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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

SONJA TRAUSS; SAN FRANCISCO BAY AREA RENTERS FEDERATION,

Petitioners,

vs.

CITY OF LAFAYETTE, and DOES 1-25

Respondents.

O'BRIEN LAND COMPANY, LLC; ANNA MARIA DETTMER, AS TRUSTEE OF THE AMD FAMILY TRUST,

Real Parties in Interest.

Case No.: N15-2077

PETITIONERS' OPPOSITION TO DEMURRER TO SECOND AMENDED PETITION

Date: July 20, 2016
Time: 9:00 a.m.
Dept.: 9
Judge: Hon. Judith Craddick

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INTRODUCTION

"(1) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.

(2) California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.

(3) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.

(4) Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for housing projects."

(Government Code § 65589.5(a))

In 1982, California recognized that it had a problem. Its population was growing but municipalities were failing to build enough housing -- especially at the low- and moderate-income levels. As the Legislature determined, vocal groups of "NIMBY"[1] residents were pressuring city councils and county supervisors to deny building applications. (Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066, 1068-1069) NIMBYs sought to prevent change by excluding new residents from their communities. The Legislature reacted by enacting Government Code § 65589.5, the Housing Accountability Act ("HAA", also known as the Anti-NIMBY Law). As Honchariw states at 1068-1069:

> The purpose of the statute is to limit the ability of local governments to "reject or make infeasible housing developments ... without a thorough analysis of the economic, social, and environmental effects of the action...."

This case asks fundamental questions about our democracy: Are property rights extinct

[1] "Not In My Back Yard." (Schellinger Bros. v. City of Sebastopol (2009) 179 Cal.App.4th 1245, 1253, fn.9)

in the San Francisco Bay Area? If California law guarantees housing developers a whole loaf, can municipalities force them to accept 15% of that loaf on threat of costly litigation? Can municipalities and developers structure that 15% loaf deal with a wink and a nod to avoid the locally-undesired, but necessary housing developments and evade the HAA? Petitioners have two goals in this case: 1) to stop Lafayette from illegally crushing an affordable apartment housing project into a smaller luxury single-family home project, and 2) to discourage other municipalities from crushing future affordable housing projects by eliminating this playbook.

This Court will either condemn or condone Lafayette's end-run around the Housing Accountability Act. If the HAA is to meaningfully protect property rights and promote the creation of affordable housing, the Court must find that Lafayette's playbook violates it.

STATEMENT OF FACTS

The following facts are drawn from the second amended petition ("SAP")[2]. On March 21, 2011, Real Parties/developer submitted an application to the City of Lafayette ("City") for the Terraces of Lafayette Apartment Project ("Apartment Project"). O'Brien Land Company proposed to build 14 apartment buildings comprising 315 units on a 22-acre parcel located at 3312 & 3233 Deer Hill Road. This proposed Apartment Project, being both a moderate-income housing project and a market-rate housing project, complied with all applicable, objective general plan and zoning standards that existed on the date the application was deemed complete. However, a group of vocal NIMBYs was openly hostile to the development, which resulted in administrative and political resistance.

On December 9, 2013, Lafayette City Manager Steven Falk presented an alternative to the Apartment Project: 44 single family homes (the "Project Alternative") -- an 85% reduction in density. He stated:

> Mayor Anderson and members of the city council, the matter before you now concerns an alternative to the Terraces of Lafayette Project Application for 315 apartment units, located along Deer Hill Road and Pleasant Hill Road in Lafayette. Given

[2] While proceeding in *pro per*, Petitioners filed a First Amended Petition to correct names on the caption page (which should have been done by amendment to the original petition. Essentially, the SAP is a first amended petition.

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> the public's dissatisfaction with the application . . . given that the Circulation Commission and Design Review Commission have both indicated that they cannot support the project, and have requested a significantly scaled down alternative, given that the developer has indicated that if the project is denied, it will file a lawsuit against the city, and . . . **given the risks to the city presented by that potential lawsuit, and particularly those associated with California's Housing Accountability Act, which limits the ability of cities to deny an affordable housing development proposal**, unless that proposal is inconsistent with both the general plan land use designation and zoning ordinance that existed at the time the application was deemed complete . . . about four weeks ago, the city council directed staff to participate in conversations with the developer to determine if there was an alternative plan that would be acceptable to all parties, the developer, community members, and the city. (Emphasis added.)

At this point, the Real Parties were faced with the following options: (1) Proceed with the Apartment Project knowing it would be turned down, and then pursue time-consuming and costly litigation in order to secure the approvals to which the Real Parties are entitled under state law; (2) abandon the Apartment Project altogether, withdrawing the application; or (3) accede to the City's lower density Project Alternative, avoiding time-consuming and costly litigation, and cooperate with the City to receive approvals. Real Parties chose the third option and entered into the infamous Process Agreement which Petitioners contend was a subterfuge to avoid high-density development and evade the mandate of the HAA, Government Code § 65589.5. The City neither approved the proposed zoning-compliant 315-apartment unit Original Project, nor approved it with other conditions unrelated to density. Instead, on August 10, 2015, as the most critical part of the Process Agreement, Lafayette amended its general plan to downzone the Deer Hill Road site so that the Apartment Project could never be approved and the HAA ostensibly avoided. On September 14, 2015, the City adopted Resolution 641 and authorized a significantly less dense version of the Project without making the necessary findings. The Real Parties did not receive unconditional approvals of their zoning-compliant Apartment Project. They received approvals for a lower-density project. The City's approval of the reduced density project constitutes a *de facto* unlawful approval of the Apartment Project with density-related conditions. During the process, Petitioners emailed and spoke their concerns at several city

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council meetings. As well, they sued Lafayette for violating the HAA.

The crux of this petition is whether municipalities can avoid high-density housing construction and evade the HAA by the type of subterfuge engaged in here by Lafayette and Real Parties. As this opposition demonstrates, the answer is "no". Unless it made the required findings, Lafayette could not strong-arm a developer into an 85% density reduction by offering it 15% of a loaf (versus none at all) and then legislatively making the original project impossible to approve. If Lafayette could lawfully do that, the HAA would be a dead letter.

STANDARD OF REVIEW

"In ruling on the sufficiency of a complaint to withstand a demurrer, i.e., to state a cause of action, the court assumes the truth of all well-pleaded allegations." (Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal.4th 952, 987) "We liberally construe the pleading with a view to substantial justice between the parties." (Gilkyson v. Disney Enterprises, Inc. (2016) 244 Cal.App.4th 1336, 1340)

ARGUMENT

I. Petitioners' First Cause of Action States a Claim for Relief Under the Housing Accountability Act

C. The HAA Applies To This Case

The HAA compels approval of code-compliant housing development projects, including, but not limited to, affordable housing projects. (Honchariw, supra, 200 Cal. App. 4th at 1077) The HAA requires, *inter alia*:

> When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:
>
> (1) 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

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> 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.
>
> (2) 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.
>
> (Gov't Code § 65589.5(j))

In this case, the Apartment Project is a qualified "housing development project" under the HAA. (SAP, p. 3, ¶ 3.) The City violated the HAA when it "disapprove[d] the project or [] approve[d] it upon the condition that the project be developed at a lower density" without even attempting to make the required findings. (Gov't Code § 65589.5(j))

Real Parties and the City argue that there was no violation of the HAA because the Apartment Project was neither approved nor denied. (MPA at 4) Indeed, most of their demurrer depends on this premise. By their argument, the Apartment Project magically ceased to exist when the Project Alternative was approved. Setting magic acts aside, there are two ways to view this case: 1) the Project Alternative is a lower-density version of the Apartment Project, and the City violated the HAA by approving the lower-density alternative without making the required findings, or 2) the Apartment Project and the Project Alternative are two distinct projects proposed for the same site, and the City's approval of the Project Alternative constitutes a denial of the Apartment Project without making the HAA's required findings.

If the Project Alternative is a lower-density version of the Apartment Project, then the City "propose[d] to . . . approve it upon the condition that the project be developed at a lower density"[3] when the City entered into a Process Agreement requiring it to consider the Project Alternative in place of the Apartment Project -- for a housing development at the same site and by the same Real Parties. Apart from the new 'voluntary' exactions the City squeezed from Real

[3] Cal. Gov't Code § 65589.5(j)

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Parties[4], the only significant difference between the two proposals is the density (and resulting affordability) of the housing units. Essentially, the City said, "Instead of 315 units, we want you to build 44 or 45 units and give us a public park" and Real Parties replied, "Fine, but if you don't let us build 44 or 45 units, we'll sue you under the HAA." Does it matter that Real Parties submitted a fresh application for the Project Alternative rather than changing the number "315" to "44" on the Apartment Project application? No, for that would "elevate form over substance." (United Sav. Bank v. Rose (D.D.C. 1990) 752 F. Supp. 506, 508) "[T]he substance must win out over the form." (Gray v. C. I. R. (9th Cir. 1977) 561 F.2d 753, 759) What occurred in this case is precisely the type of "condition[ing] that the project be developed at a lower density" that the Legislature sought to prevent. (Gov't Code § 65589.5(j)(1)) It is inconceivable that the Legislature intended the HAA to be easily controverted by filing an additional sheet of paper.

Real Parties argue that the Court should view the Apartment Project and the Project Alternative as two distinct projects. Even if that were true, the HAA was still violated. Two projects cannot be approved for the same site; approval of the Project Alternative therefore constitutes disapproval of the Apartment Project. Moreover, as Real Parties concede, "with a final GPA for single family homes (and prohibiting apartments) already in place, the City could not in any event have approved the [Apartment] Project. . . ." (MPA at 9-10.) In other words, the City (with Real Parties' consent) tied its own hands and made it impossible to approve the Apartment Project. They cannot now claim that the Apartment Project was never disapproved when in fact they rendered it unapprovable. The approval of the Project Alternative, the rezoning, and the General Plan Amendment constitute disapproval of the Apartment Project in violation of the HAA.[5] Otherwise, even if the Apartment Project were never formally

---

[4] See Process Agreement at p.3, § 3.3 *et seq.*

[5] Contrary to Real Parties' claim, the HAA explicitly provides that a development project is disapproved when an agency "Votes on ***a*** proposed housing development project application and ***the*** application is disapproved." (Cal. Gov't Code § 65589.5, emphasis added) As supported by the statute's plain language, "the" subject project application can be disapproved by voting on "a" project application—not necessarily "the" same, subject application. Moreover, while Real Parties might assert tolling of the time limits in section 65950, such tolling cannot apply to override the HAA.

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disapproved, the City still "[d]isapprove[d] the development project" in violation of the HAA by "[f]ail[ing] to comply with the time periods specified in subdivision (a) of Section 65950." (Gov't Code § 65589.5(h)(5)(B), citing the Permit Streamlining Act)

D. The HAA Violation Cannot Be Papered Over

4. The Process Agreement's Recitals Do Not Change Reality

Despite the plain facts, Real Parties maintain that their clever two-step disapproval/density-reduction did not violate the HAA because they submitted a second application for the Project Alternative. What evidence do they cite for this position? Oddly, they cite recitals in their own Process Agreement -- a subterfuge between Real Parties and the City -- as evidence. (MPA at 4) Their recitals cannot change reality and the SAP's mentioning of the Process Agreement does not make that Agreement's recitals true. In fact, the Process Agreement explicitly preserves Real Parties' causes of action under the HAA. (Process Agreement, p. 2, ¶ 2) Although the Process Agreement purports to "suspend" consideration of the Apartment Project "pending City's processing of the Project Alternative" (id. at 4, ¶ 4), the Process Agreement could not cure any HAA violation. Nor could approval of the Project Alternative cure any HAA violation (even if the Real Parties are happy enough with their 15%-loaf). Real Parties cannot waive, cure, or consent to HAA violations because the HAA does not exist merely for Real Parties' benefit; the HAA is a remedial statute for the *public's* benefit. [6] (See California Bldg. Industry Assn. v. City of San Jose (2015) 61 Cal.4th 435, 445-446)

5. Real Parties' Authorities Do Not Support Their Definition Of "Project"

Real Parties state, "Under all authorities the Apartment Project and Single-Family Project are separate projects." (MPA at 4, capitalization altered) However, Real Parties only cite one authority for this proposition: Gov't Code section 65931. (Id.) Section 65931 -- which is not part of the HAA -- defines "project" as "any activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Id.) On

[6] This is different from a case in which a developer gets cold feet and voluntarily withdraws a project application. Here, as alleged in the Second Amended Petition, the City forced Real Parties to accept a lower-density Project Alternative. Moreover, the City approved that lower-density Project Alternative without making the required findings.

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its face, sec. 65931 confirms that a project can (and often does) include more than one application. The fact that multiple applications were submitted in this case does *not* mean the Project Alternative is anything other than a reduced-density version of the Apartment Project.

More importantly, Real Parties ignore the fact that the Project Alternative relies on a Supplemental Environmental Impact Report rather than a new Environmental Impact Report. (SAP ¶ 36) As stated in Public Resources Code § 21166,

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> (a) Substantial changes are proposed in **the** project which will require major revisions of the environmental impact report.
> (b) Substantial changes occur with respect to the circumstances under which **the** project is being undertaken which will require major revisions in the environmental impact report.
>
> (Pub. Res. Code § 21166, emphasis added)

In other words, a Supplemental Environmental Impact Report can only be used when a project is changed—not when a new project is proposed.

6. The City's Approval Of The Project Alternative, General Plan Amendment, And Rezoning Constitute A Disapproval Of The Apartment Project

As Real Parties concede, the City's approval of the GPA and rezoning meant that the Apartment Project was no longer approvable. (MPA at 9-10) The same is true for approval of the Project Alternative, which physically takes the place of the Apartment Project. To the extent these approvals were the tools used to disapprove or condition the Apartment Project -- in violation of the HAA -- those approvals are invalid as a matter of law. Likewise, the fact that the City voluntarily tied its own hands -- in an attempt to thwart the HAA -- does not relieve it of responsibility to comply with the HAA. The City either disapproved the Apartment Project, or it conditioned the Apartment Project on a reduced density and called it the Project Alternative. Either way, its failure to make the required findings is a violation of the HAA.

II. The SAP Does State A Cause Of Action For HAA Enforcement

Under this heading, Real Parties make two arguments: 1) Petitioners lack standing to sue

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(MPA at 10-11); and 2) the HAA does not apply when the developer consents to a different project (MPA at 11-12).

A. Petitioners Have Standing

Real Parties argue that Petitioners do not have standing to sue because "the Apartment Project was never disapproved/conditionally approved. . . ." (MPA at 11:11-12) However, "In practical terms, nearly anyone can sue once a project has been approved. (Government Code § 66030(a)(1)) "Standing is a function not just of a party's stake in a case, but the degree of vigor or intensity with which [it] presents its arguments." (City of Santa Monica v. Stewart (2005) 126 Cal.App.4th 43, 59, citing Harman v. City and County of San Francisco (1972) 7 Cal.3d 150, 159) There is no question that petitioner Trauss has both a stake in the case and an exceptionally high degree of vigor or intensity with which she presents her arguments. Real Parties do not contend that if the Apartment Project were disapproved/conditionally approved that Petitioners would not have standing. For purposes of demurrer, the Court must accept the truth of the allegation that petitioner Trauss would be "eligible to apply for residency in" the Apartment Project. (SAP at ¶ 14) If this Court were to determine that what the Respondent and Real Parties did was a contrivance to avoid a large, middle-income development and evade the HAA, then the Apartment Project will be deemed to have been disapproved/conditionally approved. This means that somebody will have had standing and that somebody is petitioner Trauss. Real Parties' argument, that no one has standing because the Apartment Project was transmogrified via the Process Agreement, is contrived.

Additionally, petitioner SFBARF has representational standing as the representative body of numerous persons who, themselves, are "eligible to apply for residency in" the Apartment Project. (SAP at ¶ 15) " '[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. [Citations.]' " (Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc. (2005) 132 Cal.App.4th 666, 672-673, quoting Hunt v. Washington State Apple Advertising Comm'n (1977) 432 U.S.

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333, 343) On demurrer, this Court must accept the truth of the allegations that at least some of SFBARF's members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to its purpose, and determination of the questions presented in this petition do not require individual members to participate. (SAP at ¶ 15)

B. The City And Real Parties Cannot Insulate Their Conduct From Review On The Merits

"It is a fundamental principle of law that, in determining rights and obligations, substance prevails over form." (Buchwald v. Superior Court In and For City and County of San Francisco (1967) 254 Cal.App.2d 347, 355) "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal.3d 341, 349) Courts will not place form above substance if doing so defeats the objective of a statute. (Plumbing, etc., Employers Council v. Quillin (1976) 64 Cal.App.3d 215, 220) In the context of usury, courts "will always admit evidence to show that a contract fair on its face is nevertheless a disguise for a usurious transaction. . . ." (Lindsey v. Campbell (1955) 132 Cal.App.2d 746, 749; see also Boerner v. Colwell Co. (1978) 21 Cal.3d 37, 58) Court have refused to countenance municipal attempts to evade the Brown Act: "To turn a blind eye to such a subterfuge would allow City (and, potentially, other elected legislative bodies in the future) to circumvent the requirements of the Brown Act, a statutory scheme designed to protect the public's interest in open government. This we will not do." (Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist. (2001) 87 Cal.App.4th 862, 872)

The overall theme of the petition is that Lafayette contrived to "entice" (a.k.a. strong-arm) Real Parties into accepting a greatly-reduced version of its original plan or accept no development at all. Real Parties do not deny the substance of Petitioners' claims that the City's, and Real Parties', actions were a contrivance to avoid a locally-disfavored, but regionally-important, high-density, moderate-income housing development, evade the Housing Accountability Act, and buy off the developer to prevent it from suing under the HAA. At paragraph 55 of its SAP, Petitioners quoted County of Santa Barbara v. City of Santa Barbara (1976) 59 Cal.App.3d 364, 376, stating: "The city may not do indirectly what it cannot do directly." There, the Court of Appeal also stated, just before the prior quote: "We agree with the

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county's claim that the so-called charges are really assessments under a different name." (Id.) Singling out a property for discriminatory downzoning constitutes arbitrary and capricious government action. (See Avenida San Juan Partnership v. City of San Clemente (2011) 201 Cal.App.4th 1256, 1271-1272) When this Court examines the merits of the dispute, it too will conclude that Lafayette's Process Amendment and all of the land use steps it took to reach Ordinance #641, beginning with improperly re-writing the general plan to specifically bar the Apartment Project, constitute a denial under a different name. Additionally, Real Parties misinterpret Government Code § 65589.5(k). (MPA at 11-12) The "consent" provision that it refers to only comes into play *after* judgment ordering approval: "The court shall retain jurisdiction to ensure that its order of *judgment* is carried out. . . ." (MPA at 11:26-27, emph. added) This clearly does not allow the government to strong-arm the developer into avoiding larger developments and evading the HAA prior to judgment, let alone prior to suit ab initio.

III. Petitioners' First Cause Of Action Is Not Time-Barred

Real Parties rely on Gov't Code § 65009(c). (MPA at 12-13) Petitioners acknowledge that "[g]enerally, under section 65009, actions to challenge governmental planning and zoning decisions are governed by a 90-day limitations period." (Haro v. City of Solana Beach (2011) 195 Cal.App.4th 542, 551) However, "[s]ection 65009(d) creates an exception to this 90-day rule. . . ." (Id. at 551) This section was added "to modify the court's opinion in Urban Habitat Program v. City of Pleasanton (2008) 164 Cal.App.4th 1561, with respect to the interpretation of Section 65009 of the Government Code." (Petitioners' Request for Judicial Notice, Exh. 1, 2013 legislative history of AB 325) As is the SAP's theme, Petitioners are seeking to reinstate the development of housing that would increase Lafayette's supply of moderate and middle income housing which satisfies Government Code § 65009(d)(1)(A), (B).

Next, Government Code § 65863.6 falls under Government Code, Title 7, Division 1, Chapter 4, Article 2 and is entitled "Limitation on construction of housing units; consideration; findings". It states, in relevant part:

> In carrying out the provisions of this chapter, each county and city shall consider the effect of ordinances adopted pursuant to this chapter on the housing needs of the region in which the local jurisdiction is situated and balance these needs against the public

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> service needs of its residents and available fiscal and environmental resources.

The SAP alleges that Lafayette acted parochially in order to preserve its existing demographics and topographics in violation of Government Code § 65863.6. (SAP at ¶¶ 4-5, 49-50) It did not consider the effect Ordinance 641 would have on the housing needs of the Bay Area nor did it do any balancing whatsoever. (SAP at ¶¶ 6, 31-34, 38) Lafayette simply caved in to pressure.

Second, in regulating the subdivision created by the Process Agreement, Lafayette did not consider the effect of the zoning amendment, the general plan amendment, and the approval of the reduced project on housing needs of the Bay Area in violation of Government Code § 65913, § 65913.1, and § 65913.2. (SAP ¶¶ 6, 31-34, 38)

Since Petitioners' challenge satisfies §§ 65009(d)(1)(A) and (B), we move next to Government Code § 65009(d)(2), specifically subsection (C), which states:

> An action or proceeding challenging an action taken pursuant to Section 65863.6, or Chapter 4.2 (commencing with Section 65913) . . . shall be served within 180 days after the accrual of the cause of action as provided in this subdivision.

What is provided in this subdivision is § (d)(3):

> [(d)](3)(A) A cause of action brought pursuant to this subdivision shall not be maintained until 60 days have expired following notice to the city or clerk of the board of supervisors by the party bringing the cause of action, or his or her representative, specifying the deficiencies of the general plan, specific plan, zoning ordinance, or other action described in subparagraph (B) of paragraph (1).
>
> [(d)(3)](B) This notice may be filed at any time within . . . 180 days after an action described in subparagraph (C) of [¶] (2).

Essentially, what this means is the following:

1. Lafayette passes legislation that triggers § 65009(d)(1)(B)/(d)(2)(C);
2. Petitioners have 180 days from passage to serve a deficiency notice;
3. After 60 days from the notice or upon Lafayette taking final action in response to the notice, Petitioners have 180 days to file and serve their petition.

What happened here, regarding notice, is:

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1. On August 6, 2015, Sonja Trauss, on her behalf and SFBARF's, emailed Mayor Anderson and the members of the City Council, and explained their position on the project and specifically discussed the HAA. (AR 5550-5551) These emails were included in "[t]he meeting packets for the Saturday and Monday meetings of the Lafayette City Council." (AR 5546-5551);

2. Rafael Solari of SFBARF spoke at the August 8, 2015, City Council meeting and reiterated the August 6 email. (AR 4722, 4740, 4910-4916); and

3. At the September 14, 2015 City Council meeting, at which Ordinance #641 was actually adopted, petitioner Trauss, and SFBARF members Solari and Meghan Heintz, again spoke out against the ordinance and reiterated the HAA. (AR 6152, 6172, 6176-6178).

If the above emails and statements satisfy the notice requirement, then Petitioners had 180 days from September 14, 2015 to file and serve their challenge. This is because the local entity would be considered to have taken final action in response to the notice at the September 14, 2015 meeting. One hundred and eighty days from September 14, 2015 is March 12, 2016. Since the original petition was filed on December 8, 2015 and served the next day, it is timely.

If the above emails and statements do not satisfy the notice requirement, then the service of the original petition in this action does. The text/substance of original petition certainly satisfies the notice requirement by stating, in detail, how Lafayette violated the HAA. It was served on the City Council on December 9, 2015, well within the 180 days Petitioners had to serve the notice. Of course, this leads to the question of how it could be the deficiency notice if the cause of action does not accrue until 60 days after it is served (since the Lafayette had already taken the final action). The answer is that, while the original petition could not be both the notice and the resulting lawsuit, it could be the notice while the second amended petition was the resulting lawsuit – an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading; such amended pleading supplants all prior complaints, and the amended pleading alone will be considered by the reviewing court. (Giorgio v. Synergy Management Group, LLC (2014) 231 Cal.App.4th 241, 246) Given the extent to which California has made it public policy to encourage, subtly or otherwise, the expansion of below-upper-middle class housing (e.g., Government Code §§ 65589.5(a), 65913.9), the remedial

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nature of the HAA, and the special exemption from the strict, 90-day limitation period the Legislature created in Government Code § 65009(d), this Court should find that Petitioners were timely.

IV. Petitioners' Second Cause Of Action States A Claim For Relief Under Government Code § 65008

The second cause of action alleges that Lafayette's scheme violated Government Code § 65008 by reducing the availability of moderate-income units, the loss of which would have a greater effect on persons protected under Government Code § 65008(a)(1)(A). Petitioners also cited to Keith v. Volpe (C.D. Cal. 1985) 18 F.Supp. 1132. (SAP, ¶ 49) This cause of action also challenges the general plan amendment. (SAP, ¶¶ 47-49) Real Parties do not attack the cause of action on the merits. Instead, the only arguments Real Parties make are: 1) the City did not take action against the Apartment Project (MPA at 14, #1); 2) the exhibits to the petition show that Real Parties voluntary consented to an 85% reduction in its development (MPA at 14, #2); and 3) self-represented *pro per* Petitioners were 1 day late in serving this challenge (MPA at 14, #3).

As for #1 and #2, Petitioners are not trying to hide or mischaracterize anything. There is an extensive administrative record. That record clearly demonstrates that the Apartment Project was approvable. The only reason that the project was not approved was because of outspoken NIMBYs. As City Manager Falk admitted, Lafayette was faced with potential litigation under the HAA so it could not simply deny the project without findings it could not make. (SAP at ¶ 32) Then, as described in ¶¶ 33-39, Lafayette "convinced" the developer (Real Party) to agree to an 85% reduction in density in order to avoid a larger, middle-income development and to evade the HAA. Obviously, the developer was content with 15% of a loaf; Petitioners are not. If the HAA allows municipalities to amend their general plans, zone a project out of compliance, and then buy off the developer with a lower-density project, then the Courts should say so. If the HAA does not allow indirectly what cannot be done directly, then the Courts should say so.

As for #3, Real Parties proceeded on the assumption that the 90-day requirement applies. (MPA at 14:17-22) However, since § 65009(d) applies, and with it a minimum 180 day requirement, then Petitioners are timely as discussed above.

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V. Petitioners State A Cause Of Action For Declaratory Relief

In their third cause of action, Petitioners seek declaratory relief as to whether municipalities can avoid low-to-moderate income housing developments and evade the HAA by, essentially, legislating themselves around its requirements. Petitioners are *not*, in effect, claiming that if the Lafayette City Council had voted on the Apartment Project, it might have turned it down. (MPA at 15:5-7) Petitioners request a declaration as to whether Lafayette created a valid blueprint for evading the HAA. There is no dispute as to what happened – again, the administrative record is voluminous. "At the pleading stage, a complaint is broadly construed to allow declaratory relief prior to the breach of a legal obligation; therefore, any set of facts setting forth the existence of an actual controversy needing resolution will render a complaint sufficient." (Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal.2d 719, 728) An action for declaratory relief is proper where it raises a recurring issue involving the interpretation of a statute. (Bess v. Park (1955) 132 Cal.App.2d 49, 53) "A controversy over an interpretation of a statute, and the duties that statute imposes, is a proper basis for a declaratory relief claim." (Redwood Coast Watersheds Alliance v. State Bd. of Forestry and Fire Protection (1999) 70 Cal.App.4th 962, 969) "[D]eclaratory relief is [also] designed in large part as a practical means of resolving controversies, so that parties can conform their conduct to the law and prevent future litigation." (Meyer v. Sprint Spectrum L.P. (2009) 45 Cal.4th 634, 648)

CONCLUSION

For the foregoing reasons, the Court should overrule the demurrer. If the Court finds itself powerless to revoke the general plan amendment and order the City to approve the Apartment Project (which power the Court has), the Court must at least revoke the Project Alternative's approvals (which are not insulated by the general plan amendment), due to the HAA violation.

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