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SUPERIOR COURT - STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA - UNLIMITED CIVIL JURISDICTION

SONJA TRAUSS, SAN FRANCISCO BAY AREA RENTERS FEDERATION, Petitioners, vs. CITY OF LAFAYETTE, and DOES 1-25 Respondents. O'BRIEN LAND COMPANY, LLC; ANNA MARIA DETTMER, AS TRUSTEE OF THE AMD FAMILY TRUST, Real Parties in Interest.	CASE NO. Case No.: MSN15-2077 PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF ADMINSTRATIVE MANDAMUS Date: January 25, 2017 Time: 9:00 a.m. Dept: 9 Judge: Hon. Judith Craddick

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I. INTRODUCTION ON REPLY

In the midst of a critical housing shortage, California's Housing Accountability Act was enacted in order to spur the building of more housing units of all kinds, but particularly of affordable housing. This legislation is *remedial* and is plainly intended to restrict municipal power to reduce or deny affordable housing. The HAA champions affordable housing because the Legislature has determined that NIMBY hostility is particularly directed at it. The Legislature did not care *why* NIMBYs are particularly hostile to affordable housing and made a simple determination: if an affordable housing project can be approved under objective general plan and zoning standards in place when the application is complete, then it cannot be denied or reduced unless certain specific findings are made.

Although this petition may involve some complex issues of law, ultimately it comes down to the two fundamental paradigms the parties advance. On the one hand, the local government – Lafayette – advances the paradigm that the HAA is to be interpreted narrowly so that a municipality which opposes an affordable housing project can inhibit approval and then create circumstances that convince the developer to "voluntarily" agree to a different, and reduced, project it would not have built without local pressure. Lafayette's paradigm enables it to do indirectly what it cannot do directly. It would render the HAA a pointless statute. All a municipality has to do is throw up enough roadblocks and then offer the developer a better deal than litigation.

On the other hand, Petitioners' paradigm prevents municipalities from evading the HAA and avoiding unpopular affordable housing. It prevents municipalities from putting developers under economic duress to force them to agree to change their projects. Petitioners' paradigm is also appropriate – and Lafayette's is inappropriate – because the Legislature gave standing to persons other than the developer being squeezed by the municipality. These are the people whom the HAA was ultimately intended to benefit: low- and moderate-income residents of California. Accordingly, when the municipality approves a new project that it "convinced" the developer topropose in lieu of the original project, it has violated the Act. A remedial statute such as the HAA should not be interpreted so that the municipality can accomplish indirectly what it can't accomplish directly (which Petitioners argued, without contradiction) nor should whether it applies

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turn on self-serving statements, including recitals, intended to make the "deal" appear voluntary.

As the record demonstrates and Lafayette acknowledges, there was near-unanimous opposition by Lafayette residents and government to the Apartment Project. (E.g. AR 207-208) Recall that the HAA is also known as the anti-NIMBY law. Its intent is to prevent local hostility, whether municipal or civic, from forcing housing projects to be reduced or quashed without certain findings. Developer obviously knew there was hostility. When that hostility led Lafayette to sabotage approval of the Apartment Project, Developer didn't offer a new project – it threatened to sue under the HAA. Vice Mayor Andersson recognized the danger of an HAA lawsuit because Lafayette probably had no justifiable defense. (AR 634-640) Therefore, as shown below, *Lafayette* initiated the Process Agreement and Developer, being under severe economic duress, acceded. There is no evidence or explanation of why the Apartment Project was preserved if Developer wanted to voluntarily withdraw the original project and propose a new one. That Lafayette violated the HAA plainly arises from inferences which are a product of logic and reason. This is substantial evidence. (Kuhn v. Department of General Services (1994) 22 Cal.App.4th 1627, 1633)

II. ARGUMENT

A. Petitioners' Paradigm, Which Upholds The HAA's Remedial Nature, Is The Correct One

1. Petitioners' Paradigm Is Compelled By The Liberal Construction Of Remedial Legislation

Lafayette and Developer argue that the plain language of the Act compel judgment for them. However, they do not deny that because the HAA is remedial legislation, it is in the public interest to be liberally construed to the end of fostering its objectives. The plain language rule *generally* controls, but to every general rule there are exceptions, as even Developer acknowledges (perhaps unintentionally). "[T]he general rule [is] that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. (People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 313) "Statutes should be interpreted, of course, to avoid absurd and inconsistent results." (Braun v. Bureau of State Audits (1998) 67 Cal.App.4th 1382, 1393) "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its

provisions considered as a whole." (Silver v. Brown (1966) 63 Cal.2d 841, 845) Moreover, "[i]n interpreting the law to further the legislative intent, therefore, we should strive to avoid any construction that would significantly undermine its enforceability." (In re Jorge M. (2000) 23 Cal.4th 866, 880) These principles were applied in one of the seminal HAA cases, Honchariw v. County of Stanislaus (2013) 218 Cal.App.4th 1019, 1027 (Honchariw II))

2. The Court Should Interpret GC § 65589.5(h)(5)(A) To Include Approval Of A Housing Project That The Developer Was Pressured Into Building In Lieu Of A More Affordable Project

Nothing in the HAA requires a "formal" vote on the project rather than any action on a project which operates to deny the original project without complying with substantive HAA requirements. Petitioners' position is that because Lafayette could not make the necessary findings to deny or reduce the Apartment Project, it coerced Developer into submitting an alternative. In their opening brief, Petitioners stated: "[T]he HAA explicitly provides that a development project is disapproved when an agency 'Votes on *a* proposed housing development project application and *the* application is disapproved.' (G. C. § 65589.5(h)(5)(A)), emph. added)" noting that "the application" refers to the one being championed by the HAA and "a proposed housing development project application" could be any application, the approval of which operates de facto to eliminate the former project.

Developer responds that Petitioners' "interpretation does not logically flow from the plain text of the statute". (Developer's Opp. ("D-Opp.") at 16:5-6) Ironically, Developer's argument flows into Honchariw II, where the Court of Appeal determined that G.C. § 65589.5(k)(1) states that the court "shall award reasonable attorney's fees and costs of suit to the plaintiff or petitioner who proposed *the housing development...*" was ambiguous. (Honchariw II, supra, 218 Cal.App.4th at 1023, emph. in orig.) In order to resolve the ambiguity, the Court extensively analyzed the HAA's history and purpose to conclude that "the housing development" did not refer to the one on which Honchariw prevailed in Honchariw I because it was not affordable housing. (Honchariw II, supra, 218 Cal.App.4th at 1023-1024) As the Court stated: "we must adopt the interpretation that best effectuates the Legislature's purpose." (Honchariw II, supra, 218 Cal.App.4th at 1023)

Although Honchariw II analyzed a different issue, much of its discussion, from statutory

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interpretation through the history and purpose of the HAA, supports Petitioners. Though the Court could have ruled in Honchariw's favor because the section was ambiguous, the history and purpose of the Act compelled a different conclusion. Here, neither Developer nor Lafayette deny the underpinning of Petitioners' main theme, which is that if the Court rules against Petitioners, a municipality could evade the HAA by strong-arming a developer into accepting a reduced-density project in lieu of disapproval, lawsuits, and local hostility. Petitioners' interpretation prevents this from happening. It also makes practical sense because both projects could not be approved; approval of the Project Alternative constituted a de facto denial of the Apartment Project.

Developer says it is absurd to apply the HAA where there is no formal vote on the original project because it would result in lawsuits "whenever a developer withdraws, revises, or amends an application for any reason." (D-Opp. at 10:16-17) That is incorrect. Lawsuits would not occur "for any reason". They would occur when the municipality pressured the developer into submitting a reduced project in lieu of the locally-unfavorable one. Again, keep in mind the nickname of the HAA – the "anti-NIMBY law". It was not enacted because municipalities *were* approving affordable housing projects but because they were reducing or denying them altogether. So where the developer decides to change the project and that has nothing to do with local pressure, then there is no HAA violation. That is not what happened here.

Developer's argument that nothing requires Lafayette to make findings where it was not voting on an application before it makes Petitioners' point. If municipalities can coerce developers into reducing projects, they will never have to make the findings required by the HAA. Developer's argument at 11:24-12:4 also proves Petitioners' point. Aside from not citing to where Petitioners make the argument (they don't), Petitioners don't rely on these statements as proof that the HAA applies, but that Developer threatened an HAA suit and Lafayette was sufficiently concerned about that threat to be motivated to find a way to accomplish the denial of the Apartment Project by indirect means. Developer says the comments "were made prospectively, in anticipation of a possible HAA action by Real Parties. . .", but *why* were they made? Developer doesn't answer that question because the answer is Petitioners' position.

A narrow interpretation of the HAA would undermine it if not eliminate it. All the

municipality has to do to avoid the HAA is to coerce/force/convince the developer to accept a lower-density project alternative because there would be no vote on the original proposal.[1]

> If there is any class of litigant that knows of the uncertainties of litigation, it is the builders. They, more than any other group, have walked the rough, uneven, unpredictable path through planning boards, boards of adjustments, permits, approvals, conditions, lawsuits, appeals, affirmances, reversals, and in between all of these, changes in both statutory and decisional law that can turn a case upside down. (Van Dalen v. Washington Tp. (1990) 120 N.J. 234, 249, 576 A.2d 819, 827)

Dissenting[2] in Hope, Inc. v. DuPage County, Ill. (7th Cir. 1984) 738 F.2d 797, Justice Cudahy stated:

> It is unrealistic to expect that a commercial developer would be willing to take the sorts of financial and other risks which MHDC took in order to establish integrated housing in Arlington Heights. Faced with what appears to be a strongly held and consistently adverse attitude, a developer will look elsewhere rather than accept the burdens not only of developing plans for a project which will probably never be approved but also of the inevitable and interminable lawsuit and of the intimidating loss of official goodwill. [ ] The economic reality of DuPage County is that commercial developers would have to accept the additional expense and risk of "buying" a lawsuit to establish their right to build low- and moderate-income housing in the County. In addition, they would presumably incur the not insignificant hostility of officialdom in DuPage. It is not to be expected that an altruistic developer will now step forward to undertake the thankless task of securing admission to DuPage County of the poor and the non-white, nor should we have to wait for one to do so. (Hope, Inc., supra, 738 F.2d at 824, emph. in orig., Cadahy, J., dissenting)

3. The Record Shows That Developer's Agreement Was Not Voluntary

Lafayette claims the two projects are very different. However, the second is, in reality, a reduced-density version of the first with additional "goodies" thrown in to pacify the residents (andcausing further unaffordability). Lafayette could not approve both projects; both projects could not be built. Approving the Project Alternative concomitantly denied the Apartment Project.

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[1]Petitioners clearly used the word "extortion" in its colloquial sense as "rhetorical hyperbole". (See Bellavia Blatt & Crossett, P.C. v. Kel & Partners LLC (E.D.N.Y. 2015) 151 F.Supp.3d 287, 294; Brodkorb v. Minnesota (D. Minn. 2013) 2013 WL 588231, at *12)

[2] The majority reversed the trial court's decision for the plaintiff challenging exclusionary zoning laws in a wealthy and very white county on standing grounds because plaintiff was unable to show that any below market rate-income housing would have actually been built, a concern which is obviously not present here. (See Hope, Inc., supra, 738 F.2d at 807)

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In what amounts to an affirmative defense, Lafayette and Developer argue that the Process Agreement was voluntary, meaning they have the burden of proof. However, no governmental body determined that the Process Agreement was voluntary, so there is no decision on this issue to review under any test. Even if the substantial evidence test applied, Petitioners meet it. First, while Lafayette states that the record is "replete" with instances where Lafayette and Developer state that everything is voluntary, they cite to only two pieces of evidence. (Lafayette's opp. ("L-Opp.") at 1:17-24, citing AR 486, 5386) One (AR 486) is the Process Agreement and the other (AR 5386) is statements made by Developer's counsel. The Court should rightly reject these. (People v. County of Kern (1976) 62 Cal.App.3d 761, 775 - court can reject the sufficiency of evidence "regardless of its window dressing" if lacking in good faith; see also City of Poway v. City of San Diego (1984) 155 Cal.App.3d 1037, 1042, describing rejected evidence in County of Kern as "self-serving") Lafayette's evidence that Developer acted on its own initiative is "nothing more than *post hoc* rationalizations to support action already taken." (Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 394, ital. in orig.) Developer's joinder is simply its desire to get *something* built quickly. Moreover, while Ev. Code § 622 does state that "the facts recited in a written instrument are conclusively presumed to be true", this is only "between the parties thereto."

The record has compelling evidence that reveals both Lafayette's and Developer's true state of mind. From the very beginning, Developer anticipated that Lafayette would fight the Apartment Project. (AR 4-6)

> After all of this time, the Dettmer Family has a right to move forward with a project application consistent with the current General Plan and zoning designations for the Dettmer Family property. We respectfully request that the City process the application filed on today's date in a consistent and fair manner under the City's laws and ordinances. (AR 6)

At the December 9, 2013 City Council meeting, City Manager Falk introduced the concept of the Process Agreement. (AR 153) In doing so, he stated – and the Court should read the entire record cite:

> Given those things [HAA risks], about four weeks ago *the City Council directed staff to participate in conversations with the developer* to determine if there was an alternative plan that would be

> acceptable to all parties – the developer, community members, and the City." (Falk, AR 153, emph. added)

How did Lafayette arrive at this plan? "Let me take a moment to describe how we arrived at this plan, and why it is organized this way. *After establishing some rapport with the developer, staff indicated that our goals were* to, as follows: [basically gut the project in violation of the HAA]." (AR 176-177, emph. added) If Lafayette did not initiate the change, City Manager Falk would not have said it did. Furthermore, at the January 22, 2014 city council meeting, Vice Mayor Andersson essentially told city residents that: 1) the HAA bars a lot of the reasons why residents opposed the Apartment Project; 2) they had a serious chance of losing an HAA suit; and 3) if they didn't all get behind the alternative, they could end up far worse off. (AR 639-640)

Lafayette's position that the Developer voluntarily approached Lafayette because of issues having nothing to do with Lafayette's hostility to the Apartment Project, and its willingness to go so far as to manipulate the EIR, is nonsense. David Baker, for the Developer, affirmed this in a June 29, 2015 letter to Andersson and the City Council:

> As you are aware, [Real Parties] have a pending application with the City for 315 apartments (the "Apartment Project").
>
> Further, the Apartment Project consists of 100% "moderate housing" as defined under the [HAA]. Under the [HAA], a local agency's ability to disapprove an affordable housing project, and particularly a project that is consistent with the City's General Plan and zoning ordinance designations, is *strictly limited.*
>
> Despite the above, and upon the City's request, [Real Parties] placed the Apartment Project "on hold," . . . . (AR 3978, ital. in orig., underline added)

Why Lafayette emphasizes that Developer "took steps to craft the Deer Hill Project to meaningfully address the concerns raised over the Terraces Project and to prepare a new project that 'would be acceptable to all parties'" is unknown. (L-Opp. at 7:11-13) This statement admits that Developer was squeezed by the city and its residents. Developer had no obligation to craft the project to address such concerns, especially at the cost of millions of dollars. Developer sought to go ahead with a development that would have soon thereafter have been prohibited as a result of the longstanding intent to change the zoning on Deer Hill. It knew Lafayette would be hostile to a 315-unit apartment complex overlooking a major thoroughfare. This is Lafayette. O'Brien is a

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local developer. Developer knew that what it wanted to build was compliant with everything it could be required to comply with under the HAA.

Developer proceeded and when Lafayette initially demurred, it pushed hard. First, Alan Moore and David Bowie put on sterling presentations before the City Council and provided various documents showing that denying the project would be an abuse of discretion under the standards of the HAA. Then they threatened to sue under the HAA. Then "the City Council directed staff to participate in conversations with the developer to determine if there was an alternative plan that would be acceptable to all parties. . . ." (AR 153) Developer made the expected calculation that it could not afford the monetary, temporal, and other costs of litigating. Capital is tied up. Resources are diverted or paid to be stored. The lawyers send their monthly bills. It's not unreasonable that a developer would cave in to local pressure. That's one reason why the HAA exists. The public policy of the HAA isn't to benefit developers per se, but to increase the supply of affordable housing.

Developer takes the position that neither it nor Lafayette were motivated by avoiding litigation because some residents would have fought any development and some did. (D-Opp. at 9:22-10:9) This is untrue as characterized and irrelevant. Petitioners argued that *Developer* could avoid having to file its own suit. It could never do anything to mollify those completely opposed to any development. Mayor Andersson was fervently trying to convince everyone to get on board the Project Alternative because the alternative – losing under the HAA – would result in a much, much worse outcome. However, as the record bears out, Lafayette was not going to approve the Apartment Project unless ordered to do so by a court. The Developer was worn down from the fighting. When Lafayette convinced Developer to submit an application for a smaller project, and then approved the small project, it violated the Act.

Finally, that Developer previously brought a CEQA writ petition against Lafayette to compel it to certify the EIR only supports Petitioners. First, it shows that Lafayette wanted to inhibit the Apartment Project early on. (RJN - petition at 2:7-23) Second, concomitantly, it shows that Developer was serious about moving forward with it and had no intention of caving in to local pressure at that time. Third, it supports the comments Developer's counsel made at certain City

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Council meetings, namely that Lafayette had manipulated the CEQA findings. (RJN - petition at 7:20 - 8:2) Fourth, it shows extensive expenses Developer had incurred (more than $500,000) before any site preparation had even begun. (RJN - petition at 12:15-18 and Exh. D thereto - 5/28/13 Moore letter to city) The petition does not show that Developer was immune from the pressure of potential litigation. First, Developer had already spent enormous amounts of money – $500,000 alone in CEQA preparation. Second, Developer had already spent a great deal of money (including fees, which are not stated but must be substantial) on the writ petition only to face further municipal intransigence. Developer made the calculated decision that it had to go along to get along.

4. Under Lafayette's Own CEQA Analysis, This Was One Project

It is unclear what Developer's argument at 20:7-20 is. Developer argues that under CEQA, extensive changes can be considered a project modification and not a separate project because the terms are not synonymous under CEQA and the HAA. (D-Opp. at 20:10-12) However, CEQA review is done to a "housing development project", which is a kind of project.

Additionally, Resolution No. 2015-50, certifying the SEIR, acknowledges that the Apartment Project was moderate income. (AR 4316) That resolution also acknowledges that "as the Terraces of Lafayette Project moved into public hearings in 2013, the City Council of the City of Lafayette ("Council") directed City staff to participate in conversations with the Project applicant to determine if there was an alternative plan that would be acceptable to all parties, including the Project developer, community members, and the City" (AR 4316) The SEIR resolution even abbreviates "the Homes at Deer Hill Project [as] ("Revised Project")". (AR 4316) The design review component states:

> In addition, the plan will significantly reduce the number of units on the property from the Terraces apartment project and, in turn, the traffic that would be generated by those units. This plan reduces the unit count from 315 to 44 units and represents an 85% reduction compared to the apartment project. (AR 4431)

5. Petitioners' Paradigm Also Protects Developers

Allied with Lafayette on this petition, Developer takes the position that Lafayette cannot be liable for violating the HAA because the Court cannot force Developer to build something it no

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longer wants to build, and Petitioners would have greater rights under the HAA than the property owner and developer. (D-Opp. at 12:10-11) As explained below, that is untrue. Developer says one of the absurd results from Petitioners' interpretation is that a project it chose to suspend would be approved while one it chose to pursue would be denied. (D-Opp. at 16:9-11) *That* would be absurd, but *that* is not what happened here. *If* Developer had voluntarily (without municipal or civic pressure) abandoned the Apartment Project for the Project Alternative then there would be no violation of the HAA. Petitioners do not disagree that developers cannot be forced to build projects they no longer wish to. However, the Legislature provided a remedy that protects the developer from being forced to build projects they no longer – voluntarily – wish to build while vindicating the purpose of the Act and preventing municipalities from doing what Lafayette did:

> If the court determines that its . . . *judgment has not been carried out* within 60 days, the court may issue further orders . . . including . . . an order to vacate the decision of the local agency, in which case the application for the project . . . shall be deemed approved unless the applicant consents to a different decision or action by the local agency. (G.C. § 65589.5(k)(1), emph. added)

This subsection protects the developer and also has the critical function of being *post-judgment.* This is important because it prevents the municipality from getting away with violating the HAA. Even if the Court cannot mandate that the developer build the Apartment Project, it can still ensure that Lafayette is publicly adjudged to have violated the HAA, pays the cost of vindicating the law (and thereby suffers some consequence for its misconduct), and it will be chastened to act properly in the future. Indeed, vindication of civil rights and sending a message to the government are fundamental aspects of judgments in such litigation. (See Neece v. I.R.S. of U.S. (1994) 41 F.3d 1396, 1402) Moreover, developers will feel less pressure to give in to future municipal strong-arming after Lafayette is chastened. Therefore, it bears reiterating: this subsection prevents a finding of mootness or nonviolation-by-(coerced)-consent by allowing the different decision or action to be applied after the Court adjudicates Lafayette to have violated the HAA.

B. There Is No Statute Of Limitations Issue

1. The Only Thing Being Reviewed Is The Decision To Approve The Project Alternative Without The Required Findings

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Lafayette sets out general writ review law (L-Opp. at 5:6-6:10) without understanding what is being reviewed. This HAA writ challenges a decision which resulted in the Developer being given permission to build a project some 85% less dense than originally planned. Insofar as the HAA is concerned, that decision is not challenged on the grounds that it could not have been reached on its own as if there were no prior project, but whether Lafayette complied with the findings requirement of G.C. § 65589.5(d)) in voting to approve the Project Alternative. Lafayette misses the point in discussing the superlatives offered by the Project Alternative. These were not things Developer originally wanted to build and were only proposed in response to municipal pressure. The HAA does not tolerate this, for it would undermine the statute. Lafayette does not deny that it may not do indirectly what it cannot do directly.

2. Lafayette Did Not Violate The HAA Until It Voted To Approve The Project Alternative

Determining when Lafayette violated the HAA is critical to determining whether this challenge is timely. This involves the concept of ripeness:

> [I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. (Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 171)

To be ripe, "[t]he legal issues posed must be framed with sufficient concreteness and immediacy so that the court can render a conclusive and definitive judgment rather than a purely advisory opinion based on hypothetical facts or speculative future events. (Hayward Area Planning Assn, Inc. v. Alameda County Transp. Authority (1999) 72 Cal.App.4th 95, 102) This is exemplified by Stonehouse Homes v. City of Sierra Madre (2008) 167 Cal.App.4th 531, in which the city enacted a moratorium on development pending a final ordinance predicated on certain studies to be done. Plaintiff sought declaratory relief as to the moratorium's validity, which the court found to be unripe:

> The moratorium resolution thus merely gave notice to the public of potential legislation that might be adopted in the future with respect to HMZ provisions. The adoption of the resolution alone implicated no rights of Stonehouse. The resolution was not an ordinance that

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> amended the HMZ provisions. Nor did it require the planning commission to recommend adoption of such an ordinance.
>
> [F]inal recommendations have yet to be made by the planning commission or the advisory committee. At this stage, the court must speculate as to what legislation, if any, the City might adopt and whether and how that legislation might be applied to Stonehouse's property. (Stonehouse Homes, supra, 167 Cal.App.4th at 540-542)

Stonehouse Homes provides the same analytic framework. There, the claim was not ripe because the moratorium did not compel any particular ordinance which would injure plaintiff. Here, entering into the Process Agreement did not approve the Project Alternative and it kept the Apartment Project as a "backup" which could still be approved. Amending the general plan also did not approve the Project Alternative. That amendment did not deny the Apartment Project because: 1) the Process Agreement preserved the Apartment Project pending approval of the Project Alternative; and 2) changing the general plan or zoning to prohibit a proposed housing development project which complies with applicable, objective general plan and zoning standards and criteria in effect at the time that the housing development project's application is determined to be complete cannot be grounds for denial. (G.C. §§ 65589.5(d), (j)) Indeed, the City Council might have heeded Petitioners' statements at the August 10, 2015 meeting (AR 5375-5376) and disapproved the Project Alternative, which would have, as Lafayette and Developer stress, restored the Apartment Project. Had that happened, but had Petitioners still sued on the theory that the HAA was violated at some earlier point, Lafayette would be rightly outraged given that in that situation, the project the HAA protects would be getting built.

Developer argues that G.C. § 65589.5(j) only applies "where the City has determined" that the proposed project is legally compliant. (D-Opp. at 7:1-2) Neither G.C. §§ 65589.5(d) nor (j) says anything about the municipality having determined anything; it only states that the project must be compliant. If the HAA only applied where the government had already made this determination, governments would simply not make them.

C. The Record Does Not Support That CEQA Or Design Review Standards Barred The Apartment Project

Lafayette does cite to evidence that an EIR was certified with 13 significant and

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unavoidable impacts. (L-Opp. at 3:5-11)[3] However, the HAA does not require any particular CEQA review outcome before an affordable housing project benefits from the Act. (G.C. § 65589.5(e)) CEQA itself is a procedural statute and projects are approvable despite identified adverse environmental impacts. (See Towards Responsibility In Planning v. City Council (1988) 200 Cal.App.3d 671, 683, discussing "statement of overriding considerations") More importantly here, "CEQA review [can be] subject to manipulation and elongation that may verge on abuse of the process." (Schellinger Bros. v. City of Sebastopol (2009) 179 Cal.App.4th 1245, 1270) "[R]ules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 576) In a detailed and compelling presentation to the city council on April 29, 2013, Developer's attorney Alan Moore explained how Lafayette manipulated the draft EIR and changed the conclusions so that they were no longer supported by the evidence – which was simply crossed out. (AR 31-32) Attorney David Bowie and an environmental compliance expert (Marylee Guinon) also spoke about the same manipulation. (AR 31-34) Bowie said: "The second thing the City has done is that it no longer has any substantial evidence. There is no controversy between experts because the [Developer's] expert's analysis is the same as their expert's analysis. The controversy is that *the conclusion is different than the analysis*." (AR 31-33, emphasis added)

D. The Substantial Evidence Test Does Not Support Lafayette Or Developer

First, under the HAA, "the burden of proof shall be on the local legislative body to show that its decision is consistent with the findings as described in subdivision (d) and that the findings are supported by substantial evidence in the record." (G.C. § 65589.5(i)) "While it is commonly stated that [a court's] 'power' begins and ends with a determination that there is substantial evidence [cite] this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment." (Kuhn, supra, 22 Cal.App.4th at 1633) "It must be reasonable ..., credible, and of solid value ...." (Kuhn, supra, 22 Cal.App.4th at 1633) "The ultimate

[3] At AR 67, project manager Baker reiterates the same points Moore, Bowie, and Guinon make.

determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (Kuhn, supra, 22 Cal.App.4th at 1633, emph. in orig.)

As for design review standards, Developer submitted a thorough explanation for why the Apartment Project complied with Lafayette's design review standards. (AR 8, 16) There is no evidence in the record that the Apartment Project was not code compliant. The only evidence in the record at all regarding design review was City Manager Falk's statement: "the Circulation Commission and Design Review Commission have both indicated that they cannot support the project and have requested a significantly scaled-down alternative…"[4] (AR 175) This is not evidence that the Apartment Project did not comply with objective "design review standards, in effect at the time that the housing development project's application is determined to be complete" (G.C. § 65589.5(j)) but rather an admission that another Lafayette governmental body was against the project because of its size; i.e., its moderate-income housing quality. Ultimately, the question for the Court is, would it be an abuse of discretion to find the Apartment Project complied with all necessary conditions for approvability set forth in the HAA? The answer is, "no". Whether the residents or municipal government of Lafayette liked the Apartment Project is irrelevant. Under remedial California legislation, Lafayette could not force the downsizing or denial of the Apartment Project, which is what it did.

E. Petitioners Have Established Standing

Under the HAA, persons eligible to apply for residency in the particular project may sue. (G.C. § 65589.5(k)) Nothing in the HAA bars organizational standing, nor does the other side argue otherwise. Trauss and S.F. Bay Area Renters Federation provided evidence that Petitioners are within the class of persons who may sue on the HAA. Neither Lafayette nor Developer argues that this evidence is erroneous. Neither Lafayette nor Developer argues that this evidence must be in the record as opposed to being established during the litigation. Evidence of standing was not necessary to speak up on the HAA at local meetings. Evidence of standing would not have been germane, in any way, to Lafayette's decision to approve the Project Alternative, nor would it have

[4] The HAA does not recognize "circulation" as something that must be complied with.

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been germane to a vote on the Apartment Project itself. Standing evidence had nothing to do with whether either project should be approved.

F. The Court Should Augment The Record

The Court should grant the request to augment. First, anyone can speak out on the HAA at an administrative hearing. There is no standing requirement. The standing requirement pertains to standing to sue under the HAA. Second, Lafayette did not address the financial privacy argument. Third, Lafayette does not argue that augmentation is prejudicial – it is not as if the City Council may have reached a different decision. Fourth, Michael Henn is not a party to this action. Petitioners did not control him. Fifth, Henn's declaration establishes foundation. Sixth, Lafayette was required to include his any material submitted to it. Seventh, the down-sizing shows Lafayette's longstanding desire to restrict development, which is background for its motivation to interfere with the Apartment Project. Lastly, opposing the request admits that the material is compelling and supports Petitioners otherwise Lafayette and Developer would ignore it.

III. CONCLUSION

The HAA is a remedial statute designed to foster construction of affordable housing and to prevent municipalities and NIMBY-types from forcing denials or reductions in density. Here, the Developer proposed a 315-unit apartment project which was approvable. The government and residents of Lafayette opposed it on grounds not tolerated by the HAA. Lafayette could not make the findings required to inhibit the apartment project, so it did what it could – from stonewalling CEQA review, to manipulating the findings, to indicating that governmental bodies would not support approval for reasons not allowed by the HAA. As a result of the economic and time pressures Lafayette exerted on the Developer, the Developer caved in and agreed to a significantly-reduced density, abandoning the original project if Lafayette approved the modified one. This is what the HAA seeks to prevent. The Court should grant the petition for writ of mandate and find that Lafayette violated the Housing Accountability Act.

Date: January 10, 2017

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