SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

40 MAIN STREET OFFICES, LLC, Petitioner, vs. CITY OF LOS ALTOS, et al., Respondents.	Case No. 19CV349845 (Lead case, consol. with Case No. 19CV350422) ORDER GRANTING CONSOLIDATED PETITIONS FOR WRIT OF MANDATE
CALIFORNIA RENTERS LEGAL ADVOCACY & EDUCATION FUND, et al., Petitioners, vs. CITY OF LOS ALTOS, et al., Respondents.	ORDER ON SUBMITTED MATTER

These consolidated petitions for writ of mandate came on for hearing before the Honorable Helen E. Williams on January 15, 2020, at 9:00 a.m. in Department 10 of the court. Daniel R. Golub and Genna Yarkin of Holland & Knight appeared for petitioner 40 Main Street Offices, LLC (Developer); Emily L. Brough of Zacks, Freedman & Patterson appeared for

petitioners California Renters Legal Advocacy & Education Fund, San Francisco Bay Area Renters Federation, Victoria Fierce, and Sonja Trauss (collectively, Renters); Arthur J. Friedman of Sheppard Mullin Richter & Hampton LLP appeared for respondents the City of Los Altos, the City of Los Altos City Council, and the City of Los Altos Community Development Department (collectively, the City). The matter having been argued and submitted after the filing of post-hearing supplemental briefing, no party having requested a statement of decision under Code of Civil Procedure section 632 and rule 3.1590 of the California Rules of Court in this hearing lasting less than eight hours, and the Court having carefully considered the pleadings, the papers filed by the parties, the matters of which the Court takes judicial notice, the record received into evidence, the arguments of counsel, and the applicable law, Court finds and orders as follows:

I. Statement of the Case

The lead case of these two consolidated actions is one for relief in mandate brought under Code of Civil Procedure sections 1085 and 1094.5 (first–third causes of action), as well as for declaratory relief (fourth cause of action). It is brought by Developer against the City. Developer has been trying to develop a mixed-use building in downtown Los Altos for many years, having previously submitted multiple proposals all subject to discretionary review by the City. Developer primarily alleges in its petition that the City unlawfully rejected its latest proposal submitted under new, streamlined procedures established by Senate Bill 35 (Govt. Code, § 65913.4, hereafter section 65913.4 or SB 35; further unspecified statutory references are to the Govt. Code), remedial legislation enacted to promote the construction of housing within California. Developer further alleges that in rejecting the proposal, the City also violated the state Density Bonus Law (§ 65915) and the Housing Accountability Act (§ 65589.5), the provisions of both of which may be invoked, as they were here, in a development application submitted under SB 35.

Renters separately filed their petition challenging the City's course of conduct with respect to Developers' proposed project (Case No. 19CV350422). They allege their own direct and beneficial interests having been harmed in the City's denial of Developer's application for streamlined approval. This separate action against the City, commenced one day before

Developer's action, has since been consolidated with Developer's action. Renters' petition in mandate is also brought under Code of Civil Procedure sections 1085 and 1094.5, and seeks relief in the first cause of action for the City's alleged violations of SB 35 and the Housing Accountability Act. The second cause of action is for declaratory relief. Thus, Developer's and Renters' claims for relief against the City essentially overlap.

A. Summary of Administrative Record

1. Developer Applies for Streamlined Review

On November 8, 2018, Developer applied for permission to construct a mixed-use building with office space on the ground floor and residential units on the floors above at 40 Main Street in downtown Los Altos. (AR000001–AR000126 [application].) On the application cover sheet—a City form entitled "City of Los Altos General Application"—Developer checked boxes indicating that the "type of review requested" was "Commercial/Multi-Family" and "Use Permit." (AR000004.) The City had no other application form cover sheet specific to a streamlined SB 35 application. In Developer's application, it stated that it sought and qualified for streamlined review of its proposed development under SB 35. (AR000006–AR000017.) Developer's application included a project summary, a discussion of and chart detailing the proposed development's compliance with objective standards, renderings, blueprints, proposed landscaping, a preliminary plan to manage construction, and a title report. (AR000006–AR000126.)

2. The City's Initial Response

On December 7, 2018, the City—acting through Community Development Director Joe Biggs—sent Developer correspondence in which it expressed its refusal to conduct either a further streamlined or standard, discretionary review. (AR000127–AR000149.) The correspondence reflects that the City appeared to treat Developer's single development application as two distinct "applications submitted on November 8, 2018"—one for streamlined review under SB 35 and one for standard, discretionary review—which perceived dual applications purportedly could not be concurrently processed. (AR000129, AR000127.) In this

regard, the City said, "this application results in two applications that have been submitted for this site. One or the other of the projects must be withdrawn." (AR000127.)

As for the City's direct response to the application for streamlined review—a letter that contained within its subject line the reference "SB 35 Determination" and which letter specifically referenced SB 35—the City stated that it had conducted a review, made a decision, and determined that the proposed development did not qualify for streamlined review under section 65913.4. The letter enumerated two reasons for the City's denial decision. First, "the project does not provide the percentage of affordable dwelling units required by the State regulations." (AR000127.) The City cited section 65913.4, subdivisions (a)(4)(A) and (B)(ii) and a document prepared by California's Department of Housing and Community Development (HCD). (AR000127.) The HCD report lists Los Altos as a municipality in which streamlining applications can be submitted for proposed developments with "≥ 50% affordability" due to the failure to meet the [Regional Housing Needs Allocation or Assessment (RHNA), per § 65580 et seq.] for low income households as compared to the "≥ 10% affordability" threshold for streamlining applicable to municipalities that missed their targets for both low *and* moderate income households. (AR000127, citing HCD Determination Summary (Jan. 31, 2018) <https://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf> [as of Mar. 2, 2020].) Second, the City cited section 65913.4, subdivision (a)(5)—the provision of SB 35 requiring consistency with objective zoning standards and objective design review standards[1]—and stated that the project lacked "the required number of off-street residential and visitor parking spaces"

[1] Under section 65913.4, subdivision (a)(5): " 'objective zoning standards' and 'objective design review standards' mean standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal. These standards may be embodied in alternative objective land use specifications adopted by a city or county, and may include, but are not limited to, housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances … ."

and "adequate access/egress to the proposed off-street parking." (AR000127.) The City did not identify what these parking standards were or where they could be located.

The letter concluded by saying, "If you elect to pursue *other* approval/permit avenues for the project that is the subject of this notice, the applications, fees, deposits, studies, and information contained in the attached Notice of Incomplete Application are required to continue an evaluation of the project." (AR000128, italics added.) The letter did not say that Developer's submitted SB 35 application was perceived to be incomplete, or suggest that the City's further review of Developer's SB 35 application was conditioned on receipt of additional specified materials or information. Rather, the letter denied that application for the reasons stated.

As for the purported discretionary application, the City declined to review it on the asserted basis that it was "incomplete." (AR000128.) The City's letter, titled "Notice of Incomplete Application" and which omitted SB 35 in the subject line, listed 24 items that Developer needed to submit before the City would treat the application as complete and consider it on its merits. (AR000129–AR000132.) For example, the City asserted that Developer had not submitted complete documentation to substantiate its density-bonus request. (AR000148.) The City indicated that the additional materials had to be provided within 180 days—by June 6, 2019—or the application would be deemed expired. (AR000129.)

3. Developer Responds

On January 10, 2019, Developer wrote to the City to point out perceived errors in the City's correspondence rejecting the application for streamlined review under SB 35. (AR000150–AR000166.) Developer argued that the City's stated reasons for its decision were facially inadequate and substantively incorrect. (AR000151.) Developer stated that because the City had not "validly" identified a conflict with applicable statutory objective standards and could no longer do so within the statutory SB 35 statutory timeframe, the project was deemed to comply and therefore qualified for streamlined review and permitting. (AR000151.)

In support, as for the City's first stated basis for denial, Developer explained that the City had improperly relied on an outdated HCD determination of the municipalities subject to streamlining. (AR000151.) Developer pointed out that while the City had relied on a January

2018 determination, HCD had updated its determination in June 2018. (AR000151.) The June 2018 determination said that the City's threshold for streamlining is the more inclusive, 10 percent threshold. (AR000151, AR000161.) On this basis, Developer asserted that the City had erroneously determined that it was only subject to the streamlining process for projects with 50 percent as compared to 10 percent affordability. (AR000151–AR000152.)

Next, as for the City's second stated reason for the denial—insufficient parking spaces and "adequate access/egress to the proposed off-street parking"—Developer asserted that the City had failed to identify the objective standards with which the project conflicted; relied in part on a subjective, discretionary standard; and was otherwise incorrect. (AR000152–AR000154.) Developer elaborated that no standard addressing ingress and egress from the parking area was identified in the City's decision and that the adequacy of ingress and egress was not an objective standard that could be evaluated in the course of streamlined review. (AR000154.) Developer also pointed out that section 65913.4, subdivision (d)(2) prohibited the City from requiring more than one parking space per unit of housing. (AR000153.) According to Developer, it had proposed more than adequate parking because it planned to develop 18 parking spaces for only 15 units of housing and was not required to develop additional parking for the offices due to the City's public parking district. (AR000153–AR000154; AR000166 [architect statement on parking compliance, including ADA].)

Developer also asserted that the City had not made the requisite findings for having rejected the project under section 65589.5, the Housing Accountability Act. (AR000155.) Then, Developer remarked that, based on the City's own representations in the incomplete notice, that notice was immaterial to the application for streamlined review and the points it contained solely concerned issues that might be addressed in a standard, discretionary review process. (AR000156–AR000157.) Developer concluded by asserting its expectation that any streamlined public oversight must be completed by February 6, 2019, in accordance with the section 65589.5 90-day deadline.

4. The City Stands Its Ground

On February 6, 2019, the City responded to Developer's letter. (AR000168–AR000172.) The City asserted that it had correctly determined that the project was inconsistent with the streamlining criteria while simultaneously asserting that the application for streamlined review did not have sufficient information to allow the City to fully evaluate the criteria in section 65913.4. (AR000168.) The City then stated that it "*finds and determines that the Project is not eligible for issuance of a streamlined ministerial permit.*" (AR000169.) The City agreed to consider any request that would "*enable a determination of the Project's SB 35 eligibility or otherwise process the Application if and when*" additional information was provided. (AR000169.)

Next, the City responded to some of the specific points raised by Developer. (AR000169.) The City conceded the error in its earlier, first-stated reason for having denied the streamlining application; it acknowledged that under the correct and operative determination from HCD, the affordability threshold for streamlining was 10 percent, not 50 percent. (AR000169.) As for the City's earlier second-stated reason for having rejected the streamlining application, the City turned to the notice of incomplete application instead of the denial letter. (AR000169.) The City concluded that notes 18 and 19 in that notice of incomplete application were sufficient to apprise Developer of the problem with its proposal and the inability of the City to evaluate the proposed parking.[2] (AR000169–AR000170.)

Finally, the City said that because the streamlining application was incomplete, the City was not required to comply with the Housing Accountability Act and also had properly rejected the application based on its inability to evaluate the project's eligibility for a density bonus. (AR000170.)

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[2] Notes 18 and 19 do not identify any objective standard or clear inconsistency with such a standard in any event. (AR000131.) Note 18 states that two parking spaces will be affected by the driveway. (AR000131.) Note 19 states that parking circulation is "inadequate" and questions where cars would wait to enter the underground parking garage. (AR000131.)

5. Developer States Intent to Pursue Legal Action

On February 19, 2019, Developer countered the City's response in a letter documenting the problems with and inconsistencies between the City's initial action on December 7, 2018, and how it had attempted to recharacterize that action in the February 6th letter. (AR000172–AR000182.) Developer recounted the history of its attempts to develop the project through the discretionary review process since 2013 and the purpose of section 65913.4, emphasizing the ways in which the statute was designed to remedy precisely the type of agency conduct at issue here. (AR000175–AR000176.) Developer also addressed the specific legal issues raised in the parties' preceding correspondence. (AR000177–AR000181.)

In concluding, Developer observed that the City appeared to be unwilling to follow the law or work with Developer on approving the SB 35 proposal, leaving it with no option other than legal action. (AR000181.) Developer said that it did not appear there was any available administrative remedy, such as an appeal, to be exhausted before commencing suit. (AR000181.) Nevertheless, Developer indicated that it had submitted a claim[3] to the City Clerk under the Government Claims Act (§ 900 et seq.) out of an abundance of caution and invited the City to advise if it concluded that some applicable administrative procedure, in fact, existed that Developer should pursue before initiating legal action. (AR000181.) Developer offered that it remained open to discussing alternatives to litigation but otherwise intended to file suit within 90 days of the City's February 6th letter. (AR000181.)

6. Developer Administratively Appeals

On February 21, 2019, the City informed Developer by email and through written delivery of the same that its SB 35 denial *was* subject to an administrative appeal. (AR001203–AR001206.) The City insisted an administrative appeal was required despite acknowledging that Los Altos Municipal Code section 1.12.020, entitled "No appeal from ministerial acts," provides that appeal procedures do not apply when an act or decision is ministerial. The City informed Developer that if it wished to "challenge the City's decision on this matter, an appeal must be

[3] Developer's claim appears in the record at AR001201–AR001202.

filed by no later than fifteen calendar (15) days from the date of the [February-6] letter, by the close of business 4:30 pm on THURSDAY FEBRUARY 21, 2019." (AR001205.) The City provided Developer with the mandatory application form for the appeal and stated that "[f]ailure to timely appeal will preclude you, or any interested party, from challenging the City's decision in court." (AR001205–AR001207.)

In other words, the City gave Developer less than eight hours' notice of its interpretation of the Los Altos Municipal Code and position that an administrative appeal was required.

That same day, Developer submitted its appeal form along with a statement of the grounds for its appeal and the record on which it was relying (including the correspondence summarized above).[4] (AR001208–AR001210.) In the weeks that followed, Developer frequently corresponded with the City in an effort to ascertain what the process for the appeal would be and when it would be heard. (AR001311–AR001328.)

On March 26, 2019, the City noticed the appeal for a public hearing before the City Council to be held on April 9, 2019.[5] (AR001216.) In correspondence from counsel for the City to Developer the week before the hearing, it was asserted that the appeal was required because the decision that the project was not eligible for streamlined review was not a ministerial act. (AR001306.) Counsel went on to assert that April 9th was the earliest available time that the

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[4] In Developer's cover letter for its appeal, it maintained that it did not believe there was an avenue for appeal of a ministerial decision but was submitting the appeal to avoid any dispute. (AR001210.)

[5] The City noticed this appeal for public hearing based on a staff report and recommendation from counsel. (AR001238–AR001252 [staff report]; AR001253–AR001257 [presentation from Best Best & Krieger LLP].) The staff report delves into new substantive issues on the SB 35 proposal, such as whether the project satisfies the two-thirds residential-use requirement, that were not raised in the City's December 7, 2018 denial letter. (AR001242; see also AR001260 [summarizing staff's reasons for denial that are purportedly the subject of the appeal].) This seems to be because the City was advised that in determining the appeal, it would conduct a de novo review of whether the project in fact complied with section 65913.4, instead of ascertaining whether the initial denial had been insufficient or invalid such that the application was deemed approved under SB 35. (AR001255.) Developer responded to these new points in correspondence sent in connection with the appeal. (AR001284–AR001300.)

appeal could be heard based on the City Council's schedule and existing obligations. (AR001308.) Counsel also maintained without explanation that the appeal was subject to a public hearing, but that Developer would be allowed to present its case as well. (AR001309.)

On April 9th, Developer presented its appeal to the City Council, which also heard public comment[6] on the matter (including comments from Renters to the effect that the project was deemed approved for streamlined permitting). (AR001231–AR001237; AR001928–AR002047 [hearing transcript].) On April 23, 2019, the City, acting through its City Council, denied the appeal and did so by resolution. (AR002056–AR002078 [City Council minutes, report, and resolution].)

B. Summary of Allegations and Proceedings

Renters and Developer (collectively, petitioners) commenced their respective actions on June 12 and 13, 2019. Their hybrid petitions for writ of mandate and complaints for declaratory relief essentially raise the same claims. They allege that in proceeding as described above in the summary of the administrative record, the City unlawfully denied Developer's proposal in violation of the streamlining statute (SB 35), the Housing Accountability Act (§ 65589.5), and the Density Bonus Law (§ 65915). Based on these allegations, petitioners seek writs of mandate under either Code of Civil Procedure section 1085 or section 1094.5, compelling the City to approve Developer's streamlined application. They also seek a judicial declaration of their entitlement to that approval under Code of Civil Procedure section 1060, along with injunctive relief.[7] The City separately answered both petitions.

On August 28, 2019, the Court consolidated the petitions for all purposes, and designated Developer's action as the lead case. The City then lodged the administrative record with the Court. And, on October 21, 2019, the City lodged a supplement. Petitioners filed a joint opening brief, accompanied by a request for judicial notice, on November 1, 2019. The City opposed the

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[6] Public comments can be located in the record along with other hearing materials. (AR001333–AR001351, AR001907–AR001922, AR001924–AR001926.)

[7] Although Renters and Developer organized the causes of action in their petitions differently, they seek the same types of relief on the same factual and legal bases.

petition on December 6, 2019, and presented the declaration of Jon Biggs, the City's Director of Community Development. Petitioners then filed a joint reply and request for judicial notice before the hearing scheduled for January 15, 2020. The hearing went forward as scheduled. Upon receipt of post-hearing supplemental briefing ordered by the Court, the matter was submitted.

II. Petitioners' Requests for Judicial Notice

Petitioners jointly request judicial notice of portions of the Los Altos Municipal Code (RJN Ex. K) as well as legislative history materials, namely digests, reports, floor analyses, and amendments to section 65913.4 (RJN Exs. A–J). With their reply, they seek judicial notice of correspondence from HCD in response to their request for assistance. (See Golub Decl., Ex. 1.) For the reasons that follow, petitioners' requests are granted.

A court may take judicial notice of municipal law. (Evid. Code, § 452, subd. (b); *The Kennedy Com. v. City of Huntington Beach* (2017) 16 Cal.App.5th 841, 852 (*Kennedy*).) Thus, the Court takes judicial notice of the Los Altos Municipal Code.

Next, a court may consider legislative history materials as an interpretative aid, but the means of consideration and weight ascribed to these kinds of materials vary. (Cf. *People v. Cruz* (1996) 13 Cal.4th 764, 773, fn. 5 (*Cruz*) with *Cummins, Inc. v. Super. Ct.* (2005) 36 Cal.4th 478, 492, fn. 11.) As for the text of enacted legislation (Assembly Bill 101 and Assembly Bill 1485), including a redline version showing section 65913.4 as amended and in force today, (RJN Exs. C, G–H), the Court takes judicial notice under Evidence Code section 452. While the California Supreme Court has relied on precedent to take judicial notice of other legislative history materials, such as committee reports and bill analyses, some dissenters have aptly observed that such materials do not clearly fall within any enumerated category of Evidence Code sections 451 and 452. (*Cruz, supra*, 13 Cal.4th at p. 794 (dis. opn. of Anderson, J.).) Accordingly, here, the legislative reports and analyses are not subject to judicial notice under the Evidence Code. Nevertheless, precedent allows the Court to consider these reports and analyses and to ascribe to them an appropriate weight in light of their authorship and function within the legislative process.

Finally, "[w]here the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).) "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Ibid.*) A formal opinion letter or informal correspondence expressing the position of the agency may be presented to a court for consideration under *Yamaha* by way of a request for judicial notice under Evidence Code section 452, subdivision (c). (See generally *Field v. Bowen* (2011) 199 Cal.App.4th 346, 370, fn. 5 [agency-prepared documents come within Evid. Code, 452, subd. (c); see, e.g., *Linda Vista Village San Diego H.O.A., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 186.) Consequently, the Court takes judicial notice of HCD's letter to petitioners.

III. Discussion

The Court must answer two central questions to resolve the petitions. First, did petitioners timely commence their respective actions? Second, do petitioners establish that they are entitled to relief on the merits? The answer to both questions is yes.[8]

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[8] As noted, both petitions are brought under Code of Civil Procedure sections 1085, traditional mandate, *and* 1094.5, administrative mandate, without specification of which form of mandate may apply to all or each of the discrete causes of action. Likewise, the City takes no position on this question. Each of these statutes, by its terms and as discussed in case law, typically applies in different, specified circumstances or settings. And each typically invokes judicial review through its own nuanced lens or standard. As SB 35 involves an agency's ministerial duty to approve a qualifying development proposal and no administrative or public hearing is contemplated, judicial review of an agency's decision to reject a project for streamlined review and permitting under SB 35 is more likely in traditional mandate under Code of Civil Procedure section 1085. But here, the City insisted that an administrative appeal to the City Council heard through the vehicle of a public hearing was required, which typically leads to judicial review in administrative mandate under Code of Civil Procedure section 1094.5. And the

A. The Action Is Not Time-Barred

The City's primary opposing argument is that petitioners failed to timely file and serve their respective petitions within the 90-day limitations period set forth in section 65009. In advancing this argument, the City asserts that it is not estopped from raising this defense based on its insistence that Developer exhaust its administrative remedies by appealing to the City Council (or, implicitly, that Renters so exhaust by their participation in this same administrative process) before bringing this action. Petitioners argue both assertions are incorrect. And, in supplemental briefing, petitioners contend and the City disputes whether the statute-of-limitations defense is further overcome by the doctrine of equitable tolling. For the following reasons, the Court rejects the City's defense.

As a threshold matter, the City argues that the Court should assess the "gravamen" of the claims and subject all of them to the 90-day limitations period in section 65009, subdivision (c)(1)(E). Petitioners take issue with this approach. (RT at p. 25.) And the Court perceives the City's treatment of all the claims collectively based on their assessed "gravamen" to be imprecise and problematic.

"[A] plaintiff is generally permitted to allege different causes of action—with different statutes of limitations—upon the same underlying facts." (*Thomson v. Canyon* (2011)

Housing Accountability Act, which a development proposal submitted under SB 35 may invoke, specifically references judicial review in administrative mandate under Code of Civil Procedure section 1094.5. (§ 65589.5, subd. (m).) Further, courts have reviewed a challenge to an agency's decision under the Density Bonus Law likewise through administrative mandate. (See, e.g. § 65915, subd. (d)(3); *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 812, 816–817 (*Lagoon Valley*).) The parties appear to proceed here on the assumption that because the overarching relief in mandate sought by petitioners is deemed approval of the development proposal under SB 35, relief under the Housing Accountability Act and the Density Bonus Law is subsumed within that. In any event, both forms of mandate ultimately review for and address an agency's abuse of discretion, which would include a failure to perform a duty compelled by law or a failure to proceed in a manner required by law—the fundamental essence of all the claims here. Because of this, and because the particular form of mandate that is applicable is not articulated or disputed by the parties, the Court proceeds to conduct its judicial review and to adjudicate the action focused on abuse of discretion as so framed and without specifically deciding whether the ultimate relief afforded comes through Code of Civil Procedure section 1085 or section 1094.5.

198 Cal.App.4th 594, 605 (*Thomson*).) "A complaint may allege facts involving several distinct types of harm governed by different statutory periods and, where it does so, one cause of action may survive even if another cause of action with a shorter limitations period is barred." (*Ibid.*) But in doing so, "a plaintiff is not permitted to evade a statute of limitations by artful pleading that labels a cause of action one thing while actually stating another." (*Id.* at p. 606.) "California courts therefore look to the gravamen of the cause of action." (*Ibid.*) " '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]" (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22–23.)

Here, as is permissible, petitioners allege that one set of facts gives rise to multiple claims for relief based on different statutes. And, in pleading these distinct theories, petitioners do not attempt to artfully mislabel their claims to evade the statute of limitations. They assert that they are independently entitled to relief on all of the pleaded bases. Consequently, contrary to how the City proceeds, this is not a scenario in which it is necessary to drill down to the gravamen of each claim to uncover its true nature. And the City's suggestion that the gravamen of each independent claim is relief under section 65913.4 is not quite accurate. It follows that the City errs in addressing all of the claims collectively as though they are necessarily subject to one statute of limitations in lieu of establishing the limitations period applicable to each claim pleaded.[9]

To illustrate, the Housing Accountability Act contains its own 90-day statute of limitations. (§ 65889.5, subd. (m).) This limitations period runs "from the later of (1) the effective date of a decision of the local agency imposing conditions on, disapproving, or any other final action on a housing development project or (2) the expiration of the time periods

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[9] To be clear, the City does not argue that each distinct claim incidentally happens to be subject to the same statute of limitations. Rather, the City asks the Court to treat the different claims as identical and, on that basis, to apply one statute of limitations to all claims.

specified in subparagraph (B) of paragraph (5) of subdivision (h)."[10] (§ 65589.5, subd. (m), citing § 65950 [Permit Streamlining Act].) This particular statute of limitations applies to causes of action based on the Housing Accountability Act.

Next, the Legislature enacted section 65009 because it found "there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects." (§ 65009, subd. (a)(1).) The statute "is intended 'to provide certainty for property owners and local governments regarding decisions made pursuant to this division' (§ 65009, subd. (a)(3)) and thus to alleviate the 'chilling effect on the confidence with which property owners and local governments can proceed with projects' (*id.*, subd. (a)(2)) created by potential legal challenges to local planning and zoning decisions." (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.) "To this end, section 65009 establishes a short statute of limitations, 90 days, applicable to actions challenging several types of local planning and zoning decisions … ." (*Ibid.*)

The City relies on the 90-day limitations period in section 65009 based on language in subdivision (c)(1)(E), which provides that it applies when a petitioner seeks "[t]o attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901[11] and 65903[12], or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." Based on the contents of sections 65901 and 65903—section 65009, subdivision (c)(1)(E) is best summarized as applying when a petitioner

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[10] Section 65889.5, as effective January 1, 2020, contains an outdated reference to subparagraph (B) of former paragraph (5) of subdivision (h) that cites to time standards in section 65950 (the Permit Streamlining Act). Subparagraph (B) and the time standards therein are now codified in paragraph (6) of subdivision (h), not paragraph (5), but the Legislature failed to conform the reference in subdivision (m) upon making this amendment to subdivision (h), which is clearly the result of oversight.

[11] Section 65901 governs hearings on "conditional uses or other permits" as well as zoning variances.

[12] Section 65903 governs appeals of a decision of the board of zoning adjustment or zoning administrator.

challenges (1) the underlying decision of the board of zoning adjustment or zoning administrator on a conditional use permit, other permit, or zoning variance; (2) the outcome of an appeal of such a decision; or (3) the particular terms of a conditional use permit, other permit, or variance (as compared to the ultimate decision to issue or refuse to issue the permit or variance). (See generally *Save Lafayette Trees v. City of Lafayette* (2019) 32 Cal.App.5th 148, 155–159 [discussing scope and construction of section 65009].)

Petitioners argue that, if anything, the 180-day period in subdivision (d)(1) of section 65009 applies because this action meets both of the criteria specified therein, namely:

> "(A) It is brought in support of or to encourage or facilitate the development of housing that would increase the community's supply of housing affordable to persons and families with low or moderate incomes, as defined in Section 50079.5 of the Health and Safety Code, or with very low incomes, as defined in Section 50105 of the Health and Safety Code, or middle-income households, as defined in Section 65008 of this code. This subdivision is not intended to require that the action or proceeding be brought in support of or to encourage or facilitate a specific housing development project.
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> "(B) It is brought with respect to the adoption or revision of a housing element pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3, actions taken pursuant to Section 65863.6, or Chapter 4.2 (commencing with Section 65913), or to challenge the adequacy of [a density bonus] ordinance adopted pursuant to Section 65915.

Petitioners' interpretation of section 65009, subdivision (d)(1) is not entirely persuasive. While the project does seem to encourage housing development within the meaning of section 65009, subdivision (d)(1)(A), it is not especially clear that this proceeding is brought with respect to "actions taken pursuant to Section 65863.6, or Chapter 4.2 (commencing with Section 65913)" within the meaning of section 65009, subdivision (d)(1)(B). This is because this latter subdivision focuses on challenges to legislative actions as compared to ministerial or adjudicatory permitting decisions. The legislative actions enumerated in section 65009, subdivision (d)(1)(B) include the adoption or revision of a housing element, adoption of a zoning ordinance, and the adoption of a density bonus ordinance. (See *Calvert v. County of Yuba* (2006)

145 Cal.App.4th 613, 623.) The only other action identified in that subdivision is an action taken under Chapter 4.2 (commencing with section 65913). Petitioners assume that this reference necessarily encompasses section 65913.4, SB 35, because it is part of Chapter 4.2. But this interpretation does not necessarily appear to be correct under the principle of *noscitur a sociis* that directs interpretation of a term in a list by reference to the other items in that list. (See *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 40.) Under that principle of interpretation, a court interprets a term more narrowly if an expansive interpretation would make the term markedly dissimilar from the other list items or make the other list items unnecessary or redundant. (*Ibid.*)

Here, interpreting "actions taken pursuant to … Chapter 4.2 (commencing with Section 65913)" as encompassing the decision to ministerially approve a particular project under section 65913.4 would create a marked dissimilarity between that term and the other legislative actions enumerated in section 65009, subdivision (d)(1)(B). Additionally, section 65913.4 is not the only section within Chapter 4.2. Section 65913.1 requires that when zoning land or revising a housing element a city designate sufficient land for residential use. And so, an action taken under section 65913.1 falls within Chapter 4.2 and constitutes a legislative action like the other actions enumerated in section 65009, subdivision (d)(1)(B). Similarly, section 65913.2, also in Chapter 4.2, imposes limitations on the types of legislative actions a city may take when it comes to regulating subdivisions. Thus, it seems the Legislature intended section 65009, subdivision (d)(1)(B) to encompass legislative actions taken under Chapter 4.2, but not necessarily ministerial or adjudicatory decisions. Consequently, petitioners' interpretation of section 65009, subdivision (d)(1)(B) as encompassing streamlined approvals or denials of projects under section 65913.4 is not convincing.

The City's interpretation of section 65009, subdivision (c)(1)(E) is slightly more appealing. While it is true that projects subject to streamlined review do not require conditional use permits, section 65009, subdivision (c)(1)(E), including as incorporated in section 65009, subdivision (c)(1)(F), encompasses a decision on "any other permit." And so, arguably, even when a project is subject to streamlined, nondiscretionary review, there is still a decision as to whether to permit—meaning to allow—the development, which decision may be signified by the

issuance of a document or series of documents denominated as a "permit." And a decision made under section 65913.4 might otherwise qualify within the meaning of section 65009, subdivision (c)(1)(F) as a decision made before the issuance of any other permit.

Petitioners do not convince the Court that *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561 (*Urban Habitat*) precludes the application of section 65009 here. First, the facts of that case are distinct because the petitioners there claimed that the City of Pleasanton had failed to update the housing element of its general plan and local development law to meet its RHNA such that an impermissible inconsistency arose over time; in other words, the city had failed to adapt to updated needs and requirements for adequate housing. (*Urban Habitat,* at pp. 1566–1570, 1577.) The issue here is not whether the City failed to bring local law and planning documents into compliance, but rather, whether it took an affirmative action on a specific project that was unlawful. While petitioners characterize this as a failure to comply with mandatory duties, this is not the same type of failure or omission that occurred in *Urban Habitat.* Because that case is circumstantially distinguishable from the case now before this Court, and given the broad interpretation afforded to section 65009 by other courts, petitioners' analogy is not compelling.

Ultimately, even assuming all of petitioners' claims are subject to a 90-day statute of limitations under either section 65009 or, as to the Housing Accountability Act claims, section 65889.5, subdivision (m), they commenced their respective actions with 90 days of the City's decision on the administrative appeal, which process the City insisted, full stop, was required for exhaustion purposes. The City, through its City Council, made that "final" decision on April 23, 2019. (AR002313.) Petitioners filed their petitions in June and served them by July 10th, within 90 days of the April 23rd adopted resolution. Accordingly, each petition in this consolidated action is timely.

The Court accordingly rejects the City's contention that its initial rejection of the streamlining application on December 7, 2018, necessarily accrued a cause of action under SB 35 or triggered the running of the statute of limitations as to any or all claims asserted. Contrary

to what it anticipatorily argues in its opposition, the Court finds that the facts here warrant estoppel of this defense. Equitable tolling applies as well.

Equitable tolling and equitable estoppel are two distinct doctrines. (*Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 757–758.)

" 'Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be [*sic*] acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' [Citations.]" (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1359, quoting *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) And " '[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present *and,* in the considered view of a court of equity, the injustice [that] would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy [that] would result from the raising of an estoppel.' [Citation.]" (*Feduniak, supra,* 148 Cal.App.4th at pp. 1359–1360.) "[C]ourts will not hesitate to estop the government from asserting *a procedural barrier*, such as the statute of limitations or a failure to exhaust remedies, as a defense to claims against it, where the government's affirmative conduct caused the claimant's failure to comply with the procedural requirement." (*Id.* at p. 1372.)

While estoppel typically arises from misrepresentations of fact, it may also apply when a municipality or agency does not accurately advise a potential plaintiff about the existence or availability of an administrative remedy, which advice may depend in part on mixed questions of fact and law. (See, e.g., *Shuer v. County of San Diego* (2004) 117 Cal.App.4th 476, 487 (*Shuer*).) For example, when the availability of an administrative remedy is unclear and the administrative regulations are susceptible to different interpretations, a public entity may be estopped from raising the failure to exhaust administrative remedies as a defense. (*Ibid.*)

"The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th

88, 99 (*McDonald*).) "It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.]" (*Ibid.*, quoting *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 38.)

"Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' [Citations.]" (*McDonald, supra*, 45 Cal.4th at p. 101, quoting *Elkins v. Derby* (1974) 12 Cal.3d 410, 414.) "This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra*, 45 Cal.4th at p. 101.) In other words, the doctrine of equitable tolling preserves a party's right to judicial review that would otherwise be rendered infeasible due to the consumption of the limitations period by the administrative review process.

The facts here support the application of both equitable tolling and equitable estoppel.

The City mandated an administrative proceeding that consumed the limitations period that it now contends was triggered by the initial denial letter on the streamlined application on December 7, 2018. (AR001205.) But the City emphatically said to Developer that "an appeal must be filed" and that "[f]ailure to timely appeal will preclude you, or any interested party, from challenging the City's decision in court." (AR001205.) The City then insisted on scheduling a public hearing on the administrative appeal before the City Council and delayed in doing so. (AR001318–AR001324.) For mandamus claims brought under Code of Civil Procedure section 1094.5—and for any other claims in light of the emphatic language of the letter—the administrative proceeding was mandatory. This is because a "writ is not available … to intermeddle in the preliminary stages of an administrative planning process … ." (*California High-Speed Rail Authority v. Super. Ct.* (2014) 228 Cal.App.4th 676, 707; see also *California Water Impact Network v. Newhall County Water District* (2008) 161 Cal.App.4th 1464, 1482–1483 [only final decisions subject to review].) And, as petitioners point out, even if they contend

that the City's December 7, 2018 correspondence resulted in their SB 35 application being deemed approved under streamlined review, with the City then insisting instead on an administrative appeal, petitioners could pursue that appeal with the goal that the City Council would not proceed to decide de novo whether the SB 35 application in fact qualified for streamlined review but, rather, to recognize and decide that "deemed" approval of the SB 35 application under section 65913.4, subdivision (b)(2) for objective planning standards had already occurred as a matter of law obviating the need for litigation.

And even treating the administrative proceeding as voluntary, tolling still applies. (*McDonald*, *supra*, 45 Cal.4th at p. 105.) The Court rejects the City's rather incredible and unsubstantiated claim that Developer's acquiescence under protest means that it did not voluntarily pursue the administrative proceeding. The City fails to justify (through reasoned analysis or authority) the insertion of a scienter requirement into the definition of voluntary in this particular legal and procedural context. Accordingly, whether viewed as mandatory or voluntary in character, the administrative proceeding that occurred here is the type of intervening activity that tolls the limitations period.

Also, petitioners provided sufficient notice of their claims thereby fulfilling the purpose of the statute of limitations before and during the administrative proceeding. The City asserts without authority that Renters' submission of public comments was insufficient to put it on notice of their claims. (See AR001334–AR001338; AR002344–AR002345.) Given the specificity and content of Renters' communications with the City, the Court is not convinced by the City's conclusory and unsubstantiated assertion. And, as a practical matter, it is unclear how Renters could have proceeded without waiting for the disposition of Developer's administrative appeal. Especially given the City's insistence on that appeal, it would result in an unjust and technical forfeiture to allow the City to now disclaim the necessity of this administrative proceeding. Because of the brevity of the 90-day limitations period, the absence of tolling during the administrative proceeding would render judicial review illusory. Equitable tolling is just and warranted under the facts and circumstances presented here. The City's supplemental brief does not persuade the Court to reach a contrary conclusion.

Next, the City anticipatorily argues in opposition to the petitions that it is not equitably estopped from raising the statute of limitations as a defense because estoppel applies when a party misrepresents or conceals facts and not matters of law. (Opp. at p. 19:6–17, citing *Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487 (*Jordan*).) While the City's statement of law is not inaccurate on its face, it is incomplete and misleading. And the City's analysis is underdeveloped. Moreover, the City relies exclusively on *Jordan*, which is not analogous.

Here, the City vehemently asserted by letter that an administrative appeal was mandatory and that it would raise the defense of exhaustion of administrative remedies to preclude Developer from seeking judicial review of the City's conduct absent an appeal. The City's representation as to the position it was taking, and would take in any litigation, is a representation of fact. And, although Developer stated its opinion or belief that the City's legal analysis was incorrect, Developer was at the mercy of the City's interpretation of its own municipal code. In other words, the parties differed in their understanding of the law and in their authority to interpret and enforce that law. As in *Shuer*, this type of informational and interpretive asymmetry is sufficient to justify estoppel.

As for the second and fourth elements of estoppel—that the party to be estopped intended that his conduct be acted upon, or that this party so acted such that the other party had a right to believe the conduct was so intended, and that the other party relied on the conduct to his injury—the City's letter informing Developer of the requirement of an administrative appeal contained such emphatic and mandatory language that it is reasonable to conclude the City intended to induce Developer's reliance thereon. And Developer acquiesced to the City's representation to its detriment, pursuing an administrative appeal albeit under protest. When faced with the untenable choice of either suing immediately and facing dismissal for failure to exhaust, or exhausting administrative remedies to preserve its claim of unlawful conduct, it was reasonable for Developer to rely on the City's interpretation of its own code and representation of the exhaustion defense it intended to raise, particularly given the unequivocal and emphatic language the City used to express this position. Further, under these circumstances, before having to initiate litigation, Developer could reasonably so acquiesce to the City's demand in an effort to

get the City Council to recognize the mandatory timelines and requirements of SB 35 and the consequences of its having earlier failed to meet those provisions, and to correct its prior erroneous approach.

Finally, the Court concludes that the injustice that would result in the absence of estoppel is enough to justify application of the doctrine here.

For all of these reasons, the Court rejects the City's statute-of-limitations defense and reaches the merits of petitioners' claims.

B. Petitioners Are Entitled to Relief on the Merits

Petitioners allege that the City's conduct violated three different housing statutes: (1) the streamlining statute (§ 65913.4, SB 35); (2) the Density Bonus Law (§ 65915); and (3) the Housing Accountability Act (§ 65589.5).

1. The City Failed to Comply with Section 65913.4

i. Statutory Background

In 2017, the Legislature passed SB 35 to reform land-use and housing law, including by creating "a streamlined, ministerial approval process for infill developments in localities that have failed to meet their regional housing needs assessment [ ] numbers."[13] (Sen. Rules Com., Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) May 27, 2017.)

Section 65913.4, subdivision (a) states in relevant part: "A development proponent may submit an application for a development that is subject to the streamlined, ministerial approval process provided by subdivision (b) and not subject to a conditional use permit if the development satisfies all of the [ ] objective planning standards" set forth further in subdivision (a).

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[13] As part of the housing element of a municipality's general plan, it must calculate its Regional Housing Needs Allocation or Assessment (RHNA), which is the " 'existing and projected need for housing' " in the area for individuals and households of all income levels. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1186, fn. 8, quoting Gov. Code, § 65583.) If a municipality's present and projected housing needs exceed its housing stock and land available for development, it must work to satisfy its RHNA by increasing the availability of land for housing development by, for example, changing zoning and development restrictions. (Gov. Code, § 65583, subd. (c)(1)(A).)

The objective planning standards that operate as eligibility criteria for streamlined, ministerial review consist of inclusionary and exclusionary criteria. In the abstract, the inclusionary and exclusionary criteria balance the primary policy of expediting housing construction with the competing policy of safe, well-designed construction as embodied in existing law. To illustrate, a proposed development must be "a multifamily housing development that contains two or more residential units" in an urban area that will not displace existing rent-controlled and income-restricted housing. (§ 65913.4, subds. (a)(1)–(2), (a)(7).) A mixed-use development still qualifies if "at least two-thirds of the square footage of the development [are] designated for residential use." (§ 65913.4, subd. (a)(2)(C).) Exclusionary criteria disqualify a development proposed for construction in or on a coastal zone, fire zone, flood plain, earthquake fault zone, hazardous-waste site, wetland, or prime farmland. (§ 65913.4, subd. (a)(6).)

Currently, the statute specifies that when evaluating consistency with the standards above, a development is consistent "if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards."[14] (§ 65913.4, subd. (b)(3).) Unless an agency timely explains to a developer in writing the reasons why the proposed development is not consistent with the eligibility criteria, "the development shall be deemed to satisfy the objective planning standards in subdivision (a)." (§ 65913.4, subds. (b)(1)–(2).) An agency's deadline for notifying a project proponent of ineligibility for streamlined, ministerial review is either 60 or 90 days depending on the size of the proposed development. (§ 65913.4, subds. (b)(1)(A)–(B).)

Proposed developments that qualify for streamlined, ministerial review may still be subject to design review or public oversight with the limitation that this oversight "shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application,

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[14] Section 65913.4, subdivision (b)(3) became effective January 1, 2020. (Sen. Bill No. 235 (2019–2020 Reg. Sess.) § 5.3; Assem. Bill No. 1485 (2019–2020 Reg. Sess.) § 1.)

and shall be broadly applicable to development within the jurisdiction." (§ 65913.4, subd. (c)(1).) The design review must be completed, if at all, within 90 or 180 days[15] depending on the size of the development and "shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect … ."[16] (§ 65913.4, subd. (c)(1).)

ii. Application

The City's notice of inconsistency here, its SB 35 denial letter of December 7, 2018, was neither code-compliant nor supported by substantial evidence.

Section 65913.4 subdivision (b)(1) provides: "If a local government determines that a development submitted pursuant to this section is in conflict with any of the objective planning standards specified in subdivision (a), it shall provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards … ." The Court concludes here that the City failed to comply with this notice requirement

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[15] This means that for a smaller development, the deadline for notice of ineligibility is 60 days (§ 65913.4, subd. (b)(1)(A)) and an agency may take an additional 30 days to complete design review or public oversight for a total of 90 days (§ 65913.4, subd. (c)(1)). For a larger development, the deadline for notice of ineligibility is 90 days (§ 65913.4, subd. (b)(1)(B)) and an agency may take an additional 90 days to complete design review or public oversight for a total of 180 days (§ 65913.4, subd. (c)(2)).

[16] Notably, while section 65913.4, subdivision (c) gives localities additional time to review objective design standards, the Legislature also enumerates compliance with "objective design review standards" as an objective planning standard—an eligibility criterion—in subdivision (a)(5). There does not appear to be a substantive distinction between these two terms. The descriptions in subdivisions (a)(5) and (c) of what design standards may be applied are so similar that they suggest the terms are equivalent. The statutory framing of design standards as both eligibility criteria and criteria capable of review during the extended timeframe for public oversight is problematic because of the distinct deadlines for making those distinct determinations. Treating compliance with objective design standards as an objective planning standard under subdivision (a) arguably renders as surplusage the later deadline for design review in subdivision (c)(1). Courts typically avoid interpreting statutes in such a manner. (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) Ultimately, the Court need not resolve this ambiguity based on the particular record and arguments advanced here. The City did not comply by either deadline and does not ask for additional time to conduct public oversight in its supplemental brief on the scope of relief that is warranted.

because the City did not adequately identify objective standards and provide an explanation of inconsistencies supported by substantial evidence in its SB 35 denial letter.

First, the City did not adequately identify applicable objective standards with which the project did not comply. The City conceded its initial error in asserting that a higher percentage of affordable units was required; it had relied on an outdated and incorrect HCD determination. (AR000169.) Thus, it is undisputed that the first bullet point in the City's denial letter was based on an incorrect and inapplicable standard.

As for the other two bullet points, the City did not adequately identify the standards or code provisions it was referring to or relying on. It concluded the project lacked "the required number of off-street residential and visitor parking spaces" and "adequate access/egress to the proposed off-street parking." (AR000127.) But it is not apparent from this vague statement just what those purported standards are or where they can be located. Thus, the City did not adequately identify the parking standards it was relying on. And notwithstanding the opacity and ambiguity of the City's statement, it is apparent that it was not relying on permissible, objective standards for parking. First, section 65913.4, subdivision (d)(2) states that "the local government shall not impose automobile parking requirements for streamlined developments approved pursuant to this section that exceed one parking space per unit." (§ 65913.4, subd. (d)(2).) And for projects meeting certain criteria—such as projects within one-half mile of transit—no parking requirements may be imposed. (§ 65913.4, subd. (d)(1).) Consequently, the City not only failed to identify the purported parking requirement but also failed to account for the prohibitions in section 65913.4, subdivision (d) as well. Moreover, the City has yet to identify any evidence in the record to support the conclusion that it could require more parking based on the location and characteristics of the project here.

As for ingress and egress, "adequacy" is not an objective standard that may be applied to streamlined projects. Objective standards are those "that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal." (§ 65913.4, subd. (a)(5).) What qualifies as

adequate—in the absence of an identifiable standard or definition—is simply a matter of personal or subjective judgment. To date, the City has not identified a uniformly verifiable, knowable standard for adequate ingress and egress. Accordingly, it impermissibly relied on a subjective standard in its denial letter.

What's more, there is no explanation in the denial letter about how the proposal was inconsistent with the unspecified standards applied by the City. For example, the City did not explain that the project provided only X number of parking spaces when the required number was Y. So, the City's denial letter was not code-compliant in this regard as well.

The City does not present a convincing argument to support a contrary conclusion. In the City's papers, it does not clearly and directly counter petitioners' supporting points. For example, the City does not argue that it adequately identified all of the objective standards set forth in its denial letter or that all of the standards it identified qualified as objective standards permissibly applied in the course of streamlined review. And the City does not explain how its cursory reference to such standards qualified as "an explanation for the reason or reasons the development conflicts with that standard or standards." (§ 65913.4, subd. (b)(1).)[17] Instead, the City argues the denial letter, when read in conjunction with the incomplete notice, put Developer on sufficient notice so as to somehow satisfy section 65913.4. This argument lacks merit.

The first problem with the City's contention is that it relies on an unspecified standard for the sufficiency of notice in lieu of the standard spelled out by the Legislature in section 65913.4, subdivision (b)(1). Although not clearly articulated by the City, it seems to invoke the concept of notice in the context of the constitutional minimum for procedural due process. (See generally *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1275–1280.) But the issue here is not whether the City met the constitutional minimum. The issue is whether it complied with the applicable statutory requirements.

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[17] Section 65913.4 does not merely require a statement of reasons for denying an application for streamlined review. Rather, it imposes the more specific requirement of an explanation of how the proposed development conflicts with the objective standards that the municipality identifies.

The City does not advance a persuasive argument for disregarding the specific statutory requirements for notice. While it purports to invoke a principle of statutory construction that places substance over form, it is not necessary to rely on, and the City does not fairly interpret and rely on, that principle. (See generally *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1332 [discussing scope and limitations of concept of substantial compliance].) In actuality, the City urges a complete disregard for the language of the statute in a vacuum and without regard for the statute's purpose. In other words, the City disregards the form and the substance of the statute. The language the City asks the Court to ignore—what it suggests is a mere formality—is in fact the specific procedure at the heart of the statute that effectuates its purpose. In the absence of deemed compliance under section 65913.4, subdivision (b), the statute would operate as a mere suggestion without an enforcement mechanism. And, because section 65913.4, subdivision (b) is consistent with and effectuates the purpose of the statute, there is no inconsistency between that "form" and the substance of the statute necessitating a reconciliation of those concepts under the canon invoked by the City. The City's argument in this regard is questionable and its reliance on *County of Kern v. TCEF, Inc.* (2016) 246 Cal.App.4th 301 is misplaced. The Court applies the requirements for a notice of inconsistency that are plainly spelled out in the statute, not an amorphous due process standard that would do violence to its very language and purpose.

The second problem with the City's argument is that it relies on an implausible and unreasonable interpretation of the record. The City states that its incomplete notice and denial letter provide sufficient documentation when read together. But the terms of these documents do not support such a construction. The City explicitly stated that it was proceeding as though it had *two* applications submitted by Developer in November 2018. It purported to deny one application and find the other incomplete. The correspondence setting forth those distinct decisions, while issued together, cannot be fairly read and interpreted in the manner the City now urges. The incomplete notice does not purport to specify inconsistencies with objective standards under SB 35; it purports to specify the additional information required before a traditional, *discretionary review* could be commenced. Similarly, the denial letter does not purport to require additional

information so an SB 35 determination could be made; the letter purports to finally reject the streamlining application upon completion of the City's review. And so, the City's own belief that there were two applications and the unequivocal statements in each discrete item of correspondence purporting to separately dispose of each application cannot fairly be read together as one, code-compliant letter documenting inconsistencies with objective standards under section 65913.4, subdivision (b)(1). The City's post-hoc, revisionist interpretation lacks credibility.[18]

The City explicitly represented that it had made a decision to deny the streamlining application. Because of this, it cannot now claim that, in fact, it did not make such a decision and lacked sufficient information to do so, all to avoid the consequences of the inadequate notice of inconsistency it had provided. And, even if it could take this inconsistent position, it fails to substantiate the same. The City cites no authority for the proposition that it may evade the statutory deadlines in section 65913.4 by claiming incompleteness. In actuality, it appears the Legislature enacted section 65913.4, in part, to address the use of such delay tactics under existing law:

> [T]he 1977 Permit Streamlining Act requires public agencies to act fairly and promptly on applications for development permits, including new housing. If they don't, the project is deemed approved. Under the act, public agencies must compile lists of information that applicants must provide and explain the criteria they will use to review permit applications. Public agencies have 30 days to determine whether applications for development projects are complete; failure to act results in an application being "deemed complete." However, local governments may continue to request additional information, potentially extending the time before the application is considered complete, which is the trigger for the approval timeline to commence. This has led to the Permit

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[18] The Court also finds unpersuasive the City's assertion that Developer somehow created confusion over its application based on the cover sheet it used. (Opp. at p. 9:20–28.) The City had not updated its cover sheet to account for streamlining applications and does not point to any evidence in the record that it had created and made available a separate form or cover sheet for them. Thus, under the circumstances and given the explicit and clear statements in the application itself about the nature of the review Developer was requesting, this assertion and characterization by the City also lacks credibility.

> Streamlining Act to be characterized as a "paper tiger" that rarely results in accelerated development approvals.

(Sen. Gov. & Finance Com., Rep. on Sen. Bill No. 35 (2017–2018 Reg. Sess.) April 26, 2017.) Arguably, if the City had truly lacked sufficient information on which to make an SB 35 determination, it could have endeavored to follow section 65913.4 in stating as much by identifying the objective standards that it was applying and explaining how it could not conclude, or lacked sufficient information to conclude, that the project was consistent with those standards.

Furthermore, the City does not present reasoned analysis to support the conclusion that a reasonable person simply could not find that the project was consistent with objective standards without all of the information set forth in the notice of incomplete application. The bullet points at page 23 of the City's opposition do not cure the gaps in its analysis or appear, on their face, to encompass objective standards.

In sum, the City does not establish that it properly concluded that Developer's application was incomplete as a matter of law or fact (e.g., the contents of the denial letter). The City unequivocally denied the streamlining application and will be held to the reasons articulated in its denial letter.

For all of these reasons, petitioners show and the City does not effectively refute that it did not provide a code-compliant notice of inconsistency. This conclusion is corroborated by the opinion of HCD. (See AR1330; see also Pet. Supp. RJN.) It follows under section 65913.4 that Developer's proposal was deemed to comply with objective standards as a matter of law and irrespective of whether the proposal is consistent with those standards as a matter of fact. The City's points on whether the proposal was, in fact, inconsistent are immaterial, particularly to the extent the City addresses purported inconsistencies other than those identified in the denial letter and within the statutory timeframe for notice.[19] (Opp. at pp. 24:9–27:18.)

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[19] Because of the essential statutory deadlines in section 65913.4, the Court does not address the City's belated and post-hoc rationales in detail. That said, petitioners present a number of cogent points about the legal and factual illegitimacy of these belated rationales (Pet. Brief at pp. 27:6–33:1), which points the City largely fails to address in opposition (Opp. at pp. 24:21–29:2).

2. Density Bonus Law

"In 1979, the Legislature enacted the density bonus law, section 65915, which aims to address the shortage of affordable housing in California." (*Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1164 (*Latinos Unidos*).) "Although application of the statute can be complicated, its aim is fairly simple: When a developer agrees to construct a certain percentage of the units in a housing development for low or very low income households, or to construct a senior citizen housing development, the city or county must grant the developer one or more itemized concessions and a 'density bonus,' which allows the developer to increase the density of the development by a certain percentage above the maximum allowable limit under local zoning law." (*Lagoon Valley, supra,* 154 Cal.App.4th at p. 824, citing § 65915, subds. (a), (b).) "In other words, the Density Bonus Law 'reward[s] a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations.' [Citation.]"[20] (*Lagoon Valley*, *supra*, 154 Cal.App.4th at p. 824.)

"To ensure compliance with section 65915, local governments are required to adopt an ordinance establishing procedures for implementing the directives of the statute." (*Latinos Unidos*, *supra*, 217 Cal.App.4th at p. 1164, citing § 65915, subd. (a).) The general rule is that a city's density-bonus ordinance must be consistent with the statewide Density Bonus Law and is preempted to the extent it conflicts. (*Lagoon Valley*, *supra*, 154 Cal.App.4th at p. 830.) That said, while the Density Bonus Law establishes the minimum bonuses and incentives a municipality is required to provide, the law does not preempt a municipality from providing greater bonuses or incentives in its own ordinance. (*Id.* at pp. 825–826.) Additionally, a density-bonus ordinance must establish a procedure and timeline for evaluating density-bonus requests that is consistent with the Density Bonus Law, including by enumerating the documents and

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[20] In the event of an inconsistency between the maximum density allowed under the zoning ordinance and the general plan, the general plan controls and provides the limit used to calculate (using the specified bonus percentage) the number of bonus units that may be built. (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1344–1345 (*Wollmer II*).)

information that must be submitted as part of a complete request. (§ 65915, subds. (a)(2)–(3).) In codifying a transparent and expeditious procedure, a municipality "shall not condition the submission, review, or approval of an application [for a density bonus] on the preparation of an additional report or study that is not otherwise required by state law, including [the Density Bonus Law]." (§ 65915, subd. (a)(2).)

The City's density-bonus ordinance is codified in Los Altos Municipal Code section 14.28.040. Under section 14.28.040, subdivision (C)(1)(a)(i) of the City's code, a development with 10 percent of its units designated for low-income households "shall be granted" a 20 percent density bonus. This density bonus increases by 1.5 percent, up to a maximum of 35 percent, for each additional percentage point of low-income housing provided. So, for example, a development with 11 percent of its units designated for low-income households is entitled to a 21.5 percent density bonus. As relevant here, a development with 20 percent or more units designated for low-income households will be granted the maximum, 35 percent density bonus. That density bonus is calculated as a percent "increase over the otherwise maximum allowable gross residential density … ." (Los Altos Mun. Code, § 14.28.040, subd. (B)(2); see also § 65915, subd. (f).)

A developer may additionally obtain an incentive for designating units for low-income households. (Los Altos Mun. Code, § 14.28.040, subd. (C)(1)(a)(ii).) A developer must be granted one incentive for designating 10 percent of units for low-income households, two incentives for designating 20 percent, and three incentives for designating 30 percent or more. (*Ibid.*; see also § 65915, subd. (d)(2)(A)–(C).) The City has codified "on-menu incentives"—incentives that "would not have a specific adverse impact"—in the density-bonus ordinance. (Los Altos Mun. Code, § 14.28.040, subd. (F).)

A city "shall grant" a bonus or incentive unless it makes written findings supported by substantial evidence that: there will be no identifiable and actual cost reduction to provide for affordable housing costs; there will be a specific, adverse, unmitigable impact on public health and safety, the environment, or registered historic places; or granting the bonus or incentive is contrary to state or federal law. (§ 65915, subd. (d)(1); see also Los Altos Mun. Code,

§ 14.28.040, subd. (F)(3).) And, "[i]n no case may a city … apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by [the Density Bonus Law]." (§ 65915, subd. (e)(1).) A developer may seek a waiver or reduction of such standards that physically impede construction of the development. (*Ibid.*)

"The applicant may initiate judicial proceedings if the city … refuses to grant a requested density bonus, incentive, or concession." (§ 65915, subd. (d)(3).) As noted, this proceeding is ordinarily brought in administrative mandamus. (See, e.g., *Lagoon Valley*, *supra*, 154 Cal.App.4th at pp. 812, 816–817.) The city "shall bear the burden of proof for the denial of a requested concession or incentive." (§ 65915, subd. (d)(4).) "If a court finds that the refusal to grant a requested density bonus, incentive, or concession is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit." (§ 65915, subd. (d)(3).)

In Developer's application (inclusive of its density bonus report), it proposed designating two of eight base units—i.e. 25 percent of the base units—for low-income households. (AR000010, AR000061.) Developer asserted that this level of affordability entitled it to: 1) a 35 percent density bonus; and 2) two concessions, only one of which it sought to use. (AR000010, AR000061.) Developer selected an 11-foot height increase—which is on-menu (Los Altos Mun. Code, § 14.28.040, subd. (F)(1)(d))—as its concession. (AR000010, AR000061.) Based on the bonus and concession, Developer proposed constructing seven additional units. (AR000061).[21] It

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[21] Consistently with state law, the Los Altos Municipal Code defines a density bonus as an "increase over the otherwise maximum allowable gross residential density … ." (Los Altos Mun. Code, § 14.28.040, subd. (B)(2); see also § 65915, subd. (f).) The maximum allowable density means the density allowed under a local zoning ordinance or general plan, with the maximum density in the general plan controlling in the event of an inconsistency. (§ 65915, subd. (o)(2); see also *Lagoon Valley*, *supra*, 154 Cal.App.4th at p. 824.) Developer asserts and the City does not seem to dispute that there is no standard for units or intensity (Floor Area Ratio) applicable to buildings, like the proposed development, that are zoned Commercial-Retail Sales/Office-Administrative District (CRS/OAD). (AR000011, AR000062 [Density Bonus Report].) Perhaps there is no standard because housing above the ground floor qualifies as a conditionally-permitted use under Los Altos Municipal Code section 14.54.040 as compared to an office or retail use that is permitted by right under section 14.54.030. In any event, instead of applying the density bonus to the maximum density allowed under the law (either the ordinance

appears the seven units exceed the number authorized by the 35 percent density bonus standing alone, so the parties' dispute seems to hinge on whether the right to an 11-foot height increase necessarily includes the right to include additional housing units in that additional space. (See AR002310–AR002311.)

As a threshold matter, the City's interpretation of the Density Bonus Law is incorrect. The City asserts that any and all concessions, incentives, and waivers must result—collectively—in no more than a 35 percent increase in density. Courts have routinely rejected such an interpretation of the law. The 35 percent bonus authorized under the Density Bonus Law and the City's own ordinance is the mandatory minimum a city must provide; it is not a cap. (*Lagoon Valley*, *supra*, 154 Cal.App.4th at pp. 823–826.) And so, the City was required, at minimum, to provide a 35 percent bonus and any other incentive or concession required by law. Otherwise, to the extent the City believed any additional incentive or concession was discretionary, it was required to inform Developer of this conclusion in a code-compliant manner by making the statutorily-required findings. (See § 65915, subd. (d)(1); see also Los Altos Mun. Code, § 14.28.040, subd. (F)(3).) The City failed to do so here. Instead, the City made a vague statement that "the requested concessions and waivers appear to raise substantial issues concerning public health and safety, including questions regarding" compliance with the Americans With Disabilities Act (42 U.S.C. § 12101 et seq.). (AR002311.) On its face, this statement is so equivocal as to fall short of an affirmative finding. Furthermore, this statement does not identify a specific, adverse, unmitigable impact on public health and safety. Accordingly, this finding is deficient.

To be sure, although the City bears the burden of justifying its density-bonus decision, it does not attempt to justify that decision under an appropriate standard of review and based on the statutory requirements. Its opposition instead focuses on its interpretation of the 35 percent bonus

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or the general plan), both parties appear, at times, to treat the bonus as applying to the number of base units. (See, e.g., AR002310–AR002311.)

as a cap, which interpretation is contrary to established precedent. Accordingly, petitioners' density-bonus claim is meritorious; the City did not comply with the law.

In reaching this conclusion, the Court notes that it remains unsettled whether the City could attempt to deny the density-bonus request for the first time during the administrative proceeding. This is because section 65913.4 contemplates that a proposal subject to streamlined review may contain bonus units. (§ 63913.4, subd. (a)(2)(C).) Arguably, to determine whether a project with bonus units comports with the objective standards in section 65913.4, a city must determine whether the bonus units are allowable in the course of a streamlined review. In truncating the review process through section 65913.4, the Legislature has not clearly addressed how such changes operate with other housing laws, such as the Density Bonus Law. Ultimately, because even the City's final resolution is deficient, the Court does not and need not resolve this question.

In concluding that the City violated the Density Bonus Law, the Court rejects the City's argument that Developer's application was incomplete or lacked sufficient information to allow it to evaluate the density-bonus request.

"A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law, including this section." (§ 65915, subd. (a)(2).) This prohibition does not preclude a municipality from requiring "reasonable documentation to establish eligibility for a requested density bonus … ." (*Ibid.*) But, a municipality "shall … [p]rovide a list of all documents and information required to be submitted with the density bonus application in order for the density bonus application to be deemed complete." (§ 65915, subd. (a)(3)(B).) "This list shall be consistent with this chapter." (*Ibid.*)

Collectively, these directives and prohibitions establish that a municipality cannot condition consideration and approval of a density-bonus request on information or documents unless it specifies these materials in advance and in conformity with the Density Bonus Law.

Here, Los Altos Municipal Code 14.28.040, subdivision (D) specifies the local forms and other information an applicant must submit with a density-bonus request. That said, with the

exception of several forms, the ordinance broadly requires "reasonable documentation" of certain facts and does not specify particular documents that must be submitted. (Los Altos Mun. Code, § 14.28.040, subd. (D).) In the City's opposition, it offers a conclusory assertion that Developer's application was incomplete. The City does not explain how its application requirements comport with those permitted under the Density Bonus Law. And the City does not attempt to justify the sufficiency of its findings or the evidence on the subject of completeness. This presentation is insufficient to carry the City's burden of establishing that it complied with the law.

Looking to the City's final resolution and the notice of incomplete application referenced therein, and assuming for argument sake that this notice could be considered as part of the City's denial of the streamlined application, the propriety of the City's conduct is not apparent. The "Density Bonus Report Submittal Requirements"—a form that accompanied the notice of incomplete application—indicates that Developer had largely submitted all required information. (AR000147–AR000149.) Based on circling and underlining on the second page of this form, the City seemed to take the position that it needed additional documentation that incentives or concessions would result in cost reductions and that waivers were needed for standards that would physically preclude the concessions or incentives. (AR000148.) Because the Density Bonus Law now puts the onus on a municipality to make a finding to support denial of a density-bonus request, such as a finding that a concession or incentive would not result in cost reductions (§ 65915, subd. (d)(1)(A)), the City's insistence that Developer prove the contrary in the first instance shifts the burden to the applicant in contravention of the statute.[22] And, also, the requested "reasonable documentation" appears to concern matters beyond the eligibility information that can be requested. (§ 65915, subd. (a)(2).) Moreover, Developer asserts that the City is incorrect because Developer did, in fact, submit sufficient information. This assertion is correct. The claim that the City could not determine the allowable base density is not credible

[22] The record reflects that the City sought out a consultant but apparently never hired one or completed the process required to evaluate and make findings sufficient to reject Developer's density-bonus request. (See AR002332–AR002336 [proposed scope of work from Keyser Marston Associates].)

given that density is determined by municipal law. And, as for eligibility, Developer otherwise presented detailed information in its application about its building plans to allow the City to evaluate eligibility for a density-bonus. The City did not rebut this point in its papers or at the hearing. To summarize, even setting aside the City's inadequate argument and analysis on the Density Bonus Law, the record undercuts any claim of incompleteness based on what a city may legally ask for and what Developer, in fact, presented here.

3. Housing Accountability Act

The Housing Accountability Act or "HAA (§ 65589.5), known as the 'anti-NIMBY law,' was designed to limit the ability of local governments to reject or render infeasible housing developments based on their density without a thorough analysis of the 'economic, social, and environmental effects of the action ... .' (§ 65589.5, subd. (b).)" (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 938 (*Kalnel Gardens*).) "When a proposed development complies with objective general plan and zoning standards, including design review standards, a local agency that intends to disapprove the project, or approve it on the condition that it be developed at a lower density, must make written findings based on [a preponderance of the evidence on the record] that the project would have a specific, adverse impact on the public health or safety and that there are no feasible methods to mitigate or avoid those impacts other than disapproval of the project. (§ 65589.5, subd. (j)(1).)"[23] (*Kalnel Gardens*, *supra*, 3 Cal.App.4th at pp. 938–939.) And, much like the streamlining statute (§ 65913.4), the HAA requires written notice of inconsistency within 30 or 60 days and provides that if an agency "fails to provide the required documentation pursuant to subparagraph (A), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision." (§ 65589.5, subd. (j)(2).)

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[23] Until December 31, 2017, section 65889.5 required that an agency's findings be supported only by substantial evidence. Effective January 1, 2018, the findings must be supported by a preponderance of the evidence. (Sen. Bill No. 167 (2017–2018 Reg. Sess.) § 1 [Stats. 2017, ch. 368]; Assem. Bill No. 678 (2017–2018 Reg. Sess.) § 1 [Stats. 2017, ch. 373].)

If an agency fails to comply with the HAA, a developer, prospective resident, or housing organization, such as Renters here, may seek judicial review by filing a petition for writ of administrative mandate. (*Kalnel Gardens*, *supra*, 3 Cal.App.5th at p. 941, citing § 65589.5, subd. (m).) Under that judicial review, section 65589.5, subdivision (i) explicitly places the burden of proof on the agency to "show that its decision is consistent with the findings as described in subdivision (d), and that the findings are supported by a preponderance of the evidence in the record with the requirements of subdivision (o)."[24] If an agency "disapproved a project or conditioned its approval in a manner rendering it infeasible" without making the required findings, the court must issue an order or judgment compelling the jurisdiction to comply within 60 days, including by taking action on the development. (§ 65589.5, subd. (k).) "The court may issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith[25] when it disapproved … the housing development or emergency shelter in violation of this section." (§ 65589.5, subd. (k)(1)(A)(ii).) "The court shall retain jurisdiction to ensure that its order or judgment is carried out and shall award reasonable attorney's fees and costs of suit to the plaintiff or petitioner, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section." (§ 65589.5, subd. (k)(1)(A).)

The City here fails to carry its burden of establishing compliance with the HAA. For the reasons articulated above, its claim of incompleteness of Developer's SB 35 application is not persuasive. The City does not provide reasoned legal analysis to support the conclusion that the application was incomplete within the meaning of the HAA. And for the reasons previously articulated with respect to section 65913.4, the City also did not provide a code-compliant notice of inconsistency under section 65589.5. And even in the final resolution adopted by the City

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[24] This standard is similar to the abuse of discretion standard ordinarily applicable in all manner of administrative mandamus proceedings. (See *Kalnel Gardens*, *supra*, 3 Cal.App.5th at p. 937, citing Code Civ. Proc., § 1094.5, subd. (b).)

[25] "For purposes of this section, 'bad faith' includes, but is not limited to, an action that is frivolous or otherwise entirely without merit." (§ 65589.5, subd. (l).)

Council, the City did not make statutorily required findings sufficient to reject or require modification of the project under the HAA. Accordingly, the City also does not establish that it complied with the HAA.

In reaching this conclusion, the Court further finds that the City acted in bad faith as defined in the HAA because its denial was entirely without merit. The City's denial letter and the record before the Court do not reflect that the City made a benign error in the course of attempting, in good faith, to follow the law by timely explaining to Developer just how its project conflicted with objective standards in existence at the time or by trying to make findings that resemble what the law requires. Instead, in addition to tactics such as demanding an administrative appeal on less than one day's notice and using strained constructions and textual interpretations to assert that Developer had presented two applications that had to be withdrawn, the City denied the streamlining application with a facially deficient letter and later adopted a resolution enumerating insufficient reasons for the denial. So, in addition to the fact that section 65913.4 warrants a writ directing the City to issue the permit, its conduct justifies the same relief under section 65589.5, subdivision (k)(1)(A) as well.

C. Scope of Relief

Because the Court concludes that the City violated section 65913.4, the Density Bonus Law, and the HAA, petitioners are entitled to writ relief. Nevertheless, the parties dispute and addressed in supplemental briefing the nature and scope of relief that should be awarded. Petitioners ask the Court to provide relief under all three statutes, while the City argues the Court should solely order relief under section 65913.4 because additional statutory relief is duplicative. While the Court agrees that there is some overlap in the relief afforded by each separately applicable statute and that all three statutes warrant the same substantive outcome—affording relief in mandate—the Court rejects the City's claim that the relief afforded by each statute is entirely duplicative. For example, as the City acknowledges, the Density Bonus Law and HAA authorize an award of attorney fees and costs. Even accepting the City's suggestion that the Court fix the amount of such fees and costs at a later date, this fact does not obviate the need for the Court to rule on these statutory bases as a prerequisite for a later motion for attorney fees

under either statute. Also, the HAA gives the Court continuing jurisdiction over statutory enforcement mechanisms, which may include fines for noncompliance. The additional remedies for enforcing the HAA are not duplicative. And, arguably, the Court must award relief under the HAA now as a prerequisite for any later enforcement measures that may be necessary even accepting, as the City points out, that the time for such enforcement has yet to arrive. Ultimately, the City does not identify any legal basis for refusing to grant relief under all three statutes. For these reasons, the Court accepts petitioners' argument that relief under each statute is warranted.

The Court holds that Developer's project was deemed to comply with applicable standards under SB 35 and that the City must rescind its decision to deny and instead approve and permit the project at the requested density. The parties agree that this directive to rescind the existing decision and permit the project within 60 days, as compared to remanding the matter for further consideration, is the appropriate course of action. (City's Supp. Brief at p. 8.) To the extent petitioners seek relief other than a writ and declaratory judgment, including attorney fees, costs, and additional fines or penalties, the parties agree that such matters will be resolved by post-judgment noticed motion (for attorney fees or to tax costs) and, as for the penalties, further proceedings should they become necessary.

Finally, the Court declines to issue a declaratory judgment. It is true that because declaratory relief is a cumulative remedy "a proper complaint for declaratory relief cannot be dismissed by the trial court because the plaintiff could have filed another form of action." (*Californians for Native Salmon Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1429.) And there is no categorical prohibition on joining a complaint for declaratory relief with a petition for writ of mandate; in appropriate circumstances, this is permissible. (*Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 574.) That said, when challenging an action under Code of Civil Procedure section 1094.5—a decision in a particular instance as compared to a policy or ordinance standing alone—mandamus relief is typically the exclusive remedy and declaratory relief is not additionally available or necessary. (*State of Cal. v. Super. Ct.* (1934) 12 Cal.3d 237, 251–252; see also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 126–127 [declaratory relief not proper vehicle for challenging denial of building permit].) In actuality, in a

hybrid proceeding, declaratory relief may be sought to test the constitutionality or legality of an ordinance or policy on its face with an accompanying request for a writ of mandate directed to the agency's application of that ordinance or policy to the petitioner in particular. (*Gong, supra,* 250 Cal.App.2d at p. 574.) Here, petitioners do not seek a declaration of the validity of the City's policies, interpretation of the law, or zoning ordinance; rather, they seek a declaratory judgment stating the City must issue the streamlined permit Developer applied for.[26] In other words, they simply seek a duplicative declaration requiring the City to perform its duty and issue the permit. The problem is not simply that the declaratory relief requested is duplicative, but rather, that the relief sought is a proper subject of mandamus and it does not encompass a question of validity or constitutionality that typically warrants additional declaratory relief in a mandamus proceeding. Accordingly, the Court exercises its discretion under Code of Civil Procedure section 1061 and declines to provide declaratory relief that would be duplicative of that already being provided in mandate.

IV. Conclusion

The petitions for writ of mandate are granted, and judgment will be entered consistently with this Order. Petitioners are prevailing parties for purposes of costs of suit under Code of Civil Procedure section 1032, which costs would be claimed post-judgment by timely filed memoranda and which are subject to striking and taxing according to law. The judgment to be entered will direct the issuance of a peremptory writ of mandate commanding the relief contemplated in this Order and consistently with its analysis and conclusions. Counsel for petitioners have already collectively proposed a form of judgment and a form of writ to be issued, which they submitted with their post-hearing briefing. Counsel for petitioners are directed to provide those separate documents to the Court in Word format by email to Department10@scscourt.org within 10 days of service of this Order, with copy to counsel for the City. Counsel for the City is to submit any objections as to the form of the proposed judgment

[26] The Court notes that in Petitioners' supplemental brief on the scope of relief and in their proposed judgment, they elaborate on the declaratory relief sought in their pleadings.

and proposed writ within 20 days from service of this Order, with courtesy copy to the Court at the same email address and copy to counsel for petitioners.

IT IS SO ORDERED.

Date: April 24 2020

HELEN E. WILLIAMS
Judge of the Superior Court