

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 OPENING BRIEF

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

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I.

INTRODUCTION

California has faced a well-publicized housing crisis for decades. The State’s response has been to transfer responsibility for creating housing to local governments (who do not actually create housing) while passing laws that usurp the traditional role of these local governments. As the housing laws have become more restrictive on local agencies, they have also become more intricate and byzantine, often at odds or even impossible to reconcile with existing statutes. Of particular relevance to this appeal, recent amendments to the housing element law have created a direct conflict between those amendments and longstanding law regarding the sequence of general plan and zoning amendments.

On October 4, 2022, the City of La Cañada Flintridge (the “City”) adopted a substantially compliant housing element, followed by an amendment on February 21, 2023 without substantive change. At that time (and when the Petition for Writ of Mandate was filed in March 2023), the City was already in the process of adopting its rezoning in accordance with its housing element. Petitioner Californians for Homeownership (“CFH”) filed a petition for a traditional writ of mandamus under Code of Civil Procedure section 1085 against the City, challenging whether the City had complied with its legal obligations under state housing element law. Specifically, CFH challenged whether the City’s housing element substantially complied with the requirements of Government Code sections 65583.2(g)(1) and (2), and whether the City completed its rezoning within the statutory timeframe.

The trial court issued its ruling in this case on July 11, 2023, in part in favor of CFH. The trial court’s ruling required the City to complete its rezoning before its housing element could be found to be “substantially

compliant,” notwithstanding the City’s adopted housing element and ongoing proceedings to rezone.

The primary issue on appeal in this case is whether the trial court erred as a matter of law in its finding that rezoning was required concurrently with the adoption of the housing element and prior to the one-year deadline in Government Code section 65588. It is (and was) the City’s position that the housing element must be adopted first, then rezoning is adopted within a reasonable time after adoption of the October 4, 2022 housing element and February 21, 2023 amendment. The law at issue points out an inherent need for appellate review and determination.

In particular, it is an unresolved question of law whether “substantial compliance” under the housing element law means “valid” for purposes of adopting a zoning ordinance. “Substantial compliance” is not defined in housing element law in terms of validity and invalidity. If “substantial compliance” under housing element law means that 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*.

These issues are of significant and continuing public interest to future housing element planning cycles and the municipalities going through them. They are also likely to recur every planning cycle until an appellate court makes a determination as to the applicability of the statutes at issue in this case, i.e., Government Code sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(iii) (and the timeframes and penalties therein), as well as their inherent conflict with Government Code section 65860.

II.

STATEMENT OF THE CASE

A. Statutory Framework

Under the California Constitution, a “county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., Art. XI, § 7.) This plenary authority, referred to as “the police power,” is subordinate only to state law. (*Id.*) It is from this broad power that local governments exercise their authority to regulate land within their territorial limits through planning and zoning in order to protect public health, safety, and welfare. (*Black Prop. Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 978.)

Each city, including a charter city, and county in California is required to adopt a general plan. (Gov’t Code § 65300; *Endangered Habitats League, Inc. v. Co. of Orange* (2005) 131 Cal.App.4th 777, 782.) The general plan is a comprehensive, long-term plan for the development of a city, including any land outside its boundaries that the city believes is related to its planning. (Gov’t Code § 65300.) In the universe of local land use enactments, the general plan is “at the top of ‘the hierarchy of local government law regulating land use.’ ” (*DeVita v. Co. of Napa* (1995) 9 Cal.4th 763, 773.) A general plan is sometimes referred to as the “‘constitution’ for future development.” (*Leshar Commns., Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.)

The general plan consists of seven mandatory elements and any optional elements that the local government chooses to adopt. (Gov’t Code §§ 65302-65303.) One of the seven mandatory elements is a housing element. (Gov’t Code § 65302.)

Section 65583 of the Government Code sets forth the contents of a locality’s housing element, and it requires, among other things, “an identification and analysis of existing and projected housing needs and a

statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.” The contents of the housing element must be consistent with other elements of the City’s general plan. (Gov’t Code § 65300.5.)

Cities are required to periodically update their housing elements consistent with the schedule set forth by the Legislature. (Gov’t Code § 65588.) At least two years before scheduled housing element updates within a region of the state are to occur, the California Department of Housing and Community Development (“HCD”) assigns that region a share of the state’s housing needs as determined by HCD, in consultation with the council of governments (“COG”) located within that region. (Gov’t Code §§ 65584(b), 65584.01.) The Southern California Association of Governments (“SCAG”) is the regional COG for several southern California counties, including Imperial, Los Angeles, Orange, Riverside, San Bernardino, and Ventura Counties, and the incorporated cities within each of those counties.

Although there are numerous steps in the HCD and regional COG process irrelevant to the instant appeal, once each local government’s allocation has been finalized, that government’s planning agency must then submit drafts of an initial proposed housing element containing (among other things) the finalized allocation for that local government to HCD for review prior to adoption. A city is required to consider the advisory guidelines adopted by HCD. (Gov’t Code §65585(a), (b).)

HCD is required to review the draft and make written findings as to whether in its view the draft substantially complies with state law. (Gov’t Code § 65585(b), (d).) If HCD finds that such draft housing element does not substantially comply with statutory requirements, the local government must either revise the element in accordance with HCD’s recommendations (under section (f)(1)) or adopt findings explaining why the local government believes the housing element substantially complies with the statute despite

HCD’s comments (under section (f)(2). (Gov’t Code § 65585(f).) Thus, a local government has two options in response to a determination by HCD that a draft element does not substantially comply: (1) It could change the draft element as HCD requested and otherwise to substantially comply; or (2) it could adopt the draft element without changes HCD requested, including in its resolution the reasons why the local government believed the draft element substantially complied despite HCD’s statements to the contrary; a local government, however, is only required to do this once.¹ Once the local government adopts the new or amended housing element, the local government must again submit the same to HCD for review. (Gov’t Code § 65585(g).) HCD will then review the housing element again and make further comments or decide the housing element is in substantial compliance with state law. (Gov’t Code § 65585(h).)

Under section 65589.3, there is a rebuttable presumption of validity if HCD makes a finding that the housing element substantially complies with the housing element laws. (*See Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1184; *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 223.) Section 65589.3, however, does not provide for a presumption of *invalidity* upon HCD’s finding of noncompliance.

At the time of the Petition, California was in its sixth “housing-element update cycle.” (See Gov’t Code § 65588.) For cities within the SCAG region, the statutory deadline for adoption of the sixth revision of the housing element for the planning period of October 15, 2021-October 15, 2029 was October 15, 2021. (Gov’t Code §65588(e)(3)(A) (eight years after the October 15, 2013 deadline for the fifth cycle).) As noted before the trial court, the timetables for revision of the housing element have been held to be

¹ Section 65585(f) does not require a local agency to continuously make *seriatim* findings in order to comply with the statute.

directory, not mandatory. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1184-85, citing *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 544 (the timetable set by section 65588 is directory rather than mandatory and mere noncompliance with the schedule does not operate to automatically invalidate a housing element, or, by extension, a general plan).)

B. Facts Alleged in the Petition for Writ of Mandate

In an introductory manner, CFH alleges that the City adopted a deficient housing element which does not identify adequate sites for housing development. (Appellant's Appendix ("AA"), 6.) It also alleges the City was required to rezone housing element sites by October 15, 2022, but failed to do so. (AA, 6.)

The state is in the middle of the sixth housing element update cycle. (AA, 12.) CFH further alleges the statutory deadline for the City to adopt a "compliant sixth cycle updated housing element" was October 15, 2021. (AA, 12.) As the deadline approached, the City was "far behind" in developing its housing element and only submitted its initial draft housing element to HCD on October 6, 2021. (AA, 12.) CFH alleges that, on December 3, 2021, HCD provided the results of its review of the City's draft housing element to the City, and indicated it needed changes to comply with state law. (AA, 12.)

On October 4, 2022, the City Council allegedly adopted a legally inadequate sixth cycle housing element update which did not remedy the deficiencies identified by HCD. (AA, 12.) On October 10, 2022, the City allegedly submitted its adopted housing element to HCD. (AA, 12.)

CFH then alleges that, on December 6, 2022, HCD issued its determination that the City's housing element was inadequate and required changes to comply with state law. (AA, 12.) Specifically, CFH alleges each of HCD's letters to the City noted it was required to provide more

information on the realistic capacity for development on the City’s listed sites and the suitability of the nonvacant sites, including the impediment created by the existing use of these sites. (AA, 12.)

CFH alleges that, in early 2023, the City published a draft amendment to the sixth cycle housing element update, which purported to address the deficiencies identified by HCD. (AA, 13.) On February 21, 2023, CFH sent letters to the City Council identifying “remaining deficiencies” in the draft amendment. (AA, 13.) Later on February 21, 2023, the City Council adopted the amended housing element update. (AA, 13.)

CFH alleges that, for the proposed sites for redevelopment of nonvacant parcels in the amended housing element update, the sites inventory does not account for the impediment created by the existing uses, including the possibility that a site will be maintained in its current use, rather than redeveloped during the planning period.² (AA, 13.) CFH also alleges the amended housing element update relies on nonvacant sites to satisfy over fifty percent (50%) of the City’s lower-income regional housing needs assessment, but the City has not made findings identifying any evidence the existing uses on each of these sites will be discontinued during the planning period. (AA, 13.) CFH alleges that the amended housing element update does not contain the analysis required by Government Code section 65583.2(g)(1) and, in adopting the amended housing element, the City did not make the findings required under Government Code section 65583.2(g)(2). (AA, 13.)

In addition, CFH alleges the amended housing element does not comply with the City’s obligation to demonstrate that it will affirmatively

² The allegations regarding the City’s compliance with the housing element law relate to CFH’s first cause of action. As referenced below, CFH dismissed its first cause of action. Thus, these allegations are included for completeness, but are not directly relevant to this appeal.

further fair housing under Government Code section 65583(c)(10), and assess the relationship between that obligation and the sites it identified for housing development as required by Government Code section 65583(a)(3). (AA, 14.)

Of relevance to this appeal, CFH alleges the City had failed to complete its required rezoning by the deadline established by Government Code sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i), and did not commit to do so. (AA, 14.)

CFH finally alleges the City's adopted housing element was deficient in additional ways identified by HCD. (AA, 14.)

C. Summary of Undisputed Facts

On October 3, 2021, the City submitted a draft of the 2021-2029 Housing Element to HCD. (AA, 98.) The City received a response/comment letter from HCD on December 3, 2021 regarding its review of the City's draft 2021-2029 Housing Element, per Government Code section 65585(b). (AA, 104.) The City's Housing Element was subsequently revised in response to the comments received from HCD. (AA, 104.)

On August 25, 2022, the City's Planning Commission held a duly noticed public hearing, and adopted Resolution No. 22-51 recommending that the City Council approve the General Plan Amendment adopting the 2021-2029 Housing Element. (AA, 104.)

The City Council held duly noticed public hearings on the Housing Element on September 12, 2022 and October 4, 2022. (AA, 105.) On October 4, 2022, the City Council passed Resolution No. 22-35, adopting the City's 2021-2029 Housing Element ("Housing Element"), which was submitted to HCD on October 7, 2022 for review. (AA, 105.)

On December 6, 2022, the City received a response/comment letter from HCD. (AA105.) On January 12, 2023, the City and HCD engaged in a technical discussion on the items identified within HCD's letter, during

which time HCD representatives determined that there were no substantive changes or new data or policy decisions required with respect to the City’s Housing Element, but rather only clarifications of existing information.³ (AA, 105.)

On February 21, 2023, the City Council passed Resolution No. 23-08, adopting an amended 2021-2029 Housing Element Update (“Housing Element Update”). (AA, 104 – AA, 109.) Through the adoption of Resolution No. 23-08 and the Housing Element Update, the City included mere clarifications to its October 4, 2022 Housing Element, as recommended by HCD. (AA, 104 - AA, 109.)

III.

PROCEDURAL HISTORY

A. The Petition and Initial Pleadings

CFH filed its Petition for Writ of Mandate on March 3, 2023. The Petition provided a statutory background, and the factual allegations presented above. (*See generally* AA, 7 – AA, 14.) In the Petition, CFH alleges that, for cities in Southern California, if HCD has not certified a city’s adopted housing element by October 15, 2022, the city must complete all required rezoning by that date, citing Government Code sections 65583(c)(1)(A), 65583.2(c), and 65588(e)(4)(C)(i). (AA, 11.) A city which has missed its deadline to rezone cannot have a housing element found to be in substantial compliance until after the city has completed its rezoning, citing Government Code section 65588(e)(4)(C)(iii). (AA, 11.)

³ While the discussion on January 12, 2023 is not in dispute, the characterization of this discussion is disputed. Other than this, however, CFH did not dispute the City’s recitation of facts, which was supported by the Request for Judicial Notice filed with the City’s Motion for Judgment on the Pleadings (discussed below).

The Petition specifically alleges that, if a city's housing element does not substantially comply with state law, a reviewing court must order the city to bring it into compliance within 120 days under Government Code 65754(a). After a city adopts a housing element subject to such an order, the city must *subsequently* rezone to obtain consistency with the housing element within 120 days under Government Code 65754(b). (AA, 11 (emphasis added).)

The Petition alleges two causes of action for a writ of mandate under Code of Civil Procedure section 1085. (AA, 14 – AA, 15.) In the first cause of action, CFH alleges that the City's housing element does not substantially comply with state law. (AA, 14.) In the second cause of action, CFH alleges the City has not complied with the rezoning requirement and deadline in Government Code section 65583(c)(1)(A). (AA, 15.)

The Petition's Prayer sought a writ of mandate directing the City to adopt a revised housing element pursuant to Government Code section 65754, and a writ of mandate compelling the City to complete the required rezoning pursuant to Government Code section 65587(d)(1).

In addition, the Prayer sought an injunction or other order under Government Code section 65755, as well as a declaration for the following:

- a. The housing element adopted on February 21, 2023 did not substantially comply with state law;
- b. From October 16, 2021 until the City complies with the Court's writ of mandate through the adoption of a housing element which substantially complies with state law, the City has not had a housing element which was revised in accordance with Government Code section 65588;
- c. The City is not permitted to use Government Code sections 65589.5(d)(1) or (d)(5) to disapprove a housing development project which qualifies for approval under subdivision (d) or to

condition the approval of such a project in a manner which renders it infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards; and

- d. The provisions in Government Code section 65583(g) apply to the City because it failed to timely complete the required rezoning. (AA, 15 – AA, 16.)

In response to the Petition, on April 5, 2023, the City filed a Demurrer to the entire Petition, as well as a Motion to Strike Portions of the prayer for relief. (AA, 1056.)

At the time of the Trial Setting Conference on April 25, 2023, the trial court determined that the matter presented only an issue of law, i.e., whether the City’s housing element update was in substantial compliance. (AA, 49.) Therefore, the trial court vacated the City’s Demurrer and Motion to Strike and ordered the parties to submit cross-motions for judgment under Code of Civil Procedure section 1094, which allows a court to issue judgment by way of noticed motion where there is no triable issue of fact. (Code Civ. Proc. § 1094 [“the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ”].) The parties were ordered to stipulate to the briefing schedule. (AA, 49.)

B. Cross-Motions and Trial Court’s Ruling

On May 30, 2023, the City filed a Motion for Judgment on the Pleadings under Code of Civil Procedure section 438 *et seq.* (*See generally* AA, 50 – AA, 93.) The Motion was supported by a Request for Judicial Notice which detailed the factual history laid out above. (*See generally* AA, 94 – AA, 844.) On June 6, 2023, the City filed an Amended Motion for

Judgment on the Pleadings pursuant to Code of Civil Procedure section 1094.⁴ (*See generally* AA, 849 – AA, 892.)

With respect to the first cause of action, the City argued that HCD’s informal interpretation of statutory requirements is not binding on the court, and any deference that might be due to HCD’s interpretation is overcome by the plain meaning of the statute’s text. (AA, 860 – AA, 861.) The City argued that, simply put, HCD is not the final authority on the issue of substantial compliance. (AA, 860.) The City provided a detailed argument that the City’s October 4, 2022 housing element was substantially compliant and contained the analysis required under Government Code section 65583.2(g)(1), and the City adopted the findings required under Government Code section 65583.2(g)(2), within Section 9.4 of the Housing Element Update and Appendix C. (AA, 861 – AA, 863.) The City further argued that section 9.5 of the City’s Housing Element Update specifically analyzes the City’s obligation to affirmatively further fair housing, in contradiction to CFH’s broad allegations that the City’s Housing Element Update does not comply with the City’s obligation to demonstrate that it will affirmatively further fair housing. (AA, 863 – 864.) Thus, the City’s housing element update substantially complied with housing element law, and CFH’s first cause of action failed as a matter of law. (*See generally* AA, 860 – AA, 864.)

With respect to the second cause of action, the City first argued that the deadlines for revising a housing element laid out in the housing element law are directory, rather than mandatory (relying on *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1184-85 (citing *San Mateo County Coastal Landowners’ Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 544)). (AA, 865.) As argued by the City, any other position would create a

⁴ The City filed the Amended Motion for Judgment on the Pleadings to conform to the Court’s order on April 25, 2023, but it was based on the same grounds as the original Motion for Judgment on the Pleadings.

legal absurdity and render the one-year extension to adopt a substantially compliant housing element under Government Code section 65588(e)(4)(C)(i) meaningless, since a city cannot move forward with rezoning until it adopts a substantially compliant housing element. (AA, 865.)

The City then argued that its housing element update was substantially compliant as of October 4, 2022, so that the City had three years and 120 days from October 15, 2021 to complete rezoning under the extension provided in Senate Bill 197 – codified in Government Code section 65583.4 – which allows cities that have adopted a substantially compliant sixth revision of the housing element up to three years and 120 days from October 15, 2021 to complete rezoning. (AA, 865 – AA, 866.)

Finally, the City argued that the Petition improperly requested declaratory relief for matters not in controversy in the Petition, i.e., the declarations contained in Paragraphs 4.c and 4.d of the Prayer related to the City’s ability to disapprove certain housing development projects. (AA, 866 – AA, 867.)

On June 9, 2023, CFH filed a Motion for Judgment pursuant to Code of Civil Procedure section 1094.⁵ (See generally AA, 894 – AA, 913.) In support of its own Motion, CFH also filed a Request for Judicial Notice, and the Declarations of Matthew P. Gelfand and Melinda Y. Coy. (AA, 914 – AA, 955.) Matthew P. Gelfand is counsel for CFH, and Melinda Y. Coy is the “Proactive Accountability Chief in the Land Use and Local Government Relations Unit of the Division of Housing Policy Development” of HCD. (AA, 943; AA, 952.)

⁵ The trial court ordered that CFH’s Motion would double as its moving papers and opposition to the City’s Motion, and the City’s reply would double as its opposition to CFH’s Motion. (AA, 971.)

With respect to the first cause of action, CFH argued that the City had not made the findings supported by substantial evidence, as required by Government Code section 65583.2(g)(2), that the existing uses on the City's non-vacant low-income sites were likely to be discontinued during the planning period. (AA, 908 – AA, 912.)

With respect to the second cause of action, CFH argued that Government Code section 65588(e)(4)(C)(iii) barred the trial court from determining that the City was in substantial compliance because it had not completed its rezoning within one year of the statutory deadline, i.e., October 15, 2022. (AA, 903 – AA, 904.) CFH further argued that the exception to this deadline contained in Government Code section 65583.4 did not apply because HCD had not found the City's housing element to be in substantial compliance within the one year period after the statutory deadline. (AA, 905.) In addition, CFH disagreed that the holding in the *Fonseca* case, that housing element deadlines were “directory” applied, arguing that the case's analysis of the substantive requirements was of limited value in interpreting current housing element law, and the statutory bar in Section 65588(e)(4)(C)(iii) reflected a decision by the Legislature to penalize tardy jurisdictions by requiring them to complete their rezoning processes before their housing elements can be deemed substantially compliant by a reviewing court. (AA, 905 – AA, 906.) Moreover, CFH argued that the analysis in the *San Mateo County Coastal Landowners' Association* case was outdated because there were no statutory penalties for failing to timely adopt a housing element at that time. (AA, 906 – AA 907.)

Of significance to this appeal, CFH also relied on the Declaration of Melinda Y. Coy for the proposition that local governments can rezone prior to or simultaneously with adoption of their housing elements, and other jurisdictions have done so to attain compliance, as well as the assertion that

HCD has not certified the City’s housing element and “remains ineligible for certification through today.” (AA, 953 – 955.)

With respect to its Prayer, CFH acknowledged that it was seeking declaratory relief determining that the City was subject to the limits of Government Code section 65589.5, referencing a project submitted by a separate party, and arguing that the trial court would be reducing the risk that applicants would be forced to litigate the “builder’s remedy” provisions individually. (AA, 912 – AA, 913.)

On June 16, 2023, the City filed its Reply to CFH’s Motion, as well as an Objection to Petitioner’s Use of Extrinsic Evidence. (AA, 956 – 963; AA, 964 – AA, 966.) In its Reply, the City argued that CFH offered no legal authority to dispute the City’s position that the determination of substantial compliance with housing element law was solely within the trial court’s authority. (AA, 957.) The City further noted that the *Fonseca* case was still good law and recently cited extensively in *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, when discussing the standard of review for a city’s housing element, i.e.,

In an action to determine whether a housing element complied with the requirements of the Housing Element Law, the court’s review “shall extend to whether the housing element...*substantially complies* with the requirements” of the law. (§65587, subd. (b), italics added.) Courts have defined substantial compliance as “*actual* compliance in respect to the substance essential to every reasonable objective of the statute,’ as distinguished from ‘mere technical imperfections of form.’ ” [citation to *Fonseca*, 148 Cal.App.4th at 1185.] (AA, 957 – AA, 958.)

The City also argued that it adopted a substantially compliant housing element on October 4, 2022, which was subsequently updated without substantive changes on February 21, 2023, noting that CFH ignored the

October 4, 2022 housing element because it would defeat CFH’s argument that the City is statutorily barred from a determination of substantial compliance. (AA, 958.) With respect to whether the deadlines under the housing element law are directory or mandatory, the City pointed out that a case cited by CFH held that statutory time limits are usually deemed to be directory (referencing *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 223). (AA, 958 – AA, 959.)

Finally, the City argued that its housing element unequivocally demonstrates that the City substantially complied with the analysis required under Government Code section 65583.2(g)(2) in Section 9.4 of the Housing Element Update and Appendix C, in which the City adopted findings supported by substantial evidence which meets the requirements of Government Code section 65583.2(g)(1) and (2). (AA, 959 – AA, 960.)

The hearing on the cross-motions was held on July 11, 2023, after which the trial court entered its ruling on both Motions. Ultimately, the trial court denied both Motions with respect to the first cause of action, granted CFH’s Motion with respect to the second cause of action, and struck the portions of the Prayer challenged by the City. (AA, 969 – AA, 970.)

With respect to the City’s objection to the two Declarations filed by CFH with its Motion as extrinsic evidence, the trial court stated that, “[i]f a petition for writ of mandate presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ. CCP §1094. CCP section 1094 expressly permits use of either the administrative record or undisputed facts.” (AA, 986.) The trial court then held that there was one piece of disputed evidence, i.e., whether HCD representatives determined on January 12, 2023 that the October 4, 2022 housing element required no substantive changes, new data, or policy decisions, which was contradicted in the Declaration of Melinda Y. Coy. (AA, 986.) As a result,

the trial court determined that it could not consider it for purposes of CFH's motion for judgment. (AA, 986.) The trial court otherwise overruled the City's written objection for the purposes of CFH's Motion, and would not consider it for the City's Motion. (AA, 986.)

In considering the first cause of action, the trial court ultimately determined that CFH limited the dispute to whether the use of non-vacant sites for over 50% of the site inventory complies with Government Code sections 65583.2(g)(1) through (2). (AA, 989.) The trial court noted that CFH has the burden to show the City does not have substantial evidence that the existing uses of the non-vacant sites listed in its site inventory are likely to be discontinued during the planning period, and further noted the City's reliance on the October 4, 2022 housing element, the February 21, 2023 update, and their appendices in support of its argument that it did, in fact, comply with section 65583.2(g)(2). (AA, 993.)

The trial court specified that CFH's attack on the City's compliance with section 65583.2(g)(2) was based on the criteria the City principally relied on in Appendix C, but held its argument was insufficient to show the criteria were inappropriate. (AA, 993.) The trial court held an evaluation of the appropriateness of the City's criteria was ultimately a matter for trial, warranting denial of CFH's Motion. (AA, 993.)

The trial court also held, though, that the Petition sufficiently alleged that the City's site inventory did not account for the possibility that a site will remain in its current use, that the criteria concluding that existing uses are not an impediment to residential development are suspect, that the housing element does not contain the analysis required under section 65583.2(g)(1), and that the housing element did not make the findings required by section 65583.2(g)(2). (AA, 994.) According to the trial court, the facts judicially noticed at the City's request did not show otherwise; as a result, the City's Motion was denied. (AA, 994.)

In consideration of the second cause of action, the trial court stated the February 21, 2023 amended housing element was “the subject of this litigation” and required that the City rezone parcels in order to meet the City’s obligations under the housing element law. (AA, 995.) In addition, the trial court noted the amended housing element acknowledged that the deadline to complete these required rezonings was October 15, 2022. (AA, 995.) The trial court relied on the Declaration of Melinda Y. Coy in finding that, on April 24, 2023, after reviewing the 2023 housing element, HCD determined it could not find the City’s housing element in substantial compliance. (AA, 995.) The trial court further relied on the Declaration of Melinda Y. Coy in finding that HCD remains unable to certify the housing element or any subsequent revision until the City completes all rezoning required. (AA, 995.)

The trial court considered the City’s argument that it adopted a substantially compliant housing element on October 4, 2022 (which was updated on February 21, 2023 without substantive changes), and, thus, timely adopted within a year of the October 15, 2021 statutory deadline under section 65588(e)(4)(C)(i). (AA, 996.) Because of this, the City argued the statutory bar under section 65588(e)(4)(C)(iii) – which required completion of rezoning before a city’s housing element can be determined to be in substantial compliance – only applied when a local agency adopted a housing element more than one year after the deadline. (AA, 996.) The trial court held, though, that the arguments were untenable because HCD had not found the October 2022 housing element to substantially comply with the housing element law. (AA, 996.) The trial court further held that, for an adopted housing element to be timely, sections 65583(c)(1)(a), 65583.2(c), and 65588(e)(4)(C)(i) all required that a city’s housing element be found by HCD to be in substantial compliance; without such a finding, a city must complete rezoning within a year from the statutory deadline. (AA, 996.)

Additionally, the trial court held that a city’s housing element cannot be found to be in compliance until it has completed the rezoning, pursuant to section 65588(e)(4)(C)(iii), referring to this section as a “statutory bar to housing element compliance for cities that adopt housing elements after the rezoning deadline.” (AA, 996.)

The trial court further held that the City was not subject to the three-year and 120-day exception to the rezoning penalty provided to qualifying Southern California jurisdictions via section 65583.4(a), determining that this was at odds with the City’s housing element, which states, “The rezoning of adequate sites is due October 15, 2022.” (AA, 997.) The trial court also determined that the “plain meaning” of the exception limited it to circumstances where HCD found the adopted element to be in substantial compliance within one year of the statutory deadline. (AA, 997.) In reaching this determination, the trial court again relied on the Declaration of Melinda Y. Coy, finding that HCD reminded the City that it could obtain the extension only if its housing element was found to be in compliance by October 15, 2022. (AA, 997.)

The trial court also considered the City’s argument that it would be legally absurd to penalize a city which has adopted a substantially compliant housing element, since cities must adopt a housing element before rezoning; imposition of section 65588(c)(4)(C)(iii)’s penalty would require cities to complete these steps in the wrong order. (AA, 997.) The trial court specifically stated that “the City operates under a false assumption that housing element approval must come before rezoning. The undisputed evidence is that other cities have perform[ed] rezoning in conjunction with housing element updates.” The trial court again relied on the Declaration of Melinda Y. Coy for this proposition. (AA, 997 – AA, 998.)

In analyzing whether the timetables for housing element revision were directory versus mandatory, and the City’s argument that a city cannot move forward with rezoning until it adopts a substantially compliant housing element, the trial court agreed with CFH that the *Fonseca* case’s discussion of section 65583 as it existed in 2002 does not significantly bear on the statute as it exists now. (AA, 998.) The trial court also discounted the decision in the *San Mateo* case, as there were no statutory penalties at the time for failing to timely adopt a housing element, and the absence of statutory penalties for non-compliance “ ‘strongly suggests that the provision is merely directory.’ ” (AA, 998 – AA, 999.) The trial court held that the two statutory penalties applicable today – those contained in sections 65588(e)(4)(C)(iii) and 65589.5(d)(1), (d)(5) – “make all the difference in interpreting section 65583’s deadlines, which are now mandatory and not directory.” (AA, 999.)

Based on the foregoing, the trial court held the City failed to adopt a housing element certified by HCD by October 15, 2022, and the statutory bar under section 65588(c)(4)(C)(iii) applied; as a result, the City could not be considered to be in substantial compliance until it had completed the rezoning required by sections 65583(c)(1)(A) and 65583.2(c). (AA, 999.) The trial court thus granted CFH’s Motion with respect to the second cause of action, and denied the City’s Motion. (AA, 1001.)

With respect to the City’s request to strike certain portions of CFH’s Prayer in the Petition related to section 65589.5(d)(1) and (d)(5), the trial court agreed with the City that CFH did not sue under the Housing Accountability Act and it “would not be lawful to expand the prayed for relief beyond the issues and facts alleged for the first and second cause[s] of action.” The trial court struck paragraphs 4c and 4d of the Prayer accordingly. (AA, 1000 – AA, 1001.)

After the trial court’s ruling, only the first cause of action remained. On July 18, 2023, though, CFH dismissed the first cause of action. (AA,

1003 – AA, 1005.) Judgment on the second cause of action was entered by the trial court on September 5, 2023. (See generally AA, 1006 – AA, 1037.) Based on the dismissal of the first cause of action, the trial court’s ruling on CFH’s Motion with respect to the second cause of action is the only issue on appeal.

IV.

STATEMENT OF APPEALABILITY

The trial court entered its judgment as to the second cause of action in the Petition on September 5, 2023. Appellants timely filed their Notice of Appeal on October 10, 2023. The trial court’s judgment is appealable under Code of Civil Procedure section 904.1(a).

V.

ARGUMENT

A. Standard of Review

The proper interpretation of a statute is a question of law reviewed *de novo*. (See *Bitner v. Dept. of Corr. & Rehab.* (2023) 87 Cal.App.5th 1048, 1058; *People v. Harring* (2021) 69 Cal.App.5th 483, 495.) The appellate court gives no deference to the trial court’s ruling or the reasons for its ruling, but instead decides the matter anew. (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal. 4th 1185, 1191; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)

In addition, appellate courts may independently determine the proper interpretation of a statute; they are not bound by the trial court’s interpretation. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527; *Carmel Develop. Co., Inc. v. Anderson* (2020) 48 Cal.App.5th 492, 503.)

Courts must . . . independently judge the text of the statute, taking into account and respecting the agency’s interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal

effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative. To quote the statement of the Law Revision Commission in a recent report, “The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.” (*Yamaha Corp. of Amer. v. State Bd. of Equal.* (1998) 19 Cal. 4th 1, 7-8 (quotations omitted).)

Thus, the Supreme Court determined that the standard for judicial review of questions of law, such as the correctness of an agency’s statutory interpretation, is independent judgment.

“Appellate courts have the discretion to consider a pure question of law involving undisputed facts even if the question was not raised below.” (*Knudsen v. Dep’t of Motor Vehicles* (2024) 101 Cal.App.5th 186, 196 (citations omitted).)

B. The Statutory Bar Provided in Government Code Sections

65588(e)(4)(C)(iii) Violates Government Code Section 65860(c)

As discussed in the City’s Motion, the SCAG region statutory deadline for adoption of the sixth revision of the housing element for the planning period of October 15, 2021 through October 15, 2029 was October 15, 2021 (citing Gov’t Code § 65588). (AA, 864.) Sections 65583(c)(1)(a), 65583.2(c), and 65588(e)(4)(C)(i) provide cities which did not adopt a substantially compliant housing element within 120 days of October 15, 2021 with a one-year extension up to October 15, 2022 to adopt substantially compliant housing elements and to complete rezoning. At the time of the trial

court proceedings, the City was in the process of rezoning in accordance with its housing element update, to be completed by October 2023. (AA, 220.)

The City argued that requiring the City to complete rezoning by October 15, 2022 would create a legal absurdity and render the one-year extension to adopt a substantially compliant housing element under section 65588(e)(4)(C)(i) meaningless, as a city cannot legally move forward with rezoning until it adopts a substantially compliant housing element. (AA, 865.) The trial court held that “the City operates under a false assumption that housing element approval must come before rezoning. The undisputed evidence is that other cities have perform[ed] rezoning in conjunction with housing element updates,” citing the Declaration of Melinda Y. Coy (which the trial court should not have considered – see Section D below). (AA, 997 – AA, 998.)

Regardless of whether the City adopted a substantially compliant housing element update within one year of October 15, 2021, the trial court erred as a matter of law in its finding that rezoning was required either prior to or concurrently with the adoption of the housing element, and prior to the one-year deadline in section 65588, as this position is inconsistent with Government Code section 65860. The housing element must be adopted *first*, then rezoning is adopted within a reasonable time after adoption of the housing element update. State law does not mandate that rezoning be adopted prior to or concurrently with the housing element, as indicated by the trial court; in fact, it is to the contrary. As a result, the trial court’s conclusion that the City could have performed rezoning in conjunction with housing element updates was erroneous.

Government Code section 65860(c) mandates that rezoning follow general plan amendments (which include housing elements) “within a reasonable time”:

(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.

Under the trial court’s ruling, though, a housing element which is “substantially compliant” would in essence be rendered *not* “substantially compliant” by application of section 65588(c)(4)(C)(iii)’s “rezoning” requirement, which is contrary to longstanding law regarding the sequence of general plan and zoning amendments.

Such a position 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) and creates directly conflicting duties for municipalities. To illustrate, the statutory deadline for adoption of the 6th planning cycle was October 15, 2021. (Gov’t Code § 65588.) Section 65588(e)(4)(C)(i) provides cities, which did not adopt a substantially compliant housing element within 120 days of October 15, 2021, with a one-year extension to October 15, 2022 to approve a substantially compliant housing element. But that same statute *also* requires cities under that same housing element to concurrently complete rezoning in order for the housing element to be deemed “substantially compliant” in section 65588(e)(4)(C)(iii); otherwise, an applicant may invoke the “builder’s remedy” against a municipality under the Housing Accountability Act as a penalty.

As a result, the Legislature has created directly conflicting duties for the City, and other municipalities. On the one hand, section 65860(c) imposes a duty to wait until a general plan (including the housing element) is validly adopted before rezoning, otherwise the rezoning is void *ab initio* under that same statute and longstanding applicable law: A zoning ordinance

inconsistent with the general plan at the time of its enactment is “invalid when passed.” (*E.g., Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 698, 704.)

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.)

“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.” (*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.) 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.” (*Gonzalez v. Cnty. of Tulare* (1998) 65 Cal.App.4th 777, 785.)

Notably, it is an unresolved question of law whether “substantial compliance” under the housing element Law means “valid” for purposes of adopting a zoning ordinance. “Substantial compliance” is not defined in housing element law in terms of validity and invalidity. If “substantial compliance” under Housing Element Law means that 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*, 126 Cal.App.3d at 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 done concurrently with the adoption of the housing element to attempt to obtain substantial compliance would be invalid at the time of its adoption.

Here, the City’s housing element Program 1 was identified as the program to rezone the properties identified in the City’s site inventory, and it provided that the City would rezone the properties in the site inventory following adoption of the housing element by October 2023. (AA, 220; AA, 865 – AA, 866.) At the time of the hearing on the Petition in July 2023, the City was in the process of completing the rezoning “within a reasonable time,” in accordance with section 65860. (AA, 220.) The trial court’s ruling, however, establishes dangerous precedent, as it ignores the foregoing longstanding structure and sequence, and HCD’s refusal to certify the City’s housing element as substantially compliant until rezoning occurred effectively prevented such rezoning from being legally valid or enforceable if adopted concurrently with the City’s housing element.

There is no way to square section 65588(c)(4)(C)(iii) with section 65860, which is underscored by the fact that HCD has no authority to unilaterally sanction the illegal rezoning of property under section 65588(c)(4)(C)(iii), which would be void when adopted and in violation of

sections 65860(a) and (c). Surely, the Legislature did not intend such an absurd result, and the trial court’s ruling furthers a legal impossibility. Notably, the Legislature did not express any intent to overrule or contravene any existing statute, but to impose a different penalty “because the existing approach has not proven effective in facilitating housing production. . . .” (AA, 926 – AA, 928.)

Normally, under the rules of statutory interpretation, a later-enacted or more specific law is given precedence. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310). Applying this rule of statutory interpretation in this case, however, would abrogate longstanding law regarding general plans and their development. The law generally disfavors repeal by implication, and nothing in the legislative history would suggest the Legislature intended to repeal section 65860.

Canons of statutory construction may assist courts in ascertaining legislative intent. (*In re Marriage of Bonvino* (2015) 241 Cal.App.4th 1411, 1433.) “But it is well established that canons of statutory construction are merely aids to ascertaining probable legislative intent and are not to be applied so as to defeat the underlying legislative intent otherwise determined.” (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 879 (quotations omitted).) “No single canon of statutory construction is an infallible guide to correct interpretations in all circumstances.” (*Tellez v. Super. Ct.* (2020) 56 Cal.App.5th 439, 444-48 (quotations omitted).) Thus, when the legislative history answers the question of legislative intent, or at least provides clues to legislative intent, the legislative history is a more reliable indicator of the legislative intent than inferences of intent based on canons of statutory construction. (*Id.* at 449.)

It is incumbent upon courts to harmonize statutes based on their texts, if that can reasonably be done:

A court must, when reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject. Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute. . . . [T]hey must be read together and so construed as to give effect, when possible, to all the provisions thereof. (*State Dep't of Public Health v. Super. Ct.* (2015) 60 Cal. 4th 940, 955 (internal citations and quotations omitted).)

“Further, [a]ll presumptions are against a repeal by implication. Absent an express declaration of legislative intent, we will find an implied repeal only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.” (*Id.* at 955-56 (internal citations and quotations omitted).) Implied repeals include not only complete repeals, but “partial repeals that occur when one statute implicitly limits another statute’s scope of operation.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.)

As discussed above, section 65860(c) imposes a duty to wait until a general plan (and its housing element) is validly adopted before rezoning within a reasonable time, otherwise the rezoning is void *ab initio* under that same statute and longstanding applicable law. Yet section 65588(c)(4) (C)(iii) purports to impose a duty to rezone prior to, or at the same time as the adoption of a housing element in order to avoid penalties. This “Catch 22” must be reconciled by this Court in favor of longstanding, recognized law on the proper order of adoption of the housing element, followed by

rezoning; otherwise local governments will face this dilemma so long as the penalty in section 65588(c)(4)(C)(iii) is applied as it was here.

For this reason, the trial court's ruling should be reversed and this Court should find the City was *not* required to complete its rezoning in order for its housing element to be deemed substantially compliant.

C. The Trial Court Erred in Finding the City Was Not Subject to the Extension in Government Code Section 65584.3(a)

In addition to the foregoing, a second issue on appeal is 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, i.e., on October 4, 2022.

CFH has taken the position that such an extension is inapplicable here because HCD did not issue a finding of substantial compliance before October 15, 2022. (AA, 905.) The City's housing element update as of October 4, 2022 was substantially compliant, however, and this Court should find as such. 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*, 148 Cal.App.4th at 1191.)

"Substantial compliance" refers to actual compliance with respect to the substance essential to every reasonable objective of the statute and disregards simple technical imperfections of form. (*Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 297-98.) HCD's informal interpretation of statutory requirements was not binding on the trial court, and any deference which might have been due to HCD's interpretation is overcome by the plain meaning of the statute's text. (*See Martinez v. City of Clovis* (2023) 90

Cal.App.5th 193, 243.) Simply put, HCD was not the final authority on the issue of substantial compliance.

In support of its first cause of action for a writ of mandate to compel compliance with Housing Element Law, CFH alleged that “[t]he City’s amended housing element relies on nonvacant sites to satisfy over fifty percent of the City’s lower-income RHNA, but the City has not made findings identifying any evidence that the existing uses on each of these sites will be discontinued during the planning period.” (AA, 13.) CFH further alleged that the City’s amended housing element does not contain the analysis required under Government Code Section 65583.2(g)(1), and in adopting it the City did not make the findings required under Government Code Section 65583.2(g)(2). (AA, 13.)

Government Code section 65583.2(g)(1) requires the City to specify the additional development potential for each site within the planning period and to provide an explanation of the methodology used to determine the development potential. In addition to this analysis, Government Code section 65583.2(g)(2) states that, when a city relies on non-vacant sites to accommodate more than 50 percent of its housing need for lower income households (as the City did in its housing element update), the methodology used must demonstrate that the existing use does not constitute an impediment to additional residential development based on substantial evidence that the use *is likely to be discontinued* during the planning period. (AA, 861.)

Although Government Code section 65583.2(g)(2) states that an “existing use shall be presumed to impede additional residential development,” the City is not required to demonstrate that such use *will be discontinued*, only that the use *is likely to be discontinued*. (AA, 861.)

Under the recent decision of *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, the appellate court held that Government Code section

65583.2(g)(1) does not mandate a city to “specify the additional development potential for each [non-vacant] site within the planning period and ... provide an explanation of the methodology used to determine the development potential’ in the housing element itself.” (AA, 862.) Complying with Code of Civil Procedure section 1858 (which provides that “the office of the Judge is simply to ascertain and declare what is in terms or in substance contained [in a statute], not to insert what has been omitted, or to omit what has been inserted”), the *Martinez* court refused to insert such a requirement omitted by the Legislature. (AA, 862.)

This is further supported by subdivision (b) of section 65583.2, which explicitly identifies what “[t]he inventory of land shall include,” and demonstrates the Legislature knew how to express an intention that information be provided in a particular document. (*Martinez*, 90 Cal.App.5th at 248 (citing *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 465 [another statutory provision demonstrated the Legislature knew how to write a particular limitation that had been omitted from the provision in question]).) (AA, 862.) Likewise, there is no mandate in section 65583.2(g)(2) that the methodology used to determine additional development potential of non-vacant sites be included in the Housing Element itself. Therefore, as a matter of law, none of the analysis that Petitioner asserts to be missing from the City’s Housing Element Update is required to be in the Housing Element itself. (AA, 862.)

Second, the City did, in fact, adopt findings supported by substantial evidence contained within Section 9.4 of the Housing Element Update and Appendix C which meet the requirements of Government Code sections 65583.2(g)(1) and (2). (AA, 108 – AA, 109; AA, 862.) Specifically, the City determined that, because more than 50% of the parcels included in the Housing Element Sites Inventory are non-vacant, the existing sites identified are likely to be discontinued during the 2021-2029 planning period, and the

development potential on these nonvacant sites would not constitute an impediment to future housing development. (AA, 108 – AA, 109) Section 9.4 and Appendix C identify the City’s Site Inventory, which identifies over 115 sites, and an includes an analysis of each. (AA, 198 – AA, 217; AA, 728 – AA, 741.)

In addition, the City’s housing element update identified the bases for the City’s assumptions regarding the realistic capacity of the listed sites for residential development, including the expected income levels of the housing anticipated on those sites. Section 9.4 identified, among other things, a parcel-specific analysis on properties and underutilized properties according to a methodology developed by the University of California at Berkeley for the State of California Business, Transportation, and Housing Agency, namely, the ratio of land improvements to land value, which can facilitate identification of underutilized sites with potential for infill or redevelopment with higher density residential and/or mixed use developments. (AA, 198 – AA, 217.) Therefore, the City’s housing element update outlines the bases for the realistic capacity of the sites identified to be developed.

The City also considered the expected income levels of housing anticipated on those sites by analyzing the adequacy of the City’s site inventory to meet the City’s RHNA, by income level. (AA, 213 – AA, 214; AA, 728 – AA, 741.) Thus, the City’s housing element update also identified the “basis for the City’s assumptions regarding the realistic capacity of the listed sites for residential development, including the expected income levels of the housing anticipated on those sites.”

Based on the foregoing, the City’s housing element update substantially complies with the housing element law at the time of its adoption on October 4, 2022, and in conjunction with its amendment on February 21, 2023. The trial court’s finding that the City was not entitled to

the extension of time to rezone under Government Code section 65583.4(a) should be reversed.

D. The Trial Court Erred in Considering Extrinsic Evidence in Support of CFH’s Motion

Code of Civil Procedure section 1094 provides in pertinent part that, “[i]f a petition for a writ of mandate . . . presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ.” As the trial court referenced, “[a] motion for judgment under section 1094 is a mechanism to obtain a streamlined review on a particular undisputed issue based on undisputed facts or the administrative record.” (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1293.) The trial court further stated, “CCP section 1094 expressly permits use of either the administrative record or undisputed facts.”⁶

Notwithstanding, the trial court essentially allowed the use of extrinsic evidence – the Declaration of Matthew P. Gelfand and the Declaration of Melinda Y. Coy – in rendering its decision, despite the City’s objection to the two Declarations.⁷

The trial court determined there was only one “disputed fact,” whether HCD representatives determined that the October 2022 housing element

⁶ The use of extrinsic evidence is likewise improper in the context of a motion for judgment on the pleadings. Presentation of extrinsic evidence is not proper on a motion for judgment on the pleadings. (*See, e.g., Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999 [“A motion for judgment on the pleadings performs the same function as a general demurrer, and hence attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. Presentation of extrinsic evidence is therefore not proper on a motion for judgment on the pleadings.” (internal citations omitted)].)

⁷ As discussed above, the City objected to the Declarations of Matthew P. Gelfand and Melinda Y. Coy on the grounds that the use of extrinsic evidence was beyond the scope of the Petition and improper. (AA, 964 – 966.)

required no substantive changes or new data or policy decisions, which was contradicted by Melinda Y. Coy (“Coy”) in her Declaration. (AA, 986.) The trial court then ruled that it would not consider this piece of evidence for the purpose of CFH’s Motion, yet the trial court considered numerous *other* statements in the Declaration of Melinda Y. Coy, statements outside the admittedly undisputed facts. (AA, 986.) In the context of a motion for judgment under Code of Civil Procedure section 1094, this was in error and prejudicial to the City. Not only did it exceed the scope of a motion for judgment, but the City was unable to refute any of the evidence presented by CFH, as it was only permitted to submit a reply after CFH filed its Motion.

Specifically, the trial court relied on the legal conclusion of Coy that “HCD remains unable to certify the City’s adopted housing element or any subsequent revision until the City completes all of the rezoning programs required in the housing element.” (AA, 995.) The trial court further relied on statements made by Coy that HCD sent an email to Southern California jurisdictions on July 15, 2022 regarding the three-year and 120-day exception in Government Code section 65583.4(a), as well as its apparent determination that “HCD found that the extension does not apply to the City’s rezoning deadline.” (AA, 997.)

Finally, the trial court relied on Coy’s statement:

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.

(AA, 954; AA, 998.) This is particularly prejudicial given the City’s well-taken position that it cannot legally rezone *until after* adoption of a housing element.

Not only did the trial court err in considering these statements at all, but the trial court erred in giving what appears to be deference to statements made by an HCD representative. The law is to the contrary:

An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to “make law,” and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency’s *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.

(*Yamaha Corp. of Amer. v. State Bd. of Equal.* (1998) 19 Cal.4th 1, 7.) And similar to the discussion of the Supreme Court in *Yahama* of the *Culligan Water Conditioning v. State Board of Equalization* case, in which the Board of Equalization relied on “an affidavit of its assistant chief counsel,” CFH – and the trial court – relied on a declaration from Coy to assert that the City’s housing element could not be deemed substantially compliant until HCD certifies it, and further assert that the City could have, in fact, rezoned prior to or simultaneously with the adoption of its housing element update. (*Yamaha Corp. of Amer.*, 19 Cal.4th at 8 (citing *Culligan Water Conditioning v. State Bd. of Equal.* (1976) 17 Cal. 3d 86).) Akin to the affidavit in *Culligan*, “Far from being ‘the equivalent of a regulation or ruling of general application,’ the Board’s argument was ‘merely its litigating position in this particular matter.’ ” (*Id.* at 9.) The trial court’s reliance on the Declaration

of Melinda Y. Coy not only for a factual issue, but also for what appears to be HCD's advisory opinion on legal matters, was erroneous and prejudicial.

VI.

CONCLUSION


Based on the foregoing, the City respectfully requests that this Court reverse the trial court's judgment and find (1) 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: August 30, 2024

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**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 **10808** words.

DATED: August 30, 2024

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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 **August 30, 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.
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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 **August 30, 2024**, at Los Angeles, California.


Lilia E. Madrid