MILLER STARR REGALIA

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrlegal.com

Bryan W. Wenter, AICP
Direct Dial: 925 941 3268
bryan.wenter@msrlegal.com

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VIA EMAIL AND U.S. MAIL

Robert B. Hodil
Coblentz Patch Duffy & Bass LLP
1 Montgomery Street, Suite 3000
San Francisco, CA 94104
Email: rhodil@coblentzlaw.com

Re: Application of the Housing Accountability Act and the California Environmental Quality Act to the Terraces of Lafayette Apartment Project

Dear Rob:

On behalf of our client, O'Brien Land Company, LLC ("**O'Brien**"), we write to address the application of the requirements of the Housing Accountability Act ("**HAA**")[1] and the California Environmental Quality Act ("**CEQA**")[2] to the 315-unit Terraces of Lafayette apartment project ("**Project**"). We do so in the spirit of continuing to work cooperatively and in good faith with the City to process the few remaining Project approvals in a way that is consistent with the law and as efficiently as possible.

Although we understand from you that City staff apparently believe that this Project should be processed "like any other project," as a matter of fact it is unlike any other project in Lafayette, and the City is and has been arbitrarily and unfairly treating it more adversely than any other project for years, raising significant issues under the federal and state constitutions, the HAA, and CEQA. Although "public officials must themselves obey the law" (*Wirin v. Parker*, 48 Cal.2d 890, 894 (1957)), the Project has nonetheless been stuck in the City's never-ending entitlement process for disfavored projects that would allegedly disrupt Lafayette's "rural character." And in that process the Project has been subjected to the most extreme form of unrelenting municipal scrutiny and public opposition that is ultimately facilitated by the City's arbitrary and capricious processing choices, such as manipulating the EIR to "create" significant and unavoidable environmental impacts. For example, the City continues to insist that a

[1] Government Code § 65589.5 *et seq*. Except as otherwise provided, all statutory references to the Government Code are to the HAA.

[2] Public Resources Code § 21000 *et seq*. and 14 Cal. Code Regs. § 15000 *et seq*. All statutory references to the Public Resources Code are to CEQA and all regulatory references are to the CEQA Guidelines.

Class 1 ridgeline exists on the Project site despite the fact the ridgeline was removed from the Project site years ago through the construction of State Route 24 and Deer Hill Road, as well as the subsequent quarrying of the Project site, a reality O'Brien has proven through multiple expert geotechnical reports whose validity the City still refuses to accept.

Moreover, as a matter of state housing law, this Project is not like any other project. The Project is protected by the HAA (formerly known as the Anti-NIMBY Law), as the City has repeatedly acknowledged for years. As a result, **the Project must be processed and acted upon pursuant to the HAA, which is intended specifically to cut through bureaucratic red tape and NIMBYism so that housing development projects such as the Terraces are efficiently and cost-effectively approved**.[3] "Among the consequences of" the activities and policies of many local governments, such as the City, that limit the approval of housing "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." § 65589.5(a)(1)(C).

Statewide housing policy thus *requires* local governments—even Lafayette—to interpret and implement the HAA "in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." § 65589.5(a)(1)(L). A cursory reading of the substantially amended and strengthened HAA shows that it commands the City to put a thumb, if not a full hand or more, on the side of the scale in favor of approving the Project. Furthermore, as we explained in our December 18, 2018 letter to the City that never received any response, the HAA imposes a "substantial limitation" on the City's discretion to deny the Project's requested use permit "by setting forth the *only* conditions under which [the use permit] may be disapproved." *North Pacifica, LLC v. City of Pacifica*, 234 F.Supp.2d 1053, 1059-60 (N.D. Cal. 2002) (Emphasis in original). Indeed, the HAA's stringent limitations on the City's discretion are sufficient to create a constitutionally-protected property interest. *Id*.

Thus, contrary to the City's troubling notion about treating the Project "like any other project," the HAA plainly entitles the Project to be treated *better than* other projects. Not the same as other projects, and certainly not worse. *Better*.

In contrast, as you know, CEQA reflects the state's balanced policy that protecting the environment, consistent with the provision of a decent home and suitable living environment for every Californian, must guide local agency decisions. §§ 21000(g);

[3] *See, e.g.*, Letter from Senator Leroy F. Greene to Governor George Deukmejian re Senate Bill 2011 (Stats. 1990, Ch. 1439) (Greene), dated August 30, 1990, explaining that:

> "[B]ecause of NIMBY (not in my backyard) attitudes, we are seeing a number of local jurisdictions blocking affordable housing developments. Their concerns range from decreasing property values to preserving quality of life, as evidenced by some of the no growth and slow growth communities.
>
> This measure will increase housing opportunities for the backbone of our society . . . teachers, public safety employees, retail clerks, secretaries and nurses."

21001(d). Importantly, however, CEQA does not grant the City *any* new powers independent of the powers granted by other laws and is instead expressly *subject to* limitations provided in other laws. § 21004; § 15040(a); *see also County of San Diego v. Grossmont-Cuyamaca Community College* District, 141 Cal.App.4th 86, 102 (2006) (recognizing that "an agency's authority to impose mitigation measures must be based on legal authority *other than CEQA*") (Emphasis added). Rather, the exercise of an agency's authority under a particular law—such as the HAA—must be within the scope of the agency's authority *provided by that law* and must be consistent with express or implied limitations provided by *that* law. *See* § 15040(d) and (e).

The courts have thus described CEQA as a "general law" and acknowledged that while "the Legislature intended CEQA to be interpreted so as to afford the fullest possible protection to the environment," such protection must be "*within the reasonable scope of its statutory language*." *See, e.g., Friends of Davis v. City of Davis*, 83 Cal.App.4th 1004, 1014-15 (2000) (Emphasis added). Again, the HAA establishes the *only* basis upon which a local government such as the City may lawfully disapprove a housing development project or condition a housing development project's approval in a manner that renders the project infeasible. *See* §§ 65589.5(d) and (j); *see also North Pacifica, LLC v. City of Pacifica*, *supra*, 234 F.Supp.2d at 1059-60. Thus, the thought that the City could use any part of the CEQA process as a vehicle to lawfully disapprove the Project is grossly mistaken. CEQA is not a "get-out-of-jail-free" card.

Accordingly, and for the reasons set forth in more detail below, there is nothing in the Project's lengthy and growing administrative record that can serve as a lawful basis to disapprove the Project or to condition the Project's approval in a manner that renders the Project infeasible. In particular, the City cannot disapprove the Project based on anything that was previously identified in the Project's 2013 certified Environmental Impact Report (SCH No. 2011072055) ("**EIR**"), including the Project's purported significant and unavoidable environmental effects. The City cannot disapprove the Project based on anything identified in the complete and legally-defensible Addendum FirstCarbon Solutions prepared, dated December 18, 2018, which demonstrated with substantial evidence that the Project will not trigger any of the events that would be a valid basis to require subsequent or supplemental environmental review. The City cannot disapprove the Project based on anything identified in the peer review of the Addendum prepared by Impact Sciences, dated April 5, 2019, which did not identify any of the events that would be a valid basis to require or allow subsequent or supplemental environmental review. And the City cannot disapprove the Project based on anything that could be identified in the extensive, time-consuming, and costly *de facto* supplemental environmental analysis the City is presently engaged in, even in the extraordinarily unlikely event the City somehow eventually determines that any of the events that would be a valid basis to require subsequent or supplemental environmental review have occurred, despite the virtual certainty that no such events could ever plausibly be identified.

1. The City is Required to Broadly Interpret and Apply the HAA in Favor of Approving the Project.

The legislature has recognized that "California's housing picture has reached a crisis of historic proportions despite the fact that, for decades, the Legislature has enacted numerous statutes [such as the HAA] intended to significantly increase the approval, development, and affordability of housing for all income levels . . . . § 65589.5(a)(2)(J). The HAA was enacted in 1982 (Stats. 1982, Ch. 1438) and expanded since then many times expressly in order "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters." § 65589.5(a)(2)(K). Despite the legislature's ongoing efforts to substantially increase the state's housing supply and eliminate or reduce impediments to increasing the housing supply, the legislature has also expressly acknowledged that "[its] intent has not been fulfilled." *Id*.

In order to deal with this "critical problem" (§ 65589.5(a)(1)A)) and meet its clear and forceful intent, the legislature has set an extremely high bar for local governments to lawfully disapprove housing development projects. In so doing, the legislature has severely and intentionally curtailed the generally broad land use authority local governments otherwise have in a long and growing series of HAA amendments significantly strengthening the law.[4] These local control-limiting amendments have been sufficiently extensive that even the League of California Cities has complained that they would make it "virtually impossible to deny any housing project."[5] And that is precisely the point of the HAA, both as it was originally enacted and as it is substantially more restrictive today to close certain loopholes recalcitrant public agencies have improperly sought to exploit.[6]

[4] Amended by Stats. 1990, Ch. 1439 (S.B. 2011); Stats. 1991, Ch. 100 (S.B. 162); Stats. 1992, Ch. 1356 (S.B. 1711); Stats. 1994, Ch. 896 (A.B. 3735); Stats. 1999, Ch. 968 (S.B. 948); Stats. 2001, Ch. 237 (A.B. 369); Stats. 2002, Ch. 147 (S.B. 1721); Stats. 2003, Ch. 793 (S.B. 619); Stats. 2004, Ch. 724 (A.B. 2348); Stats. 2005, Ch. 601 (S.B. 575); Stats. 2006, c. 888 (A.B. 2511); Stats. 2007, c. 633 (S.B. 2); Stats. 2010, c. 610 (A.B. 2762); Stats. 2015, c. 349 (A.B. 1516); Stats. 2016, Ch. 420 (A.B. 2584); Stats. 2017, Ch. 368 (S.B. 167); Stats. 2017, Ch. 373 (A.B. 678); Stats. 2017, Ch. 378 (A.B. 1515); Stats. 2018, Ch. 92 (S.B. 1289); Stats. 2018, Ch. 243 (A.B. 3194).

[5] *See, e.g.*, Letter from League of California Cities to Assembly Member John Dutra re Assembly Bill 919 (Stats. 1999, Ch. 966 (Dutra), dated May 3, 1999, opposing AB 919 because it "so restricts local flexibility that it would be virtually impossible to deny any housing project."

[6] *See, e.g.*, California Business, Consumer Services and Housing Agency, Enrolled Bill Report re Assembly Bill 3194 (Stats. 2018, Ch. 243) (Daly), dated July 5, 2018, explaining that:

> "[T]here is a growing concern among housing proponents that local agencies might seek to exploit the HAA's health and safety exemption to reject additional proposed housing developments . . . Some examples of health and safety examples [sic] are classifying regularly occurring scenarios such as increased traffic, increased school class sizes, or decreased parks in a neighborhood as 'unmitigable' health and safety concerns."

2. The HAA Requires Projects to Comply With CEQA, but the HAA is Principally Concerned with the Environmental Consequences of Project *Disapprovals* and the Overall *Shortage* of Housing in California.

The HAA makes clear that housing development projects approved by lead agencies are required to comply with CEQA:

> "Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act . . . ."

Importantly, however, the HAA says nothing else about CEQA or about the environmental consequences of *approving* housing development projects. Moreover, although under 2018 amendments to CEQA lead agencies *may* now study "specific economic, legal, social, technological, or other benefits" of a project as well as the "negative impacts" of denying a project (§ 21082.4), CEQA's statutory and regulatory mandate applies only to project approvals. § 21080(b)(5); § 15061(b)(4).

In great contrast, the HAA makes clear that the *lack of housing* as well as the *disapproval* of particular housing development projects are the legislature's principal environmental concerns. The legislature has found, for example, that:

> "The *lack of housing*, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California." § 65589.5(a)(1)(A) (Emphasis added).

> "Many local governments do not give adequate attention to the economic, environmental, and social costs of *decisions that result in disapproval of housing development projects*, reduction in density of housing projects, and excessive standards for housing development projects." § 65589.5(a)(1)(D) (Emphasis added).

> "California has a housing supply and affordability crisis of historic proportions. *The consequences of failing to effectively and aggressively confront this crisis* are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." § 65589.5(a)(2)(A) (Emphasis added).

> "An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's *cumulative housing shortfall* therefore has not only national but international environmental

> consequences."
> § 65589.5(a)(2)(I) (Emphasis added).
>
> "It is the policy of the state that a local government *not reject or make infeasible housing development projects*, including emergency shelters, that contribute to meeting the need determined pursuant to this article without a thorough analysis of the economic, social, and environmental effects of the action and without complying with subdivision (d)."
> § 65589.5(b) (Emphasis added).

It is thus patently clear the legislature understands that the state's housing *shortage* and local governments' *disapprovals* of housing development projects have their own substantial negative environmental effects. And in contrast to CEQA, which is focused on the environmental effects of project approvals, **the HAA expresses the statewide policy that any local government that *disapproves* a housing development project or makes a housing development project infeasible must nevertheless thoroughly analyze the environmental effects of such disapproval even if the agency can validly make the findings in the HAA to lawfully disapprove a project**.

3. The HAA Establishes the *Only* Grounds Upon Which the Project Could Possibly be Lawfully Disapproved.

The HAA establishes the only basis upon which a local government such as the City may lawfully disapprove a housing development project or condition a housing development project's approval in a manner that renders the project infeasible for development for the use of very low-, low-, or moderate-income households, including through the use of design review standards. *See, e.g*., § 65589.5(d); *see also North Pacifica, LLC v. City of Pacifica*, *supra*, 234 F.Supp.2d at 1059-60. In order to lawfully do so, the City must make written findings, based upon a preponderance of the evidence in the record, as to one of five prescribed circumstances. *See, e.g.,* §§ 65589.5(d)(1)-(5).

In particular, the City cannot disapprove a housing development project or condition approval in a manner that renders the project infeasible unless it finds, based upon a preponderance of the evidence in the record, that the project, as proposed:

> "would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households . . . ."
> § 65589(d)(2).

The HAA also specifies that "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." *Id*.

Thus, to lawfully disapprove the Project, the City would have to be able to identify a *written document*[7] that existed on the date the application was deemed complete—here, on July 5, 2011—that contains objective, identified public health or safety standards, policies, or conditions.[8] And even if the City were to prove by a preponderance of the evidence that such a document exists, then the City would also have to prove, by a preponderance of the evidence, that the Project would have a "significant, quantifiable, direct, *and* unavoidable" impact in order to lawfully disapprove the Project. But the City cannot not prove, based on a preponderance of the evidence, that the Project would have impacts with all four of those qualities—(1) significant, (2) quantifiable, (3) direct, and (4) unavoidable—based on a qualifying written document within the meaning of the HAA, then it cannot lawfully disapprove the Project.[9] *See, e.g.*, *Hoffman Street, LLC v. City of West Hollywood*, 179 Cal.App.4th 754, 771-72 (2009) (holding that the city failed to make the findings required to adopt a valid moratorium ordinance for failing (1) to identify "a specific, adverse impact upon the public health or safety" and (2) to identify any "written public health or safety standards, policies, or conditions").

Despite the incredible eight-year period since the application was deemed complete and the extraordinary political pressure the Project's NIMBY opponents have consistently forced on the City from moment one through extreme efforts to convince the City to deny the Project for every reason they can conjure, we note that the City has never identified the existence of any such "objective, written standard, policy, or condition" that was in existence when the Project application was deemed complete or even taken the position that such a written standard, policy, or condition might exist. Indeed, following the City Council's certification of the EIR, the City approached O'Brien to consider what ultimately became the 44-45 single-family home Project alternative, with substantial community amenities.

The City presumably did so because it understands the applicability of the HAA to the Project and the significant downside risk of unlawfully disapproving the Project in light of the HAA. That the City should or does understand the importance of the HAA and the downside risk of disapproving the Project is reflected in the fact that it unanimously approved and subsequently ratified and extended the Terraces Project Alternative Process Agreement ("**Process Agreement**") seven additional times. And although

[7] *See* California Business, Transportation & Housing Agency, Enrolled Bill Report re Assembly Bill 919 (Stats. 1999, Ch. 966) (Dutra), dated August 23, 1999, explaining that:

> "This change in the law would have the effect of requiring local governments to provide clearer and more specific documentation of impacts that affordable housing development projects will cause before denying the project and would reduce the number of denials."

[8] It appears that the legislature's intention is that any such objective, identified written public health or safety standards, policies, or conditions—if they exist—would be local. *See, e.g.*, August 30, 1999 letter from Assemblymember John A. Dutra to former Governor Gray Davis re AB 919, sponsored by the California Building Industry Association ("**CBIA**"), tightening the definition of "public health or safety" to reduce loopholes, and September 7, 1999 letter from the CBIA to Governor Davis explaining that a "specific, adverse impact" must "be 'direct and quantifiable' and based on 'objective and identified' local laws 'as they existed on the date the application was deemed complete."

[9] In addition, the HAA precludes a project's inconsistency with the zoning ordinance or general plan land use designation from being considered a specific, adverse impact upon the public health or safety. § 65589.5(d)(2).

O'Brien detrimentally relied on the Process Agreement in pursuing the Project alternative until it was defeated via Measure L after "a change in law" following the Court of Appeal's decision in *City of Morgan Hill v. Bushey* (*See City of Morgan Hill v. Bushey*, 5 Cal.5th 1068, 1090 (2018) ("The Court of Appeal's decision here constituted a change in law that placed, for the first time, the City on notice that it needed to contest the availability of alternative zoning designations."), the City has never identified or suggested that is has or can identify any "objective, written standard, policy, or condition" that was in existence when the Project application was deemed complete. As set forth in the attached Public Records Act request (*see* Attachment 1), we hereby request that the City promptly produce any such public record, as of or pre-dating July 5, 2011, that it believes constitutes an "objective, identified written public health or safety standard, policy, or condition."

Regardless of any document the City may somehow belatedly attempt to identify that might have any relevance under the HAA, we note that of the thirteen significant and unavoidable environmental effects identified in the EIR in 2013, eight of those effects relate to aesthetics and visual resources, biological resources, and land use and planning issues that on their face have nothing to do with health or safety in any sense of the term. Of the other five effects—relating to air quality and traffic and transportation—to the extent they relate to health or safety at all, they are not the type of health or safety standards the legislature considers to be within the ambit of the HAA even if the City were to finally find some document in City Hall that existed prior to July 5, 2011 that the City can prove constitutes objective, identified written public health or safety standards, policies, or conditions.

With respect to the Project's significant and unavoidable air quality and traffic impacts, according to the EIR, we offer the following initial thoughts:

AQ-2 and AQ-5 are concerned with certain criteria pollutant emissions that can feasibly be mitigated in various ways, including more efficient construction equipment with substantially improved emission factors. Through the Addendum, MM AQ-2a would be revised to reflect minor technical changes and additions that result in more effective mitigation and further reduce impacts to air quality when compared to the previously adopted MM AQ-2a. These minor revisions do not themselves involve new significant effects and do not substantially increase the severity of previously analyzed significant effects. To the extent this impact could possibly be concerned with health or safety, much less health or safety within the meaning of the HAA, it arises frequently throughout the state and it can be feasibly mitigated.

TRAF-1 is concerned with the level of service ("**LOS**"), which is a qualitative description of intersection operations that is reported using an A through F letter rating system to describe travel delay and congestion. As clearly stated in The Highway Capacity Manual published by the Transportation Research Board, LOS is a *qualitative description* of traffic flow from a driver's perspective, based on factors such as speed, travel time, delay, and freedom to maneuver. LOS A indicates free flow conditions with little or no delay, and LOS F indicates jammed conditions with excessive delays and

long back-ups. This impact arises frequently throughout the state and has nothing to do with health or safety, much less health or safety within the meaning of the HAA.

TRAF-11 is concerned with storage lane capacity and the EIR alleges that impact cannot be feasibly mitigated. The Project's site plan has been slightly revised, however, in various environmentally-beneficial ways, including by prohibiting left turns into and out of the Project site from Pleasant Hill Road such that there would be no left-turn queueing lengths on northbound Pleasant Hill Road at the Project driveways. As such, contrary to the 2013 FEIR, to the extent this could possibly be concerned with health or safety, much less health or safety within the meaning of the HAA, this condition does not exist. In addition, because of this refinement, the left-turn lane storage at northbound Pleasant Hill Road at Deer Hill Road could be extended and would fully accommodate the left-turn lane queues at this intersection.

TRAF-13 is concerned with the Delay Index, which is calculated by measuring the time it takes to travel a segment of road during peak period congested conditions, and comparing it to the time it takes to travel the same segment during uncongested, free flow conditions. This impact arises frequently throughout the state and has nothing to do with health or safety, much less health or safety within the meaning of the HAA.

4. There is Nothing in CEQA That Would Allow the City to Disapprove the Project.

In contrast to the legislature's intentions in the HAA: (1) to facilitate the approval of housing (§§ 65589.5(a)(1)(A)-(D) and (a)(2)(A)-(L)); and (2) that the conditions that would have a specific, adverse impact upon the public health and safety "arise infrequently" (§ 65589.5(a)(3)), CEQA was enacted to advance four entirely different purposes:

1. inform the government and public about a proposed activity's potential environmental impacts;

2. identify ways to reduce, or avoid, environmental damage;

3. prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and

4. disclose to the public the rationale for governmental approval of a project that may significantly impact the environment.
§ 15002(a).

To further these goals, CEQA requires that public agencies follow a three-step process when planning an activity that could fall within its scope. § 15002(k). First, the agency must determine whether a proposed activity is a "project," i.e., an activity that is undertaken, supported, or approved by a public agency and that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." § 21065.

Second, if the proposed activity is a project, the agency must next decide whether the project is exempt from the CEQA review process under either a statutory exemption (§§ 21080 and 21084(a); §§ 15260-15285) or a categorical exemption set forth in the CEQA Guidelines (§ 21084(a); §§ 15300-15333). If the agency determines the project is not exempt, it must then determine whether the project may have a significant environmental effect. And where the project will not have such an effect, the agency "must 'adopt a negative declaration to that effect.' " § 21080(c); § 15070.

Third, if the agency finds the project "may have a significant effect on the environment," it must prepare an EIR before approving the project. §§ 21100(a); 21151(a); 21080(d); 21082.2(d). An EIR provides public officials and the general public with details about a proposed project's consequences. An EIR also lists the ways to potentially minimize any significant environmental effects and presents alternatives to the project. § 21061; § 21002.1(a).

Importantly, however, CEQA does not necessarily call for the disapproval of a project having a significant environmental impact, nor does it require selection of the alternative "most protective of the environmental status quo." *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal.App.4th 656, 695 (2002). Instead, when "economic, social, or other conditions" make alternatives and mitigation measures "infeasible," a project may be approved *despite its significant environmental effects* if the lead agency adopts a statement of overriding considerations and finds the benefits of the project outweigh the potential environmental damage. §§ 21002, 21002.1(c); § 15093. Whether a mitigation measure or alternative is feasible "involves a balancing of various 'economic, environmental, social, and technological factors.' " § 21061.1. As defined in the CEQA Guidelines, "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." § 15364.

5. The HAA and CEQA Must be Harmonized.

California has an extensive body of case law explaining that the language of statutes and regulations much be construed in context and harmonized "both internally and with each other, to the extent possible." *See, e,g*., *Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329, 1348-49 (2011) (harmonizing the Density Bonus Law and CEQA and holding that waived zoning standards are not "applicable" for purposes of CEQA's infill exemption (§ 15332(a)), which only requires consistency with "applicable" general plan designations and policies and applicable zoning designations and regulations). "Our fundamental task in construing" any legislative enactment is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.' [Citation]. We begin as always with the statute's actual words, the 'most reliable indicator' of legislative intent, 'assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the

legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy.' " [Citation]. *See. e.g*., *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC*, 61 Cal.4th 830, 837-38 (2015).

The legislature's words and intent with respect to the HAA and CEQA are clear. Indeed, there is nothing in the extensive legislative history of the HAA, which is the later-enacted and more specific statute,[10] to indicate that the legislature intended in any way to equate "public health or safety" under the HAA with "significant effects on the environment" under CEQA or for CEQA to serve as an additional basis to lawfully disapprove a housing development project.[11] *See San Francisco Taxpayers Assn. v. Board of Supervisors*, 2 Cal.4th 571, 577 (1992) (holding that a more specific statute serves as an exception to a general one). In fact, all evidence is to the contrary,[12] including the fact that the HAA has been extensively amended repeatedly, as recently as 2018,[13] to strengthen the law and close all identified loopholes. "Just as amendments to existing legislation are indicative of legislative intent to broaden or restrict the scope of a statute [citation], so too is the evolution of proposed legislation from its introduction to its final form. [citation]. *See Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal.App.5th 927, 942 (2016) (holding that "the Coastal Act takes precedence over statutes awarding density and height increase bonuses for proposed residential developments that include affordable housing units").[14]

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[10] Added by Stats.1982, Ch. 1438.

[11] Added by Stats.1970, Ch. 1433.

[12] In notable contrast, the Density Bonus Law contained in Government Code 65915 allows a local agency to refuse to grant the concession or incentive requested by an applicant for a density bonus if the agency can prove that the concession or incentive "has a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health, safety, *or the physical environment*, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact." § 65915(d)(1)(3) (Emphasis added). While we need not delve into the meaning of the Density Bonus Law to prove our point, the legislature's decision to reference the physical environment in the Density Bonus Law, while citing specifically to the HAA's health or safety exception, speaks volumes. "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided." *See, e.g*., *People v. Woodhead*, 43 Cal. 3d 1003, 1010 (1987). CEQA may be relevant in a local agency's decision to refuse to grant a concession or incentive requested by an applicant for a density bonus, but CEQA's role in an agency's decision to disapprove a housing development project under the HAA is extremely limited at best given the clear statutory language in sections 65589.5(d)(2) and (j) providing the only bases for lawful denial of a project and the legislature's intent that the conditions that would have a specific, adverse impact upon the public health and safety "arise infrequently."

[13] *See* Senate Bill 3194 (Stats. 2018, Ch. 243) (Daly), providing the legislature's intent that the conditions that would have a specific, adverse impact upon the public health and safety "arise infrequently" (§ 65589.5(a)(3), and Senate Bill 1289 (Maintenance of the codes) (Stats. 2018, Ch. 92), deleting the word "should" from section 65589.5(a)(2)(L).

[14] *Kalnel Gardens* dismissed the developer's challenge to the Los Angeles' decision to deny his appeal and adopt Coastal Commission findings that his 15-unit housing project in Venice did not conform to the Coastal Act, because the developer failed to seek appellate review by way of a writ petition as required by the HAA. *Kalnel Gardens'* analysis of the tensions between various state housing laws and the Coastal Act is not at all analagous to the "hand in glove" interaction of the HAA and CEQA, which can and must be harmonized for the reasons described in this letter, for various reasons, including that the Coastal Act contains several provisions that subordinate housing development to the Coastal Act that do not exist in CEQA. *See, e.g*., Public Resources Code § 30604(f) (requested residential densities may be denied if the local agency issuing a coastal development permit finds that the project "cannot feasibly be accommodated on the site in a manner that is in conformity with" the Coastal Act).

As a general rule, when two statutes can be reconciled, they must be construed in reference to each other, so as to "harmonize the two in such a way that no part of either becomes surplusage." *Royalty Carpet Mills, Inc. v. City of Irvine*, 125 Cal.App.4th 1110, 1118 (2005). Put another way, if two statutes dealing with the same subject can reasonably be harmonized, then "concurrent effect" must be given to both even though one is specific and the other general. *Garcia v. McCutchen*, 16 Cal. 4th 469, 478 (1997). "In order that legislative intent be given effect, the statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part." *California State Restaurant Assoc. v. Witlow*, 58 Cal.App.3d 340, 347 (1976). "One ferrets out the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated and vindicated, the social history which attends it, the effect of the particular language on the entire statutory scheme." *Santa Barbara County Taxpayers Assoc. v. County of Santa Barbara*, 194 Cal.App.3d 674, 680 (1987).

Here, there is no conflict between the two statutory schemes because the statutes do not have identical mandates addressing the same subject, and to the extent the statutes overlap with respect to the development of housing development projects the overlapping provisions can be harmonized. As discussed above, the HAA is concerned with "specific, adverse impacts upon the public health or safety." § 65589.5(d)(2). And as defined in subsection (d)(2), "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." In addition, the HAA is required to "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)) in a context where the express legislative intent is "that the conditions that would have a specific, adverse impact upon the public health and safety "arise infrequently." § 65589.5(a)(3). And as noted above, the HAA is particularly concerned with the environmental effects of the *lack of housing* as well as the *disapproval* of particular housing development projects (§§ 65598.5(a)(1)(A), (a)(1)(D), (a)(2)(A), (a)(2)(I), and (b)), which effects must be studied and disclosed even in the case of the rare project that can lawfully be disapproved under subsections (d) and (j) the HAA.

CEQA, in contrast, is concerned with "significant effects on the environment." § 21068. As defined in section 21068, "significant effect on the environment" means "a substantial, or potentially substantial, adverse change in the environment." In turn, "environment" means "the physical conditions which [sic] exist within the area which [sic] will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." § 21060.5. While CEQA's general policy is "that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which [sic] would substantially lessen the significant environmental effects of such projects" (§ 21002), projects may be approved despite one or more significant environmental effects if

"specific economic, social, or other conditions" make alternatives or mitigation measures infeasible. *Id*. In addition, CEQA expressly seeks to balance environmental protection with providing a "decent home" for every Californian. § 21000(g); § 21000(d).

The HAA's statutory scheme directly accommodates the concerns underlying CEQA by requiring "housing development projects" protected by the HAA to nevertheless comply with CEQA and its implementing guidelines, the purpose of which is to provide public officials and the general public with details about a proposed project's environmental consequences. An EIR, in particular, also lists the ways to potentially minimize any significant environmental effects, and presents alternatives to the project. *See, e.g.,* §§ 21002.1(a) and 21061. By making this information available to decisionmakers and the public at a crucial moment when the merits of a project and its alternatives are under discussion, an EIR advances not only the goal of environmental protection but of informed self-government. *In re Bay–Delta*, 43 Cal.4th 1143, 1162 (2008).

Again, however, CEQA does not necessarily call for disapproval of a project having a significant environmental impact, nor does it require selection of the alternative "most protective of the environmental status quo." *See, e.g*., *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal.App.4th 656, 695 (2002). Instead, when "economic, social, or other conditions" make alternatives and mitigation measures "infeasible," a project may be approved despite its significant environmental effects if the lead agency adopts a statement of overriding considerations and finds the benefits of the project outweigh the potential environmental damage. §§ 21002, 21002.1(c); § 15093; *see City of Irvine v. County of Orange*, 221 Cal.App.4th 846, 855 (2013). Furthermore, as discussed above, CEQA does not grant the City any new powers independent of the powers granted by other laws and is instead expressly subject to limitations provided in other laws such as the HAA. § 21004; § 15040(a); *see also County of San Diego v. Grossmont-Cuyamaca Community College* District, *supra*, 141 Cal.App.4th 86, 102.

Although the analysis required to understand how the HAA and CEQA work together is admittedly somewhat complicated, the same is true in much modern land use law. That said, in light of the HAA's text, structure, and purpose, it is clear that "specific, adverse impacts *upon the public health or safety*" are, for the purposes of the HAA, distinct from CEQA's concerns regarding "significant effects *on the environment*." There is no evidence on the face of either statute or in the extensive legislative history of the HAA, which was have reviewed in detail, that the legislature intended CEQA to supersede any part of the HAA and to undermine the HAA's objective of "significantly increas[ing] the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects. *See* § 65589.5(a)(2)(K). In fact, all of the evidence is that the legislature intended the HAA and CEQA to work together, in tandem, analyzing and disclosing the environmental effects of housing development project approvals and project denials, but only allowing project denials under the specific and limited circumstances provided

in subsections (d) and (j) of the HAA. This construction gives full effect to and honors the policies and provisions of both laws. "Such an interpretation is strongly preferred." *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC*, *supra*, 61 Cal.4th at 841.

Moreover, a conclusion that CEQA prevails over the HAA if there are significant and unavoidable environmental effects, allowing the City to disapprove the Project by refusing to issue a statement of overriding considerations, would impliedly repeal sections 65589.5(d) and 65589.5(j), if not the entire HAA. There is a strong presumption against repeal by implication. *People v. Park*, 56 Cal.4th 782, 798 (2013). " 'Absent an express declaration of legislative intent, [the courts] will find an implied repeal "only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " *Merrill v. Navegar, Inc*., 26 Cal.4th 465, 487 (2001). "Courts have also noted that implied repeal should not be found unless 'the later provision gives undebatable evidence of an intent to supersede the earlier.' " *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist*., 49 Cal.3d 408, 420 (1989).

In *Tuolumne Jobs and Small Business Alliance v. Superior Court of Tuolumne County*, 59 Cal.4th 1029, 1043 (2014), addressing the role of CEQA in the context of citizen-sponsored ballot initiatives—and holding that "CEQA review is not required before direct adoption of an initiative, just as it is not required before voters adopt an initiative at an election"—the California Supreme Court relied on important principles of statutory interpretation that are applicable and helpful here:

- "Our primary task in interpreting a statute is to determine the legislature's intent, giving effect to the law's purpose." *In re Greg F*., 55 Cal.4th 393, 406 (2012).

- "We consider first the words of a statute, as the most reliable indicator of legislative intent." *Pineda v. Williams–Sonoma Stores, Inc*., 51 Cal.4th 524, 529 (2011).

- "Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. Interpretations that lead to absurd results or render words surplusage are to be avoided." *People v. Loeun*, 17 Cal.4th 1, 9 (1997).

- "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage." *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist*., 14 Cal.4th 627, 634 (1997), *see People v. Shabazz*, 38 Cal.4th 55, 67–69 (2006).

- "An interpretation that renders statutory language a nullity is obviously to be avoided." *Williams v. Superior Court*, 5 Cal.4th 337, 357 (1993).

- "The Legislature is presumed to be aware of all laws in existence when it passes or amends a statute." *Greg F.*, *supra*, 55 Cal.4th at p. 407.

As noted above, CEQA is intended to afford the most thorough possible protection to the environment (1) within the reasonable scope of its text and (2) subject to the limitations established in other laws such as the HAA. Subsections (d) and (j) of the HAA establish the only bases upon which local agencies may lawfully deny housing development projects, and neither subsection makes any mention of CEQA, nor do they make any mention of the environment. And subsection (e), requiring CEQA compliance, expressly does not "*relieve* the local agency from making one or more of the findings required pursuant to Section 21081" (emphasis added) in the event of a project with significant environmental effects.

Here, because subsections (d) and (j) of the HAA establish the only conditions upon which the City could validly disapprove the Project or condition the Project so as to render it infeasible (*North Pacifica, LLC v. City of Pacifica*, *supra*, 234 F.Supp.2d at 1059-60), it is legally infeasible to disapprove the Project even if it is ultimately determined to have significant and unavoidable environmental effects under CEQA. *See Sequoyah Hills Homeowners Association v. City of Oakland*, 23 Cal.App.4th 704 (1993). *Sequoyah Hills* is directly on point. In that case, local project opponents sued over Oakland's certification of an EIR and approval of a 45-unit housing development project pursuant to the HAA. Although the opponents sought to convince the city to reduce the project's density to address various alleged concerns, the city council expressly found that the HAA prevented it from requiring the developer to reduce the project's density. *Id* at. 712. In other words, the city council found that it would be *legally infeasible* to decrease the project's density. *Id*. at 715.

The Court of Appeal ultimately affirmed the trial court's denial of the opponents' challenge to the project, agreeing with the city and developer that the HAA "is not a legislative will- o'-the-wisp. Rather, it is based on a legislative finding that "The lack of affordable housing is a critical problem which threatens the economic, environmental, and social quality of life in California." *Id*. And the Court held that:

> "the only way appellant can avoid the impact of section 65589.5, subdivision (j)(1), is by establishing that the project, at the approved density, will have a "specific, adverse impact upon the public health or safety." This they cannot do. There is no evidence to support such a conclusion, and the city specifically found that no such impact would result from the project. We conclude that the city did not abuse its discretion when it found that any decreased density alternative would be legally infeasible and approved the mitigated alternative."

The facts here are virtually identical to those in *Sequoyah Hills* except that the Project is perhaps the most heavily-opposed housing development project in the entire Bay area if not all of California, and instead of it being processed in a city such as Oakland,

that demonstrably acts in accordance with its obligations under the state housing law,[15] it appears that Lafayette is desperate to avoid ever taking action on the Project's use permit despite the clear and controlling requirements of the HAA. But City cannot avoid dealing with the Project on the merits forever, and at the end of the day the City will be unable to lawfully disapprove the Project because it cannot make the HAA's stringent findings and it is legally infeasible to disapprove the Project based on CEQA.[16] Thus, even if the City insists on ensuring that the Addendum continues to reflect alleged significant and unavoidable environmental impacts (as a result of the heavily manipulated EIR and further manipulated Addendum the City belatedly decided to "take over" three months after properly committing to "peer review" FCS' expert work), a statement of overriding considerations will be required. *See, e.g.*, *Uphold Our Heritage v. Town of Woodside*, 147 Cal.App.4th 587, 602 (2007) (holding that "[a] statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have properly been found to be infeasible.").

The HAA itself articulates "specific overriding economic, legal, social, technological, or other benefits of the [Project] that outweigh the significant effects on the environment." Those benefits include the provision of much-needed housing for low-income and minority households, provision of housing to support employment growth, reducing the City's imbalance in jobs and housing, increasing mobility, and decreasing urban sprawl, excessive commuting, and air quality deterioration. *See* § 65589.5(a)(1)(C). And they also include all of the benefits described in the Statement of Overriding Considerations included in the detailed and complete Addendum FCS prepared that O'Brien filed with the City on December 18, 2018. In addition, as briefly discussed in our December 18 letter, given that only 700 of approximately 9,400 total jobs in Lafayette are filled by Lafayette residents,[17] approving the Project would be one of the most important actions the City could take to reduce the City's jobs and housing imbalance.

Moreover, the City has nothing to fear in finally approving this Project and much to gain. Given that the HAA has already been significantly amended based at least in part on what the legislature thinks of Lafayette's non-compliance with mandatory state housing law (*see* Attachment 2), finally approving the Project would be a more credible

[15] *See. e.g.,* Oakland At Home Update, A Progress Report on Implementing the Oakland Housing Cabinet's "17K/17K" Recommendations (March 2019) , *available at* https://static1.squarespace.com/static/55b90b8de4b060a0d84fcbd0/t/5c87f01ab208fc134b4677bb/1552412707131/Housing+Cabinet+3+year+update+report+2019+%283-12-19%29.pdf, documenting in detail Oakland's progress towards exceeding the city's goal of exceed its goal of protecting 17,000 households from displacement and building 17,000 new homes by 2024.

[16] We note that the Town of Windsor approved an HAA project, consisting of 360 condominium units on a 20.3-acre site, on June 26, 2019, after the developer appealed an unlawful planning commission denial based on various grounds, following a staff recommendation to uphold the appeal and approve the project. *See* Windsor Town Council Special Meeting, June 26, 2019, Agenda Item 9 .2 (Appeal of Planning Commission Denial of Windsor Mill Development Project), *available at* https://windsor-ca.granicus.com/MediaPlayer.php?view_id=2&clip_id=1028&meta_id=64274.

[17] According to an analysis prepared by the Labor Market Information Division of the State of California Employment Development Department and based on data from the Longitudinal Employer-Household Dynamics (LEHD) program of the Center for Economic Studies at the U.S. Census Bureau.

basis to lobby in Sacramento for retention of local control.[18] And if the City finally does approve this Project voluntarily, by complying with the HAA, O'Brien will indemnify the City in any litigation its opponents might file and successfully defend the City's action in any such wasteful challenge.

6. Should the City Ultimately Disapprove the Project, the Consequences to the City Could be Financially Devastating.

As a matter of law, for all of the reasons explained herein, the City can only lawfully disapprove the Project for the specific and limited reasons set forth in the HAA. In particular, the City can only validly disapprove the Project or condition the Project so as to render it infeasible if all of the following are true:

- The City proves by a preponderance of the evidence in the record that there was an "objective, identified written" public health or safety standard, policy, or condition that existed on the date the application was deemed complete on July 5, 2011.
  § 65589.5(d)(2) and § 65589.5(i).

- The City makes a written finding, based upon a preponderance of the evidence in the record, that the Project "as proposed would have a specific, adverse impact upon the public health or safety," meaning a significant, quantifiable, direct, *and* unavoidable impact based on the foregoing standards, policies, or conditions.
  § 65589.5(d)(2) and § 65589.5(i).

- The City overcomes the legislature's intent, based on a preponderance of the evidence in the record, that "the conditions that would have a specific, adverse impact upon the public health and safety . . . arise infrequently."
  § 65589.5(a)(3).

- The City "thoroughly analyze" the economic, social, and environmental effects if it disapproves the Project or conditions the Project so as to render it infeasible.
  § 65589.5(b).

Unless the City can thread that tiny needle, however, it cannot lawfully disapprove the Project or condition the Project so as to make it infeasible. And for the reasons we have explained in this and other communications—written and oral—we are confident that the City cannot meet the heavy burdens established in the HAA. Nevertheless, should the City ultimately succumb to the pressures of the Project's NIMBY opposition by taking either of those actions notwithstanding the law and the enormous and

[18] We presume the City is aware that several Important bills deep in the legislative process would make additional strengthening amendments to the HAA. For example, Senate Bill 592 (Wiener) would, among other things, authorize project applicants to seek compensatory damages for a violation of the HAA.

mounting downside risk of unlawfully disapproving the Project, the consequences to the City could be financially devastating.

As we explained to the City in our December 18 letter, under the significantly strengthened HAA a broad range of plaintiffs can sue to enforce the law, including our clients and third party housing groups (§ 65589.5(k)(1)(A)), and the City would bear the burden of proof in any challenge to show that its decision is consistent with the HAA's stringent findings and that the findings are supported by a preponderance of the evidence in the record. § 65589.5(i). In the event the Project is disapproved in violation of the HAA, "the court shall issue an order or judgment compelling compliance with [the HAA] within 60 days, including, but not limited to, an order that the local agency take action on the housing development project . . . . [Alternatively, the] court may issue an order or judgment directing the local agency to approve the housing development project . . . if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development . . . in violation of [the HAA]." § 65589.5(k)(1)(A).

In addition, the amended and strengthened HAA makes attorney's fees and costs of suit presumptively available to prevailing plaintiffs, requires a minimum fine of $10,000 per housing unit for jurisdictions that fail to comply with the HAA within 60 days of a trial court finding that a city disapproved a "housing development project" without making the required findings supported by a preponderance of the evidence, and requires fines to be multiplied by five times if a court concludes a local jurisdiction acted in bad faith when rejecting a "housing development project." §§ 65589.5(k)(1) and (l). Moreover, in litigation brought to enforce the HAA, the local agency must prepare and certify the administrative record, at the agency's expense, within 30 days after the petition is served. § 65589.5(m).[19]

Because the Project is a "housing development project" under the HAA and the legislature long ago shifted the burden of proof to cities when they deny such projects, the likely result of a denial here would include a court order to approve the Project but at the substantial added cost of preparation of an enormous administrative record,[20] attorneys' fees, defense costs, and, potentially, severe monetary damages. These costs to the City could be overwhelming, and the courts have consistently shown they are unafraid of such outcomes.

As we also explained in our December 18 letter, a 2010 appellate decision relating to an alleged breach of a development agreement resulted in an award of more than $32 million against the Town of Mammoth Lakes, which was also required to pay the

[19] Given the City's legislative priority of retaining local control in the face of the legislature's and the governor's desire to actually solve the housing crisis, disapproving the Project or conditioning the Project so as to render it infeasible would also likely impair any credibility the City has in its lobbying efforts to avoid or water down current and future bills seeking to affect local control over land use and housing.

[20] The content of administrative records in CEQA proceedings is governed by Public Resources Code section 21167.6(e). The courts have observed that this section "contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development." *See, e.g., County of Orange v. Superior Court*, 113 Cal.App.4th 1, 8, (2003).

developer $2.4 million in attorneys' fees plus the city's own legal defense costs. *See Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal.App.4th 435 (2010).

Similarly, in a 167-page opinion, a federal district court in an inverse condemnation action ordered Half Moon Bay to pay damages of almost $37 million, along with attorney's fees, costs, and interest to the developer of a proposed 83-unit subdivision. *See Yamagiwa v. City of Half Moon Bay*, 523 F.Supp.2d 10.36 (N.D. Cal. 2007).

While these cases had nothing to do with the HAA and indeed dealt with laws far less favorable to developers, they show the liability to which cities can be exposed for making poor decisions in the land use arena and that courts are willing to award substantial damages against malfeasant public agencies.

Finally, we again remind the City that its legal exposure is substantial even in litigation where the law is far more favorable to the City than it is under the HAA, as in a recent trial court decision over the City's approval of a backyard cabana project in which Lafayette residents alleged that the City held improper closed session meetings and violated the California Constitution. On December 6, 2018, in *Fowler v. City of Lafayette*, (Case No. MSN16-2322), the Contra Costa Superior Court ruled in favor of the City, finding that the Council's closed sessions were lawful, that the City Council's decision was based on a fair, thorough process, and that there was no evidence anyone at the City was biased.

Despite prevailing in that small one-day trial, however, the trivial litigation cost City taxpayers more than $680,000. And now that the petitioners in that case have filed a likely doomed appeal to the First District Court of Appeal (Case No. A156525), the City's legal fees are now a staggering $755,000. While we anticipate that the appellate court will affirm the trial court decision in all respects, given the weak allegations in the underlying petition for writ of mandate, we understand that the City Council expects the City will ultimately spend more than $1 million.[21] The City Council and the City's taxpayers are justified in their frustration at such an extraordinary and avoidable waste of public funds to defend a simple and straightforward case the City is virtually certain to win.

The City's taxpayers would ultimately be far more frustrated if the City unlawfully disapproves the Project. While the Project is not large except perhaps to its NIMBY opponents, and certainly not large in the context of the HAA in light of the legislature's efforts to meaningfully increase the supply of housing (§ 65589.5(a)(2)(L)), its declaration that the conditions that would have a specific, adverse impact upon the public health and safety "arise infrequently," (§ 65589.5(a)(3)), and its finding that "the lack of housing . . . is a critical statewide problem," (§ 65589.5(g)), the administrative record is voluminous, complex, and full of evidence regarding the City's arbitrary and

[21] *See* Minutes of May 28, 2019 Lafayette City Council Regular Meeting, *available at* http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_2ce64f6e0e31273e58ce3efaf953533f.pdf&view=1.

unjustified recalcitrance in contravention of the federal and state constitutions, the HAA, and CEQA.

Moreover, the law is unambiguously and overwhelmingly favorable to our clients rather than to the City. Here, if the City ultimately violates our clients' rights by improperly disapproving the Project or conditioning the Project so as to render it infeasible, the City would be responsible for our client's attorney fees and face a court could order to comply with the HAA or even to approve the Project. § 65589.5(k)(1)(A). If the City failed to comply with a court order to comply with the HAA, the City would be fined $3.15 million. § 65589.5(k)(1)(B)(i). Moreover, if the court were to find that the City acted in bad faith (which is defined to include, but not be limited to, action that is frivolous or entirely without merit (§ 65589.5(l)), when it disapproved or conditionally approved the Project in violation of the HAA, the City could be fined $15.75 million. § 65589.5(l). In addition, in any such action to enforce our clients' rights under the HAA, the City would be required to prepare and certify the voluminous record of proceedings no later than 30 days after the petition is served, at the City's expense. § 65589.5(m).

7. Conclusion.

Although we understand that City staff may somehow believe that this Project should be processed "like any other project," it is unlike any other project factually and legally, and the City has an arbitrary and capricious pattern and practice of unlawfully discriminating against the Project by treating it more adversely than any other project. As the City has repeatedly acknowledged for years, however, the Project is protected by the HAA. For that important reason, the Project must be processed and acted upon pursuant to the HAA, which is supposed to pave the path forward for its approval. As a matter of law, for the reasons explained herein, there is nothing that was previously identified in the EIR; nothing in the complete and legally-defensible Addendum FirstCarbon Solutions prepared; nothing in the peer review of the Addendum prepared by Impact Sciences; nor anything that could be identified in the extensive, time-consuming, and costly ongoing environmental analysis the City is presently engaged in that can serve as a lawful basis to disapprove the Project or to condition the Project's approval in a manner that renders the Project infeasible. We thus strongly encourage the City to promptly schedule the Project's use permit hearing before the Planning Commission, and to approve the Project, without further needless delay.

To conclude, we reiterate our client's sincere desire to work cooperatively with the City to process the remaining Project approvals in a way that is consistent with the law as efficiently as possible. This letter is sent entirely with those ends in mind, and in a good faith effort to explain our position and how it is consistent not only with the law and the City's obligations thereunder, but in the best interest of both the City and our client, which has demonstrated extraordinary patience and cooperation for years—at great expense. That said, we can only respond to the City's concerns if the City shares them with us. Accordingly, if the City disagrees with any part of the analysis provided in this letter, please let us know as soon as possible so that we can evaluate the City's position and respond appropriately.

O'Brien reserves all its rights and remedies against the City under all applicable laws.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter, AICP

BWW:kli

Attachment 1: Public Records Act Request, dated July 9, 2019.
Attachment 2: Letter from Senator Nancy Skinner to Governor Edmund G. Brown, Jr. re SB 167, dated September 28, 2017.

cc: Honorable Mayor Mike Anderson
City Councilmember Steve Bliss
City Councilmember Cameron Burks
City Councilmember Teresa Gerringer
Planning Commission
Niroop Srivatsa, Interim City Manager
Greg Wolff, Acting Planning Director
Joanne Robbins, City Clerk
Michele Rodriguez, Adjunct Planner
Dennis O'Brien
Caryn Kali
Dave Baker
Arthur F. Coon, Esq.
Allan Moore, Esq.

Attachment 1

Attachment 1

Pursuant to the Public Records Act (Cal. Gov't Code section 6250 *et seq*.) and all applicable law, we hereby formally request that the City make available for inspection and copying the following public records that are within its possession, custody, or control: all "writings" (as defined in California Evidence Code § 250) that comprise, constitute, or relate to all of the following:

- Any document prepared, owned, used, retained, created, received, or exchanged by the City, on or prior to July 5, 2011, that pertains to objective, identified written public health or safety standards, policies, or conditions.[1]

"City" shall be broadly construed to include any council, board, commission, department, committee, official, officer, council member, commissioner, employee, agent, or representative of the City.

"Pertain(s)" and "pertaining," shall be broadly construed to include any writing that evidences, is about, relates to, constitutes, contains, supports, repudiates, ratifies, memorializes, explains, addresses, comments upon, criticizes, or describes the particular topic or described subject matter.

"Record" or "Records" shall be broadly construed to mean any kind of written matter, however produced or reproduced, of any kind of description, whether sent, received or neither, including originals, copies and drafts and both sides thereof, and including, but not limited to: papers, books, letters, electronic mail, photographs, objects, tangible things, correspondence, memoranda, notes, notations, work papers, minutes, recordings of telephone or other conversations, manuals, reports, studies, contracts, agreements, desk calendars, appointment books, computer printouts, data processing input and output, microfilms, all other records kept by electronic, photographic or mechanical means, and things similar to the foregoing however denominated.

This request reasonably describes identifiable public records or information to be produced from those public records. If the City contends it is unable to comply with this request because the City believes the request is not sufficiently focused, then pursuant to California Government Code section 6253.1(a), we request that the City: (1) assist us in identifying the records and information that are responsive to our request and/or to the purpose of our request; (2) describe the information technology and physical location in which the records exist; and (3) provide us with suggestions for overcoming any practical basis for denying access to the records or information we are seeking.

Under Government Code section 6253(b), we ask that the City make the records promptly available for inspection and copying.

We do not believe any provision of law exempts the records from disclosure. However, if the City determines that a portion of the records we have requested is exempt from disclosure, Government Code section 6253(a) requires segregation and deletion of those materials so that the remainder of the records may be promptly released.

[1] In the event the City produces any such document, O'Brien will subsequently request documents pertaining to any specific, adverse impacts of the Terraces of Lafayette apartment project (L03-11) prepared, owned, used, retained, created, received, or exchanged by the City on or after March 21, 2011.

Article I, § 3(b)(2) of the California Constitution requires a broad construction of any statute, court rule, or other authority intended to further the people's right of access and a narrow construction of any statute, court rule, or other authority if it limits the right of access. If the City determines that an express provision of law exempts from disclosure all or a portion of the records requested, Government Code section 6253(c) requires the City to promptly notify us of that determination and the reasons for it with 10 days from receipt of this request. In addition, Government Code section 6253(d) prohibits the use of the 10-day period or any other provision of the PRA to delay or obstruct the inspection or copying of public records.

For any responsive public record kept in electronic format, we request that an electronic copy of the document be produced in that format, pursuant to Government Code section 6253.9.

Please notify us by phone or email when any portion of the documents is ready, and we will arrange for its pick up by courier. Also, please notify us regarding the reasonable copying costs, and we will promptly send payment.

If documents are voluminous, then please indicate in your response the approximate volume of documents responsive to this request, and the location, dates, and times upon which inspection will be allowed. If you can provide documents in response to one or more of the above requests sooner than for others, please so indicate, and we will arrange for their pick up as such documents become available.

Please note that the City has an affirmative duty to: (1) assist us to identify responsive records; (2) describe the technology and location of the records; and (3) help us overcome any practical basis for denial of the request. *See* Government Code § 6253.1. If you have any questions or concerns, or need additional information to comply with this request, please contact the undersigned at your earliest convenience.

Thank you in advance for your anticipated prompt attention to this request.

Attachment 2

CAPITOL OFFICE
STATE CAPITOL
ROOM 2059
SACRAMENTO, CA 95814
TEL (916) 651-4009
FAX (916) 651-4909

DISTRICT OFFICE
1515 CLAY STREET
SUITE 2202
OAKLAND, CA 94612
TEL (510) 286-1333
FAX (510) 286-3885

SENATOR.SKINNER@SENATE.CA.GOV

California State Senate

SENATOR
NANCY SKINNER
MAJORITY WHIP
NINTH SENATORIAL DISTRICT

CHAIR
PUBLIC SAFETY
BUDGET & FISCAL REVIEW
SUBCOMMITTEE 5:
PUBLIC SAFETY & LABOR

COMMITTEES
ENERGY, UTILITIES & COMMUNICATIONS
ENVIRONMENTAL QUALITY
TRANSPORTATION & HOUSING

September 28, 2017

The Honorable Edmund G. Brown
Governor, State of California
State Capitol, 1st Floor
Sacramento, CA 95814

RE: SB 167 (Skinner) – Housing Accountability Act

Dear Governor Brown:

I respectfully request your signature on SB 167, legislation that strengthens California's Housing Accountability Act (HAA) so that the unreasonable denial of housing projects that meet all local laws and regulations can be lessened. SB 167 is one of the bills in the Legislature's housing package.

This bill, drafted with the help of housing developers and advocates of housing construction, responds to your office's call for streamlining housing permits and reducing local barriers.

In 1982, California passed the HAA to limit local governments from denying housing projects without justifiable cause. However, existing law does not have enough teeth to truly prevent local governments from engaging in policy decisions that perpetuate "Not in My Back Yard" politics. For example, in the court case *San Francisco Bay Area Renters Federation vs. City of Lafayette*, the City of Lafayette approved only 44 out of 315 units in a proposed affordable housing development. The proposed project met the city's zoning requirements, yet was on unsubstantiated grounds that it would negatively impact resident's health and safety. Because the City of Lafayette was only required to provide "substantial evidence" to support their denial of the project, the court held in favor of the City. SB 167 addresses this problem by increasing the burden of proof needed for project denial and creating a penalty for localities that unjustly deny projects.

SB 167 will strengthen the HAA so that local agencies cannot disapprove housing projects without sufficient evidence that the project adversely impacts the community. For these reasons, I respectfully ask for your signature on SB 167. Thank you for your consideration.

Sincerely,

Nancy Skinner

Senator Nancy Skinner
Senate District 9

ATTACHMENT 2