Superior Court of California
County of Los Angeles

TNHC CANYON OAKS LLC, Petitioner, vs. CITY OF CALABASAS, *et al.*, Respondents.	Case No. 21STCP01819 (consolidated with 21STCP02726) **RULING ON PETITION FOR WRIT OF MANDATE** Dept. 82 (Hon. Curtis A. Kin)

In two separate petitions for writ of mandate, petitioners TNHC Canyon Oaks LLC and Building Industry Association of Southern California seek an order directing respondent City Council of the City of Calabasas ("City Council") to set aside its denial of the residential and commercial development located in respondent City of Calabasas ("City").

I. Factual Background

This proceeding concerns the West Village Project ("Project"), located at the corner of Las Virgenes Road and Agoura Road in Calabasas. (AR 1223.) The Project, proposed by petitioner TNHC Canyon Oaks LLC ("TNHC"), would involve the development of a 77-acre vacant site. (AR 1223.) Under the Project, multi-family residences, a park, a public trail easement, and retail would occupy 11 acres of the site. (AR 1223.) The remaining 66 acres would be permanently dedicated as open space. (AR 1223.)

With respect to the City's open space requirements, the 2030 General Plan designated approximately 16 acres of the Project site for multi-family residential and planned development, with the remaining 61 acres designated as open space. (AR 367, 7853, 8035, 18560.) In 2005, the voters in Calabasas passed Measure D, which required two-thirds voter approval for any amendment to the General Plan that would redesignate open space for non-open space uses. (AR 7500, 7511.) Measure D

was scheduled to automatically expire in 2030. (AR 7501, 7512.) In 2015, the voters passed Measure O, which made Measure D permanent. (AR 7522, 7535-37.)

On October 17, 2016, TNHC applied for approval of the Project from the City of Calabasas ("City"). (AR 363.) The Project originally consisted of 205 multi-family residences (195 apartments and 10 townhomes), 18 of which were designated as affordable for low-income households, as well as 150,000 square feet of commercial space. (AR 363.) After review and comments by the City's Development Review Committee and staff, TNHC reduced the number of multi-family residences to 180, 27 of which were designated as affordable income units. (AR 4, 363.) The application was deemed complete on September 1, 2017. (AR 363, 7602.)

The City recognized that the Project "would require a significant amount of remedial grading to stabilize a landslide hazard area on the southern portion of the site." (AR 1223; *see also* AR 7901 [Environmental Impact Report stating "The proposed grading would involve re-contouring of the existing hillsides and filling of the existing canyon feature to create a series of building pads.... In order to remediate an existing landslide feature on the project site, the project would involve approximately 2,403,418 cy [cubic yards] of cut and an estimated 2,406,971 cy of fill"].) City staff recognized that a significant portion of the impacts of the Project were temporary and would be mitigated or would be attributed to the "necessary permanent remediation of the landslide feature." (AR 1909.)

On November 8, 2018, the Woolsey Fire burned in Los Angeles and Ventura Counties. (AR 7133.) "No single fire had ever occurred in the mountains or the Malibu area that did not receive massive quantities of fire engines in time, but the Woolsey Fire was different." (AR 7133.) During the fire, more than 250,000 people, including in Calabasas, were successfully evacuated. (AR 7133, 7168, 7189.) After the fire, a report that the County of Los Angeles had prepared recommended "ongoing public policy discussion regarding significant development in Very High or High Fire Hazard Severity areas." (AR 7133.)

Pursuant to the California Environmental Quality Act ("CEQA"), the Draft Environmental Impact Report ("EIR") was conducted. (AR 13557, 14437.) The County of Los Angeles Fire Department reviewed the Project on four occasions. (AR 35717.) The City's Initial Study determined that "[a]lthough the project would potentially be subject to existing wildfire hazards...the project would not exacerbate the potential for wildfire hazards." (AR 6731.)

The City's EIR determined that, during a wildfire, residents and employees at the Project would be able to quickly access US-101, the primary evacuation route, from the Project site, which was 0.25 miles from the highway. (AR 13570.) As part of the Project, a third northbound lane would be added on Las Virgenes Road, and a sidewalk would be added along the same road. (AR 13570.) According to the EIR, "[t]he additional lane and sidewalk connections would improve vehicle and

pedestrian circulation, which would benefit emergency access and the function of the evacuation route on Las Virgenes Road." (AR 13570.)

In July 2019, City staff presented an analysis of the Project to the Planning Commission. (AR 365-474.) Staff asserted that the Project was "consistent with 140 different individual policies of the General Plan." (AR 355.) Staff noted that the Project "meets the General Plan's stated housing density for this property, and proposes significantly less (96% less) commercial intensity than the General Plan allows (5,867 square feet compared to 155,000 square feet)." (AR 355.)

Staff prepared a resolution recommending approval of the Project. (AR 478-540.) Staff found that all environmental factors other than aesthetics would be less than significant with mitigation factors. (AR 481.) Staff also found that the Project conformed to the General Plan. (AR 484.) Staff determined that the Project's design and proposed improvements "are not likely to cause substantial environmental damage" or "serious public health problems." (AR 486.)

Three days of public hearings for the Project were held on July 10, 11, and 18, 2019. (AR 3051.) The Planning Commission voted to recommend that the City Council not certify the EIR and to deny the proposed resolution. (AR 3051.) The Planning Commission recommended that TNHC explore a project alternative described as viable in the Original Final EIR, which did not require grading to remediate the landslide area. (AR 3051.)

Pursuant to the Planning Commission's recommendation, TNHC hired a geotechnical consultant to make recommendations on the feasibility of project alternatives. (AR 1225.) TNHC also provided a "post-Woolsey Fire oak tree assessment documenting the updated conditions of on-site oak trees," "updated traffic impact analysis," and an "updated biological assessment of the current on-site biological conditions." (AR 1225-26.) An Amended Draft EIR resulted from the new information. (AR 1225.)

TNHC's geotechnical consultant concluded that the "risks to life and property from gross, seismic, and surficial instability were too high for Alternative 4 (or any variation that did not implement slope stabilization measures) to be feasible." (AR 3052.) Staff recommended that "the Planning Commission re-evaluate its prior decision in light of the new geotechnical findings, and recommend approval of the project as proposed because it is fully consistent with the General Plan, including providing all of the housing specified in the City's 2014 – 2021 Housing Element for this site, and fully mitigates all significant environmental impacts to the greatest feasible extent." (AR 1259.)

On April 21, 2021, the Planning Commission voted 3-2 to recommend that the City Council approve the Project with a reduction of housing units from 180 to 135 and certify the Amended Final EIR. (AR 1890, 3054.) The Planning Commission

recognized that "remediation of the landslide was an unfortunate, yet necessary element of any project that was to be built on the project site...." (AR 3054.)

In preparation for the City Council meeting, the City's CEQA consultant prepared a supplemental memorandum analyzing the Project's impact on the environment with respect to wildfire. (SAR 38432-37.) The memorandum was revised at least three times. (SAR 38433-37, 38510-14, 39793-98; AR 6730-33.) The version of the memorandum, dated May 13, 2021, set forth reasons why "there [was] not substantial evidence suggesting that the project would exacerbate the potential for or severity of wildfires." (SAR 39797.) The consultant clarified that its conclusion did "not mean that the project could not be subject to wildfires, but merely that the project would not increase the potential for wildfires to occur." (SAR 39797.) The conclusion was deleted from the final version of the memorandum dated May 14, 2021. (*Compare* SAR 39797 *with* AR 6730-33.)

On May 26, 2021, the City Council declined to certify the Amended Final EIR and denied the Project. (AR 7600-23.) The City Council found that "[t]he proposed project violated Calabasas Municipal Code and General Plan prohibitions on development and non-open space uses of General Plan designated open space," in that "permanent, remedial grading for a residential and commercial development project constitutes conversion of General Plan designated open space land for non-open space uses." (AR 7605.) In addition, noting that the Project site was part of a designated "Very High Fire Hazard Severity Zone," the City Council also found that "the project site's vicinity has inadequate evacuation routes to safely accommodate the proposed, estimated 495 new residents within the project, nor to safely allow the evacuation of the surrounding community along Las Virgenes Road...." (AR 7606.)

II. Procedural History

On June 4, 2021, TNHC Canyon Oaks LLC ("TNHC") filed a Verified Petition for Writ of Mandate and Complaint in Case No. 21STCP01819. On September 14, 2021, respondents City of Calabasas and City Council of the City of Calabasas filed an Answer to TNHC's petition.

On August 20, 2021, Building Industry Association of Southern California ("BIASC") filed a Verified Petition for Writ of Mandate and Complaint in Case No. 21STCP02726. On September 14, 2021, respondents City of Calabasas and City Council of the City of Calabasas filed an Answer to BIASC's petition.

On August 20, 2021, BIASC filed a notice seeking to relate its petition to TNHC's petition. On September 16, 2021, the Court (Hon. Mary H. Strobel) deemed the matters related and reassigned BIASC's petition to Department 82, where TNHC's petition was also assigned.

On November 4, 2021, pursuant to a stipulation by the parties, the Court consolidated the petitions of TNHC and BIASC and designated TNHC's petition as the lead case. The Court reaffirmed that the non-writ causes of action were stayed pending resolution of the writ causes of action by the Court.

On July 3, 2023, petitioners TNHC and BIASC filed a joint opening brief. On August 1, 2023, respondents City of Calabasas and City Council of the City of Calabasas filed an opposition. On August 16, 2023, petitioners filed a reply. The Court has received an electronic copy of the administrative record (comprised of the West Village Administrative Record, the West Village Supplemental Record, and the Canyon Oaks partial record), an amended electronic copy of the administrative record, and a hard copy of the joint appendix.

On August 31, 2023, the Court issued a tentative ruling and held a hearing on the consolidated petitions. The Court then took the matter under submission.

III. Standard of Review

Under CCP § 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

In administrative mandate proceedings, the trial court reviews land use decisions for substantial evidence. (*See Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.) Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion" (*California Youth Authority v. State Personnel Board* (2002) 104 Cal.App.4th 575, 584-85), or evidence of ponderable legal significance which is reasonable, credible and of solid value (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633). "Courts may reverse an [administrative] decision only if, based on the evidence...a reasonable person could not reach the conclusion reached by the agency." (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610.)

However, "'[o]n questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.' .... Interpretation of a statute or regulation is a question of law." (*Christensen v. Lightbourne* (2017) 15 Cal.App.5th 1239, 1251.)

An agency is presumed to have regularly performed its official duties. (Evid. Code § 664.) A reviewing court "will not act as counsel for either party to an appeal and will not assume the task of initiating and prosecuting a search of the record for any purpose of discovering errors not pointed out in the briefs." (*Fox v. Erickson* (1950) 99 Cal.App.2d 740, 742.) When an appellant challenges "'the sufficiency of the evidence, all material evidence on the point must be set forth and not merely their own evidence. Failure to do so amounts to waiver of the alleged error and we may

presume that the record contains evidence to sustain every finding of fact." (*Toigo,* 70 Cal.App.4th at 317, citations omitted.)

Generally, the petitioner seeking administrative mandamus has the burden of proof to demonstrate where the proceedings were unfair, exceeded jurisdiction, or demonstrated prejudicial abuse of discretion. (*See Alford v. Pierno* (1972) 27 Cal.App.3d 682, 691.) However, in an action such as this to enforce the Housing Accountability Act ("HAA"), the burden of proof is reversed. Here, in this challenge to the validity of the city's decision to disapprove the project, the City bears the burden of proof that its decision has conformed to all of the conditions specified in Section 65589.5. (Gov. Code § 65589.6; *see California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 837 ["As the public entity that disapproved the project, the City bears the burden of proof that its decision conformed to the HAA. (§ 65589.6)"].)

IV. Requests for Judicial Notice

All requests for judicial notice are DENIED as "unnecessary to the resolution" of the issues before the Court. (*Martinez v. San Diego County Credit Union* (2020) 50 Cal.App.5th 1048, 1075.)

V. Analysis

A. The Housing Accountability Act

"The HAA was enacted in 1982 in an effort to address the state's shortfall in building housing approximating regional needs, and the Legislature has amended the law repeatedly in an increasing effort to compel cities and counties to approve more housing." (*Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842, 850.) "Still dissatisfied with the dearth of housing in this state, the Legislature in 2017 passed further amendments to the HAA, supported by detailed findings. The Legislature added a provision requiring that an applicant receive timely written notice and an explanation if an agency considers a proposed housing development inconsistent with applicable standards. (§ 65589.5, subd. (j)(1); Stats. 2017, ch. 378, § 1.5.) It heightened fines for bad faith disapproval of a project. (§ 65589.5, subd. (l); Stats. 2017, ch. 378, § 1.5.) And it increased the burden of proof required for a finding of adverse effect on public health or safety. (§ 655589.5, subd. (j)(1); Stats. 2017, ch. 378, § 1.5.)." (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 836 [hereafter "CARLA"].)

As relevant to this writ petition, "the HAA provides that when a proposed housing development complies with objective general-plan, zoning, and subdivision standards and criteria in effect *at the time the application is deemed complete,* the local agency may disapprove the project or require lower density only if it finds the development would have specific adverse effects on public health or safety that cannot feasibly be mitigated." (*Save Lafayette,* 85 Cal.App.5th at 850, emphasis in

original; *see* Gov. Code § 65589.5(j)(1).)[1] Thus, stated differently, a city may deny a land use application without making the findings required by the HAA if the proposed housing development does not comply "with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." (Gov. Code § 65589.5(j)(1); *CARLA*, 68 Cal.App.5th at 838.)

Section 65589.5(f)(4)[2] also states the following: "For purposes of this section, a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity."

In an action under the HAA, "instead of asking, as is common in administrative mandamus actions, 'whether the City's findings are supported by substantial evidence' [citation], we inquire whether there is 'substantial evidence that would allow a reasonable person to conclude that the housing development project' complies with pertinent standards. (§ 655589.5, subd. (f)(4).) As the public

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1 Gov. Code § 65589.5(j)(1) states:

> When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to disapprove the project...the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:
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> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.
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> (B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

2 Statutory references are to the Government Code, unless otherwise stated.

entity that disapproved the project, the City bears the burden of proof that its decision conformed to the HAA. (§ 65589.6.)" (*CARLA*, 68 Cal.App.5th at 837.)

Finally, the HAA states that "[i]t is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (§ 65589.5(a)(2)(L).)

B. Compliance with Applicable, Objective Standards

1. Timeliness of Written Determination of Inconsistency with Applicable Standards

Petitioners contend that the Project is deemed to comply with applicable standards because City failed to make a timely written determination to the contrary. Petitioners contend that section § 65589.5(j)(2)(A), which was enacted with Senate Bill 167 ("SB 167") and went into effect on January 1, 2018 (Stats. 2017, ch. 368, § 1.5), should be construed to apply to the Project application, which was complete on September 1, 2017. (AR 363, 7602.) Petitioners raise an issue of retroactive application of the statute.

Section 65589.5(j)(2) provides in relevant part:

> (2)(A) If the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows:
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> ....[¶]
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> (ii) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units.
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> (B) If the local agency fails to provide the required documentation pursuant to subparagraph (A), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.

Assuming the Project will contain 180 residential units,[3] section 65589.5(j)(2) mandates notice of the inconsistency, noncompliance, or nonconformity from the local agency "within 60 days of the date that the application for the housing development project is determined to be complete." The parties agree that the Project application was deemed complete for purposes of the HAA by September 1, 2017. (OB 20:12; Opp. at 16:27-17:1; *see also Save Lafayette*, 85 Cal.App.5th at 850 and § 65943(b) [agency must determine completeness of application within 30 days of receipt].) Section 65589.5(j)(2) was not effective until January 1, 2018, after the 60-day window for giving notice. Thus, petitioners seek a retroactive application of the statute.

"'Generally, statutes operate prospectively only.' [Citations.] '[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' [Citations]....[¶] ... [A] statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' [Citations.] '[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.'" (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475.)

Petitioners have not identified any express language of retroactivity in the HAA or SB 167 relevant to section 65589.5(j)(2). Instead, petitioners argue that the 60-day deadline began running on January 1, 2018, because the imposition of the deadline did not interfere with vested rights, impose new liabilities, or substantially affect existing obligations and rights. (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 956, internal quotations omitted ["In general, a law has a retroactive effect when it functions to "change[ ] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct" that is, when it "substantially affect[s] existing rights and obligations[.]"].) The Court disagrees. Imposition of a 60-day deadline would have dramatically altered the time City had to prepare a statement

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[3] In the "Factual Background" section of the opening brief, petitioners noted that the Planning Commission recommended approval of the Project at a reduced density. (AR 1890 [180 units to 135 units].) Petitioners do not expressly dispute the Planning Commission's recommendation. However, in arguing that the City Council's determination that the Project was inconsistent with the General Plan was untimely, petitioners apply the 60-day timeframe for housing developments containing more than 150 units. Accordingly, the Court addresses petitioners' contention based on the assumption that the proposed Project has 180 residential units.

finding inconsistency with the General Plan, when such deadline was not effective at the time the application became complete. In other words, application of a 60-day deadline would have substantially altered the obligations of the City Council. Indeed, applying a 60-day deadline under section 65589.5(j)(2) does not make particular sense here, given that a 60-day period for the subject application had already lapsed by January 1, 2018.

Petitioners contend that "any question about whether SB 167 applies to pending applications must be resolved in favor of the interpretation that furthers housing approvals and provides certainty to stakeholders about which standards apply." (Reply at 8:22-24; *see CARLA*, 68 Cal.App.5th at 845, citing § 65589.5(a)(2)(L) ["[T]he Legislature has declared the HAA must be interpreted and implemented to 'afford the fullest possible weight' to the approval of housing [citation]"].) Section 65589(a)(2)(L) does not provide "a clear and unavoidable implication" that the Legislature intended the notice requirement of section 65589.5(j)(2) to operate retroactively to a Project application that was complete prior to January 1, 2018. While section 65589.5(a)(2)(L) suggests the Legislature intended for the HAA to be interpreted in a manner that promotes the approval of housing, that instruction concerns prospective enforcement of the statute. If the Legislature intended to make the notice provision under section 65589.5(j)(2) retroactive, it would have declared that the provision applies to applications that were deemed complete prior to January 1, 2018.

The notice and "deemed consistent" provisions of section 65589.5(j)(2)(A) and (B) do not apply to the Project. The Project is thus not deemed consistent with City's objective standards pursuant to that provision of the HAA.

2. Objectiveness of Development Standards Upon Which City Council Relied in Denying Approval of Project

Respondents contend that the Project does not comply with "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." (§ 65589.5(j)(2)(A).)

"Objective" means "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (§ 65589.5(h).) "[A] standard that cannot be applied without personal interpretation or subjective judgment is not 'objective' under the HAA." (*CARLA*, 68 Cal.App.5th at 840.) Whether a standard is objective is a question of law. (*Id.* at 839.)

In its resolution denying the Project ("Denial Resolution"), the City Council cited Calabasas Municipal Code ("CMC") § 17.16.030(A)(1), which was a codification

of Measures D and O. (AR 7605.) The statute requires two-thirds voter approval for any "amendment to the General Plan or any specific plan that would redesignate for non-open space use of any property in the city designated OS-R or OS-RP" in the 2008 General Plan. (AR 18680.) This statute does not support a denial of the Project because neither TNHC nor City proposed any amendment to the General Plan for the Project. Nor does any party suggest that the open space at the Project site be designated for non-open space uses. Accordingly, two-thirds voter approval was not required for the Project.

The Denial Resolution also cited CMC § 17.20.150 for the proposition that "all grading and project design conform to the City's grading ordinance and must adapt to the natural hillside topography and maximize view opportunities to and from a development." (AR 7607; *see also* AR 18683-84.) CMC § 17.20.150(B)(3) is not objective, however, because it requires personal interpretation to determine whether the grading and project design "adapts" to the natural hillside topography and "maximizes" view opportunities.

The Denial Resolution also cited CMC § 17.20.055(A)(6) and (A)(9). (AR 7606, 7608, 7610.) The City Council contended that CMC § 17.20.055(A)(9) "prohibits manufactured slopes as a final feature in open space areas." (AR 7610-12; *see* AR 18681 ["The open space set aside calculation should not include lawns, landscaping, manufactured slopes, or other artificially landscaped features but may include habitat restoration areas"].) The Denial Resolution purported to quote CMC § 17.20.055(A)(6), but it instead quotes CMC § 17.20.055(A)(5), which states: "Where an average slope for a project exceeds twenty (20) percent, dwelling units should be clustered together on the more level portions of a site and steeper areas should be preserved in a natural state."[4] (AR 7606, 18681.) The City Council contended that the Project "does not preserve the neighboring hillsides in a natural state; instead engaging in excessive grading." (AR 7606-07.) However, CMC § 17.20.055, including subdivisions (A)(5) and (A)(9), pertain to HM and RR zones, which are not contained in the Project site. (AR 7601 [section 2, paragraph 3 of Denial Resolution, listing PD, RM (2), and OS-DR zones], 7853 [PD, R-MF, and OS-RP zones].)

The Denial Resolution also cites various General Plan policies. (*See, e.g.,* AR 7605 [citing General Plan Policy III-2, which provides that City will limit "the permitted intensity of development within lands designated as open space to that which is consistent with the community's environmental values and that will avoid significant impacts to sensitive environmental features..."]; AR 7606 [citing General Plan Policy VII-14, which requires City to "[dliscourage development and encourage sensitive siting of structures within hazardous fire areas as higher priorities than attempting to implement fuel modification techniques that would adversely affect significant biological resources"].) However, the General Plan policies cite policy

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[4] CMC § 17.20.055(A)(6) states: "At least fifty (50) percent of the subdivision shall be preserved as permanent open space." (AR 18681.)

goals, as opposed to standards that leave no room for subjective judgment. (*See* OB at 22, fn. 13 [General Plan policies cited in Denial Resolution].)

Respondents contend that objective statutes in the Calabasas Municipal Code prohibit grading at the Project site. (*See, e.g.,* Opp. at 20:28-21:2 [CMC §§ 17.18.040, 17.20.070, 17.13.020, 17.20.050].) Respondents may not rely on statutes not cited in the Denial Resolution to support its denial. (*Southern California Edison Co. v. Public Utilities Com'n* (2000) 85 Cal.App.4th 1086, 1111, citing *Securities Comm'n v. Chenery Corp.* (1943) 318 U.S. 80, 94; *Motor Vehicle Mfrs. Assn. v. State Farm Mut.* (1983) 463 U.S. 29, 50 ["We may not affirm an agency's action on a basis not embraced by the agency itself"]; *Motor Vehicle Mfrs.,* 463 U.S. at 50 ["[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. [Citation.] It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself"].)

Even if the Court were to consider respondents' *post hoc* rationalizations, the Court would still find that they fail to justify the denial of the Project with any objective standard. Respondents cite CMC § 17.90.020, which defines "development" as "any grading or construction activity or alteration of the land, its terrain contour or vegetation, including the addition to, erection, expansion, or alteration of existing structures." (SAR 38100.) Respondents then cite CMC § 17.02.010(A), which states that no development shall occur, and no new land use shall be allowed, unless the use is listed under the zoning district at issue in Table 2-2, the Land Use Table. (SAR 37756; *see also* AR 37759 [CMC § 17.03.010(D) states, "If a proposed use of land is not specifically listed in Table 2-2 - Land Use Table of Chapter 17.11, the use is prohibited except as allowed by Section 17.11.020"].) In turn, Table 2-2 only lists temporary "Location Filming" as an authorized use of OS-DR land. (SAR 37777.) Respondents thus argue that grading is not one of the land uses that are exempt from Table 2-2 under CMC § 17.02.020. (SAR 37756-58.) Respondents contend that the uses authorized by Table 2-2 are objective standards.

As a preliminary matter, CMC § 17.02.020 lists exemptions from land use *permit* requirements, which are not at issue in the instant petition. Regardless, as petitioners persuasively explain, grading is not set forth in Table 2-2 for *any* zoning district. (SAR 37766-77.) If Table 2-2 listed the only permissible uses of land in City, this would mean that grading, including grading for remediation purposes, is not permitted citywide. Statutes must be interpreted to avoid absurd results. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1449.) The land uses set forth in Table 2-2 refer to the ultimate use of land, *e.g.*, agricultural, residential, commercial, etc., and not intermediary activities that allow the land to accommodate the ultimate use. (SAR 37764-65.) For the foregoing reasons, respondents' reliance on Table 2-2 is unavailing.

For the foregoing reasons, with respect to whether the Project complied with applicable, objective standards and criteria, respondents have not met their burden

to demonstrate that the denial conformed to the conditions set forth in Section 65589.5. (§ 65589.6.)

C. Specific, Adverse Impact on Public Health or Safety

Respondents contend that the denial of the Project was justified due to the increased risk the Project purportedly poses in the event of a wildfire.

When a proposed housing development project complies with applicable, objective standards, the local agency seeking to disapprove of the project must base its decision upon written findings supported by a preponderance of the evidence that: (1) the project would have a "specific, adverse impact upon the public health or safety" absent disapproval; and (2) there is "no feasible method to satisfactorily mitigate or avoid the adverse impact" other than disapproval of the project. (§ 65589.5(j)(1)(A-B).) A "specific, adverse impact" means a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (§ 65589.5(j)(1)(A).)

In denying the Project, the City Council asserted that the Project site is located along the Las Virgenes Canyon Corridor, an "area with a historically high proportion of fire ignitions." (AR 7616.) The City Council maintained that the addition of 495 new residents would adversely impact evacuation of the residents of the Project, as well as surrounding communities near the Project site. (AR 7616-17.)

Arguably, the addition of 495 new residents in an area prone to wildfires could quantifiably, directly, and unavoidably impact the evacuation of residents at the Project and surrounding areas during a wildfire. However, respondents fail to identify any objective, written public health or safety standards, policies, or conditions upon which any such purported impact is based.

The Denial Resolution stated that the area where the Project would be located has an approximately 5% chance of burning in any given year, meaning that the site is expected to burn once every 20 years. (AR 7616.) However, the pages of the administrative record to which respondents cite do not contain any support for this contention. (*See* AR 35636, 35787 [statement that 20 years of growth would be required before there could be a fire like Woolsey Fire].)

The Denial Resolution also references the 30,000 vehicles per day that Las Virgenes Road carries. (AR 7616.) Respondents cite a Draft Traffic and Circulation Study that states that the US-101 southbound ramps at Las Virgenes Road operate at "LOS E" during afternoon peak hour, which exceed City's LOS D standard for interchanges. (AR 108.) Notably, the report is only a draft and still under review. (AR 112 [comment that the "numbers do not seem to add up"].) In contrast, the final EIR shows that the same interchange operates at an acceptable LOS D. (AR 13912.)

The final EIR concluded that the Project would have a "less than significant" impact on congestion at intersections with mitigation. (AR 13925-40.)

The Denial Resolution also states that the Project is within a Very High Fire Hazard Severity Zone ("VHFHSZ"). (AR 7616.) Respondents reference a map from the Santa Monica Mountains Community Wildfire Protection Plan which shows the area where the Project site is located to have a relatively high ignition probability. (AR 7402.) However, these conditions are not unique to the Project; rather, they undisputedly apply to the entire area. (*See* AR 7606 [Las Virgenes Road Corridor is within VHFHSZ]; AR 7402 [other areas of City also have high ignition probability].) In enacting the HAA, the Legislature stated that it was its intent that "the conditions that would have a specific, adverse impact upon the public health and safety, as described in...paragraph (1) of subdivision (j), arise infrequently." (§ 65589.5(a)(3).) It cannot be said that a condition in existence beyond the Project site is infrequent. The HAA must "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (*Id.* § 65589.5(a)(2)(L).) The Court cannot interpret section 65589.5(j)(1)(A) in such a manner that would result in restricting housing from being built throughout the entire City.

Respondents also fail to show that a preponderance of the evidence supports its finding of the adverse impact that the Project would have on public health and safety. Respondents contest the assertion in the EIR that an additional northbound lane on Las Virgenes Road and additional sidewalk connections "would improve vehicle and pedestrian circulation" during an evacuation (AR 13570, 14590-91) by arguing that the additional lane is only a quarter mile in length (AR 35797:25-35798:10). Respondents also point out that the City's transportation consultant stated during the City Council meeting that he only considered the evacuation of the residents at the project, not the surrounding communities on Las Virgenes Road. (AR 35799:5-19.)

Respondents also attempt to rebut the EIR's contention that Project residents and employees would be able to quickly access the US-101 highway by referencing City residents' comments that escape routes were closed off or gridlocked during the Woolsey Fire. (AR 35558:20-25; SAR39852-3; AR 35306:7-9.) Respondents further reference councilmembers' skepticism that the additional northbound lane would be effective during an evacuation. (AR 35379:2-7.) However, "mere argument, speculation, and unsubstantiated opinion...is not substantial evidence for a fair argument." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.) Residents' accounts during past fires are not sufficient to overcome the experts' conclusion that the additional lane would benefit emergency access and the evacuation capacity of Las Virgenes Road. (AR 1873. 1875, 3069, 3083, 5815, 13570; SAR 37701-07; *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 894 ["Although they present their numbers as scientific fact, we find appellants' calculations are essentially opinions rendered by nonexperts, which do not amount to

substantial evidence"].) Indeed, the expert conclusion regarding the ease of evacuation of Project residents and employees was reached upon consideration of the Woolsey Fire. (AR 13569-71.) Given the EIR's conclusion that "project-related traffic would incrementally increase congestion on Las Virgenes Road," respondents fail to demonstrate that the impact on evacuation from the Project would be significant. (AR 13570.)

Because respondents fail to adequately dispute the experts' opinion regarding the benefit that the additional northbound lane would have during an evacuation, respondents fail to show that there is no feasible method to satisfactorily mitigate or avoid the increased congestion during a wildfire that would result from the Project.

For the foregoing reasons, respondents fail to meet their burden that the denial of the Project conformed with section 65589.5.

D. California Environmental Quality Act

The Denial Resolution stated that the level of grading to be done for the Project is "excessive and that the proposed economic, social, and other benefits of the project do not outweigh the harm caused by the project's significant, unavoidable environmental impact on the site's visual character." (AR 7604.) As a result, the City Council purportedly could not make the findings set forth in Public Resources Code § 21081 to approve the Project. (*See* Pub. Res. Code § 21081(b) [public agency must find that specific economic, legal, social, technological, or other benefit outweighs significant effect on environment].)

However, respondents cannot use their discretion in determining whether a benefit outweighs a significant effect on the environment to shield themselves from the obligations of the HAA. "CEQA applies only to 'discretionary projects proposed to be carried out or approved by public agencies....'" (*McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 89, quoting Pub. Res. Code § 21080.) "The exercise of discretionary powers for environmental protection shall be consistent with express or implied limitations provided by other laws." (14 C.C.R. § 15040(e).)

In *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, the Court of Appeal found that a city council did not abuse its discretion in rejecting a decreased density alternative for a housing development because the city found that no specific, adverse impact to public health or safety would result from the higher density alternative. (*Sequoyah Hills,* 23 Cal.App.4th at 715, citing § 65589.5(j)(1).) Accordingly, the HAA required the city council to approve the higher density alternative. (*Id.* at 716; *see also Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 732 ["CEQA ... recognizes that an agency's discretion is limited by its own legal obligations. Accordingly, where a legal

obligation limits an agency's discretion, the scope of environmental review likewise is limited"].)

Here, because respondents fail to show that the Project does not comply with applicable, objective standards, that the Project would have a specific, adverse impact upon public health or safety, or that there is no feasible method to mitigate or avoid the adverse impact, the HAA requires that respondents set aside the decision to deny the Project.

E. Whether Respondents Acted in Bad Faith

In an action to enforce the HAA, if the Court finds that the "the local agency, in violation of subdivision (j), disapproved a housing development project complying with applicable, objective general plan and zoning standards and criteria...without making the findings required by [the HAA] or without making findings supported by a preponderance of the evidence," 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...the housing development...in violation of" the HAA. (§ 65589.5(k)(1)(A)(i), (ii).) "[B]ad faith includes, but is not limited to, an action that is frivolous or otherwise entirely without merit." (§ 65589.5(l).)

For the following reasons, the Court finds that the City's acted in bad faith when it denied approval of the Project:

The Denial Resolution cited inapplicable municipal code sections and subjective General Plan policies. (*See* Section V.B.2.) A councilmember acknowledged that the Project "appears to be within the General Plan guidelines" (AR 35821 [Councilmember Shapiro begins speaking], 35824), only to later vote against the Project (AR 7623 [Councilmember Shapiro voted to approve Denial Resolution]).

In the Denial Resolution, the City Council asserted that the remedial grading and drainage required by the Project violated CMC § 17.16.030(A)(1), which was a codification of Measures D and O. (AR 7605.) The City Council found that "permanent, remedial grading for a residential and commercial project" and "installation of permanent, concrete, drainage ditches and related drainage infrastructure" "constitutes conversion of General Plan designated open space land for non-open space uses." (AR 7605.) However, as stated above, CMC § 17.16.030(A)(1) required two-thirds voter approval for amendments to the General Plan or redesignation from open space to non-open space use. None of these situations applied. (*See* Section V.B.2.) Moreover, the staff and Planning Commission found that grading was a necessary mitigation method according to three geotechnical experts, but the City Council did not attempt to reconcile their objection to the grading with the staff's recommendation. (AR 1909.)

As stated above, the Court having found that respondents had not met their burden to demonstrate that the Project did not comply with applicable, objective standards and criteria, respondents then had the burden to demonstrate a "quantifiable" impact or "written" public health or safety standard. (*See* Section V.C.) However, respondents did not identify any objective, written public health or safety standards, policies, or conditions upon which any impact is based, as the HAA requires. (§ 65589.5(j)(1)(A).)

Moreover, respondents failed to adequately show that there was no feasible method to satisfactorily mitigate any increased traffic congestion from the Project, as required by section 65589.5(j)(1)(B). Although the City's EIR found that the additional lane and sidewalk connections would "benefit emergency access and the function of the evacuation route" (AR 13570) and the staff concluded that the Project "would not exacerbate the potential for wildfire or significantly affect emergency evacuation in the event of a wildfire" (AR 6732), the City Council relied on speculation to dispute the findings. (*See* Section V.C.)

The City's CEQA consultant concluded that "there [was] not substantial evidence suggesting that the project would exacerbate the potential for or severity of wildfires." (SAR 39797.) However, the City withheld the conclusion from the materials presented to the City Council. (*Compare* SAR 39797 *with* AR 6730-33.)

In reviewing a draft of the Denial Resolution, Mayor Bozajian stated that he wanted "the part that says notwithstanding the staff's recommendation otherwise to be taken out." (AR 35906.) Because the City Council's decision was already made, the staff's recommendation was "irrelevant," according to Mayor Bozajian. (AR 35906.) However, the staff's recommendation to approve the Project was directly relevant to whether there was substantial evidence that would allow a reasonable person to find that the Project complied with pertinent standards. (§ 655589.5, subd. (f)(4).)

Further, City staff and the Department of Housing and Community Development ("HCD") advised the City Council on the requirements of the HAA. (AR 3391-92, 3850-56.) Mayor Bozajian "discount[ed] and discredit[ed]" HCD and determined that the agency had "absolutely no credibility and validity" in the City. (AR 35827.) HCD is the state agency with "primary responsibility for development and implementation of housing policy." (Health & Saf. Code § 50152.)

Based on the foregoing, the Court finds that respondents acted in bad faith when they disapproved the Project. The disapproval was entirely without merit. (*See* § 65589.5(l).) Considering Mayor Bozajian's expressed disdain for the recommendations of staff or the HCD, the City Council's citation to inapplicable municipal code sections and subjective General Plan policies, and the City Council's reliance on speculation in dismissing the staff's recommendations, respondents' actions do not inspire confidence that they would attempt to comply with the HAA in good faith on remand.

Having found that respondents acted in bad faith, the Court will issue a judgment directing respondents to approve the Project.

F. Housing Element Law

With respect to TNHC's second cause of action, Government Code § 65863(b) prohibits City from reducing the housing needed to meet its current share of the regional housing need unless it makes written findings supported by substantial evidence that the reduction is consistent with the adopted general plan and the remaining sites identified in its housing element are adequate to meet regional housing need. (*See* § 65583 ["The housing element shall identify adequate sites for housing...and shall make adequate provision for the existing and projected needs of all economic segments of the community"].)

TNHC demonstrates how the remaining sites identified in the housing element are not adequate to meet regional housing needs. TNHC persuasively argues that there is no reason to believe that the City Council will allow development at other sites when such housing may also add traffic to the US-101 highway, which the City Council believes is inadequate to accommodate evacuations. (AR 7618, 18614 [housing element sites near U.S. 101 highway].)

However, TNHC fails to demonstrate how City failed to comply with its General Plan. While TNHC argues how the standards upon which the City Council relies in denying the Project are not objective (OB at 21:19-24:5), TNHC does not demonstrate how denial of the Project is not consistent with the General Plan. An argument unsupported by substantive argument is waived. (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 418-19 [finding appellant did not adequately discuss Government Code § 65863 issue in trial court].)

Accordingly, TNHC does not demonstrate how it is entitled to relief under the Housing Element Law.

G. Density Bonus Law

With respect to TNHC's third cause of action, TNHC maintains that it is entitled to incentives and waivers for which it applied under the Density Bonus Law. (§ 65915; AR 3392, 7653.) City can deny the incentives and waivers under limited exceptions, including, as pertinent here, based on a written finding supported by substantial evidence that the incentive or waiver would have a specific, adverse impact as defined in the HAA that cannot feasibly be mitigated. (§ 65915(d)(1)(B); *see also Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 770.)

City bears the burden of proof when a requested incentive or waiver is denied. (§ 65915(d)(4).) For the reasons set forth above with respect to the HAA, City fails to

meet its burden to justify the denial of TNHC's requested incentives and waivers. TNHC is entitled to writ relief with respect to its requested incentives and waivers.

In the tentative ruling issued on August 31, 2023, the Court requested clarification on what incentives and waivers TNHC requested. In TNHC's petition, TNHC seeks the following incentives and waivers: "(a) that the Project's building height limits may exceed the otherwise applicable 35-foot height maximum; (b) the Project's retaining wall heights may exceed otherwise applicable limits; and (c) the Project's parking density may exceed otherwise applicable limits." (Pet. ¶ 77.) However, in the final Planning Commission Staff Report, staff reported the concessions as "1) building heights exceeding the 35-foot maximum allowable limit; 2) retaining wall heights exceeding the maximum allowable limit; and 3) a statutory reduced parking allowance." (AR 3392.) The Court requested clarification regarding whether TNHC seeks a reduced or increased parking allowance.

During oral argument, TNHC clarified that it seeks a reduced parking allowance. Accordingly, the Court will issue a judgment finding that THNC is entitled to a reduced parking allowance.

H. Declaratory Judgment

Petitioners request a declaratory judgment indicating that "the City disapproved the Project unlawfully and in bad faith, that the Project is entitled to approval under the HAA, and that the City may not take any further unlawful action to preclude the Project." (OB at 30:22-31:2.)

Pursuant to the local rules, which designate that Department 82 is a specialized Writs and Receivers department and not a general civil department, only a cause of action for writ of mandate is properly assigned to this department. (LASC Local Rules 2.8(d) and 2.9.) Local Rules 2.8(d) and 2.9 do not include a claim for declaratory relief as a special proceeding assigned to the writs departments.

On November 4, 2021, the Court reaffirmed that the non-writ causes of action are stayed pending resolution of the writ causes of action. In the tentative ruling issued on August 31, 2023, the Court requested the parties to address whether the Court's ruling on the writ causes of action would fully resolve the cause of action for declaratory relief. TNHC noted that it asserted an inverse condemnation cause of action. (THNC Petition ¶¶ 80-85.) Accordingly, upon resolution of the causes of action for writ relief, the Court will transfer the consolidated petitions to Department 1 for reassignment to an independent calendar department for resolution of the remaining causes of action.

VI. Conclusion

The petitions are GRANTED. The Court hereby schedules a Status Conference for January 25, 2024, at 1:30 p.m., in Department 82 (Stanley Mosk

Courthouse), for the parties to discuss what, if anything, remains in dispute and must be resolved in these consolidated actions, in light of the Court's rulings herein. In advance of the hearing, the parties shall meet and confer and file with the Court a Joint Status Report by no later than January 19, 2024.

Date: November 27, 2023

HON. CURTIS A. KIN