

Case Nos. A159320 & 159658

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT**

CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION
FUND, *et al.*,
Petitioners and Appellants,

v.

CITY OF SAN MATEO, *et al.*,
Defendants and Respondents;

On Appeal from an Order Denying Petition for Writ of Mandate, Judgment,
and Order Denying Motion to Vacate/Motion for New Trial
Case No. 18-CIV-02105
The Superior Court of San Mateo County
Honorable J. George Miram, Judge

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court 8.208 and 8.488)

Appellants California Renters Legal Advocacy and Education Fund, Victoria Fierce, and John Moon certify that they know of no interested entities or persons to list in this certificate pursuant to California Rule of Court 8.208, subd. (e)(1).

Pursuant to California Rule of Court 8.20, subd. (e)(2), Appellants California Renters Legal Advocacy and Education Fund, Victoria Fierce, and John Moon are aware that Tony and Aynur Gundogdu, the Real Parties in Interest in this case, may have a financial interest in the outcome of the proceeding.

Dated: June 29, 2020

Respectfully submitted,

/s/ Daniel R. Golub

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INTRODUCTION

In 1982, the California Legislature enacted the Housing Accountability Act (“HAA”), Gov. Code § 65589.5.¹ The HAA is a vital component of the State’s Housing Element Law, which for decades has limited the ability of local governments to deny approval to desperately needed housing. Petitioner and Appellant California Renters Legal Advocacy and Education Fund (“CARLA”), a nonprofit advocacy group representing renters adversely affected by California’s housing crisis, brought a petition for writ of mandate (“Petition”) against Respondents City of San Mateo, et al. (“Respondents” or “City”) for disapproving a ten-unit multifamily housing development (the “Project”) without making the findings that the HAA requires. But rather than enforce the law, the trial court concluded—after receiving briefing on only one side of the question—that this nearly 40-year-old housing law is actually unconstitutional.

The trial court’s conclusion—that the HAA violates the principle of charter city “home rule” over municipal affairs—directly contradicts well-established authority holding that housing is a critical statewide concern rather than a purely municipal affair, and that state housing laws such as the HAA constitutionally apply to charter cities. The HAA allows localities to impose conditions on housing to address design and other aesthetic issues, and the law reserves to localities the authority to establish objective rules governing where and at what scale housing will be built. The law merely limits local governments from denying or reducing the density of housing proposals that conform to the objective standards the cities themselves put in place. Even less convincing is the trial court’s conclusion that the law

¹ Subsequent statutory citations are to the California Government Code except where otherwise stated.

delegates authority to private parties by merely establishing a standard of review that is favorable to housing approvals. The trial court’s interpretation of the California Constitution would render the State Legislature powerless to choose reasonable methods to address local resistance to new housing, which the Legislature has found on the basis of ample evidence to be a key cause of the State’s housing crisis.

Once the constitutionality of the law is accepted, there is no reasonable question about whether the Petition should be granted. The HAA forbids cities from denying, or reducing the density of, housing development projects that comply with a city’s objective standards unless cities make findings required by law. Under the applicable standard of review, a court must find a project compliant with objective standards as long as there is substantial evidence from which a reasonable person could conclude that the project complies. Here, the record is replete with evidence—including the determinations of the City’s Mayor, its Planning Commissioners, its Planning staff and its City Attorney—that the Project complies with all objective standards in the City’s General Plan and zoning code. Yet the City’s appointed and elected officials yielded to pressure from “Not In My Back Yard” neighbors and disapproved the Project. The City’s decision to disapprove a code-compliant housing development for subjective reasons is the type of anti-housing activity that the Legislature enacted the HAA to prevent.

This Court should reverse, and order the Petition granted.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. Legal Background.

A. “Home Rule” Under California’s Constitutional System.

California’s political subdivisions do not possess inherently sovereign or semi-sovereign status. The degree of autonomy local

governments enjoy is a matter of constitutional and legislative policy rather than intrinsic right. *See generally* Stahl, *Home Rule and State Preemption of Local Land Use Control* (February 25, 2020), *forthcoming*, __ URBAN LAWYER __ (hereinafter, “Stahl”)² at p. 5 (“Local governments have no inherent right to self-rule”).

Initially, “[u]nder the California Constitution of 1849, cities were ‘but subordinate subdivisions of the State Government,’ and the Legislature had power to ‘enlarge or restrict’ city powers.” *Johnson v. Bradley* (1992) 4 Cal.4th 389, 394-95 (“*Johnson*”) (quotation omitted). Subsequent constitutional amendments provided two distinct—but importantly limited—grants of greater authority to localities.

In 1879, all counties and cities were granted general “police power” authority to enact ordinances and regulations without a specific grant of authority from the State, but only if the local regulations are “not in conflict with general [state] laws.” *City & Cty. of San Francisco v. Regents of Univ. of California* (2019) 7 Cal.5th 536, 544 (“*CCSF*”). This “police power” clause is now contained in Cal. Const. Art. XI, § 7 (hereinafter, “Section 7”). Subsequently, in amendments enacted in 1896, and last substantively amended in 1914, charter cities were granted a limited immunity from conflicting state laws—but only within the circumscribed realm of “municipal affairs.” *See generally Johnson, supra*, 4 Cal.4th at pp. 394-98. This charter city “home rule” provision is now contained in Cal. Const. Art. XI, § 5 (hereinafter, “Section 5”).

“The home rule doctrine enshrines charter cities’ sovereignty over ‘municipal affairs’” but “‘also implicitly recognizes state legislative supremacy over matters not within the ambit of that phrase [municipal affairs].’” *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 698,

² Available at SSRN: <https://ssrn.com/abstract=3485872>.

(“Anderson”) (citing *Cal. Fed. Savings & Loan Ass’n. v. City of Los Angeles* (1991) 54 Cal.3d 1, 13 (“*Cal.Fed.*”). The “Legislature may legislate as to matters of statewide concern and, if the statute is not overbroad, then the conflicting charter city law ceases to be a municipal affair *pro tanto* and the Legislature is not prohibited by [Section 5(a)], from addressing the statewide dimension by its own tailored enactments.” *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 254-55 (“*Huntington Beach*”) (quotations omitted). “The touchstone of the state preemption inquiry is whether there is a statewide interest in regulating a matter and, relatedly, whether local control has a sufficiently substantial extralocal impact that state intervention is appropriate.” Stahl, *supra*, at p. 4; *see also Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505 (“In general, ‘municipal action which affects persons outside of the municipality becomes to that extent a matter which the state is empowered to prohibit or regulate’” (internal citation omitted)).

B. The Statewide Housing Crisis and the State’s Decades-Long Role in Addressing It.

Local governments, by design, represent local interests. In California, as in many other states, local homeowners often press their local governments to enact zoning and other regulations that limit housing opportunities for non-residents, especially for multifamily housing. *See, e.g., Fischel, An Economic History of Zoning and a Cure for Its Exclusionary Effects* (2004) 41 URB. STUD. 317, 331; *see also Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601 (“*Livermore*”) (citing numerous scholarship showing “that exclusionary land use ordinances tend primarily to exclude racial minorities and the poor ...”). This exercise of local police power authority serves the interests of local homeowners, but at the expense of renters, lower- and moderate-income households, and communities of color. *See, e.g.,* § 65589.5, subd.

(a)(1)(C)-(D). For this reason, although the Legislature has preserved significant authority for local governments over zoning, it has also enacted laws that significantly restrict the police power authority of local governments—including charter cities—to regulate housing.

More than fifty years ago, the Legislature required all local governments to adopt a general plan including “a mandatory housing element consisting of standards and plans for housing sites in the municipality that shall endeavor to make adequate provision for the housing needs of all economic segments of the community.” *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 444-46 (“*CBIA*”) (internal quotations omitted). A little more than a decade later, in 1980, declaring that “[t]he availability of housing is of vital statewide importance,” and that “[l]ocal and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community,” the Legislature enacted a separate comprehensive statutory scheme that substantially strengthened the requirements of the housing element component of local general plans. *Ibid.* [emphasis in the opinion]. This 1980 law is “commonly referred to as the ‘Housing Element Law.’” *Ibid.*

“In addition to adopting the Housing Element Law, the Legislature has enacted a variety of other statutes to facilitate and encourage the provision of affordable housing, for example, prohibiting local zoning and other restrictions that preclude the construction of affordable housing units (see, e.g., Gov.Code, §§ 65913.1 [least cost zoning law], 65589.5 [Housing Accountability Act]), and requiring local governments to provide incentives, such as density bonuses, to developers who voluntarily include affordable housing in their proposed development projects. (Gov.Code, § 65915.)” *CBIA, supra*, 61 Cal.4th at p. 446.

Although it has been well understood for at least half of century that the State has a strong statewide interest in housing, it is equally well understood that these state laws have failed to achieve the Legislature’s goal of ensuring that adequate housing be built. *See, e.g.*, Dillon, *California Lawmakers Have Tried for 50 Years to Fix the State’s Housing Crisis. Here’s Why They’ve Failed*, L.A. TIMES (June 29, 2017); *see also* § 65589.5, subd. (a)(2)(K). The California Legislative Analyst’s Office estimated in 2015 that the state should be building approximately 210,000 new homes a year in major metropolitan areas to meet housing demand. Legis. Analyst, *California’s High Housing Costs: Causes and Consequences* (2015) (“LAO”) at p. 21.³ Subsequent studies document a need for 3.5 million homes by 2025, a pace of 500,000 homes a year—which is California Governor Gavin Newsom’s endorsed goal. McKinsey & Company, *A Tool Kit to Close California’s Housing Gap: 3.5 Million Homes By 2025* (2016) (“McKinsey”) at p. 3;⁴ Newsom, *The California Dream Starts at Home*, Medium (Oct. 20, 2017).⁵

But the State of California comes nowhere close to meeting this need. Between 1980 and 2010, California’s major metropolitan regions built only 120,000 homes per year. LAO, *supra*, at p. 21. The entire state issued permits for only 110,000 homes in 2019, down from 113,000 in 2018 (U.S. Census Bureau, *Building Permits Survey* [2020]⁶)—a pace that is sure to plummet in 2020 and beyond due to the COVID-19 pandemic.

³ Available at <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.

⁴ Available at https://www.mckinsey.com/~/_media/McKinsey/Featured%20Insights/Urbanization/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.ashx.

⁵ Available at <https://medium.com/@GavinNewsom/the-california-dream-starts-at-home-9dbb38c51cae>.

⁶ Available at <https://www.census.gov/construction/bps/stateannual.html>.

Today, California ranks 49th out of the 50 states in homes per capita. McKinsey, *supra*, at p. 3.

There are many reasons that the State builds so little housing compared to its needs, but is undisputable that local review processes are a critical component of the problem. *See, e.g.*, LAO, *supra*, at p. 15 (listing “community resistance to new housing,” and the fact that “local communities make most decisions about new housing” as the first of the most significant factors why California coastal areas underbuild); McKinsey, *supra*, at pp. 25-30 (documenting need to “incentivize local governments to approve already planned-for housing” and “accelerate [local] land-use approvals”). “Too many of California’s high-rent cities have built too few apartments, contributing to the current shortage.” Schuetz & Murray, *California Needs to Build More Apartments*, Brookings Institution (July 11, 2019) (“Schuetz”)⁷; *see also* Reid, *The Costs of Affordable Housing Production*, UC Berkeley Turner Center for Housing Innovation (March 2020) (“Reid”) at p. 23 (“[L]engthy entitlement processes, local development fees and design requirements, and environmental building standards are driving up the costs of market-rate units as well [as income-restricted units]”).⁸ The result is a “housing supply and affordability crisis of historic proportions” that is “hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, [and] worsening poverty and homelessness....” § 65589.5, subd. (a)(2)(A).

⁷ Available at <https://www.brookings.edu/blog/the-avenue/2019/07/10/california-needs-to-build-more-apartments/>.

⁸ Available at http://turnercenter.berkeley.edu/uploads/LIHTC_Construction_Costs_Marc_h_2020.pdf.

Since State law requires cities to adopt plans that *allow* for housing, it might not be immediately apparent why zoning for housing has not resulted in the permitting of actual homes. “[T]he original theory of zoning presupposed that conforming projects would be approved as of right” Elmendorf, *Beyond the Double Veto* (2019) 71 HASTINGS L. J. 79, 88 (“Elmendorf”). In other jurisdictions, when a project conforms to objective rules governing height, density, and other standards, the project is approved on a “by-right” basis by staff officials, with no further discretionary review. *See, e.g., Neville v. Koch* (1992) 79 N.Y.2d 416, 425 (“*Neville*”) (in New York City, “so long as the proposed use is one of the ‘Uses Permitted As of Right’ in the City’s Zoning Resolution, a developer who also satisfies the Building Code can simply file its architectural plans with the Department of Buildings and begin construction upon issuance of a building permit”).

But unlike in other states, most permitting of multifamily housing in California is discretionary. *See O’Neill et al., Developing Policy from the Ground Up* (2019) 25 HASTINGS ENVTL. L.J. 1, 49 (five representative Bay Area cities all “require discretionary review for residential developments of five or more units ... even if these developments comply with the underlying zoning code”). “[C]ities uniformly eschew ‘by-right’ zoning for multi-family housing in favor of multi-year discretionary processes that require developers to follow vague standards and ensure a long and expensive approval process.” Stahl, *supra*, at p. 16. Most local governments in California engage in extensive discretionary review not just when they zone land to permit housing, but then *again* when an applicant proposes to actually build the housing for which the local government has already zoned.

Since “California’s land-use approval process is largely discretionary, with power resting in local government bodies,” this “leads to a significantly longer and riskier entitlement process than in other

jurisdictions.” McKinsey, *supra*, at p. 27; *see also* Schuetz, *supra* (California’s local “ad hoc approval process makes building new housing longer, riskier, and more expensive for the developer, which translates into higher costs for the finished housing”). Because the local approval process involves “project-by-project negotiations over design, scale, public benefits, affordable housing set asides, and so much more ... governments and neighborhood NIMBYs⁹ use this discretion to kill projects they dislike, and though some projects make it through, the delays and uncertainties can be very costly.” Elmendorf, *supra*, 71 HASTINGS L. J. at p. 88. Experts conclude that, “California will not solve its housing crisis unless policymakers develop a robust pro-housing policy agenda, one that includes streamlining development permits and reforming zoning” Reid, *supra*, at p. 22.

To address this problem, the Legislature has for decades enacted laws that limit cities’ authority over their permitting decisions as well as their zoning and planning decisions. Since 1977, the Permit Streamlining Act has required all local governments to review and consider development proposals on defined timelines, even if those timelines conflict with local laws. Stats. 1977, Ch. 1200, § 1 (enacting § 65920, *et seq.*). On numerous occasions, the Legislature has required local governments to approve specified qualifying housing projects on a “by-right” basis, even when the local government’s ordinances would otherwise subject such projects to discretionary subjective review. *See, e.g.*, § 65583.2, subds. (h) & (i); § 65589.4; § 65913.4.

These laws all limit cities’ police power authority over their own housing approval processes. And among the most important of these laws is the HAA.

⁹ “Not In My Backyard” opponents of new housing.

C. The Housing Accountability Act.

In 1982, the Legislature amended the Housing Element Law to add the Housing Accountability Act. Stats. 1982, Ch. 1438, § 2 (enacting § 65589.5). At the time, the law read in its entirety:

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

(a) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density.

(b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to subdivision (a), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

Then, as now, the gravamen of the statute is simple: except in cases of a significant and unavoidable public health or safety problem, cities should be approving code-compliant housing developments. This core aspect of the law remains the same today. *Compare ibid.* with § 65589.5, subd. (j).

In 1990, the Legislature confirmed that the HAA applies to charter cities, after finding “that the lack of affordable housing is a critical statewide problem.” Stats. 1990, Ch. 1439, § 1 (enacting § 65589.5(g)). The Legislature supported this conclusion with an unusually thorough set of legislative findings, including that “[t]he excessive cost of the state’s housing supply is partially caused by activities and policies of many local governments which limit the approval of affordable housing, increase the cost of land for affordable housing, and require that high fees and exactions

be paid by producers of potentially affordable housing,” that “[a]mong the consequences of those actions are discrimination against low-income and minority households,” and that “[m]any local governments do not give adequate attention to the economic, environmental, and social costs of decisions which result in disapproval of affordable housing projects, reduction in density of affordable housing projects, and excessive standards for affordable housing projects.” Stats. 1990, Ch. 1439, § 1 (enacting § 65589.5, subd. (a)(2)-(4)).

Since enactment, the Legislature has had to amend the statute continuously “to respond to the creative ways in which local governments attempt to maintain the ability to deny projects.” California Bill Analysis, Senate Committee, 2017-2018 Regular Session, Assembly Bill 3194, CA B. An., A.B. 3194, Sen. (June 27, 2016); Joint Appendix (“JA”)/191.¹⁰ In 1999, the Legislature provided that qualifying housing development projects need only comply with “objective” general plan and zoning standards. Stats. 1999, Ch. 968, § 6 (amending § 65889.5, subd. (j)). In 2017, the Legislature concluded that its decades-long intent to “curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects ... [had] not been fulfilled,” and so it further reinforced this limitation. Stats. 2017, Ch. 378, § 1 (enacting § 65589.5, subd. (a)(2)(K)). Specifically, the Legislature provided that a project must be considered compliant with objective standards “if there is substantial evidence that would allow a reasonable person to conclude that the housing development” complies. *Ibid.* (enacting § 65589.5, subd.(f)(4) (hereinafter, “Paragraph (f)(4)”). An “objective” standard, such as the number of feet a building can reach in height, should be a standard about which reasonable persons cannot disagree. But if reasonable minds can

¹⁰ See Petitioners’ Request for Judicial Notice (“RJN”), Exh. B, at p. 3.

disagree about whether a standard is satisfied, then it is not “objective” for purposes of the HAA.

Recognizing that the HAA has important policy purposes that transcend the interests of developers, the Legislature gave standing to enforce the HAA to any “person who would be eligible to apply for residency in the housing development project,” and to any “housing organization.” § 65589.5, subd. (k)(1)(A)(i). Petitioner and Appellant CARLA is a “nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households.” § 65589.5, subd. (k)(2); Administrative Record (“AR”)/1663-64; 1JA/004-05. Petitioner and Appellant Victoria Fierce, CARLA’s then-co-executive director, and Petitioner and Appellant John Moon, a resident of San Mateo (collectively with CARLA, “Petitioners” or “Appellants”), are both persons who would be eligible to apply for residency in the Project. 1JA/005.

II. Factual Background.

On February 23, 2015, Real Parties in Interest Tony and Aynur Gundogdu (the “Applicant”) submitted an application to construct a 5,322 square foot, ten-unit residential housing development (the “Project”). AR/1228-34. The Applicant only sought the necessary permits to be allowed to build in conformance with the City’s existing standards on a site that the City had identified for high-density, multi-family development in its General Plan and Zoning Code. AR/869.

In other states, this type of project would be approved “by right” after staff confirmed its compliance with the building code. *See Neville, supra*, 79 N.Y.2d at p. 425. But in San Mateo, even a ten-unit development that sought no zoning changes required years of compromise and discussions with staff before it could even be recommended to the City Planning Commission (“Commission”) for discretionary consideration. *See*

generally AR/860; AR/869. At an August 2017 hearing and in the findings prepared after careful analysis, City Staff explained that:

- The Project conforms to the General Plan, which “designates [the Project] parcel as High Density Multi-Family.” AR/886-87; AR/870; AR/875; AR/883-91.
- The Zoning Code designates the parcel as R4 (Multiple Family High Density) and “[t]he factual data sheet ... shows compliance with all Zoning Code development standards.” AR/870.
- With certain modifications that were included as a condition of approval, “the project is consistent with the Multi-Family Design Guidelines and the policies of the General Plan.” AR/871.
- The Project is categorically exempt from CEQA pursuant to the Class 32 exemption in 14 Cal. Code Regs. § 15332, because, *inter alia*, it is “in conformance with the General Plan Policies and Zoning Code.” AR/872-73.

Although there was some opposition to the Project from neighboring property owners at the August 2017 Commission hearing, no member of the City Staff or Commission suggested that the Project failed to satisfy any applicable, objective requirement. *See generally* AR/1093-1223. The Commission continued the hearing to allow the Applicant to continue discussions with the neighbors, and the Commission limited public comment at the continued hearing to only address the conditions of approval for the Project. AR/1089.

At the September 26, 2017 meeting, Planning staff again recommended approval of the Project, with revised conditions of approval to address neighbors’ concerns. AR/572-74. However, despite the fact that the continued hearing was only supposed to consider the conditions of approval for the Project, the Commission performed an abrupt about-face in

response to pressure from anti-development neighbors who contended that the Project was “out of scale with the neighborhood.” AR/798.

Commissioner Dreschler concluded that the building “doesn’t feel right” and “feels too big” and stated that he wanted to change the project to produce fewer homes: “That means reducing the number of units and I know that.” AR/837. Commissioner Dreschler asked the Applicant to reduce the density of the project to eliminate two or three homes from the project, and the Applicant responded to explain why that would not be feasible. AR/838-39.

Planning Commissioners then explained their reasons for disapproving the Project: that the “project needs to be smaller” (AR/842), that “it is a very large building” that may not be “in scale or harmonious with the character of the neighborhood” (AR/842-43), and that while the design is “well thought out,” it is on the “wrong lot” because it would diminish the quality of life and use of the neighbors’ property (AR/851). At no point during the September 2017 hearing did any Planning Commissioner or member of the public suggest that the Project was inconsistent with any specific, objective City standard—in fact, Commissioner Rodriguez acknowledged that “technically it does meet[] all the zoning requirements.” AR/842-43. Despite this, the Commission voted to disapprove the Project, and then directed Staff to prepare findings to support the decision the Commission had made. AR/854-55.

In its staff report for the October 10, 2017 meeting, staff prepared a set of denial findings based on subjective conclusions such as that the project was “not in scale and ... not harmonious with the character of the neighborhood.” AR/521-22. Amidst these determinations, Staff also supplied another finding that the Commission members had not identified, that the Project failed to meet a guideline relating to differential in height (“Height Variation Guideline” or “Guideline”) in the City’s Multi-Family

Design Guidelines (“MFDGs”). AR/522. The Commission then re-affirmed its disapproval of the Project. AR/525-26.

The Applicant timely appealed to the San Mateo City Council (“Council”). In a letter and in oral comments at the appeal hearing on February 5, 2018, Petitioners commented in the record to urge the City to comply with the HAA. AR/461; AR/1663-64.

At the Council hearing, staff’s presentation again focused on subjective considerations rather than the Project’s purported noncompliance with an objective standard. AR/357-77; AR/388-90. The City Attorney acknowledged that the HAA “significantly limits the Council’s decision making discretion,” and advised the Council that subjective criteria such as neighborhood “compatibility” or “suitability” are not permissible grounds for denial of the Project. AR/483; AR/485. Out of the many findings Staff had prepared to support the denial, the City Attorney identified only one—the Height Variation Guideline—that he thought could be characterized as “objective,” and which he interpreted to require the Project to add an additional setback to one of its upper floors. AR/486-87. Then, rather than impose a condition on the approval of the project to address this concern, the Council voted 3-1 to affirm the Commission’s disapproval, over the dissenting vote of the City’s Mayor. As the Mayor noted, the staff report demonstrated the project’s compliance with all objective standards, including all of the City’s requirements for setbacks. AR/504-05.

III. Procedural History.

On April 26, 2018, Petitioners timely filed and served a petition for writ of mandate pursuant to § 65589.5, subd. (k) to enforce the HAA. 1JA/003. Respondents answered on August 2018, and filed an amended answer in September 2018. 1JA/021; 1JA/028. Respondents’ first answer raised First Amendment constitutional arguments as affirmative defenses (1JA/025), but the amended and operative answer pled no constitutional

defenses. 1JA/031-32. In their briefing on the merits, Respondents argued that the City had complied with the HAA, contending that the Height Variation Guideline qualified as an applicable objective standard, as well as offering a new argument that the Project violated a parking standard.

1JA/067-78. Respondents made no argument in merits briefing that the law was unconstitutional or unenforceable in any respect. *See* 1JA/062-83.

After merits briefing was complete, the trial court entered a minute order continuing the scheduled merits hearing by two months, and directed the parties to file supplemental briefs to address questions related to the burden of proof, the standard of review, and the appropriate remedy.

1JA/158-59. The minute order did not request briefing on the constitutionality of the statute, but stated that, “If either party contends that some aspect of Government Code 65589.5(f)(4) is or is not enforceable or is or is not applicable to this action, the parties are ordered to provide all authority supporting that contention.” 1JA/159. The court ordered Petitioners to file their supplemental brief first, and ordered that Petitioners would be allowed “No Reply” to Respondents’ supplemental brief.

1JA/158.

Petitioners filed their supplemental brief and addressed the questions in the Court’s minute order. At that time, Respondents had neither pled nor argued that any aspect of the HAA was unenforceable—and in fact, the City’s attorney had stated in the record that the HAA “significantly limits the Council’s decision making discretion.” AR/483. In Respondents’ supplemental brief, however, Respondents chose to make new arguments they had declined to advance in merits briefing: that the HAA was unenforceable and unconstitutional because it “violates the Home Rule Doctrine and effects an unlawful delegation of municipal functions to private parties.” 1JA/238.

At the hearing, the trial court allowed fifteen minutes for each side to present all aspects of its case. Reporter’s Transcript (“RT”)/4. Petitioners’ counsel used this time primarily to address the issues raised in merits briefing, while noting that, to the extent the Court was considering the arguments in Respondents’ supplemental brief, Petitioners did not have an opportunity to reply to that brief, and that it would be impossible to attempt to address all of its claims in a 15-minute oral argument. RT/10. The court did not respond to this. *Ibid.* Respondents’ counsel presented Respondents’ arguments from their merits briefs, but presented no argument that the law was unconstitutional. RT/10-18. The trial court neither asked any questions nor made any comments about the constitutionality of the statute.

After the hearing, the court issued an order denying the Petition. 2JA/432-39. The majority of the trial court’s analysis rested on the court’s conclusion that the HAA was unconstitutional. 2JA/434-39. In its order, the trial court noted that it had found the HAA unconstitutional because Respondents’ constitutional arguments were “uncontroverted.” 2JA/436. The court concluded that the HAA was unconstitutional as applied to charter cities because it was not narrowly tailored to avoid unnecessary interference with municipal affairs. 2JA/439. Although the trial court primarily objected to the standard of review in Paragraph (f)(4), the court was clear that it had concluded that the entire statute was unconstitutional as applied to charter cities. *Ibid.* (“This court finds that *the HAA in general* and Government Code § 65589.5(f)(4) in particular constitute a significant and unnecessary interference in municipal governance”) (emphasis added). The trial court also held that the HAA unconstitutionally delegated municipal functions in violation of Cal. Const., Art. XI, § 11 (hereinafter, “Section 11”) (2JA/437-38)—and, therefore, that the law is unconstitutional in every city.

Petitioners filed a motion for a new trial pursuant to Code Civ. Proc. § 657, and a motion to set aside and vacate the judgment pursuant to Code Civ. Proc. § 663, to allow the trial court to address these procedural irregularities, and to consider substantive arguments that had not been addressed in merits briefing. 2JA/454-460. The trial court denied these motions, and this appeal followed. 2JA/697-704.

STATEMENT OF APPEALABILITY

To obtain appellate review in an HAA action, a party “may appeal the judgment or order of the trial court under Section 904.1 of the Code of Civil Procedure.” § 65589.5, subd. (m). Appellants filed a notice of appeal (2JA/675) after the trial court’s order denying the Petition. Appellants also filed a notice of appeal (2JA/725) after the trial court’s separate final judgment (*see* Code Civ. Proc. § 904.1, subd. (a)(1)), and the trial court’s post-judgment order denying Appellants’ motion to vacate and motion for a new trial (*see* Code Civ. Proc. § 904.1, subd. (a)(2)). This Court consolidated both appeals for all purposes.

STANDARD OF REVIEW

I. The Court of Appeal Exercises Independent Judgment, with No Deference to the Trial Court.

The Court of Appeal “exercise[s] ... independent judgment,” without deference to the trial court, when “decid[ing] whether ... [a state law] can be constitutionally applied to charter cities.” *Anderson, supra*, 42 Cal.App.5th at p. 697. The Court of Appeal also reviews *de novo* a trial court’s ruling that a state statute violates Section 11. *Cty. of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4th 20, 28 (“*PERB*”).

When, as here, a petition for writ of mandate is denied in a decision that “did not turn on any disputed facts,” the trial court’s decision “is subject to *de novo* review” on appeal. *Professional Engineers in California*

Government v. Kempton (2007) 40 Cal.4th 1016, 1032 (“*Professional Engineers*”); see also *Our Children's Earth Found. v. State Air Resources Bd.* (2015) 234 Cal.App.4th 870, 885 (“[t]he appellate court reviews the agency’s action, not the trial court’s decision; in that sense appellate judicial review ... is de novo”).

II. The Court Resolves Any Doubt in Favor of the Constitutionality of a State Statute, and Gives Great Weight to the Legislature’s Findings.

“[O]ne of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, ‘is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.’” *Lockyer v. City & Cty. of San Francisco* (2004) 33 Cal.4th 1055, 1086 (citing numerous authorities). Under “well settled rules of constitutional construction,” although a reviewing court “must enforce the provisions of our Constitution,” if “there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *PERB, supra*, 246 Cal.App.4th at pp. 28-29 (rejecting Section 11 challenge).

Specifically, any “doubt whether a matter which is of concern to both municipalities and the state is of sufficient statewide concern to justify a new legislative intrusion into an area traditionally regarded as strictly a municipal affair ... must be resolved in favor of the legislative authority of the state.” *Cal.Fed, supra*, 54 Cal.3d at p. 24 (quotation omitted). Although the question of a statute’s constitutionality “presents a legal question, not a factual one ... [c]ourts accord great weight to the factual record that the Legislature has compiled.” *State Bldg. & Construction Trades Council of Calif. v. City of Vista* (2012) 54 Cal.4th 547, 558 (“*Vista*”). A reviewing court may not “disregard the Legislature’s pronouncements about the importance of the concern to the state or the

supporting factual and decisional record.” *Anderson, supra*, 42 Cal.App.5th at p. 707.

III. Courts Review an Agency’s Compliance with the HAA under a Standard That Is Highly Deferential to Housing.

The HAA is enforced by a petition for writ of mandate. *Honchariw v. Cty. of Stanislaus* (2011) 200 Cal.App.4th 1066, 1072 (“*Honchariw*”) (citing § 65589.5, subd. (m)). Mandate lies to correct an “abuse of discretion,” which is established if the City “has not proceeded in the manner required by law.” *Ibid.*; Code Civ. Proc. § 1094.5. Under the HAA, an agency has “not proceeded in the manner required by law” if it denies a housing development project that complies with applicable objective standards without making the required findings. *Honchariw, supra*, 200 Cal.App.4th at p. 1081.

The City bears the burden of proof to demonstrate that it complied with the HAA. § 65589.6. The HAA also dictates a specific standard of review to govern the question of whether a project complies with applicable objective standards. § 65589.5, subd. (f)(4). Instead of requiring courts to defer to a city’s determination as long as a reasonable person could agree with the city, the HAA provides exactly the opposite: a qualifying housing development “shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity.” § 65589.5, subd. (f)(4) (emphasis added).

The HAA also directs that the HAA must be interpreted in a manner “to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” § 65589.5, subd. (a)(2)(L). To the extent there are any questions not governed by the specific standards of review in the HAA

itself, such questions are decided under the independent judgment standard, as in any other mandamus action. *See Professional Engineers, supra*, 40 Cal.4th at p. 1032. When exercising independent judgment on questions of law, courts do not defer to a city’s interpretation of a State law intended to be statewide in scope. *See, e.g., Cal. Highway Patrol v. Super. Ct.* (2006) 135 Cal.App.4th 488, 501 (“*CHP*”); see also Argument, Part II-A-1, *infra*.

ARGUMENT

I. The Housing Accountability Act Is Constitutional.

A. Article XI, Section 7 of the Constitution Does Not Prohibit the Legislature from Applying the HAA to Charter Cities.

1. It Is Well Established That Housing Laws Such as the HAA Constitutionally Apply to Charter Cities.

Numerous published cases directly address whether state housing and land use laws—including the Housing Element Law—constitutionally apply to charter cities. In those cases, “courts have consistently held that the state can preempt local land use authority because land use touches upon issues of statewide concern like regional land use planning, environmental protection, and housing affordability.” Stahl, *supra*, at p. 4. The trial court held otherwise without citing a single opinion that has ever found to the contrary.

The statewide interest in housing is so great that it in *Anderson, supra*, 42 Cal.App.5th at p. 718, the court declared constitutional the Surplus Land Act (SLA), § 54220, *et seq.*, which deprives charter cities of their autonomy to control *their own city-owned property*. The HAA, which does not deprive any city of authority over its own property or funds, stands on much firmer constitutional footing. And *Anderson* is only the most recent of the many cases affirming that land use and housing are not purely municipal affairs.

In *City of Los Angeles v. State of California* (1982) 138 Cal.App.3d, 526, 532-33 (“*Los Angeles*”), the Court of Appeal rejected Los Angeles’ Section 5 challenge to a law requiring the city conform its zoning to its general plan. Three years later, the Court of Appeal held that a charter city’s land use initiative ordinance must yield to a state housing discrimination law, because the local initiative related to a “vital state concern” rather than a municipal affair. *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18, 22 (“*Bruce*”). The *Bruce* court canvassed the many legislative declarations of statewide interest in housing, to which it gave “great weight,” and noted that “[t]hese high pronouncements do no more than iterate what is the common knowledge of all.” *Id.* at pp. 21-22.

The same year as *Bruce*, the Court of Appeal held that there was “no merit” to the argument that the Housing Element law intruded into “municipal affairs.” *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 307 (“*Buena Vista*”). *Buena Vista*, too, cited numerous prior legislative and judicial declarations finding the “need to provide adequate housing to be a matter of statewide concern,” rather than a purely municipal affair. *Id.* at pp. 306-07 (citing, e.g., *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 743; *Green v. Superior Court* (1974) 10 Cal.3d 616, 625). More recently, the Court of Appeal held that a charter city must comply with state accessory dwelling unit law. *Coal. Advocating Legal Housing Options v. City of Santa Monica* (2001) 88 Cal.App.4th 451, 458 (“*Coalition*”).

In light of this case law, the constitutionality of the HAA and related state housing laws has never been in serious question. In fact, when it suits the interests of charter cities, they are quick to emphasize that the HAA constrains their authority (as the City attorney did here, AR/483; AR/485). In 1991, when the charter city of Oakland certified an Environmental Impact Report for a housing development project without considering a

reduced-density alternative, Oakland argued—and the Court of Appeal agreed—that such alternative was legally infeasible, because the HAA prohibited the city from reducing the density of the project. *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 716. Similarly, the charter city of Porterville successfully defended its failure to analyze density-related impacts of a housing development, on the grounds that the HAA prohibited it from reducing that density. *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 905-06.

Rather than cite any prior case law finding that a state housing law violated Section 5, the trial court relied on authority construing a different clause of the constitution: Section 7. The authorities on which the trial court relied held only that “[l]and use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7.” 2JA/735 (emphasis added) (quoting *DeVita v. Cty. of Napa* (1995) 9 Cal.4th 763, 782 (“*DeVita*”). But the fact that housing falls within a city’s police power under Section 7 says very little about whether the city’s laws supersede conflicting state laws pursuant to Section 5. Police power authority under Section 7 extends only to local ordinances that are “not in conflict with general laws.”

The trial court’s reliance on *DeVita* is particularly surprising, because there the Supreme Court concluded that the Legislature’s forbearance from intruding into local land use was a legislative policy choice, not a constitutional mandate. In *DeVita, supra*, 9 Cal.4th at p. 784, the Legislature “[made] plain” that its laws regulating general plan amendments did *not* apply to charter cities. The court took this to be a strong indication that the Legislature did not regard this to be an area of statewide concern, and therefore assumed the Legislature did not intend to

preclude local initiative amendments to amend general plans. *Ibid.* But the Supreme Court went on to note that “[t]he probability that general plan amendments will have regional or statewide impacts certainly supports the contention that *the Legislature possesses the constitutional authority to limit the power of initiative in this area if it chose to do so.*” *Ibid.* (emphasis added). The question turned on legislative intent, not constitutional authority—and in this case, the Legislature has stated its intent to apply the HAA to charter cities (§ 65589.5, subd. (g)), in light of the significant evidence that local decisions in this area “will have regional or statewide impacts.” *DeVita, supra*, 9 Cal.4th at p. 784; *see* § 65589.5, subd. (a)(1)(D), (a)(2)(K). *DeVita* actually strongly supports the State’s authority to legislate in this area.

“[M]unicipalities are not isolated islands remote from the needs and problems of the area in which they are located.” *Livermore, supra*, 18 Cal.3d at p. 607. For that reason, local governments must consider regional as well as local interests even when they exercise their police power authority in a manner consistent with state law. *Id.* The responsibility of a city to *comply* with state law in this area should be beyond question.

It is true that for many years the Legislature, and accordingly, the courts, recognized local supremacy over many aspects of housing and land use. But “[a]s conditions in the state change, what was once a matter of local concern may later become a matter of statewide concern controlled by general law.” *Los Angeles, supra*, 138 Cal.App.3d at p. 532. The Legislature has found and declared, on the basis of ample evidence, that local control over housing has had dramatic negative results on housing supply and affordability. Therefore, the Legislature has taken action to limit local authority to serve the interests of the people of the state as a whole. Nothing in the Constitution prohibits it from doing so.

The Legislature possesses the authority to apply laws regulating housing and land use to charter cities. If it were otherwise, then the Legislature would have been unable to apply such well-established statutes as the Housing Element Law, the Density Bonus Law, and the Surplus Land Act, to effectively limit local resistance to new housing.¹¹ The case law on this point has been well established for decades, and the trial court cited no authority holding otherwise.

2. The HAA Is Sufficiently Tailored to Avoid Unnecessary Interference Into Local Governance.

Even looking past the lack of authority supporting the trial court’s ruling, the HAA is constitutional under the “four-part ‘analytical framework’” courts apply to “determine whether a state law unconstitutionally infringes the home rule authority of charter cities....” *Huntington Beach, supra*, 44 Cal.App.5th at p. 255. This inquiry considers (1) the nature of the “municipal affair,” (2) whether a state law is in “actual conflict” with the local ordinance, (3) whether the state law addresses a matter of “statewide concern,” and finally (4) whether the state law is “reasonably related to ... resolution” of the identified statewide concern and “‘narrowly tailored’ to avoid unnecessary interference in local governance.” *Ibid.*

The HAA does not intrude into any city’s authority over its own finances or property. But even if it did, in light of the state’s strong interest

¹¹ According to the League of California Cities, as of 2017, 121 of California’s 482 cities, including all of the 15 most populous, have charters. *See* https://www.cacities.org/Resources-Documents/Resources-Section/Charter-Cities/Charter_Cities-List and <https://www.cacities.org/Resources-Documents/About-Us/Careers/2017-City-Population-Rank.aspx> (accessed June 15, 2020). The State cannot effectively limit local ability to restrict housing if the Legislature can only apply its housing laws to jurisdictions that have yet to adopt a charter.

in housing supply and affordability, the law is sufficiently tailored to avoid unnecessary interference in municipal affairs.¹²

a. It Is Undisputed That the Laws Conflict, and That the State Has a Strong Statewide Interest in Housing.

In the absence of the HAA, the City’s local ordinances allow it to deny or reduce the density of housing developments that comply with objective standards without making findings. The HAA forbids this. There is no dispute that the state and local laws conflict. 1JA/241-42.

As for the state’s interest, the “lack of affordable housing has been a statewide issue of concern for almost 40 years.” *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 627. The Legislature and the Courts have recognized this statewide interest on numerous occasions. *See, e.g.*, §§ 65913.9, 65589.5, subds. (a), (g); *Coalition, supra*, 88 Cal.App.4th at p. 458. A reviewing court must give those declarations “great weight.” *Bruce, supra*, 166 Cal.App.3d at p. 21. Cities’ decisions to reject or delay housing have a well-documented regional and statewide impact, as the Legislature has found and declared. *See, e.g.*, § 65589.5, subds. (a), (g); *see also* “Statement of the Case,” *supra*, at I-B.

California’s strong interest in housing availability has been “the common knowledge of all” for more than thirty years. *Bruce, supra*, 166 Cal.App.3d at p. 22. The state is strongly interested not just in creating

¹² Appellants do not dispute that cities have an interest in imposing discretionary review over housing, but it is far from the type of internal governance interest typically held sufficient to supersede conflicting state laws. *See Vista, supra*, 54 Cal.4th at p. 559 (“wage levels of contract workers constructing locally funded public works are certainly a ‘municipal affair’”); *CCSF, supra*, 7 Cal.5th, at p. 560 (“Levying taxes to raise revenue is an archetypal municipal affair”). The nature of the municipal interest is relevant when determining whether a state law is sufficiently tailored to “avoid unnecessary interference in local governance.” *Huntington Beach, supra*, 44 Cal.App.5th at p. 255.

below-market subsidized homes but also increasing housing supply overall to decrease costs for all. *See* § 655895, subd. (a)(2)(F) (“Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians”); *see also* Reid, *supra*, at p. 23 (California must ensure that “all cities are building their fair share of both affordable and market-rate housing”). The fact that the HAA regulates a matter of statewide concern is not disputed. 1JA/242.

b. The HAA Is Sufficiently Tailored.

A state law prevails over conflicting charter city ordinances if the state law is “‘reasonably related to ... resolution’ of [the statewide] concern ... and ‘narrowly tailored’ to avoid unnecessary interference in local governance.” *Huntington Beach, supra*, 44 Cal.App.5th at p. 277 (citing *Vista, supra*, 54 Cal.4th at p. 556). Despite the phrase “narrowly tailored,” courts do not require the state to demonstrate that it has chosen the least impactful way that it could possibly regulate an area. *See Cal.Fed., supra*, 54 Cal.3d at p. 24. A state law is “[s]ufficiently [t]ailored” if it is “reasonably related to the issue at hand and limit[s] the incursion into a city’s municipal interest.” *Anderson, supra*, 42 Cal.App.5th at pp. 716-17 (quotation omitted). To meet the “tailoring” prong, “all that is required” is a “direct, substantial connection between the rights provided” by the HAA “and the Legislature’s asserted purpose.” *Huntington Beach, supra*, 44 Cal.App.5th at p. 277 (quotation omitted).

There is a direct, substantial connection between the rights provided by the HAA and the Legislature’s well-demonstrated interest in promoting housing supply and affordability. § 65589.5, subd. (a)(2)(K). The statewide interest in housing is so well-established that laws such as the HAA, which do not intrude onto cities’ control over their own property or finances, have been readily affirmed without the need for searching inquiry into the means the Legislature chose to meet its end. *See, e.g., Buena Vista,*

supra, 175 Cal.App.3d at p. 307; *Bruce, supra*, 166 Cal.App.3d at p. 22; *Coalition, supra*, 88 Cal.App.4th at p. 458.

Moreover, even if the HAA *did* interfere with a power such as a city's control over its own property, the law would still be constitutional. Noting that state laws which only impose "procedural standards ... impinge[] less on local autonomy than ... substantive obligations," the *Anderson* court affirmed the SLA as sufficiently tailored in part because "[w]hether land is deemed 'surplus' is entirely within the local government's discretion," and the SLA only applies to those lands the city chose to designate. *Id.* at pp. 704, 717. So, too, under the HAA, it is entirely within the city's discretion to decide where to zone for housing. The HAA only applies in those areas the city chooses to designate for housing.

The HAA further "leaves cities considerable discretion" in the manner in which they comply with the law. *Buena Vista, supra*, 175 Cal.App.3d at p. 307. *First*, the HAA fully reserves to cities the right to adopt objective standards to regulate housing. Nothing in the HAA prevents cities from prohibiting housing in certain areas or establishing numerical limits on building height or density.

Second, even when a project fully complies with a locality's objective standards, a city may still condition a development in any way that does not reduce the project's density. Notably, here, if the City had really been concerned about the Project's upper floors providing sufficient setbacks, the HAA fully permitted the city to impose a condition of approval to address that issue—as long as it was clear that the condition would not reduce the project's density. The HAA only prohibits a city from using subjective discretion to do two things: to reduce a project's density (which the Commission attempted to do, AR/838-39), or to disapprove the project (which the City ultimately did, AR/28).

Third, cities still have the authority to deny projects that comply with objective standards if they make the public-health-and-safety findings in § 65589.5, subd. (j).

Despite this, the trial court held that the HAA was not sufficiently tailored because the Legislature could have enacted a less effective law that only applies to cities that act in bad faith or only to “larger” projects. 2JA/439. But when determining whether a state law reasonably “limit[s] the incursion into a city’s municipal interest,” *Anderson, supra*, 42 Cal.App.5th at p. 717 (quotation omitted), courts “defer to legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution.” *See also Cal.Fed., supra*, 54 Cal.3d at p. 24.

The trial court also concluded that, by enacting a standard of review in Paragraph (f)(4) that does not favor the locality, the Legislature reached too far into municipal affairs. *See* 2JA/439. But there is nothing unusual about the Legislature dictating a standard of review to govern litigation, and nothing in the constitution requires lawmakers to only adopt standards of review that defer to local governments. *See e.g., Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 933 (“*Pocket Protectors*”) (“Under the fair argument test” in CEQA challenges to a negative declarations, a plaintiff suing a local government “has a much lower threshold to meet and [reviewing courts] do not defer to the lead agency’s exercise of discretion”). The Legislature only concluded that it needed to enact Paragraph (f)(4) after finding and declaring that its prior attempts to curb local governments from denying code-compliant housing projects had failed to achieve their intended result. § 65589.5, subd. (a)(2)(K). The Legislature concluded on the basis of ample evidence and thorough findings that this change was important to address a “housing supply and affordability crisis of historic proportions.” § 65589.5, subd. (a)(2)(A); *see*

also “Statement of the Case,” at Part I-B & I-C, *supra*. The Supreme Court has affirmed less compelling statewide interests, and much blunter legislative measures, as sufficient to meet the Home Rule Doctrine. *See Cal.Fed.*, 54 Cal.3d p. at 10 (affirming state’s interest in “uniform statewide regulation of banks and financial corporations” as sufficient to authorize preemption of charter city business license taxes).

The HAA would be sufficiently tailored even if it went so far as to impair a city’s control over its own property. *Anderson, supra*, 42 Cal.App.5th at pp. 717-18. Since the HAA does not reach nearly as far into municipal affairs as the SLA, and leaves considerable discretion to local agencies, its constitutionality is clear.

B. The Housing Accountability Act Does Not Delegate Authority over a “Municipal Function” to Any Private Party.

The trial court also concluded that, because Paragraph (f)(4) contains a standard of review that is deferential to housing applicants, the statute violates Section 11, and is therefore unconstitutional not just in charter cities but everywhere in the state. The court did not cite any decisional authority supporting this dramatic holding. 2JA/437-38. But the primary authority on which Respondents relied is clearly distinguishable.

In *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 292-93, the Supreme Court held unconstitutional a statute that fully delegated to private arbitrators the ability “actually to set [county] employee salaries,” robbing a municipal authority of its authority to set its own workers’ salaries. Respondents argue that Paragraph (f)(4) is comparable because it allows private parties to present evidence that becomes binding on the city in determining whether a project complies with objective standards. 1JA/244.

To begin with, this case does not present this issue because here it was not private parties but several municipal officials who supplied substantial evidence that the Project complied with applicable objective standards. *See, infra*, at “Argument,” Part II-A-2. But more importantly, Paragraph (f)(4) is no different than any other standard of review, such as the “rational basis” standard for equal protection claims, or the “fair argument” standard for CEQA challenges to Negative Declarations. It is true, of course, that a private litigant can prevail in litigation against a municipality by meeting the relatively low burdens these standards establish. Under the fair argument standard, for example, if a private party produces any substantial evidence to support a fair argument of environmental impact, the private party’s evidence prevails over the municipality’s better-supported conclusions to the contrary, depriving the municipality of its authority to reach its own conclusion about impact significance and depriving it of its ability to approve a project without further CEQA review. *See, e.g., Pocket Protectors, supra*, 124 Cal.App.4th at p. 933. But it would be risible to suggest that this or any other standard of review results in the “delegation” of municipal authority to the private litigant.

Under the HAA, the City retains full authority to adopt standards, review projects for compliance with those standards, and impose conditions on project approvals. Paragraph (f)(4) merely provides a relatively favorable standard of review for litigants who challenge an agency’s argument that a project violated objective standards. Respondents cited no authority holding this type of statute unconstitutional.

C. Respondents’ Other Constitutional Contentions Are Meritless.

In their un rebutted supplemental brief, Respondents raised two additional constitutional arguments, which the trial court did not address.

These contentions should be rejected if Respondents seek to advance them on appeal. The HAA does not deprive anyone of a due process right to notice and a hearing before a local agency makes a decision on a housing development. It merely limits—but does not eliminate—the discretion the city has to deny projects. As for the suggestion, raised only in a footnote, that the HAA might violate the equal protection clause, the HAA implicates no suspect class triggering heightened scrutiny, and Respondents have not met their burden to “negative every conceivable basis that might support” the distinctions that the HAA draws. *Johnson v. Dept. of Justice* (2015) 60 Cal.4th 871, 881.

II. The Petition Should Be Granted.

The trial court’s rulings rested primarily on the conclusion that the HAA is unconstitutional. 2JA/432-39; 2JA/697-704. Once the constitutionality of the law is accepted, it is clear that the Petition should be granted.

The HAA prohibits a city from disapproving housing development projects that comply with applicable objective general plan, zoning and subdivision standards, unless the city makes the findings in § 65589.5, subd. (j). It is undisputed that the Project is a qualifying housing development project, and it is undisputed that the City disapproved the Project without making the findings. Therefore, the Petition should be granted unless Respondents can meet their burden of proof under the applicable standard of review to demonstrate that the City properly found the Project to violate an applicable objective general plan, zoning or subdivision standard.¹³

¹³ In *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1262, this Court rejected a petitioner’s attempt to argue that the HAA “imposes a self-executing deadline within which an EIR must be certified.” This rationale does not apply here: the Project is exempt from CEQA

Respondents cannot meet their burden.

A. Because There Is Substantial Evidence from Which a Reasonable Person Could Conclude That the Project Meets All Applicable Objective General Plan, Zoning and Subdivision Standards, the Petition Should Be Granted.

1. A Reviewing Court Applies the Standard of Review in Paragraph (f)(4), and Does Not Defer to the City.

The trial court declined to apply the standard of review that the Legislature specifically directed to apply to the question of whether a project complies with applicable objective standards. 2JA/434. The primary reason the trial court refused to apply the standard of review in Paragraph (f)(4) was that the court concluded that the provision was unconstitutional. As set forth *supra* at “Argument,” Part I-A, this was error, because this provision, like the rest of the HAA, is constitutional.

The trial court also indicated that it would not apply the HAA’s standard of review because the question is a “legal” one and therefore the court should defer to the city’s interpretation of its Guideline. Even if the HAA’s specific standard of review did not control, the court’s deference to agency legal interpretation would have been error. Courts do not defer to local interpretations of laws that are intended to be statewide in scope, because the principles of deference have “dubious application when numerous cities and counties are charged with applying state law, particularly when they apply the law inconsistently.” *CHP, supra*, 135 Cal.App.4th at 501; *Irvin v. Contra Costa Cnty. Employees' Retirement Assn.* (2017) 13 Cal.App.5th 162, 172-73; *Purifoy v. Howell* (2010) 183 Cal.App.4th 166, 182-83. By allowing the City to articulate a *post hoc* legal interpretation that allowed its Guideline to qualify as “objective”

(AR/872-73), and San Mateo, unlike Sebastopol, took final action to disapprove the Project.

under the HAA, the trial court effectively deferred to the City about whether the City had complied with a state law specifically designed to limit the City's authority.

Respondents' claim to deference is further misplaced because the case law to which they cite is premised on the "long-standing construction of a law by the agency charged with its enforcement." 1JA/234 (citing *Gerawan Farming Inc. v. Agricultural Labor Relations Board* (2017) 3 Cal.5th 1118, 1155-56). The City is not charged with the *enforcement* of the HAA; it is charged with *complying* with the HAA. Moreover, the City had no "long-standing construction" of the Height Variation Guideline that would command deference. The City's interpretation of the Guideline was not even consistent *within this approval process*. City staff and consultants each found the Project to comply with the MFDGs, including the Guideline, before staff suddenly reversed course after the Commission voted to deny the Project. AR/574, AR/582, AR/588, AR/590, AR/871, AR/881, AR/887, AR/889, AR/940-42. This convenient re-interpretation of the Guideline, which directly contradicted the interpretation the City had provided weeks prior, would not be entitled to deference in any circumstance.

But in any event, regardless of whether the general principle of deference to local legal interpretation would apply in the absence of Paragraph (f)(4), here the specific standard of review in the HAA governs. *See* Code Civ. Proc. § 1859. The Legislature has stated with specificity the standard of review that applies to the question of whether a project complies with objective standards. § 65589.5, subd. (f)(4). The Legislature has also established that the only relevant standards are those in effect at the *beginning* of the review process, "at the time that the application was deemed complete." § 65589.5, subd. (j)(1). If cities could escape the effect of Paragraph (f)(4) by providing a new "legal" interpretation of their code

at the very end of the review process, then Paragraph (f)(4) would be completely ineffective in serving its author’s purpose to “strengthen the provisions of the HAA and provide the courts with clear standards for interpreting the Act in favor of building housing.” California Bill Analysis, Assembly Committee, 2017-2018 Regular Session, Assembly Bill 1515, CA B. An., A.B. 1515, Assem. (Apr. 26, 2017); 1JA/185.¹⁴ The trial court’s interpretation of Paragraph (f)(4) is untenable enough in light of the fact that the HAA is a “remedial statute” that “must be liberally construed to promote its purpose.” *East West Bank v. Rio School Dist.* (2015) 235 Cal.App.4th 742, 748. In light of the Legislature’s specific direction to interpret the HAA “to afford the fullest possible weight to the interest of, and the approval and provision of, housing,” § 65589.5, subd. (a)(2)(L), this constrained reading of Paragraph (f)(4) cannot possibly be sustained.

2. There Is Substantial Evidence from Which a Reasonable Person Could Conclude That the Project Complies with All Applicable Objective General Plan, Zoning and Subdivision Criteria.

The record is replete with evidence that the Project complies with the City’s objective standards. The Court need not analyze in the abstract whether a reasonable person “would” conclude that the Project complies with all objective standards, because in this case, many reasonable persons—including numerous City officials—specifically *did* conclude that it was compliant.

First, City Planning Staff determined that the Project complied with all objective standards and criteria on two separate occasions. AR/576; AR/870-73. City staff explained at the August 8, 2017 Commission meeting that the Project conforms to the General Plan and all Zoning Code standards. AR/870–873; AR/881-91; AR/937. Staff also confirmed that

¹⁴ RJN, Exh. A, at p. 3.

the Project is exempt from CEQA pursuant to the Class 32 exemption, which requires that the Project be “consistent with the applicable general plan designation and all applicable general plan policies, as well as the applicable zoning designation and regulations.” 14 Cal. Code Regs. § 15332; AR/872-75. On September 26, 2017, the City staff re-confirmed the same conclusions. AR/574-76; AR/582-92.

Second, the City’s consultant hired to assess the Project’s “consistency with the City’s Multi-Family Design Guidelines and General Plan Urban Design Element” (AR/870), noted that the Project is “well designed,” “has a relatively small footprint,” and had addressed any perceived height differential sufficiently to comply with the Height Variation Guideline. AR/145-47; AR/940-42. On this basis, Staff affirmed that the Project as conditioned met the MFDGs. AR/871; AR/881.

Third, throughout the hearings, City officials repeatedly confirmed that the Project met the City’s objective standards. A Planning Commissioner explained that he was voting to disapprove it despite the fact that “technically it does meet[] all the zoning requirements.” AR/842-43.

The City’s Mayor also noted that:

“... I had a problem finding many objective standards really in the findings for denial. And when I looked at the findings for approval, which were what was recommended just a month or two before the findings for denial came about, I saw what looked really objective based on the City standards.... If you look at the City’s data sheet, it actually complies with all of those requirements.” AR/504-05.

There is more than enough substantial evidence—including Planning staff reports, statements made by City staff and decision-makers at the hearings, and the City Attorney’s conclusion that the Project qualified for the Class 32 Categorical Exemption—that would enable a reasonable person to conclude that the Project complies with the City’s objective

general plan, zoning and subdivision standards. If this amount of evidence does not qualify as “substantial evidence” from which a reasonable person could conclude that a project complies with objective standards, it would be hard to imagine any situation in which Paragraph (f)(4) could ever be invoked.

B. The City’s Citation To the Height Differential Guideline Does Not Excuse It from Complying with the HAA.

The Commission and Council findings cited a number of reasons to disapprove the Project which were plainly not “objective.” AR/28-31; AR/44-47. In litigation, Respondents extracted from this set of subjective determinations only a single conclusion that they argued was “objective”: the contention that the Project violated the Height Variation Guideline in the MFDGs. To begin with, “[f]indings are not supposed to be a post hoc rationalization for a decision already made” (*Bam, Inc. v. Board of Police Com’rs* (1992) 7 Cal.App.4th 1343, 1346)—and the Guideline finding was exactly that.¹⁵ But even putting this aside, the City’s contention must be rejected for multiple reasons. Whether the Court applies Paragraph (f)(4), or simply applies the HAA’s explicit limitation to “objective” standards, the City was not permitted to disapprove the Project by citing this Guideline.

¹⁵ The Commissioners stated on the record their reasons for disapproving the Project, all of which were explicitly subjective. AR/840-42; AR/844-45; AR/848; AR/851-522. Not one Commissioner cited the Height Variation Guideline or claimed that the Project failed to meet it or any other objective standard, and in fact one Commissioner even acknowledged that the Project complied with zoning. AR/842-43. City staff reversed their prior finding, and argued that the Project violated the Height Variation Guideline, only *after* the Commission had already voted to disapprove the Project. *See* AR/519-22. As Staff later noted, it was not the Guideline but rather the Commission’s conclusion that the Project “was not in scale or harmonious with the single family nature of the existing neighborhood” that “resulted in a vote of denial.” AR/41.

1. The Multifamily Design Guidelines Are Not Part of the City’s General Plan, Zoning or Subdivision Standards.

The HAA limits a city’s authority if a housing development complies with “applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards.” § 65589.5, subd. (j)(1). As construed by the Court of Appeal, this language means that “design review standards” are only included within the purview of Section 65589.5, subd. (j)(1) if they are “*part of* ‘applicable, objective general plan and zoning standards and criteria.’” *Honchariw, supra*, 200 Cal.App.4th at p. 1077 (emphasis added).

The MFDGs are not “part of” the City’s general plan, zoning, or subdivision standards. The MFDGs “are intended to complement the Zoning Code” and to “illustrate[] major sections of the Zoning Code that affect multi family development” (AR/6), but they were not adopted into the Zoning Code. Similarly, the MFDGs were adopted “pursuant” to the City’s General Plan (AR/2; AR/5-6), but nowhere are they claimed to be “part of” the General Plan.

Respondents do not dispute that the MFDGs are not part of the City’s general plan or zoning, but they argue this is irrelevant because the MFDGs are a “plan, program, policy, ordinance, standard, requirement, or other similar provision.” 1JA/69 (citing § 65589.5, subd. (f)(4)). To begin with, of all the synonyms for “standard” the Legislature chose to use in Paragraph (f)(4), it notably declined to use the term “guideline.” But more importantly, nothing in Paragraph (f)(4) changes the fact that a “plan, program, policy, ordinance, standard, requirement, or other similar provision” must be *part of* a city’s “general plan, zoning, and subdivision standards and criteria,” pursuant to § 65589.5, subd. (j)(1), for a city to cite it as a valid reason to deny a housing development project.

An overriding purpose of the HAA is to require cities to adopt clear standards so that housing applicants do not spend years preparing a code-compliant development only to be told later that it fails to conform to a non-codified guidance document. For this reason, the Legislature has chosen to restrict a city’s authority to “general plan, zoning and subdivision” standards: words Respondents would read out of the statute. At least since *Honchariw* was decided in 2011, cities have been on notice that they must adopt design review standards into their general plan or zoning code if they wish to assert them as a ground to disapprove a housing development. Pursuant to *Honchariw, supra*, 200 Cal.App.4th, at p. 1077, and the plain text of § 65589.5, subd. (j)(1), the City cannot cite the Height Variation Guideline as a reason to reject a project.

2. The MFDGs Are Subjective Development Policies, Not Objective Standards.

Even if the MFDGs were part of the City’s general plan or zoning code, they would not be “objective” standards. The MFDGs, as their name suggests, are non-binding *guidelines* for the City to use in the exercise of discretion. The City is free to use these guidelines to impose conditions on housing, but the HAA forbids it from using these guidelines to disapprove a qualifying housing development.

Respondents urged an interpretation of the word “objective” that means “of, relating to, or based on *externally verifiable* phenomena.” 1JA/070 (emphasis added). The Legislature has recently clarified that “objective” means a determination “involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.”

§ 65589.5, subd. (h)(8).¹⁶ Respondents contended the MFDGs meet this definition as well. RT/13. But the MFDGs simply are not “objective” under this or any other definition.

Rather than require projects to comply with each guideline in the MFDGs, the City only requires that projects “substantially conform” to the MFDGs as a whole. AR/86. There are no objective benchmarks to define substantial conformance, and even if the Project violated the Height Variation Guideline (which it does not), it is undisputed that the Project meets every other guideline in the MFDGs. The MFDGs state that developments are “required to conform,” but on the same page say that officials may decide on the basis of subjective judgment to “approve projects not in compliance with the Guidelines,” deferring instead to different design solutions that officials consider to better implement the General Plan. AR/6.

As City staff explained the MFDGs:

The reason that they are guidelines is *the commission has some amount of discretion*, so if you choose to interpret that, okay, that particular design element is not necessary to achieve conformance with the *overall objectives* of the design guidelines. Because they are guidelines, you have that ability to make that interpretation. AR/847-48 (emphasis added).

As the City Attorney put it, an objective standard means “checking the box,” as opposed to the “exercise of discretion.” AR/485. Applying the

¹⁶ “[A] statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment.” *Scott v. City of San Diego* (2019) 38 Cal.App.5th 228, 236 (quoting *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922). By adopting § 65589.5, subd. (h)(8), the Legislature merely clarified that this definition of “objective,” which it had been previously articulated in other sections of the Government Code (§ 65913.4), was applicable to the HAA. In any case, mandamus and injunctive relief “operate in the present.” *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 403; *City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 884.

MFDGs is not a matter of “checking the box”; public officials use the “exercise of discretion” to determine based on subjective judgment whether a project is in “substantial conformance” with the “overall objectives” of the MFDGs as a whole—or even whether the project needs to satisfy the MFDGs at all to be code-compliant. AR/6; AR/86; AR/485; AR/847-48. Substantial conformance is not defined by any specific “benchmark or criterion” that is “available and knowable by both the development applicant or proponent and the public official.” *See* § 65589.5, subd. (h)(8). Compliance is based on subjective discretion. *See Honchariw, supra*, 200 Cal.App.4th at pp. 1077-81 (county violated HAA by denying a project without findings based on noncompliance with a subjective “development policy” [“suitability”]).

3. There Is Substantial Evidence from Which Reasonable Persons Concluded That the Project Met the Height Variation Guideline.

Until October 2017, City officials consistently determined that the Project met all MFDGs, including the Height Variation Guideline. AR/574; AR/582; AR/588; AR/590; AR/871; AR/881; AR/881; AR/889. As the City’s expert concluded, the Project provided a transition between the neighboring buildings with “large trees proposed at the west property line and the street trees [that] will substantially mitigate” the height differential between neighboring buildings. AR/942. The City’s expert went on to state that the “building mass has been articulated to relate to the smaller scale of the adjacent single family neighborhood.” *Ibid.* Further, the Project provides a forty-foot setback, and landscaping, between a nearby two-story house and the Project, which led the Mayor to conclude that the Project complied with all objective standards and provided setbacks that are “what the City calls for.” AR/492; AR/504-05. There is ample evidence in the record to lead a reasonable person—including such

reasonable persons as the City’s staff, Planning Commissioners, and Mayor—to conclude that the Project provided a sufficient transition or steps in height between height differentials to comply with the Guideline.

The City does have an objective height standard applicable to this site: a maximum height of 45 feet, with which the Project complies. AR/48; AR/1418. If the Applicant had proposed a 50-foot building, reasonable people could not have disagreed about the project’s compliance. It would have been easy enough for a city to establish an additional objective standard in its zoning ordinance stating, for example, that “no new building can exceed by more than one story the height of any other building within 50 feet.” The City has no such objective standard. Instead, it has only a flexible guideline, which contains sufficient ambiguity that many public officials considered the Project to comply.

4. To the Extent the Height Variation Guideline Could Be Construed as “Objective,” the Project Complies with It.

Finally, even if the City had adopted the Height Variation Guideline as part of its General Plan or zoning (which it has not), *and* even if the City applied the MFDGs as objective standards (which it does not), *and* even if the court were to decline to apply the standard of review in Paragraph (f)(4) (which it should not), the Petition should still be granted.

The pertinent portions of the Height Variation Guideline are:

Height. Most multi-family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, *a transition or step in height is necessary.*

[...]

Design Objectives:

- Avoid changes in building height greater than one story from adjacent structures. If changes are greater, stepback upper floors to ease the transition.

AR/10 (emphasis added).

To begin with, the Guideline does not provide any “externally verifiable” criteria informing applicants how close another building must be to trigger the requirement to provide a “transition or step in height.” The City’s Mayor noted that the closest single-family home was 40 feet from the project, which led him to conclude that the project met the criterion. AR/492. Moreover, the Guideline also does not provide any “externally verifiable” criteria to define a sufficient “transition” or “step in height.” This is left to subjective determination. At best, the only thing the Guideline *objectively* requires is that if height varies by more than one story, a “transition or step in height is necessary.”

It is undisputed that the Project provides a “transition”—a 40 foot distance, and a landscaped treatment, that City officials, the City’s consultant, and the Mayor considered sufficient. AR/504-05. And even though the Guideline only requires projects to provide a transition *or* a step in height, the Project also provided steps in height as well: “trellises add a horizontal element to reduce the appearance of height” (AR/581), creating a step in height between the ground and the first story, stepbacks are provided at every floor (AR/947), and the fourth floor is stepped back into the roof form (AR/145). The Project complies with all aspects of the Guideline that could arguably be characterized as “objective.”

After the Commission voted to disapprove the Project, staff began contending that language in the “Design Objective” portion of the Guideline—“If changes are greater, stepback upper floors to ease the transition”—objectively requires stepbacks on every upper floor that faces

shorter buildings, even those forty feet away. *See* AR/487.¹⁷ But the Guideline does not say this—and certainly does not say so in clear “objective” language that is “externally verifiable” and would have been “knowable by ... the development applicant” from the text of the Guideline itself. *See* § 65589.5, subd. (h)(8).¹⁸

First, to the extent language in the “Design Objectives” purports to adopt an objective standard that always requires setbacks, it contradicts the antecedent language in the Guideline stating that a “transition *or* step in height” are both permissible ways to address height differences of greater than one story. This internal inconsistency is yet another textual clue that the Guideline offers general guidance rather than objective standards. *Second*, the Project in fact steps back every upper floor, which is all the text in the Design Objective could be read to require. AR/947. *Third*, the Height Variation Guideline does not require that setbacks go further than necessary to reduce the effective height differential between immediately adjacent buildings to a single story. There is only a “two story differential between the proposed project” and the home forty feet away. AR/29-31; AR/45-47. By stepping back the portion of the fourth floor facing the nearby home, the differential is effectively reduced to a single story. Nothing in the Guideline states that this is an insufficient way to “ease the transition,” particularly where, as here, there are other steps in height throughout the building. *Fourth*, it is dubious—and certainly not objectively clear—that a building forty feet away qualifies as an “immediately adjacent” structure.

¹⁷ Notably, the Council and Commission findings did not endorse this interpretation that the Guideline objectively requires the Project to provide a setback on every portion of every upper floor. *See* AR 31;AR 522.

¹⁸ *See, supra*, note 16.

This is, at the very least, a question of judgment about which reasonable people can disagree—which is probably why so many reasonable people disagreed with this interpretation throughout the process. For the City to contend that the Project violates an objective standard, it must contend that for years, City staff advanced through the process a Project that violated an objective code requirement to which the Project was required to conform. In reality, the City knew all along that the Commission and Council had complete discretion to find the Project as designed to comply with the MFDGs. That the City must resort to this single subjective design guideline as the only valid basis on which the Council rejected the Project only demonstrates how clear it is that the Project complies with the City’s objective general plan, zoning and subdivision standards. The City’s impermissible rejection of a code-compliant housing project is exactly what the HAA was enacted to prohibit.

C. As the Trial Court Correctly Held, the City’s Decision Cannot Be Affirmed on the Basis of a *Post Hoc* Rationalization That the Project Violated a Parking Standard.

Neither the Commission nor the Council made any finding that the Project violated any parking standard. AR/28-31; AR/488-91; AR/822-23. Despite this, Respondents argued in litigation that the City’s denial could be affirmed on this basis. 1JA/071-78. In other words, Respondents attempted not only to rely on a *post hoc* rationalization that the City only endorsed after the Commission had voted to deny the Project, Respondents also attempted to rely on a *post hoc* rationalization that neither the Commission nor the Council *ever* endorsed at any point in the record, that directly contradicted staff’s position throughout the process, and that Respondents only endorsed for the first time in litigation. The trial court properly rejected this argument. 2JA/433. If Respondents nonetheless seek to advance it on appeal, it should be rejected as well by this Court.

1. The Court May Not Affirm the City on a Basis the City Never Embraced—and in Fact Explicitly Rejected—at Every Point in the Record.

“It is a ‘foundational principle of administrative law’ that judicial review of agency action is limited to ‘the grounds that the agency invoked when it took the action,’” and that an agency may not be affirmed on the basis of a “*post hoc* rationalization” only advanced in litigation. *Dept. of Homeland Security v. Regents of the Univ. of Cal.* (2020) 591 U.S. ___, 2020 WL 3271746, at *9-10 (quotations omitted). Review under Code Civ. Proc. § 1094.5 is focused “upon the relationships between evidence and findings and between findings and ultimate action.” *Topanga Assn. for a Scenic Community v. Cty. of Los Angeles* (1974) 11 Cal.3d 506, 515. For this reason, California administrative mandamus law is settled that a “court may not affirm the ... [agency’s] determination on a basis not embraced by the agency itself.” *SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 477, n.4 (citing *Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1111). This is true even when an agency merely fails to specifically “embrace” the position it later advances in litigation. But it is indisputably true here, since up to and including the Council vote, Planning staff, Public Works staff, and the City’s parking and transportation consultants all *affirmatively found* that the proposed parking system *met the code*. AR/42; AR/487-90; AR/821-23. To allow the City to claim noncompliance with an objective standard after consistently taking the opposite position throughout the process would eviscerate the purposes of the HAA and make the law effectively impossible to enforce.

CERTIFICATE OF WORD COUNT

California Rules of Court 8.204(c))

The text of this brief consists of 13,848 words, not including tables of contents and authorities, the cover information, the signature blocks and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: June 29, 2020

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Document received by the CA 1st District Court of Appeal.