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Orally Modified



Janet Jha v. City of Los Angeles and City Council, 23STCP03499

~~Tentative~~ decision on (1) demurrer: overruled; (2) motion to strike: denied

Respondents City of Los Angeles and Los Angeles City Council ("City Council") (collectively, "City") demur to the second cause of action of the Petition filed by Petitioner Janet Jha ("Jha"). The City also moves to strike portions of the Petition.

The court has read and considered the moving papers, oppositions, and replies, and renders the following tentative decision.

**A. Statement of the Case**

**1. The Petition**

Petitioner Jha filed the Petition against the City on September 21, 2023, alleging (1) mandamus based on a violation of the Permit Streamlining Act ("PSA"); (2) mandamus based on a violation of the Housing Accountability Act ("HAA"); (3) mandamus based on a violation of the Density Bonus Law; and (4) declaratory relief. The Petition alleges in pertinent part as follows.

**a. Governing Law**

When the Legislature enacted the Housing Element Law, it declared that local governments need to designate and maintain a supply of land and adequate sites for the development of housing sufficient to meet the locality's housing need for all income levels. Pet., ¶21.

The HAA provides an avenue for developers to provide housing for very low, low-, or moderate-income households (sometimes referred to as "low-cost housing") when a local government fails to adopt a housing element in substantial compliance with the Housing Element Law. Pet., ¶22. The local government shall approve housing, and not condition that approval in a matter rendering that housing project infeasible, unless the local government can make certain written findings based upon a preponderance of the evidence. Pet., ¶23.

A local jurisdiction cannot determine whether its adopted element is in substantial compliance with the Housing Element Law. Pet., ¶25. It must submit a draft housing element to the State Department of Housing and Community Development ("HCD"), which must issue findings before the local jurisdiction adopts the housing element. Pet., ¶25. If HCD finds the draft element is not substantially compliant, the local jurisdiction must either revise the draft to address any issues or adopt the draft housing element with written findings explaining why it substantially complies with the Housing Element Law. Pet., ¶25. It must then submit the adopted housing element to HCD for it to find whether it substantially complies with the Housing Element Law. Pet., ¶25. In a March 16, 2023 memorandum, HCD advised that a local jurisdiction's housing element is only in substantial compliance with the Housing Element Law on the date HCD issues a letter finding to that effect. Pet., ¶26.

The Housing Element Law requires local governments to update their housing element in eight-year cycles. Pet., ¶27. The City had not adopted a substantially compliant housing element by the time the current cycle began on October 15, 2021. Pet., ¶27. Although it drafted a housing element on November 24, 2021, HCD found on February 22, 2022 that it was not substantially compliant. Pet., ¶28. The City revised and resubmitted the draft housing element on April 28, 2022, and HCD found it substantially compliant on May 11, 2022. Pet., ¶28. The City adopted the housing element on June 14, 2022, and HCD certified its compliance with the Housing Element

Law on June 29, 2022. Pet., ¶28.

Under Government Code[1] sections 65589.5(o)(1) and 65941.1(a), a housing development applicant who submits a complete preliminary application is vested with the zoning and general plan standards in effect at the time of submission. Pet., ¶30. This includes entitlement to the Builder's Remedy if submitted when the jurisdiction does not have a compliant housing element, even if it adopts one during the entitlement process. Pet., ¶31. HCD confirmed as much in a June 2023 Notice of Violation issued to La Cañada Flintridge and in an October 2023 Letter of Technical Assistance to Santa Monica. Pet., ¶32, Ex. A.

**b. The Project**

On June 23, 2022, Jha submitted a preliminary application for a 40-unit project with 20% set aside as affordable to lower-income households ("Project") at 13916 W. Polk Street. Pet., ¶53. Because the City found the Project was complete on June 24, 2022, development rights in effect on that date vested for the Project. Pet., ¶54.

Jha proposed a housing project that reserved 20% of the units for low-cost housing while the City was out of compliance with the Housing Element Law. Pet., ¶55. Under the Builder's Remedy, the City was barred from disapproving the Project unless it made one of the written findings required under section 65589.5(d). Pet., ¶55.

On August 11, 2022, Jha filed an Affordable Housing Referral Form with the City's Affordable Housing Services Section. Pet., ¶57. The City signed this form on December 12, 2023. Pet., ¶64. After a meeting with City staff on December 9, 2022, Jha was allowed to submit a PSA development application. Pet., ¶66. Jha submitted the application and paid the fees on December 21, 2022. Pet., ¶66.

On January 26, 2023, the City sent Jha a 39-page Project Review letter. Pet., ¶67. The Project Review asserted the application was incomplete and did not comply with objective zoning standards. Pet., ¶67. The Project Review further said that, although the Project was eligible for the Builder's Remedy, HAA does not specify the entitlement process that a local government can require. Pet., ¶68. The City Planning Department's ("Planning") position was that a general plan amendment ("GPA") and rezoning amendment were the proper entitlement path. Pet., ¶68. This is not an entitlement at all, but rather a legislative action. Pet., ¶68.

Section 65589.5(d) does provide an entitlement path. Pet., ¶71. If HCD does not find a local jurisdiction's housing element substantially compliant by the jurisdiction's statutory deadline, the local jurisdiction may not use section 65589.5(d)(5) to deny a qualifying affordable housing project. Pet., ¶72. HCD's Notice of Violation to La Cañada Flintridge explained that a jurisdiction shall not disapprove a housing development project for low-cost housing, or condition approval in a manner that renders the housing development project infeasible for development for such households, without one of five written findings. Pet., ¶71, Ex. A.

On April 5, 2023, Jha resubmitted revised application materials in response to the Project Review. Pet., ¶81. The City sent a second Project Review asserting the application was incomplete for failure to comply with City code standards. Pet., ¶¶ 82-83. The letter emphasized that the City would not process the development application unless Jha sought legislative rezoning that she did not want. Pet., ¶85.

Jha appealed the City's incompleteness determination of her application. Pet., ¶86. The City Council's Planning and Land Use Management Committee ("PLUM") recommended denial

[1] All statutory citations are to the Government Code unless otherwise specified.

of the appeal, and the City Council denied it on June 27, 2023. Pet., ¶¶ 92-93.

On May 16, 2023, the City wrote Jha a letter asserting that the preliminary application's submittal had expired and that Jha's vested rights therefore had terminated. Pet., ¶95. Section 65941.1(d)(2) states that if a public agency determines that the application for the development project is incomplete, the development proponent shall submit the specific information necessary to complete the application within 90 days of receiving the agency's written identification of the necessary information. Pet., ¶99. This means that the 90-day period resets with every new completeness determination. Pet., ¶99. The City wrongly interpreted the statute to mean that an applicant has only a single 90-day clock after the first written incompleteness determination. Pet., ¶100. Planning argued that even if Jha were entitled to approval pursuant to the Builder's Remedy, it no longer applied because Jha's vesting rights had expired and the City's Housing Element was now in substantial compliance with the Housing Element Law. Pet., ¶104.

After Jha received the City's May 16 letter, she asked HCD to clarify the preliminary application expiration provision. Pet., ¶103. HCD confirmed that the application remains valid after a second incompleteness determination so long as the applicant resubmits within 90 days of that determination. Pet., ¶103.

**c. Causes of Action**

The first cause of action seeks mandamus for violation of the PSA. The PSA requires public agencies to compile lists of the information required from an applicant for a development project. Pet., ¶109. It also has strict timelines when an agency must determine whether an application is complete. Pet., ¶109. Agencies can only judge whether an application is complete based on the items in the checklist. Pet., ¶109.

The City's Project Reviews violated the PSA because they treated project consistency with a zoning ordinance or general plan as an item necessary for an application to be complete. Pet., ¶110. The City refused to process an application based on a substantive decision regarding project consistency. Pet., ¶110. Section 65931 defines development projects as activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. Pet., ¶111. This does not include rezonings or GPAs. Pet., ¶111. Courts have held that applicants cannot use the PSA to compel legislative changes to a zoning ordinance or a general plan. Pet., ¶111. Conversely, the City cannot demand an applicant to seek such changes through a PSA completeness determination. Pet., ¶111. The City refused to accept Jha's development application based on purported non-compliance with substantive zoning standards and criteria, not because of incomplete information. Pet., ¶114.

The second cause of action seeks mandamus for violation of the HAA. The City unlawfully disapproved the Project and failed to proceed in the manner required by law. Pet., ¶117. The City disapproved the low-cost housing Project without making one of the findings under Section 65589.5(d)(1)-(5) and also did not support such findings by a preponderance of evidence in the record. Pet., ¶121. Although Jha submitted the preliminary application before the City's Housing Element was deemed substantially compliant with the Housing Element Law, the City attempted to deny her the Builder's Remedy. Pet., ¶122.

The third cause of action seeks mandamus for violation of the Density Bonus Law. The Project reserved 20% of the units for low-cost housing. Pet., ¶128. This entitled the Project to two incentives or concessions and a waiver or reduction of any development standards that will physically preclude the Project at the proposed density. Pet., ¶128. The City denied Jha those incentives without making the public health and safety findings required under the HAA. Pet.,

¶129.

The fourth cause of action seeks declaratory relief. The City has avoided obligations under state law through its refusal to process housing development projects that qualify under the Builder's Remedy. Pet., ¶132.

**d. Prayer for Relief**

Jha seeks a writ of mandate compelling the City to review and process development applications pursuant to the PSA and SB 330. Pet. Prayer, ¶¶ 1-2. Jha also seeks a writ of mandate (1) voiding the June 27, 2023 denial of the PSA appeal based on violation of section 655589.5(d), (2) compelling Planning to accept and process the Project application, and (3) compelling the City and Planning to take all steps necessary to process the application, approve the Project, and issue all related approvals within 60 days. Pet. Prayer, ¶3. Jha also seeks a declaration concerning the City's violations. Pet. Prayer, ¶7.

Jha also seeks attorneys' fees, costs, and fines under section 65589.5. Pet. Prayer, ¶¶ 8-10.

**2. Course of Proceedings**

On September 25, 2023, Jha served the City with the Petition and Summons.

On November 8, 2023, the parties stipulated to extend the deadline for all responsive pleading to February 1, 2024.

**B. Demurrers**

Demurrers are permitted in administrative mandate proceedings. CCP §§1108, 1109. A demurrer tests the legal sufficiency of the pleading alone and will be sustained where the pleading is defective on its face.

Where pleadings are defective, a party may raise the defect by way of a demurrer or motion to strike or by motion for judgment on the pleadings. CCP §430.30(a); Coyne v. Krempels, (1950) 36 Cal.2d 257. The party against whom a complaint or cross-complaint has been filed may object by demurrer or answer to the pleading. CCP §430.10. A demurrer is timely filed within the 30-day period after service of the complaint. CCP § 430.40; Skrbina v. Fleming Companies, (1996) 45 Cal.App.4th 1353, 1364.

A demurrer may be asserted on any one or more of the following grounds: (a) The court has no jurisdiction of the subject of the cause of action alleged in the pleading; (b) The person who filed the pleading does not have legal capacity to sue; (c) There is another action pending between the same parties on the same cause of action; (d) There is a defect or misjoinder of parties; (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain ("uncertain" includes ambiguous and unintelligible); (g) In an action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct; (h) No certificate was filed as required by CCP §411.35 or (i) by §411.36. CCP §430.10. Accordingly, a demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. CCP §430.30(a); Blank v. Kirwan, (1985) 39 Cal.3d 311, 318. The face of the pleading includes attachments and incorporations by reference (Frantz v. Blackwell, (1987) 189 Cal.App.3d 91, 94); it does not include inadmissible hearsay. Day v. Sharp, (1975) 50 Cal.App.3d 904, 914.

The sole issue on demurrer for failure to state a cause of action is whether the facts pleaded, if true, would entitle the plaintiff to relief. Garcetti v. Superior Court, (1996) 49 Cal.App.4th 1533, 1547; Limandri v. Judkins, (1997) 52 Cal.App.4th 326, 339. The question of plaintiff's ability to

prove the allegations of the complaint or the possible difficulty in making such proof does not concern the reviewing court. Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 47. The ultimate facts alleged in the complaint must be deemed true, as well as all facts that may be implied or inferred from those expressly alleged. Marshall v. Gibson, Dunn & Crutcher, (1995) 37 Cal.App.4th 1397, 1403. Nevertheless, this rule does not apply to allegations expressing mere conclusions of law, or allegations contradicted by the exhibits to the complaint or by matters of which judicial notice may be taken. Vance v. Villa Park Mobilehome Estates, (1995) 36 Cal.App.4th 698, 709.

For all demurrers filed after January 1, 2016, the demurring party must meet and confer in person or by telephone with the party who filed the pleading for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. CCP §430.31(a). As part of the meet and confer process, the demurring party must identify all of the specific causes of action that it believes are subject to demurrer and provide legal support for the claimed deficiencies. CCP §430.31(a)(1). The party who filed the pleading must in turn provide legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency. Id. The demurring party is responsible for filing and serving a declaration that the meet and confer requirement has been met. CCP §430.31(a)(3).

If a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. CCP §472a(c). It is an abuse of discretion to grant a motion for judgment on the pleadings without leave to amend if there is any reasonable possibility that the plaintiff can state a good cause of action. Dudley v. Department of Transportation ("Dudley") (2001), 90 Cal. App. 4th 255, 260. However, in response to a demurrer and prior to the case being at issue, a complaint or cross-complaint shall not be amended more than three times, absent an offer to the trial court as to such additional facts to be pleaded that there is a reasonable possibility the defect can be cured to state a cause of action. CCP §430.41(e)(1).

**C. Governing Law**[2]

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[2] The City requests judicial notice of (1) HCD's September 3, 2021, letter to Planning regarding its review of the City's Sixth Cycle Draft Housing Element Update (RJN Ex. 1); (2) HCD's February 22, 2022, letter to Planning regarding its review of the City's Sixth Cycle Adopted Housing Element (RJN Ex. 2); (3) HCD's May 11, 2022, letter to Planning regarding its review of the City's Sixth Cycle Revised Draft Housing Element (RJN Ex. 3); and (4) HCD's June 29, 2022, letter to Planning regarding its review of the City's Sixth Cycle Adopted Housing Element (RJN Ex. 4). The requests are granted. Evid. Code §452(c).

Jha requests judicial notice of (1) a "Summary and Clarification of Requirements for Housing Element Compliance Memorandum" from the HCD to Planning Directors and Interested Parties, dated March 16, 2023 (RJN Ex. A); (2) an Notice of Violation from HCD to La Cañada Flintridge, dated June 8, 2023 (RJN Ex. B); (3) a Letter of Technical Assistance from HCD to the City of Redondo Beach, dated May 8, 2023 (RJN Ex. C); (4) HCD's opening brief in California Housing Defense Fund v. City of La Cañada Flintridge, Case No. 23STCP02614 ("Housing Defense"), filed December 29, 2023 (RJN Ex. D); (5) the court's decision in New Commune DTLA LLC vs. City of Redondo Beach et al, 23STCP00426 ("New Commune"), filed February 8, 2024 (RJN Ex. E); (6) Planning's "13916 W. Polk Street Appeal Recommendation Report to

**1. The Housing Element Law**

The Legislature finds that the provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government. §65580(c). The Housing Element Law details the substantive requirements that each housing element must include. §65583(a)-(c).

At least 90 days prior to adoption of a revision of its housing element, or 60 days prior to the adoption of a subsequent amendment thereto, the local jurisdiction agency shall submit a draft element revision or draft amendment to HCD. §65585(b)(1). In the preparation of review findings, HCD may consult with any public agency, group, or person and shall receive and consider any written comments from such entities regarding the draft or adopted element or amendment under review. §65585(c).

HCD shall review the draft and report its written findings to the planning agency within 90 days of its receipt of the first draft submittal for each housing element revision, or 60 days of its receipt of a subsequent draft amendment or an adopted revision or adopted amendment to an element. §65585(b)(3). In its written findings, HCD shall determine whether the draft element or draft amendment substantially complies with the Housing Element Law. §65585(d).

Prior to the adoption of its draft element or draft amendment, the legislative body shall consider the findings made by HCD if they become available within the time limits set in section 65585. §65585(e).

If HCD finds that the draft element or draft amendment does not substantially comply with this article, the legislative body shall either change the draft element or amendment to so comply or adopt the draft element or draft amendment without changes. §65585(f). If the legislative body adopts without changes, it shall include in its resolution of adoption written findings that explain why the legislative body believes the draft element or draft amendment substantially complies with the Housing Element Law despite HCD's findings. §65585(f)(2).

The legislative body shall submit a copy to HCD promptly after adopting the element. §65585(g). HCD shall then review it and report its findings to the planning agency within 60 days of submission. §65585(h).

"Despite the mandatory nature of many of the Housing Element Law's provisions compliance has been mixed statewide." Martinez v. City of Clovis, (2023) 90 Cal.App.5th 193, 226. The Legislature has amended the Housing Element Law multiple times since 2017, and a 2018 amendment, AB 72, increased HCD's oversight powers. Id. AB 72 added HCD's ability to review any local government action that is inconsistent with an adopted housing element and to revoke its findings of substantial compliance until the local jurisdiction complies. Id. at 226, n. 9; §65585(i), (j).

The Housing Element Law provides that a local government that fails to adopt a housing element that has been found to be in substantial compliance within 120 days of the statutory deadline is required to complete mandatory rezoning within one year instead of the permitted three years. §65583.2(c). If the one-year requirement applies, the local government's housing element cannot be found to be in substantial compliance until that city has completed the rezoning. §65588(e)(4)(C)(iii).

A local government that fails to substantially comply with the Housing Element Law is subject to enforcement action by the Attorney General. §65585(l). A failure to adopt a housing element found by HCD to be in substantial compliance makes the local government ineligible for

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City Council" dated June 12, 2023 (RJN Ex. F); and (7) the Senate Floor Analysis of SB 330, dated September 9, 2019 (RJN Ex. G). The requests are granted. Evid. Code §§ 452(c)-(d).

certain program funding. §65589.11. A local government that is compliant with Housing Element Law requirements is awarded preference for certain state funding programs. §65589.9. A "compliant housing element" is defined for purposes of this preference as "an adopted housing element that has been found to be in substantial compliance with the requirements of this article by [HCD] pursuant to Section 65585." §65589.9(f)(2).

**2. The Housing Accountability Act**

**a. Legislative Findings and Intent**

The Legislature recognizes the lack of housing as a critical problem that threatens the economic, environmental, and social quality of life in California. §65589.5(a)(1)(A). It adopted the HAA in 1982 to "significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters." §65589.5(a)(2)(K). To date, the goal remains unfulfilled. Id.

The HAA reflects the Legislature's findings that "the availability of housing is of vital statewide importance," and that providing the necessary housing supply "requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels." §65580(a)-(b).

Effective January 1, 2018, the Legislature significantly amended the HAA to strengthen its provisions, expand its applicability, and increase local governments' liability for violations. The HAA found that California is in a housing crisis that is "partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing," §65589.5(a)(1)(B). The consequences of those actions include discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration. §65589.5(a)(1)(C).

Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects. §65589.5(a)(1)(D). The state's homeownership rate was at its lowest level since the 1940s and ranked 49 out of the 50 states. §65589.5(a)(2)(E). The lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians. §65589.5(a)(2)(F).

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(a)(2)(L).

It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety under either section 65589.5(d)(2) and 65589.5(j)(1) arise infrequently. §65589.5(a)(3).

It is the policy of the state that a local government not reject or make infeasible housing development projects that contribute to meeting the need determined pursuant to the HAA without a thorough analysis of the economic, social, and environmental effects of the action and without complying with section 65589.5(d). §65589.5(b).

**b. Project Approval Based on Vested Rights**

Section 65589.5 is referred to colloquially as the "anti-NIMBY law." Schellinger Brothherrs v. City of Sebastopol, (2009) 19 Cal.App.4th 1245 1253, n. 9. Subject to certain exceptions, a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application which included all the information required by section 65941.1(a) was submitted. §65589.5(o)(1).

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 or emergency shelter is consistent, compliant, or in conformity." §65589.5(f)(4).

Section 65589.5(j)(1) provides:

> "When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:
>
> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.
>
> (B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (emphasis added).

Section 65589.5(j) applies to market rate housing as well as affordable housing. Honchariw v. County of Steinhaus, (2011) 200 Cal.App.4th 1066, 1070. The HAA applies to all residential housing developments and takes away the agency's ability to deny residential projects based on subjective development policies. Id. at 1072-77.

"Disapprove the housing development project" includes any instance in which a local agency "votes on a proposed housing development project application and it is disapproved", "fails to comply with the timer periods specified in Section 65950" or fails to meet the time limits specified in Section 65913.3. §65589.5(h)(6).

If the court finds that an agency acted in bad faith in disapproving a project in violation of the HAA, the appropriate remedy is an "order or judgment directing the local agency to approve the housing development project." §65589.5(k)(1)(A)(ii). "Bad faith" "includes, but is not limited to, an action that is frivolous or otherwise entirely without merit." §65589.5(l).

The local jurisdiction bears the burden of proving that its decision conforms to the conditions specified in section 65589.5. §65589.6.

**c. The Builder's Remedy**

A local agency shall not disapprove a housing development project for very low, low-, or moderate-income households, or an emergency shelter, 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, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, for one of five conclusions:

(1) the local jurisdiction has adopted a housing element in substantial compliance with the HAA and has met or exceeded its share of the regional housing need allocation pursuant to section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by section 65008. §65589.5(d)(1).

(2) the proposed housing development would have a specific, adverse impact on the public health or safety that cannot be feasibly mitigated without rendering the project unaffordable or infeasible. A specific, adverse impact on public health or safety does not include inconsistency with the zoning ordinance or general plan land use designation. §65589.5(d)(2)(A);

(3) denial of the project is required to comply with specific state or federal law, and there is no feasible method to comply without rendering the project unaffordable or infeasible;

(4) the proposed land for the project is zoned for, and surrounded on at least two sides by, agriculture or resource preservation purposes;

(5) the housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with the Housing Element Law. §§ 65589.5(d)(1)-(5).

Section 65589.5(d)(5) means that, when the local government does not have a housing element in substantial compliance with the Housing Element Law, it cannot disapprove an applicable project based on inconsistencies with the jurisdiction's zoning ordinance or general plan land use designation. This is colloquially referred to as the "Builder's Remedy."

A "housing development project" includes any mixed-use development consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use. §65589.5(h)(2). "Housing for very low, low-, or moderate-income households" includes buildings where 20% of the units are sold or rented to lower income households. §65589.5(h)(3).

"Deemed complete" means the applicant has submitted a preliminary application pursuant to section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a complete application pursuant to section 65943. §65589.5(h)(5).

"Disapproval of a housing development project" includes whenever a local agency votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit. §65589.5(h)(6)(A).

A "specific, adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." §65589.5(j)(1)(A). The Legislature's intent is that conditions that would have a specific, adverse impact upon the public health and safety should arise infrequently. §65589.5(a)(3).

**d. Consistency with Other Laws**

New housing developments constructed within the coastal zone shall, where feasible, provide housing units for persons and families of low or moderate income. §65590(d). Where it is not feasible to provide these housing units in a proposed new housing development, the local government shall require the developer to provide such housing, if feasible to do so, at another location within the same city or county, either within the coastal zone or within three miles thereof. Id.

Nothing in the HAA relieves the local agency from complying with, *inter alia*, the Coastal Act or the California Environmental Quality Act ("CEQA"). §65589.5(e). Nothing in the HAA, aside from section 65589.5(o), shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need. §65589.5(f)(1). 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. Id.

**D. Statement of Facts**

**1. The City's Evidence**

The City first submitted its draft housing element to HCD for review on July 7, 2021. RJN Ex. 1. On September 3, 2021, HCD informed the City that although the draft addressed many statutory requirements, it still required revisions to comply with the Housing Element Law. RJN Ex. 1. The letter included an appendix of required revisions. RJN Ex. 1.

To remain on an eight-year planning cycle, the City needed to adopt a compliant housing element within 120 calendar days of the October 15, 2021 statutory due date. RJN Ex. 1. Under section 65588(e)(4), a failure to do so would require the City to revise its housing element every four years until it has adopted two consecutive elements before the statutory deadline. RJN Ex. 1.

The City adopted a housing element on November 24, 2021. RJN Ex. 2. On February 22, 2022, HCD acknowledged that this element addressed most of the requirements at issue in the September 3, 2021 notice. RJN Ex. 2. However, an additional revision was still necessary to fully comply with the Housing Element Law. RJN Ex. 2. The element's programs and actions needed to include metrics and milestones to target significant and meaningful affirmatively furthering fair housing outcomes. RJN Ex. 2. Once the City revised and re-adopted the housing element to comply with the identified requirements, it would meet the statutory requirements of the Housing Element Law. RJN Ex. 2.

On April 28, 2022, the City submitted a revised draft housing element update to HCD. RJN Ex. 3. On May 11, 2022, HCD informed the City that the revised draft element met the statutory requirements outlined in HCD's February 22, 2022 letter. RJN Ex. 3. The housing element would comply with the Housing Element Law when the City adopted the revisions and submitted the adopted element to HCD pursuant to section 65585. RJN Ex. 3. HCD recommended that the City expeditiously adopt these changes and submit them to HCD so that the City may regain housing element compliance. RJN Ex. 3.

On June 14, 2022, HCD received the City's newly adopted housing element. RJN Ex. 4. On June 29, 2022, HCD confirmed that the adopted housing element is in full compliance with the Housing Element Law and found it to be substantially the same as the element reviewed by HCD on May 11, 2022. RJN Ex. 4. HCD cautioned that the City still needed to timely and effectively

implement all programs therein. RJN Ex. 4.

**2. Jha's Evidence**

**a. Legislative History of SB 330**

The September 2019 Senate Floor Analysis of SB 330, the Housing Crisis Act of 2019, explains that it amends both the HAA and PSA. RJN Ex. G. In amending the PSA, SB 330 established a procedure for filing an initial application and provides that a housing development project shall be deemed to have a complete initial application upon providing information specified. Ex. G, p. 5. HCD shall adopt a standardized form that applicants may use for the purposes of satisfying a complete application. Ex. G, p. 6.

In amending the HAA, SB 330 prohibited a local agency from applying ordinances, policies, and standards to a development after submission of its complete preliminary application. Ex. G, p. 6. The analysis explains that the bill would prohibit cities from changing the rules on builders who are going through the approval process. Ex. G, pp. 6-7.

**b. HCD's Clarifying Memorandum**

On March 16, 2023, HCD sent all 539 local jurisdictions a memorandum clarifying what they must do to avoid the consequences of non-compliance under the Housing Element Law. RJN Ex. A. A jurisdiction first needs to submit a draft housing element to HCD at least 90 days before adoption. Ex. A. HCD will then issue findings determining whether the draft element is substantially compliant. Ex. A.

A local jurisdiction cannot not adopt the draft element until it had received and considered HCD's findings. Ex. A. If a jurisdiction submits an "adopted" element to HCD before either submitting a draft element or considering HCD's findings thereon, HCD will consider the "adopted" element a draft element for purposes of both HCD review and statutory compliance. Ex. A.

If HCD finds the draft element not substantially compliant, the jurisdiction may revise the draft to address the findings. Ex. A. If it chooses instead to adopt the draft element without changes, it must include written findings explaining why the jurisdiction believes that the draft substantially complies. Ex. A. The jurisdiction must then submit the adopted element to HCD for its findings. Ex. A.

In other words, a jurisdiction does not have the authority to determine for itself whether the adopted element is in substantial compliance with the Housing Element Law. Ex. A. It can only provide reasoning why HCD should find that it is. Ex. A. A jurisdiction is "in compliance" as of the date of HCD's letter finding the adopted element in substantial compliance. RJN Ex. A.

**c. La Cañada Flintridge**

On June 8, 2023, HCD sent a Notice of Violation to La Cañada Flintridge for denial of a housing project. RJN Ex. B. La Cañada Flintridge denied the housing project appeal because the city asserted that its housing element, adopted on October 4, 2022, complied with the Housing Element Law and the Builder's Remedy did not apply. Ex. B.

The Notice of Violation explained that the city did not have a compliant housing element on October 4, 2022. RJN Ex. B. On December 3, 2021, HCD issued findings that La Cañada Flintridge's draft element required significant revisions. Ex. B. On October 4, 2022, La Cañada Flintridge adopted a housing element that failed to address HCD's findings. Ex. B. On December 6, 2022, HCD found the adopted element still required critical revisions to comply with state law.

Ex. B. On February 21, 2023, the city adopted a housing element that addressed HCD's new findings. Ex. B. On April 24, 2023, HCD found that the city was not in substantial compliance. Ex. B. The city passed the housing element over a year after the October 15, 2021 deadline and, under section 65588(e)(4)(C)(iii), was required to complete the required rezoning before HCD could find the element in substantial compliance. Ex. B.

Based on this chronology, the Notice of Violation advised the city that it was still not in compliance with the Housing Element Law and could not backdate its housing element compliance to circumvent the Builder's Remedy for the project at issue. Ex. B.

On December 29, 2023, the Attorney General filed an opening brief in Housing Defense. RJN Ex. D. The brief asserted that La Cañada Flintridge wrongly assumed that it could retroactively self-certify its housing element as substantially complaint. Ex. D. However, no local jurisdiction can declare or certify that its housing element is substantially compliant with Housing Element Law without HCD review. Ex. D. HCD is the sole government agency statutorily vested with the power to make such findings. Ex. D. The Attorney General agreed with HCD that, pursuant to section 65588(e)(4)(C)(iii), La Cañada Flintridge was required to complete the required rezoning before HCD could find its housing element to be in substantial compliance. Ex. D.

**d. Redondo Beach**

On May 8, 2023, HCD sent the City of Redondo Beach a Letter of Technical Assistance regarding a developer's appeal for a proposed housing project. RJN Ex. C. The city's incompleteness determination for the developer's application indicated that the Builder's Remedy did not apply because the city's housing element adopted on July 5, 2022 substantially complied with the Housing Element Law. Ex. C. The applicant submitted the preliminary application after the city adopted the housing element but before HCD's September 1, 2022, letter finding the adopted element to be in substantial compliance. Ex. C.

The Letter of Technical Assistance stated that a local jurisdiction does not have the authority to determine that its adopted element is in substantial compliance. Ex. C. The compliance date is the date of HCD's letter finding the adopted element is in substantial compliance. Ex. C. For the city, this date was after the applicant submitted a preliminary application. Ex. C.[3]

**e. Jha's Application**

On June 12, 2023, Planning issued an Appeal Recommendation Report recommending that the City Council deny Jha's appeal. RJN Ex. F, p.1. In part, Planning explained that Jha submitted her preliminary application on June 24, 2022. Ex. F, p. 18. The Project therefore had vesting rights to the regulatory environment in place after the City had adopted a substantially compliant housing element but before HCD issued certification of substantial compliance. RJN Ex. F, p. 18. On June 29, 2022, HCD deemed the housing element to be in full compliance with the Housing Element Law. RJN Ex. F, p. 18. To maintain those vesting rights, Jha needed to submit a Development Project Application by December 21, 2022, and make the application complete within 90 days of the first letter determining the application was incomplete. RJN Ex. F, p. 18.

Planning again acknowledged that Jha submitted a vesting Preliminary Application on June

[3] On February 8, 2024, this court issued a decision in New Commune which denied mandamus but agreed with HCD on this issue. RJN Ex. E.

24, 2022, before HCD certified the City's adopted housing element. RJN Ex. F, pp. 20-21, 30. However, Jha failed to submit a completed Development Project Application on time to maintain vesting rights. RJN Ex. F, p. 21. The preliminary application therefore no longer had any force or effect. RJN Ex. F, p. 30.

**E. Analysis**

The City demurs to the Petition's second cause of action seeking mandamus for violation of the HAA.[4] Jha accurately states that the City's demurrer is based entirely on an argument that it had a substantially compliant housing element when Jha submitted her preliminary application and the Builder's Remedy does not apply. Opp. at 11.

The pertinent facts are as follows. On April 28, 2022, the City submitted a revised draft housing element update to HCD. RJN Ex. 3. On May 11, 2022, HCD informed the City that its revised draft element met the statutory requirements outlined in HCD's February 22, 2022 letter. Ex. 3. HCD stated that the housing element would comply with the Housing Element Law when the City adopted the revisions and submitted the adopted element to HCD pursuant to section 65585. Ex. 3. HCD recommended that the City expeditiously adopt these changes and submit them to HCD so that the City may regain housing element compliance. Ex. 3.

On June 14, 2022, HCD received the City's newly adopted housing element. RJN Ex. 4. Jha submitted her preliminary application on June 23, 2022. Pet., ¶53. On June 29, 2022, HCD confirmed that the adopted housing element is in full compliance with the Housing Element Law and found it to be substantially the same as the element reviewed by HCD on May 11, 2022. RJN Ex. 4.

At issue is whether the Builder's Remedy applies because Jha submitted her preliminary application before HCD's June 29, 2022 certification. The Petition asserts the City unlawfully disapproved of her Project including low-cost housing without making one of the findings under section 65589.5(d)(1)-(5). Pet., ¶121. Jha submitted her preliminary application before the City's housing element was deemed substantially compliant with the Housing Element Law, and the City wrongly denied her rights under the Builder's Remedy. Pet., ¶122.

The City argues that, at a minimum, it had a substantially compliant housing element as of June 14, 2022 when it adopted the revised housing element text that HCD twice determined to be substantially compliant on May 11 and June 29, 2022. The City argues that section 65583's list of requirements for a substantially compliant housing element does not include a post-adoption written determination by HCD of substantial compliance. Dem. at 11. Nor is there anything in the HAA's text, including the Builder's Remedy provision (§65589.5(d)(5)) and the vesting provision (§65589.5(o), stating that a HCD post-adoption determination fixes the date that a jurisdiction has adopted a substantially compliant housing element. HCD's June 29, 2022 post-adoption determination of substantial compliance relates back to the City's June 14, 2022 adoption of the housing element. Dem. at 9, 10; Reply at 4.

The City contends that there are two ways a local jurisdiction may obtain a determination

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[4] On January 25, 2024, the City sent a letter to Jha's counsel outlining the grounds for the demurrer and motion to strike. Wong Decl., ¶5, Ex. A. Despite a Google Meet video conference on January 29, 2024, the parties failed to reach any agreement. Wong Decl., ¶¶ 6-7. The City has satisfied the requirement to meet and confer.

of substantial compliance. First, HCD may determine that the housing element is substantially compliant. §65585(d), (e), (h), (i). If HCD makes this determination, there is a rebuttable presumption of substantial compliance in any action challenging the validity of the housing element. §65589.3. Second, a court may adjudicate and determine that the adopted housing element is substantially compliant. §65585(l); 65587(b. Thus, a housing element's substantial compliance is not solely dependent on a HCD post-adoption determination because a court may separately decide that a housing element is substantially compliant. Dem. at 11.[5]

To require HCD's post-adoption certification of a housing element's substantial compliance would impermissibly read a non-existent requirement into the Government Code. CCP §1858 (court may not "insert what has been omitted..."); DiCampli-Mintz v. County of Santa Clara, (2012) 55 Cal.4th 983, 992 (court may not rewrite the law under the guise of construction). Further, allowing the date of HCD determination to fix the date of substantial compliance would unfairly place the City's ability to enforce its planning and zoning codes at the whim of HCD's workload-influenced timelines. Dem. at 11.[6]

**a. Interpretation of the Housing Element Law**

The City's argument requires interpretation of the Housing Element Law. In construing a statute, a court must ascertain the intent of the legislature so as to effectuate the purpose of the law. Brown v. Kelly Broadcasting Co., (1989) 48 Cal.3d 711, 724. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841. The statutory language must be harmonized with provisions

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[5] Jha correctly notes (Opp. at 14) that a court's determination of housing element substantial compliance is not independent; the Housing Element Law authorizes a court to adjudicate substantial compliance in only two instances. First, if the Attorney General brings suit alleging a housing element's non-compliance, a court may determine whether the adopted housing element is substantially compliant. §65585(l). Second, a local government may bring suit for a judicial determination of substantial compliance after HCD determines non-compliance and other procedural requirements take place. §65589.11(d). This provision permits judicial review only after HCD makes an adverse determination. There is no general provision for a local government to seek judicial approval of its own determination.

[6] The City makes a confusing argument that Jha's preliminary application vested the Project in the housing element as one of the local ordinances, policies, and standards in effect when the application was submitted (§65589.6(o)), but not in any existing state laws or absence of state regulatory actions. Dem. at 12. Neither the court nor Jha understand what the City means. *See* Opp. at 17.

The City further argues that, while a HCD approved housing element enjoys a rebuttable presumption of substantial compliance, there is no presumption of invalidity simply because of the absence of HCD approval. As a result, Jha cannot plead the prerequisite absence of a substantially compliant housing element to assert reliance on the Builder's Remedy. Dem. at 12; Reply at 7. This argument is wholly dependent on the correctness of the City's position that HCD approval is not necessary.

relating to the same subject matter to the extent possible. Id. Statutes are not construed in isolation and every statute must be read and harmonized with the statutory scheme. People v. Ledesma, (1997) 16 Cal.4th 90, 95.

"'The statute's words generally provide the most reliable indicator of legislative intent; if they are clear and unambiguous, '[t]here is no need for judicial construction and a court may not indulge in it. [Citation.]'" MCI Communications Services, Inc. v. California Dept. of Tax & Fee Administration, ("MCI") (2018) 28 Cal. App. 5th 635, 643. If a statute is ambiguous and susceptible to more than one reasonable interpretation, the court may resort to extrinsic aids, including principles of construction and legislative history. MacIsaac v. Waste Management Collection & Recycling, Inc., (2005) 134 Cal.App.4th 1076, 1082 (*quoting* Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd., (1994) 23 Cal.App.4th 1120, 1126).

Where ambiguity still remains, the court should consider "reason, practicality, and common sense." Id. at 1084. This requires consideration of the statute's purpose, the evils to be remedied, public policy, and contemporaneous administrative construction. MCI, *supra,* 28 Cal.App.5th at 643. The enactment must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. Lungren v. Deukmejian, (1988) 45 Cal. 3d 727, 735.

Section 65585 governs the process for local jurisdictions to prepare and submit housing elements to the HCD for compliance certification. At least 90 days prior to adoption of a revision of its housing element, the local jurisdiction shall submit a draft element revision to HCD. §65585(b)(1). HCD shall review the draft and report its written findings whether the draft element substantially complies with the Housing Element Law within 90 days of its receipt. §65585(b)(3), (d). Prior to the adoption of its draft element, the legislative body shall consider the findings made by HCD if they are timely made. §65585(e). If HCD finds that the draft element does not substantially comply, the legislative body shall either change the draft element to comply or adopt the draft element without changes. §65585(f). If the legislative body adopts without changes, it shall include in its resolution of adoption written findings that explain why it believes the draft element substantially complies with the Housing Element Law despite HCD's findings. §65585(f)(2). The planning agency shall submit a copy to HCD promptly after adopting the element. §65585(g). HCD shall then review it and report its findings to the planning agency within 60 days of submission. §65585(h).

The City had not completed this procedure as of Jha's June 24, 2022 preliminary application. Section 65585(g) requires a local government to submit a copy of a housing element or amendment to HCD promptly following its adoption. HCD shall then review it and report its findings to the planning agency within 60 days of submission. §65585(h). HCD had not reviewed and determined compliance until after Jha's preliminary application.

Section 65589.5(d)(5) expressly states that the Builder's Remedy applies unless the local government "has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article." "This article" means the Housing Element Law. Jha correctly argues (Opp. at 11) that section 65589.5(d)(5) has two requirements. The housing element must substantially comply with the Housing Element Law and be adopted "in accordance with Section 65588." §65589.5(d)(5).

Section 65588, in turn, specifies that HCD may find the sixth revision element substantially compliant with the Housing Element Law per section 65585. §65588(e)(4)(A). Section 65585(g) provides that the planning agency shall submit a copy to HCD promptly after adopting the element.

Section 65585(h) provides that HCD "shall, within 60 days, review adopted housing elements or amendments and report its findings to the planning agency." The City's argument that the Housing Element Law does not require a post-adoption determination of substantial compliance by HCD is contradicted by section 65585(g) and (h). A post-adoption HCD determination is a mandatory Housing Element Law requirement.

The City responds that this interpretation elevates form over substance. Substantial compliance with the Housing Element Law means "'actual compliance in respect to the substance essential to every reasonable objective of the statute', as distinguished from 'mere technical imperfections of form.'" Fonseca v. City of Gilroy, (2007) 148 Cal.App.4th 1174, 1185. Reply at 10. The City's argument answers itself. There is no actual compliance with Housing Element Law procedure if a local jurisdiction can adopt a housing element without final HCD certification under section 65585(h).

The court's conclusion that a post-adoption HCD determination is required is supported by other parts of the Housing Element Law, particularly the rezoning deadline penalty for late housing element adoption. For an adopted housing element to be timely, sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i) require that a city's housing element be found by HCD to be in substantial compliance with the Housing Element Law. Without such a finding, the city must complete rezoning within a year after the statutory deadline. §§ 65583(c)(1)(A)), §65583.2(c), 65588(e)(4)(C)(i). Additionally, that city's housing element cannot be found to be in substantial compliance until it has completed the rezoning. §65588(e)(4)(C)(iii). It would not make sense to require HCD approval of a housing element's substantial compliance to avoid late penalties but not for substantial compliance generally.[7]

Jha adds (Opp. at 12) that HCD may review any local government action that is inconsistent with an adopted housing element and revoke its findings of substantial compliance until the local jurisdiction complies. §65585(i), (j). HCD's authority to revoke a substantial compliance finding indicates that a post-adoption HCD determination is necessary in the first place.

Jha also cites section 65589.9, which provides that a local government that is compliant with Housing Element Law requirements is awarded preference for certain state funding programs. §65589.9. A "compliant housing element" is defined for purposes of this preference as "an adopted housing element that has been found to be in substantial compliance with the requirements of this article by [HCD] pursuant to Section 65585." §65589.9(f)(2). Opp. at 12.

The City replies that section 65589.9(a)'s definition of a "compliant housing element" only applies when awarding extra points or preference in the scoring of competitive housing and infrastructure programs and has nothing to do with the Builder's Remedy. Reply at 5. True, but statutes are not construed in isolation and the various provisions of the Housing Element Law should be construed in harmony if possible. People v. Ledesma, *supra,* 16 Cal.4th at 95.

Finally, the court's interpretation to require HCD post-adoption approval is supported by the fact that the HAA must be interpreted and implemented in a manner to afford the fullest weight to the interest of and approval of housing. §65589.5(a)(2)(L). The City notes that courts have refused to apply rules of liberal construction to ignore the statutory language or construe it to accomplish a purpose that does not appear on the face of the statute or from its legislative history.

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[7] The City argues that the one-year rezoning requirement is inapplicable because it timely adopted its housing element within one year of its October 15, 2022 deadline. Reply at 6. The fact that the City is not subject to the re-zoning penalty does not affect the court's interpretation of the statutory scheme.

Reznitskiy v. County of Marin (2022) 79 Cal.App.5th 1016, 1036. This argument begs the question; the requirement of HCD approval is part of the HAA as properly interpreted.

As a matter of statutory interpretation and harmonizing the statutory scheme, the Housing Element Law requires HCD post-adoption approval of a local government's housing element.

**b. HCD, the Attorney General, and Planning Staff Agree With The Court's Interpretation**

On May 11, 2022, HCD informed the City that its revised housing element will comply with the State Housing Element Law "when the revisions are adopted and submitted to HCD, pursuant to Government Code section 65585." RJN Ex. 3. This language clearly shows that HCD believed that an adopted housing element is not substantially compliant until HCD has approved it.

On March 16, 2023, HCD sent a clarifying memorandum to all local jurisdictions. RJN Ex. A. The memorandum outlined the process for submitting a draft housing element to avoid the consequences of non-compliance under the Housing Element Law. Ex. A. HCD emphasized a jurisdiction is not "in compliance" until the date of HCD's letter finding the adopted element in substantial compliance. Ex. A.

In a June 8, 2023 Notice of Violation to La Cañada Flintridge, HCD explained that the city, which asserted that its housing element complied with the Housing Element Law, could not be backdated to the adoption date to circumvent the Builder's Remedy for the project at issue. RJN Ex. B.

On May 8, 2023, HCD sent the City of Redondo Beach a Letter of Technical Assistance regarding the applicant's appeal for a proposed housing project. RJN Ex. C. The applicant submitted the preliminary application after the city adopted the housing element but before HCD's letter finding the adopted element to be in substantial compliance. Ex. C. The city's incompleteness determination indicated that the applicant did not have a Builder's Remedy because the city's adopted housing element substantially complied with the Housing Element Law. Ex. C. The Letter of Technical Assistance stated that a local jurisdiction does not have the authority to determine that its adopted element is in substantial compliance. Ex. C. The substantial compliance date is the date of HCD's letter finding the adopted element was in substantial compliance. Ex. C.

The City contends that the La Cañada Flintridge matter is not analogous because HCD determined that La Cañada Flintridge's adopted housing element was not substantially compliant after the applicant filed its preliminary application. In the Redondo Beach matter, the developer submitted a preliminary application before HCD determined that Redondo Beach had a substantially compliant draft housing element. Here, HCD approved the City's draft housing element as substantially compliant before Jha submitted her preliminary application. Reply at 4-5.

While the City is correct that both matters are factually distinguishable, HCD's position in both was plain that it must determine an adopted housing element's substantial compliance under the Housing Element Law, and substantial compliance cannot be backdated to avoid a Builder's Remedy.

Courts generally defer to an agency's interpretation when that agency possesses special familiarity with the legal and regulatory issues at issue. Reddell v. California Coastal Com., (2009) 180 Cal.App.4th 956, 965. Jha cites Boling v. Public Employment Relations Bd. (2018) 5 Cal.5th 898, 911, which stated that an agency's construction has greater weight when the legal text is

technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. Opp. at 15.

The City replies that HCD's interpretation is not absolute. Reply at 10-11. The courts independently interpret the law, giving deference to the determination of the agency appropriate to the circumstances of the agency action. Fonseca v. City of Gilroy, (2007) 148 Cal.App.4th 1174, 1193. HCD's informal interpretation of statutory requirements is not binding on a court, and the weight afforded to such interpretations depends ultimately on the court's assessment of its reasonableness. Reply at 10-11.

It is true that HCD's interpretation is informal and not binding. For an ambiguous statute, the agency's "construction ... is entitled to consideration and respect, [but] it is not binding and it is ultimately for the judiciary to interpret[.]" Murphy v. Kenneth Cole Prods., Inc., (2007) 40 Cal. 4th 1094, 1105, n.7. The agency's interpretation is entitled to consideration if such construction has a reasonable basis. Ontario Community Foundations, Inc. v. State Bd. of Equalization, (1984)35 Cal.3d 811, 816. The City fails to show the HCD's interpretation of an element's compliance date is unreasonable.[8]

Finally, the City argues that HCD's interpretation requiring post-adoption certification is tantamount to an underground regulation. Reply at 8-9. This is an issue raised for the first time in reply and need not be considered. Regency Outdoor Advertising v. Carolina Lances, Inc., (1995) 31 Cal.App.4th 1323, 1333 (new evidence/issues raised for the first time in a reply brief are not properly presented to a trial court and may be disregarded). In any event, HCD's letters are received in this case only to show HCD's interpretation of the Housing Element Law.

**c. Public Policy**

The City's policy argument is that a requirement of post-adoption certification by HCD of a housing element's substantial compliance unfairly places the City's ability to enforce its planning and zoning codes at the whim of HCD's workload-influenced timelines. Dem. at 11.

Jha responds by citing the Senate Floor Analysis of SB 330, which explains that SB 330 would prohibit cities from changing the rules on builders who are going through the approval process. RJN Ex. G, pp. 6-7. Jha argues that the City's position would leave developers in limbo. In this case, the City adopted a housing element in November 2021 only for HCD to find it non-compliant in February 2022. RJN Exs. 1-2; Pet., ¶28. Under the City's interpretation, every applicant between the November 2021 date of adoption and the February 2022 HCD determination

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[8] The Attorney General agrees with HCD. The Attorney General's opening brief in Housing Defense contended that no local jurisdiction can declare or certify that its housing element is substantially compliant with Housing Element Law without HCD review. RJN Ex. D. HCD is the sole government agency statutorily vested with the power to make such findings. Ex. D.

Jha adds that Planning's own staff understood that the City's housing element was not in substantial compliance when she submitted her preliminary application. On June 12, 2023, Planning issued an Appeal Recommendation Report that recommended the City Council deny Jha's appeal. RJN Ex. F, p.1. In part, Planning explained that Jha submitted her Project's preliminary application on June 24, 2022. Ex. F, p. 18. The Project therefore had vesting rights to the regulatory environment in place after the City had adopted a substantially compliant housing element but before HCD issued certification of substantial compliance. RJN Ex. F, p. 18. Jha points out that Planning staff never argued that the City's housing element was in substantial compliance before her preliminary application. Opp. at 17.

of non-compliance would not know whether the City could defeat any assertion of the Builder's Remedy. Opp. at 18.

The City replies that a requirement of HCD post-adoption finding of substantial compliance would also result in limbo. Developers would not know when this determination would materialize, even if HCD had already confirmed the substantive terms comply with the Housing Element Law. Reply at 8.

Public policy only comes into play where plain language, statutory purpose, and principles of construction and legislative history do not resolve the interpretation issue. *See* MCI, *supra,* 28 Cal.App.5th at 643; Lungren v. Deukmejian, (1988) 45 Cal. 3d 727, 735. Policy arguments do not favor either party.[9]

**F. Conclusion**

The City fails to demonstrate that its adopted housing element substantially complied with the Housing Element Law before HCD's July 29, 2022 post-adoption determination to that effect. This procedure had not been completed by the date of Jha's preliminary application. Under the HAA, Jha may invoke the Builder's Remedy in section 65589.5(d). [redacted]. The demurrer is overruled and the motion to strike is denied. The City has 20 days' leave to answer only.

[9] The City moves to strike paragraphs within the second cause of action (Pet., ¶¶117-129) and other references to the HAA, Housing Element Law, or Builder's Remedy (Pet., ¶¶ 23-24, 26-28, 31). Mot. Strike at 4-5. The City makes this motion on the same basis as the demurrer – that the Builder's Remedy does not apply because the City has a substantially compliant housing element before Jha's preliminary application. The motion is denied for the same reasons the demurrer is overruled.