RYAN J. PATTERSON (SBN 277971)
SARAH M. K. HOFFMAN (SBN 308568)
ZACKS, FREEDMAN & PATTERSON, PC
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Tel: (415) 956-8100
Fax: (415) 288-9755
Email: ryan@zfplaw.com

Attorneys for Petitioners/Plaintiffs
Aleksandr Reznitskiy and Cecily Rogers

SUPERIOR COURT – STATE OF CALIFORNIA

COUNTY OF MARIN – UNLIMITED JURISDICTION

ALEKSANDR REZNITSKIY and CECILY ROGERS, Petitioners/Plaintiffs, vs. MARIN COUNTY and COUNTY OF MARIN BOARD OF SUPERVISORS, Respondents/Defendants.	Case No.: CIV1903573 PETITIONERS'/PLAINTIFFS' OPENING BRIEF (CCP § 1094.5; Govt. Code § 65589.5) **Hearing Date:** December 8, 2020 **Time:** 1:30 p.m. **Dept.:** A **Judge:** Hon. Stephen Freccero **Action Filed:** September 17, 2019

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I. INTRODUCTION

In 2016, Aleksandr Reznitskiy and Cecily Rogers (collectively, "Petitioner") proposed to build a modest home for their family at 308 Los Angeles Blvd., San Anselmo (the "Property"), a vacant, residentially-zoned parcel of land in Marin County (the "Project"). The Project went through months of environmental review and vetting by Marin County agencies. The Marin County Planning Division determined that it complies with all applicable Code requirements and approved the Project on February 25, 2019. (Administrative Record ("AR"), 372.) However, neighbors of the Property filed an appeal challenging the approval of the Project. (AR, 250.) Planning Staff again recommended approval of the Project. (AR, 034.) The County of Marin Planning Commission ("Commission") granted the neighbors' appeal, unlawfully denying the Project. (AR, 040.)

Petitioner appealed the Project denial to the Marin County Board of Supervisors ("Board," AR, 007). The Board repeated the errors of the Commission and upheld the denial decision. In doing so, the Board violated state law, including the Housing Accountability Act (Gov. Code § 65589.5 *et seq.*, "HAA"). The HAA was enacted in 1982 (and recently strengthened) to address the desperate need for housing in California, squarely targeting the "activities and policies of many local governments that limit the approval of housing [and] increase the cost of land for housing." (*Id.*) The HAA requires local agencies to approve a proposed "housing development project" if it complies with "objective general plan, zoning, and subdivision standards and criteria." (Gov. Code § 65589.5(j)(1).) A local agency may only disapprove a code-compliant project if it makes "written findings supported by a preponderance of the evidence on the record" that the project would have a "specific, adverse impact upon the public health or safety" that cannot be mitigated. (*Id.*)

Here, the Project complies with all "applicable, objective general plan, zoning, and subdivision standards and criteria" (Gov. Code § 65589.5(j)(1)) and would build housing suitable for a local family on an undeveloped, residentially-zoned lot. However, the County of Marin, through its Planning Commission and Board of Supervisors (collectively,

"Respondent"), yielded to neighbor opposition and denied the Project for unlawful reasons. Respondent's denial decision did not identify any objective standards with which the Project was allegedly non-compliant. Nor did Respondent make written findings, based on a preponderance of the evidence, that the Project would have unmitigable health and safety impacts. Rather, Respondent asserted that the HAA does not apply to the Project because it proposes a single-family home. This is a specious attempt to circumvent the HAA, which clearly compels approval of the Project.

II. FACTUAL BACKGROUND

On July 21, 2016, Petitioner submitted an application to the Planning Division of the Marin County Community Development Agency ("Planning Division") to build a single family home and Accessory Dwelling Unit ("ADU") on the Property. The Property is a vacant lot that is surrounded by developed properties. It is steeply sloped and has a limited buildable area.

The Project proposes to build a two-story home on the lowest part of the Property. As there is currently no vehicular access to the Property, the Project also includes an access road, a bridge over an ephemeral stream on the Property, and a driveway that includes a required emergency turnaround area. At the urging of Planning Division staff who said the Project was too bulky, and they would not approve it unless it was reduced in size, Petitioner agreed to remove the proposed ADU and reduced the size of the Project from 5,145 square feet to 3,872 square feet. (AR, 188; Petitioner's Request for Judicial Notice ("RJN"), Exh. A.)

On October 29, 2018, the Planning Division approved a draft Mitigated Negative Declaration ("MND") for the Project, which determined, on the basis of multiple expert reports, that any potentially significant environmental effects of the Project had been "mitigated by modifications to the project, so that the potential adverse effects are mitigated to a point where no significant effects would occur." (AR, 054.) The draft MND was circulated for public comment on November 13, 2018.

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On February 25, 2019, based upon substantial evidence and after receiving public comment, the Planning Division certified the draft MND and approved the Design Review and Tree Removal Permit for the Project (the "Permits," AR, 372). In its Administrative Decision granting approval of the Project, the Planning Division found that the Project is consistent with the Marin Countywide Plan, satisfies the Marin County Code's mandatory findings for design review (Marin County Code § 22.42.060), and satisfies the mandatory findings for a tree removal permit (Marin County Code § 22.62.050). The approval decision noted, *inter alia*, that because Petitioner had reduced the size of the project, "the design of the house fits as closely as it possibly can with the intent behind the Single-Family Residential Design Guidelines," and the Project complied with all such guidelines. (AR, 374.)

On March 11, 2019, a neighbor appealed the Permit to the Marin County Planning Commission, arguing that the Project was too large and not compatible with the character of the neighborhood. (AR, 252.) Planning Division staff recommended that the Commission deny the neighbor's appeal and sustain the Planning Division's approval of the Permits. (AR, 034). Planning staff prepared a draft resolution holding that the bases of the neighbor's appeal were "insufficient to overturn" the approval of the Permits, and the Project is "consistent with the goals and policies of the Marin Countywide Plan." (AR, 277, 230.) Nevertheless, on May 13, 2019, the Commission granted the appeal and denied the Project, on the basis that the Project allegedly does not comply with the Marin Countywide Plan. (AR, 369.)

Petitioner appealed the Commission's denial of the Project to the Marin County Board of Supervisors. (AR, 206.) The Project's engineers and architects addressed the issues raised by the neighbors in letters to the Board dated July 23, 2019 (AR, 187) and August 12, 2019 (AR, 206), and provided additional evidence refuting the neighbors' contentions. (RJN, Exh. B).

The Board conducted a public hearing on August 13, 2019, and adopted Resolution No. 2019-96 (the "Denial Resolution," AR, 215). The Denial Resolution denied the appeal and

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denied the Permit application for the Project. The Denial Resolution was largely based on neighbors' assertions about the size of the Project and its consistency with the Countywide Plan. Although the Project complies with all "applicable, objective standards" (Gov. Code § 65589.5(j)), the Board stated that the home was "excessively large" and that the "scale and size of the house and parking areas is incompatible with the surrounding neighborhood . . . ." (AR, 220-221.) At various points in the Denial Resolution, the Board asserted that the Project should be "smaller." (AR, 221, 222.)

III. ARGUMENT

Respondents acted unlawfully in denying the Permit application. In doing so, the County made erroneous findings and relied on grounds prohibited by the Housing Accountability Act (Gov't Code § 65589.5).

A. Standard Of Review And Burden Of Proof

1. The Housing Accountability Act Establishes The Standard Of Review For Decisions Denying A Housing Development Project

California's Housing Accountability Act (Gov. Code § 65589.5 *et seq.*) was enacted to "limit the ability of local governments to reject or render infeasible housing developments." (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, citing Gov. Code § 65589.5, subd. (b).) As recently amended, the HAA imposes significant limitations on public agencies' discretion to deny permits for housing. The HAA requires, inter alia:

> 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 approve it upon the 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

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> 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.
>
> (Gov. Code § 65589.5(j).)

The HAA is enforced by a petition for writ of administrative mandate. (*Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1072, citing Gov. Code § 65589.5(m).) The inquiry in such a case shall extend to the questions of whether the public agency has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. (CCP § 1094.5(b).) Abuse of discretion is established if, in denying the Project, Respondent did not proceed in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (*Honchariw, supra*, 200 Cal.App.4th at 1072; CCP § 1094.5.)

Importantly, the HAA reverses the traditionally deferential standard of review afforded to local agencies under CCP § 1094.5. Where a petitioner alleges that an agency's findings are not supported by evidence, the agency's decision will normally be upheld if its findings are supported by substantial evidence in the record. (Code Civ. Proc., § 1094.5(b); *Bixby v. Pierno* (1971) 4 Cal.3d 130, 149; *Broadway, Laguna, Vallejo Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 767, 772.) However, in HAA cases involving the denial of a project, the "substantial evidence" standard of review is *reversed* to favor the petitioner. **If there is "substantial evidence that would allow a reasonable person to conclude" that a project is code-compliant, it *must* be deemed compliant**. (Gov. Code § 65589.5(f)(4).)

If an agency violates the HAA by failing to approve a code-compliant housing development project, it has failed to proceed in the manner required by law. Here, the record shows that in response to political pressure from neighbors, Respondent relied on an

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impermissible pretext to deny the Project. Accordingly, Respondent violated the HAA and did not proceed in the manner required by law.

2. In An HAA Case, The Public Agency Bears The Burden Of Proof

The HAA also modifies the traditional burden of proof under CCP § 1094.5. In ordinary mandamus cases, the burden is on the petitioner to prove that the respondent agency abused its discretion or did not proceed in the manner required by law, so that its action should be overturned. (CCP § 1094.5(b).) The HAA shifts this burden of proof to the local agency, providing that in any action challenging the denial of a project, the local agency "shall bear the burden of proof that its decision has conformed to all of the conditions specified in [the HAA]." (Gov. Code § 65589.6.) That is, the burden is on the local agency to justify its denial of a housing development project, rather than on the petitioner to prove abuse of discretion. (Gov. Code § 65589.6.) This is very different from most land use litigation, wherein the petitioner must prove that the agency's decision should be overturned. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 336; *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1212.)

Here, the County bears the burden of proving that the Project failed to comply with "applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application [was] determined to be complete." (*Honchariw v. County of Stanislaus*, *supra*, 200 Cal.App.4th at 1081.) In particular, the County must prove that there is *no* substantial evidence that would allow a reasonable person to conclude that the Project complies with applicable objective standards. (Gov. Code § 65589.5(f)(4).) If Respondent fails to do so, it "'has not proceeded in the manner required by law' (Code Civ. Proc., § 1094.5, subd. (b)), in denying approval of [Petitioner's] proposed housing development project . . . ." (*Honchariw, supra*, 200 Cal.App.4th at 1081.)

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3. The HAA Compels Approval Of The Project

a. There Is Substantial Evidence That Would Allow A Reasonable Person To Conclude That The Project Is Code-Compliant.

If there is substantial evidence that "would allow a reasonable person to conclude that the housing development project" complies with all applicable, objective standards, the HAA directs that it "shall be deemed" compliant. (Gov. Code § 65589.5(f)(4).) In this context, "objective" means: "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code § 65589.5(h)(8)). That is, in order to be invoked to deny a project under the HAA, a standard must be verifiable in advance and involve no discretionary judgment. For example, a 40-foot height limit would meet this requirement, whereas a requirement that a project be consistent with the "scale" of the neighborhood would not. The policy reason for this is to promote fairness and expeditiousness in the entitlements process, so that a project applicant can know whether a project would be approvable when designing it.

Here, the Project complies with all objective general plan and zoning standards and criteria, including design review standards, and there is substantial evidence in the administrative record that would allow a reasonable person to reach this conclusion. First, the Planning Division determined that the Project is compliant with all objective standards and criteria, and approved the Project. (AR, 371.) The Staff Report prepared for the Planning Commission *again* recommended approval of the Project (AR, 033), and included Findings for Approval. The Planning Division's administrative approval of the Project, and the report submitted to the Commission, constitute substantial evidence that would allow a reasonable person to conclude the Project is consistent with the Marin Countywide Plan, the Marin Development Code, and all applicable, objective standards. Therefore, the Project must be deemed compliant.

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b. The Denial Decision Impermissibly Relied On Wholly Subjective Standards, And The Project Complies With Such Standards In Any Event.

The County's findings for denial present no evidence, much less substantial evidence, supporting a conclusion that the Project fails to comply with any objective Code requirement. To the contrary, the County's findings are riddled with subjective, discretionary language that is prohibited by the HAA.

The Board asserts that the Project is inconsistent with a number of Countywide Plan policies. Such "policies" are not "objective standards and criteria" as defined by the HAA. There is an important distinction between aspirational policies and the "standards and criteria" that implement them. As noted above, in order to be considered an "objective" standard or criterion, the HAA requires the application of the standard to:

- Involve no personal or subjective judgment by a public official; and
- Be 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.

Here, the Countywide Plan frames the "policies" as "desired outcomes" rather than objective standards or criteria. (RJN, Exh. C.) That is, these policies are aspirational and speak to what the County hopes to achieve, as opposed to enunciating objective development standards that are uniformly verifiable or knowable in advance.

i. Woodland preservation policy (BIO-1.3)

The Board improperly determined that the Project does not comply with the "Woodland Preservation Policy." This policy encourages the protection of "Woodlands, Forests, and Tree Resources" and states in full:

> Protect Woodlands, Forests, and Tree Resources. Protect large native trees, trees with historical importance; oak woodlands; healthy and safe eucalyptus groves that support colonies of monarch butterflies, colonial nesting birds, or known raptor sites; and forest habitats. Prevent the untimely removal of trees through implementation of standards in the Development Code and the Native Tree Preservation and Protection Ordinance. Encourage other local agencies

> to adopt tree preservation ordinances to protect native trees and woodlands, regardless of whether they are located in urban or undeveloped areas.
>
> (RJN, Exh. D.)

The County asserts that the Project fails to comply with this policy because it proposes to remove trees (which is allowed and is unavoidable for the development of a heavily-wooded lot). This denial finding is improper because the Woodland Preservation Policy does not contain *any* objective criteria or standards for its application. Rather, it relies on the "implementation of standards in the Development Code" for tree protection. (BIO 1-3.)

The Marin Development Code § 22.62.050 sets out criteria for issuance of a tree removal permit and expressly allows for tree removal to occur if the criteria are satisfied. (RJN, Exh. E.) The Denial Resolution did not identify *any* areas of non-compliance with the § 22.26.050 criteria, because the Project complies with all of them, as the Planning Division determined. (AR, 378-379.) The Property is heavily wooded and there is no way to develop it without removing some trees. (*Id.*) Of the 73 trees on the site, 54 will be preserved. As the Planning Division found when it approved the Project, preservation of additional trees "would unreasonably interfere with the property owner's rights to develop the land," and "the 19 trees that are proposed for removal . . . are located in the only area where the applicant could reasonably develop the property." (*Id.*)

The *only* possibly objective criterion for a tree removal permit that was identified in the Denial Resolution relates to the ratio for the replacement of trees. To wit, the Denial Resolution recommended that "future proposals should plan for replacement of any removed trees at a 2:1 ratio wherever possible." (AR, 026.) The Project complies with this standard, and the 2:1 ratio was also a condition of the Planning Division's approval. (AR, 379.)

ii. Natural transition and connection policies (BIO-2.3 and BIO-2.4)

The County further erred in citing the "Natural transition and connection policies" to deny the Project. The Countywide Plan encourages development to preserve "natural transitions between habitat types" and "corridors for wildlife movement," including riparian

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areas. (BIO-2.3; 2.4.) These policies contain no objective criteria, but the Project complies with them in any event. The Denial Resolution suggests that the Project does not comply with the Natural Connection and Transition Policies because it proposes a temporary access road, in addition to the bridge that will be constructed, so that the Project would span over a "larger stretch" of a creek located on the Property, instead of being focused in one specific area. (AR, 026.) In the Board of Supervisors hearing, members of the Board and staff opined (without evidence) that the Project could be constructed without needing to build a temporary access road. (AR, 429.)

These policies are not applicable, objective standards for the purposes of the HAA. There are *no* objective standards in the Code or Plan that prohibit the construction of temporary access roads. Moreover, there is no reasonable way to develop the site without building a temporary road. (RJN, Exh. B.) The Project's civil engineer confirmed that in order to build a bridge that supports heavy emergency vehicles, as required by the County (AR, 275), it is necessary to build relatively deep footings on each side of the creek before the superstructure of the bridge is placed across the creek. (*Id.,* AR, 085.) There is currently no vehicular access to the site, and the bank on the far side of the creek is too steep to build a temporary bridge in the same place as the permanent bridge. (AR, 208, RJN, Exh. B.) This means a temporary road is needed to provide access to the far side of the Creek for construction of the bridge footing and would be required for *any* development of the site. (*Id.*) That is, it would be practically impossible to reasonably develop the site without building a temporary road,

This is important because the Property is zoned for residential use, and Petitioner has a right to develop the Property. In making the finding that a temporary access road is not permitted, the County has effectively rendered it impossible to develop the Property, in violation of the HAA and its own Code.

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iii. Wetland conservation policies (BIO-3.1) and stream conservation policy (BIO-4.1)

The Board further erred in relying on the Countywide Plan Wetland Conservation (BIO-3) and Stream Conservation (BIO-4) policies (AR, 218). These policies promote the protection of wetland and stream areas, including by requiring a 50-foot setback from streams in certain circumstances. (RJN, Exh. F.) The Denial Resolution asserts that the Project does not comply with these policies, because Sorich Creek, an ephemeral stream, runs through the Property. (AR, 219.) The Denial Resolution objects to the location of the "parking deck" and temporary access road in a "stream conservation area." (*Id.*)

However, the Project is *not* in a stream conservation area ("SCA"). Sorich Creek is an ephemeral stream, which is subject to SCA policies only if it supports riparian vegetation for at least 100 feet, or supports a special status species. (RJN, Exh. F.) The Project biologist concluded that Sorich Creek meets neither of these criteria, and the Mitigated Negative Declaration prepared by the County's consultant confirmed that Sorich Creek is not an SCA. (AR, 108, 150.) The stream does not appear on the County's own map of SCAs in the County. (AR, 015.) Moreover, Planning staff agreed that "Sorich Creek does not meet all of the criteria to be classified as an SCA." (AR, 036.) The SCA policy is therefore not "applicable" to the Project.

The County further asserted that even if there is no SCA on the Property, the Wetland Conservation policy would still apply to require a 50-foot setback from an adjacent Wetland Conservation Area. ("WCA," RJN, Exh. F.) But this policy is not an applicable "objective" standard as defined by the HAA. The WCA policy includes certain exceptions, including an exception that allows development within a WCA if imposing a buffer "would have greater impacts on water quality, wildlife habitat, [or] other sensitive biological resources." (*Id.*) (The SCA policy contains an identical exception.) The application of the WCA policy (and its exceptions) involves the exercise of a decision-maker's subjective judgment as to the relative impacts of developing inside or outside the 50-foot buffer. Whether a 50-foot setback will be

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required in a given case is therefore not uniformly verifiable or knowable in advance, as is required by the HAA.

In any event, imposing a 50-foot buffer would require the house to be built further uphill, resulting in more cut and fill, more tree removal, and increased visibility of the Project, creating a far greater environmental impact. (AR, 228, 351.) As Planning staff found when recommending approval of the Project, enforcing the 50-foot buffer would have "greater impacts on the environment," so the exception to the WCA policy applied. (*Id.*) The Project therefore complies with the WCA policy (and the SCA policy, if this policy applied).

iv. Aesthetic policies and programs (DES-4.1 and DES-4.e) / Residential design policies and programs (DES-3.b and DES-4c).

The County compounded its violations of the HAA by citing wholly subjective aesthetic and design policies in support of its denial of the Project. The HAA was enacted expressly to prohibit the use of subjective aesthetic criteria to deny a project. In *Honchariw,* the Court of Appeal noted that the word "objective" was inserted in 1999 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 1076.)

Here, the Denial Resolution asserts that the Project does not comply with the Plan's aesthetic and residential design policies because it is "out of scale with the common house sizes in the surrounding neighborhood" and "incompatible with the neighborhood." (AR, 219, 221.) This is an impermissible basis to deny the Project because the Project satisfies *all* objective standards and criteria. The Project is in fact significantly smaller than the maximum square footage allowed by Code, proposing a floor-area-ratio of only 0.05, where the maximum permitted floor-area-ratio is 0.3 (AR, 189, 376). At 3,872 square feet and with four bedrooms, it is a reasonably-sized family home. Moreover, Petitioner produced an analysis of home sizes in the neighborhood, which showed the Project is *not* out of scale. (AR, 206.) There

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are no objective standards in the Plan or Code that require the Project to be reduced further in size, and it was improper for Respondent to deny the Project on this basis.

v. Marin County Code § 22.42.06

Finally, the Board found the Project is inconsistent with the Code's Design Guidelines and Discretionary Development Standards because it "was not designed to avoid adversely affecting natural resources or the character of the local community." (AR, 028.) This conclusory statement is subjective to the point of vagueness and is an unlawful basis for disapproval of the Project. The HAA does not allow housing development projects to be denied on the basis of subjective guidelines, and the Board was prohibited from denying the Projects on the basis of noncompliance with the Design Guidelines and Discretionary Development Standards because they are not "objective standards and criteria" for the purposes of the HAA.

As detailed above, the Project complies with all Plan policies and Code requirements. In any event, any alleged noncompliance with the above policies cannot be used to deny a housing development project under the HAA because each of these Countywide Plan policies is entirely subjective and involves the exercise of discretion. The specific policies cited by the County can therefore not be relied on to deny the Project.

4. The HAA Applies To Single-Family Homes

Rather than comply with the HAA, Respondent, without any supporting evidence or analysis, asserts that the HAA is inapplicable to the Project because the Project proposes a single-family home. The staff report for the Board of Supervisors erroneously claims that the HAA only applies to "large-scale housing projects such as mixed-use, multiple residential unit projects, transitional and supportive housing." (AR, 026.) Similarly, the Denial Resolution asserts that the HAA "makes reference to a 'housing development project,' for the sole purpose of identifying and protecting certain types of large-scale development, and the [Project] does not fit the description." (*Id.*) Respondent provides no analysis or legal authorities in support of this position. Respondent's interpretation of the HAA is inaccurate, unsupported by the

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authorities, and would undermine the existential purpose of the HAA – to promote the construction of housing at all income levels. (Gov. Code § 65589.5(a)(1)(K).)

The HAA is a remedial statute and must be construed broadly and "consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians." (Gov. Code § 65589(d); *Bunner v. Imperial Ins. Co*. (1986) 181 Cal.App.3d 14, 20–21: A remedial statute should be liberally construed to promote its underlying public policy.) Indeed, the HAA specifically requires that it be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5(k).) This is the lens through which the HAA must be interpreted.

The County asserts that the HAA's definition of "housing development project" excludes single family homes. Government Code § 65589.5(h)(2) states:

> "Housing development project" means a use consisting of any of the following:
>
> (A) Residential units only.
>
> (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
>
> (C) Transitional housing or supportive housing.

There are no controlling authorities that have addressed whether the HAA applies to single-family homes. However, the HAA has been applied by the Court of Appeal to compel the approval of a project that proposed the construction of eight single-family homes on separate parcels – by no means a "large-scale housing project." (*Honchariw, supra,* 200 Cal.App.4th at 1067.) The Court of Appeal held that the HAA's definition of "housing development project" is "clear and unambiguous," noting:

> There is no dispute that the project envisions only a single-family dwelling to ultimately be constructed on each of the eight proposed lots. The anticipated use is thus "[r]esidential units only" (§ 65589.5, subd. (h)(2)(A)), and the proposed project is therefore a "proposed housing development project" within the meaning of section 65589.5(j).
>
> (*Honchariw*, *supra*, 200 Cal.App.4th at p. 1074.)

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A simplistic reading might say that because the reference to residential "units" is plural, a housing development project must comprise at least two units. However, the canons of statutory interpretation do not support such a reading. It is a "basic rule that unless the provision or context otherwise requires, *the singular number includes the plural and the plural the singular*. . . ." (*San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748, 758, citing Gov't Code §§ 5, 13, emphasis added.) "[T]he English language does not always carefully differentiate between singular and plural word forms, and especially in the abstract, such as in legislation prescribing a general rule for future application." (2A Singer, Sutherland Statutory Construction (7th ed. 2015) § 47.34.)

Further, while it is true that the HAA's definition of "housing development project" includes residential units, it also includes mixed used developments. Both "units" and "developments" are expressed in the plural, and this does not necessarily mean that multiple "units" or "developments" are required for a project to qualify for approval under the HAA. Indeed, the idea that a single project would include multiple "mixed-use developments" is illogical. This shows that the definitions at (A)–(C) speak generally to the housing development categories covered by the HAA, rather than mandating a minimum number of housing units for a project to qualify for approval.

The legislative history supports this approach. When the above definition was inserted into the HAA in 2003 (pursuant to SB 619), the Senate Committee Report noted that the bill defined "Housing development project" as "residential housing or mixed-use developments." (RJN, Exh. G.) Similarly, a Senate Analysis noted that "SB 619 provides that, in addition to residential-only *developments*, the protections of the anti-NIMBY act apply to mixed-use residential *developments*." (RJN, Exh. H.) These legislative materials are "useful in determining the Legislature's intent." (*Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal.App.4th 780, 792, citing *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627.) Importantly, in the materials for SB 619, the

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Legislature did *not* suggest that "residential housing" is restricted to multi-unit buildings, or that a minimum number of units is required. Rather, it referred generally to residential developments, alongside mixed-use developments.

Moreover, the HAA does not require a minimum number of residential units in a "mixed-used development," but instead refers to "residential use." (Gov. Code § 65589.5(h)(2)(C).) One residential unit is a "residential use." This means that an applicant could conceivably propose a three-story mixed-used development with ground-floor retail and a residential unit on the second and third floors. This type of development would be subject to approval as a "mixed-used development" under the HAA. Excluding single-family home projects from subsection (2)(A) would create an absurd inconsistency, whereby the HAA would apply to a mixed-use development with one residential unit, but not to a single-family home by itself.

At most, it could be said that the definition of "housing development project" is ambiguous. But when ambiguity arises, a remedial statute must be interpreted in a way that effectuates its purpose and suppresses the mischief at which it is directed. (*East West Bank. v. Rio School District* (Cal. App. 2d Dist. 2015) 235 Cal.App.4th 742, 748.) Here, the purpose of the HAA is to promote the construction of housing at all income levels. (Gov. Code § 65589.5(a)(1)(K).) The statute itself states it is to be construed "to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(1)(L)). The County's approach does the opposite, excluding *any* district zoned for single family homes only from the HAA. The County is effectively asserting that it can use restrictive zoning rules to circumvent the HAA, undermining the purpose and spirit of this law. In order to effectuate the purpose of the HAA, its definition of "housing development project" should be interpreted liberally to include single family homes.

Finally, it should be noted that the Project initially proposed *two* units. However, the Respondent wrongfully required Petitioner to remove the ADU as a precondition to Project

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approval. (RJN, Exh. A.) Indeed, the Planning Division's approval decision spoke positively of the fact the Project had been downsized. (AR, 374.) Having forced Petitioner to remove the ADU and reduce the size of the Project, Respondent cannot now claim that the HAA does not apply to the Project – due to its own wrongful actions.

5. The Court Should Order Approval Of The Project Because Respondent's Denial Decision Was Made In Bad Faith.

If the Court finds that Respondent has unlawfully denied the Project in violation of the HAA, Gov. Code § 65589.5(k)(1)(A) provides that:

> . . . the court shall issue an order or judgment compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the housing development project or emergency shelter. The court may issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section.

That is, if a local agency has acted in bad faith in denying a project, the court may *immediately* issue an order approving the project. Otherwise, the court may remand the project to the agency and order it to comply with the HAA within 60 days.

Here, Respondent acted in bad faith, so the appropriate remedy is an order approving the Project. Respondent ignored the advice of its own staff, expert consultants, and the substantial evidence that the Project is code-compliant, and denied the Project for subjective and unlawful reasons. The true reasons for denial, as enunciated by both the Planning Commission and City Council, were wholly subjective. For instance, one Planning Commissioner opined that reducing the size of the Project would make it "more in line with the character of the homes in this neighborhood." (AR, 519.) A member of the Board said the Project "needs to be scaled down," but did not identify *any* objective basis for this requirement. (AR, 430.)

Because Respondent failed to enunciate any objective standards as a basis to deny the

ZACKS, FREEDMAN & PATTERSON, PC
235 MONTGOMERY STREET, SUITE 400
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Project and relied on completely subjective reasons, Respondent acted in bad faith and the Project should be approved by the Court.

6. Even If The HAA Did Not Apply Here, Respondent's Denial Of The Project Should Be Reversed Because Its Findings Are Not Supported By The Evidence.

In the alternative, even if the HAA did not apply to the Project, Respondent's findings are not supported by the evidence and should be overturned, even under the more deferential standard of review in § 1094.5. As analyzed above at § 3(b), the Project complies with all applicable policies and Plan requirements. Respondent's findings are unsupported by the evidence, and its denial decision must be overturned.

IV. CONCLUSION

Petitioner respectfully requests that the Court grant the Petition, reverse the County's resolution denying the Project, and order that the Project be approved.

October 9, 2020

ZACKS, FREEDMAN & PATTERSON, PC

Ryan J. Patterson
Attorney for Petitioners

ZACKS, FREEDMAN & PATTERSON, PC
235 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94104