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Exempt From Filing Fees Pursuant To Government Code Section 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SONJA TRAUSS, SAN FRANCISCO BAY AREA RENTERS FEDERATION,

Petitioners,

v.

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. CIVMSN15-2077

Judge: Hon. Juddith Craddick

RESPONDENT'S OPPOSITION TO PETITIONERS' OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS

[Filed with:

1. Opp'n to Mot. to Augment Record;
2. Req. for Judic. Notice;
3. Obj. to Pinkston Decl.]

Writ Hearing:
Date: January 25, 2017
Time: 9:00 a.m.
Dept.: 9

Action Filed: December 8, 2015
Trial Date: August 21, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This lawsuit presents a novel and unsupported approach to the Housing Accountability Act ("HAA"). Petitioners Sonja Trauss and San Francisco Bay Area Renters Federation seek to overturn a voluntary agreement between Respondent City of Lafayette ("City") and Real Parties in Interest O'Brien Land Company, LLC ("Developer") and Anna Maria Dettmer ("Dettmer")[1] (collectively "Real Parties") that replaced a multi-family residential project with a single family residential project and to force the City to approve the multi-family project. If Petitioners are successful, either the Developer would have to build a project it does not want to build or Dettmer's property would remain undeveloped. Petitioners advance two theories to achieve this unusual result, neither of which are based in fact or law.

First, Petitioners assert, without evidentiary support[2] from the administrative record or relevant legal authority, the City forced the Developer to yield to the alternative residential project. However, the administrative record does not show extortion by the City. The record is replete with instances where representatives for Dettmer and the Developer expressly state that they had "voluntarily worked with the City to propose [the alternative project]" and that "[t]hey [we]re not being required by the City to do that." E.g., Administrative Record ("AR") 5386. Further, the alternative process agreement itself states that it was the intent of the parties to explore an alternative project, and that Dettmer and the Developer would preserve all their rights to challenge the City's actions related to the multi-family project and to resume pursuit of that project. AR 486. Moreover, Real Parties' joinder with the City to oppose the Petition for Writ of Administrative Mandamus confirms their support for the single family project.

[1] Dettmer is a party in her capacity as Trustee of the AMD Family Trust.

[2] By Resp't City of Lafayette's Opp'n to Req. to Augment the Administrative Record, filed concurrently, the City opposes the filing of the Declarations of Sonja Trauss and Michael Henn on evidentiary grounds.

Second, Petitioners recast their coercion argument by contending that the City performed an end-around the HAA. Petitioners Opening Brief 8-9. Actually, when the multi-family project faced widespread public opposition and when the environmental impact report identified 13 significant and unavoidable impacts arising from the project, the Developer and the City suspended the application for the multi-family project and explored the single-family project to respond to these concerns. Nothing in the HAA prohibits a developer from withdrawing or suspending a pending application, going back to the drawing board, and proceeding with a new project for consideration. This was the exact course of action here, and as such, there was no evasion or subversion of the HAA.

Viewed in this context, it is clear the HAA is not applicable to this case. By its express and unambiguous terms, the HAA applies to decisions by local agencies to disapprove a housing project or to condition approval upon development at a lower density. Cal. Gov. Code. § 65589.5(d), (j). Here, the developer suspended the multi-family project in order to pursue the residential project. These were two separate and distinct development projects. Because of the terms of the alternative process agreement and the existence of the second single family project, the City did not approve or disapprove the multi-family project, and did not make any of the findings required by the HAA with respect to the multi-family project. Further, because the single family project was ultimately approved at the exact density at which it was proposed, the City did not make an approval contingent upon reduction in density. Accordingly, the HAA does not apply and is not relevant to this dispute.

2. FACTUAL BACKGROUND

A. THE TERRACES OF LAFAYETTE PROJECT

On March 21, 2011, Real Parties submitted an application for a multi-family residential project proposed for property owned by the AMD Family Trust in the City. AR 2. That project

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was known as the Terraces of Lafayette and was to include approximately 315 housing units marketed to moderate-income individuals ("Terraces Project"). AR 2, 62. The Terraces Project application was deemed complete by the City by letter, dated July 5, 2011. 2nd. Am. Pet. 9, ¶ 28.

The final Environmental Impact Report ("EIR") for the Terraces project, as required by the California Environmental Quality Act ("CEQA") was certified by the City's Planning Commission on March 4, 2013. AR 112. The EIR identified 13 significant and unavoidable impacts resulting from the Terraces Project. AR 175. Real Parties appealed the certification of the EIR by the Planning Commission to the City Council, challenging the significance of certain impacts of the Terraces Project. AR 67. After conducting three hearings related to the appeal, the City Council ultimately voted unanimously to certify the EIR on August 12, 2013. AR 137.

In response to the EIR's identification of 13 significant and unavoidable impacts, the public dissatisfaction with the project expressed throughout the environmental review process, the City's Circulation Commission's and Design Review Commission's concerns, and the threat of litigation, the City Council directed City 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." AR 153. The result of that discussion was the Real Parties' decision to suspend the Terraces Project, as well as Real Parties' proposal of a new, alternative project, the Homes at Deer Hill Project. AR 486.

B. THE HOMES AT DEER HILL PROJECT

At a meeting of the City Council on December 9, 2013, the City Manager presented the Homes at Deer Hill Project ("Deer Hill Project"). AR 175-179. The Deer Hill Project included two major components: (1) the central part of the approximately 22-acre parcel would include a subdivision of 44 to 45 single family detached homes; and (2) surrounding the housing development would be a community park, including a soccer field, bike paths, a playground, and

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a dog park, as well as open space. AR 153-156, 158.

Thereafter, the City Council met on January 13, 2014, and January 22, 2014, to hear public comment regarding the Deer Hill Project and to consider whether to enter into an alternative process agreement, which would provide for the suspension of the Terraces Project pending the review process and consideration of the Deer Hill Project ("Alternative Process Agreement"). AR 252-268, 469-485. After extensive comment and consideration, the Council voted unanimously to approve the Alternative Process Agreement.[3]

Real Parties submitted a development application for the Deer Hill Project to the City on March 19, 2014. AR 971-1021. The application included a general plan amendment, rezoning, subdivision map, and hillside development permit. AR 974. The Deer Hill Project required a general plan amendment to change the existing designation, Administrative/Professional Office/Multifamily Residential, to the designation Low Density Single Family. AR 975. The project also required rezoning from Administrative Professional Office ("APO") to Planned District. AR 975. Due to the substantial differences between the Deer Hill Project and the previously proposed Terraces Project, a Supplemental EIR ("SEIR") was prepared to address the specific impacts of the new, alternative project. AR 1234. The SEIR identified only two significant and unavoidable impacts of the project. AR 1234-1235. The SEIR was certified by the City Council on August 10, 2015. AR 5396.

In total, the City conducted more than 10 hearings/meetings which discussed the impacts and/or merits of the Deer Hill Project. In addition, the Planning Commission, Parks, Trails, and Recreation Commission, Design Review Commission, and Circulation Commission each met multiple times to consider the impacts and merits of the Deer Hill Project under their respective

[3] During the review process, the Alternative Process Agreement was amended on five separate occasions to allow for the consideration of an alternative location for the dog park component of the Deer Hill Project and to extend the time necessary for the City to consider and review the Deer Hill Project. AR 712-938.

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purview. AR 6190-6191. After thoughtful consideration of all issues and comments, the City voted to approve the Deer Hill Project on September 14, 2015. AR 6183, 6209.

3. STANDARD OF REVIEW

Actions to enforce the HAA, Government Code Section 65589.5, must be brought pursuant to Civil Procedure Code Section 1094.5. Honchariw v. Couty of Stanislaus, 200 Cal.App.4th 1066, 1072 (2011). Section 1094.5(b) pertains to judicial review of administrative decisions and states:

> The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded 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.

Where it is asserted that the findings are not supported by the evidence, in order to find abuse of discretion, the court must determine that the findings are not supported by substantial evidence in light of the entire administrative record. Cal. Civ. Proc. Code § 1094.5(c).

The substantial evidence standard is deferential and provides that the agency's decision will be upheld if there is substantial evidence to support it. People v. Semaan, 42 Cal.4th 79, 88 (2007). Substantial evidence means evidence that is "reasonable . . . , credible, and of solid value . . . ." Kuhn v. Department of General Services, 22 Cal.App.4th 1627, 1633 (1994) (quoting, Estate of Teed, 112 Cal.App.2d 638, 644 (1952)). In considering the sufficiency of the evidence, the court does not re-weigh the evidence, it only examines whether there is substantial evidence to support the agency's decision. Crail v. Blakely, 8 Cal.3d 744, 750 (1973); Rubin v. Los Angeles Federal Savings & Loan Assn., 159 Cal.App.3d 292, 298 (1984). In making the determination whether substantial evidence supports the agency's findings, the reviewing court

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must resolve reasonable doubts in favor of the administrative findings and decision. Topanga Assn. for a Scenic Community v. C'ty of Los Angeles, 11 Cal.3d 506, 514 (1974).

Here, Petitioners allege, without support or citation to substantial evidence in the record, that the Alternative Process Agreement was entered as a result of extortion on the part of the City or through an attempt to evade the HAA. Petitioners alternatively argue that the Deer Hill Project approval constituted a density restriction on the approval of the Terraces Project or a de facto denial or the Terraces Project. As explained next, there is substantial evidence that the Developer acted voluntarily and the City was not conspiring to circumvent the HAA. Put another way, there is ample substantial evidence that the City did not coerce the Developer or evade the HAA.

4. ARGUMENT

A. THE CITY DID NOT EXTORT THE DEVELOPER

In support of its claims, Petitioners assert that the Real Parties "succumbed to extortion" and entered into the Alternative Process Agreement, rather than voluntarily initiating an alternative to the Terraces Project. Petitioners' Opening Brief 8. However, the record does not support such a conclusion. Rather, the recitals in the Alternative Process Agreement, and the oral statements made by O'Brien Land and Real Parties' actions show precisely the opposite.

The Alternative Process Agreement states that the Real Parties and City "desire to consider a project alternative to the [Terraces Project] that consists of 44-45 single-family detached homes and public parkland...." AR 486. The record shows that the Real Parties "voluntarily worked with the City to propose [the Deer Hill Project]," and that "[t]hey are not being required by the City to do that." AR 5386.

In response to the City's presentation regarding the Deer Hill Project alternative, the

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attorney for the Real Parties stated: "We appreciate the staff's presentation and we agree with moving forward with the project alternative...." AR 288-289. Their attorney further explained:

> [W]e've been listening to folks. We've been reading the emails. We've been reading the correspondence. We've been listening to the sincere comments that have been made. We've been listening to the staff who have been reading these comments. And we agree that there are significant concerns with the apartment project. And so, it's a good opportunity for us to work with staff on a proposed alternative.

AR 289-290.

In fact, the Real Parties 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." AR 153, 290-294. The Real Parties expressly stated:

> We're agreeing to reduce the units and voluntarily submit a subdivision application, a General Plan amendment, a rezone, and a new development plan....

AR 302 (emphasis added).

Contrary to the collaborative process evidenced from the administrative record, Petitioners state that because the only options for the Real Parties were to "proceed with the Apartment Project knowing it would be turned down in violation of the HAA..." or to "abandon the Apartment Project altogether, withdrawing the application..." Interestingly, Petitioners acknowledge that the Developer had the option of "withdrawing the application" and assert no resultant violation of the HAA arising from so doing. Petitioners' Opening Brief, p. 8 Nevertheless, Petitioners claim Real Parties "accede[d] to [the City]..." in order to "avoid[] time consuming and costly litigation...." Petitioners' Opening Brief 8. However, Real Parties conduct does not support these assertions. First, Real Parties never abandoned the Apartment Project and

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instead, retained "the right to terminate this [Process] Agreement.... and the City's processing of the Apartment Project Application shall immediately resume" if the City fails to approve the Deer Hill Project. AR 490. Second, Real Parties are not adverse to litigation, having already sued the City over processing the EIR for the Terraces Project. Resp't Req. for Judic. Notice, etc., filed concurrently ("RJN"), ex. A. (Verified Petition).[4] Accordingly, there is more than substantial evidence to establish that the Developer was not extorted.

B. THE CITY'S APPROVAL OF THE DEER HILL PROJECT WAS NOT AT ATTEMPT TO EVADE THE HAA

Petitioners argue that the Real Parties' proposal and the City's approval of the Deer Hill Project was a direct attempt to "evade the HAA" and an act of "subterfuge." Petitioners' Opening Brief 8-9. This assertion finds no support from the record. The City plainly articulated its reasons, of which there were several, for entering discussions with the Real Parties regarding an alternative project:

> Given the public's dissatisfaction with the application, given that the EIR for the project identified 13 significant and unavoidable impacts on the environment, given that the Circulation Commission and the DRC have both indicated that they cannot support the project and have requested a significantly scaled down alternative, given that the developer has indicated that if the project is denied, it will file a lawsuit against the City, and given the risks to the City presented by that potential lawsuit and particularly those associated with California's Housing Accountability Act which limits the ability of cities to deny an affordable housing development proposal unless that proposal is inconsistent with both the General Plan land use designation and zoning and zoning ordinance that existed at the time the application was deemed complete. Given those things, about four weeks ago the City Council directed staff to participate in conversations with the

[4] In the RJN, the City asks the Court to take judicial notice of the following case filed by Real Parties related to the development of the Deer Hill Project: O'Brien Land Co., LLC, et al. v. City of Lafayette, et al., Contra Costa Superior Ct. Case No. N13-1177.

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> developer to determine if there was an alternative plan that would be acceptable to all parties -- the developer, community members, and the City.

AR 153.

There were real issues identified with Terraces Project, which City and Real Parties acknowledged and sought to rectify. The new Deer Hill Project addressed the concerns of the citizens, met long unfulfilled desires of the community for sports fields, a park space, a playground, and a dog park, and greatly reduced the significant and unavoidable environmental impacts from the development of the land. AR 153-156, 159, 1234.

Moreover, the City repeatedly acknowledged that it was bound by the HAA, and noted significant limitations in its ability to deny projects providing affordable housing that are consistent with general plan and zoning standards, including design review standards, at the time the project application is deemed complete. AR 153, 252, 259. Indeed, City Councilmember Don Tatzin specifically explained in correspondence to a concerned constituent, that "[r]egardless of our opinion of [the Terraces P]roject, state law might compel us to approve it because it provides affordable housing." AR 3601.

While the HAA prohibited the City from addressing environmental impacts and public concern by conditioning approval of the Terraces Project on development at a lower density, the HAA does not prohibit a developer from voluntarily suspending or withdrawing a previously proposed project, a fact which Petitioners acknowledge, but allege is not the case here for reasons that are unsupported by case law or the administrative record. Petitioners' Opening Brief 12 n. 6. The City could not have taken action to propose or consider the alternative project without participation and cooperation from the Real Parties. Had the Real Parties wished instead to proceed with the original Terraces Project, they had every right to do so.

Petitioners fail to cite to any factual support or case authority that would suggest that the

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City's and Developer's desire to set forth a project with limited impacts equates to some nefarious plot on the part of the City to evade the HAA. Without the acts of extortion and strong-arming alleged by the Petitioners, the argument that the collaborative process to put forth a new, alternative project was an act of subterfuge aimed at circumventing the HAA also lacks support. A developer and/or landowner is well within its rights to reconsider and withdraw a project in favor of a new proposal, regardless of whether or not the initial project fell within the scope of the HAA. Therefore, substantial evidence clearly confirms that the City's approval of the Deer Hill Project was not an evasion of the HAA.

C. THERE WAS NO VIOLATION OF THE HAA

Petitioners contend that the City violated the HAA because there are "only two realistic ways to view [the Deer Hill Project] in this case:" (1) as a lower-density version of the Terraces Project, which was the result of conditioned approval by the City without the required findings; or (2) as a separate project from the Terraces Project proposed at the same site, which necessarily resulted in denial of the Terraces Project when approved by the City. Petitioners' Opening Brief 10. Again, Petitioners do not cite any factual evidence or authority to show there were "only" two ways to perceive the Deer Hill Project. Rather, Petitioners entire argument in this regard is simply a manifestation of Petitioners' perception of the Deer Hill Project.

Indeed, a third view of this case, and the actual scenario demonstrated by the facts, establishes that the Terraces Project and the Deer Hill Project were two separate projects, both proposed for the Dettmer Family Property, and that the Real Parties voluntarily suspended their application for the Terraces Project in favor of pursuing the alternative Deer Hill Project, which was approved by the City in September 2015, without any conditions related to project density. AR 5812, 6183, 6209.

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1. The Terraces Project and the Deer Hill Project Are Separate Projects

The Terraces Project, proposed by the Real Parties in March 2011, was put forth in order to provide for the development of a 315-unit multi-story apartment complex, with units ranging between 750 and 1290 square feet in size. AR 2. The project was aimed at providing high density housing for moderate-income households. AR 62.

In contrast, the Deer Hill Project application, submitted in March 2014, proposed a subdivision of 44 to 45 single-family homes, limited to 30 feet in height and situated on lots of approximately 4,500 square feet each. AR 153-155. The housing community was to be surrounded by open space and community park areas, including sports fields, bike paths, a playground, and a dog park. AR 153-156. The Deer Hill Project was designed with the services of a new site planner, and was intended to be clustered and tucked into the topography to reduce visibility. AR 154-155, 298. Further, the ingress and egress from the development was located at the far western edge of the property to reduce stress on the freeway on/off ramps already heavily utilized by commuters in the area. AR 155. The Deer Hill Project called for a general plan amendment and rezoning. AR 158, 4.

Not only did the Terraces and Deer Hill Projects differ vastly with respect to their specifications, but they differed with respect to their aims and environmental impacts. The Deer Hill project created open space and public areas to help address the public's concerns. AR 153-154, 159, 289-290, 1234. Unlike the Terraces Project, which was projected to result in 13 significant and unavoidable environmental impacts, the Deer Hill Project involved only two such significant and unavoidable impacts. AR 169, 1234-1235.

Consequently, Real Parties intended these projects to be separate and distinct because they submitted separate applications for each project and voluntarily suspended the application for the

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Terraces Project prior to applying for the Deer Hill Project. AR 2, 486, 971-1021. The Alternative Process Agreement sets forth, in no uncertain terms, that the Real Parties were pausing the review process for the Terraces Project, and preserving all related rights to pursue approval of the Terraces Project in the event the Deer Hill Project was not approved by the City. AR 486. These actions are consistent with the stated intent of the parties to the agreement, which was to "consider a project alternative...." AR 486.

The representative for the Real Parties explained:

> The project alternative puts the 315 unit apartment project, the project that folks had the concerns, on hold. We won't be processing that, pending the city's review of this application. [¶] We'll submit a new application at our cost, an application to down zone our own property. We'll have public hearings, and as your city and attorney indicated, we'll have further environmental review. And we'll have public hearings to really view this project. [¶] And I just think that is -- this type of project, this alternative is really worth pursuing. And we hope, we hope that folks that had concerns earlier will recognize what we're trying to do and they'll work with us. They'll work with us and staff to make this a great project.

AR 293-294.

The only argument proffered by the Petitioners to support their position that the projects were in fact one and the same is the assertion that because the parties opted to prepare a supplemental EIR for the Deer Hill Project, rather than an entirely new EIR, the projects are in fact "a single, modified project...." Petitioners' Opening Brief 13. The only authority cited by Petitioners in support of this assertion is California Public Resources Code Section 21166, which sets forth the circumstances under CEQA when a subsequent or supplemental EIR is required for the same project. Specifically, a supplemental EIR is required when "substantial changes are proposed" to a project or "substantial changes occur with respect to the circumstances under

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which the project is being undertaken." Cal. Pub. Resources Code § 21166.

However, the meaning and usage of term "project" under CEQA may not be imported to the HAA to show that because a development is a "project" under CEQA, it is also a project under the HAA. Indeed, Petitioners cite no authority that mandates a finding that any time a supplemental EIR is prepared for a "project," as opposed to a new EIR, that there can be only one proposed project.

The CEQA Guidelines permit and encourage reusing an existing EIR prepared for an earlier project or incorporating portions by reference. Cal. Code Regs. tit. 14, §§ 15006, 15153, 15150. This reduces costs and the time needed to prepare and complete the required environmental review. Cal. Code Regs. tit. 14, § 15006. In order to avoid the preparation of an entirely new EIR and the need for a second full evaluation under CEQA, changes in project components, and even changes in the proposed location for a project, may be treated as an application for a project modification, rather than as an application for a new project under CEQA. E.g., Mani Brothers Real Estate Group v. City of Los Angeles, 153 Cal.App.4th 1385, 1400-1402 (2007); Temecula Band of Luiseno Mission Indians v. Rancho Cal. Water Dist., 43 Cal.App.4th 425, 437-438 (1996); Benton v. Board of Supervisors, 226 Cal.App.3d 1467, 1475-1477 (1991).

This is true even when a local agency receives a new application for approval after having previously conducted and considered environmental review on an earlier proposed project. Benton, supra, 226 Cal.App.3d at 1475-1477 (considering a new application for a use permit for a relocated and redesigned winery to be a modification for the purposes of CEQA review); Fund for Environmental Defense v. City of Orange, 204 Cal.App.3d 1538, 1542-1548 (1988) (finding a new application for a use permit was a modification of the earlier project for purposes of CEQA, and requiring only an addendum to the previous EIR despite the fact that previous approval had occurred six years earlier and the project had been redesigned).

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Because the Deer Hill Project was expected to have differing and significant effects on the environment, further environmental review was prepared. AR 1099. However, because full environmental review related to the Terraces Project and the Dettmer Family Property had already been conducted and certified, it made sense to consider only the new and differing environmental impacts of the Deer Hill Project through the SEIR to the previous EIR.

Petitioners alternatively argue that to recognize two separate projects under these circumstances "would 'elevate form over substance'" because Real Parties could have just as easily "chang[ed] the number '315' to '44' on the Apartment Project application...." Petitioners' Opening Brief 12. This argument wholly overlooks the complexity of the differences between the two projects. The projects indeed proposed different densities of housing, but one project was for multi-story, multi-family apartment buildings, while the other project was for single family homes, situated on large lots, concealed from public view, surrounded by recreation and open space, and designed with specific considerations in mind for mitigating traffic and other environmental impacts. AR 2, 153-156, 289-290. Further, the Terraces Project did not require a general plan amendment or rezoning, whereas the Deer Hill Project required additional review and City action to change the general plan designation and zoning for the property and for the preparation of subdivision map. AR 2-3, 974.

As discussed in detail above, these projects had marked differences and required different levels of City review and consideration. The Real Parties did not simply change the number of proposed housing units and submit a new application form. Rather, the Real Parties and the City worked together to design an entirely new project that was responsive to the impacts of the EIR, public comments, and need. The distinction between the projects was not merely the project density or the application forms used. Rather, the only key similarity between the projects was the fact that they were to be developed on the same property. This alone does not necessitate a finding that the projects were one and the same for the purposes of the HAA, and Petitioners have cited no authority stating that it should.

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2. Government Code Section 65589.5(d) Does Not Apply to Either Project

Petitioners assert that regardless of whether the Terraces Project and the Deer Hill Project were in fact a single project or two separate projects, the City violated the HAA because the approval of the Deer Hill Project was either an approval conditioned upon lower density development, or a de facto denial of the Terraces Project. Petitioners' Opening Brief 12. Neither conclusion is supported by the record.

The HAA California Government Code Section 65589.5(d), provides in relevant part:

> (d) A local agency shall not disapprove a housing development project...for very low, low-, or moderate-income households,...or condition approval in a manner that renders the project infeasible for development for the use of very low, low-, or moderate-income households,...unless it makes written findings, based on upon substantial evidence in the record, as to one of the following....[5]

By its own terms, subdivision (d) is only applicable when a local agency either disapproves a housing development project or conditions approval in a manner that renders development for very low, low-, or moderate-income households infeasible. Cal. Gov. Code § 65589.5(d). The HAA specifically defines disapproval of a housing project as either: (1) a vote to disapprove a proposed housing development project application; or (2) a failure to comply with the time periods set forth in the Permit Streamlining Act at Government Code section 65950, subdivision (a). Cal. Gov. Code, § 65589.5(h)(5). The City never voted on, or even considered the merits of the Terraces Project; it only conducted environmental review before the Real Parties elected to suspend the project. AR 26, 29.

[5] The potential findings are listed at Gov. Code § 65589.5(d)(1)-(5).

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Petitioners' argument that the City in essence voted to deny the Terraces Project by voting to approve the Deer Hill Project lacks legal support and common sense. Petitioners' Opening Brief 12. Petitioners say that under the plain language of section 65589.5(h), an application may be disapproved "by voting on 'a' project application – not necessarily 'the' same, subject application." Petitioners' Opening Brief 12 n. 7. This interpretation does not logically flow from the plain text of the statute. The text of the statute shows that disapproval occurs when a local agency "votes on a proposed housing development project application and the application is disapproved" Gov. Code § 65589.5(h)(5)(A). There was no such disapproval of any kind by the City. An interpretation of the HAA which allows the approval of one project, which Real Parties chose to suspend, to be treated as a denial of another completely separate project, which Real Parties chose to pursue, would produce absurd results.

Alternatively, a project may also be deemed disapproved under the HAA if the guidelines set forth in the Permit Streamlining Act are not adhered to by the agency. Cal. Gov. Code § 65589.5(h)(5)(B). Under the Permit Streamlining Act, a public agency considering development project must approve or disapprove the project within 180 days from the date of certification of the EIR by the lead agency. Cal. Gov. Code § 65950(a)(1). Here, the City certified the EIR for the Terraces Project on August 12, 2013. AR 137. The Alternative Process Agreement was entered into by the Real Parties and the City on January 22, 2014, within 180 days from the date the EIR was certified. AR 485. As a result of the Alternative Process Agreement, the Real Parties voluntarily suspended the Terraces Project, thus eliminating the need for City action to approve or disapprove the project. AR 486. Furthermore, it was an explicit term of the Alternative Process Agreement that:

> [T]he Parties acknowledge that because the Parties have mutually agreed to toll the processing of the Apartment Project, City has not failed to act to approve or disapprove the Apartment Project under the Permit Streamlining Act....

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AR 490. In light of the subsequent approval of the Deer Hill Project, the Terraces Project was never again put before the City for consideration or action and there was no violation of the Permit Streamlining Act.

In addition to disapproval, the HAA may also be violated by conditioning approval of a project on restrictions that render the project infeasible for development of very low, low-, or moderate-income housing. Cal. Gov. Code § 65589.5(d). Petitioners have failed to show evidence from the record, substantial or otherwise, that the Terraces Project and the Deer Hill Project were a single project such that the City's approval of the Deer Hill Project could be deemed a conditioned approval of the earlier Terraces Project. In contrast, and as discussed at length previously, the projects were two separate and independent projects which were never pending before the City simultaneously, and when the City voted to approve the Deer Hill Project, it did so without imposing any additional density restrictions.[6]

3. Government Code Section 65589.5(j) Does Not Apply to Either Project

Petitioners assert that even if the Terraces Project is not deemed by the Court to qualify as affordable housing under the HAA, there was still an obligation for the City to approve the Terraces Project under Section 65589.5(j) at its proposed density since the project met all applicable general plan and zoning standards and criteria, including design review standards, in effect at the time that the development application was deemed complete. Petitioners' Opening Brief 14. Petitioners have also failed to show that California Government Code Section 65589.5(j) applies to this dispute.

First, Subdivision (j) applies only if: (1) a proposed project complies with all applicable

[6] Moreover, as the Deer Hill Project was never intended to provide housing for very low, low-, or moderate-income households Cal. Gov. Code § 65589.5(d), has no application to the Deer Hill Project. .

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general plan and zoning standards and criteria, including design review standards; and (2) the local agency proposes to disapprove the project or approve upon the condition that the project be developed at a lower density. Cal. Gov. Code, § 65589.5(j). Here, while the Real Parties asserted in their application for the Terraces Project that it complied with the general plan and zoning standards in effect when the application was deemed complete, the project was never considered beyond environmental review and whether or not it met the design review standards was never discussed or determined. AR 2-3, 26, 29. The City is not aware of any authority that supports the application of subsection (j) in situations where the local agency did not make a decision on the proposed project.[7]

Second as discussed in the previous section, the City neither disapproved Terraces Project or the Deer Hill Project nor approved either project on the condition that it be developed at a lower density. Petitioners' argument with respect to subdivision (j) is again dependent on the Terraces Project and the Deer Hill Project being considered one single project, which they were not, or upon the Terraces Project being disapproved, which it was not.

D. THE AMICUS CURIAE BRIEFS ARE IRRELEVANT AND INCORRECT

The Brief of Amici Curiae Denise Pinkston, et al., dated November 30, 2016, and attached to the Declaration of Ryan Patterson ("Pinkston Brief"), and the Brief of Amicus Curiae Carol J. Galante, dated November 30, 2016, and attached to the Declaration of Ryan Patterson ("Galante Brief"), make two assertions that are irrelevant or incorrect.[8]

First, the Pinkston Brief states there is a need for affordable housing in the Bay

[7] All cases cited by Petitioners involve a denial of a development application by vote of a local agency.

[8] By Resp't City of Lafayette's Objections to Decl. of Amicus Curiae Denise Pinkston, filed concurrently, the City also objects to the Pinkston Decl. on evidentiary grounds.

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Area. Pinkston Brief 2 – 4. While perhaps true, this is irrelevant for the issue of whether the City and Real Parties violated the HAA in this case.

Second, Lafayette coerced the Developer into dropping the Terraces Project and it was intimidated from suing the City to enforce its rights. Pinkston Brief 4 – 8; Galante Brief 2 – 3. As explained above, the Developer was not coerced into anything. Furthermore, it retained it right to restart the Terraces Project if the City did not honor its obligations under the Process Agreement. AR 490. Finally, Real Parties have sued the City before over the Terraces Project. Resp't RJN, ex. A.

5. CONCLUSION

Petitioners effort to argue that the Real Parties' Deer Hill Project was not a voluntary exercise and therefore, a violation of the HAA, is contradicted by the administrative record, is devoid of legal support and refuted by the Real Parties' conduct. Therefore, the City respectfully requests that the Petitioners' Petition for Writ of Administrative Mandamus be denied in full.

Dated: December 21, 2016

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