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A CHANGED LANDSCAPE: LOCAL AGENCY DISCRETION AND JUDICIAL DEFERENCE IN LAND USE DECISIONMAKING

*By Karl E. Geier**

California's continuing shortfall of new housing to meet demand has led to the enactment of a number of measures at the state level to encourage housing development and to limit the grounds for local governments to disapprove or excessively condition particular projects. These laws have not merely limited the discretion of local government; they also have limited the ability of project opponents to challenge or overturn project approvals once the local government has acted on the application, and they have provided developers of qualifying projects with a number of tools to expedite and enhance the entitlement process.

Past decisions have sometimes narrowly defined the circumstances in which a local agency can allow a project to proceed even where inconsistent with their general plans and zoning ordinances, as in the often-cited case of *Topanga Association for a Scenic Community v. County of Los Angeles*,[1] where a county's grant of a zoning variance was overturned based on failure to make the required findings and demonstrate support with substantial evidence, or in *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*,[2] a case that applied the statutory "uniformity" requirement for local zoning and land use decisions to disapprove a development agreement for a use not authorized by the existing zoning. Paradoxically, other decisions have deferred to local agencies' interpretation of their own laws and ordinances, and have been reluctant to overturn local decisions that arguably were inconsistent with existing requirements, as in *J. Arthur Properties, II, LLC v. City of San Jose*,[3] *Anderson First Coalition v. City of Anderson,*[4] or *Friends of Davis v. City of Davis*.[5] The newer statutes enacted to encourage or force development of new or affordable housing, however, virtually insist that variations from local plans, policies, and ordinances be allowed where necessary to accommodate certain types of housing developments.

Although it has generally been understood that local ordinances and policies that are directly inconsistent with some of these statutes are preempted by the state law,[6] several recent cases have focused on the discretionary aspects of local

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land use decisionmaking, and on the principles of judicial review that are applicable to such decisions. These cases tilt the scales towards support of these statutory objectives irrespective of local jurisdictions or project opponents' efforts to limit them through more nuanced arguments from local policies. This case law, as discussed later in this article, also supports more flexible interpretations of a jurisdiction's own plans, policies, and ordinances where the result is to facilitate, rather than limit, the construction of new housing, while continuing to limit local discretion to disapprove such new housing projects.

I. A Brief Outline of the "Housing-Favorable" Legislation to Limit and Channel Local Decisionmaking in Favor of New Housing Development

The amount of legislation intended to force local jurisdictions to facilitate the development of housing has been accelerating in recent years. One of the laws, the Housing Accountability Act (HAA),[7] has been in effect in some form since 1982, but it has been significantly strengthened to limit the authority of local agencies (cities, counties, and cities and counties) to deny or excessively condition the approval of applications for eligible housing projects that comply with specific and objective pre-existing criteria in their general plan and zoning ordinances, as distinguished from subjective standards requiring the application of judgment or discretion,[8] and to prohibit local agencies from disapproving or requiring a reduction of density unless the local agency can demonstrate, by a preponderance of evidence on the record, that it is necessary to do so due to specific adverse impacts on public health or safety that cannot be mitigated, with detailed definitions of the nature of such specific impacts.[9] Another longstanding statute, the Density Bonus Law,[10] has been modified several times over the past few years to force local governments not only to provide a "density bonus" of additional units if certain affordability standards will be met by the project, but also to require qualifying projects to be granted additional incentives and concessions, including waivers or reductions of development standards, and relief from some parking ratio requirements, when the developer needs them in order to make the project financially feasible.[11] Both of these laws apply to charter cities as well as general law cities and counties,[12] reflecting a legislative determination that the need for such measures addresses a matter of statewide concern, a lack of suitable housing, and therefore will override the "home rule" powers otherwise reserved to charter cities.[13]

Another significant law intended to encourage, if not compel, local govern-

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ments to approve housing development projects is the so-called Housing Crisis Act of 2019,[14] which created a pre-application process that effectively freezes local zoning and planning laws, policies, and regulations for a significant period of time after submission of a formal application while pinning down the local agency's application and processing requirements and fees. The purpose of this law was to facilitate submission and streamlined processing of complete development applications without having the local agency change the rules or create additional hurdles after the applicant submits a project for approval.[15] It too applies to all cities and counties, including charter cities.[16] Where applicable, this law has flipped the usual deferential test for whether a local finding of consistency with local plans, policies, or ordinances is supported by substantial evidence by providing, instead, that a project is *not inconsistent* with a plan, policy, or ordinance "if there is substantial evidence that would *allow* a reasonable person to conclude that the project is consistent, compliant, or in conformity."[17] It further requires the local agency to apply only objective standards and criteria, not subjective standards that require judgment or discretion, in acting on a housing development project, and requires that these standards and criteria be applied "to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project,"[18] and that the statute be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply."[19]

Other recent enactments have included similar limitations on local discretion by requiring certain approvals regardless of outstanding zoning ordinances, or to limit application of any local standards that involve judgment or discretion, by applying only "objective standards and criteria." Senate Bill 9, which became effective at the beginning of 2022, created the so-called "four-units per parcel" right to develop and divide existing single-family lots.[20] It essentially compels local agencies to allow such development "as of right," i.e., ministerially and without a hearing, if the statutory criteria are met.[21] It further limits the local government to the application of "objective standards,"[22] but it also preempts even the objective standards to the extent necessary to accommodate a minimum of two units,[23] and it otherwise requires projects that are compliant with the objective standards to be approved unless specific findings of substantial adverse effects on public health or safety that cannot be mitigated can be adduced.[24] Another narrowly-drafted law creates a limited exemption from local floor area ratios and minimum lot sizes for certain smaller residential proj-

ects consisting of between three and nine units,[25] although it allows application to such projects of local plans, policies, and ordinances that do not conflict with that specific exemption.[26] Another such law provides that for attached housing projects of up to 100 units that include an affordable component and otherwise meet additional specified criteria, located on an infill site that is shown in a city's or county's general plan as available for such housing types, the project must be allowed as of right, without requirement of a conditional use permit, and regardless of whether the site has been rezoned to correspond with the general plan, essentially preempting any local zoning ordinance to the contrary.[27]

Each of these laws is technically complex and some are incredibly prolix, so drawing a conclusion that any given project falls within them or is entitled to the benefits that are only briefly touched on in the preceding paragraphs can require extended analysis and a close reading of the statutory language. This article is not intended to provide a guide as to when they may apply. Rather, the following discussion summarizes a developing body of California case law that gives effect to these new principles, as well as the lessons some of these cases pose for local decisionmakers who are often pressured by NIMBY constituents to flout their statutory duties with regard to qualifying development projects.

II. The Developing Body of Case Law Implementing State Requirements to Facilitate the Approval of New Housing Projects Despite Local Restrictions, or to Sanction Local Agencies' Relaxation of Standards for Qualifying Projects

The cases discussed below have arisen in a variety of contexts, and do not always turn on the same technical analysis. That said, they have cumulatively altered the usual expectations for local governmental decisionmaking, in furtherance of the state legislature's policy of fostering development of new housing, particularly affordable housing, despite local agency recalcitrance and despite local NIMBY opposition.

***Wollmer v. City of Berkeley* (2011)**

In *Wollmer v. City of Berkeley*,[28] a project opponent objected to the City's allowance of a larger project than would otherwise have been permitted under the zoning designation for the project site, among other reasons, because the city waived certain standards for height, number of stories, and setbacks, and granted variances or waivers to allow the project as designed by the applicant to proceed. The project included enough affordable units to qualify for bonus

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units under the Density Bonus Law, and to include those additional units as well as the affordable units, the developer designed a project that exceeded building scale and setback requirements of the City's zoning ordinances in several respects. The project opponents argued that these variances would not have been needed to accommodate the project if the developer had stripped out certain "amenities" such as an interior courtyard, a community plaza, and higher ceiling heights, from the project design, and that the city could not waive development standards to approve a density bonus project unless it specifically found that the waived standards would "physically preclude" construction of the density bonus qualifying project.

The court of appeal in *Wollmer*, like the trial court, rejected this argument, noting the Density Bonus Law was amended in 2008 to delete a requirement that the applicant for a waiver must show that the waiver was necessary to render the project economically feasible. It also found that "nothing in the statute requires the applicant to strip the project of amenities, such as an interior courtyard, that would require a waiver of development standards," because the statute does not say what must be "precluded" by the standards requested to be waived is a project with no amenities, or that "amenities may not be the reason a waiver is needed."[29] The Density Bonus Law simply allows the developer to request a waiver of development standards where the project otherwise qualifies for the density bonus, and limits the governmental entity's authority to deny the waiver where the developer deems it necessary. Otherwise, as the court noted, if the waiver of development standards is denied, the density bonus project might never be built, which would defeat the whole purpose of the Density Bonus Law.[30]

Wollmer was one of the first of a developing line of authority that recognized the statutory bias in favor of granting developers' requests for concessions and waivers in connection with the Density Bonus Law, and it provided support for a city that wanted to approve the project, rather than succumb to neighborhood opposition. The next case, while arising under a different statute, is an example of what can happen when the local agency decides to deny approvals based on a strained effort to avoid the reach of the state's housing development laws.

Honchariw v. County of Stanislaus (2011)

The case of *Honchariw v. County of Stanislaus*[31] arose out of the county's rejection of an eight-lot residential subdivision project based on the county's as-

sertion that the project violated a provision of the county code requiring a connection to a public water supply. The county took the position that it was not required to comply with the Housing Accountability Act because the project was not for affordable housing and did not involve an attached multi-family type of housing product. Responding to community opposition to the project, the county also contended that the public water connection requirement meant the project site was not physically suited to the development, which was ostensibly an independent ground for disapproval under the Subdivision Map Act, and therefore made no findings demonstrating how the proposed project in some manner failed to comply with "applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete," as required by the HAA. The developer's petition for writ of mandate directing the county to comply with the HAA was denied by the trial court.

On appeal, the court of appeal first disposed of the county's textual arguments that the HAA somehow only applied to multi-family housing or to affordable housing, reviewing the evolution of the statutory term "housing development project," and found that an eight-lot subdivision for single-family detached residences was clearly a "housing development project" for purposes of Gov. Code, § 65589.5.[32] It went on to reject the county's claim that the failure to comply with its rules concerning domestic water supply somehow excused the county from making the necessary findings of noncompliance with objective standards for a disapproval of the project as required by the HAA (§ 65589.5, subd. (j)), noting that the county neither made such findings nor made findings of specific threats to public health or safety to render such findings of compliance unnecessary.

As part of its analysis, the court explained that an amendment made in 1999 to subdivision (j) of section 65589.5, replaced an earlier reference to "applicable general plan, zoning, and development policies" with "applicable, *objective* general plan and zoning standards and criteria." This change "appears to have been intended to strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability') to exempt a proposed housing development project from the reach of subdivision (j)."[33] In the course of its decision, the court focused, however, not on whether the county had applied "objective" standards, but on whether the city's proffered claim of noncompliance involved a "plan," "zoning," or "development policy" or "design standard," and found that in any event there was no

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"noncompliance" to support a finding of disapproval, even if one had been made.

The county's fallback argument, that its finding of noncompliance with the domestic water supply ordinance constituted the necessary finding under § 65589.5, subd. (j), was rejected—there was no basis in the record for finding the project failed to comply with public water supply requirements, because the applicant all along had stated he would connect to the public water system if his request for an exemption from the ordinance was denied, and "the project has not yet had an opportunity to be out of compliance with" the ordinance, given the county's rejection of the plan.[34] The court thus reversed the denial of the writ and directed the county to reconsider the project in accordance with the requirements of the HAA.

Honchariw was an important decision because of its holding that the HAA cannot be ignored by local agencies, and that the state law requirements will be broadly construed against recalcitrant local decisionmakers. It did not have to address the validity of specific findings of noncompliance (since none had been made), but its focus on the overall purposes of the HAA—to force local governments to demonstrate why they are disapproving projects that, if approved, would increase the housing supply—is noted in other decisions discussed in this article, as are its comments on the significance of the legislature's addition of the word "objective" in reference to the standards and policies that may be imposed on a project under the HAA.

Ruegg & Ellsworth v. City of Berkeley (2021)

In *Ruegg & Ellsworth v. City of Berkeley*,[35] the party seeking to overturn the local agency's decision also was the applicant, whose affordable housing project was denied approval despite the developer's contention that it qualified for the streamlined, ministerial approval process under existing plans, policies, and ordinances in effect at the time the application was submitted. This was required under a portion of the Housing Crisis Act of 2019, Gov. Code, § 65913.4, that expressly limits local governments' authority over applications for development of certain housing development projects meeting the specified criteria, by providing for a "streamlined, *ministerial* approval process" based on "objective planning standards" and limits the imposition of *new* plans, policies, or ordinances on a project once an application is filed.[36] The city, however, claimed it was exempt from that requirement for two reasons, first because the state law

impinged on its "home rule" authority as a charter city to regulate zoning under the municipal affairs doctrine, and second, because the project involved the "demolition of an historic structure," which is one of the enumerated exclusions in § 65913.4, subd. (a)(7).

With regard to the home rule argument, the court found the housing shortage to involve "unquestionably a matter of statewide concern," and rejected the city's claim that each provision of the state law had to be itself a matter of statewide concern; the court would not subject the means to address this problem selected by the legislature to a line-by-line analysis of necessity, once the general statewide concern was identified.[37]

With regard to the "demolition of an historic structure" argument, the court rejected that the particular historical or cultural resource at issue, a shell mound, was a "structure," and refused to defer to the city's own determination that it was a "structure" that removed the project from the mandatory ministerial permit process imposed by the statute.[38] Among other things, given that the state law was mandatory and binding on charter cities, the court would not defer to the city's attempt to interpret the law by "finding" a shell mound to be a structure.[39]

The *Ruegg & Ellsworth* decision operates as a firm judicial endorsement of the means selected by the legislature to facilitate the development of affordable housing to address a statewide housing shortage by significantly restricting the ability of the local agency to reject an application for a qualifying project that state law required it to approve under its existing objective rules and policies. It has been followed in other decisions involving other provisions of the state's housing laws, including the next one discussed below.

Ruegg & Ellsworth also contains a judicial interpretation of the term "objective planning standards" that is germane to the interpretation of similar language in other statutes, not just § 65913.4. The court stated:

> "Objective" means "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions". . . ."based only on facts and not influenced by personal feelings or beliefs." *The Legislature's choice of language makes obvious its intent to constrain local governments' discretion.*[40] [emphasis added, citations omitted].

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California Renters Legal Advocacy and Education Fund v. City of San Mateo **(2021)**

The case of *California Renters Legal Advocacy and Education Fund v. City of San Mateo*[41] arose under the portion of the Housing Accountability Act that addresses the standards to be followed in considering whether a qualifying project is in compliance with applicable plans, policies, and ordinances of the locality. The case involved a proposed 10-unit apartment building in a multifamily zone that fell squarely under the provisions of the HAA but had been disapproved by the city on the basis that it was too large and out of scale with the surrounding residential areas, and therefore violated the city's design review guidelines. Thus, the case turned on the application of Gov. Code, § 65589.5, subd. (j)(1), which provides that unless it makes specific findings of a significant threat to public health and safety, a local agency may not disapprove or reduce the density of a proposed housing development that "complies with applicable, *objective* general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete."[42] Since no public health or safety findings had been made, the issue of compliance with objective standards was directly presented both at the trial court and on appeal.

The defendant city attempted to argue that it had properly determined the project was out of compliance with its design standards as it had customarily interpreted them, and that the court should defer to that determination. In effect, the court of appeal found the city's argument to be a "tacit admission" that its design review guidelines were not "objective" standards, and the court did not consider the city's findings on the height and scale of the building to be based on "objective" standards in any case. The city's argument for judicial deference would require overlooking the legislature's imposition of a more stringent standard on local agencies who attempt to deny approval of housing projects based on their local policies and ordinances. As germane to the "compliance with objective standards" issue, the HAA had been amended in 2017 by the addition of Gov. Code, § 65589.5, subd. (f)(4), which provides:

> For purposes of this section, a housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision *if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, and in conformity*.[43] [emphasis added].

The city argued that it had the right, as a charter city, to enact ordinances,

regulations, and policies and to construe and apply them in accordance with its usual and customary interpretations, and that this provision of the HAA was unconstitutional as it violated the home rule powers of charter cities, i.e., their exclusive right to regulate matters involving municipal affairs, such as zoning and design laws. This argument the court rejected on grounds similar to those identified in *Ruegg & Ellsworth*: once the legislature has identified a matter of statewide concern and enacted its chosen means of addressing it, a charter city is bound and may not assert its municipal affairs powers in an effort to pick and choose which of the provisions selected by the legislature to enforce. After reviewing the *Ruegg & Ellsworth* precedent, the court went on to state:

> Similarly here, we consider not whether there is a statewide interest in limiting local governments' authority to disapprove projects that comply with objective standards, but whether there is a statewide interest in increasing the state's housing supply. . . .[O]ur inquiry is not whether the Legislature has enacted "prudent public policy" or whether its enactments will be "advisable or effective"; rather, it is whether the problem it addresses "is of sufficient extramural dimension to support legislative measures reasonably related to its resolution. [Citation omitted]."[44]

The court reviewed the lengthy history of the HAA, which has been amended numerous times over the past 40 years, including the legislature's repeated expressions of concern that previous efforts to address the shortage of housing had not produced the desired result. The continued failure of the law to engender sufficient housing development has led the legislature to adopt increasingly stringent limitations on local agencies' authority to disapprove housing projects. Based on the clear expressions of legislative intent to address a statewide concern, the court rejected the city's claim that Gov. Code, § 65589.5, subd. (f)(4) unconstitutionally overreached into the internal decisionmaking process of a charter city.

The court also made it clear that the HAA has altered the usual rules for judicial review of local land use decisions. The city argued that judicial deference to local interpretations in land use matters was appropriate because of the city's presumed greater experience in applying its own guidelines, citing cases such as *J. Arthur Properties, II, LLC v. City of San Jose,*[45] which had involved the interpretation of a marijuana dispensary siting ordinance, a non-residential use. Here, however, the court found that the HAA "cabins the discretion of a local agency to reject proposals for new housing" and therefore commands not deference but "more rigorous independent review. . . in order to prevent the City from circumventing what was intended to be a strict limitation on its authority," citing *Ruegg & Ellsworth.*[46]

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California Renters further engaged directly with the question of whether the city's design standards were "objective" within the meaning of the HAA, which allows a city only to disapprove a project for noncompliance with its *objective* standards:

> At the time of the events at issue here, the HAA did not define the term "objective," so we look to the ordinary meaning of that term. One dictionary defines "objective" as "expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices, or interpretations." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 799.) The definition added to the HAA effective January 1, 2020 is a longer version of the same idea. The HAA now defines "objective" as "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (§ 65589.5, subd. (h)(8), added Stats. 2019, ch. 665, § 3.1.) Using either of these definitions, a standard that cannot be applied without personal interpretation or subjective judgment is not "objective" under the HAA.

The court analyzed specific language in the city's design guidelines that required a "transition or step-back" of building heights in relation to adjoining residential areas and found it wanting as an "objective" standard, both because it was ambiguous and because it would require the exercise of personal interpretation or judgment—"transition" was not a quantifiable, finite term, nor was "stepback," and the standard also did not clarify whether either a "stepback" or some other "transition" would suffice. Citing *Honchariw,* the court concluded the city could not apply this "transition or setback" aspect of its development guidelines to a housing development project:

> *Honchariw* explains that an amendment made in 1999 to subdivision (j) of section 65589.5, replacing an earlier reference to " 'applicable general plan, zoning, and development policies' " with " 'applicable, *objective* general plan and zoning standards and criteria,' " "appears to have been intended to strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability') to exempt a proposed housing development project from the reach of subdivision (j)." [citation omitted]. On their face, the Guidelines' provisions regarding the relative height of multifamily buildings and adjacent single-family houses are certainly less vague or subjective than a term such as "suitable." But, in our view, they nevertheless require personal interpretation or subjective judgment that may vary from one situation to the next.[47]

California Renters did not lead to a directive by the court to approve the project, only to a writ of mandate directing the city to "comply with the Housing

Accountability Act." But the court of appeal's opinion was clear in pointing out that the legislature's increasing frustration over the failure of past efforts to induce local governments to approve more housing development had led it to adopt not only increasingly stringent standards for disapproval, but also larger statutory penalties and a broadening of standing requirements for prospective litigants seeking to enforce the HAA against recalcitrant local governments. The project opponents were free to oppose the project, but only on the basis of the objective criteria allowed by Gov. Code, § 65859, subd. (f)(4), which would be construed in favor of housing development in case of doubt. As summarized by the court:

> We return to the history of the HAA. As the Legislature has steadily strengthened the statute's requirements, it has made increasingly clear that those mandates are to be taken seriously and that local agencies and courts should interpret them with a view to giving "the fullest possible weight to the interest of, and the approval and provision of, housing."[48]

Schreiber v. City of Los Angeles (2021)

Schreiber v. City of Los Angeles[49] involved an effort by project opponents to overturn a city's *approval* of a mixed use residential and commercial development project that qualified for a density bonus under the Density Bonus Law (Gov. Code, § 65915), and that included certain "waivers" and "incentives" to make the project economically feasible. The city had allowed the project to exceed height limits and floor area ratio limits imposed by its zoning and design standards, and also waived transitional height and rear setback requirements. Initially, the developer had submitted financial feasibility analyses that city ordinances required to justify its requested concessions and waivers, but after the Density Bonus Law was amended in 2016 to limit a municipality's ability to require financial studies and otherwise justify such requests,[50] the developer had changed its requests and the city staff acknowledged that it could no longer require substantiation of the requested waivers and concessions. The objecting neighbors then sued to overturn the project approvals, contending the city improperly granted the waivers and concessions without the requisite proof that they were needed to make the project economically feasible.

The court of appeal in *Schreiber* reviewed the series of changes in Gov. Code, § 65915 and ultimately concluded that the law now prohibits a requirement that the developer must substantiate the financial necessity of any incentives or waivers it requests. To the contrary, under subd. (d)(4) of that section, the local

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agency bears the burden of proof for the *denial* of a requested concession or incentive,[51] and under subd. (d)(1), the local agency is required to grant the concession or incentive requested by the applicant *unless* the local agency finds, based upon substantial evidence, that the concession or incentive (i) does not result in identifiable and actual cost reductions, or (ii) would have a specific, adverse impact on public health and safety or the physical environment or historical resources, as defined, or (iii) would be contrary to state or federal law.[52] Similar language governs a request for a waiver under subd. (e), except the statute imposes no financial criteria for a waiver.[53]

The *Schreiber* court went on to conclude that because the local ordinance that the project opponents sought to enforce (requiring pro forma financial analyses and economic justification for incentives and waivers) was preempted by the changes in the Density Bonus Law shifting the burden of proof concerning economic feasibility to the city, the city had properly granted the waivers and concessions without requiring specific financial information to support them, and had properly found there was no evidence the concessions and waivers would not result in cost reductions or were necessary to make the project financially feasible. Further, to the extent any evidence of the need for waivers or concessions to accommodate the density bonus was needed, the court found adequate evidence in the record from an earlier economic study that had been provided by the applicant's consultant, RSG, in connection with its initial application for approval. The RSG analysis had been required under the city's now-preempted ordinance requiring the developer to demonstrate the need for incentives and concessions, and was not cited or referred to in the city's findings approving the ultimate project including the waivers and concessions at issue. This was immaterial to the validity of its actions, however. As stated by the court:

> The city did *not* make a finding that the incentives would *not* result in cost reductions, and was *not* required to substantiate this negative finding with evidence. But even if substantial evidence regarding cost reductions was required, the RSG analysis was sufficient for this purpose.[54] [emphasis added].

In short, the city had complied with the statute, which under the circumstances did not allow it to reject the requested concessions and waivers.[55]

Schreiber also disposed of an argument by the petitioners based on *Topanga Assn. for a Scenic Community,* that the city's decision was deficient because it did not "set forth findings to bridge the analytic gap between the raw evidence and

ultimate decision or order . . . [b]y focusing . . . upon the relationships between evidence and findings and between findings and ultimate action."[56] Here, the city was not required to grant the incentives *unless* it made a finding that they did *not* result in cost reductions. It made no such finding. Rather, "[i]t was not required to make an affirmative finding that the incentives would result in cost reductions, or to cite evidence to establish a fact presumed to be true."[57]

Schreiber, like all of the cases discussed in this article, engaged in a careful and detailed analysis of the statutory language in reaching its specific conclusions, and a similar analysis is necessary in any given situation to determine whether and to what extent the developer of affordable housing must substantiate the density bonus to which it is entitled or the financial basis for any requested waivers, concessions, or incentives. But it highlights that the legislature has effectively turned the tables on local governments, making them justify their own decisions to disapprove a deviation from their normal standards and policies by substantial evidence in the record, rather than the other way around. It is an example of how the legislature has given project applicants the presumptive right to having their housing development projects approved, rather than be subjected to the whims of a local agency whose decisions ordinarily would be entitled to judicial deference if any evidence in the record supported *denial* of project approval.

Bankers Hill 150 v. City of San Diego **(2022)**

The most recent decision reflecting the new paradigm for land use decision-making is *Bankers Hill 150 v. City of San Diego.*[58] The case involved a mixed-use project that was a housing development project within the meaning of the Housing Affordability Act, and it also included an affordable housing component that qualified it for a density bonus of additional residential units under the Density Bonus Act. Thus, it raised most of the issues that are running through all of the decisions mentioned above.

Like *Wollmer*, *Bankers Hill 150* involved a challenge to the city's approval of a density bonus project that included several "amenities" including an internal courtyard, a public access area, and recreational facilities. The developer's design incorporating these amenities was not forced by city directives, but the result of the design submitted by the developer was to push the building envelope into setback areas and create a project with a height and scale that arguably exceeded several other policies and standards set out in the applicable general and specific

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plans for the area. As in *Schreiber*, the developer had offered limited evidence for why the project needed special exceptions from existing plans and ordinances, and the city nevertheless had approved the project despite several deviations from specific site development standards, including setback and height limitations.

The neighborhood association that opposed the project in *Bankers Hill 150* claimed it violated various policies set forth in the city's general plan and a specific plan for the downtown Bankers Hill community, and contended, as had been argued in *Schreiber* and *Wollmer*, that specific economic justifications for these deviations were needed, and that the city should have forced removal of the "amenities" rather than accede to the developers' requests.

Bankers Hill reiterates the conclusions of *Wollmer* and *Schreiber*, that the Density Bonus Law can sometimes require a local agency to override some objective development standards and policies if the project applicant considers such overrides necessary to make the project financially viable, and it limits local authority to require evidence to support these claims. These *requirements* of the Density Bonus Law leave a local agency with limited discretion to deny or condition a project approval or to deny a request for a concession or incentive—they "place[] the burden on a city to establish an exception applies," rather than on the developer to demonstrate that the incentive or concession is needed.[59] A city may deny a requested incentive or concession if "the city can establish" that it would *not* "result in identifiable and actual cost reductions to provide for affordable chousing costs."[60] Otherwise, a city can only refuse to grant the request if doing so would (1) have a specific adverse impact on public health or safety, (2) have an adverse impact on any historical resource, as defined, or (3) be contrary to state or federal law.[61] As stated by the court:

> Thus, unless one of the statutory exceptions applies, so long as a proposed housing development project meets the criteria of the Density Bonus Law by including the necessary affordable units, a city may not apply any development standards that would physically preclude construction of that project as designed, even if the building includes "amenities" beyond the bare minimum of building components.[62]

Here, the City had affirmatively concluded that it could not make any of these findings, and the project opponents "do not contend the evidence establishes that the City could have made any of those specific findings." In short, the court found the project was entitled to the benefits of the Density

Bonus Law, including reduced parking standards and development incentives, in addition to the density bonus itself.[63]

Unlike *Wollmer* and *Schreiber*, however, *Bankers Hill 150* also directly invoked the requirements of the Housing Accountability Act in addition to those of the Density Bonus Law. The project not only included deviations from the specific setback and height limitations that the court found supported under the Density Bonus Law, it also included numerous other arguable deviations from applicable general and specific plan policies with which the City had found it to be in compliance over the objections of the project opponents.

Most of the general plan and specific plan policies and standards in *Bankers Hill 150* involved arguably subjective or potentially conflicting objectives and policies, such as a preference to maintain "view corridors," require new buildings to be "designed to conform to the predominant scale of the neighborhood," "minimize visual intrusiveness," and "complement the natural environment." The City had affirmatively found that the project conformed with these policies and standards. These findings were challenged by the project opponents, who claimed the City should have made a different determination under these arguably subjective standards. The City, in response, argued that a court also should give substantial deference to a local agency's interpretation of its own general and specific plans and policies, while also conceding that many of these standards were "subjective" and therefore, under the HAA, could not have been imposed on the project.

In making their arguments, the opponents, like the county in *Honchariw* and like the city in *California Renters,* were ignoring or attempting to avoid the implications of the HAA, which limits both the discretion of a local agency to reject proposals for new housing and the deference courts must give to local agencies, instead requiring "more rigorous independent review . . . in order to prevent the City from circumscribing what was intended to be a strict limitation on its authority."[64] Thus, the *Bankers Hill 150* court pointed out that with the enactment of the HAA, courts actually are required to give even more stringent review to local agency determinations with regard to *housing* development projects. The usual substantial evidence test has been altered by the HAA to *require* the local agency to find a housing development to be in compliance with those applicable standards and policies if a reasonable person *could* find it to be in compliance.

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> An agency abuses its discretion if it makes findings not supported by the evidence. (Code Civ. Proc., § 1094.5, subd. (b).) Although the parties contend we apply the typical substantial evidence standard of review, the HAA imposes a slightly different standard when an agency is considering approval of a housing development project. "[I]nstead of asking, as is common in administrative mandamus actions, 'whether the City's findings are supported by substantial evidence' [citation], we inquire whether there is 'substantial evidence that would allow a reasonable person to conclude that the housing development project' complies with pertinent standards."[65]

At one point, the *Bankers Hill 150* court suggested it might apply a different standard of review under the Housing Accountability Act depending on whether the local agency has approved or disapproved a particular aspect of the project. As the court framed the issue:

> The discussion in *California Renters* [concerning non-deference to a local agency's interpretation of its own policies] was framed by the circumstances of that case, in which the city [San Mateo] had denied a housing development project. Here, the City [San Diego] approved the Project, which lessens the need for a more stringent, independent review. Regardless, the level of deference to be afforded to the City's decision does not alter our ultimate conclusion that the City did not abuse its discretion in approving the Project.[66]

However, after reciting these constraining principles on the discretion of a city to *deny* project approval or for the court to second-guess a city's consistency determinations to *uphold* project approvals, the court went on to reject the project opponents' claims that the project was inconsistent with general and specific plan policies and standards for preservation of view corridors, conforming to residential neighborhood scales, minimizing visual intrusiveness through development scale and intensity "transitions," and complementing natural features, as well as provisions for façade articulations and setbacks to improve pedestrian environment and enhance the view of neighboring Balboa Park. The City had made findings that the project did comply with these requirements, however subjective they may have been. In many cases there was *some* evidence in the record to support the City's findings and in other cases the court seemed to simply agree with the City's interpretation of its own policies and standards. In either case, the project opponents had failed to demonstrate that the City had abused its discretion in finding the project in compliance with the general plan policies and standards. Because it was able to affirm the City's decision based on the City's findings of compliance with applicable plans and standards, which it found supported by the evidence, the court in *Bankers Hill 150* did not rely on the distinction between "objective" and "subjective" plans or poli-

cies, and did not determine whether the City could have been compelled *not* to apply its more subjective standards under the Housing Accountability Act.

The court acknowledged that the City may not have been correct in finding the project to comply with a specific setback requirement in the community plan implementation overlay zone, but that deviation had been specifically requested by the developer to allow for the project design, which the developer said was necessary to accommodate the density bonus units as well as the affordable units. To the extent the project was inconsistent with these policies and standards, the court said, "the City was nevertheless compelled to approve the Project under the Density Bonus Law based on the record before us."[67]

Summary and Conclusion

The daunting technical complexity and sheer volume of the legislation enacted to address the shortage of housing in California has not obscured the overriding legislative purpose, which is to facilitate approval and construction of housing and to limit the effectiveness of NIMBY opposition as well as procedural foot-dragging and imposition of excessive conditions by local governmental agencies. The fact that this legislation is deliberately intended to overturn the usual principles of judicial deference to local decisionmakers and sometimes to override local policies and standards that interfere with the legislative objectives has been well understood by the appellate courts. The decisions outlined in this article should go a long way toward convincing local decision-making bodies and their constituents that the rules have changed and past practices in limiting or conditioning housing developments merely based on local preferences and political opposition are no longer viable, particularly where they include an affordable housing component.

ENDNOTES:

[1] *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12 (1974).

[2] *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 1016, 68 Cal. Rptr. 3d 882 (5th Dist. 2007).

[3] *J. Arthur Properties, II, LLC v. City of San Jose*, 21 Cal. App. 5th 480, 486, 230 Cal. Rptr. 3d 365 (6th Dist. 2018).

[4] *Anderson First Coalition v. City of Anderson*, 130 Cal. App. 4th 1173, 1193, 30 Cal. Rptr. 3d 738 (3d Dist. 2005).

[5] *Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1014-1015, 100

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Cal. Rptr. 2d 413 (3d Dist. 2000).

[6]See, e.g., *Latinos Unidos Del Valle De Napa Y Solano v. County of Napa*, 217 Cal. App. 4th 1160, 1169, 159 Cal. Rptr. 3d 284 (1st Dist. 2013); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 830, 65 Cal. Rptr. 3d 251 (1st Dist. 2007) (both of which found local ordinances that conflicted with the Density Bonus Law with respect to the formula used in calculating the bonus to be preempted by the state law).

[7]Gov. Code, § 65589.5.

[8]Gov. Code, § 65589.5, subd. (f)(1).

[9]Gov. Code, § 65589.5, subds. (f)(4), (j)(1).

[10]Gov. Code, § 65915.

[11]Gov. Code, § 65915, subd. (b)(1).

[12]Gov. Code, §§ 65589.5, subd. (g), 65915, subds. (a), (s).

[13]See *California Renters Legal Advocacy & Education Fund v. City of San Mateo*, 68 Cal. App. 5th 820, 848-849, 283 Cal. Rptr. 3d 877 (1st Dist. 2021).

[14]Housing Crisis Act of 2019, 2019 Stats., ch. 564 (SB 330), amending Gov. Code, § 65589.5, and adding Gov. Code, §§ 66300, et seq. See Geier, *A Whole New Ballgame: What the Housing Crisis Act of 2019 (SB 330) Means for Housing Developers, Local Governments, and Go-Slow Opposition to New Residential Development Projects in California*, Miller & Starr, Real Estate Newsalert, Vol. 31, No. 1 (Sept. 2020).

[15][Need authority].

[16]Gov. Code, § 65913.4, subd. (k)(7).

[17]Gov. Code, §§ 65905.5, subd. (c)(1), 65913.4.

[18]Gov. Code, §§ 65905.5, subd. (c)(2), 65913.4.

[19]Gov. Code, § 65913.4, subd. (n).

[20]2021 Stats., ch. 122 (SB 9), adding Gov. Code, §§ 65852.21, 66411.7 and amending Gov. Code, § 66562.6. See Geier, *The New Provisions for Multiple-Unit Housing in Single-Family Zones: The "End of Single-Family Housing" or Just Another Minimally Effective But Overcomplicated Effort to Address the Deficit of Affordable Housing in California*? Miller & Starr, Real Estate Newsalert, Vol. 32, No. 2 (Nov. 2021).

[21]Gov. Code, § 65852.21, subd. (a).

[22]Gov. Code, §§ 65852.21, subd. (b), 66411.7, subd. (c).

[23]Gov. Code, §§ 65852.21, subd. (b), 66411.7, subd. (c).

[24]Gov. Code, §§ 65852.21, subd. (d), 66411.7, subd. (d).

[25]2022 Stats., ch. 363 (SB 478), amending Gov. Code, § 65585 and adding Gov. Code, § 65913.11.

[26]Gov. Code, § 65913.11, subd. (c).

[27]Gov. Code, § 65589.4.

[28]*Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329, 122 Cal. Rptr. 3d 781 (1st Dist. 2011).

[29]*Wollmer v. City of Berkeley*, *supra*, 193 Cal. App. 4th at 1346-1347.

[30]*Id*. at 1347.

[31]*Honchariw v. County of Stanislaus*, 200 Cal. App. 4th 1066, 132 Cal. Rptr. 3d 874 (5th Dist. 2011).

[32]*Honchariw v. County of Stanislaus*, *supra*, 200 Cal. App. 4th at 1076-1077.

[33]*Id*. at 1076-1077.

[34]*Id*. at 1080.

[35]*Ruegg & Ellsworth v. City of Berkeley*, 63 Cal. App. 5th 277, 277 Cal. Rptr. 3d 649 (1st Dist. 2021).

[36]Gov. Code, § 65913.4, subd. (a).

[37]*Ruegg & Ellsworth v. City of Berkeley, supra*, 63 Cal. App. 5th at 314-315.

[38]*Id*. at 303-304.

[39]*Id*. at 300-301.

[40]*Id*. at 300.

[41]*California Renters Legal Advocacy & Education Fund v. City of San Mateo*, 68 Cal. App. 5th 820, 283 Cal. Rptr. 3d 877 (1st Dist. 2021).

[42]Gov. Code, § 65589.5, subd. (j)(1).

[43]Gov. Code, § 65589.5, subd. (f)(4).

[44]*California Renters Legal Advocacy and Education Fund v. City of San Mateo, supra,* 68 Cal. App. 5th at 849.

[45]*J. Arthur Properties, II, LLC v. City of San Jose*, 21 Cal. App. 5th 480, 486, 230 Cal. Rptr. 3d 365 (6th Dist. 2018).

[46]*California Renters Legal Advocacy and Education Fund v. City of San Mateo, supra,* 68 Cal. App. 5th at 840.

[47]*Id*. at 840.

[48]*Id*. at 854, citing Gov. Code, § 65589.5, subd. (a)(2)(L).

[49]*Schreiber v. City of Los Angeles*, 69 Cal. App. 5th 549, 284 Cal. Rptr. 3d 587 (2d Dist. 2021).

[50]2016 Stats., ch. 758 (AB 2501), § 1, amending Gov. Code, § 65915, subds. (a)(2), (j)(1).

[51]Gov. Code, § 65915, subd. (d)(4).

[52]Gov. Code, § 65915, subd. (d)(1).

[53]*Schreiber v. City of Los Angeles*, *supra*, 69 Cal. App. 5th at 556, referencing

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Gov. Code, § 65915, subd. (e).

[54]*Schreiber v. City of Los Angeles*, *supra*, 69 Cal. App. 5th at 559.

[55]*Id*.

[56]*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal. 3d at 515.

[57]*Schreiber v. City of Los Angeles*, *supra*, 69 Cal. App. 5th at 560.

[58]*Bankers Hill 150 v. City of San Diego*, 74 Cal. App. 5th 755, 289 Cal. Rptr. 3d 268 (4th Dist. 2022). See the summary of this case at page 446, in this issue of the *Miller & Starr, Real Estate Newsalert*.

[59]*Bankers Hill 150 v. City of San Diego,* 74 Cal. App. 5th at 770-771.

[60]Gov. Code, § 65915, subd. (d)(1).

[61]*Bankers Hill 150 v. City of San Diego,* 74 Cal. App. 5th at 770.

[62]Gov. Code, § 65915, subds. (d)(1)(B)-(C), (e)(1); *Bankers Hill 150 v. City of San Diego, supra*, 74 Cal. App. 5th at 775, citing *Wollmer v. City of Berkeley*, *supra*, 193 Cal. App. 4th at 1347.

[63]*Bankers Hill 150 v. City of San Diego, supra*, 74 Cal. App. 5th at 775.

[64]*Id.* at 778.

[65]*Id.* at 778, quoting *California Renters, supra*, 68 Cal. App. 5th at 837.

[66]*Bankers Hill 150 v. City of San Diego, supra*, 74 Cal. App. 5th at 776.

[67]*Id*. at 783.

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