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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT, STANLEY MOSK COURTHOUSE

CHILL THE BUILD, a California limited liability corporation,

Petitioner/Plaintiff,

v.

CITY OF MANHATTAN BEACH, a California municipal corporation, CITY COUNCIL OF THE CITY OF MANHATTAN BEACH, HIGHROSE EL PORTO LLC, a California limited liability company, Real Party in Interest, and DOES ONE through ONE HUNDRED inclusive,

Respondents/Defendants.

Case No. 23STCP00474

FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR:

(1) Violation of the State Density Bonus Law (Cal. Govt. Code, § 65915)

(2) Violation of the Housing Accountability Act (Cal. Govt. Code, § 65589.5)]

(3) Violation of CEQA (Cal. Pub. Res. Code §§ 21000 et seq.); and

(4) Declaratory Relief

JURY TRIAL DEMANDED

Petitioner/Plaintiff, Chill the Build, a California limited liability corporation, hereby alleges as follows:

I. INTRODUCTION

1. This case arises from the approval by a municipality (the City of Manhattan Beach, through its City Council) ("City" or "City Council," respectively) of a residential housing project purported to promote the access of affordable housing to very low or low-income residents that, in the City of Manhattan Beach, as a whole, and in the proposed neighborhood in question, El Porto, would necessarily reflect a higher-than-average population of persons from historically disadvantaged communities and backgrounds.[1]

2. The proposed project was designed, and then presented to the City, so as to pose as eligible to facilitate the City, then in violation of state housing laws, to claim compliance (or substantial progress to achieving same), such non-compliance having been as confirmed as of February 15, 2022 and memorialized in a letter from the State to the City dated June 3, 2002.

3. Chill The Build is a bi-partisan grassroots organization consisting of, and supported by, over 3,000 residents of the City (roughly ten (10) percent of the electorate) and residents of the three northerly and southerly adjoining cities, El Segundo and Hermosa Beach and Redondo Beach, that includes real estate investors, real estate professionals, real estate owners (and taxpayers), lawyers, doctors, accountants, other professionals, firefighters, paramedics, teachers, small business owners, and others from all walks of life who live near the

[1] Table 9 of the City's Housing Element (page 2-15), adopted by the City Council on January 16, 2013, and amended July 2, 2013 to implement the at that time its newly-adopted Housing Element, was in effect when the redevelopment plans for this project were conceived; that document stated that the population within the El Porto neighborhood at that time to be 91.1% white. The City overall was stated to have a population that was 89% white (Table 10, page 2-16). El Porto and the City overall, ranked second of in terms of having the highest percentage of whites among its residents within a grouping in each table of roughly one-half dozen comparable jurisdictions. (Table 10 states the population of those identifying as "white' in Los Angeles County was 48.7%.) Table II-7 of the City's subsequent (2013-2021) Housing Element (page II-15), was adopted by City Council on February 4, 2014 through Resolution No. 14-0005 and noted that, at that time, the median income in Los Angeles County was $55,476, while the median income in Manhattan Beach at that time was $132,752 (239% of the Los Angeles County median).

project or work near the project, citizens who routinely utilize nearby coastal resources, and other environmental amenities in the vicinity, environmental justice advocates and other community members, some of whom have lived in Manhattan for half a decade or more.

4. Chill The Build is pro-development consistent with the City's Mission Statement which emphasizes maintaining a quality beach community character that accommodates reasonable growth and development consistent with local zoning and occupancy, which is almost exclusively higher density residential in nature. Larger developments nearby, such as industrial concerns, commercial concerns, retail (such as the Manhattan Village Mall) are consistent with the city's zoning and Chill The Build does not oppose those developments based on usage or character or location.

5. However, Chill The Build is outraged and astonished that its elected officials would sanction any development that has the potential, as defined pursuant to statutorily recognized and applicable enactments detailed below, to harm the environment and jeopardize public health and safety without required prior environmental assessment of whether these potential risks are in fact present and, if so, whether they can be feasibly mitigated to permit the project to be approved in a responsible manner.

6. These threats, all of which are addressed, albeit grossly inadequately, in the City's records and in documents submitted to the City, include, among others the following:

a. Indoor migration of carcinogens and reproductive toxins emanating from the shallowest aquifer (or water-bearing zone) beneath the project location (as documented on the front page of the Los Angeles Times in the late 1980's and as further documented by samples obtained from the subsurface or subterranean improvements confirming the presence of marker chemicals of this potential risk in the very near vicinity);[2]

b. Methane explosion risks originating from natural and man-made sources (similar examples having been documented in the vicinity);

c. Unexploded ordnance known to be present (but not known where, precisely) in the vicinity of the project resulting from the operation of an anti-aircraft artillery battalion that was constructed and operated after Pearl

[2] It would be quite atypical if the highest concentrations of such chemicals were not co-existent with the lowest units which, on information and belief, the low and/or very low units would be located.

> Harbor (which, to clarify, remains a tangible risk as the proposed project would be, on information and belief, the first ever construction since World War II excavating to these planned depths (approximately 30+ feet, exclusive of construction over-excavation).

7. Although all of this, and more, was in the City's possession, the City somehow managed to reach the conclusion that they were undeserving of further inquiry.

8. The determination whether the project was exempt because it was "ministerial" or, conversely, whether it was at least in part discretionary, along with the question whether the specific findings mandated by Cal. Govt. Code §§ 65589.5 and 65915 could be made, and, if so, the extent to which, if at all, an alternative project could be approved, or the project, conditioned upon feasible mitigation, among other options, could be approved, was the City's – and the City's alone – mandatory duty to make. As noted below,[3] for nearly two years it did not make any determination (or, to the extent it did in approving the project in March, 2022 and then in denying the project in October, 2022, no cogent rationale was proffered); then, just last month, it announced it had reversed itself 180 degrees again based on a completely unsupportable explanation not properly publicized before the public hearing and which, as explained below, constituted a clear abuse of discretion.

9. Had the City made the necessary inquiries and determined no such risk was presented, or that any verified risks triggering the applicable health and safety and environment conditions precedent in the statutes relied upon by the City in approving the project could feasibly be mitigated, or alternatives selected, Chill The Build would have accepted the majority vote of the elected officials in compliance with these state laws and the City's local land use ordinances.

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[3] After almost two years of Chill The Build members and others requesting, repeatedly, for some legal grounding that might possibly support the City's assertion the project was "ministerial," a more fulsome explanation was not presented until the public hearing during which the project was approved. That hearing was conducted January 19, 2023 at 6 PM and, according to the hearing transcript published on the City's website, this explanation was "released" by City staff at 5:15. The explanation, apparently contained in a staff report purportedly "made available for public review," and then read into the record by Acting Director Mirzakhanian, is nothing but an additional round of "smoke and mirrors," as discussed in Paragraphs 33 - 35. Thereafter, on January 23, 2023, the City filed a Notice of Exemption citing Cal. Pub. Res. Code § 21080(b)(1) and 14 Cal. Code Regs § 15268.

10. Chill The Build does not seek a pre-ordained result; it seeks its elected officials to protect their city and its residents.

11. Regrettably, this was not done, unfortunately, compelling Chill The Build now to request this Court's intervention.

12. Chill The Build should not have been forced to commence this proceeding in order to request that this Court prevent the City from either: (1) placing in harm's way those on whose behalf the affordable housing laws are intended to benefit most directly (thus essentially exacerbating historical exploitation to profit Highrose); or (2) turning a blind eye to whether such is the case – and in so doing flagrantly violating those same laws which mandate – as a condition precedent to any approval – that the City to determine whether such is so and, if so, undertake the prescribed appropriate action.

II. THE PARTIES

13. Petitioner/Plaintiff Chill the Build hereby incorporates the preceding allegations as if fully set forth hereat.

14. Petitioner/Plaintiff, Chill the Build, is a limited liability corporation existing under the laws of the State of California.

15. Respondent/Defendant, City of Manhattan Beach, is a municipal corporation located and operating within the County of Los Angeles.

16. Respondent/Defendant, the City Council of Manhattan Beach, is the City of Manhattan Beach's legislative body.

17. Highrose El Porto, LLC, the real party in interest, is a California limited liability corporation existing under the laws of the State of California.

18. Petitioner/Plaintiff does not know the true names and capacities of the respondents/defendants sued as Does 1 through 100, inclusive, and therefore sues them by fictitious names. Petitioner/Plaintiff alleges that respondents/defendants Does 1 through 100, inclusive, are jointly, severally, and/or concurrently liable and responsible for the causes of action asserted herein, acting on their own or as the agents of the above-named respondents/defendants.

Petitioner/Plaintiff will amend this Petition/Complaint to insert the true names of the fictitiously named respondents/defendants when they are known.

19. Petitioner/Plaintiff believes and alleges that each respondent/defendant was the agent and/or employee of every other respondent/defendant, and at all relevant times was acting within the course and scope of said agency and/or employment.

III. JURISDICTION AND VENUE

20. Petitioner/Plaintiff, Chill the Build hereby incorporates the preceding allegations as if fully set forth hereat.

21. This action is properly filed in this Court inasmuch as the parties are domiciled in Los Angeles County and the real property that is the subject of this action is located in Los Angeles County.

22. Prior to filing this Action, Petitioner exhausted its administrative remedies to the extent such exhaustion was required by law or was not otherwise excused.

23. This Action is timely under all relevant statute of limitations.

24. Petitioner/Plaintiff has standing to commence this action, as set forth above.

25. Venue is proper in this Court because the acts giving rise to this Action occurred, and the subject Property is located, in Los Angeles County. In addition, defendant/respondent is domiciled in Los Angeles County.

IV. FACTUAL BACKGROUND

26. Petitioner/Plaintiff Chill the Build hereby incorporates the preceding allegations as if fully set forth hereat.

27. The proposed project, termed the Highrose El Porto, LLC, "Verandas" Project was the subject of a development entitlement application filed with the City on March 4, 2021, to be sited on two adjacent parcels bearing the street addresses, respectively, of 401 Rosecrans Avenue and 3770 Highland Avenue, in the El Porto neighborhood within the jurisdictional limits of the City of Manhattan Beach (that neighborhood having been annexed by the City in 1980).

28. The application proposed the demolition of the existing structures (a banquet facility and a multi-use commercial building) and the subsequent construction of a 96,217 square foot, 79-unit, four story (exclusive of an additional two subterranean levels for parking), multi-family residential structure.

29. As noted above, of the 79 proposed units, six (6) were slated to be low-income or very-low income affordable housing which the project proponent contended entitled it to preferential treatment in the form of building design waivers and concessions and – importantly, a potential award of an exemption from CEQA -- pursuant to the Housing Accountability Act, Cal. Govt Code § 65598.5 and the State Density Bonus Law, Cal. Govt. Code § 65915.

30. The City has flip-flopped so many times on the question of the purported applicability of the CEQA exemptions in these two statutory provisions – those questions forming the core of this action – it is hard to keep tally.

31. In brief, however, the foregoing provides a summary chronology:

a. In 2014, the environmental consulting firm (Citadel) later engaged by the current project proponent (Highrose) conducted an ASTM 1527 Phase I Environmental Site Assessment for another party.

b. A limited Phase II was conducted in 2017.

c. In 2020, Citadel prepared another ASTM 1527 Phase I Environmental Site Assessment, this time for Highrose.

d. Highrose submitted its application to develop the site to the City on March 4, 2021.

e. The application was approved by the Community Development Director on March 29, 2022. (This approval would be permissible were the review in fact ministerial inasmuch as, as a rule, that is potential basis of a CEQA exemption, and notwithstanding that the City asserted as much, the issues presented very clearly were not remotely issues that ever could have justified a ministerial approval, as discussed below.)

f. Four independent appeals of the Community Development Director's approval were timely filed.

g. The appeals were heard by the City's Planning Commission on June 8, 2022. All four were denied.

h. Five independent appeals of the Planning Commission's decision were timely filed.

i. The appeals were heard by the City Council on August 16, 2022. The City Council was presented with a resolution affirming the approval of the project by the Community Development Director, however, the City Council ultimately adjourned without affirming or denying that approval.

j. The matter was continued, was heard in closed session, and, eventually, on October 18, 2022, the City Council denied the project approval.

k. A general election was held in November, 2022, resulting in a change in the composition of the City Council.

l. On November 2, 2022, Highrose filed a petition for writ of mandate and complaint in Los Angeles Superior Court, LASC Case No. 22STCP03962).[4]

m. On January 19, 2023, the City Council approved the project.[5]

n. On February 2, 2023, the City Council received a request from former Mayor Mark Burton that it reconsider its January 19, 2023 during its scheduled hearing on February 7, 2023. It did not do so.

32. All four causes of action stated herein relate to a common misinterpretation (or other reason), which relates to the nature of the CEQA review exemption contained in both the Housing Accountability Act ("HAA") (the first cause of action) and the Density Bonus Law ("DBL") (the second cause of action), as well as the broader question of review of potential environmental or public health and safety considerations implicated by a proposed development. If the Government Code exemptions were inapplicable, the project was subject to CEQA (the third cause of action). Even if they were, however, the project still was deserving of environmental and public health and safety review by the City. These matters likewise form the foundation for the request for declaratory relief (the fourth cause of action).

33. The statutory language in the two Government Code Sections is detailed in each of the first two causes of action, first, the HAA, Cal. Govt. Code § 65589.5(d)(2), (e) and, second, the DBL, Cal. Govt. Code § 65915(d)(1)(B). However, in each case, the benefits available are specifically subject to a mandatory condition precedent, as follows:

a. *In the case of the HAA*, [a] local agency shall not disapprove a housing development project … for very low, low-, or moderate-income households … unless it makes written findings, based upon a preponderance of the

[4] A notice of related case in this regard is being filed contemporaneously with this petition and complaint.

[5] As noted in n. 3, *supra*, the City's professed rationale in support of its decision is discussed in Paragraphs 33 - 35, *infra*.

> evidence in the record [that] [t]he housing development project … as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete ... Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to [CEQA]; and
>
> *b.* *In the case of the DBL*, "[t]he city … shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following … The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5 … upon public health and safety … and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households [or] [t]he concession or incentive would be contrary to state or federal law.

34. Setting to the side for the moment questions such as burden of production or proof, it cannot be denied that, at least in this case, the City utterly failed to investigate or obtain, or otherwise establish any basis upon which the required finding could be made – ***one way or the other.*** No doubt, someone at the City at some point reviewed some submissions by the project proponent inasmuch as at least some portion of that was disclosed in the staff report "made available for public review," some 45 minutes before the commencement of the hearing in which the decisive vote on this project was made.[6] The sum and substance of the statement referred to above read into the record of the public hearing on January 19, 2023 by Acting Director Mirzakhanian was that the project abuts a refinery but that, first, "the proximity to [the refinery] is not considered a significant, quantifiable, direct or unavoidable impact," that, second, the project proponent's environmental consultant "concluded that there was no significant environmental concern to the site at this time," and, third, that the City wanted to "reiterate that any project on the site would have to comply with federal, state, local, environmental and public health regulations prior to and during demolition, excavation, and construction of any project…."

[6] Petitioner/Plaintiff intends to investigate this recent development in further detail and, if appropriate, reserves its right to amend it Petition/Complaint to address this issue.

Apart from misstating the applicable standards and the condition precedents in the Government Code, not to mention violating bedrock CEQA doctrines such as reviewing impacts and mitigation at the earliest possible time in order to further public participation and informed decision-making (*e.g.*, reshaping or recasting a project so as to avoid or minimize impacts rather than deferring mitigation until an issue arises), there is a more fundamental flaw in the City's reliance on the project proponent's submissions, namely, that its consultant asked the wrong question to begin with. That is, the consultant performed an ASTM Standard 1527-13 Phase I Environmental Site Assessment, which is most commonly purposed for identifying potential environmental issues in real property transactions (as a matter of due diligence) and/or, to the extent feasible, possibly as a resource for a subsequent owner to rely upon in asserting an "innocent purchaser" affirmative defense in a subsequent action. Here, the Citadel Phase I, dated February 20, 2020, acknowledges as much (including, *e.g.*, Sections 1.1 and 1.3) and refers to -- but does not undertake – the somewhat more applicable, although insufficient here, ASTM methodology to investigate soil vapor encroachment (the risk finally acknowledged at the January 19, 2023 hearing approving the project), as is set forth in ASTM Standard E2600-15.[7] Finally, as far as Citadel is concerned, it documented the methane threat, which it stated it could not "rule out" (Section 4.2) and documented the unexploded ordnance but as to which it had no commentary (Appendix L, pp. 124-26).

35. Using the City's own description of the one potential risk it deemed worthy of mention, the migration of vapors from groundwater into subterranean or lower level units at the Veranda, the City was required to review, consider, assess, and evaluate that risk using the

[7] Two other reasons use of the ASTM standards were insufficient here are that: (1) the City was not entitled to use or rely on the Highrose reports (Section 1.2) and (2) Citadel's review was limited to public records (plus the minimal 2017 EPC report which only advanced soil vapor probes to 4 feet below ground surface) (B2-SV4, B7-SV4, and B8-SV4 – notwithstanding, EPC reported detection of toluene, a petroleum constituent) and further limited to those it could feasibly and promptly obtain. Although the City has the gall to assert that if Chill The Build was so concerned about these "supposed' issues, it should have funded and undertaken its own investigation which, of course, is yet another improper repudiation by the City of its core duty to protect its residents, *Kings County Farm Bureau v. City of Hanford,* 221 Cal. App. 3d 692, 724 (1990).

USEPA and Cal-EPA methods directly applicable to that scenario, such as Cal-EPA's *Screening and Evaluating Vapor Intrusion*, dated February 2020 (co-published by the California Water Resources Control Board and the California Department of Toxic Substances Control, and USEPA's Office of Solid Waste and Emergency Response's *EPA's Vapor Intrusion Guide*, dated October, 2015, among other such directly applicable federal and state regulatory pronouncements developed to "promote national consistency and enhanced approaches in how the vapor intrusion pathway is addressed …."[8] These methods are far superior to the methods described, and used, seemingly in a limited manner, if at all, as set forth in the Highrose submissions. Moreover, these methods provide various means by which potential risks can be calculated, which thus could be sufficient foundation for making or not making the findings specified in the Government Code HAA and DBL conditions precedent.

V. FIRST CAUSE OF ACTION

(Housing Accountability Act (Cal. Govt. Code, § 65589.5))

36. Petitioner/Plaintiff realleges and hereby incorporates all of the foregoing allegations as if fully set forth hereat.

37. The purpose of the HAA is to limit the ability of local governments to "reject or make infeasible housing developments . . . without a thorough analysis of the economic, social, and environmental effects of the action . . . ." Gov. Code, § 65589.5(b).

The statute provides that:

> When a proposed housing development project 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, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following

[8] Another similarly applicable USEPA technical guidance for assessing, managing and mitigating potential human exposure to vapor intrusion of hazardous substances at USEPA jurisdiction sites and any potential site where petroleum hydrocarbons or chlorinated solvents potentially can migrate into buildings. *OSWER Publication 9200.2-154* (June, 2015). (This document cautions that in the event EPA personnel wish to use an alternative method for such an assessment, prior consultation with USEPA headquarters is required) (n. 26).

> conditions exist: (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete; and (B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

38. Further, section (e) provides: "Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act…. ("CEQA")"

39. The HAA also provides: [a] local agency shall not disapprove a housing development project … for very low, low-, or moderate-income households … unless it makes written findings, based upon a preponderance of the evidence in the record [that] [t]he housing development project … as proposed *would* have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete ... Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to [CEQA].

40. As discussed above, (i) the City did not conduct any (or, if any, inappropriately limited and inadequate) investigation of the potential risk even it acknowledged were possible and would affect public health and safety; (ii) relied on the project proponent's environmental report, which used an inapplicable methodology and prohibited the City to use the report for the purpose employed here; and (iii) disregarded, trivialized, or purposefully ignored other potential health

risks to the public, such as methane, as to which no explanation or rationale was provided. Worse, it either decided not to educate itself regarding directly applicable federal and state regulatory procedures that could have enabled it to fulfill its statutory duty to make (or not make) the findings specified in the HAA.

41. Having thus hobbled itself, it was unable – due to its own acts and omissions -- to comply with the HAA.

42. Its approval of the development was thus an abuse of discretion.

VI. SECOND CAUSE OF ACTION

(Violation of the Density Bonus Law (DBL) (Gov. Code, § 65915))

43. Petitioner/Plaintiff realleges and hereby incorporates all of the foregoing allegations as if fully set forth hereat.

44. The DBL is another method of encouraging the development of affordable housing by offering incentives to developers in the form of relaxed building design standards.

45. Under the DBL, Highrose sought one incentive to allow relief from otherwise applicable wall-height limits.

46. DBL waivers of City development standards governing buildable floor area, limitation on stories, setbacks, and height, which would have precluded construction of the number of units allowed by the applicable density bonus and incentives.

47. Here, Highrose proposed a combination of incentives and/or waivers of development standards to allow the Project design.

48. While a density bonus may be available where ten percent or more of the total units in a housing project are restricted for rent to very-low-income households, *id.* § 65915(b) & (d)(2)(B), that availability remains subject to the public health and safety provisions within that code section, which act as a condition precedent to the granting of such a density bonus.

49. The California DBL requires the City to make an examination and written finding — and not rely on a developer's findings and reports — to determine whether a housing project

would have a "specific, adverse impact" upon public health and safety. Gov. Code, § 65915 *et seq.*

50. For this reason, approving a project under the DBL, the City must make an independent examination and a "written finding" to determine whether the project would have a "specific, adverse impact" upon public health and safety, and "there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households." *Id.* § 65915(d)(1)(B).

51. The City's municipal code contains similar language mandating this condition precedent for DBL approval. *See* MBMC, § 10.94.040(B)(2) (stating that the City must make a "written finding" concerning "specific adverse impact" upon public health to approve the project).

52. To approve a housing project, the local government must make a written finding that the project would not have a "specific, adverse impact … upon public health and safety," and "there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households." *See* Gov. Code, § 65915(d)(1)(B).

53. The City failed to follow the DBL when it did not undertake an independent examination and make a written finding before approving the Project. Instead, the City approved the Project based in part on the Developer's consultant's site-assessment reports.

54. But the City's reliance on these reports did not meet its obligations under the DBL. In particular, the consultant did not create these reports to meet the DBL's "specific, adverse impact" standard. Instead, the consultant created the reports for the Developer's own business purposes: to meet certain standards that would entitle the Developer to assert that it had examined the property and thus could assert an affirmative defense — as a "bona fide prospective purchaser" under the federal Superfund law — in possible future litigation. 42 U.S.C. Section 101(35). The DBL's "specific, adverse impact" standard and the "bona fide prospective purchaser" standard are completely different standards.

55. The City's 2008-2014 Housing Element Section 5, Policy 7, Goal III (page 5-16), in effect when supporting documentation advocating approval of this proposed project was being prepared for submission to the City for development approval (as reflected in the Highrose Citadel 2020 Environmental Assessment Report, Exhibit G, containing an earlier 2014 Citadel Phase I Environmental Assessment Report), stated as a goal of the City:

> "Provide a safe and healthy living environment for City residents…. It is the goal of the City to continue to provide a healthy environment for all residents, consistent with the stated goal of the California Legislature to provide decent sage [sic] and sanitary housing …."

56. As discussed above, (i) the City did not conduct any (or, if any, inappropriately limited and inadequate) investigation of the potential risk even it acknowledged were possible and would affect public health and safety; (ii) relied on the project proponent's environmental report, which used an inapplicable methodology and prohibited the City to use the report for the purpose employed here; and (iii) disregarded, trivialized, or purposefully ignored other potential health risks to the public, such as methane, as to which no explanation or rationale was provided. Worse, it either decided not to educate itself regarding directly applicable federal and state regulatory procedures that could have enabled it to fulfill its statutory duty to make (or not make) the findings specified in the DBL.

57. Because this was not done, the bonus could not be granted. This violates the DBL and its approval of the development was thus an abuse of discretion.

VII. THIRD CAUSE OF ACTION

(Violation of California Environmental Quality Act (CEQA))

58. Petitioner/Plaintiff hereby realleges and incorporates all of the foregoing allegations as if fully set forth hereat.

59. CEQA is intended: to (1) inform the government and public about a proposed activity's potential environmental impacts; (2) to identify ways to reduce, or avoid, environmental damage; (3) to prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and (4) to disclose to the public the rationale for

governmental approval of a project that may significantly impact the environment." Cal. Code Pub. Res. § 21000, Code Regs. tit. 14 § 15002.

60. A CEQA lead agency conducts its CEQA review under a three-tier process. *Id.*

61. First, the agency must determine whether the proposed activity is a "project" subject to CEQA. *Id.* CEQA defines a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." *See* Guidelines, § 15378.

62. Second, if the activity is a project, the agency must decide whether the project qualifies for an exemption that will excuse otherwise covered activities from CEQA's environmental review. CEQA also contains statutory and categorical exemptions, and other state laws contain CEQA exemptions or partial exemptions

63. Third, assuming no applicable exemption, the agency must undertake environmental review of the project. *Id.*

64. CEQA applies to "discretionary projects."

65. A project is discretionary when an agency is required to exercise judgment or deliberation in deciding whether to approve an activity. *See* Guidelines, § 15357.

66. Aside from decisions pertaining to a project that will have a direct physical impact on the environment, CEQA also applies to decisions that could lead to indirect impacts, such as making changes to local codes, policies, and general and specific plans. Cal. Pub. Res. Code § 21065.

67. CEQA does not apply to ministerial projects. Guidelines, § 15268. A ministerial project is one that requires only conformance with a fixed standard or objective measurement and requires little or no personal judgment by a public official as to the wisdom or manner of carrying out the project. *Id.* at § 15369.

68. Generally, ministerial permits require a public official to determine only that the project conforms with applicable zoning and building code requirements and that applicable fees

have been paid. Examples of ministerial projects include automobile registrations, dog licenses, and marriage licenses. Guidelines, § 15369.

69. Determining whether an agency's action is discretionary or ministerial turns on the applicable substantive law. *Id.* at § 15002. The test is whether the law governing the agency's decision to approve the project gives it authority to require changes that would lessen the project's environmental effects. If the law gives the agency authority to require change that would lessen the environmental effects, the project is discretionary. If the law does not give the agency such authority, the project is ministerial. *Id.*

70. For the reason that the City was unable to, and in fact did not, make the condition precedent findings detailed in the First and Second Causes of Action herein, and in view of the threatened or actual significant effect of the project described in Section IV, the City was required to undertake some appropriate CEQA or other environmental review, for example, an initial study, a negative declaration, a mitigated negative declaration, or an EIR. Because the City undertook none of these reviews, it violated CEQA.

VIII. FOURTH CAUSE OF ACTION

(Declaratory Relief)

71. Chill the Build realleges and incorporates by reference each and every allegation set forth above.

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73. An actual controversy has arisen and now exists between Petitioner, Respondents, and Does 1 through 100, concerning the City Council's decision to approve the Project. Chill the Build contends that the City's approval of the Project violates state and other laws.

74. Chill the Build is informed and believes that Respondents deny these contentions.

75. Chill the Build desires a judicial determination of its rights and the City's duties concerning the Property and the Project's approval.

76. A declaration is necessary and appropriate at this time so that Chill the Build and the City may ascertain their rights at the time with respect to the validity and enforceability of the City's approval of the Project.

PRAYER

WHEREFORE, Petitioner prays for judgment as follows:

(1) an order declaring the City's January 19, 2023, approval void for violating Government Code section 65915,

(2) an order declaring the City's January 19, 2023, approval void for violating Government Code section 65598.5

(3) an order declaring the City's January 19, 2023, approval void for violating CEQA;

(4) a declaration that the City's approval of the project was void;

(5) an award of costs of the suit herein;

(6) an award of reasonable attorneys' fees to the extent permitted by law, including pursuant to Cal. Code Civ. Proc. section 1021.5; and

(7) for such other relief deemed appropriate by the Court.

Dated: February 23, 2023

CROWELL & MORING LLP

By: _____
Richard J. McNeil
Attorneys for Petitioner/Plaintiff
Chill the Build

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all issues so triable in this Action.

Dated: February 23, 2023

CROWELL & MORING LLP

By: _____
Richard McNeil
Attorneys for Petitioner/Plaintiff
Chill the Build

VERIFICATION

I, MITCHELL CHUN, declare:

I am a member of Chill the Build, LLC.

I have read the foregoing First Amended Verified Petition for Writ of Mandate and Complaint and know the contents thereof. The matters stated in the foregoing are true of my own knowledge, except as to any matters which are therein alleged on information and belief, and, as to those matters, I believe them to be true.

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

Executed at Manhattan Beach, California, on February 23, 2023.

Mitchell Chun
MITCHELL CHUN