

Case No. B333151

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

CITY OF LA CAÑADA FLINTRIDGE

Respondent and Appellant,

v.

CALIFORNIANS FOR HOMEOWNERSHIP, INC.

Petitioner and Respondent.

APPELLANT'S REPLY BRIEF

On Appeal from the Superior Court for the State of
California,
County of Los Angeles, Case No. 23STCP00699, Hon. James
C. Chalfant

PETER C. SHERIDAN, SBN 137267
psheridan@glaserweil.com
CHRISTOPHER L. DACUS, SBN 238000
cdacus@glaswerweil.com
GLASER WEIL FINK HOWARD
JORDAN & SHAPIRO, LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, California 90067
Telephone: (310) 553-3000
Facsimile: (310) 556-2920

ALESHIRE & WYNDER, LLP
Adrian R. Guerra, SBN 217540
aguerra@awattorneys.com
Alison S. Flowers, SBN 271309
aflowers@awattorneys.com
3701 Wilshire Blvd., Suite 725
Los Angeles, California 90010
Telephone: (310) 527-6660
Facsimile: (949) 223-1180

Attorneys for CITY OF LA CAÑADA
FLINTRIDGE

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I.

INTRODUCTION

Respondent Californians for Homeownership, Inc.'s ("CFH") feigns surprise at the reasons for this appeal. CFH ignores the significant conflicts that exist between the Housing Accountability Act (HAA) and Government Code sections regarding the correct sequence for achieving a compliant housing element while still meeting legal requirements adopting a general plan and completing zoning. If this Court does not resolve this question of law, it will continue through to the next housing cycle leaving Appellant the City of La Canada Flintridge (the "City") and other cities without proper guidance and will simply leave them with the Hobson's choice of violating laws that prevent concurrent rezoning before adoption of a general plan and housing element rather than facing lawsuits based upon the HAA.

CFH's disingenuous argument that the City waived its right to appeal certain pure questions of law is misplaced and misstates the facts. With regard to the fundamental issue of the conflict between code sections governing rezoning and the HAA, the City raised those issues sufficiently at the trial court level. In any event, pure questions of law that relate to undisputed facts may be raised at any time, including on appeal.

Further, CFH is wrong that the trial court could not review the City's substantial compliance with the housing element provisions of the HAA. As set forth below, the legislative history is clear that at the time the trial court issued its decision the law permitted the trial court to determine whether the City's housing element was substantially compliant within the appropriate time period. CFH's contention that HCD's determinations were immune to judicial review is simply wrong. The power of the courts to perform mandamus review of administrative decisions is enshrined in the State Constitution.

The City's appeal is not moot simply because the current housing cycle is complete. While the reasons are myriad, the basic principle is that this appeal is addressed to an area of broad public interest (for every city in the State) and the same conflicts between laws will occur in subsequent housing cycles without judicial intervention.

Finally, the trial court erred in relying heavily upon extrinsic evidence and the case must be remanded for reconsideration without reliance upon declarations by interested parties purporting to summarize the way the law works on some practical level. This was clear error by the trial court.

II.

ARGUMENT

A. The Trial Court and the City Raised the Questions of Law CFH Says Were Raised Here for the First Time

CFH argues that the City has waived its argument that there is a statutory conflict, but this ignores the record below. CFH acknowledges that the City raised it in its moving papers, which is sufficient to preserve the matter on appeal. (Respondent's Brief, pg. 15 (citing AA, 865).) The trial court also addressed this argument in its ruling, as noted in the City's Opening Brief. (Opening Brief, pg. 30 (citing AA, 997 – AA, 998).) As a result, the City has not waived this argument on appeal.

As well, any rule CFH cites in this regard does not apply to pure questions of law. A new theory pertaining only to questions of law on undisputed facts can be raised for the first time on appeal. In these circumstances, there is no "unfairness" to opposing parties, because they have not been deprived of the opportunity to litigate disputed fact issues. (E.g., *Ward v. Taggart* (1959) 51 Cal. 2d 736, 742; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767; see also *Marriage of Priem* (2013) 214 Cal.App.4th 505, 510-11 (new theory may be presented for first time on appeal where it "involves only a legal question determinable from facts

which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence” (internal quotes omitted)). Appellate courts are most likely to apply this exception where the issue involves important questions of public policy or public concern. (*Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 654, fn. 3; *Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 646.)¹

Consequently, even if the City or the trial court had not already raised the issue, because the City’s argument that the statutory bar in Government Code section 65588(e)(4)(iii) violates Government Code section 65860(c) is a question of law – and undoubtedly raises a question of public concern – it is properly brought before this Court on this appeal.

In addition to CFH’s acknowledgement that the City raised it in its moving papers, which is sufficient to preserve the matter on appeal (Respondent’s Brief, pg. 15 (citing AA, 865)), the trial court also addressed this argument in its ruling, as noted in the City’s Opening Brief. (Opening Brief, pg. 30 (citing AA, 997 – AA, 998).) As a result, the City has not “waived” this argument on appeal.

B. There Remains an Inherent Conflict between the Statutory Provisions and the Sequence of Zoning Enactments

The conflict between Government Code section 65860(c) and section 65588(e)(4)(C)(iii) is clear and must be resolved by this Court. CFH argues that “the law requires general plan and zoning consistency and ordinarily *allows* a ‘reasonable time’ to attain that consistency following adoption of a general plan amendment. . . .” (Respondent’s Brief, pg. 15-16 (emphasis in

¹ The court can even raise the new issue *independently*. “It makes no difference that the issue was first raised on appeal by the court rather than the parties, as long as the parties have been given a reasonable opportunity to address it.” (*Tsemetzin v. Coast Fed. Sav. & Loan Ass’n* (1997) 57 Cal.App.4th 1334, 1341, fn. 6.)

original).) This is inaccurate, however, because the language in Government Code section 65860(c) is compulsory:

(c)(1) In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the general plan, or to any element of the plan, the zoning ordinance **shall be** amended within a reasonable time so that it is consistent with the general plan, as amended. (Emphasis added.)

In addition, CFH ignores case law, cited by the City, which holds that the absence of a valid general plan, or valid relevant elements of that general plan, precludes rezoning concurrently with the adoption of a substantially compliant housing element: “Since consistency with the general plan is required, absence of a valid general plan, or valid relevant elements or components thereof, precludes enactment of zoning ordinances and the like.” (Opening Brief, pg. 32 (citing *Res. Def. Fund v. Cnty. of Santa Cruz* (1982) 133 Cal.App.3d 800, 806; cited by *Buena Vista Gardens Apartments Assn. v. City of San Diego Plan. Dep’t* (1985) 175 Cal.App.3d 289, 310).)

As further asserted by the City, this requirement is “the linchpin of California’s land use and development laws; it is the principle which infused the concept of planned growth with the force of law.” (Opening Brief, pg. 32 (citing *Gonzalez v. Cnty. of Tulare* (1998) 65 Cal.App.4th 777, 785).) If the City rezones before its housing element is deemed “substantially compliant,” it renders any rezoning void *ab initio*. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531, 544; *Sierra Club*, 126 Cal.App.3d at 704.) Thus, rezoning naturally must follow the adoption of a housing element.

These cases are not addressed by CFH in its Respondent’s Brief, and CFH acknowledges the necessary sequence of events. As CFH states in its Respondent’s Brief:

At the core of a city’s housing element update is the “sites inventory,” a listing of potential sites for housing sufficient to accommodate its RHNA allocations in each of four income categories. If needed, the local government must make changes to its land use rules, including by rezoning land, as needed to enable housing production sufficient to meet the RHNA goals. (Gov. Code § 65583(c), 65583.2(h).

(Respondent’s Brief, pg. 6.) This argument by CFH admits the proper sequence – conclude the sites inventory, approve the Housing Element, then rezone “to enable [the] housing production” envisioned by the Housing Element.

Contrary to CFH’s assertion, the statutes cannot simply be harmonized to give effect to both. A municipality cannot enact zoning ordinances until it has a valid general plan, which in turn requires valid approval – and thus the validity of – all relevant elements of that plan. Yet section 65588(c)(4)(C)(iii) imposes penalties upon a municipality if it does not rezone within the one-year time periods in sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i), creating directly conflicting duties for municipalities and essentially forcing cities to concurrently complete rezoning in order for the housing element to be deemed “substantially compliant” in section 65588(e)(4)(C)(iii). This conflict must be addressed, and the penalty in section 65588(c)(4)(C)(iii) should be rendered unenforceable in favor of the general planning provision in section 65860(c).

Apropos of nothing, CFH includes anecdotal references to other cities and their ostensible “natural interpretation” of the relevant statutes, but this argument is not based on anything included in the record; it is simply CFH’s unsupported assertion that “(it appears) every other city and county in

California” has interpreted the statutes as CFH has. (Respondent’s Brief, pg. 17.) This argument should be disregarded.²

C. The Trial Court Had Jurisdiction to Review HCD’s Determination of Whether City’s Housing Element Was in Substantial Compliance as of October 15, 2022

CFH states, “The City’s operative housing element was adopted on February 21, 2023, well over one year after the statutory deadline of October 15, 2021.” (Respondent’s Brief, pg. 12.) This is inaccurate, however. The City adopted a substantially compliant housing element within one-year of October 15, 2021, i.e., on October 4, 2022.³ For this reason, the City’s housing element fell within the exception to the rezoning penalty in Government Code section 65583.4(a) since it adopted its housing element within one year of the statutory deadline.

The trial court held that it lacked the authority to review whether a city’s housing element was in substantial compliance until rezoning was complete based on the legislative history of section 65588(e)(4)(C)(iii). (AA, 996-997.) Section 65588(e)(4)(C)(iii) ultimately states, “A jurisdiction that adopts a housing element more than one year after the statutory deadline. . . shall not be found in substantial compliance with this article until it has completed the rezoning required. . . .” A prior version, however, stated, “If a jurisdiction adopts a housing element more than one year after the statutory deadline, the department shall not find that jurisdiction’s housing element to be in substantial compliance with this article . . . until all required rezoning

² It also assumes that the actions of other cities in rezoning *prior* to the adoption of a substantially compliant housing element are lawful.

³ The City originally submitted its draft housing element to HCD on October 3, 2021, and HCD provided its review on December 3, 2021. The City made the changes HCD wanted and adopted its housing element on October 4, 2022.

is complete.” The trial court took this change in language as an indication that “the Legislature intended this statutory bar to apply not only to HCD’s review of a local government’s housing element, but also to judicial review.” (AA, 996-997.) For this reason, the trial court held that the City’s housing element could not be deemed in substantial compliance until it completed its rezoning. (AA, 997.)

The trial court is incorrect. A trial court can, in fact, review whether a housing element substantially complies with housing element law, as even noted by CFH:

[T]he courts are the final arbiters of compliance with state housing element law. In making that assessment, courts consider whether a housing element “substantially complies” with state law, which “[c]ourts have defined [] as *actual* compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form.” (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 237 [element failed to meet state law requirements for listing certain housing element sites and therefore did not substantially comply with state law, despite HCD’s certification] [internal quotation marks and citations omitted].)

(Respondent’s Brief, pg. 7.)

Withdrawal of the authority of the courts to engage in judicial review of administrative agency action requires a clear expression of legislative intent to eliminate judicial review. No such legislative intent had been expressed at the time of the trial court’s decision with respect to judicial review of HCD’s determination of whether a city is in substantial compliance with housing element law, i.e., HCD’s determination that the City’s October 4, 2022 adopted housing element was not substantially compliant is subject

to judicial review (regardless of whether the City has completed its rezoning).⁴

The power of superior courts to perform mandamus review of administrative decisions derives in part from Article VI, Section 10 of the California Constitution. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 138; *Lipari v. Dept. of Motor Vehicles* (1993) 16 Cal.App.4th 667, 672.) Section 10 provides in part, “The Supreme Court, courts of appeal, superior courts, and their judges have ... original jurisdiction in proceedings for extraordinary relief in the nature of mandamus” (Cal. Const., Art. VI, § 10.) “The jurisdiction thus vested may not lightly be deemed to have been destroyed.” (*Int’l Ass’n of Fire Fighters, Local 188, AFL-CIO v. Pub. Emp. Rel. Bd.* (51 Cal. 4th 259, 270, citing *Co. of San Diego v. St. of Cal.* (1997) 15 Cal. 4th 68, 87.)

If the trial court had substantively determined that the City’s October 4, 2022 housing element was, in fact, substantially compliant with housing element law – as is within its purview, then the exception in Government Code section 65583.4(a) to complete rezoning within an additional one year period (by October 2023) would have been applicable. And as a necessary corollary, the statutory bar under section 65588(c)(4)(C)(iii) would *not* have been applicable.

Moreover, the trial court’s determination that the October 4, 2022 housing element was irrelevant – and CFH’s reliance on this – was also erroneous. (Respondent’s Brief, pg. 13-14.) While *CFH* may frame the dispute as one only involving the February 21, 2023 amendment, the trial

⁴ Appellate courts “independently ascertain as a question of law whether the housing element at issue substantially complies with the requirements of the Housing Element Law,” using the same standard as the trial court, without giving deference to the trial court’s conclusions. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1191.)

court was not precluded from reviewing the October 4, 2022 housing element as substantially compliant. There is nothing which precludes a city from amending a substantially compliant housing element after it has been adopted. Thus, the fact that the City made non-substantive changes in February 2023⁵ does not render its October 4, 2022 housing element noncompliant.

D. The Appeal Is Not Moot

As noted in the City’s opposition to CFH’s motion to dismiss, the City’s completion of its rezoning does not render this appeal moot.⁶ Because of the complete discrepancy between two different areas of housing law, this case poses an issue of broad public interest which is likely to recur, warranting an exception to the mootness doctrine. (*In re William M.* (1970) 3 Cal. 3d 16, 23; *Citizens Oversight, Inc. v. Vu* (2019) 35 Cal.App.5th 612, 615.)⁷

In imposing penalties upon a municipality if it does not rezone within the one-year time periods in sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i), while *also* requiring cities to complete rezoning under that same housing element concurrently in order for the housing element to be deemed “substantially compliant, the Legislature has created directly conflicting duties for municipalities. On the one hand, section 65860

⁵ CFH characterizes the February 2023 amendment as “a new version of its housing element,” but it simply provided amendments without substantive change.

⁶ As also noted by the City, it was in the process of rezoning at the time that CFH filed its Petition for Writ of Mandate in March 2023, as well as when the trial court issued its decision.

⁷ “The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian . . . is a priority of the highest order.” (Gov’t Code § 65580(a))

imposes a duty to wait until a general plan (including the housing element) is adopted before rezoning, otherwise the rezoning is void *ab initio* under that same statute and longstanding applicable law. On the other hand, section 65588(c)(4)(C)(iii) purports to impose a duty to rezone within the same one-year extended period the Legislature granted to adopt a substantially compliant housing element. The Legislature has made compliance with one statute impossible by reason of the application of another, such that section 65588(c)(4)(C)(iii)'s penalty – that a housing element cannot be found to be substantially compliant until a City has completed rezoning – should be rendered unenforceable. (*E.g., Res. Def. Fund v. Cnty. of Santa Cruz* (1982) 133 Cal.App.3d 800, 806.)

Moreover, as laid out in the City's Opening Brief, it is an unresolved question of law whether "substantial compliance" under the housing element law means "valid" for purposes of adopting a zoning ordinance under Government Code section 65860(c)(1). "Substantial compliance" is not defined in housing element law in terms of validity and invalidity. If "substantial compliance" under the housing element law means a city must adopt a *valid* housing element *before* rezoning, any imposition of a requirement that local governments complete the adoption of the housing element (a mandatory element of the general plan) and zoning ordinance *concurrently* or, in this case, complete rezoning *before* a housing element can be deemed "substantially compliant," requires local governments to take actions in the wrong order, creates a legal impossibility, and renders any rezoning void *ab initio*. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 544; *Sierra Club v. Bd. of Supers.* (1981) 126 Cal.App.3d 698, 704.)

If a local government's housing element must be "valid" or "substantially compliant" before rezoning can occur, section 65588(c)(4)(C)(iii)'s penalty – compelling rezoning before a housing

element can be found to be substantially compliant – creates a “Catch 22” trapping municipalities in an inescapable dilemma. Accordingly, on the one hand, a city’s housing element will never be substantially compliant because the city does not rezone. And on the other hand, any rezoning concurrently with the adoption of the housing element done in attempt to obtain substantial compliance would be invalid at the time of its adoption.

In addition, the City has raised a secondary issue on appeal, i.e., whether the City was subject to the three-year and 120-day timeframe to complete rezoning contained in section 65583.4(a) because it adopted a substantially compliant housing element within one-year of October 15, 2021.

If this Court finds in the City’s favor on either of these matters, then the judgment would be reversed and invalidated, with a finding that the City was timely in adopting its rezoning in the statutorily correct order. For this reason, the matter is not moot. A question becomes moot when the appellate court is unable to grant any effectual relief or render an opinion that affects the matter at issue. (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 566.) And even if the case is deemed to be moot, exceptions to the doctrine apply, as set forth above.

Given its clear relation to the provision of housing in California, the question presented by this case is of broad public interest and is likely to recur, if not in the 6th planning cycle, then in subsequent cycles where cities face similar issues.

E. The Trial Court’s Consideration of Extrinsic Evidence Was in Error, Regardless of the Standard of Review

The fact that the standard of review is *de novo* does not preclude a finding by this Court that the trial court erred in considering extrinsic evidence. Any other outcome would absolve trial courts of errors every time an issue on appeal is subject to a *de novo* standard of review. In addition,

and as CFH ignores, the Declaration of Melinda Y. Coy was fundamental to the Court's determination with respect to the main issue on appeal here, i.e., that the City cannot legally rezone until after adoption of a housing element.

As noted in the City's Opening Brief, the trial court relied on the Declaration of Melinda Y. Coy in making the following determination:

Local agencies have chosen to complete the rezoning required in their housing elements prior to or simultaneously with the adoption of their housing element updates, and other jurisdictions have achieved HCD certification through that approach. For example, the City of Alameda, the City of Yucaipa, and City of Sierra Madre all completed required rezones prior to or concurrent with the adoption of the housing element and prior to HCD's review and finding of substantial compliance.

(Opening Brief, pg. 41 (citing AA, 954; AA, 998.) Not only is this reliance by the Court on "facts" outside the record, but it improperly gives deference to statements made by an HCD representative, in contradiction to the law. (Opening Brief, pg. 42-43.) This was undoubtedly prejudicial to the City, and an error invited by CFH because it submitted the extrinsic evidence.

Given the fact that the law clearly precludes consideration of extrinsic evidence in the context of a motion for judgment, or a motion for judgment on the pleadings (Opening Brief, pg. 40-42), the trial court's consideration of and reliance on extrinsic evidence was improper and prejudicial to the City. The appropriate remedy would be to remand this case back to the trial court for reconsideration absent improper reliance upon the Declaration of Melinda Y. Coy.

III.

CONCLUSION

Based on the foregoing, the City respectfully requests that this Court reverse the trial court's judgment and find (1) contrary to the trial Court's


Order, the City was not required to complete its rezoning prior to or concurrently with the adoption of its housing element update, and (2) the City was subject to the three-year and 120-day timeframe to complete rezoning contained in section 65583.4(a) because it adopted a substantially compliant housing element within one-year of October 15, 2021.

Respectfully submitted,

DATED: November 12, 2024

GLASER WEIL FINK HOWARD
JORDAN & SHAPIRO, LLP

ALESHIRE & WYNDER, LLP
ADRIAN R. GUERRA
ALISON S. FLOWERS

By: 
ALISON S. FLOWERS
Attorneys for CITY OF LA
CAÑADA FLINTRIDGE


**CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA
RULES OF COURT RULE 8.204(c)(1)**

Pursuant to California Rules of Court Rule 8.204(c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains **3654** words.

DATED: November 12, 2024

GLASER WEIL FINK HOWARD
JORDAN & SHAPIRO, LLP

ALESHIRE & WYNDER, LLP
ADRIAN R. GUERRA
ALISON S. FLOWERS

By: 

ALISON S. FLOWERS
Attorneys for CITY OF LA
CAÑADA FLINTRIDGE

PROOF OF SERVICE

Californians for Homeownership, Inc. vs. City of La Cañada Flintridge

Case No. 23STCP00699

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3701 Wilshire Blvd., Suite 725, Los Angeles, CA 90010.

On **November 12, 2024**, I served true copies of the following document(s) described as **APPELLANT’S OPENING BRIEF** on the interested parties in this action as follows:

CALIFORNIANS FOR
HOMEOWNERSHIP, INC.
Matthew P. Gelfand, Esq.
Allyson H. Richman, Esq.
525 S. Virgil Ave.
Los Angeles, California 90020


Attorneys for Petitioner,
**CALIFORNIANS FOR
HOMEOWNERSHIP, INC.**

Telephone: (213) 739-8206
Facsimile: (213) 480-7724
Email(s): matt@caforhomes.org
allyson@caforhomes.org

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **November 12, 2024**, at Los Angeles, California.


Lilia E. Madrid