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CALIFORNIA HOUSING DEFENSE FUND v. CITY OF LA CAÑADA FLINTRIDGE
Case Number: 23STCP02614 [Related to Case No. 23STPC02575]
Hearing Date: November 22, 2023

[Tentative] ORDER OVERRULING DEMURRER

[Tentative] ORDER DENYING MOTION TO STRIKE

Respondent, City of La Cañada Flintridge, generally demurs to the first and second causes of action in the petition for writ of mandate filed by Petitioner, California Housing Defense Fund. Respondent also moves to strike two paragraphs of the prayer for relief from the petition.[1]

JUDICIAL NOTICE

Respondents' Request for Judicial Notice (RJN) of Exhibits 1 through 14 is granted in part. To be clear, the court judicially notices the existence of the records, but not the truth of any hearsay or factual statements made therein, or the truth of any interpretation of the documents submitted. (See *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374. ["The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable."] See also *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879. ["A demurrer is simply not the appropriate procedure for determining the truth of disputed facts."])

ANALYSIS

Demurrer

Legal Standard

A demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. (Code Civil Proc., § 430.30, subd. (a); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "We assume the truth of the allegations in the complaint, but do not assume the truth of contentions, deductions, or conclusions of law." (*California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 247.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters." (*Hahn v.*

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[1] On August 7, 2023, the court related this proceeding to Case No. 23STPC02575, *600 Foothill Owner, LP v. City of La Cañada Flintridge*. Both proceedings concern the City's decision the Builder's Remedy application of Real Party in Interest, 600 Foothill Owner, LP, was incomplete. Additional fact background and summary is found in the court's tentative ruling on Respondents' demurrer and motions to strike also on calendar today in the related proceeding.

Mirda (2007) 147 Cal.App.4th 740, 747.) The allegations in the petition must be liberally construed in favor of Petitioner on demurrer. (See *Mobil Oil Corp. v Exxon Corp.* (1986) 177 Cal.App.3d 942, 947.) "A demurrer must dispose of an entire cause of action to be sustained." (*Poizner v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.)

Petitioner's Standing; Respondent's Request for Stay and Consolidation of Actions; and Splitting of Causes of Action

Respondent contends "because Real Party in Interest 600 Foothill Owner, LP has already brought a separate suit challenging the City's decision under [Government Code] section 65589.5, Petitioner should be barred from asserting the same rights of 600 Foothill." (Memo 16:22-24.) Respondent apparently contends Petitioner lacks standing (Memo 16:12-21); the petition improperly "splits a single cause of action" (Memo 17:19; or, alternatively, that the action should be stayed and/or consolidated[2] with the related action. (Memo 16:9-10, 25.)

Respondent's contention Petitioner lacks standing is unpersuasive on this briefing. Government Code section 65559.5, subdivision (k)(1)(A)(i) provides: "The applicant, a person who would be eligible to apply for residency in the housing development project or emergency shelter, **or** a housing organization may bring an action to enforce this section." (Emphasis added.) Petitioner sufficiently alleges it is a "housing organization," as defined in the statute. (Pet. ¶ 9.) Respondent does not challenge the allegation. Based on the plain language of Government Code section 65559.5, subdivision (k)(1)(A)(i), Petitioner has alleged standing to bring its claim under the Housing Accountability Act (HAA). (See *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 833-836. ["In 2016, the Legislature added an enhanced standing provision, allowing not only a person eligible for residency in a development but also a housing organization to bring an action to challenge a local agency's disapproval of a housing development."])

To the extent Respondent contends there is ambiguity in the HAA as to whether a housing organization may bring an action that "duplicates" one brought by the applicant, Respondent does not cite any legislative history or extrinsic aids from which the court could resolve such alleged ambiguity on demurrer. (See *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [rules of statutory construction].) Further, the HAA explicitly directs courts to "interpret[] and implement[] [the HAA] in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5, subd. (a)(2)(L).) Petitioner has sufficiently alleged it has standing to bring this proceeding, notwithstanding the related action filed by Real Party.

Respondent's argument Petitioner is improperly "splitting a cause of action" is unpersuasive on demurrer because, as noted, the plain language of Government Code section 65559.5, subdivision (k)(1)(A)(i) confers standing on Petitioner to bring this action. Respondent provides

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[2] Consolidation does not inform on this demurrer. Respondent's motion to consolidate is calendared to be heard on February 2, 2024 in the related case.

no authority suggesting the same or similar cause of action brought be different petitioners in different proceedings constitutes a split cause of action as the term is typically understood.

The demurrer on the grounds Petitioner lacks standing or is improperly splitting a cause of action is overruled.

No Final Decision Under CEQA[3]

Respondent contends the petition has been filed prematurely because "no CEQA review of 600 Foothill's project has occurred, given the lack of information from 600 Foothill." (Memo 10:3-4.)

Respondent raises a factual question concerning the status and feasibility of CEQA review. The petition alleges Real Party "submitted all information and documentation requested by the February incompleteness determination on April 28, 2023." (Pet. ¶ 53.) Respondent does not cite any statements in the petition admitting the exact status of CEQA review or showing that CEQA review will not be completed during the pendency of this writ action. Respondent cannot rely on judicially noticeable materials to prove, as a factual matter, the status of Respondent's CEQA review. (See Memo 10:4 [citing RJN Exh. 6 (City Council agenda report); *Joslin v. H.A.S. Ins. Brokerage, supra,* 184 Cal.App.3d at 374. ["The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable."]) If CEQA review is completed during the pendency of this writ action, Respondent concedes CEQA would not impede any remedy on Petitioner's HAA claims. (See Memo 10:4-7 [citing Gov. Code, § 65589.5, subds. (e) and (o)(6).)

More fundamentally, Respondent fails to explain why the court could not issue an order on Petitioner's HAA claims that avoids a conflict with CEQA. For example, if the court were to issue an order pursuant to Government Code section 65589.5, subdivision (k)(1)(A)(ii) directing Respondent to comply with the HAA, Respondent fails to show the court would lack the authority or discretion to accommodate CEQA review in any such order. For these reasons, Respondent's reliance on *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1262 is misplaced at the pleading stage. The case involved a request **to compel** the certification of an environmental impact report. *Schellinger Brothers v. City of Sebastopol* did not hold that claims under the HAA or other housing laws are unripe or cannot be filed until an agency completes CEQA review, or that the trial court lacks discretion to structure a writ issued pursuant to the HAA in a manner that allows for CEQA review to be completed.

Respondent's demurrer to all causes of action on the grounds the petition is "premature" because no final decision under CEQA has been issued is overruled.

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[3] The California Environmental Quality Act (CEQA) is at Public Resources Code section 21000, *et seq.*

Has Petitioner Sufficiently Alleged Final Disapproval of the Project?

Respondent contends that Petitioner's causes of action have been filed "prematurely" because "no final decision" on Real Party's development application has been made. (Memo 10:13-19.)

Petitioner alleges Real Party's "submission on November 10, 2022, while Respondent's housing element was out of compliance, preserved Applicant's right to pursue the project under the builder's remedy, regardless of subsequent changes in Respondent's housing element compliance status." (Pet. ¶ 47.) As summarized in the petition (Pet. ¶ 3), the so-called "Builder's Remedy" refers to Government Code section 65589.5, subdivision (d)(5), which provides in pertinent part:

> (d) A local agency shall not disapprove a housing development project, . . . for very low, low-, or moderate-income households, or an emergency shelter . . . unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:
>
> . . . .
>
> (5) The housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, **and** the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article . . . . (Emphasis added.)

Thus, to state a claim under the HAA and to invoke the Builder's Remedy, Petitioner must show the City "disapprove[d] a housing development project." (Gov. Code, § 65589.5, subd. (d).) Government Codee section 65589.5, subdivision (h)(6) in the HAA states " 'disapprove the housing development project' includes any instance in which a local agency does any of the following: (A) Votes on a proposed housing development project application and the application is disapproved, **including** any required land use approvals or entitlements necessary for the issuance of a building permit . . . ." The HAA does not limit its definition of disapproval to land use approvals and entitlements; it is more expansive. It applies to disapproval of project applications.

Notably, the Legislature has expressed its intent that the HAA "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5, subd. (a)(2)(L); *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 854 [Legislature has made clear that the HAA's "mandates are to be taken seriously"].) In addition, "[a]s a basic principle of statutory construction, 'include' is generally used as a word of enlargement and not of limitation. . . . Thus, where the word 'include' is used to refer to specified items, it may be expanded to cover other items." (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209,

1227.) Applying these canons of statutory construction, the court finds it appropriate, at the pleading stage, to give Government Code section 65589.5, subdivision (h)(6) a broad construction.

Petitioner has sufficiently alleged the City Council's May 1, 2023 denial of Real Party's appeal was, in effect, a disapproval of the housing development project pursuant to Government Code section 65589.5, subdivision (h)(6). Petitioner alleges Real Party relied on the Builder's Remedy in the development application. Nonetheless, the City determined in its second "incompleteness" determination the Builder's Remedy would not apply, such that the Project could not be approved pursuant to the applicable proposed density and development standards applicable to a Builder's Remedy project. (See Pet. ¶¶ 40-71.)

While the court need not resolve the statutory question definitively for purposes of this demurrer, broadly reading the petition as the court is required to do, Petitioner has sufficiently alleged factual circumstances that could fall within the definition of "disapprove a housing development" of the HAA. The label used by Respondent on its decision to deny the application (that is, Project) as proposed, is not determinative.

Respondent also appears to raise a defense of exhaustion of administrative remedies. (See Dem. 1:15-17. ["Petitioner has failed to exhaust its administrative remedies and filed this action prematurely."]) Exhaustion of administrative remedies is "a jurisdictional prerequisite to judicial review." (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489.) "Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings." (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 520.) Generally, "the exhaustion doctrine precludes review of an intermediate or interlocutory action of an administrative agency. A party must proceed through the full administrative process 'to a final decision on the merits.' " (*Alta Loma School Dist. v. San Bernardino County Com. On School District Reorganization* (1981) 124 Cal.App.3d 542, 554.)

There are exceptions to the exhaustion requirement, including "when the subject of the controversy lies outside the administrative agency's jurisdiction, when pursuit of an administrative remedy would result in irreparable harm, when the administrative agency cannot grant an adequate remedy, and when the aggrieved party can positively state what the administrative agency's decision in his particular case would be." (*Edgren v. Regents of University of California, supra,* 158 Cal.App.3d at 520 [citations omitted].)

Here, for the reasons discussed above, Petitioner sufficiently alleges the City Council's May 1, 2023 decision **constituted a "disapproval" of Real Party's housing development project, as proposed pursuant to the Builder's Remedy provision of the HAA**. The petition alleges that "no further avenue for appeal was provided." (Pet. ¶ 63.) In its request for judicial notice, Respondent does not demonstrate Real Party had an opportunity for further appeal of that decision. Accordingly, Petitioner sufficiently alleges Real Party (and thereby Petitioner)

exhausted administrative remedies. (See *Freeny v. City of San Buenaventura* (2013) 216 Cal.App.4th 1333, 1340 ["when all a plaintiff challenges is the denial of a specific use through denial of a special project, the plaintiff need only show that the administrative agency has finally ruled on that project"].)

Further, Petitioner has sufficiently alleged the futility exception to the exhaustion doctrine. Among other allegations, Petitioner alleges on June 24, 2023:

> Respondent sent a follow-up letter reiterating its position that its housing element was in substantial compliance when the application was submitted. . . . According to Respondents, the proposed development did not comply with Respondent's zoning and general plan because its density of 62 dwelling units per acre is higher than the density specified in Respondent's zoning ordinance and general plan; because the proposed development did not include as much outdoor space as Respondents required; and because it did not employ the architectural styles preferred by Respondent's zoning ordinance and general plan, instead opting for a clean contemporary look. Respondent made clear, in this letter, that it believed the project's inconsistencies with the zoning code and general plan were grounds for denying the application, and the builder's remedy did not apply. (Pet. ¶¶ 66-68.)

At the pleading stage, these allegations are sufficient to support a claim Petitioner can positively state what Respondent's decision was with respect to Real Party's application to develop the Project pursuant to the Builder's Remedy provision of the HAA. (See, e.g., *Felkay v. City of Santa Barbara* (2021) 62 Cal.App.5th 30, 40-41 [futility exception, which is a question of fact, applied where city "made plain" it would not permit the proposed development]; *Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 832-34 [futility exception applied where it was "inconceivable the city council would grant a variance for the very project whose prospective existence brought about the enactment of the rezoning" that necessitated the variance in the first place].)

The demurrer to the first and second causes of action, on the grounds they are "premature" and/or a failure to exhaust administrative remedies is overruled.

City's Time to Rezone

Respondent contends that the first cause of action should be dismissed because "the City had a compliant housing element, and statutorily allowed time to rezone." (Memo 11:17.) Respondent argues Government Code section 65860, subdivision (c) "specifically contemplates that rezoning will occur after adoption of an amendment to a General Plan 'within a reasonable time' (including Housing Elements), and this amendment must be valid by operation of law before rezoning can occur." (Memo 12:11-13.)

That Respondent may have additional time to rezone does not impact Real Party's Builder's Remedy application if Respondent was not in substantial compliance with the Housing Element Law as of November 14, 2022. The petition alleges "Respondent did not have a substantially compliant housing element when Applicant submitted its pre-application for the builder's remedy project on November 10, 2022." (Pet. ¶ 69) Because Respondent does not address the allegation Respondent did not have a substantially compliant housing element at the time Real Party submitted the application, the demurrer is unpersuasive.

Moreover, on this briefing, Respondent fails to persuasively address Government Code section 65588, subdivision (e)(4)(C)(iii): "A jurisdiction that adopts a housing element more than one year after the statutory deadline described in subparagraph (A) or (C) of paragraph (3) **shall not be found in substantial compliance with this article until it has completed the rezoning required by subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 and subdivision (c) of Section 65583.2.**" (Emphasis added.) Respondent does not demonstrate for purposes of demurrer (citation to the petition or request for judicial notice) Respondent adopted a final housing element within the statutory deadline or has completed the rezoning. Respondent bears the burden of proof on that issue. (Gov. Code, § 65587, subd. (d)(2).) Further, the petition sufficiently alleges Respondent failed to adopt a substantially compliant housing element by the statutory deadline and that rezoning has not been completed. (Pet. ¶¶ 20-21, 33-37.)[4] For reasons discussed *infra*, Respondent does not show Petitioner's allegations of lack of substantial compliance may be adjudicated on demurrer and without the administrative record.

In reply, Respondent does not persuasively analyze Government Code section 65588, subdivision (e)(4)(C)(iii) or respond fully to Petitioner's argument of how its application here. (See *Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].)

The demurrer to the first cause of action on the grounds Respondent's time to rezone has not expired is overruled.

Substantial Compliance with Housing Element and Respondent's Unlawful Delegation Defense

Respondent contends the first cause of action fails to state a claim of non-compliance with the Housing Element L aw because: (1) "City did include, although it had no duty to [include in its housing element], the discussion required under Cal. Govt. Code § 8899.50 regarding 'Affirmatively Furthering Fair Housing' " (Memo 12:27-13:1); (2) "the documents concerning which the Court may take judicial notice reflect that the City complied with the cited provisions

[4] To the extent Respondent contends in reply Respondent "has completed its rezoning," Respondent improperly relies on extrinsic evidence and improperly raises a new reply argument. (Reply 10, fn. 3; *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 747; *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.)

of section 65583.2 of the Government Code" (Memo 13:2-3); and (3) Petitioner cannot rely on statutes that unconstitutionally delegate judicial authority to HCD to determine substantial compliance. (Memo 12:25-26.)

Respondent does not demonstrate through its briefing its constitutional challenge to Government Code section 8899.50 should be adjudicated on demurrer. Respondent has not fully briefed the issue or explained whether it brings a facial or as-applied challenge. Respondent also relies on a single United States Supreme Court case which, as discussed *infra*, did not decide a challenge to Government Code section 8899.50 or some similar state law.

Even assuming the court did consider the challenge, on this briefing, the court finds Respondent's position unpersuasive. Government Code section 8899.50, subdivision (b)(1) provides:

> A public agency shall administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and take no action that is materially inconsistent with its obligation to affirmatively further fair housing.

Compliance with the provision is mandatory. (*Id.* § 8899.50, subd. (b)(2).) The statute defines "affirmatively further fair housing" as:

> taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a public agency's activities and programs relating to housing and community development. (Gov. Code, § 8899.50(a)(1).)

To the extent Respondent's challenge to Government Code section 8899.50 is a facial one, it is insufficiently developed. Generally, "[t]o support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)[5] Respondent does not

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[5] To the extent Respondents facially challenge Government Code section 65588, subdivision (e)(4)(C) and other statutes vesting authority in HCD to assess a city's substantial compliance

make such a showing today. The phrase "affirmatively furthering fair housing" necessarily requires a fact-based inquiry.

To the extent Respondent's challenge is as applied, its claim is also insufficiently developed based on these facts. Respondent's challenge to Government Code section 8899.50 appears entirely based on a single case—the United States Supreme Court's recent decision in *Students for Fair Admission v. Harvard College* (June 29, 2023) 600 U.S. 181 (*Harvard*). In *Harvard*, the Court held certain colleges' race-based admissions policies did not satisfy strict scrutiny and therefore violated the Equal Protection Clause of the United States Constitution. The Court's analysis focused on a line of cases that have considered "whether a university may make admissions decisions that turn on an applicant's race." (*Id.* at 208.) The Court did not mention the federal Fair Housing Act, similar housing laws or decide the constitutionality of such laws under the Equal Protection Clause.

As for Respondent's alleged compliance with the Housing Element Law, Respondent does not demonstrate the court may decide such issues on demurrer in the absence of the administrative record. Respondents ask the court to adjudicate the substantial compliance issue based on citations to judicially noticeable records—without regard to the record as a whole. (Memo 13:2-15 [citing RJN Exh. 3, 4, 6].) Respondent's request is improper. As noted earlier, " '[a] demurrer is simply not the appropriate procedure for determining the truth of disputed facts.' [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." (*Joslin v. H.A.S. Ins. Brokerage, supra,* 184 Cal.App.3d at 374.) Certain facts contained in the administrative record may conflict with those judicially noticed. Here, the interpretation of Respondent's Housing Element and related materials are expressly disputed by Petitioner. The absence of the administrative record creates a one-sided view.

In addition, Petitioner's argument it has sufficiently **pleaded** the City's Housing Element does not substantially comply with the Housing Element Law, as determined by HCD, for purposes of this demurrer is persuasive. (See Pet. ¶¶ 20-39, 64-65.) Among other allegations, Petitioner sufficiently alleges "The October draft did not affirmatively further fair housing or provide an assessment of fair housing in the City as required by Government Code sections 8899.50 et seq. and Government Code section 65583, subdivisions (c)(10)(A) and (c)(5). The October draft did not properly assess the suitability of non-vacant sites in its housing site inventory as required by Government Code section 65583, subdivision (a)(3). The October draft did not identify actions that would be taken to ensure the sites in its housing site inventory would be available for the City's projected housing needs. This failure violated Government code section 65583, subdivision (c)(1)." (Pet. ¶¶ 22-24.)

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with the Housing Element Law, Respondents do not demonstrate a "total and fatal conflict" between Government Code section 65588, subdivision (e)(4)(C) (or any other statute) and any constitutional provision. (See *ibid.*)

Petitioner's allegations are sufficient to state a cause of action. Again, the court cannot adjudicate substantial compliance issues without the administrative record. (See *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 282-283. ["Resolving the factual issues of whether the City's noncompliance with the Housing Element Law actually causes or predictably results in a disparate impact or perpetuates segregated housing patterns involves a weighing of evidence and drawing inferences, a task best left to the trial court in its role as the finder of fact."])

Additionally, in a challenge to the pleadings, Respondent's constitutional claims regarding HCD's authority is unpersuasive. The argument today is insufficiently developed—Respondent has not provided any cogent discussion of relevant authorities on delegation and administrative agencies and HCD's statutory scheme. (See *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862-863 [legal "briefs must provide argument and legal authority for the positions taken"].)

Finally, on this briefing and for purposes of this demurrer, the court is not persuaded Government Code section 65588, subdivision (e)(4)(C) (or any other, unspecified statute challenged by Respondents) is unconstitutional (facially or as applied). " 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature.' " (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-376.) Petitioner sufficiently argues required standards exist in the Housing Element Law. For purposes of their demurrer, Respondent has not developed a persuasive argument to the contrary. Further, Respondents do not demonstrate the Legislature has improperly delegated to HCD the power to make law, as opposed the power to "determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature." (*Kugler v. Yocum, supra*, 69 Cal.2d at 375-376.) Finally, HCD's determinations of substantial compliance (or lack thereof) presumably could be challenged by a petition for writ of mandate.

Based on the foregoing, the demurrer on the grounds Petitioner has not sufficiently alleged non-compliance with the Housing Element Law is overruled.

Petitioner Alleges a Complete Application

Respondent contends Real Party's "SB330 Preliminary Application expired [and] no right to assert a "Builder's Remedy" approval process remains extant." (Memo 18:23-24.) Respondent raises factual questions not appropriate for resolution on demurrer. Petitioner sufficiently alleges Real Party submitted all information requested by Respondent on April 28, 2023—within the 180-day statutory window cited in the demurrer. (Pet. ¶ 53.) The petition further alleges Respondent confirmed Real Party's development application was complete. (Pet. ¶¶ 53-54, 66.) Accordingly, the demurrer is overruled.

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Second Cause of Action for Declaratory Relief

"Generally, a specific decision or order of an administrative agency can only be reviewed by a petition for administrative mandamus." (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566.) However, "[d]eclaratory relief has been held to be the proper remedy when it is alleged an agency has a policy of ignoring or violating applicable laws." (*Ibid.*)

Petitioner sufficiently alleges Respondent may have a policy of ignoring or violating applicable laws, including the HAA and Housing Element Law, and a judicial declaration may be necessary "to resolve the City's fundamental misunderstanding of its responsibilities under the [HAA and Housing Element Law] to avoid continued violations or nonenforcement in the future." (*Ibid.*) Thus, the requests for declaratory relief in the second cause of action and related paragraphs in the prayer for relief are proper at the pleading stage.

Respondent also contends the second cause of action is barred by a 90-day statute of limitations in Government Code section 65009, subdivision (c)(1). (Memo 19:23-24.) However, for reasons discussed in Petitioner's opposition and in the court's tentative ruling on the demurrer in the related action, Petitioner has a colorable argument a one-year statute of limitations applies pursuant to Government Code section 65009, subdivision (d)(2)(B) and the cause of action is timely. (See Memo 19:1-18.)[6]

Accordingly, the demurrer to the second cause of action is overruled.

Motion to Strike Pursuant to Code of Civil Procedure Sections 435 and 436

Legal Standard

Upon motion, the court may "strike out any irrelevant, false, or improper matter inserted in any pleading" or "[s]trike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) As with a demurrer, "[t]he grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice." (*Id.* at § 437.) Given that limitation, a motion to strike is "not the appropriate procedure for determining the

[6] Section 65009(d)(2)(B) provides as follows: "An action or proceeding challenging the adoption or revision of a housing element that the Department of Housing and Community Development has found does not substantially comply with the requirements of Article 10.6 (commencing with Section 65580) of Chapter 3, where the legislative body has failed to change the draft element or amendment to substantially comply with the requirements of Article 10.6 or has adopted the draft element or amendment without change and made findings pursuant to subdivision (f) of Section 65585, shall be commenced, and the legislative body shall be served, within one year after the accrual of the cause of action as provided in this subdivision."

truth of disputed facts." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113-114.)

Courts take a "cautious" approach to motions to strike. "We have no intention of creating a procedural 'line item veto' for the civil defendant." (*PH II, Inc. v. Superior Court* (1995) 33 Cal. App. 4th 1680, 1683.) "Judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Prayer Paragraph 1

Respondent contends "[a]n essential requirement for the requested [writ] relief [in Prayer paragraph 1] is that the City actually disapproved the Project, which it has not done." (Memo 6:11-12.) For the reasons discussed earlier as to the demurrer, Petitioner has sufficiently alleged Respondent disapproved the Project under the HAA. Accordingly, the motion to strike Prayer paragraph 1 is denied.

Respondent next argues, at length, that granting relief under the HAA would "run afoul of the City's 'police power' " (Memo 6:17); would "conflict[] with the Planning and Zoning Law, the Code of Civil Procedure, and the Public Resources Code" (Memo 6:21-22); exceed the scope of the court's authority in an administrative mandate action (Memo 10:4-5); and create a "legal impossibility" with respect to City's concurrent obligations under CEQA. (Memo 10:16.) In effect, Respondent challenges the constitutionality and legality of the enforcement provisions of the HAA. (See Gov. Code § 65589.5, subd. (k)(1)(A)(ii). ["The court may issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development."])

While the court has considered Respondent's arguments and cited authorities, the court finds it unnecessary to discuss them at length for this ruling. For the reasons discussed earlier with the demurrer, Petitioner has sufficiently alleged claims for relief under the HAA.

Respondent does not dispute that Petitioner seeks relief consistent with the enforcement provisions of the HAA. Accordingly, Respondent raises issues of remedy that cannot be decided at the pleading stage. The constitutionality and enforceability of the HAA have not been fully briefed and, in any event, cannot be adjudicated on a motion to strike. Further, on the merits and as stated in the opposition brief, Petitioner has colorable arguments the HAA is constitutional and enforceable pursuant to its plain language. (See Opposition 7-12 and *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 851. ["In short, the HAA does not wrest control from local governments so much as require them to proceed by way of clear rules adopted in advance, rather than by ad hoc decisions to accept or reject proposed housing."]; see also Id. at 853 [" In short, the City's claim that section 65589.5(f)(4) impermissibly delegates municipal authority fails because the HAA leaves to the public agency final authority to approve, condition, or deny a project."].

The motion to strike Prayer paragraph 1 is denied.

Prayer Paragraph 3

Prayer paragraph 3 seeks fines against Respondent pursuant to Government Code section 65589.5, subdivision (k)(1)(B) and (l). As Respondent acknowledges, Government Code section 65589.5, subdivision (k)(1)(B) requires "as a condition precedent, that a Court order have been violated . . . ." (See Memo Related Proceeding 23:12-13.) Government Code section 65589.5, subdivision (l) authorizes the court to "multiply the fine determined pursuant to subparagraph (B) of paragraph (1) of subdivision (k) by a factor of five" if it determines the agency acted with bad faith. A determination of whether Petitioner is entitled to such relief necessarily cannot be made at the pleading stage before the court has issued an order or judgment. The motion to strike the Prayer paragraph 3 is denied.

CONCLUSION

The demurrer is overruled.

The motion to strike is denied.

IT IS SO ORDERED.

November 22, 2023

Hon. Mitchell Beckloff
Judge of the Superior Court

11/27/2023