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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

No.: N15-2077

MEMORANDUM OF POINTS &  
AUTHORITIES IN SUPPORT OF  
DEMURRER BY REAL PARTIES  
IN INTEREST O'BRIEN LAND  
COMPANY, LLC AND ANNA  
MARIA DETTMER, AS TRUSTEE  
OF THE AMD FAMILY TRUST, TO  
PETITIONERS' AMENDED  
PETITION FOR WRIT OF  
ADMINISTRATIVE MANDAMUS

Date: February 3, 2016  
Time: 9:00 am  
Dept: 9

Action Filed: 12/8/15:  
Trial Date: none

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF CONTRA COSTA  
By S. OZUNA Deputy Clerk

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1 SUMMARY OF DEMURRER

2 Petitioners SONJA TRAUSS and SAN FRANCISCO BAY AREA RENTERS  
3 FEDERATION ("Petitioners") have filed an Amended Petition for Administrative Writ  
4 of Mandamus ("Petition") against the Respondent CITY OF LAFAYETTE ("City"), and  
5 Real Parties in Interest O'BRIEN LAND COMPANY, LLC, ("O'Brien") and ANNA  
6 MARIA DETTMER, as Trustee of the AMD Family Trust ("Dettmer") (together "Real  
7 Parties in Interest," or "O'Brien/Dettmer").

8 This DEMURRER is submitted by the Real Parties in Interest (developer O'Brien  
9 and landowner Dettmer), and is joined by the City, in response to the Petition.

10 The Petition is based on Petitioners' sole claim that the City, in not approving a  
11 315-unit multi-family apartment project ("Apartment Project"), and in processing and  
12 approving O'Brien/Dettmer's applications for a General Plan Amendment and single-  
13 family residential project with a community sports field, a community dog park, a public  
14 parking and student drop-off area, public trails, and other community amenities ("Single-  
15 Family Project"), violated the California Housing Accountability Act ("HAA") at  
16 California Government Code section 65589.5(j).<sup>1</sup>

17 As shown herein, the HAA at section 65589.5(j) applies *only* to a housing  
18 development project that is either (i) *disapproved* by the City; or (ii) *approved* by the  
19 City, with less density than proposed by the applicants. The Petition shows on its face  
20 that neither of these two requirements is met in this case. As conceded by the Petition,  
21 the City never disapproved or conditionally approved the Apartment Project. Instead,  
22 again as shown on the face of the Petition, the City approved the separate Single-Family  
23 Project.

24 Further as shown herein, the HAA expressly limits those who may file a suit  
25 enforcing the HAA to: (i) the applicant; or (ii) a person eligible to apply for residency in  
26 the development. The Petition states on its face that neither of these two requirements are  
27 met. The applicants here are the Real Parties in Interest, who have received approvals for

28 <sup>1</sup> All statutory references are to the California Government Code, unless otherwise indicated.

1 the Single-Family Project, and are being sued by Petitioners. The Petitioners, as stated in  
2 the Petition, are not claiming to be eligible to apply for residency in any development --  
3 but rather are: (i) an individual; and (ii) an unincorporated association of affordable  
4 housing advocates, both seeking only to enforce general housing rights on behalf of  
5 "California citizens."

6 Finally as shown herein, in any event the HAA's enforcement provisions do not  
7 apply if the applicant (O'Brien/Dettmer) *consents to the decision or action by the City*.  
8 The Petition shows on its face that O'Brien/Dettmer, as the developer and owner of the  
9 property, *consented* to the City's processing and approval of the Single-Family Project.

10 The City and Real Parties therefore respectfully request, on the basis of defects  
11 appearing on the face of the Petition, and on the basis of matters that are judicially  
12 noticed, and assuming that all material facts in the Petition are true, that the Petition be  
13 denied without leave to amend.

#### 14 STATEMENT OF ALLEGED FACTS

15 The following facts are alleged in the Petition:

16 On March 21, 2011, the Real Parties in Interest (O'Brien as the developer of the  
17 property, and Dettmer as the landowner) submitted an application to the City for a 315-  
18 unit Apartment Project, to be developed by O'Brien on a 22-acre parcel owned by  
19 Dettmer. (Petition at p. 2, par. 2, ln. 17-24.)

20 The Apartment Project was consistent with the General Plan designation and  
21 zoning designations and standards (for a multi-family apartment project) that existed on  
22 the date that the application was complete. (Petition at p. 2, par. 2, ln. 25-27.)

23 On January 22, 2014, the City and O'Brien/Dettmer agreed to enter into a Process  
24 Agreement ("Process Agreement") for the consideration of the new Single-Family  
25 Project. (Petition at p. 12, par. 32, ln. 5-7.) The Petition attaches the Process Agreement  
26 as Appendix A to the Petition. (hereinafter "Petition at Appendix A.")

27 The Process Agreement states the City and O'Brien/Dettmer together desire to  
28 consider a project alternative to the Apartment Project (the Single-Family Project).

1 (Petition at Appendix A, p. 1, RECITAL C.) The Process Agreement states the City and  
2 applicant (O'Brien/Dettmer) will prepare new applications necessary for the Single-  
3 Family Project, which will include: (i) a general plan amendment ("GPA") from multi-  
4 family housing to single-family; (ii) a rezone of the property to Planned Unit District; (iii)  
5 a subdivision map; and (d) related grading, hillside and tree permits. (Petition at  
6 Appendix A, pp. 2, 3 Sec. 3.2.)

7 The Process Agreement states that the Single-Family Project will be generally as  
8 shown on the "Concept Site Plan" dated December 3, 2013, attached to the Process  
9 Agreement. The Concept Site Plan provides for 44 single-family units, a soccer and  
10 lacrosse all-weather play field; a community dog park; a public parking and student drop-  
11 off area; public trails, and other community amenities. (Petition at Appendix A, p. 2,  
12 Sec. 3.1; and Concept Site Plan attached thereto.)

13 The Petition and the Process Agreement provide that the Apartment Project will be  
14 placed "on hold" and no longer considered for approval by the City, pending the City's  
15 review of the separate Single-Family Project. (Petition at p. 12, par. 32, ln. 6-9; Petition  
16 at Appendix A, p. 1, RECITAL E.)

17 In March, 2014, pursuant to the Process Agreement, O'Brien/Dettmer submitted to  
18 the City all the new applications required for the Single-Family Project (Petition at p. 5,  
19 par. 7, ll. 1-2; Petition at Appendix A, p. 2, Sec. 3.1.)

20 On August 10, 2015, by Resolution No. 2015-51, the City Council approved the  
21 General Plan Amendment for the Single-Family Project, from APO to single-family low  
22 density, providing for single-family homes for the Single-Family Project. Further on  
23 August 10, 2015, by Resolution No. 2015-50, the City Council certified the Supplemental  
24 Environmental Impact Report (SEIR) for the Single Family Project. (See Real Party in  
25 Interest's Request for Judicial Notice in Support of Demurrer, referencing and attaching  
26 City Council Resolution No. 2015-51 and 2015-50.) On September 14, 2015, by  
27 Ordinance 641, the City approved the related zoning amendment and permits for the  
28 Single-Family Project. (Petition at p. 8, par. 24, ln. 22-28.)

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1                                    **LEGAL ARGUMENT SUPPORTING THE DEMURRER**

2                    **I. PETITIONERS' SOLE CLAIM FOR RELIEF FAILS TO STATE FACTS**  
3                    **SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION, AND IS SUBJECT TO**  
4                    **DEMURRER WITHOUT LEAVE TO AMEND.**

5                    Petitioners' sole claim for relief, referenced at Section VII of the Petition as  
6                    "First Claim For Relief," claims the City violated the Housing Accountability Act (HAA)  
7                    by approving the applicant's "project" upon the condition that the project be developed at  
8                    a lower density, without basing its decision on findings referenced in section 65589.5(j).

9                    California Code of Civil Procedure ("CCP") section 430.10(e) and 430.30(a)  
10                   provide for a demurrer when "[t]he pleading does not state facts sufficient to constitute a  
11                   cause of action." As shown below, the entire Petition wholly fails to state facts sufficient  
12                   to constitute a cause of action, based on grounds shown on the face of the Petition, and as  
13                   requested herein by judicial notice.

14                    A.    Section 65589.5(j) Applies Only When (i) the Local Agency  
15                    Disapproves the Project, or (ii) Approves the Project with a Lower Density. Neither of  
16                    These Two Requirements is Met in This Case.

17                    The Petition references the Housing Accountability Act (HAA) at section  
18                    65589.5(j), which states as follows:

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

28                    (1) The housing development 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 . . .

                     (2) There is no feasible method to satisfactorily mitigate or avoid the  
                     adverse impact . . . [Emphasis added.]

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1 Section 65589.5(j) requires when a City (i) disapproves a housing development  
2 project or (ii) approves the project with lower density, the City's "decision" must be  
3 supported by findings to the effect that the housing development would have a specific,  
4 adverse impact on the public health or safety.

5 The Petition shows on its face that the City *never made a decision to disapprove*  
6 *the Apartment Project, or to approve the Apartment Project with a lower density.*

7 With regard to the first requirement, wherein the City must "disapprove" the  
8 project, the HAA defines the term "Disapprove the development project" as follows:

9 "Disapprove the development project" includes any instance in which a  
10 local agency does either of the following:

11 (A) *Votes on a proposed housing development project application and the*  
12 *application is disapproved.* [Emphasis added.] (§ 65589.5(h)(5))<sup>2</sup>

13 The HAA requires a formal "vote" for the City's decision on the Apartment  
14 Project. The Petition specifically confirms that the Apartment Project was never voted on  
15 or considered for approval/disapproval by the City. The Petition states: "On December  
16 9, 2013 . . . and *no closer to approval than when the [Apartment Project] was submitted*  
17 . . . Steven Falk, Lafayette City Manager, made a presentation before Lafayette City  
18 Council [regarding the alternative Single-Family Project]." (Petition at p.3, par. 5, ln. 26-  
19 28.)

20 The Petition states that the City and Dettmer/O'Brien agreed, pursuant to the  
21 Process Agreement, to place the Apartment Project "on hold," and to instead process new  
22 applications for the Single-Family Project. (Petition at p. 12, par. 32, ln. 6-9; Petition at  
23 Appendix A, p. 1, RECITAL E.)

24 The Process Agreement states:

25 The Parties [City and O'Brien/Dettmer] desire to consider a project  
26 alternative to the Apartment Project that consists of 44-45 single-family  
detached homes and public parkland and parking amenities . . .

27 <sup>2</sup> Section 65589.5(h)(B) sets forth a second finding, where the City fails to comply with the time limits for approval  
28 of a project, pursuant to the Permit Streamlining Act at section 65950. The Petition makes no claim that the City  
failed to follow this Permit Streamlining Act requirement.

1 By this Agreement, the intent of the Parties is to: (i) set forth a process for  
2 consideration of the Project Alternative [the Single-Family Project]; . . . (ii)  
3 "suspend the Apartment Project pending the consideration of the Project  
4 Alternative . . . ] (Petition at Appendix A, p. 1, RECITALS C and E.)

5 From and after the execution of this Agreement, Applicants shall prepare  
6 the development application required for consideration of the [Single-  
7 Family] Project Alternative. (Petition at Appendix A, p. 2, Sec. 3.1)

8 The Petition confirms that the City and the Real Parties in Interest thereafter  
9 proceeded as set forth in the Process Agreement. After the execution of the Process  
10 Agreement, the Real Parties in Interest filed their new applications for the Single-Family  
11 Project, including applications for separate environmental review under the California  
12 Environmental Quality Act ("CEQA"). (Petition at p. 5, par. 7, ln. 1-7.) Such separate  
13 applications for the Single-Family Project were ultimately approved by the City.  
14 (Petition at p. 13, par. 36, ll. 27-28; p. 14, ln. 1-4.)

15 With regard to the second requirement, to "conditionally approve the project with  
16 lower density," again, the Petition confirms that the City Council never voted on the  
17 Apartment Project, and therefore did not "conditionally approve" the Apartment Project  
18 with a lower density. Instead, the City and Real Parties in Interest executed the Process  
19 Agreement, and from that date forward proceeded solely and exclusively with the Single-  
20 Family Project. As stated, the General Plan Amendment, rezoning and related permits for  
21 the Single-Family Project have all been approved. (Petition at p. 8, par. 24, ln. 22-28; p.  
22 13, ll. 27-28; p. 14, ln. 1-4; Real Party in Interest's Request for Judicial Notice in Support  
23 of Demurrer, referencing and attaching City Council Resolution No. 2015-51 and 2015-  
24 50.)

25 Given that the Petition states on its face that neither of the two requirements for  
26 application of section 65589.5(j) were met (the Apartment Project was not *disapproved*,  
27 or *conditionally approved with less density*), and given that those two requirements  
28 cannot be met in this case (the City has approved the separate Single-Family Project and  
its accompanying General Plan Amendment), Petitioners respectfully request that this  
Demurrer be granted without leave to amend.

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1                   B.     Petitioners' Claim That the Apartment Project and the Single-Family  
2 Project are "the Same Project" is Invalid as a Matter of Law.

3             Petitioners cannot show that the Apartment Project was disapproved, or approved  
4 with less density under the Housing Accountability Act. Petitioners thus instead assert  
5 that the referenced Apartment Project and the Single-Family Project are in effect "the  
6 same project."

7             In such manner, Petitioners request the Court to stretch the provisions of the  
8 Housing Accountability Act, from cases where the City does not "*disapprove*" or  
9 "*approve* " a single project, to cases in which the City and the applicant agree not to  
10 process one project (the Apartment Project) and to submit applications for a new and  
11 separate project (the Single-Family Project). (Petition at Appendix A, Process  
12 Agreement, at p. 1, Recitals C, D and E.)

13             The Petition claims as follows:

14             The Process Agreement establishes that the [Apartment] Project and the  
15 [Single Family] Project Alternative *are two versions of the same project*,  
16 higher and lower density respectively and not two separate projects. . .  
(Petition at p. 12, par. 33, ll. 18-19.)

17             As shown herein, Petitioners' claim is invalid as a matter of law: (i) the Petition  
18 confirms on its face that the Apartment Project and the Single-Family Project are two  
19 separate projects; (ii) the term "project" is well-defined by statute, and under all  
20 authorities the Apartment Project and Single-Family project are separate projects; and  
21 (iii) the plain meaning of section 65589.5(j) does not allow the Petitioners' interpretation.

22                   1. The Petition Confirms on its Face that the Apartment Project and  
23 Single-Family Project are Separate Projects.

24             The Petition confirms on its face that the Apartment Project and the Single-Family  
25 Project are two separate projects. The Petition states:

26             By this Agreement, the intent of the Parties is to: . . . set forth a process for  
27 consideration of the Project Alternative [the Single-Family Project] . . . .  
28 (Petition at Appendix A, p. 1, Recital E.)

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1 From and after the execution of this Agreement, Applicant shall prepare the  
2 development application required for consideration of the [Single Family]  
3 Project Alternative . . . The Project Alternative Application shall be  
generally as shown on the Concept Site Plan, dated December 3, 3014,  
attached as Exhibit "A". . . (Petition at Appendix A, p. 2, Sec. 3.1.)

4 Applicant shall submit the Project Alternative Application, consisting of the  
5 following: (a) a general plan amendment to allow for single family housing  
6 . . . (b) a rezone . . . (c) a subdivision map, and (d) grading permit, hillside  
7 permit, and tree removal permit . . . (Petition at Appendix A, p. 2, 3, Sec.  
8 3.2.)

9 The Project Alternative application shall go through the complete City  
10 review process . . . (Petition at Appendix A, p. 3, Sec. 3.2)

11 Pursuant to the Process Agreement, the Real Parties in Interest made formal,  
12 separate applications for the new Single-Family Project, including applications for a  
13 General Plan Amendment to allow only single family homes; such applications went  
14 through the "complete City review process," and such applications were approved.  
15 (Petition at p. 8, par. 24, ln. 22-28; Real Party in Interest's Request for Judicial Notice in  
16 Support of Demurrer, referencing and attaching City Council Resolution No. 2015-51  
17 and 2015-50.)

18 2. The Term "project" is Defined by Statute, and Under All  
19 Authorities the Apartment Project and Single-Family Project are Separate Projects.

20 The term "project" is defined by the California Environmental Quality Act  
21 (CEQA) (Pub. Res. Code sections 21000 *et seq.*) as follows:

22 "Project" means an activity which may cause either a direct or indirect  
23 physical change in the environment . . . and

24 (c) An activity that involves the issuance to a person of a lease, permit,  
25 license, certificate, or other entitlement for use by one or more public  
26 agencies." (Pub. Res. Code § 21065.)

27 The term "project" is similarly defined by California's planning and zoning statute:

28 "Project" means any activity involving the issuance of a lease, permit, license,  
certificate, or other entitlement for use by one or more public agencies." (Gov't Code at  
Division 1, Planning and Zoning, Chapter 4.5 "Review and Approval of Development  
Permits," at section 65931.)

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1 The Petition confirms that the Single-Family Project, as a new project separate  
2 from the earlier Apartment Project, needed separate review under CEQA:

3 *The Project Alternative* [the Single-Family Project] *was not considered in*  
4 *the EIR for the Apartment Project*, and therefore, the City shall comply  
5 with the California Environmental Quality Act ("CEQA") in its  
6 consideration of the [Single Family Project] Alternative. [Emphasis added.]  
(Petition at Appendix A, p. 4, Sec. 3.4.)

7 Pursuant to the Process Agreement, the City prepared a full supplemental  
8 environmental impact report (SEIR) for the Single Family Project, as required by the  
9 CEQA, and *separate project applications* for the Single-Family Project. (Petition at p.  
10 13, par. 35, ln. 22-26; Petition at Appendix A, p. 2, Sec. 3.2).

11 3. The "Plain Meaning" of Section 65589.5(j) does not allow for the  
12 Petitioners' Interpretation.

13 Section 65589.5(j) states:

14 [W]hen a proposed housing development project complies with objective  
15 general plan and zoning standards and criteria, including design review  
16 standards, in effect at the time that that the housing development project's  
application is determined to be complete, but the local agency proposes to  
disapprove the project or to approve [the project] on the condition that the  
project be developed at a lower density . . . [Emphasis added.]

17 Section 65589.5(j) limits its application to the City's decision on a *single*  
18 *development project*. Section 65589.5(j) is limited solely to cases where (i) a proposed  
19 housing project complies with the objective general plan and zoning standards in effect at  
20 the time that project's application is complete, and where (ii) the local agency (here, the  
21 City) disapproves (or conditionally approves) *that same project*.

22 Here, Petitioners first claim that the *Apartment Project* complies with the  
23 objective general plan and zoning standards in place at the time the application was  
24 complete. (Petition at p. 2, par. 2, ln. 25-27). Petitioners thereafter claim, however, that  
25 the City violated 65589.5(j) *by approving the Single-Family project* without making the  
26 findings required by 65589.5(j). (Petition at p. 6, par. 10, ln. 6-11). The Single-Family  
27 Project, however, was not "consistent with the general plan and zoning criteria" in effect  
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1 at the time the Single-Family Project applications were complete as required by section  
2 65589.5(j). Instead, the Single-Family Project required both a General Plan Amendment  
3 (GPA) and a rezone to allow for single family homes.

4 Simply stated, on its face, section 65589.5 does not apply, and cannot legally  
5 apply, concurrently to both the Apartment Project and the Single-Family Project. It is  
6 well-settled that the plain meaning of the words of the statute is controlling. "It is  
7 axiomatic that in the interpretation of a statute where the language is clear, its plain  
8 meaning should be followed. (*Great Lakes Properties, Inc. v. City of El Segundo* (1977)  
9 19 Cal. 3d 152, 155.)

10 We note that Petitioners' sole argument in support of their claim that the  
11 Apartment Project and the Single-Family Project are "the same project" is stated in the  
12 Petition as follows:

13 If they were two separate projects, and not two versions of the same  
14 project, it would be possible for the application process for both of them to  
15 happen concurrently and approvals for each project would be independent  
of each other. (Petition at p. 12, par. 33, ll. 26-28; p. 13, ll.1-2).

16 Petitioners claim that if the Apartment Project and the Single-Family Project were  
17 two separate projects, it would be possible for both projects to be approved  
18 "concurrently," and the approvals for the two projects would be "independent of each  
19 other." This legal conclusion is simply not true as a matter of law. *The Apartment*  
20 *Project and the Single-Family Project could not, and cannot, be processed or approved*  
21 *"concurrently."* As shown, the Apartment Project was based on the earlier General Plan  
22 designation of APO, allowing *multi-family housing projects*, and prohibiting single-  
23 family homes. (Petition at p. 2, par. 2, ll. 25-28.) The Single-Family Project required a  
24 General Plan Amendment to a single-family residential designation, allowing for the  
25 separate Single-Family Project. (Petition at Appendix A, p. 2, Sec. 3.2.)

26 The General Plan is the "constitution" for all future land use approvals. (*Leshner*  
27 *Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 540) State law  
28 prohibits establishment of zoning amendments that are not consistent with the General

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1 Plan . (Gov't. Code § 65860.) All land use approvals must similarly be consistent with  
2 the General Plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d  
3 553, 570) The Apartment Project relied on the earlier General Plan designation of APO,  
4 allowing only multi-family residential (apartments), while the Single-Family Project,  
5 including its rezone and related approvals, relied on the new General Plan amendment to  
6 single-family residential. Both projects could not, and cannot, as a matter of law, be  
7 processed concurrently.

8 C. The Petition Does Not State a Cause of Action Under the Housing  
9 Accountability Act Enforcement Provisions at Government Code Section 65589.5(k).

10 The Petition does not reference the Housing Accountability Act (HAA) at section  
11 65589.5(k), which sets forth the "standing" requirements for filing a Petition, and the  
12 specific requirements for judicial relief under the HAA.

13 Section 65589.5(k) states in pertinent part as follows:

14  
15 The applicant or any person who would be eligible to apply for residency in  
16 the development . . . may bring an action to enforce this section. [Emphasis  
added.]

17 1. The Petitioners Have No Standing Under Section 65589.5.

18 Section 65589.5(k) strictly limits standing to bring an action to: (i) the applicant  
19 (here, O'Brien/Dettmer); or (ii) "any person who would be eligible to apply for residency  
20 in the development." By its terms, the HAA is intended to allow judicial enforcement,  
21 after a development application is denied/conditionally approved, to the *applicant* (here,  
22 O'Brien/Dettmer) or to someone who is eligible to apply for residency *in that specific*  
23 *development which has been denied/conditionally approved.*

24 The Petitioners claim "standing" under the HAA as follows:

25 Petitioners have standing to raise the HAA claims because, as citizens,  
26 petitioners have a public interest in The City of Lafayette's full and  
27 complete compliance with state laws and regulations including, without  
28 limitation, California Government Code § 65589.5. (Petition at p. 7, par.  
18, ll. 27-28; p. 8, ll. 1-3.)

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1 The Petition does not allege that any Petitioner would be eligible to apply for  
2 residency in the Apartment Project. The Petition instead claims that San Francisco Bay  
3 Area Renters Federation is "an unincorporated association whose mission includes  
4 advocating for the production of housing . . ." (Petition at p. 7, par. 14, ll. 3-4.) The  
5 Petition claims that Petitioner Trauss is a "natural person and California citizen;" and that  
6 Petitioner SF Bay Area Renters Federation has a "direct and substantial interest in  
7 insuring that Respondents comply with laws requiring the City of Lafayette to address the  
8 housing needs of California citizens and workers." (Petition at p. 7, par. 13, par. 14, ll.  
9 2-10.)

10 The Petition does meet the "standing" requirements of the HAA. The Petition has  
11 been filed, not by anyone eligible to live in a specific housing project, but by a housing  
12 advocacy association.

13 We note that the Petition cannot be amended to provide for Petitioners' standing in  
14 this case. The HAA extends standing on a limited basis to a person "who would be  
15 eligible for residency *in the development*." Petitioners claim on the face of the Petition  
16 that "the development," or the project, *includes both the Apartment Project and the*  
17 *Single-Family Project*. (Petition at p. 12, par. 33, ll. 18-19.) The HAA, however, limits  
18 standing (beyond the applicant) only to those eligible, or qualified, to live *in the specific*  
19 *housing project that was disapproved (or conditionally approved)*. (Gov't Code  
20 § 65589.5(j), (k).)

21 If Petitioners were to plead for purposes of standing that such "development" is the  
22 Apartment Project, then Petitioners would need to show that *the Apartment Project* was  
23 disapproved, or conditionally approved. As stated on the face of the Petition, the  
24 Apartment Project was never disapproved or conditionally approved.

25 2. The City Did Not Disapprove or Conditionally Approve the  
26 Apartment Project.

27 Section 65589.5(k) further states:  
28

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1 If in any action brought to enforce the provisions of this section, a court  
2 finds that the local agency *disapproved a project or conditioned its*  
3 *approval in a manner rendering it infeasible for the development of . . .*  
4 *housing for very low, low-, or moderate-income households. . .without*  
5 *making the findings required by this section or without making sufficient*  
6 *findings supported by substantial evidence, the court shall issue an order or*  
7 *judgment compelling compliance with this section within 60 days,*  
8 *including, but not limited to, an order that the local agency take action on*  
9 *the development project . . .[Emphasis added.]*

10 The second requirement for enforceability under section 65589.5(k) is that the  
11 Court must find that the local agency (i) disapproved the project; or (ii) conditioned its  
12 approval in a manner rendering it infeasible for the development of . . . housing for very  
13 low, low-, or moderate-income households . . . without making the findings required by  
14 this section."

15 This is essentially the same standard as set forth in section 65589.5(j), above. As  
16 shown herein, the City did not "disapprove" the Apartment Project, or "conditionally  
17 approve" the Apartment Project. As further shown herein, the City did not make a  
18 decision on the Apartment Project, and instead, through the Processing Agreement, the  
19 City and O'Brien/Dettmer agreed to submit and process the separate Single-Family  
20 Project.

21 3. In Any Event, the HAA Does Not Apply When the Applicant  
22 Consents to a Different City Decision or Action.

23 The HAA's enforcement provisions at section 65589.5(k) provide a "catch-all," or  
24 "fail-safe" mechanism, to address the specific types of claims raised by the Petition.

25 The Petition claims that the Petitioners have the right to "enforce" the state laws,  
26 and the standing to utilize the HAA to "demand" that the City approve the Apartment  
27 Project. As shown above (i) the HAA does not apply to this case, given that the City did  
28 not make a decision on the Apartment Project; and (ii) Petitioners have not shown valid  
"standing" under the HAA. However, even assuming (for the sole purposes of this  
Demurrer) that the HAA applies to this case, and that the Petitioners have shown proper

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1 "standing," in any event, the HAA's judicial enforcement provisions do not apply where  
2 the applicant "consents" to the City's decision or action regarding the project.

3 The Petitioners in this case demand that the City's determination to "disapprove"  
4 the Apartment Project be vacated, and that the Apartment Project be approved.

5 Section 65589.5(k) states in pertinent part:

6 The court shall retain jurisdiction to ensure that its order of judgment is  
7 carried out . . .

8 If the court determines that its order or judgment has not been carried out  
9 within 60 days, the court may issue further orders as provided by law to  
10 ensure that the purposes and policies of this section are fulfilled, including  
11 but not limited to, an order to vacate the decision of the local agency, in  
12 which case the application for the project, as constituted at the time the  
13 local agency took the initial action determined to be in violation of this  
14 section, along with standard conditions determined by the court to be  
15 generally imposed by the local agency on similar projects, shall be deemed  
16 approved, *unless the applicant consents to a different decision or action by  
17 the local agency.* [Emphasis added.]

18 Thus, the HAA provides specifically that the court's power under the HAA to  
19 vacate the decision of the local agency, and/or to determine that a project is "deemed  
20 approved," *does not apply if the "applicant [O'Brien/Dettmer] consents to a different  
21 decision or action by the local agency [the City]."*

22 Here, the Petition confirms that the City and the applicant (the Real Parties in  
23 Interest) entered into a formal, written agreement (the Process Agreement) to process the  
24 Single-Family Project as a separate alternative Project to the Apartment Project. The  
25 applicant/Real Parties in Interest thereafter filed applications for the Single-Family  
26 Project, including a GPA, by the applicant/Real Parties in Interest. *The Petition confirms  
27 on its face that the applicant consented to a different action by the local agency --  
28 O'Brien/Dettmer consented to the City's processing of the Single-Family Project.*  
(Petition at Appendix A, p. 1, RECITALS C, D and E.)

29 Therefore, even assuming (solely for purposes of this Demurrer) that the HAA  
30 applies to this case, and even assuming the Petitioners have shown proper standing, the  
31 HAA provides that the relief requested by the Petitioners cannot be granted.

1 The HAA on its face clearly intends that its requirements be waived where the  
2 landowner agrees with the City's decision to approve a different project. Under the  
3 Petitioners' novel claim, a third party (here, the Petitioners), could "force" a landowner to  
4 build and manage apartments even where the landowner does not desire to do so. Such  
5 an absurd result was never intended, and could never be enforced.

6 **CONCLUSION**

7 As stated on the face of the Petition, the HAA by its express terms, applies only to  
8 a housing development project that is either (i) *disapproved* by the City; or (ii) *approved*  
9 by the City, with less density than proposed. The City did not deny or conditionally  
10 approve the Apartment Project, instead, the City processed and approved the new and  
11 separate Single Family Project.

12 The HAA, again by its express terms, is intended to be enforced only by the  
13 applicant, or "by any person who would be eligible to apply for residency" in the project.  
14 Petitioners do not qualify here. Petitioners are housing advocates, attempting to stretch  
15 the HAA to cases far beyond the face of the statute.

16 Finally, and in any event, the HAA's enforcement provisions do not apply where  
17 the applicant consents to the City's decision or decision. In this case, as shown on the  
18 face of the Petition, the Real Parties in Interest, as applicants, formally agreed with the  
19 City to move forward with the Single-Family Project.

20 Pursuant to all the these facts as set forth on the face of the Petition, the Real  
21 Parties in Interest respectfully request this Demurrer be granted without leave to amend.

22 Dated: January 8, 2016

Gagen, McCoy, McMahon, Koss, Markowitz &  
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