was not eligible for streamlined review was not a ministerial act.
17 (AR001306.) Counsel went on to assert that April 9th was the earliest available time that the
18

19
20 ⁴ In Developer's cover letter for its appeal, it maintained that it did not believe there was
21 an avenue for appeal of a ministerial decision but was submitting the appeal to avoid any dispute.
(AR001210.)

22 ⁵ The City noticed this appeal for public hearing based on a staff report and
23 recommendation from counsel. (AR001238–AR001252 [staff report]; AR001253–AR001257
24 [presentation from Best Best & Krieger LLP].) The staff report delves into new substantive
25 issues on the SB 35 proposal, such as whether the project satisfies the two-thirds residential-use
26 requirement, that were not raised in the City's December 7, 2018 denial letter. (AR001242; see
27 also AR001260 [summarizing staff's reasons for denial that are purportedly the subject of the
28 appeal].) This seems to be because the City was advised that in determining the appeal, it would
conduct a de novo review of whether the project in fact complied with section 65913.4, instead
of ascertaining whether the initial denial had been insufficient or invalid such that the application
was deemed approved under SB 35. (AR001255.) Developer responded to these new points in
correspondence sent in connection with the appeal. (AR001284–AR001300.)

1 appeal could be heard based on the City Council's schedule and existing obligations.
2 (AR001308.) Counsel also maintained without explanation that the appeal was subject to a
3 public hearing, but that Developer would be allowed to present its case as well. (AR001309.)

4 On April 9th, Developer presented its appeal to the City Council, which also heard public
5 comment⁶ on the matter (including comments from Renters to the effect that the project was
6 deemed approved for streamlined permitting). (AR001231–AR001237; AR001928–AR002047
7 [hearing transcript].) On April 23, 2019, the City, acting through its City Council, denied the
8 appeal and did so by resolution. (AR002056–AR002078 [City Council minutes, report, and
9 resolution].)

10 *B. Summary of Allegations and Proceedings*

11 Renters and Developer (collectively, petitioners) commenced their respective actions on
12 June 12 and 13, 2019. Their hybrid petitions for writ of mandate and complaints for declaratory
13 relief essentially raise the same claims. They allege that in proceeding as described above in the
14 summary of the administrative record, the City unlawfully denied Developer's proposal in
15 violation of the streamlining statute (SB 35), the Housing Accountability Act (§ 65589.5), and
16 the Density Bonus Law (§ 65915). Based on these allegations, petitioners seek writs of mandate
17 under either Code of Civil Procedure section 1085 or section 1094.5, compelling the City to
18 approve Developer's streamlined application. They also seek a judicial declaration of their
19 entitlement to that approval under Code of Civil Procedure section 1060, along with injunctive
20 relief.⁷ The City separately answered both petitions.

21 On August 28, 2019, the Court consolidated the petitions for all purposes, and designated
22 Developer's action as the lead case. The City then lodged the administrative record with the
23 Court. And, on October 21, 2019, the City lodged a supplement. Petitioners filed a joint opening
24 brief, accompanied by a request for judicial notice, on November 1, 2019. The City opposed the

25
26 ⁶ Public comments can be located in the record along with other hearing materials.
(AR001333–AR001351, AR001907–AR001922, AR001924–AR001926.)

27 ⁷ Although Renters and Developer organized the causes of action in their petitions
28 differently, they seek the same types of relief on the same factual and legal bases.

1 petition on December 6, 2019, and presented the declaration of Jon Biggs, the City's Director of
2 Community Development. Petitioners then filed a joint reply and request for judicial notice
3 before the hearing scheduled for January 15, 2020. The hearing went forward as scheduled.
4 Upon receipt of post-hearing supplemental briefing ordered by the Court, the matter was
5 submitted.

6 *II. Petitioners' Requests for Judicial Notice*

7 Petitioners jointly request judicial notice of portions of the Los Altos Municipal Code
8 (RJN Ex. K) as well as legislative history materials, namely digests, reports, floor analyses, and
9 amendments to section 65913.4 (RJN Exs. A–J). With their reply, they seek judicial notice of
10 correspondence from HCD in response to their request for assistance. (See Golub Decl., Ex. 1.)
11 For the reasons that follow, petitioners' requests are granted.

12 A court may take judicial notice of municipal law. (Evid. Code, § 452, subd. (b); *The*
13 *Kennedy Com. v. City of Huntington Beach* (2017) 16 Cal.App.5th 841, 852 (*Kennedy*)). Thus,
14 the Court takes judicial notice of the Los Altos Municipal Code.

15 Next, a court may consider legislative history materials as an interpretative aid, but the
16 means of consideration and weight ascribed to these kinds of materials vary. (Cf. *People v. Cruz*
17 (1996) 13 Cal.4th 764, 773, fn. 5 (*Cruz*) with *Cummins, Inc. v. Super. Ct.* (2005) 36 Cal.4th 478,
18 492, fn. 11.) As for the text of enacted legislation (Assembly Bill 101 and Assembly Bill 1485),
19 including a redline version showing section 65913.4 as amended and in force today, (RJN
20 Exs. C, G–H), the Court takes judicial notice under Evidence Code section 452. While the
21 California Supreme Court has relied on precedent to take judicial notice of other legislative
22 history materials, such as committee reports and bill analyses, some dissenters have aptly
23 observed that such materials do not clearly fall within any enumerated category of Evidence
24 Code sections 451 and 452. (*Cruz, supra*, 13 Cal.4th at p. 794 (dis. opn. of Anderson, J.)).
25 Accordingly, here, the legislative reports and analyses are not subject to judicial notice under the
26 Evidence Code. Nevertheless, precedent allows the Court to consider these reports and analyses
27 and to ascribe to them an appropriate weight in light of their authorship and function within the
28 legislative process.

1 Finally, “[w]here the meaning and legal effect of a statute is the issue, an agency’s
2 interpretation is one among several tools available to the court.” (*Yamaha Corp. of America v.*
3 *State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).) “An agency interpretation of the
4 meaning and legal effect of a statute is entitled to consideration and respect by the courts;
5 however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has
6 confided the power to ‘make law,’ and which, if authorized by the enabling legislation, bind this
7 and other courts as firmly as statutes themselves, the binding power of an agency’s interpretation
8 of a statute or regulation is contextual: Its power to persuade is both circumstantial and
9 dependent on the presence or absence of factors that support the merit of the interpretation.”
10 (*Ibid.*) A formal opinion letter or informal correspondence expressing the position of the agency
11 may be presented to a court for consideration under *Yamaha* by way of a request for judicial
12 notice under Evidence Code section 452, subdivision (c). (See generally *Field v. Bowen* (2011)
13 199 Cal.App.4th 346, 370, fn. 5 [agency-prepared documents come within Evid. Code, 452,
14 subd. (c); see, e.g., *Linda Vista Village San Diego H.O.A., Inc. v. Tecolote Investors, LLC* (2015)
15 234 Cal.App.4th 166, 186.) Consequently, the Court takes judicial notice of HCD’s letter to
16 petitioners.

17 *III. Discussion*

18 The Court must answer two central questions to resolve the petitions. First, did
19 petitioners timely commence their respective actions? Second, do petitioners establish that they
20 are entitled to relief on the merits? The answer to both questions is yes.⁸

21
22 ⁸ As noted, both petitions are brought under Code of Civil Procedure sections 1085,
23 traditional mandate, and 1094.5, administrative mandate, without specification of which form of
24 mandate may apply to all or each of the discrete causes of action. Likewise, the City takes no
25 position on this question. Each of these statutes, by its terms and as discussed in case law,
26 typically applies in different, specified circumstances or settings. And each typically invokes
27 judicial review through its own nuanced lens or standard. As SB 35 involves an agency’s
28 ministerial duty to approve a qualifying development proposal and no administrative or public
hearing is contemplated, judicial review of an agency’s decision to reject a project for
streamlined review and permitting under SB 35 is more likely in traditional mandate under Code
of Civil Procedure section 1085. But here, the City insisted that an administrative appeal to the
City Council heard through the vehicle of a public hearing was required, which typically leads to
judicial review in administrative mandate under Code of Civil Procedure section 1094.5. And the

1 A. *The Action Is Not Time-Barred*

2 The City's primary opposing argument is that petitioners failed to timely file and serve
3 their respective petitions within the 90-day limitations period set forth in section 65009. In
4 advancing this argument, the City asserts that it is not estopped from raising this defense based
5 on its insistence that Developer exhaust its administrative remedies by appealing to the City
6 Council (or, implicitly, that Renters so exhaust by their participation in this same administrative
7 process) before bringing this action. Petitioners argue both assertions are incorrect. And, in
8 supplemental briefing, petitioners contend and the City disputes whether the statute-of-
9 limitations defense is further overcome by the doctrine of equitable tolling. For the following
10 reasons, the Court rejects the City's defense.

11 As a threshold matter, the City argues that the Court should assess the "gravamen" of the
12 claims and subject all of them to the 90-day limitations period in section 65009, subdivision
13 (c)(1)(E). Petitioners take issue with this approach. (RT at p. 25.) And the Court perceives the
14 City's treatment of all the claims collectively based on their assessed "gravamen" to be imprecise
15 and problematic.

16 "[A] plaintiff is generally permitted to allege different causes of action—with different
17 statutes of limitations—upon the same underlying facts." (*Thomson v. Canyon* (2011))

18
19
20 Housing Accountability Act, which a development proposal submitted under SB 35 may invoke,
21 specifically references judicial review in administrative mandate under Code of Civil Procedure
22 section 1094.5. (§ 65589.5, subd. (m).) Further, courts have reviewed a challenge to an agency's
23 decision under the Density Bonus Law likewise through administrative mandate. (See, e.g.
24 § 65915, subd. (d)(3); *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807,
25 812, 816–817 (*Lagoon Valley*).) The parties appear to proceed here on the assumption that
26 because the overarching relief in mandate sought by petitioners is deemed approval of the
27 development proposal under SB 35, relief under the Housing Accountability Act and the Density
28 Bonus Law is subsumed within that. In any event, both forms of mandate ultimately review for
and address an agency's abuse of discretion, which would include a failure to perform a duty
compelled by law or a failure to proceed in a manner required by law—the fundamental essence
of all the claims here. Because of this, and because the particular form of mandate that is
applicable is not articulated or disputed by the parties, the Court proceeds to conduct its judicial
review and to adjudicate the action focused on abuse of discretion as so framed and without
specifically deciding whether the ultimate relief afforded comes through Code of Civil Procedure
section 1085 or section 1094.5.

1 198 Cal.App.4th 594, 605 (*Thomson*).) “A complaint may allege facts involving several distinct
2 types of harm governed by different statutory periods and, where it does so, one cause of action
3 may survive even if another cause of action with a shorter limitations period is barred.” (*Ibid.*)
4 But in doing so, “a plaintiff is not permitted to evade a statute of limitations by artful pleading
5 that labels a cause of action one thing while actually stating another.” (*Id.* at p. 606.) “California
6 courts therefore look to the gravamen of the cause of action.” (*Ibid.*) “‘[T]he nature of the right
7 sued upon and not the form of action nor the relief demanded determines the applicability of the
8 statute of limitations under our code.’ [Citation.]” (*Hensler v. City of Glendale* (1994) 8 Cal.4th
9 1, 22–23.)

10 Here, as is permissible, petitioners allege that one set of facts gives rise to multiple claims
11 for relief based on different statutes. And, in pleading these distinct theories, petitioners do not
12 attempt to artfully mislabel their claims to evade the statute of limitations. They assert that they
13 are independently entitled to relief on all of the pleaded bases. Consequently, contrary to how the
14 City proceeds, this is not a scenario in which it is necessary to drill down to the gravamen of
15 each claim to uncover its true nature. And the City’s suggestion that the gravamen of each
16 independent claim is relief under section 65913.4 is not quite accurate. It follows that the City
17 errs in addressing all of the claims collectively as though they are necessarily subject to one
18 statute of limitations in lieu of establishing the limitations period applicable to each claim
19 pleaded.⁹

20 To illustrate, the Housing Accountability Act contains its own 90-day statute of
21 limitations. (§ 65889.5, subd. (m).) This limitations period runs “from the later of (1) the
22 effective date of a decision of the local agency imposing conditions on, disapproving, or any
23 other final action on a housing development project or (2) the expiration of the time periods
24
25

26
27 ⁹ To be clear, the City does not argue that each distinct claim incidentally happens to be
28 subject to the same statute of limitations. Rather, the City asks the Court to treat the different
claims as identical and, on that basis, to apply one statute of limitations to all claims.

1 specified in subparagraph (B) of paragraph (5) of subdivision (h).”¹⁰ (§ 65589.5, subd. (m),
2 citing § 65950 [Permit Streamlining Act].) This particular statute of limitations applies to causes
3 of action based on the Housing Accountability Act.

4 Next, the Legislature enacted section 65009 because it found “there currently is a housing
5 crisis in California and it is essential to reduce delays and restraints upon expeditiously
6 completing housing projects.” (§ 65009, subd. (a)(1).) The statute “is intended ‘to provide
7 certainty for property owners and local governments regarding decisions made pursuant to this
8 division’ (§ 65009, subd. (a)(3)) and thus to alleviate the ‘chilling effect on the confidence with
9 which property owners and local governments can proceed with projects’ (*id.*, subd. (a)(2))
10 created by potential legal challenges to local planning and zoning decisions.” (*Travis v. County*
11 *of Santa Cruz* (2004) 33 Cal.4th 757, 765.) “To this end, section 65009 establishes a short statute
12 of limitations, 90 days, applicable to actions challenging several types of local planning and
13 zoning decisions” (*Ibid.*)

14 The City relies on the 90-day limitations period in section 65009 based on language in
15 subdivision (c)(1)(E), which provides that it applies when a petitioner seeks “[t]o attack, review,
16 set aside, void, or annul any decision on the matters listed in Sections 65901^[11] and 65903^[12], or
17 to determine the reasonableness, legality, or validity of any condition attached to a variance,
18 conditional use permit, or any other permit.” Based on the contents of sections 65901 and
19 65903—section 65009, subdivision (c)(1)(E) is best summarized as applying when a petitioner
20

21 ¹⁰ Section 65889.5, as effective January 1, 2020, contains an outdated reference to
22 subparagraph (B) of former paragraph (5) of subdivision (h) that cites to time standards in
23 section 65950 (the Permit Streamlining Act). Subparagraph (B) and the time standards therein
24 are now codified in paragraph (6) of subdivision (h), not paragraph (5), but the Legislature failed
25 to conform the reference in subdivision (m) upon making this amendment to subdivision (h),
which is clearly the result of oversight.

26 ¹¹ Section 65901 governs hearings on “conditional uses or other permits” as well as
27 zoning variances.

28 ¹² Section 65903 governs appeals of a decision of the board of zoning adjustment or
zoning administrator.

1 challenges (1) the underlying decision of the board of zoning adjustment or zoning administrator
2 on a conditional use permit, other permit, or zoning variance; (2) the outcome of an appeal of
3 such a decision; or (3) the particular terms of a conditional use permit, other permit, or variance
4 (as compared to the ultimate decision to issue or refuse to issue the permit or variance). (See
5 generally *Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 155–159
6 [discussing scope and construction of section 65009].)

7 Petitioners argue that, if anything, the 180-day period in subdivision (d)(1) of
8 section 65009 applies because this action meets both of the criteria specified therein, namely:

9 “(A) It is brought in support of or to encourage or facilitate the
10 development of housing that would increase the community’s
11 supply of housing affordable to persons and families with low or
12 moderate incomes, as defined in Section 50079.5 of the Health and
13 Safety Code, or with very low incomes, as defined in Section
14 50105 of the Health and Safety Code, or middle-income
15 households, as defined in Section 65008 of this code. This
16 subdivision is not intended to require that the action or proceeding
17 be brought in support of or to encourage or facilitate a specific
18 housing development project.

19 “(B) It is brought with respect to the adoption or revision of a
20 housing element pursuant to Article 10.6 (commencing with
21 Section 65580) of Chapter 3, actions taken pursuant to Section
22 65863.6, or Chapter 4.2 (commencing with Section 65913), or to
23 challenge the adequacy of [a density bonus] ordinance adopted
24 pursuant to Section 65915.

25 Petitioners’ interpretation of section 65009, subdivision (d)(1) is not entirely persuasive.
26 While the project does seem to encourage housing development within the meaning of section
27 65009, subdivision (d)(1)(A), it is not especially clear that this proceeding is brought with
28 respect to “actions taken pursuant to Section 65863.6, or Chapter 4.2 (commencing with Section
65913)” within the meaning of section 65009, subdivision (d)(1)(B). This is because this latter
subdivision focuses on challenges to legislative actions as compared to ministerial or
adjudicatory permitting decisions. The legislative actions enumerated in section 65009,
subdivision (d)(1)(B) include the adoption or revision of a housing element, adoption of a zoning
ordinance, and the adoption of a density bonus ordinance. (See *Calvert v. County of Yuba* (2006)

1 145 Cal.App.4th 613, 623.) The only other action identified in that subdivision is an action taken
2 under Chapter 4.2 (commencing with section 65913). Petitioners assume that this reference
3 necessarily encompasses section 65913.4, SB 35, because it is part of Chapter 4.2. But this
4 interpretation does not necessarily appear to be correct under the principle of *noscitur a sociis*
5 that directs interpretation of a term in a list by reference to the other items in that list. (See *Kaatz*
6 *v. City of Seaside* (2006) 143 Cal.App.4th 13, 40.) Under that principle of interpretation, a court
7 interprets a term more narrowly if an expansive interpretation would make the term markedly
8 dissimilar from the other list items or make the other list items unnecessary or redundant. (*Ibid.*)

9 Here, interpreting “actions taken pursuant to ... Chapter 4.2 (commencing with Section
10 65913)” as encompassing the decision to ministerially approve a particular project under section
11 65913.4 would create a marked dissimilarity between that term and the other legislative actions
12 enumerated in section 65009, subdivision (d)(1)(B). Additionally, section 65913.4 is not the only
13 section within Chapter 4.2. Section 65913.1 requires that when zoning land or revising a housing
14 element a city designate sufficient land for residential use. And so, an action taken under section
15 65913.1 falls within Chapter 4.2 and constitutes a legislative action like the other actions
16 enumerated in section 65009, subdivision (d)(1)(B). Similarly, section 65913.2, also in Chapter
17 4.2, imposes limitations on the types of legislative actions a city may take when it comes to
18 regulating subdivisions. Thus, it seems the Legislature intended section 65009, subdivision
19 (d)(1)(B) to encompass legislative actions taken under Chapter 4.2, but not necessarily
20 ministerial or adjudicatory decisions. Consequently, petitioners’ interpretation of section 65009,
21 subdivision (d)(1)(B) as encompassing streamlined approvals or denials of projects under section
22 65913.4 is not convincing.

23 The City’s interpretation of section 65009, subdivision (c)(1)(E) is slightly more
24 appealing. While it is true that projects subject to streamlined review do not require conditional
25 use permits, section 65009, subdivision (c)(1)(E), including as incorporated in section 65009,
26 subdivision (c)(1)(F), encompasses a decision on “any other permit.” And so, arguably, even
27 when a project is subject to streamlined, nondiscretionary review, there is still a decision as to
28 whether to permit—meaning to allow—the development, which decision may be signified by the

1 issuance of a document or series of documents denominated as a “permit.” And a decision made
2 under section 65913.4 might otherwise qualify within the meaning of section 65009, subdivision
3 (c)(1)(F) as a decision made before the issuance of any other permit.

4 Petitioners do not convince the Court that *Urban Habitat Program v. City of Pleasanton*
5 (2008) 164 Cal.App.4th 1561 (*Urban Habitat*) precludes the application of section 65009 here.
6 First, the facts of that case are distinct because the petitioners there claimed that the City of
7 Pleasanton had failed to update the housing element of its general plan and local development
8 law to meet its RHNA such that an impermissible inconsistency arose over time; in other words,
9 the city had failed to adapt to updated needs and requirements for adequate housing. (*Urban*
10 *Habitat*, at pp. 1566–1570, 1577.) The issue here is not whether the City failed to bring local law
11 and planning documents into compliance, but rather, whether it took an affirmative action on a
12 specific project that was unlawful. While petitioners characterize this as a failure to comply with
13 mandatory duties, this is not the same type of failure or omission that occurred in *Urban Habitat*.
14 Because that case is circumstantially distinguishable from the case now before this Court, and
15 given the broad interpretation afforded to section 65009 by other courts, petitioners’ analogy is
16 not compelling.

17 Ultimately, even assuming all of petitioners’ claims are subject to a 90-day statute of
18 limitations under either section 65009 or, as to the Housing Accountability Act claims,
19 section 65889.5, subdivision (m), they commenced their respective actions with 90 days of the
20 City’s decision on the administrative appeal, which process the City insisted, full stop, was
21 required for exhaustion purposes. The City, through its City Council, made that “final” decision
22 on April 23, 2019. (AR002313.) Petitioners filed their petitions in June and served them by July
23 10th, within 90 days of the April 23rd adopted resolution. Accordingly, each petition in this
24 consolidated action is timely.

25 The Court accordingly rejects the City’s contention that its initial rejection of the
26 streamlining application on December 7, 2018, necessarily accrued a cause of action under SB
27 35 or triggered the running of the statute of limitations as to any or all claims asserted. Contrary
28

1 to what it anticipatorily argues in its opposition, the Court finds that the facts here warrant
2 estoppel of this defense. Equitable tolling applies as well.

3 Equitable tolling and equitable estoppel are two distinct doctrines. (*Ashou v. Liberty*
4 *Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 757–758.)

5 “ ‘Generally speaking, four elements must be present in order to apply the doctrine of
6 equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend
7 that his conduct shall be [*sic*] acted upon, or must so act that the party asserting the estoppel had
8 a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts;
9 and (4) he must rely upon the conduct to his injury.’ [Citations.]” (*Feduniak v. California*
10 *Coastal Com.* (2007) 148 Cal.App.4th 1346, 1359, quoting *Driscoll v. City of Los Angeles*
11 (1967) 67 Cal.2d 297, 305.) And “ ‘[t]he government may be bound by an equitable estoppel in
12 the same manner as a private party when the elements requisite to such an estoppel against a
13 private party are present *and*, in the considered view of a court of equity, the injustice [that]
14 would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect
15 upon public interest or policy [that] would result from the raising of an estoppel.’ [Citation.]”
16 (*Feduniak, supra*, 148 Cal.App.4th at pp. 1359–1360.) “[C]ourts will not hesitate to estop the
17 government from asserting a *procedural barrier*, such as the statute of limitations or a failure to
18 exhaust remedies; as a defense to claims against it, where the government’s affirmative conduct
19 caused the claimant’s failure to comply with the procedural requirement.” (*Id.* at p. 1372.)

20 While estoppel typically arises from misrepresentations of fact, it may also apply when a
21 municipality or agency does not accurately advise a potential plaintiff about the existence or
22 availability of an administrative remedy, which advice may depend in part on mixed questions of
23 fact and law. (See, e.g., *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 487 (*Shuer*).)
24 For example, when the availability of an administrative remedy is unclear and the administrative
25 regulations are susceptible to different interpretations, a public entity may be estopped from
26 raising the failure to exhaust administrative remedies as a defense. (*Ibid.*)

27 “The equitable tolling of statutes of limitations is a judicially created, nonstatutory
28 doctrine. [Citations.]” (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th

1 88, 99 (*McDonald*.) “It is ‘designed to prevent unjust and technical forfeitures of the right to a
2 trial on the merits when the purpose of the statute of limitations—timely notice to the defendant
3 of the plaintiff’s claims—has been satisfied.’ [Citation.]” (*Ibid.*, quoting *Appalachian Ins. Co. v.*
4 *McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38.)

5 “Where exhaustion of an administrative remedy is mandatory prior to filing suit,
6 equitable tolling is automatic: ‘It has long been settled in this and other jurisdictions that
7 whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil
8 action, the running of the limitations period is tolled during the time consumed by the
9 administrative proceeding.’ [Citations.]” (*McDonald, supra*, 45 Cal.4th at p. 101, quoting *Elkins*
10 *v. Derby* (1974) 12 Cal.3d 410, 414.) “This rule prevents administrative exhaustion requirements
11 from rendering illusory nonadministrative remedies contingent on exhaustion.” (*McDonald,*
12 *supra*, 45 Cal.4th at p. 101.) In other words, the doctrine of equitable tolling preserves a party’s
13 right to judicial review that would otherwise be rendered infeasible due to the consumption of
14 the limitations period by the administrative review process.

15 The facts here support the application of both equitable tolling and equitable estoppel.

16 The City mandated an administrative proceeding that consumed the limitations period
17 that it now contends was triggered by the initial denial letter on the streamlined application on
18 December 7, 2018. (AR001205.) But the City emphatically said to Developer that “an appeal
19 must be filed” and that “[f]ailure to timely appeal will preclude you, or any interested party, from
20 challenging the City’s decision in court.” (AR001205.) The City then insisted on scheduling a
21 public hearing on the administrative appeal before the City Council and delayed in doing so.
22 (AR001318–AR001324.) For mandamus claims brought under Code of Civil Procedure section
23 1094.5—and for any other claims in light of the emphatic language of the letter—the
24 administrative proceeding was mandatory. This is because a “writ is not available ... to
25 intermeddle in the preliminary stages of an administrative planning process” (*California*
26 *High-Speed Rail Authority v. Super. Ct.* (2014) 228 Cal.App.4th 676, 707; see also *California*
27 *Water Impact Network v. Newhall County Water District* (2008) 161 Cal.App.4th 1464, 1482–
28 1483 [only final decisions subject to review].) And, as petitioners point out, even if they contend

1 that the City's December 7, 2018 correspondence resulted in their SB 35 application being
2 deemed approved under streamlined review, with the City then insisting instead on an
3 administrative appeal, petitioners could pursue that appeal with the goal that the City Council
4 would not proceed to decide de novo whether the SB 35 application in fact qualified for
5 streamlined review but, rather, to recognize and decide that "deemed" approval of the SB 35
6 application under section 65913.4, subdivision (b)(2) for objective planning standards had
7 already occurred as a matter of law obviating the need for litigation.

8 And even treating the administrative proceeding as voluntary, tolling still applies.
9 (*McDonald, supra*, 45 Cal.4th at p. 105.) The Court rejects the City's rather incredible and
10 unsubstantiated claim that Developer's acquiescence under protest means that it did not
11 voluntarily pursue the administrative proceeding. The City fails to justify (through reasoned
12 analysis or authority) the insertion of a scienter requirement into the definition of voluntary in
13 this particular legal and procedural context. Accordingly, whether viewed as mandatory or
14 voluntary in character, the administrative proceeding that occurred here is the type of intervening
15 activity that tolls the limitations period.

→ 16 Also, petitioners provided sufficient notice of their claims thereby fulfilling the purpose
17 of the statute of limitations before and during the administrative proceeding. The City asserts
18 without authority that Renters' submission of public comments was insufficient to put it on
19 notice of their claims. (See AR001334–AR001338; AR002344–AR002345.) Given the
20 specificity and content of Renters' communications with the City, the Court is not convinced by
21 the City's conclusory and unsubstantiated assertion. And, as a practical matter, it is unclear how
22 Renters could have proceeded without waiting for the disposition of Developer's administrative
23 appeal. Especially given the City's insistence on that appeal, it would result in an unjust and
24 technical forfeiture to allow the City to now disclaim the necessity of this administrative
25 proceeding. Because of the brevity of the 90-day limitations period, the absence of tolling during
26 the administrative proceeding would render judicial review illusory. Equitable tolling is just and
27 warranted under the facts and circumstances presented here. The City's supplemental brief does
28 not persuade the Court to reach a contrary conclusion.

1 Next, the City anticipatorily argues in opposition to the petitions that it is not equitably
2 estopped from raising the statute of limitations as a defense because estoppel applies when a
3 party misrepresents or conceals facts and not matters of law. (Opp. at p. 19:6–17, citing *Jordan*
4 v. *City of Sacramento* (2007) 148 Cal.App.4th 1487 (*Jordan*).) While the City’s statement of law
5 is not inaccurate on its face, it is incomplete and misleading. And the City’s analysis is
6 underdeveloped. Moreover, the City relies exclusively on *Jordan*, which is not analogous.

7 Here, the City vehemently asserted by letter that an administrative appeal was mandatory
8 and that it would raise the defense of exhaustion of administrative remedies to preclude
9 Developer from seeking judicial review of the City’s conduct absent an appeal. The City’s
10 representation as to the position it was taking, and would take in any litigation, is a
11 representation of fact. And, although Developer stated its opinion or belief that the City’s legal
12 analysis was incorrect, Developer was at the mercy of the City’s interpretation of its own
13 municipal code. In other words, the parties differed in their understanding of the law and in their
14 authority to interpret and enforce that law. As in *Shuer*, this type of informational and
15 interpretive asymmetry is sufficient to justify estoppel.

16 As for the second and fourth elements of estoppel—that the party to be estopped intended
17 that his conduct be acted upon, or that this party so acted such that the other party had a right to
18 believe the conduct was so intended, and that the other party relied on the conduct to his injury—
19 the City’s letter informing Developer of the requirement of an administrative appeal contained
20 such emphatic and mandatory language that it is reasonable to conclude the City intended to
21 induce Developer’s reliance thereon. And Developer acquiesced to the City’s representation to
22 its detriment, pursuing an administrative appeal albeit under protest. When faced with the
23 untenable choice of either suing immediately and facing dismissal for failure to exhaust, or
24 exhausting administrative remedies to preserve its claim of unlawful conduct, it was reasonable
25 for Developer to rely on the City’s interpretation of its own code and representation of the
26 exhaustion defense it intended to raise, particularly given the unequivocal and emphatic language
27 the City used to express this position. Further, under these circumstances, before having to
28 initiate litigation, Developer could reasonably so acquiesce to the City’s demand in an effort to

1 get the City Council to recognize the mandatory timelines and requirements of SB 35 and the
2 consequences of its having earlier failed to meet those provisions, and to correct its prior
3 erroneous approach.

4 Finally, the Court concludes that the injustice that would result in the absence of estoppel
5 is enough to justify application of the doctrine here.

6 For all of these reasons, the Court rejects the City's statute-of-limitations defense and
7 reaches the merits of petitioners' claims.

8 *B. Petitioners Are Entitled to Relief on the Merits*

9 Petitioners allege that the City's conduct violated three different housing statutes:

10 (1) the streamlining statute (§ 65913.4, SB 35); (2) the Density Bonus Law (§ 65915); and
11 (3) the Housing Accountability Act (§ 65589.5).

12 *I. The City Failed to Comply with Section 65913.4*

13 *i. Statutory Background*

14 In 2017, the Legislature passed SB 35 to reform land-use and housing law, including by
15 creating "a streamlined, ministerial approval process for infill developments in localities that
16 have failed to meet their regional housing needs assessment [] numbers."¹³ (Sen. Rules Com.,
17 Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) May 27, 2017.)

18 Section 65913.4, subdivision (a) states in relevant part: "A development proponent may
19 submit an application for a development that is subject to the streamlined, ministerial approval
20 process provided by subdivision (b) and not subject to a conditional use permit if the
21 development satisfies all of the [] objective planning standards" set forth further in subdivision
22 (a).

23
24 ¹³ As part of the housing element of a municipality's general plan, it must calculate its
25 Regional Housing Needs Allocation or Assessment (RHNA), which is the "existing and
26 projected need for housing" in the area for individuals and households of all income levels.
27 (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1186, fn. 8, quoting Gov. Code,
28 § 65583.) If a municipality's present and projected housing needs exceed its housing stock and
land available for development, it must work to satisfy its RHNA by increasing the availability
of land for housing development by, for example, changing zoning and development restrictions.
(Gov. Code, § 65583, subd. (c)(1)(A).)

1 The objective planning standards that operate as eligibility criteria for streamlined,
2 ministerial review consist of inclusionary and exclusionary criteria. In the abstract, the
3 inclusionary and exclusionary criteria balance the primary policy of expediting housing
4 construction with the competing policy of safe, well-designed construction as embodied in
5 existing law. To illustrate, a proposed development must be “a multifamily housing development
6 that contains two or more residential units” in an urban area that will not displace existing rent-
7 controlled and income-restricted housing. (§ 65913.4, subds. (a)(1)–(2), (a)(7).) A mixed-use
8 development still qualifies if “at least two-thirds of the square footage of the development [are]
9 designated for residential use.” (§ 65913.4, subd. (a)(2)(C).) Exclusionary criteria disqualify a
10 development proposed for construction in or on a coastal zone, fire zone, flood plain, earthquake
11 fault zone, hazardous-waste site, wetland, or prime farmland. (§ 65913.4, subd. (a)(6).)

12 Currently, the statute specifies that when evaluating consistency with the standards
13 above, a development is consistent “if there is substantial evidence that would allow a reasonable
14 person to conclude that the development is consistent with the objective planning standards.”¹⁴
15 (§ 65913.4, subd. (b)(3).) Unless an agency timely explains to a developer in writing the reasons
16 why the proposed development is not consistent with the eligibility criteria, “the development
17 shall be deemed to satisfy the objective planning standards in subdivision (a).” (§ 65913.4,
18 subds. (b)(1)–(2).) An agency’s deadline for notifying a project proponent of ineligibility for
19 streamlined, ministerial review is either 60 or 90 days depending on the size of the proposed
20 development. (§ 65913.4, subds. (b)(1)(A)–(B).)

21 Proposed developments that qualify for streamlined, ministerial review may still be
22 subject to design review or public oversight with the limitation that this oversight “shall be
23 objective and be strictly focused on assessing compliance with criteria required for streamlined
24 projects, as well as any reasonable objective design standards published and adopted by
25 ordinance or resolution by a local jurisdiction before submission of a development application,
26

27 ¹⁴ Section 65913.4, subdivision (b)(3) became effective January 1, 2020. (Sen. Bill
28 No. 235 (2019–2020 Reg. Sess.) § 5.3; Assem. Bill No. 1485 (2019–2020 Reg. Sess.) § 1.)

1 and shall be broadly applicable to development within the jurisdiction.” (§ 65913.4, subd. (c)(1).)
2 The design review must be completed, if at all, within 90 or 180 days¹⁵ depending on the size of
3 the development and “shall not in any way inhibit, chill, or preclude the ministerial approval
4 provided by this section or its effect”¹⁶ (§ 65913.4, subd. (c)(1).)

5 *ii. Application*

6 The City’s notice of inconsistency here, its SB 35 denial letter of December 7, 2018, was
7 neither code-compliant nor supported by substantial evidence.

8 Section 65913.4 subdivision (b)(1) provides: “If a local government determines that a
9 development submitted pursuant to this section is in conflict with any of the objective planning
10 standards specified in subdivision (a), it shall provide the development proponent written
11 documentation of which standard or standards the development conflicts with, and an
12 explanation for the reason or reasons the development conflicts with that standard or standards
13” The Court concludes here that the City failed to comply with this notice requirement
14

15 ¹⁵ This means that for a smaller development, the deadline for notice of ineligibility is
16 60 days (§ 65913.4, subd. (b)(1)(A)) and an agency may take an additional 30 days to complete
17 design review or public oversight for a total of 90 days (§ 65913.4, subd. (c)(1)). For a larger
18 development, the deadline for notice of ineligibility is 90 days (§ 65913.4, subd. (b)(1)(B)) and
19 an agency may take an additional 90 days to complete design review or public oversight for a
20 total of 180 days (§ 65913.4, subd. (c)(2)).

21 ¹⁶ Notably, while section 65913.4, subdivision (c) gives localities additional time to
22 review objective design standards, the Legislature also enumerates compliance with “objective
23 design review standards” as an objective planning standard—an eligibility criterion—in
24 subdivision (a)(5). There does not appear to be a substantive distinction between these two terms.
25 The descriptions in subdivisions (a)(5) and (c) of what design standards may be applied are so
26 similar that they suggest the terms are equivalent. The statutory framing of design standards as
27 both eligibility criteria and criteria capable of review during the extended timeframe for public
28 oversight is problematic because of the distinct deadlines for making those distinct
determinations. Treating compliance with objective design standards as an objective planning
standard under subdivision (a) arguably renders as surplusage the later deadline for design
review in subdivision (c)(1). Courts typically avoid interpreting statutes in such a manner.
(*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Ultimately, the Court need not resolve this
ambiguity based on the particular record and arguments advanced here. The City did not comply
by either deadline and does not ask for additional time to conduct public oversight in its
supplemental brief on the scope of relief that is warranted.

1 because the City did not adequately identify objective standards and provide an explanation of
2 inconsistencies supported by substantial evidence in its SB 35 denial letter.

3 First, the City did not adequately identify applicable objective standards with which the
4 project did not comply. The City conceded its initial error in asserting that a higher percentage of
5 affordable units was required; it had relied on an outdated and incorrect HCD determination.
6 (AR000169.) Thus, it is undisputed that the first bullet point in the City's denial letter was based
7 on an incorrect and inapplicable standard.

8 As for the other two bullet points, the City did not adequately identify the standards or
9 code provisions it was referring to or relying on. It concluded the project lacked "the required
10 number of off-street residential and visitor parking spaces" and "adequate access/egress to the
11 proposed off-street parking." (AR000127.) But it is not apparent from this vague statement just
12 what those purported standards are or where they can be located. Thus, the City did not
13 adequately identify the parking standards it was relying on. And notwithstanding the opacity and
14 ambiguity of the City's statement, it is apparent that it was not relying on permissible, objective
15 standards for parking. First, section 65913.4, subdivision (d)(2) states that "the local government
16 shall not impose automobile parking requirements for streamlined developments approved
17 pursuant to this section that exceed one parking space per unit." (§ 65913.4, subd. (d)(2).) And
18 for projects meeting certain criteria—such as projects within one-half mile of transit—no parking
19 requirements may be imposed. (§ 65913.4, subd. (d)(1).) Consequently, the City not only failed
20 to identify the purported parking requirement but also failed to account for the prohibitions in
21 section 65913.4, subdivision (d) as well. Moreover, the City has yet to identify any evidence in
22 the record to support the conclusion that it could require more parking based on the location and
23 characteristics of the project here.

24 As for ingress and egress, "adequacy" is not an objective standard that may be applied to
25 streamlined projects. Objective standards are those "that involve no personal or subjective
26 judgment by a public official and are uniformly verifiable by reference to an external and
27 uniform benchmark or criterion available and knowable by both the development applicant or
28 proponent and the public official before submittal." (§ 65913.4, subd. (a)(5).) What qualifies as

1 adequate—in the absence of an identifiable standard or definition—is simply a matter of
2 personal or subjective judgment. To date, the City has not identified a uniformly verifiable,
3 knowable standard for adequate ingress and egress. Accordingly, it impermissibly relied on a
4 subjective standard in its denial letter.

5 What's more, there is no explanation in the denial letter about how the proposal was
6 inconsistent with the unspecified standards applied by the City. For example, the City did not
7 explain that the project provided only X number of parking spaces when the required number
8 was Y. So, the City's denial letter was not code-compliant in this regard as well.

9 The City does not present a convincing argument to support a contrary conclusion. In the
10 City's papers, it does not clearly and directly counter petitioners' supporting points. For example,
11 the City does not argue that it adequately identified all of the objective standards set forth in its
12 denial letter or that all of the standards it identified qualified as objective standards permissibly
13 applied in the course of streamlined review. And the City does not explain how its cursory
14 reference to such standards qualified as "an explanation for the reason or reasons the
15 development conflicts with that standard or standards." (§ 65913.4, subd. (b)(1).)¹⁷ Instead, the
16 City argues the denial letter, when read in conjunction with the incomplete notice, put Developer
17 on sufficient notice so as to somehow satisfy section 65913.4. This argument lacks merit.

18 The first problem with the City's contention is that it relies on an unspecified standard for
19 the sufficiency of notice in lieu of the standard spelled out by the Legislature in section 65913.4,
20 subdivision (b)(1). Although not clearly articulated by the City, it seems to invoke the concept of
21 notice in the context of the constitutional minimum for procedural due process. (See generally
22 *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1275–1280.) But the issue here is not
23 whether the City met the constitutional minimum. The issue is whether it complied with the
24 applicable statutory requirements.

26 ¹⁷ Section 65913.4 does not merely require a statement of reasons for denying an
27 application for streamlined review. Rather, it imposes the more specific requirement of an
28 explanation of how the proposed development conflicts with the objective standards that the
municipality identifies.

1 The City does not advance a persuasive argument for disregarding the specific statutory
2 requirements for notice. While it purports to invoke a principle of statutory construction that
3 places substance over form, it is not necessary to rely on, and the City does not fairly interpret
4 and rely on, that principle. (See generally *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th
5 1305, 1332 [discussing scope and limitations of concept of substantial compliance].) In actuality,
6 the City urges a complete disregard for the language of the statute in a vacuum and without
7 regard for the statute's purpose. In other words, the City disregards the form and the substance of
8 the statute. The language the City asks the Court to ignore—what it suggests is a mere
9 formality—is in fact the specific procedure at the heart of the statute that effectuates its purpose.

→ 10 In the absence of deemed compliance under section 65913.4, subdivision (b), the statute would
11 operate as a mere suggestion without an enforcement mechanism. And, because section 65913.4,
12 subdivision (b) is consistent with and effectuates the purpose of the statute, there is no
13 inconsistency between that “form” and the substance of the statute necessitating a reconciliation
14 of those concepts under the canon invoked by the City. The City's argument in this regard is
15 questionable and its reliance on *County of Kern v. TCEF, Inc.* (2016) 246 Cal.App.4th 301 is
16 misplaced. The Court applies the requirements for a notice of inconsistency that are plainly
17 spelled out in the statute, not an amorphous due process standard that would do violence to its
18 very language and purpose.

19 The second problem with the City's argument is that it relies on an implausible and
20 unreasonable interpretation of the record. The City states that its incomplete notice and denial
21 letter provide sufficient documentation when read together. But the terms of these documents do
22 not support such a construction. The City explicitly stated that it was proceeding as though it had
23 *two* applications submitted by Developer in November 2018. It purported to deny one application
24 and find the other incomplete. The correspondence setting forth those distinct decisions, while
25 issued together, cannot be fairly read and interpreted in the manner the City now urges. The
26 incomplete notice does not purport to specify inconsistencies with objective standards under SB
27 35; it purports to specify the additional information required before a traditional, *discretionary*
28 *review* could be commenced. Similarly, the denial letter does not purport to require additional

1 information so an SB 35 determination could be made; the letter purports to finally reject the
2 streamlining application upon completion of the City's review. And so, the City's own belief that
3 there were two applications and the unequivocal statements in each discrete item of
4 correspondence purporting to separately dispose of each application cannot fairly be read
5 together as one, code-compliant letter documenting inconsistencies with objective standards
6 under section 65913.4, subdivision (b)(1). The City's post-hoc, revisionist interpretation lacks
7 credibility.¹⁸

8 The City explicitly represented that it had made a decision to deny the streamlining
9 application. Because of this, it cannot now claim that, in fact, it did not make such a decision and
10 lacked sufficient information to do so, all to avoid the consequences of the inadequate notice of
11 inconsistency it had provided. And, even if it could take this inconsistent position, it fails to
12 substantiate the same. The City cites no authority for the proposition that it may evade the
13 statutory deadlines in section 65913.4 by claiming incompleteness. In actuality, it appears the
14 Legislature enacted section 65913.4, in part, to address the use of such delay tactics under
15 existing law:

16 [T]he 1977 Permit Streamlining Act requires public agencies to act
17 fairly and promptly on applications for development permits,
18 including new housing. If they don't, the project is deemed
19 approved. Under the act, public agencies must compile lists of
20 information that applicants must provide and explain the criteria
21 they will use to review permit applications. Public agencies have
22 30 days to determine whether applications for development
23 projects are complete; failure to act results in an application being
24 "deemed complete." However, local governments may continue to
25 request additional information, potentially extending the time
26 before the application is considered complete, which is the trigger
27 for the approval timeline to commence. This has led to the Permit

28 ¹⁸ The Court also finds unpersuasive the City's assertion that Developer somehow created
29 confusion over its application based on the cover sheet it used. (Opp. at p. 9:20–28.) The City
30 had not updated its cover sheet to account for streamlining applications and does not point to any
31 evidence in the record that it had created and made available a separate form or cover sheet for
32 them. Thus, under the circumstances and given the explicit and clear statements in the
33 application itself about the nature of the review Developer was requesting, this assertion and
34 characterization by the City also lacks credibility.

1 Streamlining Act to be characterized as a “paper tiger” that rarely
2 results in accelerated development approvals.

3 (Sen. Gov. & Finance Com., Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) April 26, 2017.)

4 Arguably, if the City had truly lacked sufficient information on which to make an SB 35
5 determination, it could have endeavored to follow section 65913.4 in stating as much by
6 identifying the objective standards that it was applying and explaining how it could not conclude,
7 or lacked sufficient information to conclude, that the project was consistent with those standards.

8 Furthermore, the City does not present reasoned analysis to support the conclusion that a
9 reasonable person simply could not find that the project was consistent with objective standards
10 without all of the information set forth in the notice of incomplete application. The bullet points
11 at page 23 of the City’s opposition do not cure the gaps in its analysis or appear, on their face, to
12 encompass objective standards.

13 In sum, the City does not establish that it properly concluded that Developer’s application
14 was incomplete as a matter of law or fact (e.g., the contents of the denial letter). The City
15 unequivocally denied the streamlining application and will be held to the reasons articulated in
16 its denial letter.

17 For all of these reasons, petitioners show and the City does not effectively refute that it
18 did not provide a code-compliant notice of inconsistency. This conclusion is corroborated by the
19 opinion of HCD. (See AR1330; see also Pet. Supp. RJN.) It follows under section 65913.4 that
20 Developer’s proposal was deemed to comply with objective standards as a matter of law and
21 irrespective of whether the proposal is consistent with those standards as a matter of fact. The
22 City’s points on whether the proposal was, in fact, inconsistent are immaterial, particularly to the
23 extent the City addresses purported inconsistencies other than those identified in the denial letter
24 and within the statutory timeframe for notice.¹⁹ (Opp. at pp. 24:9–27:18.)

25 _____
26 ¹⁹ Because of the essential statutory deadlines in section 65913.4, the Court does not
27 address the City’s belated and post-hoc rationales in detail. That said, petitioners present a
28 number of cogent points about the legal and factual illegitimacy of these belated rationales (Pet.
Brief at pp. 27:6–33:1), which points the City largely fails to address in opposition (Opp. at
pp. 24:21–29:2).

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1 information that must be submitted as part of a complete request. (§ 65915, subds. (a)(2)–(3).) In
2 codifying a transparent and expeditious procedure, a municipality “shall not condition the
3 submission, review, or approval of an application [for a density bonus] on the preparation of an
4 additional report or study that is not otherwise required by state law, including [the Density
5 Bonus Law].” (§ 65915, subd. (a)(2).)

6 The City’s density-bonus ordinance is codified in Los Altos Municipal Code section
7 14.28.040. Under section 14.28.040, subdivision (C)(1)(a)(i) of the City’s code, a development
8 with 10 percent of its units designated for low-income households “shall be granted” a 20
9 percent density bonus. This density bonus increases by 1.5 percent, up to a maximum of 35
10 percent, for each additional percentage point of low-income housing provided. So, for example, a
11 development with 11 percent of its units designated for low-income households is entitled to a
12 21.5 percent density bonus. As relevant here, a development with 20 percent or more units
13 designated for low-income households will be granted the maximum, 35 percent density bonus.
14 That density bonus is calculated as a percent “increase over the otherwise maximum allowable
15 gross residential density” (Los Altos Mun. Code, § 14.28.040, subd. (B)(2); see also
16 § 65915, subd. (f).)

17 A developer may additionally obtain an incentive for designating units for low-income
18 households. (Los Altos Mun. Code, § 14.28.040, subd. (C)(1)(a)(ii).) A developer must be
19 granted one incentive for designating 10 percent of units for low-income households, two
20 incentives for designating 20 percent, and three incentives for designating 30 percent or more.
21 (*Ibid.*; see also § 65915, subd. (d)(2)(A)–(C).) The City has codified “on-menu incentives”—
22 incentives that “would not have a specific adverse impact”—in the density-bonus ordinance.
23 (Los Altos Mun. Code, § 14.28.040, subd. (F).)

24 A city “shall grant” a bonus or incentive unless it makes written findings supported by
25 substantial evidence that: there will be no identifiable and actual cost reduction to provide for
26 affordable housing costs; there will be a specific, adverse, unmitigable impact on public health
27 and safety, the environment, or registered historic places; or granting the bonus or incentive is
28 contrary to state or federal law. (§ 65915, subd. (d)(1); see also Los Altos Mun. Code,

1 § 14.28.040, subd. (F)(3).) And, “[i]n no case may a city ... apply any development standard that
2 will have the effect of physically precluding the construction of a development meeting the
3 criteria of subdivision (b) at the densities or with the concessions or incentives permitted by [the
4 Density Bonus Law].” (§ 65915, subd. (e)(1).) A developer may seek a waiver or reduction of
5 such standards that physically impede construction of the development. (*Ibid.*)

6 “The applicant may initiate judicial proceedings if the city ... refuses to grant a requested
7 density bonus, incentive, or concession.” (§ 65915, subd. (d)(3).) As noted, this proceeding is
8 ordinarily brought in administrative mandamus. (See, e.g., *Lagoon Valley, supra*,
9 154 Cal.App.4th at pp. 812, 816–817.) The city “shall bear the burden of proof for the denial of a
10 requested concession or incentive.” (§ 65915, subd. (d)(4).) “If a court finds that the refusal to
11 grant a requested density bonus, incentive, or concession is in violation of this section, the court
12 shall award the plaintiff reasonable attorney’s fees and costs of suit.” (§ 65915, subd. (d)(3).)

13 In Developer’s application (inclusive of its density bonus report), it proposed designating
14 two of eight base units—i.e. 25 percent of the base units—for low-income households.
15 (AR000010, AR000061.) Developer asserted that this level of affordability entitled it to: 1) a 35
16 percent density bonus; and 2) two concessions, only one of which it sought to use. (AR000010,
17 AR000061.) Developer selected an 11-foot height increase—which is on-menu (Los Altos Mun.
18 Code, § 14.28.040, subd. (F)(1)(d))—as its concession. (AR000010, AR000061.) Based on the
19 bonus and concession, Developer proposed constructing seven additional units. (AR000061).²¹ It
20

21 ²¹ Consistently with state law, the Los Altos Municipal Code defines a density bonus as
22 an “increase over the otherwise maximum allowable gross residential density” (Los Altos
23 Mun. Code, § 14.28.040, subd. (B)(2); see also § 65915, subd. (f).) The maximum allowable
24 density means the density allowed under a local zoning ordinance or general plan, with the
25 maximum density in the general plan controlling in the event of an inconsistency. (§ 65915,
26 subd. (o)(2); see also *Lagoon Valley, supra*, 154 Cal.App.4th at p. 824.) Developer asserts and
27 the City does not seem to dispute that there is no standard for units or intensity (Floor Area
28 Ratio) applicable to buildings, like the proposed development, that are zoned Commercial-Retail
Sales/Office-Administrative District (CRS/OAD). (AR000011, AR000062 [Density Bonus
Report].) Perhaps there is no standard because housing above the ground floor qualifies as a
conditionally-permitted use under Los Altos Municipal Code section 14.54.040 as compared to
an office or retail use that is permitted by right under section 14.54.030. In any event, instead of
applying the density bonus to the maximum density allowed under the law (either the ordinance

1 appears the seven units exceed the number authorized by the 35 percent density bonus standing
2 alone, so the parties' dispute seems to hinge on whether the right to an 11-foot height increase
3 necessarily includes the right to include additional housing units in that additional space. (See
4 AR002310–AR002311.)

5 As a threshold matter, the City's interpretation of the Density Bonus Law is incorrect.
6 The City asserts that any and all concessions, incentives, and waivers must result—
7 collectively—in no more than a 35 percent increase in density. Courts have routinely rejected
8 such an interpretation of the law. The 35 percent bonus authorized under the Density Bonus Law
9 and the City's own ordinance is the mandatory minimum a city must provide; it is not a cap.
10 (*Lagoon Valley, supra*, 154 Cal.App.4th at pp. 823–826.) And so, the City was required, at
11 minimum, to provide a 35 percent bonus and any other incentive or concession required by law.
12 Otherwise, to the extent the City believed any additional incentive or concession was
13 discretionary, it was required to inform Developer of this conclusion in a code-compliant manner
14 by making the statutorily-required findings. (See § 65915, subd. (d)(1); see also Los Altos Mun.
15 Code, § 14.28.040, subd. (F)(3).) The City failed to do so here. Instead, the City made a vague
16 statement that “the requested concessions and waivers appear to raise substantial issues
17 concerning public health and safety, including questions regarding” compliance with the
18 Americans With Disabilities Act (42 U.S.C. § 12101 et seq.). (AR002311.) On its face, this
19 statement is so equivocal as to fall short of an affirmative finding. Furthermore, this statement
20 does not identify a specific, adverse, unmitigable impact on public health and safety.
21 Accordingly, this finding is deficient.

22 To be sure, although the City bears the burden of justifying its density-bonus decision, it
23 does not attempt to justify that decision under an appropriate standard of review and based on the
24 statutory requirements. Its opposition instead focuses on its interpretation of the 35 percent bonus
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27
28 or the general plan), both parties appear, at times, to treat the bonus as applying to the number of
base units. (See, e.g., AR002310–AR002311.)

1 as a cap, which interpretation is contrary to established precedent. Accordingly, petitioners'
2 density-bonus claim is meritorious; the City did not comply with the law.

3 In reaching this conclusion, the Court notes that it remains unsettled whether the City
4 could attempt to deny the density-bonus request for the first time during the administrative
5 proceeding. This is because section 65913.4 contemplates that a proposal subject to streamlined
6 review may contain bonus units. (§ 63913.4, subd. (a)(2)(C).) Arguably, to determine whether a
7 project with bonus units comports with the objective standards in section 65913.4, a city must
8 determine whether the bonus units are allowable in the course of a streamlined review. In
9 truncating the review process through section 65913.4, the Legislature has not clearly addressed
10 how such changes operate with other housing laws, such as the Density Bonus Law. Ultimately,
11 because even the City's final resolution is deficient, the Court does not and need not resolve this
12 question.

13 In concluding that the City violated the Density Bonus Law, the Court rejects the City's
14 argument that Developer's application was incomplete or lacked sufficient information to allow
15 it to evaluate the density-bonus request.

16 "A local government shall not condition the submission, review, or approval of an
17 application pursuant to this chapter on the preparation of an additional report or study that is not
18 otherwise required by state law, including this section." (§ 65915, subd. (a)(2).) This prohibition
19 does not preclude a municipality from requiring "reasonable documentation to establish
20 eligibility for a requested density bonus" (*Ibid.*) But, a municipality "shall ... [p]rovide a list
21 of all documents and information required to be submitted with the density bonus application in
22 order for the density bonus application to be deemed complete." (§ 65915, subd. (a)(3)(B).)
23 "This list shall be consistent with this chapter." (*Ibid.*)

24 Collectively, these directives and prohibitions establish that a municipality cannot
25 condition consideration and approval of a density-bonus request on information or documents
26 unless it specifies these materials in advance and in conformity with the Density Bonus Law.

27 Here, Los Altos Municipal Code 14.28.040, subdivision (D) specifies the local forms and
28 other information an applicant must submit with a density-bonus request. That said, with the

1 exception of several forms, the ordinance broadly requires “reasonable documentation” of certain
2 facts and does not specify particular documents that must be submitted. (Los Altos Mun. Code,
3 § 14.28.040, subd. (D).) In the City’s opposition, it offers a conclusory assertion that Developer’s
4 application was incomplete. The City does not explain how its application requirements comport
5 with those permitted under the Density Bonus Law. And the City does not attempt to justify the
6 sufficiency of its findings or the evidence on the subject of completeness. This presentation is
7 insufficient to carry the City’s burden of establishing that it complied with the law.

8 Looking to the City’s final resolution and the notice of incomplete application referenced
9 therein, and assuming for argument sake that this notice could be considered as part of the City’s
10 denial of the streamlined application, the propriety of the City’s conduct is not apparent. The
11 “Density Bonus Report Submittal Requirements”—a form that accompanied the notice of
12 incomplete application—indicates that Developer had largely submitted all required information.
13 (AR000147–AR000149.) Based on circling and underlining on the second page of this form, the
14 City seemed to take the position that it needed additional documentation that incentives or
15 concessions would result in cost reductions and that waivers were needed for standards that
16 would physically preclude the concessions or incentives. (AR000148.) Because the Density
17 Bonus Law now puts the onus on a municipality to make a finding to support denial of a density-
18 bonus request, such as a finding that a concession or incentive would not result in cost reductions
19 (§ 65915, subd. (d)(1)(A)), the City’s insistence that Developer prove the contrary in the first
20 instance shifts the burden to the applicant in contravention of the statute.²² And, also, the
21 requested “reasonable documentation” appears to concern matters beyond the eligibility
22 information that can be requested. (§ 65915, subd. (a)(2).) Moreover, Developer asserts that the
23 City is incorrect because Developer did, in fact, submit sufficient information. This assertion is
24 correct. The claim that the City could not determine the allowable base density is not credible
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26 ²² The record reflects that the City sought out a consultant but apparently never hired one
27 or completed the process required to evaluate and make findings sufficient to reject Developer’s
28 density-bonus request. (See AR002332–AR002336 [proposed scope of work from Keyser
Marston Associates].)

1 given that density is determined by municipal law. And, as for eligibility, Developer otherwise
2 presented detailed information in its application about its building plans to allow the City to
3 evaluate eligibility for a density-bonus. The City did not rebut this point in its papers or at the
4 hearing. To summarize, even setting aside the City's inadequate argument and analysis on the
5 Density Bonus Law, the record undercuts any claim of incompleteness based on what a city may
6 legally ask for and what Developer, in fact, presented here.

7 3. *Housing Accountability Act*

8 The Housing Accountability Act or "HAA (§ 65589.5), known as the 'anti-NIMBY law,'
9 was designed to limit the ability of local governments to reject or render infeasible housing
10 developments based on their density without a thorough analysis of the 'economic, social, and
11 environmental effects of the action' (§ 65589.5, subd. (b).)" (*Kalnel Gardens, LLC v. City of*
12 *Los Angeles* (2016) 3 Cal.App.5th 927, 938 (*Kalnel Gardens*).) "When a proposed development
13 complies with objective general plan and zoning standards, including design review standards, a
14 local agency that intends to disapprove the project, or approve it on the condition that it be
15 developed at a lower density, must make written findings based on [a preponderance of the
16 evidence on the record] that the project would have a specific, adverse impact on the public
17 health or safety and that there are no feasible methods to mitigate or avoid those impacts other
18 than disapproval of the project. (§ 65589.5, subd. (j)(1).)"²³ (*Kalnel Gardens, supra*,
19 3 Cal.App.4th at pp. 938–939.) And, much like the streamlining statute (§ 65913.4), the HAA
20 requires written notice of inconsistency within 30 or 60 days and provides that if an agency "fails
21 to provide the required documentation pursuant to subparagraph (A), the housing development
22 project shall be deemed consistent, compliant, and in conformity with the applicable plan,
23 program, policy, ordinance, standard, requirement, or other similar provision." (§ 65589.5,
24 subd. (j)(2).)

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27 ²³ Until December 31, 2017, section 65889.5 required that an agency's findings be
28 supported only by substantial evidence. Effective January 1, 2018, the findings must be
supported by a preponderance of the evidence. (Sen. Bill No. 167 (2017–2018 Reg. Sess.) § 1
[Stats. 2017, ch. 368]; Assem. Bill No. 678 (2017–2018 Reg. Sess.) § 1 [Stats. 2017, ch. 373].)

1 If an agency fails to comply with the HAA, a developer, prospective resident, or housing
2 organization, such as Renters here, may seek judicial review by filing a petition for writ of
3 administrative mandate. (*Kalnel Gardens, supra*, 3 Cal.App.5th at p. 941, citing § 65589.5,
4 subd. (m).) Under that judicial review, section 65589.5, subdivision (i) explicitly places the
5 burden of proof on the agency to “show that its decision is consistent with the findings as
6 described in subdivision (d), and that the findings are supported by a preponderance of the
7 evidence in the record with the requirements of subdivision (o).”²⁴ If an agency “disapproved a
8 project or conditioned its approval in a manner rendering it infeasible” without making the
9 required findings, the court must issue an order or judgment compelling the jurisdiction to
10 comply within 60 days, including by taking action on the development. (§ 65589.5, subd. (k).)
11 “The court may issue an order or judgment directing the local agency to approve the housing
12 development project or emergency shelter if the court finds that the local agency acted in bad
13 faith²⁵ when it disapproved ... the housing development or emergency shelter in violation of this
14 section.” (§ 65589.5, subd. (k)(1)(A)(ii).) “The court shall retain jurisdiction to ensure that its
15 order or judgment is carried out and shall award reasonable attorney’s fees and costs of suit to
16 the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that
17 awarding fees would not further the purposes of this section.” (§ 65589.5, subd. (k)(1)(A).)

18 The City here fails to carry its burden of establishing compliance with the HAA. For the
19 reasons articulated above, its claim of incompleteness of Developer’s SB 35 application is not
20 persuasive. The City does not provide reasoned legal analysis to support the conclusion that the
21 application was incomplete within the meaning of the HAA. And for the reasons previously
22 articulated with respect to section 65913.4, the City also did not provide a code-compliant notice
23 of inconsistency under section 65589.5. And even in the final resolution adopted by the City
24

25 ²⁴ This standard is similar to the abuse of discretion standard ordinarily applicable in all
26 manner of administrative mandamus proceedings. (See *Kalnel Gardens, supra*, 3 Cal.App.5th at
27 p. 937, citing Code Civ. Proc., § 1094.5, subd. (b).)

28 ²⁵ “For purposes of this section, ‘bad faith’ includes, but is not limited to, an action that is
frivolous or otherwise entirely without merit.” (§ 65589.5, subd. (l).)

1 Council, the City did not make statutorily required findings sufficient to reject or require
2 modification of the project under the HAA. Accordingly, the City also does not establish that it
3 complied with the HAA.

4 In reaching this conclusion, the Court further finds that the City acted in bad faith as
5 defined in the HAA because its denial was entirely without merit. The City's denial letter and the
6 record before the Court do not reflect that the City made a benign error in the course of
7 attempting, in good faith, to follow the law by timely explaining to Developer just how its
8 project conflicted with objective standards in existence at the time or by trying to make findings
9 that resemble what the law requires. Instead, in addition to tactics such as demanding an
10 administrative appeal on less than one day's notice and using strained constructions and textual
11 interpretations to assert that Developer had presented two applications that had to be withdrawn,
12 the City denied the streamlining application with a facially deficient letter and later adopted a
13 resolution enumerating insufficient reasons for the denial. So, in addition to the fact that section
14 65913.4 warrants a writ directing the City to issue the permit, its conduct justifies the same relief
15 under section 65589.5, subdivision (k)(1)(A) as well.

16 *C. Scope of Relief*

17 Because the Court concludes that the City violated section 65913.4, the Density Bonus
18 Law, and the HAA, petitioners are entitled to writ relief. Nevertheless, the parties dispute and
19 addressed in supplemental briefing the nature and scope of relief that should be awarded.
20 Petitioners ask the Court to provide relief under all three statutes, while the City argues the Court
21 should solely order relief under section 65913.4 because additional statutory relief is duplicative.
22 While the Court agrees that there is some overlap in the relief afforded by each separately
23 applicable statute and that all three statutes warrant the same substantive outcome—affording
24 relief in mandate—the Court rejects the City's claim that the relief afforded by each statute is
25 entirely duplicative. For example, as the City acknowledges, the Density Bonus Law and HAA
26 authorize an award of attorney fees and costs. Even accepting the City's suggestion that the
27 Court fix the amount of such fees and costs at a later date, this fact does not obviate the need for
28 the Court to rule on these statutory bases as a prerequisite for a later motion for attorney fees

1 under either statute. Also, the HAA gives the Court continuing jurisdiction over statutory
2 enforcement mechanisms, which may include fines for noncompliance. The additional remedies
3 for enforcing the HAA are not duplicative. And, arguably, the Court must award relief under the
4 HAA now as a prerequisite for any later enforcement measures that may be necessary even
5 accepting, as the City points out, that the time for such enforcement has yet to arrive. Ultimately,
6 the City does not identify any legal basis for refusing to grant relief under all three statutes. For
7 these reasons, the Court accepts petitioners' argument that relief under each statute is warranted.

8 The Court holds that Developer's project was deemed to comply with applicable
9 standards under SB 35 and that the City must rescind its decision to deny and instead approve
10 and permit the project at the requested density. The parties agree that this directive to rescind the
11 existing decision and permit the project within 60 days, as compared to remanding the matter for
12 further consideration, is the appropriate course of action. (City's Supp. Brief at p. 8.) To the
13 extent petitioners seek relief other than a writ and declaratory judgment, including attorney fees,
14 costs, and additional fines or penalties, the parties agree that such matters will be resolved by
15 post-judgment noticed motion (for attorney fees or to tax costs) and, as for the penalties, further
16 proceedings should they become necessary.

17 Finally, the Court declines to issue a declaratory judgment. It is true that because
18 declaratory relief is a cumulative remedy "a proper complaint for declaratory relief cannot be
19 dismissed by the trial court because the plaintiff could have filed another form of action."
20 (*Californians for Native Salmon Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419,
21 1429.) And there is no categorical prohibition on joining a complaint for declaratory relief with a
22 petition for writ of mandate; in appropriate circumstances, this is permissible. (*Gong v. City of*
23 *Fremont* (1967) 250 Cal.App.2d 568, 574.) That said, when challenging an action under Code of
24 Civil Procedure section 1094.5—a decision in a particular instance as compared to a policy or
25 ordinance standing alone—mandamus relief is typically the exclusive remedy and declaratory
26 relief is not additionally available or necessary. (*State of Cal. v. Super. Ct.* (1934) 12 Cal.3d 237,
27 251–252; see also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 126–127
28 [declaratory relief not proper vehicle for challenging denial of building permit].) In actuality, in a

1 hybrid proceeding, declaratory relief may be sought to test the constitutionality or legality of an
2 ordinance or policy on its face with an accompanying request for a writ of mandate directed to
3 the agency's application of that ordinance or policy to the petitioner in particular. (*Gong, supra*,
4 250 Cal.App.2d at p. 574.) Here, petitioners do not seek a declaration of the validity of the City's
5 policies, interpretation of the law, or zoning ordinance; rather, they seek a declaratory judgment
6 stating the City must issue the streamlined permit Developer applied for.²⁶ In other words, they
7 simply seek a duplicative declaration requiring the City to perform its duty and issue the permit.
8 The problem is not simply that the declaratory relief requested is duplicative, but rather, that the
9 relief sought is a proper subject of mandamus and it does not encompass a question of validity or
10 constitutionality that typically warrants additional declaratory relief in a mandamus proceeding.
11 Accordingly, the Court exercises its discretion under Code of Civil Procedure section 1061 and
12 declines to provide declaratory relief that would be duplicative of that already being provided in
13 mandate.

14 *IV. Conclusion*

15 The petitions for writ of mandate are granted, and judgment will be entered consistently
16 with this Order. Petitioners are prevailing parties for purposes of costs of suit under Code of
17 Civil Procedure section 1032, which costs would be claimed post-judgment by timely filed
18 memoranda and which are subject to striking and taxing according to law. The judgment to be
19 entered will direct the issuance of a peremptory writ of mandate commanding the relief
20 contemplated in this Order and consistently with its analysis and conclusions. Counsel for
21 petitioners have already collectively proposed a form of judgment and a form of writ to be
22 issued, which they submitted with their post-hearing briefing. Counsel for petitioners are directed
23 to provide those separate documents to the Court in Word format by email to
24 Department10@scscourt.org within 10 days of service of this Order, with copy to counsel for the
25 City. Counsel for the City is to submit any objections as to the form of the proposed judgment
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28 ²⁶ The Court notes that in Petitioners' supplemental brief on the scope of relief and in
their proposed judgment, they elaborate on the declaratory relief sought in their pleadings.

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and proposed writ within 20 days from service of this Order, with courtesy copy to the Court at the same email address and copy to counsel for petitioners.

IT IS SO ORDERED.

Date: April 24 2020

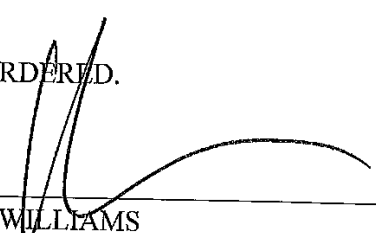

HELEN E. WILLIAMS
Judge of the Superior Court

EXHIBIT K

CARLA v City of San Mateo

There is no such thing as sufficiently objective

And a standard – among other requirements for a standard - must have been consistently applied across the city to be a candidate to be used in an SB 35 development

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

CALIFORNIA RENTERS LEGAL
ADVOCACY AND EDUCATION
FUND et al.,

Plaintiffs and Appellants,

v.

CITY OF SAN MATEO et al.,

Defendants and Respondents;

TONY MEHMET GUNDOGDU et al.,

Real Parties in Interest;

ROB BONTA, as Attorney General,
etc.,

Intervener and Respondent.

A159320, A159658

(San Mateo County
Super. Ct. No. 18-CIV-02105)

“California has a housing supply and affordability crisis of historic proportions.” (Gov. Code, § 65589.5, subd. (a)(2)(A).)¹ This “despite the fact that, for decades, the Legislature has enacted numerous statutes intended to significantly increase the approval, development, and affordability of housing for all income levels.” (§ 65589.5, subd. (a)(2)(J).) Among these statutes is the Housing Accountability Act (HAA) (Gov. Code, § 65589.5), enacted in 1982 with the goal of “meaningfully and effectively curbing the capability of

¹ All undesignated statutory references are to the Government Code.

local governments to deny, reduce the density for, or render infeasible housing development projects.” (§ 65589.5, subd. (a)(2)(K).) In this, the HAA has historically failed. (*Ibid.*)

These were the findings of the Legislature in 2017, when it amended the HAA to strengthen the statute. (Stats. 2017, ch. 378, § 1.5.) In relevant part, the HAA restricts the ability of local governments to deny an application to build housing if the proposed project complies with general plan, zoning, and design review standards that are “objective.” (§ 65589.5, subd. (j)(1).) A 2017 amendment adds teeth to this restriction by defining what it means to comply with such standards: a housing development project is deemed to comply if “substantial evidence . . . would allow a reasonable person to conclude” that it does. (§ 65589.5, subd. (f)(4) (subdivision (f)(4)).) This case raises questions about how to apply the HAA as amended and whether the statute, especially subdivision (f)(4), violates the California Constitution.

After the City of San Mateo (the City) denied an application to build a ten-unit apartment building, petitioners California Renters Legal Advocacy and Education Fund, Victoria Fierce, and John Moon (collectively, CARLA) sought a writ of administrative mandamus seeking to compel the project’s approval.² The trial court denied the petition, ruling that the project did not satisfy the City’s design guidelines for multifamily homes and that, to the extent the HAA required the City to ignore its own guidelines, it was an unconstitutional infringement on the City’s right to home rule and an unconstitutional delegation of municipal powers.

² The petition was also brought on behalf of San Francisco Bay Area Renters Association, which is not a party to this appeal.

We conclude otherwise. The design guideline the City invoked as part of its reason for rejecting this housing development is not “objective” for purposes of the HAA, and so cannot support the City’s decision to reject the project. And because the HAA checks municipal authority only as necessary to further the statewide interest in new housing development, the HAA does not infringe on the City’s right to home rule. Rejecting the City’s other constitutional arguments as well, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Tony Gundogdu submitted an application to build a four-story, ten-unit multifamily residential building (the building or the project) in San Mateo in 2015. As proposed, the building would stretch the length of a block on North El Camino Real, bounded by El Camino Real on the east, West Santa Inez Avenue at the south, and Engle Road at the north. West Santa Inez Avenue and Engle Road are both in residential neighborhoods of single-family houses. Immediately to the west of the project are a two-story house on West Santa Inez Avenue and a single-story house on Engle Road. The project site is designated in the City’s general plan—and zoned—for high-density multifamily dwellings, “R4” Zoning.

Staff to the City’s Planning Commission (the Commission) reviewed Gundogdu’s application and, after securing minor changes to the proposal, concluded it was consistent with the City’s general plan and its Multi-Family Design Guidelines (the Guidelines). Staff recommended the Commission approve the project. They reported that “[v]ariations in the roof forms help to create a transition” between the building and the single-family homes to the north and west, and that “[p]roposed landscaping helps to soften the structure and provide buffers to the adjacent single-family residences.” Alterations made at the behest of Commission staff included adding trellises

to facades “to create more articulation and add horizontal elements,” thus “reduc[ing] the appearance of height.”

The application came before the Commission in August 2017. At the hearing, a number of City residents opposed the project, on grounds including concerns that it was out of scale with the adjacent single-family residential area. The Commission continued the hearing. Before the next hearing, planning staff again recommended approval, subject to revised conditions. The staff again proposed the Commission find the project is “in scale and harmonious with the character of the neighborhood” and “meets all applicable standards,” including that it “complies with the City’s Multi-Family Dwelling Design Guidelines.”

On September 26, 2017, commissioners nonetheless expressed concern that the proposed building was out of scale with the houses in the neighborhood, and the Commission voted to disapprove the project, directing staff to prepare findings for denial. So directed, the staff next proposed findings that the project is “not in scale and . . . not harmonious with the character of the neighborhood.” The building is “too tall,” “too large and bulky for the subject site due to [its] four-story height,” and “not in keeping with the smaller one and two story dwellings in the area.” Key to this case, the proposed findings noted that on the Engle Road side there is a two-story differential between the project and adjacent single-family dwellings (ignoring the fourth story, which is stepped back). Thus, “[t]he project is not in substantial compliance with” the Guidelines’ limitations on building scale, which direct that if there is more than a one-story variation in height between adjacent buildings, “a transition or step in height is necessary,” including that a project should “step back upper floors to ease the transition.”

Adopting these proposed findings in full, the Commission denied the project without prejudice on October 10, 2017. The City Council considered the appeal on February 5, 2018, and upheld the Commission’s decision, also denying the application without prejudice. Appellants then brought this action seeking a writ of administrative mandamus (Code Civ. Proc., § 1094.5) on the ground the denial violated the HAA.

The trial court denied the petition. Before doing so, the court asked the parties for additional briefing on a number of issues, including the following: “If either party contends that some aspect of [subdivision] (f)(4) is or is not enforceable or is or is not applicable to this action, the parties are ordered to provide all authority supporting that contention.” In response, the City argued that the HAA’s subdivision (f)(4) violates the California Constitution by infringing on the City’s right to “home rule”—or control of its own municipal affairs as a charter city—and by unlawfully delegating municipal functions to private parties, and that subdivision (f)(4) raises due process concerns because it deprives neighboring landowners of a meaningful hearing. CARLA did not address these issues, either in its briefing or at the hearing on the petition.

The trial court in its ruling found that the City’s Guidelines were “‘applicable, objective’” standards for purposes of the HAA and that the project did not satisfy the Guidelines, and accordingly stated it would deny the petition for writ of mandate. Despite reaching this seemingly dispositive result, the court went on to conclude that, to the extent the HAA conflicted with “otherwise enforceable portions of the city’s Municipal Code regarding review of housing development projects,” it was unenforceable as an impermissible intrusion into the City’s municipal affairs under the home rule doctrine of the California Constitution (Cal. Const., art. XI, § 5(a)) and

violated the prohibition on delegation of municipal affairs to private parties (Cal. Const., art. XI, § 11(a)). With these sweeping conclusions, the court had no occasion to reach the City's due process argument.

The court later denied CARLA's motion for a new trial, and this timely appeal ensued. Before this court, CARLA defends the constitutionality of the HAA and argues the project meets all applicable standards. Intervening, the Attorney General argues that the HAA is constitutional and that the trial court erred in deferring to the City's interpretation of its Guidelines. (See Code Civ. Proc., §§ 664.5, subd. (e), 902.1.) The City urges us to affirm the trial court's judgment without reaching the constitutional issues, but also contends that CARLA's interpretation of the HAA violates the California Constitution. And numerous amici have weighed in with helpful briefs.³

DISCUSSION

Because it is fundamental, we begin with a careful examination of the HAA as it operates and has evolved in the context of California's system for approving new housing development. We then address whether the City's denial of this project application violates the HAA; if, as the City urges, we answer that question in the negative, we need not reach the constitutional issues. (See *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 66 [courts do not decide constitutional issues unnecessarily].) Because we

³ In support of appellants are the Building Industry Association-Bay Area, the San Francisco Bay Area Planning and Urban Research Association, Bay Area Council, and Housing Action Coalition; Californians for Homeownership and the California Association of Realtors®; Habitat for Humanity Greater San Francisco, Inc.; and law professors Christopher S. Elmendorf, Michelle Wilder Anderson, Anika Singh Lemar, Dave Owen, Darien Shanske, and Kenneth Stahl. In support of respondents are the League of California Cities and the California State Association of Counties.

conclude that the City’s decision did violate the HAA, we go on to address the constitutionality of, and uphold, the statute.

I. The Housing Accountability Act

More than 50 years ago, the Legislature enacted a broad measure requiring counties and cities to “ ‘adopt a comprehensive, long-term general plan for the physical development of the county or city,’ ” with a housing element designed to promote adequate housing for the community.

(*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 444 (*San Jose*), quoting Gov. Code., § 65300 et seq., enacted by Stats. 1965, ch. 1880, § 5.) The Legislature went further in 1980 with the Housing Element Law, which “set forth in considerable detail a municipality’s obligations to analyze and quantify the . . . locality’s share of the regional housing need as determined by the applicable regional ‘ “[c]ouncil of governments” ’ (Gov. Code., § 65582, subd. (b)), and to adopt and to submit to California’s Department of Housing and Community Development a multiyear schedule of actions the local government is undertaking to meet these needs. (*Id.*, §§ 65583–65588.)” (*San Jose*, at p. 445; see Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts* (2019) 71 Hastings L.J. 79, 100–103.) Local governments prepare housing elements, but the state’s Department of Housing and Community Development must approve them. (*San Jose*, at p. 445.)

Since 1980, local governments have failed to approve, and developers have failed to build, housing in quantities approximating regional housing needs. As an example, a report of the Civil Grand Jury of Santa Clara County shows that of 16 jurisdictions in the county, fewer than half met their regional housing needs assessment between 2007 and 2014. (Civil Grand Jury of Santa Clara County, *Affordable Housing Crisis: Density is our*

Destiny (June 2018), p. 7.) And the California Department of Housing and Community Development reported in 2018 that for the previous ten years, California had averaged fewer than 80,000 new homes permitted annually—less than half the projected need for 180,000 homes a year. (Dept. of Housing and Community Development, California’s Housing Future: Challenges and Opportunities, Final Statewide Housing Assessment 2025 (Feb. 2018) p. 5.) A report from the California Legislative Analyst’s Office found a similar shortfall for the entire period of 1980 to 2010, and attributed it in part to community resistance to new housing, facilitated by laws allowing cities and counties to control when and where development occurs. (Legislative Analyst’s Office, California’s High Housing Costs: Causes and Consequences (Mar. 2015) pp. 15, 21.)

Against this backdrop, the Legislature enacted in 1982 the HAA, colloquially known as the “Anti-NIMBY” (Not-In-My-Back-Yard) law, and it has amended the statute repeatedly in an increasing effort to compel local governments to approve more housing. (§ 65589.5, subd. (a); *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 295–297 (*Ruegg*); *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1068 (*Honchariw*).) As originally enacted—and still generally today—the HAA provides that when a proposed housing development complies with applicable general plan, zoning, and development policies, the local agency may disapprove the project (or approve it on condition that it be developed at lower density) only if the local agency finds that the project would have a specific, adverse, and unavoidable impact on public health or safety. (Stats. 1982, ch. 1438, § 2; *Honchariw*, at pp. 1074–1075; § 65589.5, subd. (j)(1).)

Ensuing amendments to the HAA have sought to serve and clarify the Legislature’s intent. In 1990, the Legislature made the HAA expressly

applicable to charter cities. (Former § 65589.5, subds. (a)(1) & (2), (g); Stats. 1990, ch. 1439, § 1.) In 1999, the Legislature amended the operative language of subdivision (j) to narrow the kinds of policies that could be invoked to defeat an application, adding the italicized words: “When a proposed housing development project complies with applicable, *objective* general plan and zoning *standards and criteria*,” the project cannot be denied or reduced in density without the specified health and safety findings. (Stats. 1999, ch. 968, § 6, italics added.) A 2002 amendment clarified that the phrase “general plan and zoning standards and criteria” includes “design review standards.” (Stats. 2002, ch. 1721, § 1.) And a 2005 amendment authorized fines if a local agency denied a project in bad faith. (Former § 65589.5, subd. (l); Stats. 2005, ch. 601, § 1.)

In 2016, the Legislature added an enhanced standing provision, allowing not only a person eligible for residency in a development but also a housing organization to bring an action to challenge a local agency’s disapproval of a housing development. (Former § 65589.5, subd. (k)(1) & (2), Stats. 2016, ch. 420, § 1.)

Still dissatisfied with the dearth of housing in this state, the Legislature in 2017 passed further amendments to the HAA, supported by detailed findings. The Legislature added a provision requiring that an applicant receive timely written notice and an explanation if an agency considers a proposed housing development inconsistent with applicable standards. (§ 65589.5, subd. (j)(1); Stats. 2017, ch. 378, § 1.5.) It heightened fines for bad faith disapproval of a project. (§ 65589.5, subd. (l); Stats. 2017, ch. 378, § 1.5.) And it increased the burden of proof required for a finding of adverse effect on public health or safety. (§ 65589.5, subd. (j)(1); Stats. 2017, ch. 378, § 1.5.)

Most importantly for our purposes, the Legislature added subdivision (f)(4), which provides, “For purposes of this section, a housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, and in conformity.” (Stats. 2017, ch. 378, § 1.5.)

Finally, the Legislature added this interpretative gloss on the statute: “It is the policy of the state 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), Stats. 2017, ch. 378, § 1.5.)

In this case, the City made no findings regarding an adverse impact on public health or safety, and no party contends this portion of the statute is relevant to our analysis. Also not at issue are separate provisions of the HAA addressing below-market-rate housing and emergency shelters. (See, e.g., § 65589.5, subds. (d), (h)(3), (k)(1)(A)(ii).) The key provision for our review is subdivision (j), which now provides that in the absence of health and safety findings a local agency may not disapprove or reduce the density of a proposed housing development that “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.” (§ 65589.5, subd. (j)(1).)

II. The City’s Rejection of the Project Violated the HAA

A. Standard of Review

CARLA brings this petition for administrative mandamus under Code of Civil Procedure section 1094.5, seeking to enforce the HAA. (See

§ 65589.5, subd. (m).) Our task is therefore to determine whether the City “proceeded in the manner required by law,” with a decision supported by the findings, and findings supported by the evidence; if not, the City abused its discretion. (Code Civ. Proc., § 1094.5, subd. (b); *Honchariw, supra*, 200 Cal.App.4th at p. 1072.)

To the extent our decision rests on factual issues, our scope of review is identical to that of the trial court. We examine the findings of the public entity itself and the relevant materials in the administrative record to determine whether the decision should be upheld, reviewing the City’s action, and not the trial court’s decision. (See *Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 937–938.) However, instead of asking, as is common in administrative mandamus actions, “whether the City’s findings are supported by substantial evidence” (*ibid.*), we inquire whether there is “substantial evidence that would allow a reasonable person to conclude that the housing development project” complies with pertinent standards. (§ 65589.5, subd. (f)(4).) As the public entity that disapproved the project, the City bears the burden of proof that its decision conformed to the HAA. (§ 65589.6.)

Questions of law, including the proper interpretation of a statute, we review independently, although we may take into account an agency’s interpretation of its own rules in appropriate circumstances. (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 8 (*Yamaha*).) Where the constitutionality of a statute is challenged, we bear in mind that “a statute, once duly enacted, ‘is presumed to be constitutional,’ ” such that any “ ‘[u]nconstitutionality must be clearly shown.’ ” (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086.)

B. General Plan and Multifamily Design Guidelines

One of the goals enumerated in the housing element of the City's general plan is to "[m]aintain the character and physical quality of residential neighborhoods." To that end, the housing element establishes a policy of "[r]eview[ing] development proposals for conformance to the City's multi-family design guidelines for sites located in areas that contain substantial numbers of single-family homes." "[N]ew multi-family projects in areas having a predominance of single-family residences should be of a scale and include design features which are compatible with surrounding single-family homes," the housing element directs, "while maintaining housing affordability as a major goal."

The urban design element of the general plan also notes that the City adopted the Guidelines because "the character of the neighborhood," including the scale of its buildings, is important in a residential area. To maintain and enhance the character of residential neighborhoods, the urban design element includes a policy to "[e]nsure that new multi-family developments substantially conform to the City's Multi-family and Small Lot Multi-family Design Guidelines. . . ."

The portion of the Guidelines with which the City found the project inconsistent addresses building scale. The Guidelines provide, under the topic "Height," as follows: "Most multi[-]family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, *a transition or step in height is necessary*. Any portion of a building constructed taller than surrounding structures should have the taller section built to a width that acknowledges the traditional building width pattern of the City—generally 30 to 50 feet in width." The

design objectives listed for this guideline are, “Avoid changes in building height greater than one story from adjacent structures. *If changes are greater, setback upper floors to ease the transition,*” and “Construct taller portions at traditional building widths, generally 30 to 50 feet wide.” (Partial italics omitted.)

An accompanying illustration shows an appropriate design in which “[u]pper floors of the multi[-]family building are stepped[]back where adjacent to an existing building that is two stories lower.” In that illustration, no adjacent portion of the larger building is more than one story higher than the smaller existing building. An illustration of an inappropriate design shows a two-story house next to a box-like four-story multifamily building.

C. Application of the HAA

The pivotal question in our application of the HAA is whether the Guidelines qualify as “applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards,” which would allow the City to disapprove the project if they are not satisfied. (§ 65589.5, subd. (j)(1).) As to the portion of the Guidelines that addresses height, we conclude the Guidelines do not qualify as objective for purposes of the HAA.

As an initial matter, the parties disagree on the standard of review. The City urges that the issue be treated as one of law, subject to our de novo review as an issue of statutory interpretation but with deference to the City in interpreting its own rules. CARLA urges us to apply, to legal as well as factual issues, subdivision (f)(4)’s mandate that a project is deemed consistent with applicable standards if there is substantial evidence allowing a reasonable person so to conclude.

We model our answer on the decision of our colleagues in Division Two of this court in *Ruegg*. In construing a different statute intended also to restrict local authorities' ability to deny applications for new housing, they considered whether a project “ ‘would require the demolition of a historic structure that was placed on a national, state, or local historic register.’ ” (*Ruegg, supra*, 63 Cal.App.5th at p. 301, quoting § 65913.4, subd. (a)(7)(C).) This question, the *Ruegg* court concluded, had both a legal and a factual component: whether the type of object at issue, an ancient shellmound, was a “ ‘structure’ ” within the meaning of the statute was a question of statutory interpretation to be reviewed de novo; whether a shellmound existed on the project site was a question of fact. (*Ruegg*, at p. 301.)

Similarly here, we conclude that whether the height standards in the Guidelines are “applicable” and “objective” for purposes of the HAA is a question of law; whether the project is consistent with those standards is one of fact, to be evaluated under the standards of subdivision (f)(4). The questions of whether the height guidelines are “applicable” and “objective” require us to discern the meaning and legal effect of the HAA and the Guidelines, so they are questions of statutory interpretation we will review independently. (*Yamaha, supra*, 19 Cal.4th at p. 8.)

The first issue—applicability—is straight-forward. Relying on *Honchariw*, CARLA argues that to fall within the scope of section 65589.5 a standard must be *part of* a city’s “general plan, zoning, and subdivision standards and criteria.” (§ 65589.5, subd. (j); *Honchariw, supra*, 200 Cal.App.4th at p. 1077.) We are unpersuaded. The Guidelines, adopted in November 1994, recite that they are intended to implement multiple general plan policies, including a general plan directive to “[p]repare specific guidelines for multi[-]family development that address the preservation and

enhancement of neighborhood character,” including by addressing “building scale.” The applicable version of the City’s general plan, mostly recently amended in 2015, specifically refers to the Guidelines in its housing and urban design elements, effectively incorporating them by reference. In the circumstances, we conclude the Guidelines fall within the scope of “general plan . . . standards and criteria, including design review standards.”

(§ 65589.5, subd. (j)(1).)

CARLA fares better with its second argument, that the Guidelines do not provide *objective* standards for purposes of the HAA. At the time of the events at issue here, the HAA did not define the term “objective,” so we look to the ordinary meaning of that term. One dictionary defines “objective” as “expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations.” (Merriam-Webster’s Collegiate Dict. (10th ed. 2001) p. 799.) The definition added to the HAA effective January 1, 2020 is a longer version of the same idea. The HAA now defines “objective” as “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.” (§ 65589.5, subd. (h)(8), added Stats. 2019, ch. 665, § 3.1.) **Using either of these definitions, a standard that cannot be applied without personal interpretation or subjective judgment is not “objective” under the HAA.**

Further guidance is found in *Honchariw*, which looked at the Legislature’s purpose in adding the word “objective” to the HAA. *Honchariw* explains that an amendment made in 1999 to subdivision (j) of section 65589.5, replacing an earlier reference to “‘applicable general plan, zoning, and development policies’” with “‘applicable, *objective* general plan and

zoning standards and criteria,’ ” “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’) to exempt a proposed housing development project from the reach of subdivision (j).” (*Honchariw, supra*, 200 Cal.App.4th at pp. 1076–1077.) On their face, the Guidelines’ provisions regarding the relative height of multifamily buildings and adjacent single-family houses are certainly less vague or subjective than a term such as “suitable.” But, in our view, they nevertheless require personal interpretation or subjective judgment that may vary from one situation to the next.

First, the language of the Guidelines is ambiguous as to whether a proposed building *must* incorporate a stepback in height when a project is taller than adjacent buildings. The applicable portion of the Guidelines states that if height varies by more than one story between buildings, “a transition *or* step in height is necessary.” (Italics added.) One reasonable reading of this language is that a transition that is something *other* than a step in building height may be acceptable. Indeed, to read it otherwise would render the words “transition or” superfluous.

An interpretation that allows for a transition other than one accomplished by a step in height is consistent with the City’s consultant’s assessment—which planning staff appear originally to have shared—that trees between the project and the nearest house on Engle Road and a nearby street tree would “substantially mitigate [the] height differential.” The project calls for four large trees—each depicted as almost two stories tall—to run along the property line between the project and its nearest Engle Road neighbor. Can large trees provide an adequate “transition or step in height”? Answering this question not only allows, but requires, interpretation or

judgment. Under the planning staff's original interpretation of the Guidelines, the question is treated as one of design choice, which may be resolved in myriad ways depending on what form the designer views as most "compatible" with adjacent structures and "visually interesting."

A similar question arises with regard to trellises. The project includes, attached to the building along the Engle Road side, a trellis or arbor that looks to be about 10 feet wide and that creates a covered walkway alongside the building, next to the row of new trees. This trellis approximates the first floor in height, and a series of smaller trellises, each appearing to be two to three feet wide, also attaches to the building over windows at the level of the second story. Since these trellises are affixed to or abut the building's facade, perhaps the project's footprint includes the trellises, such that the building steps back from that footprint at the second and third floors on the Engle Road side. But if the trellises do not create a setback, do they nonetheless create an adequate "transition"? Again, there is no clear answer to this interpretive question, and reasonable designers may disagree on the most satisfactory solution.

Second, to the extent the Guidelines do require a setback in building height excluding trellises, the Guidelines offer no guidance on how extensive such a setback must be. Where a setback is required, it is unclear how far back upper floors of the building must step. In response to a question at oral argument, counsel for the City assessed a six-inch setback of upper floors as sufficient for compliance with the Guidelines, although such a small setback would provide a less robust visual transition to the single-story home next door than would the much larger trellises and trees on which the project applicant relies. Also unclear is how far along a building's aspect a setback must run. Is the City concerned primarily with street view, or should a

stepback run the length of the building? The Guidelines do not address this issue. Then there is the question of how many floors must be stepped back when a four-story project is adjacent to a single-story home. On this question, the City itself has taken different positions during the course of this dispute. The City Attorney who explained the stepback requirement to the City Council appears to have said that the Guidelines require *every* floor above the first to be stepped back along the Engle Road side, which is the position the City defended in its briefing in the trial court. In this court, however, the City maintains that the Guidelines require the third and fourth floors—but not the second—to be stepped back.

The City is certainly capable of setting more specific standards, as the Guidelines themselves show. The requirements for setbacks from property lines specify to the foot the required setbacks, and they further provide different setback standards where buildings are more than three stories in height, are adjacent to properties zoned R1 or R2, or are on specified blocks of El Camino Real. There are even more detailed standards for setbacks from property lines and stepbacks in height in the Gateway area of the City; for instance, “South side of Third Avenue and Fourth Avenue: Buildings shall be set back a minimum of 15’ to a maximum of 20’ from the Fourth Avenue property line for at least 60 % of the building frontage. *Portions of the building over 30’ [in] height shall be stepped back 8’ minimum.*” (Italics added.) Particularly relevant to this case is the specific height standard for R4 zoning at the project site, which according to a City staff report allows a maximum building height of 45 feet. The building here tops out at 38 feet, demonstrably within that quantitative limit.

The Guidelines standard on height, by contrast, provides no such specificity, and on its face requires interpretation and subjective judgment.

→ This is no knock on the Guidelines. They were adopted in 1994, before the HAA required objective criteria, when Guidelines could appropriately leave such ambiguities to the discretionary judgment of staff and elected officials. In the exercise of such discretion the City’s planning staff and its experienced consultant originally concluded the project complied with the Guidelines; exercising *their* discretion, the Commission and City Council later determined that it did not. The problem for the City is that since 1999, the

→ HAA has required that a City rely only on objective, not discretionary, criteria in rejecting applications to build new housing.

The Legislature insists on objective criteria so as to ensure “reasonable certainty . . . to all stakeholders” about the constraints a municipality will impose. (Assem., 3d reading analysis of Assem. Bill No. 1515, as amended May 1, 2017, p. 2.) Reasonable certainty is important to Department of Housing and Community Development officials, so they understand the impact of a locality’s housing element in deciding whether to approve it. Reasonable certainty is important to neighbors, who want to know how big a building can be erected next door, and it is important to those who build housing, so they know what size project can be approved for a particular site. Yet reasonable certainty in application—that is, objectivity—is precisely the test that the height provisions of the Guidelines fail.

→ The City protests that an argument over interpretation does not mean the Guidelines lack objectivity. In another case posing a discrete interpretive issue that might be true, but here the ambiguities in the Guidelines’ height standard are pervasive and not amenable to objective resolution. The problem is fundamentally different from the narrow interpretive issue posited by amici: a quantitative ordinance requiring roads to be designed to support a load of “‘25 ton[s],’” which leaves to interpretation whether a short

ton, a long ton, or a metric ton is intended. A definitional question of this type can be resolved objectively (e.g., by reference to common usage in a community or trade), leaving room for a single standard, knowable in advance, to be applied to all. The standards imposed by the height Guidelines, by contrast, are too ambiguous to be similarly susceptible to objective interpretation.

To resolve the pervasive ambiguities, the City asks us to defer to its interpretation of its own Guidelines. As the City points out, where the meaning of an enactment is at issue, the interpretation of an agency charged with enforcing it is one tool available to the court as it exercises its independent judgment (*Yamaha, supra*, 19 Cal.4th at pp. 6–8; *Ocean Park Associates v. Santa Monica Rent Control Bd.* (2004) 114 Cal.App.4th 1050, 1062), and in appropriate situations we may accord “‘great weight’” to the agency’s construction (*Yamaha*, at p. 12; *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 911 (*Boling*)). This rule applies to a city’s interpretation of its own ordinances. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193.) Crucially, however, such weight is given to *consistent* administrative construction of an enactment, particularly when the agency’s interpretation is “of long standing.” (*Mason v. Retirement Board* (2003) 111 Cal.App.4th 1221, 1228, citing *Yamaha, supra*, 19 Cal.4th at p. 13; see *Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 278.) “[L]awmakers are presumed to be aware of long-standing administrative practice and, thus, . . . the failure to substantially modify a provision[] is a strong indication the administrative practice was consistent with underlying legislative intent.” (*DeYoung v. City of San Diego* (1983) 147

Cal.App.3d 11, 18–19, disapproved on another ground in *Yamaha, supra*, 19 Cal.4th at p. 15.)

→ This principle of deference does not assist the City here because the record does not show a long-standing and consistent interpretation of the Guidelines’ requirement for “a transition or step in height.” Rather, the record suggests the opposite. In its initial design review, the planning staff concluded that, with certain modifications, the project satisfied the Guidelines. Staff reached this conclusion *after* the design review consultant for the City reported, in a letter attached to the staff report, that the height differential at the portion of the project that was not stepped back adjacent to the Engle Road house was “problematic[]” but would be substantially mitigated by the trees at the property line and the street trees. Thus, fully aware of the issue, the City’s planning staff nevertheless assessed that the project was consistent with the Guidelines, and so reported to the Commission. The record does not indicate the Commission disagreed with this assessment when it directed staff to prepare findings to deny the project. Rather, the commissioners expressed more general concern about the size and density of the project in relation to the neighboring residences. Staff pointed to an inconsistency with the height Guideline for the first time only *after* the Commission decided to deny the application. This record belies the notion that the City has consistently construed the height standards in the manner it now urges.

The City also argues that deference is appropriate because of its greater familiarity and expertise in applying the Guidelines. In an appropriate case, courts “are inclined to defer to a government entity’s interpretation of its own regulation ‘ “since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical

implications of one interpretation over another.” ’ ’ (*J. Arthur Properties, II, LLC v. City of San Jose* (2018) 21 Cal.App.5th 480, 486; see also *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305 [deferring to city’s determination of a project’s consistency with its general plan “because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity”]; *Boling, supra*, 5 Cal.5th at p. 911 [affording greater weight to an agency’s construction of a statute “ ‘when “ ‘the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion’ ” ’ ”].) Such deference makes sense where a local agency must weigh and balance competing interests in applying policies that require broad discretion. (*East Sacramento Partnerships*, at p. 305.) But land use decisions under the HAA are different. **Precisely because the HAA cabins the**

→ **discretion of a local agency to reject proposals for new housing, it is inappropriate for us to defer to the City’s interpretation of the Guidelines.**

We must engage in “ ‘more rigorous independent review . . . in order to prevent the City from circumventing what was intended to be a strict limitation on its authority.’ ” (*Ruegg, supra*, 63 Cal.App.5th at p. 299, quoting *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 669–670.)

The City’s request that we defer to its interpretation of the Guidelines
→ serves as a tacit acknowledgement that the height Guidelines require something other than objective interpretation. But the HAA requires municipalities to apply standards that are both “objective” and “in effect at the time that the application was deemed complete” (§ 65589.5, subd. (j)(1)),

not to apply standards that are rendered objective only by adding an after-the-fact interpretive gloss.

Our conclusion that the applicable portion of the Guidelines does not provide an objective standard is confirmed by considering subdivision (f)(4) of the HAA, which complements and reinforces subdivision (j)'s objectivity requirement. Added in 2017 as the Legislature sought to strengthen the HAA, subdivision (f)(4) deems a project consistent with applicable objective standards “if there is substantial evidence that would allow a reasonable person to conclude that the [project] is consistent, compliant, or in conformity” with such standards. (§ 65589.5, subd. (f)(4).) The City sees all manner of mischief in this standard—as we will see shortly in the next section—but where a standard is truly objective, in that it is “*uniformly verifiable* by reference to an external and uniform benchmark” (§ 65589.5, subd. (h)(8), italics added), there is little to no room for reasonable persons to differ on whether a project complies with such a benchmark. Subdivision (f)(4) is intentionally deferential to housing development. It is also an excellent backstop to ensure that the standards a municipality are applying are indeed objective.

Applying subdivision (f)(4) in this case leads to the conclusion that the City violated the HAA for much the same reason as we have found the pertinent Guideline not to be objective. A reasonable person could read the Guideline to allow a “transition” comprised of trees rather than a stepback in building height, or could find a sufficient stepback where the building recedes from a project footprint that includes the ground-floor trellises. Reasonably concluding that the proposed landscaping and trellises do provide the requisite transition, the City’s planning staff and consultant originally found the project consistent with the Guidelines, while the Commission and City

Council later determined, again reasonably, that the project does not comply because of an insufficient setback of (at least) the third floor. The plausibility of both views demonstrates that the height guidelines are not objective *and* that a reasonable person could conclude the project satisfies them. Whether one focuses on the first, subdivision (j)(1) question or on the second, applying subdivision (f)(4), the effect is the same.

To the extent the question of whether the City denied the project for failure to conform to an objective standard is close, recall that the City has the burden to show its decision conformed to the HAA (§ 65589.6), and that the Legislature has declared the HAA must be interpreted and implemented to “afford the fullest possible weight” to the approval of housing (§ 65589.5, subd. (a)(2)(L)). Although the HAA should not be construed to prohibit local governments from requiring compliance with “objective, quantifiable, written development standards” that are consistent with meeting the jurisdiction’s share in regional housing need (§§ 65589.5, subd. (f)(1), 65583), the criteria at issue here are neither objective nor quantifiable. We therefore conclude that the City did not “proceed[] in the manner required by law” in denying approval of the project based on its interpretation of the height Guideline, and the trial court erred in determining otherwise. (Code Civ. Proc., § 1094.5, subd. (b).)

In reaching this conclusion, we emphasize two things. First, the HAA does not prevent local agencies from establishing and enforcing appropriate design review standards. But those standards must be objective and they must be in place at the time an application is complete. (§ 65589.5, subd. (j)(1).) Second, even with respect to standards that are not objective, the HAA does not bar local agencies from imposing conditions of approval; rather, it prohibits conditions of approval “that the project be developed *at a lower*

density,” unless public health or safety findings are made. (§ 65589.5, subd. (j)(1), italics added.) Thus, nothing in our opinion prevents the City from imposing appropriate conditions of approval to mitigate any effects the height differential may have on the surrounding neighborhood, as long as those conditions do not reduce the density of the project.

III. Constitutionality of HAA

Having concluded the City abused its discretion in denying the project based on inconsistency with the height guidelines, we must reverse unless persuaded by the City’s arguments that the HAA transgresses provisions of the California Constitution. We consider the trial court’s ruling that the HAA in general and subdivision (f)(4) in particular violate the home rule doctrine for charter cities, and the prohibition on delegation of municipal functions. We also consider the City’s contention that subdivision (f)(4) would result in a meaningless, predetermined hearing that does not comport with due process.

In so doing, we reject out of hand the City’s contention that CARLA waived its defense of the HAA’s constitutionality when it failed to address this issue in the trial court. Even if CARLA’s failure to anticipate and respond to a constitutional challenge that was neither pleaded nor argued could somehow oblige us to acquiesce in striking down a duly enacted statute—a proposition absurd on its face—the trial court’s cryptic invitation to address the enforceability of subdivision (f)(4) said nothing about the enforceability of the HAA as a whole and made no reference to the constitutionality of the statute. There was no waiver of the issue we now consider, and in any event the Attorney General has, as authorized by statute, intervened to defend the HAA’s constitutionality. (Code Civ. Proc., §§ 664.5, subd. (e), 902.1.)

A. Home Rule

California's Constitution authorizes charter cities to "govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 555; Cal. Const., Art. XI, § 5.) As to truly municipal affairs, "charter cities are 'supreme and beyond the reach of legislative enactment.'" (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 (*California Fed. Savings*).)

To determine whether the Legislature may exert control over the actions of a charter city despite its right to home rule, we apply a four-part test: First, we "determine whether the city ordinance at issue regulates an activity that can be characterized as a 'municipal affair.' [Citation.] Second, the court 'must satisfy itself that the case presents an actual conflict between [local and state law].' [Citation.] Third, the court must decide whether the state law addresses a matter of 'statewide concern.' [Citation.] Finally, the court must determine whether the law is 'reasonably related to . . . resolution' of that concern [citation] and 'narrowly tailored' to avoid unnecessary interference in local governance [citation]. 'If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a "municipal affair" pro tanto and the Legislature is not prohibited by article XI, section 5(a) from addressing the statewide dimension by its own tailored enactments.'" (*City of Vista*, at p. 556, quoting *California Fed. Savings*, at pp. 16, 17, 24; accord, *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 698–699 (*Anderson*).) In this analysis, " 'the question of statewide concern is the bedrock inquiry through which the conflict between state and

local interests is adjusted.’” (*Anderson*, at p. 699.) “[W]e exercise our independent judgment in interpreting the state law to identify whether it addresses a matter of statewide concern and can be applied constitutionally to the City.” (*Id.* at pp. 704–705.)

The City does not defend the court’s sweeping rejection of the HAA, limiting its constitutional challenge instead to what it characterizes as CARLA’s and the Attorney General’s “extreme” interpretation of subdivision (f)(4). Despite the parties’ failure to defend the trial court’s conclusion that the HAA as a whole is unconstitutional, this was arguably an alternate basis for the trial court’s decision so we will consider the constitutionality of the HAA as a whole—its mandate that local governments rely only on objective standards to deny an application and the reasonable person standard of subdivision (f)(4).

As to the first prong of the home rule test, the parties agree that planning and zoning laws are a traditional municipal concern. (*Ruegg, supra*, 63 Cal.App.5th at p. 311; *Center for Community Action & Environmental Justice v. City of Moreno Valley* (2018) 26 Cal.App.5th 689, 704–705)

As to the second prong, to the extent City ordinances allow proposed housing developments to be rejected based on standards that are not objective, municipal law appears directly to conflict with the HAA. (See *Ruegg, supra*, 63 Cal.App.5th at p. 314; cf. *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 270–271 [finding conflict where statute directly restricted regulation of city police force].) For purposes of this analysis, we will assume an actual conflict between the HAA and the City’s design review standards.

As to the third step, the parties agree that the provision of housing is a matter of statewide concern. The term “‘statewide’ refers to all matters of

more than local concern and thus includes matters the impact of which is primarily regional rather than truly statewide.” (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.) The City argues, however, that subdivision (f)(4) of the HAA does not itself address a matter of statewide concern because California’s housing crisis has other causes in addition to local governments denying approval for housing developments—causes including high construction costs, a shortage of construction labor, and delays caused by the California Environmental Quality Act (Pub. Res. Code, § 21000 et seq.; CEQA). And, the City contends, CARLA and the Attorney General have not shown that the housing crisis is caused by local governments’ actions in denying applications for housing projects. We find the City’s argument unpersuasive.

The Legislature has declared the shortfall in housing in California to be a matter of statewide importance (§ 65589.5, subds. (a)(1) & (2), (g)), and in other contexts both our high court and appellate courts have acknowledged the statewide nature of the interest in providing a stock of housing sufficient to meet the needs of all Californians. (See, e.g., *San Jose, supra*, at p. 441; *Ruegg, supra*, 63 Cal.App.5th at p. 312, *Anderson, supra*, 42 Cal.App.5th at pp. 708–709, 711; *Buena Vista Garden Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 307.) The parties and amici have submitted abundant legislative history and other materials that reinforce the conclusion that a shortage of housing in our state has led to escalating costs that for many have rendered adequate shelter unaffordable.

The City’s argument looks past the statewide concern with a shortage of housing to focus instead on the means the HAA employs to address that concern (i.e., limits on local governments’ ability to disapprove or restrict projects). The City contends there has been no showing these actions by local

governments are a matter of statewide concern, but the court in *Ruegg* recently rejected a similar argument. A city there argued that the statewide interest in increasing affordable housing does not “ ‘translate into a statewide interest in eliminating local landmark preservation authority.’ ” (*Ruegg, supra*, 63 Cal.App.5th at p. 313.) Our colleagues rejected this theory as an “inapposite” framing of the issue, holding that a statute that streamlines approval of certain multifamily housing projects with below-market-rate units does not impermissibly interfere with a city’s “ ‘home rule’ authority over historic preservation.” (*Ruegg*, at pp. 310–315.) That the Legislature could have increased affordable housing without undermining local authority over historical preservation was immaterial: “the constitutionality of [the statute] does not turn on there being a statewide interest in limiting local historical preservation authority but rather on whether the statewide interest in increasing affordable housing sufficiently justifies the legislation’s impact on that authority.” (*Id.* at p. 313.) Indeed, “historical preservation is precisely the kind of subjective discretionary land use decision the Legislature sought to prevent local government from using to defeat affordable housing development.” (*Id.* at p. 315.) Similarly here, we consider not whether there is a statewide interest in limiting local governments’ authority to disapprove projects that comply with objective standards, but whether there is a statewide interest in increasing the state’s housing supply. As our high court has explained, our inquiry is not whether the Legislature has enacted “prudent public policy” or whether its enactments will be “advisable or effective”; rather, it is whether the problem it addresses “is of sufficient extramural dimension to support legislative measures reasonably related to its resolution.” (*California Fed. Savings, supra*, 54 Cal.3d at pp. 23–24.)

We have no doubt that this standard is met. The Legislature’s findings and the mandates of the HAA itself confirm that the purpose of the statute is to address a matter of statewide concern. When extending the statute to reach charter cities in 1990, the Legislature found that actions and policies of local governments limiting the approval of affordable housing were a partial cause of the “excessive cost of the state’s housing supply.” (Former § 65589.5, subd. (a)(2); Stats. 1990, ch. 1439, § 1.) In 2001, the Legislature deleted the word “affordable” from this finding, concluding that local governments’ actions in limiting the approval of “housing” in general were a partial cause of its excessive cost. (Former § 65589.5, subd. (a)(2), now § 65589.5, subd. (a)(1)(B); Stats. 2001, ch. 237, § 1.) The Legislature reinforced this finding in the 2017 amendments, which declared that the Legislature intended in enacting and expanding the HAA to increase the approval of new housing by curbing local governments’ ability to deny or reduce the density of housing projects. (§ 65589.5, subd. (a)(2)(J) & (K); Stats. 2017, ch. 378, § 1.5.) Although we “‘may not simply abdicate to the Legislature’ [citation] the determination of statewide concern and the corresponding assignment of power between local and state government,” we nevertheless “‘defer[] to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution.’” (*Anderson, supra*, 42 Cal.App.5th at pp. 707; see *California Fed. Savings, supra*, 54 Cal.3d at p. 24; *Ruegg, supra*, 63 Cal.App.5th at p. 312.) The City has done nothing to cast doubt on these legislative findings, which are well supported by case law. The HAA, which has the express purpose of ameliorating the housing crisis and seeks to accomplish this goal by increasing approval of housing developments (§ 65589.5, subd. (a)(2)(K)),

“patently addresses a matter of statewide concern.” (See *Ruegg, supra*, 63 Cal.App.5th at p. 312.)

In the fourth and final prong of our inquiry, we decide whether the statute is “ ‘ “reasonably related to . . . resolution” ’ of the identified statewide concern [citation] and is ‘ “narrowly tailored” to avoid unnecessary interference in local governance.’ ” (*Anderson, supra*, 42 Cal.App.5th at pp. 716–717.) At the outset, we agree with the Legislature that limiting local governments’ ability to deny new development based on subjective criteria is reasonably related to providing additional housing. (§ 65589.5, subds. (a)(1)(B), (a)(2)(J) & (K).) And we also have no doubt that the statute appropriately limits its incursions into municipal authority. (See *Anderson*, at pp. 716–717.) The HAA leaves local governments free to establish and enforce policies and development standards appropriate to local circumstances, as long as those policies and standards are consistent with meeting the jurisdiction’s share of the regional housing need and, if used to deny or reduce the density of housing developments, are *objective* so that their application is predictable. (§ 65589.5, subds. (f)(1) & (j).)

The HAA’s reach is further narrowed by other provisions. Local governments are not barred from imposing conditions of approval that do *not* reduce density. (§ 65589.5, subd. (j)(1).) And the HAA includes an escape valve that allows municipalities to deny a project that would have an unavoidable adverse impact on health and safety. (§ 65589.5, subd. (j)(1)(A) & (B).) These provisions indicate not only that the HAA is reasonably related to the statewide problem the Legislature sought to redress but also that it “ ‘limit[s] the incursion into [the] city’s municipal interest’ ” so as to be narrowly tailored for purposes of the home rule analysis. (*Anderson, supra*, 42 Cal.App.5th at pp. 716–717.)

The City asserts that subdivision (f)(4) is not narrowly tailored to the extent it is interpreted to allow the local agency's judgment to be replaced with "that of any person who can provide evidence of consistency"; this, the City urges, impinges on the local government's "core functions" of hearing and weighing evidence and deciding by majority vote whether a project is consistent with legal requirements. We disagree that a proper reading of subdivision (f)(4) leads to a conclusion the HAA is not narrowly tailored. The effect of subdivision (f)(4) is simply to hold local governments to a standard of objectivity in their decisionmaking, such that if a *reasonable* person could find a housing development in compliance, it will be so deemed. If a municipality wishes to enforce limitations on housing developments, it must promulgate standards that are not so malleable that reasonable minds could differ on whether they are met. In short, the HAA does not wrest control from local governments so much as require them to proceed by way of clear rules adopted in advance, rather than by ad hoc decisions to accept or reject proposed housing.

In finding the HAA not narrowly tailored, the trial court suggested an appropriate limitation would be to apply the statute only where the administrative record showed objective evidence of bad faith by the public agency. But the parties have made no showing that this state's insufficient supply of housing derives substantially from bad faith actions by cities and counties, and we will not presume that municipalities routinely proceed in bad faith when they apply their development laws and standards. Individual jurisdictions may well make decisions in good faith that nevertheless contribute to the collective shortfall in housing. It is to this collective action problem that the HAA is addressed, and it is because the Legislature concluded that earlier versions of the statute were not having a sufficient

impact that it amended the statute repeatedly. (See, e.g., Stats. 2017, ch. 378, § 1.5.) Given the extent and intractability of the housing shortfall, we see nothing improper in the Legislature addressing it on a statewide basis, without limiting the statute to local agencies that act in bad faith. We reject the trial court’s proposed limitation.

B. Delegation of Municipal Functions

California’s Constitution prohibits the Legislature from “delegat[ing] to a private person or body power to . . . perform municipal functions.” (Cal. Const., Art. XI, § 11, subd. (a).) The City contends, and the trial court apparently agreed, that subdivision (f)(4) violates this prohibition. The City’s theory is that subdivision (f)(4) would allow *anyone*—even a private person such as a project proponent—to place into the record evidence indicating a project is consistent with objective standards and thereby force a local agency to approve the project. This, the City argues, would divest local authorities of final decisionmaking control in violation of the prohibition on delegation of municipal functions. (Citing *Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 155.)

This argument is unpersuasive because subdivision (f)(4) does not “divest the [City] of its final decisionmaking authority.” (*County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 28; accord, *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 340.) As we have already explained, nothing in the HAA prevents cities from establishing and enforcing objective land use and design standards that are consistent with their other obligations. (See § 65589.5, subds. (f)(1) & (j).) Although subdivision (f)(4) of the HAA lowers the burden to show a project is consistent with applicable objective standards, the statute cedes municipal authority to no private person. (Cf. *County of Riverside v. Superior Court* (2003) 30

Cal.4th 278, 283, 294 [Legislature impermissibly delegated authority to private person when it required local agencies to submit to private arbitration].) A city's governing body retains broad authority, subject to judicial review, to exercise decisionmaking authority: to determine whether there is substantial evidence from which a reasonable person could conclude the project is consistent with the city's applicable objective requirements; to deny or reduce the density of a project that does not meet such standards or that causes an unavoidable adverse impact on public health or safety; and to impose conditions of approval that do not reduce the project's density where applicable objective standards are met. (§ 65589.5, subd. (f)(4) & (j)). Viewing subdivision (f)(4) in the context of the entire HAA, we find no violation of the municipal nondelegation doctrine.

We are untroubled by the City's suggestions that a governing body would be forced to approve a project if a proponent succeeds in "dig[ging] up" "self-serving evidence," regardless of its weight, and that if a single staff member or member of the governing body opines that a project complies with objective standards then the local agency would be compelled to find it so. The usual meaning of "substantial evidence" is "evidence that is 'of ponderable legal significance,' 'reasonable in nature, credible, and of solid value,' and ' "substantial" proof of the essentials which the law requires in a particular case.' " (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1006.) In determining whether evidence is substantial, the test is whether it is " " "reasonable for a trier of fact to make the ruling in question in light of the whole record." ' ' " (*In re Yolanda L.* (2017) 7 Cal.App.5th 987, 992; see Code Civ. Proc., § 1094.5, subd. (c) [in administrative mandamus action, court reviews whole record to determine whether findings are supported by substantial evidence].) And subdivision (f)(4) of the HAA employs the

objective standard that evidence must be such as to allow a *reasonable person* to conclude the project is compliant. (See *Speier v. The Advantage Fund, LLC* (2021) 63 Cal.App.5th 134, 147.) There is thus no basis for concern that subdivision (f)(4) would require project approval based solely on the unsupported opinion of a single person, or on evidence that a reasonable person would not find credible and persuasive.

In short, the City's claim that subdivision (f)(4) impermissibly delegates municipal authority fails because the HAA leaves to the public agency final authority to approve, condition, or deny a project.

C. Due Process

The City also contends that subdivision (f)(4) violates the due process rights of neighboring landowners by depriving them of a meaningful opportunity to be heard before a housing development is approved.

Land use decisions that “substantially affect the property rights of owners of adjoining parcels may constitute deprivations of property for purposes of procedural due process” (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 853), and those landowners are entitled to notice and an opportunity to be heard before a project's approval (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616; *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 570). Due process requires an opportunity to be heard “ ‘ ‘ ‘at a meaningful time and in a meaningful manner.’ ” ” (*Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104, 1126 (*NRDC*), citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) However, “action involving only the nondiscretionary application of objective standards” does not entitle neighboring landowners to these protections. (*Horn*, at p. 616.)

The City argues that subdivision (f)(4) renders local government review a useless exercise because if anyone submits evidence that a project is consistent with applicable standards the project is “‘deemed’” consistent and must generally be approved. The City points to *NRDC*, in which one party contended that a substantial evidence standard, while appropriate for judicial review, was inappropriate to the *initial* decision of an agency, because “if the petitioner adduces substantial evidence it wins, no matter how compelling the contrary evidence, [which] is the antithesis of due process.” (*NRDC, supra*, 28 Cal.App.4th at p. 1126.) *NRDC* is not persuasive because the court merely noted this argument, observing there was no need to address it since the court’s interpretation of the relevant statute avoided the issue.⁴ (*NRDC*, at p. 1126; Fish & G. Code, § 2074.2.) Moreover, *NRDC* did not consider—as we do here—the proper procedure when the issue is whether *objective* standards are met.

Even assuming due process protections apply to a municipality’s determination whether a project complies with objective standards under subdivision (f)(4), we see no violation here. As we have already discussed, the substantial evidence standard requires evidence that is “‘of ponderable legal significance,’ ‘reasonable in nature, credible, and of solid value’”

⁴ We note that it is not unheard of for agencies to be required to use a substantial evidence standard in making decisions. CEQA requires the preparation of an environmental impact report if “substantial evidence supports a fair argument” that a proposed project may have a significant effect on the environment, even if there is also substantial evidence it will not. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The City seeks to distinguish this rule as applying only to the initial decision whether to prepare an environmental impact report, not to the final decision whether to approve a project. We do not give undue weight to the CEQA analogy, but it shows that in appropriate circumstances agencies may be required to make decisions on a substantial evidence standard.

(*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1006) in light of the whole record (*In re Yolanda L.*, *supra*, 7 Cal.App.5th at p. 992). Nothing in subdivision (f)(4) prevents project opponents from seeking to demonstrate that the evidence of compliance does not meet this standard. Nor does the statute prevent neighbors from presenting, or the agency from considering, evidence that conditions of approval that do not reduce density could mitigate undesirable effects on neighbors, or that the project would have an unavoidable “specific, adverse impact upon the public health or safety” if approved at the proposed density. (See § 65589.5, subd. (j).) Subdivision (f)(4) may affect which arguments will carry the day, but it does not deprive a project’s opponents of a meaningful opportunity to be heard.

We return to the history of the HAA. As the Legislature has steadily strengthened the statute’s requirements, it has made increasingly clear that those mandates are to be taken seriously and that local agencies and courts should interpret them with a view to giving “the fullest possible weight to the interest of, and the approval and provision of, housing.” (§ 65589.5, subd. (a)(2)(L).) The HAA is today strong medicine precisely because the Legislature has diagnosed a sick patient. We see no inconsistency between the provisions of the HAA and the California Constitution.

VI. Further Issues

In denying the application, the City pointed to no assertedly objective standard that the project did not meet, other than the height Guideline. In the trial court, the City argued as a separate basis for denying the writ that the project violated the City’s objective standards for the dimensions of parking spaces. On appeal, the City does not contend we may affirm on this theory. Rather, it argues that if a writ of mandate issues, the City should be

allowed to consider the project's compliance with parking standards on remand.

The parties agree that if we reverse the judgment of the trial court, the appropriate remedy is to direct the trial court to issue a writ of mandate ordering the City to comply with the HAA. Nothing we say is intended to preclude the City from reviewing on remand the project's compliance with objective standards, including parking standards in effect at the time the application was deemed complete. (§ 65589.5, subd. (j)(1).)

DISPOSITION

The judgment of the trial court is reversed. The trial court shall issue a writ of mandate directing the City to (1) vacate its February 5, 2018 action upholding the Planning Commission's decision to deny the application, and (2) reconsider the challenge to the Planning Commission's decision in accordance with the views expressed in this opinion. The trial court may make any other appropriate orders that are consistent with this opinion.

Appellants shall recover their costs on appeal.

TUCHER, J.*

WE CONCUR:

STREETER, Acting P. J.
BROWN, J.

* Presiding Justice of the Court of Appeal, First Appellate District, Division Three, sitting by assignment pursuant to article VI, section 6 of the California Constitution.

Trial Court:	San Mateo County Superior Court
Trial Judge:	Hon. George A. Miram
Counsel for Appellants:	Holland & Knight, Jennifer L. Hernandez, Daniel R. Golub, and Emily M. Lieban
Counsel for Amicus Curiae on behalf of Appellants:	Miller Starr Regalia, Bryan W. Wenter; Paul B. Campos for Building Industry Association – Bay Area, San Francisco Bay Area Planning and Urban Research Association, Bay Area Council, and Housing Action Coalition
Counsel for Amicus Curiae on behalf of Appellants:	Californians for Homeownership: Matthew Gelfand; California Association of Realtors®: June Babiracki Barlow
Counsel for Amicus Curiae on behalf of Appellants:	Reed Smith, Raymond A. Cardozo and Kathryn M. Bayes for Habitat for Humanity Greater San Francisco
Counsel for Amicus Curiae on behalf of Appellants:	Christopher S. Elmendorf, Michelle Wilde Anderson, Anika Singh Lemar, and Dave Owen for Law Professors
Counsel for Respondents:	Goldfarb & Lipman, Dolores Bastian Dalton, Barbara E. Kautz, James T. Diamond, Jr., and Rye P. Murphy; Shawn Mason, City Attorney
Counsel for Amicus Curiae on behalf of Respondents:	Rural County Representatives of California, Arthur J. Wylene; California State Association of Counties, Jennifer B. Henning
Counsel for Amicus Curiae on behalf of Respondents:	Colantuono, Highsmith & Whatley, Andrew L. Jared, and Matthew T. Summers for League of California Cities.

Counsel for Intervener: Xavier Becerra and Rob Bonta, Attorneys General; Thomas S. Patterson and Daniel A. Olivas, Senior Assistant Attorneys General; Mark R. Beckington and Christina Bull Arndt, Supervising Deputy Attorneys General; and Jonathan M. Eisenberg and David Pai, Deputy Attorneys General