

From: James Lloyd <james@calhdf.org>

Sent: Friday, May 15, 2026 7:34 PM

To: Mayor Kate <Kate.Colin@cityofsanrafael.org>; Maika Llorens Gulati <Maika@cityofsanrafael.org>; Eli Hill <Eli.Hill@cityofsanrafael.org>; Maribeth Bushey <Maribeth.Bushey@cityofsanrafael.org>; Rachel Kertz <rachel.kertz@cityofsanrafael.org>

Cc: Rob Epstein <Rob.Epstein@cityofsanrafael.org>; Paul Navazio <Paul.Navazio@cityofsanrafael.org>; Community Development <community.development@cityofsanrafael.org>; Distrib- City Clerk <city.clerk@cityofsanrafael.org>

Subject: public comment re item 3b for the 5/18/26 Council meeting

Dear San Rafael City Council,

The California Housing Defense Fund (CalHDF) submits the attached public comment and referenced court case regarding agenda item 3b for the May 18, 2026 Council meeting, the City's proposed Park And Recreation Facilities Fee; and Park Dedication and In-Lieu Fees.

Sincerely,

James M. Lloyd

Director of Planning and Investigations

California Housing Defense Fund

james@calhdf.org

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May 15, 2026

**City of San Rafael
1400 Fifth Avenue
San Rafael, CA 94901**

Re: Proposed Nexus Study and Ordinance for Parks Impact Fees

**To: Kate.Colin@CityOfSanRafael.org; Maika@CityOfSanRafael.org;
Eli.Hill@CityOfSanRafael.org; Maribeth.Bushey@CityOfSanRafael.org;
rachel.kertz@cityofsanrafael.org**

**Cc: Rob.Epstein@CityOfSanRafael.org; Paul.Navazio@CityOfSanRafael.org;
community.development@cityofsanrafael.org; city.clerk@cityofsanrafael.org**

Dear San Rafael City Council,

The California Housing Defense Fund (CalHDF) submits this letter to remind the Council of its obligation to abide by all relevant state and federal laws, given the legal deficiencies with the City's proposed Park And Recreation Facilities Fee; and Park Dedication and In-Lieu Fees ("Parks Impact Fees"), which are calendared as agenda item 3b for the May 18, 2026 Council meeting. These laws include the Mitigation Fee Act (Gov. Code §§ 66000 et seq.; the MFA), fair housing law, the Housing Element Law, and the takings clause of the federal constitution (U.S. Const., 5th Amend.).

Of note, CalHDF is currently litigating the legality of similar impact fees in a court action against the City of Los Altos. You may read more about this lawsuit [here](#).

Background

The federal constitution prohibits governments – including local governments – from taking private property without paying for it. (U.S. Const., 5th Amend. ["nor shall private property be taken for public use, without just compensation"].) This prohibition applies to takings that occur in the land use permitting process. (*Nollan v. Cal. Coastal Com* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.) It also applies to fees collected from an applicant seeking land use entitlements. (*Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595.) Such fees must have an "essential nexus" to a legitimate governmental interest and "rough proportionality" to the proposed development's impact on that interest. (*Id.* at

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605-606.) Recently, the Supreme Court reaffirmed that impact fees imposed by local legislative bodies must satisfy the nexus and rough proportionality standards. (*Sheetz v. Cnty. of El Dorado* (2024) 144 S.Ct. 893.) If such impact fees do not satisfy those standards, a permit applicant may sue under the takings clause. (*Ibid.*)

State law, via the MFA, also imposes a nexus and rough proportionality requirement on impact fees. (Gov. Code, §§ 66001, subd. (a), 66005, subd. (a).) To ensure this requirement is satisfied, the MFA requires local jurisdictions, before they collect impact fees from permit applicants, to adopt a “nexus study” that provides evidence regarding nexus and rough proportionality. (Gov. Code, § 66016.5, subd. (a).)

MFA and Constitutional Problems with Nexus Study and Adopted Fees

The City’s nexus study for its Parks Impact Fees (Draft Parkland Dedication In-Lieu Fee and Parkland and Recreation Facility Development Impact Fee Nexus Study, August 18, 2025; “Parkland Nexus Study”) falls short of the nexus and rough proportionality standards on several points. The nexus study also violates the MFA. CalHDF urges the Council to correct these problems and adopt an updated study and fee schedule.

1. The City Must Account For Future Tax Revenue from New Development

The assumptions employed by the City’s consultant throughout the report share a common flaw. In addition to the issues identified below, the individual fee calculations do not factor in funding available for infrastructure due to increased general fund tax revenues resulting from new development.

The calculation for the final fee assumes that all the funding for new development’s share of park facilities will need to come from impact fee revenues. This amounts to the City charging an up-front tax on new residents in the amount to offset all of their need for park facilities going forward. This policy results in double-charging new residents, who will also be paying sales tax and property tax that will grow the City’s tax base, thus making more general fund money available for the identified projects, and making it easier for the City to fund required improvements. Multifamily development, in particular, often replaces underutilized property and comes with a property tax assessment substantially higher than existing uses. The residents of these new developments also patronize local stores, generating sales tax revenue. All impact fee calculations should account for the growth in the City’s tax base that would be generated by the projected multifamily development. Failing to account for this results in fee schedules charging costs to new development in amounts far exceeding their impacts on city parks and recreation facilities.

These developments, in effect, double pay, as they will pay for their full share of new infrastructure on an upfront basis through these impact fees, and then they will pay

property tax on an annual basis. In fact, new development will *more* than double pay, as due to the effects of Prop 13, new residential development pays significantly more in property taxes than existing residences.

However, the City is assuming the opposite. Page 6 of the agenda report: “Adopting fees below the maximum would result in a funding gap between the cost of park infrastructure needed to serve new development and the revenue generated by the fee program, **effectively requiring subsidy from existing residents** or resulting in reduced service levels.”

This is simply untrue. As discussed above, new development will pay dramatically more in taxes than the previous land use (and surrounding existing land uses). Even without any impact fees, existing residents would benefit dramatically from the significantly increased tax revenue provided by new development. It is the new developments that will be subsidizing existing residents, not the other way round. This miscalculation clearly violates the MFA and constitutional rough proportionality requirements by imposing a fee that far exceeds the impacts of new development on City park facilities.

2. The Parks Development Impact Fee Lacks the Specificity Required by Law

The City proposes to impose the Parks Impact Fees based on a replacement cost theory, wherein each new dwelling unit is assessed a fee based on the per capita replacement cost of the City’s entire parks and recreation physical plant.

In an attempt to fulfill the requirements of state law (Gov. Code, § 66001, subd. (a)(2)), the nexus study lists parks to be acquired with the funds provided. (Parkland Nexus Study at p. 24). The study then states that \$64,878,230 is needed to fund land acquisitions for future parks development. However, the nexus study fails to identify which parcels the City intends to acquire, as required by law. The study only identifies the Canal Boatyard by address. Other future parks are simply identified by the general neighborhood in which they might be located. (*Ibid.*).

The MFA requires that before adopting an impact fee, a local government must identify “the public facilities that will be financed with the fee.” (Gov. Code, § 66001, subd. (a)(2).) Instead of identifying specific parcels for acquisition, the nexus study just identifies neighborhoods where the City may elect to develop parks at some point in the future.

This turns the impact fee into a blank check for future land acquisition, untethered from any specific infrastructure need created by the developments paying the fee. The City has two options: (1) identify specific parcels for acquisition and revise the nexus study accordingly, or (2) eliminate the open space acquisition fee. However, it may not collect \$64,878,230 million based on undefined future acquisitions (or \$60,751,380, which is \$64,878,230 less the identified cost of the boatyard, the sole property specifically identified for acquisition).

As currently drafted, the fee is effectively a poll tax on new residents. This does not comport with the requirements of state law to identify the specific facilities to be financed with the impact fee. (See *Ibid.*)

3. The City is Making Newcomers Fund Its Parks Wish List

The proposed Parks Impact Fees fail the constitution's and MFA's nexus and rough proportionality requirements. They charge new residential development for a series of improvements that are either already needed and will primarily benefit existing residents, or that represent discretionary upgrades to park facilities. Furthermore, the nexus study assigns 97% of the cost of the parks capital plan to new development, without any explanation. (Parkland Nexus Study at p. 24).

The nexus study calls for extensive renovations and upgrades to existing facilities, without making any connection to the impact of new development. The nexus study plans for \$48.4 million of improvements to existing parks, of which it calls for \$45.3 million to be borne by new development via the Parks Impact Fees. (Parkland Nexus Study at p. 24). It is unclear, and never justified, why the City is calling for new development to shoulder almost the entire cost of these park improvements, which include items that were almost certainly going to be needed anyway (e.g. Falkirk Cultural Center Accessibility Improvements) or are discretionary projects. For instance, it is unclear why the City would charge impact fees to new residents of multifamily housing who will likely never be able to use the Starkweather Park Boat ramp, given that apartments typically don't have room for boat storage. (See *Ibid.*)

These are not new facilities required to serve increased demand from new development. They are renovations and upgrades to facilities that primarily serve existing residents, as well as discretionary projects unrelated to potential housing development.

However, AB 602 specifically requires that when a nexus study increases service levels beyond existing standards, it must "explain the methodology used to develop the increased level of service." (Gov. Code, § 66016.5, subd. (a)(3).) The study claims these expensive renovations and new facilities merely "maintain" existing service levels, when they plainly represent substantial service increases.

The City should fund these facilities through taxes. Indeed, it must. It cannot do so through "impact fees" that penalize new residential development: that is unconstitutional under the federal constitution and illegal under state law. CalHDF notes that the City will collect more money in taxes as a result of the development. *That* is the appropriate revenue stream to rely on for the City's general operations.

The City's capital plan calls for \$113,297,730 of new parks and improvements to existing facilities, and it states that new development's share of that cost is \$110,160,230, or 97% of the total. (Parkland Nexus Study at p. 24.) It is patently inequitable to force new residents to pay for 97% of a City's parks wish list. While the City's existing residents will continue to pay an ever-decreasing share of the City's property tax base as a result of Prop 13, they will be able to enjoy dramatically upgraded parks and recreational facilities, paid for by new residents who will then also pay dramatically higher property taxes than existing residents. The City is, without explanation, attributing the vast majority of capital improvements to existing parks to new residents, while also charging new residents for the entire cost of acquiring a developing new parkland that would serve them, all while failing to account at all for the fact that new residents generate significant additional tax base for the City's general fund. The proposed fees are vastly overcharging for the actual impacts of new residents on City park infrastructure.

4. Different Rates for Multi-family and Single-family Development

All the proposed impact fees charge different rates to multi-family versus single-family housing developments. Specifically, multifamily units will have to pay \$18.50 per square foot vs. \$9.98 per square foot for single-family development.

CalHDF appreciates the City's commitment to following the MFA's rule that nexus studies must calculate impact fees "proportionately to the square footage of proposed units." (Gov. Code, § 66016.5, subd. (a)(5).) But the City is following the rule in a twisted and impermissible fashion: it does *not* assess impact fees proportionately to square footage, but rather assesses impact fees based partly on square footage and partly on housing type. The MFA's language leaves no room for such a two-factor approach. Fees must be calculated based on square footage alone.

The MFA was amended by AB 602 in order to incentivize smaller unit sizes. The City's policy to penalize multifamily housing does the opposite. It incentivizes building large single-family homes, as they will have to pay much less per square foot than multi-family homes.

California has a housing crisis, and it needs more housing of all types, especially housing suitable for lower- and middle-income families. State law has changed to reflect this, and so must the City's policy.

The Proposed Fee Fails to Comply with Housing Element Law

Housing Element Law requires local governments to analyze governmental constraints on housing production. (Gov. Code, § 65583, subd. (a)(5).) The results of this analysis then inform the policies and programs in the housing element. (See *id.*; *id.* at subd. (c)(3); *Californians for*

Homeownership, Inc. v. City of Beverly Hills (2023) Los Angeles County Superior Court, Case No. 23STCP00143, at p. 6, [finding planned rezonings for housing element site inventory must consider constraints identified by the housing element’s constraints analysis] [opinion attached to this letter].)

The City’s Housing Element acknowledges that impact fees impose a constraint on housing development: “Development fees, including planning fees, building fees, and impact fees have been identified as a factor in the financial feasibility of housing development throughout the Bay Area.” (San Rafael Housing Element, May 15, 2023, pp. 5-44)

Table 5.11 of the Housing Element lists the City’s current parks impact fees. While the Housing Element states that the fee will be updated and expanded to cover all types of housing, not just subdivisions, it does not mention the potential for the fee to be increased by a factor of 10. (*Id.* at 5-47).

The current fee is \$1,967 per dwelling. (*Ibid.*) In contrast, the proposed fee would be \$18.50 per square foot in a multi-family development. This means that the typical fee per multifamily unit amounts to approximately \$18,500 per unit,¹ roughly 10 times the current fee. At no point does the Housing Element analyze what a 10x increase to the parks impact fee would do to housing development.

Because this new parks impact fee was not analyzed in the City’s housing element, the City cannot rely on its Housing Element programs, including its rezoning program, to produce as many units as it is required to unless the City analyzes the effects of the new constraint and offsets its impact on housing production.

The Proposed Impact Fee Violates Fair Housing Law

The City proposes to charge multifamily units approximately double what it charges single-family homes: \$18.50 per square foot vs. \$9.98 per square foot. (Parks Fees Ordinance, Exhibit B.) This wild inconsistency violates the City’s duty to affirmatively further fair housing.

Local governments have an obligation under California to refrain from any actions that would discriminate against protected classes, or against the “intended occupancy of any residential development by persons or families of very low, low, moderate, or middle income.” (Gov. Code, § 65008, subs. (a)(3), (b)(1)(C), and (b)(2)(B).) In addition, both local governments and California state agencies are tasked with affirmatively further fair housing (AFFH), requiring “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that

¹1,000 sf (gross) per two-bedroom apartment, with 200 sf devoted to circulation space

restrict access to opportunity based on protected characteristics.” (Gov. Code, § 8899.50, subd. (a)(1).) The obligation to AFFH works in conjunction with, and independently of, local governments’ housing element obligations. Local governments are required to include a plan to AFFH as part of a compliant housing element, and are required to carry out this plan and other policies consistent with their obligation to affirmatively further fair housing. (Id., § 65583, subd. (a)(3), (b)(1).)

Demanding more money from multi-family developments imposes an unfair burden on housing for lower- and moderate-income households, while wealthier households in single-family homes enjoy a discount on their required contributions to the city treasury. Given racial and ethnic gaps in wealth and income, the City runs the risk of creating a disparate impact on protected classes, specifically race, ethnicity, and familial status.

The structure of the fees adopted by the City violates the City’s general duty to affirmatively further fair housing, as well as its duty to affirmatively further fair housing in connection with the implementation of its housing element. (Gov. Code §§ 8899.50, 65583(c)(5).) The City should be aware that even if the fees calculated in the nexus study were correct, those fees would represent the maximum potential fee. The City is obligated to weigh other factors in setting the fee amount, especially its mandatory duty to further fair housing under state law.



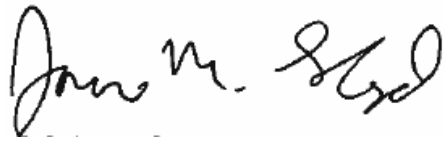
As you are well aware, California remains in the throes of a statewide crisis-level housing shortage. Impact fees directly increase the cost of new housing, leading to an overall insufficient supply. Multifamily housing in particular is vital for fulfilling housing need, as it is lower-cost on a per-unit basis and generally more accessible to low- and moderate-income households. If we do not allow sufficient housing development, more and more Californians will become and remain homeless. CalHDF urges the City to reconsider its impact fee schedule and follow state and federal constitutional law.

CalHDF is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at www.calhdf.org.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Dylan Casey', with a long horizontal line extending to the right.

Dylan Casey
CalHDF Executive Director

A handwritten signature in black ink, appearing to read "James M. Lloyd". The signature is fluid and cursive, with the first name "James" being the most prominent part.

James M. Lloyd
CalHDF Director of Planning and Investigations

**Superior Court of California
County of Los Angeles**

SEP 12 2023

David W. Slayton, Executive Officer/Clerk of Court

By: M. Mort, Deputy

CALIFORNIANS FOR
HOMEOWNERSHIP, INC.,

Petitioner,

vs.

CITY OF BEVERLY HILLS,

Respondent.

Case No. 23STCP00143

**RULING ON VERIFIED FIRST
AMENDED PETITION FOR
WRIT OF MANDATE**

Dept. 82 (Hon. Curtis A. Kin)

Petitioner Californians for Homeownership, Inc. petitions for a writ of mandate directing respondent City of Beverly Hills to adopt a revised housing element pursuant to Government Code § 65754.

I. Factual Background

The State of California requires each city to have a “comprehensive, long-term general plan for the physical development” of the city. (Gov. Code § 65300.)¹ Each general plan must have a housing element. (§ 65302(c).) The housing element consists of ‘standards and plans for housing sites in the municipality that ‘shall endeavor to make adequate provision for the housing needs of all economic segments of the community.’ [Citations.]” (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 444; *see also* § 65580 [legislative findings concerning housing element law].)

“A municipality must review its housing element for the appropriateness of its housing goals, objectives, and policies and must revise the housing element in accordance with a statutory schedule.” (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 222, citing § 65588(a), (b).) “The interval between the due dates for

¹ All statutory references are to the Government Code, unless otherwise specified.

the revised housing element is referred to as a planning period or cycle, which usually is eight years.” (*Martinez*, 90 Cal.App.5th at 222, citing § 65588(e)(3), (f)(1).)

“A revised housing element’s assessment of needs must quantify the locality’s existing and projected housing needs for all income levels, which includes the locality’s proportionate share of regional housing needs for each income level.” (*Martinez*, 90 Cal.App.5th at 223, citing § 65583(a)(1).) “The projected regional housing needs for a planning period are determined by the HCD [Department of Housing and Community Development] in consultation with regional ‘councils of government.’” (*Martinez*, 90 Cal.App.5th at 223, citing §§ 65584(a) & (b), 65584.01, 65588(e)(3).) “Based on the HCD’s regional housing needs determination, each regional council of governments adopts a ‘final regional housing need plan that allocates a share of the regional housing need’ among the cities and counties within its region.” (*Martinez*, 90 Cal.App.5th at 223, citing § 65584(b).)

For the 2021-2029 planning period, the City Council of respondent City of Beverly Hills (“City”) adopted a housing element on October 12, 2021 and submitted it for review to HCD. (JR 776.) On January 14, 2022, HCD determined that the housing element did not fully comply with the housing element law and provided necessary revisions. (JR 1309-16.)

On September 28, 2022, the City submitted a revised housing element to HCD. (JR 776.) On November 28, 2022, HCD determined that the revised housing element did not fully comply with the housing element law and provided necessary revisions. (JR 1318-24.)

On February 21, 2023, after having revised the September 2022 housing element, the City adopted the revision. (JR 5.) On February 21, 2023, petitioner Californians for Homeownership, Inc., who monitors local compliance with the housing element law, sent a letter to the City asserting that the revised housing element was inadequate for reasons identified by HCD and petitioner. (JR 1584-85.) On May 12, 2023, HCD determined that the housing element does not substantially comply with housing element law. (RJN Ex. B.)

II. Procedural History

On January 18, 2023, petitioner filed a verified petition for writ of mandate. On May 24, 2023, pursuant to stipulation, petitioner filed a verified first amended petitioner for writ of mandate.

On June 22, 2023, during the trial setting conference, the Court set the hearing on the instant petition for September 12, 2023.

On July 14, 2023, petitioner filed an opening brief. On August 15, 2023, respondent filed an opposition. On August 31, 2023, petitioner filed a reply.

III. Request for Judicial Notice

Petitioner's requests for judicial notice are ruled on as follows:

- Exhibit A (September 15, 2017 Assembly Floor Analysis of AB 1397 (2017-2018 Session)) – GRANTED (Evid. Code § 452(c); *Wood v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 742, 751, fn. 4)
- Exhibit B (May 12, 2023 Letter from HCD to City) – GRANTED (Evid. Code § 452(c))
- Exhibit C (Staff Report for June 22, 2023 Meeting of Beverly Hills Planning Commission) – DENIED
- Exhibit D (Minutes of June 22, 2023 Meeting of Beverly Hills Planning Commission) – DENIED
- Exhibit E (Resolution No. 1907 of Beverly Hills Planning Commission) – DENIED
- Exhibit F (2022 Form 10-K for Creative Media & Community Trust Corporation (Excerpts)) – DENIED
- Exhibit G (June 10, 2020 Memorandum of the California Department of Housing and Community Development, Entitled “Housing Element Site Inventory Guidebook”) – GRANTED (Evid. Code § 452(c))
- Exhibit H (City of Gardena’s 2021-2029 Housing Element, Table C-1) – GRANTED (Evid. Code § 452(c))

With respect to denying the request for judicial notice of Exhibits C, D, E, and F, the Court notes these exhibits are extra-record evidence petitioner presents to demonstrate that certain sites listed in the sites inventory of the housing element are improperly included. For the reason stated in section V.C below, this is improper. The exhibits are accordingly irrelevant. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [“Although a court may judicially notice a variety of matters (Evid. Code, § 450 *et seq.*), only relevant material may be noticed”].)

IV. Standard of Review

CCP § 1085(a) provides: “A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to

which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.”

“Any action brought by any interested party to review the conformity with the provisions of this article of any housing element or portion thereof or revision thereto shall be brought pursuant to Section 1085 of the Code of Civil Procedure; the court’s review of compliance with the provisions of this article shall extend to whether the housing element or portion thereof or revision thereto substantially complies with the requirements of this article.” (§ 65587(b); *see also* § 65751.) Substantial compliance means “actual compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form.” (*Martinez*, 90 Cal.App.5th at 237, internal citations omitted.)

“[A] city’s adoption of a housing element is a legislative enactment, something which is generally entitled to some deference.” (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1191.) “If the municipality has substantially complied with statutory requirements, we will not interfere with its legislative action, unless that action was arbitrary, capricious, or entirely lacking in evidentiary support.” (*Ibid.*) The challenging party has the burden to demonstrate that the housing element is inadequate. (*Ibid.*)

V. Analysis

A. This Dispute is Not Moot

As a preliminary matter, respondent asserts that the City anticipates adopting a revised housing element in November of this year to address concerns about the current housing element. (Wiener Decl. ¶ 2.) However, there is no guarantee that a revision will be completed by November or that the City will adopt a revision at that time, or at any time thereafter. The Court can only rule based on the current housing element. The instant petition is entitled to preference. (§ 65752.) Further, if the Court were to enter judgment in favor of petitioner, the housing element law provides deadlines for the City to address the deficiencies in the housing element and to submit the revision to HCD. (§ 65754(a).) If respondent were to appeal, the appeal would be given preference also. (§ 65752.) Accordingly, there is no reason to delay ruling on the merits of the operative first amended petition.

B. Whether Sites Inventory Meets Statutory Requirements

1. Realistic Development Capacity

The inventory in a housing element must “specify for each site the number of units that can realistically be accommodated on that site and whether the site is adequate to accommodate lower income housing, moderate-income housing, or above moderate-income housing.” (§ 65583.2(c).) For a city that does not require a

minimum residential density,² the city “shall demonstrate how the number of units determined for [each] site...will be accommodated.” (§ 65583.2(c)(1).) As part of the calculation, “ [t]he number of units calculated...shall be adjusted as necessary, based on the land use controls and site improvements requirement identified in paragraph (5) of subdivision (a) of Section 65583, the realistic development capacity for the site, typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction, and on the current or planned availability and accessibility of sufficient water, sewer, and dry utilities.” (§ 65583.2(c)(2).)

An “assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs” shall include an “analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels...including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, local processing and permit procedures, and any locally adopted ordinances that directly impact the cost and supply of residential development.” (§ 65583(a)(5).)

To demonstrate that its inventory is adequate, respondent relies on a Mixed Use Overlay Zone (“Overlay Zone”) adopted by ordinance on November 17, 2020, where the maximum residential density within the zone was increased from 0 in commercial areas to 79.2 units/acre. (JR 200, 209.) The Overlay Zone spans the length of the City from east to west and partially north to south, along its largest commercial corridors, including Wilshire Boulevard, Robertson Boulevard, Olympic Boulevard, South Doheny Drive, and South Beverly Drive. (JR 125; *see also* JR 213 [map of Overlay Zone].) In the housing element, the City describes the purported benefits of the Overlay Zone: “This wide-scale rezoning allows for the creation or conversion of non-residential space into residential units, and therefore will create all net new housing, since it does not involve the displacement of any existing occupied housing/residents.” (JR 125.)

Respondent argues that the maximum residential density exceeds the minimum 30 units per acre that is statutorily deemed appropriate to accommodate housing for lower income individuals. (§ 65583.2(c)(3)(B)(iv).) Respondent also argues that existing commercial buildings in the Overlay Zone may obtain a permit to convert to a mixed-use building and obtain relief from having to comply with standards concerning parking requirements, loading facilities, outdoor living space, commercial-residential transitional setbacks, or height limits if compliance is physically infeasible. (JR 1636; *see also* Chen Decl. Ex. G [Beverly Hills Municipal Code (“BMMC”) § 10-3-1888].) The vacancy rates for commercial buildings also purportedly create an incentive for commercial building owners to convert their buildings to mixed-use projects. (JR 201.)

² It is undisputed Beverly Hills does not mandate a minimum residential density.

For commercial properties listed in the sites inventory of the housing element that were designated for conversion or indicated as having conversion potential (JR 229-34), to calculate the total number of units on the site, the City multiplied the total parcel size by the maximum allowable residential density.³ However, the total parcel size listed in the sites inventory refers to land area, not the square footage of the existing building that can accommodate residential units. Contrary to respondent's contention, the sites inventory does not account for floor area capacity; the sites inventory lists the height limit of the building, not the number of stories to be converted to residential use. (See, e.g., JR 229 [column name is "Height Limit (stories)," 233 [8500 Wilshire Blvd. described as "8 story building – conversion," but height limit is 3 stories].) As a result, for buildings to be converted to mixed use, the housing element does not demonstrate how the number of units indicated in the sites inventory will be accommodated, as required by section 65583.2(c)(1).

Moreover, as petitioner points out in the reply, most of the sites in the City's sites inventory are not designated as conversions or potential conversions. (JR 229-34.) For sites not indicated as conversions, any construction of residential units is subject to land use and building controls. For example, multi-family developments are subject to height limits from three to five stories. (JR 153-54.) Any building in the Overlay Zone must include commercial uses on the ground floor, and residential uses on the first floor within the first 40 feet from the street are prohibited. (BMMC §§ 10-3-1877(C), 10-3-1879.) Moreover, each multi-family development must have at least 200 square feet for each dwelling unit, excluding front yards, balconies, and pedestrian accessways. (BMMC §§ 10-3-1886, 10-3-2803.)

The sites inventory contains no adjustment based on land use controls for new construction, as required by section 65583.2(c)(2). Rather, like the sites designated as conversions, the number of units for each site is calculated based on the land area multiplied by the maximum residential density. Moreover, the housing element contains no meaningful consideration and analysis of the governmental constraints on the development of housing, as required by § 65583(a)(5). Rather, the City relies on prior approved and proposed developments in arguing in conclusory fashion that "the current standards are not inhibiting development of housing." (JR 158-159, 203-04.) Accordingly, the housing element, including the sites inventory, fails to account for the realistic development capacity for the sites listed in the inventory.

With respect to respondent's contention that the maximum residential density exceeds the density set forth in section 65583.2(c)(3)(B)(iv), this only means that the

³ For example, for 8730 Wilshire Blvd., the parcel size is 11,863 square feet. (JR 233.) There are 1/43,560 acres in one square foot. (See <https://www.britannica.com/science/acre-unit-of-measurement> [43,560 square feet in 1 acre].) 11,863 square feet multiplied by 1/43,560 acre per square foot is 0.27 acres. 0.27 acres multiplied by 79.2 units per acre is approximately 21 units.

City does not have to provide an analysis demonstrating how its adopted density accommodates its share of the regional housing need for lower income households. (§ 65583.2(c)(3)(A-B).) However, the City still must adjust the number of units for each site based on the realistic development capacity of the site under section 65583.2(c)(1) and (c)(2) and provide an “analysis of potential and actual governmental constraints upon the...development of housing for all income levels” under section 65583(a)(5).

Petitioner also argues that the City designated the majority of the sites on the sites inventory as 100% low-income or 100% moderate-income housing without explaining the basis for such designation. (OB at 10:6-7.) Petitioner further argues that the City did not adjust the unit counts based on “typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction,” as required by section 65583.2(c)(2). (OB 10:7-8.)

Petitioner, however, does not reference any statute that requires an explanation for the basis for the low-income or moderate-income housing designation. The housing element law only requires that the City specify “the number of units that can realistically be accommodated on that site and whether the site is adequate to accommodate lower income housing, moderate-income housing, or above moderate-income housing” and demonstrate “how the number of units determined for that site...will be accommodated.” (§ 65583.2(c), (c)(1).) The sites inventory indicates the total number of units for each site. (JR 229 [“Total Units” column].) By indicating the number of units that are designated as low-income or moderate-income housing, the City also indicates “whether the site is adequate to accommodate lower income housing [or] moderate-income housing.” (JR 229 [“Lower” and “Mod” columns].) While the City did not explain how the total number of units will be accommodated for the reasons stated above, the designation of housing as low-income or moderate-income is not deficient.

Nevertheless, it is not apparent from the sites inventory whether the City adjusted the numbers for low-income and moderate-income housing based on “typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction.” (§ 65583.2(c)(2).) By multiplying the land area by the maximum residential density of 79.2 units per acre and designating all housing as low- or moderate-income housing, the City assumes that all units built on the site will be low-income or moderate-income housing. The City does not account for the possibility that only a certain percentage of the housing on the site will be designated for residents with low- or moderate-income. A revised housing element would need to contain an adjustment based on typical densities at similar affordability levels.

In sum, with respect to realistic development capacity, the housing element is deficient for the following reasons: (1) for conversions, the sites inventory calculates the total number of units based on a product of land area and the maximum residential density without accounting for the floor area of the building; (2) the sites

inventory does not contain any adjustments based on land use controls for new construction; (3) the housing element contains no analysis of the governmental constraints on the development of housing; and (4) the sites inventory does not contain any adjustments based on typical densities of existing or approved residential developments at similar affordability levels in the City.

2. Nonvacant Sites

For nonvacant sites, the housing element law imposes the following additional requirement:

[T]he city or county shall specify the additional development potential for each site within the planning period and shall provide an explanation of the methodology used to determine the development potential. The methodology shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, the city's or county's past experience with converting existing uses to higher density residential development, the current market demand for the existing use, an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites.

(§ 65583.2(g)(1).)

Petitioner argues that the City does not explain how its methodology relates to the sites it has included or excluded in the sites inventory. For underutilized nonvacant sites, respondent explains that it selected sites that were more likely to be redeveloped or converted based on evidence of a lack of investment in the property, such as a lack of maintenance or lack of recent upgrades and improvements; parcels with underutilized improvements; and parcels with existing commercial buildings that are higher than 3 stories but whose floor plan is conducive to residential conversion. (JR 202-03, 210-11.) Respondent also explains that existing uses do not constitute an impediment to additional residential development because the creation of the Overlay Zone creates opportunities for residential development; conversion from non-residential to residential use costs less than new construction; and high residential property values in the City create financial incentives for residential development. (JR 209-10.) However, respondent discusses its methodology for determining development potential generally, without engaging in any site-specific analysis.

Respondent contends that it need not engage in an analysis of the methodology of the development potential for each site. The Court disagrees. Section

65583.2(g)(1) states that, for nonvacant sites, “the city or county shall specify the additional development potential for each site within the planning period and shall provide an explanation of the methodology used to determine the development potential.” Reading the subdivision as a whole, the City is required to provide an explanation of the methodology for each site in the sites inventory. Among the factors that the methodology must consider are “the current market demand for the existing use” and “an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development.” (§ 65583.2(g)(1).) These factors necessarily relate to specific sites and cannot be discussed generally. Because the Legislature included these factors, the Legislature surely intended that the City provide “an explanation of the methodology used to determine the development potential” for each site.

Without a site-specific analysis, it is unclear how the methodology was applied. For example, as petitioner points out in the opening brief, the City purports to have excluded commercial buildings that contained medical uses and car dealerships from the sites inventory. (JR 210.) However, the sites inventory includes medical buildings and car dealerships. (*See, e.g.*, JR 229-30 [153 S. Doheny Dr., 239 S. La Cienega Blvd., 8833 W. Olympic Blvd., 8845 W. Olympic Blvd., 9134 W. Olympic Blvd.].) The City does not explain how the existing use does not serve as an impediment to residential development.

For the foregoing reasons, with respect to section 65583.2(g)(1), the housing element is deficient because the City did not provide an explanation of the methodology used to determine the development potential for each site, including a discussion of the factors probative of likelihood of redevelopment set forth in section 65583.2(g)(1).

Further, the sites inventory shows that the City is meeting all of its share of the need for lower-income housing through nonvacant sites. Accordingly, section 65583.2(g)(2), quoted below, is implicated:

In addition to the analysis required in paragraph (1), when a city or county is relying on nonvacant sites described in paragraph (3) of subdivision (b) to accommodate 50 percent or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use identified pursuant to paragraph (3) of subdivision (b) does not constitute an impediment to additional residential development during the period covered by the housing element. An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period.

(§ 65583.2(g)(2).)

For nonvacant sites, the “Field Notes/Existing Conditions & Analysis for Keeping/Removing” column in the sites inventory only indicates the existing use of the site and whether the site is designated for conversion or has conversion potential. (JR 229-34.) The City does not engage in any discussion of occupancy rates, lease terms, viability of the business operating at the sites. Nor does the City present any other discussion demonstrating that the existing use for each site “does not constitute an impediment to additional residential development during the period covered by the housing element.” (§ 65583.2(g)(2).) Without any evidence concerning the existing use of each site, the existing use is presumed to impede additional residential development. (*Ibid.*)

Respondent maintains that Culver City and Gardena obtained HCD approval based on a chart similar to its sites inventory. However, unlike Beverly Hills, Gardena’s sites inventory sets forth the existing use of each site and why the existing use is likely to be discontinued during the planning period. (Reply RJN Ex. B; cf. Chen Decl. Ex. B at 71 [listing criteria used in selection of sites].) With respect to Culver City, the sites inventory does not set forth the reason why the existing use is likely to be discontinued. (Chen Decl. Ex. A at Appendix B.) However, elsewhere in the housing element, Culver City discusses sites that present opportunities for development based on positive responses from property owners and developers. (Chen Decl. Ex. A at B-9 to B-10.) Unlike Beverly Hills, Culver City discussed how the existing use at certain sites would not impede residential development. Beverly Hills did not engage in any site-specific analysis concerning how the existing use would not impede additional residential development.

Respondent contends that the Court of Appeal in *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193 determined that no site-specific analysis concerning the methodology used to determine development potential and additional development factors is required. This is not quite accurate. In *Martinez*, the Court of Appeal found that section 65583.2(g)(1) “does not mandate the City ‘specify the additional development potential for each [nonvacant] site within the planning period and ... provide an explanation of the methodology used to determine the development potential’ *in the housing element itself.*” (*Martinez*, 90 Cal.App.5th at 248-49, emphasis added.) While specification of the additional development potential for each site does not have to be part of the housing element, the City still must demonstrate the additional development potential for each site. In *Martinez*, for example, the City of Clovis provided evidence outside of the housing element to demonstrate the development potential of a nonvacant site. (*Id.* at 249-51.)

Here, there is no analysis of the additional development potential for each site listed in the sites inventory in the housing element or elsewhere. Further, the housing element does not contain findings based on substantial evidence that the existing uses of nonvacant sites are likely to be discontinued, as required by section 65583.2(g)(2).

In sum, with respect to nonvacant sites, the housing element is deficient for the following reasons: (1) the City did not provide an explanation of the methodology used to determine the development potential for each site in the sites inventory, including a discussion of the factors probative of likelihood of redevelopment set forth in section 65583.2(g)(1); and (2) the City fails to demonstrate with substantial evidence that the existing use for each site in the sites inventory does not constitute an impediment to additional residential development during the period covered by the housing element.

C. Specific Sites

Petitioner also contends that certain sites were improperly included in the sites inventory. (OB at 15:6-17:1.) Petitioner maintains that the City did not make the findings based on substantial evidence that are required to rebut the presumption under section 65583.2(g)(2) that the existing use will impede additional residential development. (Reply at 4:13-14.)

However, in contending that additional residential development is not possible on certain sites, petitioner relies on extra-record evidence. For example, for 55 North La Cienega, the sites inventory indicates that the property will have 70 low-income units. (JR 229.) However, petitioner presents a Planning Commission Report and meeting minutes to assert that the City's Planning Commission approved development on the site with only 11 units of very low-income housing. (Gelfand Decl. Exs. C at 1, D at 3-4.)

"[W]here the scope of review of factual findings is substantial evidence, review limited to the administrative record is appropriate because extra-record evidence is irrelevant to whether the agency's decision is supported by substantial evidence." (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 208.) Petitioner cannot challenge the inclusion of sites in the inventory based on extra-record evidence. Ironically, petitioner would have the Court consider the propriety of certain sites based on extra-record evidence, but then bar respondent from presenting extra-record evidence to rebut petitioner's argument. (Reply at 4:18-5:13.)

With respect to sites which petitioner contends are unlikely to disappear based on their existing use (OB at 16:21-17:2; JR 1557-58), the Court already finds that respondent did not make findings based on substantial evidence that the existing use for each nonvacant site in the sites inventory is likely to be discontinued. The City must make such findings in revising the housing element.

VI. Conclusion

The petition is GRANTED. Pursuant to Local Rule 3.231(n), petitioner shall prepare, serve, and ultimately file a proposed judgment and proposed writ of mandate.

Date: September 12, 2023


HON. CURTIS A. KIN