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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA**

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.: MSN15-2077

**BRIEF OF AMICI CURIAE DENISE
PINKSTON, TMG PARTNERS, AND
CALIFORNIA APARTMENT
ASSOCIATION IN SUPPORT OF
PETITION FOR WRIT OF
ADMINISTRATIVE MANDAMUS**

Date: January 25, 2017

Time: 9:00 a.m.

Dept: 9

Judge: Hon. Judith Craddick

This amicus curiae brief is submitted by the following amici:

Denise Pinkston, the Housing Committee Chair for the Bay Area Council, a business sponsored public policy organization that advocates on regional and state issues to improve the quality of life for all families, communities, and businesses in the Bay Area. Ms. Pinkston also serves as the Chair of the Berkeley Zoning Adjustments

Board, which reviews development projects in that city. Ms. Pinkston also teaches real
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1 estate at the Mills College Graduate School of Management. Ms. Pinkston is also
2 signing on behalf of her firm, TMG Partners, a privately-held full service development
3 company focusing on urban infill projects in the San Francisco Bay Area. Over three
4 decades, TMG Partners has developed a mix of uses totaling approximately 23 million
5 square feet of office, research and development, for-sale and multifamily residential
6 and retail projects, and more than 400 acres of land, with a portfolio valuation totaling
7 \$3.5 billion.

8 The California Apartment Association, the nation's largest statewide trade group
9 representing owners, investors, developers, managers and suppliers of apartment
10 communities. The California Apartment Association includes experts in rental housing
11 law, legal analysts, state and local lobbyists, member-service representatives and
12 media-outreach specialists.
13

14 Ensuring an adequate supply of housing is a matter of vital statewide importance. For
15 Bay Area businesses, the lack of housing availability in the Bay Area makes it difficult to hire
16 and retain employees. Numerous stories have appeared in the press about local retailers
17 closing, major employers relocating out of State, schools leaving teacher positions vacant, our
18 major research universities unable to attract professors, doctors, and students because there are
19 no housing options for these people in the Bay Area.

20 The Silicon Valley Leadership Group's 2015 CEO Business Climate Survey reported
21 that the top two business challenges in Silicon Valley are high housing costs for employees and
22 employee recruitment and retention costs.¹ Increasingly, rising home prices compel Bay Area
23 business leaders to locate middle-income jobs to more affordable metro areas, thereby denying
24 middle-class career opportunities to local residents. Bay Area companies like Yelp and Uber
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28 ¹ Gerston, Larry N., "Silicon Valley CEO Survey Business Climate 2015," *Silicon Valley Leadership Group*,
2015, http://svlg.org/wp-content/uploads/2011/04/2015_CEOsurvey_Web.pdf
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1 are relocating sales and customer service jobs out of State.² The Bay Area Council did a survey
2 that reported 30% of Bay Area residents are contemplating a move out of the region.³

3 In order to meet the needs of the Bay Area business community, its workforce, and its
4 families, communities must build sufficient housing for a growing California—and yet they
5 repeatedly refuse to do so when faced with localized opposition to new housing development.
6 The November 25 edition of the SF Business Times described how in the **month of November**
7 **2016 alone**, the following housing projects were delayed, reduced in scale or denied. Each of
8 these examples provides further evidence that local governments are ignoring the Housing
9 Accountability Act and instead bowing to capricious local pressures to delay and deny housing
10 that is critically needed for the economic well-being of our state and its families:

- 11 • 224 unit project in Marin strongly opposed by neighbors has been put on hold
12 permanently
- 13 • 882 unit project proposed initially reduced to 670 units and then reduced again by
14 another 40 units by City of Fremont due to opposition against 4 story tall buildings
- 15 • 150 unit project senior affordable housing project in San Francisco opposed by
16 neighbors for changing neighborhood character by adding affordable housing
- 17 • 157 unit project delayed by San Francisco Board of Supervisors and sent for further
18 study after opposition by neighbors worried about changing neighborhood character by
19 adding market rate housing

20 Enforcing the Housing Accountability Act is critical to ensure cities approve housing
21 projects for a growing California and to clearly demonstrate to localities the critical importance
22 of adding housing in every neighborhood where it is consistent with plans and zoning despite
23 organized vocal neighborhood opposition.
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26 ² Dougherty, Conor, “Bay Area Start-Ups Find Low-Cost Outposts in Arizona,” *New York Times*, August 21,
27 2016, [http://www.nytimes.com/2016/08/22/business/economy/bay-area-start-ups-find-low-cost-outposts-in-](http://www.nytimes.com/2016/08/22/business/economy/bay-area-start-ups-find-low-cost-outposts-in-arizona.html)
28 [arizona.html](http://www.nytimes.com/2016/08/22/business/economy/bay-area-start-ups-find-low-cost-outposts-in-arizona.html)

³ Gerston, Larry N., “Silicon Valley CEO Survey Business Climate 2015,” *Silicon Valley Leadership Group*,
2015, http://svlg.org/wp-content/uploads/2011/04/2015_CEOsurvey_Web.pdf

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1 Recent studies by the McKinsey Global Institute and the California Legislative
2 Analyst's Office support the need for more housing development and enforcing housing
3 entitlement streamlining measures, including the Housing Accountability Act. According to an
4 October 2016 report by the McKinsey Global Institute, California's acute housing shortage
5 costs the state between \$143 and \$233 billion in lost economic output per year.⁴
6 Approximately 854,000 households in the San Francisco metropolitan area are unable to afford
7 rent. McKinsey's number-one suggestion for closing the housing gap is to "build on vacant
8 urban land already zoned for multifamily development,"⁵ such as the Lafayette parcel at issue
9 in this case. Accelerating proposed housing development approvals, which enforcing the
10 Housing Accountability Act would accomplish, also ranks as a key issue. McKinsey estimates
11 that "shortening the land use approval process in California could reduce the cost of housing by
12 more than \$12 billion through 2025 and accelerate project approval times by four months on
13 average."⁶

14 The nonpartisan Legislative Analyst's Office (LAO) found that the lack of housing
15 supply, caused in part by localities circumventing or violating state law, caused tremendous
16 housing price appreciation and increased housing cost burdens. In a March 2015 report, LAO
17 declared, *ceteris paribus*, "if a county with a home building rate in the bottom fifth of all
18 counties during the 2000s had instead been among the top fifth, its median home price in 2010
19 would have been roughly 25 percent lower. Similarly, its median rent would have been roughly
20 10 percent lower."⁷

21 In a May 2016 analysis, LAO noted rampant disregard for the Housing Accountability
22 Act among localities and predicted further local agency efforts to thwart the intention of the
23 Legislature to promote reasonable and expeditious housing approvals. Responding to the
24

25 ⁴ Woetzel, J., J. Mischke, S. Peloquin, and D. Weisfield, "A tool kit to close California's housing gap: 3.5 million
26 homes by 2025," *McKinsey Global Institute*, 2016,
27 <http://www.mckinsey.com/~media/McKinsey/Global%20Themes/Urbanization/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.ashx>

⁵ *Ibid.*

⁶ *Ibid.*

28 ⁷ Alamo, Chas and Brian Uhler, "California's High Housing Costs: Causes and Consequences," *Legislative Analyst's Office*, 2015, <http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>

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1 Governor’s proposal to streamline housing construction, the LAO declared, “given past
2 experiences, the Legislature may wish to ... consider adding provisions to the Governor’s
3 proposal to guard against possible actions some communities may take to hinder the use of ...
4 streamlined approval.”⁸ By strengthening the Housing Accountability Act several times since
5 its inception in 1982, the Legislature has made clear that courts should not tolerate actions like
6 the coercive Alternative Process Agreement undertaken by Lafayette.

7 Local agencies charged with approving developments consistent with local plans
8 nevertheless participate in a process of continual delay and whittling down of proposed and
9 essential housing developments where developers must adapt to unpredictable entitlement
10 requirements, mounting and shifting demands from neighbors and elected officials, and
11 typically reductions in height and density. If developers do not agree to the continual changing
12 of the rules, they face denial of their projects.

13 Refusing to engage in the “entitlement game” would be an irresponsible act on the part
14 of the developer who has a fiduciary obligation to investors to secure an approval, build the
15 project, and generate a return. Developers are in a “do or die” situation where they cannot
16 refuse to jump a continually rising bar and instead can only ask how high they must jump to
17 get to the other side. Because they must secure a local approval, once they have an approval
18 they must find a way to build using it or violate their fiduciary responsibilities to their
19 investors. It is their fiduciary obligation to generate a return from their entitlement approval
20 that prevents developers from securing an approval and then suing the host city to enforce the
21 Housing Accountability Act. Such litigation creates still further uncertainty and delay before
22 the developer can get clarity on what they can build, and then go build it and generate a return
23 for their investors. Developers have a fiduciary obligation to get to yes and immediately
24 proceed with a project. In addition to a fiduciary obligation to the investors in a particular deal
25 to proceed with all due expediency, developers cannot risk a reputation for negotiating to
26 secure an approval and then turning around and suing the cities where they do business.

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28 ⁸ Uhler, Brian, “Considering Changes to Streamline Local Housing Approvals,” *Legislative Analyst’s Office*,
2016, <http://www.lao.ca.gov/reports/2016/3470/Streamline-Local-Housing-Approvals.pdf>
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1 Developers depend on the continued goodwill of local officials to approve their ongoing
2 projects. Because developers cannot bite the hand that feeds them without risking their future
3 development deals and they cannot challenge a hard-fought approval once it is granted without
4 violating their fiduciary obligations to their current investors to proceed immediately to build a
5 project, they will not sue under the Housing Accountability Act no matter how unfair the
6 process or how much the final project has been reduced in size and scope.

7 The Housing Accountability Act can only be enforced for the benefit of a region that
8 cannot grow without more housing and for the benefit of all those who might have been able to
9 live there if people like the petitioners in this case are able to successfully bring action to
10 enforce this vital State law. The petitioners are performing a vital public service by enforcing
11 state law that would otherwise be violated.

12 The inability of a development business to constantly sue the governments on whom
13 they rely for approvals was identified in May 2016 by the State Legislative Analyst Office:

14 ***Developers May Be Reluctant to Challenge Local***
15 ***Noncompliance.*** Disagreements may arise between cities and
16 counties and housing developers seeking streamlined approval.
17 Should this occur, the developer of an eligible project (or other
18 interested parties) would need to ask the courts to compel the city
19 or county to allow by-right approval. Project developers,
20 however, may be reluctant to challenge a city or county in court.
21 Developers often build multiple projects within the same city or
22 county over a number of years. Because of this, developers may
23 find it is in their long-term best interest to maintain a good
24 relationship with the city or county by not challenging it on any
25 particular project.⁹

22 In demanding an 85% reduction in density, Lafayette rendered moderate housing
23 development infeasible for the developer. The lowered density and increased lot and unit size
24 significantly reduced the number of units from which the developer could generate a return to
25 cover sunk land and entitlement costs. Building a larger unit on a larger lot is less efficient and
26 more costly per unit than building a multi-unit building. The increased cost to build fewer
27 larger units necessitates an increase in sales price to pay for the larger more expensive to build

28 ⁹ *Ibid.*

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1 homes. Restricting a developer to only 44 or 45 single-family homes versus hundreds of multi-
2 family units made building moderate-income rental housing infeasible.

3 By exercising project-by-project negotiations with unpredictable discretion increases
4 development uncertainty and risk. Efficient investment decisions require transparent rules
5 knowable to all – developing real estate should not require negotiations where local officials
6 can change the rules mid-application, and after public hearings are held where neighbors
7 complain about the zoning already approved for a particular site. Ad hoc changes increase risk,
8 which requires a greater rate of return to investors to cover the down side of this risk. Ad hoc
9 reduced density, particularly from multi-family rental affordable to more modest incomes to
10 single family homes affordable only to high income earners, reduces the ability of projects to
11 produce homes at prices affordable to moderate income earners.

12 Many housing projects are made entirely infeasible due to the shifting sands and delays
13 that are created by many cities through their local approval processes. Continual changes to
14 the project that occur in an unpredictable highly negotiated local approval process increase the
15 cost and reduce the revenues from building housing: reductions in height/density reduce
16 income to the investor, changes in design and materials typically increase project costs, added
17 mitigations and fees increase the cost of project design and construction. Delays drag out the
18 investment horizon of a housing development which adds carrying costs: land payments,
19 interest payments, need for more equity to pay bills, money set aside for the inevitable
20 problems and unknowns. Delay also adds the more tangible cost of being unable to build in
21 the market that existed when the project was submitted. Over time, construction costs increase
22 and the longer it takes for a project to have certainty it will be built as designed, the more
23 expensive it will be to build when it is approved. Market downturns or increases in interest
24 rates also make a project that had been feasible the day it was applied for less feasible as time
25 drags on. Real estate development is a cyclical business. Delays can cause developers to miss
26 a real estate cycle, wait years for the market to recover so they can build in a favorable market.
27 The end result is fewer homes are built over time, which worsens California's chronic housing
28 shortage, thereby increasing housing prices.

1 Principles of sound planning and good governance require that zoning and planning
2 documents represent a city's vision for their future that both the city and landowners can rely
3 on. Project by project negotiation and whip-sawing the developer subverts the considered
4 judgment of local officials and other stakeholders represented in adopted plans and zoning.
5 Cities like Lafayette circumvent their own land use ordinances by (1) demanding unpredictable
6 project changes over time (2) withholding approvals until the latest demands of officials or the
7 loudest community members have been satisfied which may have nothing to do with the
8 written standards in the general plan or zoning ordinance and may be raised years after an
9 initial project has been conceived. This ad hoc approval process undermines normal
10 democratic decision-making and the will of the state Legislature to see housing built for the
11 good of the State and its people.

12 The Legislature sought to prevent the very abuse that Lafayette committed by passing
13 the Housing Accountability Act. We agree with the California Legislature when it found and
14 declared:

- 15 1. The lack of housing, including emergency shelters, is a critical problem that threatens
16 the economic, environmental, and social quality of life in California.
- 17 2. California housing has become the most expensive in the nation. The excessive cost of
18 the state's housing supply is partially caused by activities and policies of many local
19 governments that limit the approval of housing, increase the cost of land for housing,
20 and require that high fees and exactions be paid by producers of housing.
- 21 3. Among the consequences of those actions are discrimination against low-income and
22 minority households, lack of housing to support employment growth, imbalance in jobs
23 and housing, reduced mobility, urban sprawl, excessive commuting, and air quality
24 deterioration. (GC 65589.5)

25 By enforcing the Housing Accountability Act, this Court will permit California's
26 housing builders to fulfill an urgent public need – building sufficient homes to house our
27 growing population at an affordable price.

28 Respectfully submitted,

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2 November 30, 2016
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6 Denise Pinkston
7 Partner, TMG Partners, a Bay Area real estate development company
8 Chair, Berkeley Zoning Adjustments Board
9 Chair, Bay Area Council Housing Committee
10 Lecturer in Real Estate, Mills College Lorry I. Lokey Graduate School of Management
11 Former Planning Services Coordinator, County of Marin
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November 30, 2016

California Apartment Association