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Mayor Victor M. Gordo
City of Pasadena
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RE: NOTICE OF VIOLATIONS OF GOVERNMENT CODE SECTIONS 65858, 65852.21, AND 66411.7

Dear Mayor Gordo:

It has come to our attention that the City of Pasadena has adopted an urgency ordinance designed to circumvent Senate Bill (SB) 9. Specifically, on December 6, 2021, the City adopted Urgency Ordinance No. 7384 (the "Ordinance"), which broadly prohibits the application of SB 9 to any parts of the City designated as a "landmark district."[1] Although enacted as an "urgency ordinance," the Ordinance does not satisfy the legal requirements for urgency ordinances under the Government Code because it fails to identify "a significant quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions." (Gov. Code, § 65858, subd. (c)(1).) Further, the Ordinance prohibits the development of SB 9 projects in the City's so-called "landmark districts," but the text of SB 9 does not exempt "landmark districts"—it exempts only landmarks, historic properties, or historic districts. The Ordinance is thus contrary to the plain text of SB 9 and cannot stand.

A. The City Has Not Made the Requisite Findings to Justify Adopting New SB 9 Development Standards Via Urgency Ordinance

The City's legislative body cannot "adopt or extend any interim ordinance" as an urgency measure without making legislative findings that the approval of additional development permits would pose a "current and immediate threat to the public health, safety, or welfare." (Gov. Code, § 65858, subd. (c).) And before adopting or extending an interim urgency ordinance that has the effect of denying multifamily housing projects, the City's legislative body must make specific written findings, "supported by substantial evidence on the record," that all of the following

[1] The City extended the Ordinance on January 10, 2022, by adopting a resolution (the "Extension Resolution").

conditions are present: (1) multifamily housing projects would have "a significant, quantifiable, direct, and unavoidable impact [on public health or safety], based on objective, identified written public health or safety standards, policies, or conditions"; (2) the interim ordinance is necessary to mitigate or avoid that impact; (3) there is no feasible alternative to satisfactorily mitigate or avoid that impact as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance. (*Ibid*.)

SB 9 enables the creation of multifamily housing projects—namely, duplexes on lots zoned for single-family use, with the potential for projects of up to four units on existing single-family lots through a lot split. Thus a local legislative body adopting an urgency ordinance that prevents SB 9's application must make the more specific written findings required under subdivision (c) of Section 65858 and support those findings with substantial evidence.

Nothing in the Ordinance, the staff report, or your City Attorney's December 6, 2021 letter provides written findings that SB 9 projects would have a significant adverse impact on public health or safety, let alone substantial evidence of a significant, quantifiable, direct, and unavoidable impact based on objective standards and criteria in place at the time the Ordinance was adopted. As the City Council was considering the Ordinance, the City Attorney provided only one reason for why the Ordinance was necessary: "to ensure that any development is undertaken pursuant to SB 9 does not occur without regulation intended to address the environmental and land use impacts thereof, while staff studies permanent standards." Similarly, the Extension Resolution summarily states "that there is a current and immediate threat to public health, safety, and welfare pursuant to the standards and policies set forth in the General Plan … in order to preserve the established character of such zones and allow sufficient time for staff to analyze impacts of additional density in areas that were not studied for such development under the General Plan and develop appropriate permanent regulations for such development."

These findings do not meet the requirements of subdivision (c) of Section 65858. Therefore, the Ordinance is invalid as a matter of law. (See *California Charter School Association v. City of Huntington Park* (2019) 35 Cal.App.5th 362, 365.)

B. The Ordinance Illegally Prohibits the Development of SB 9 Projects in the City's "Landmark Districts"

Under SB 9, local agencies must provide a ministerial approval process for any proposed housing development consisting of two residential units within a single-family residential zone, and for any proposed subdivision of an existing parcel within a single-family residential zone into no more than two parcels. (Gov. Code, §§ 65852.21, subd. (a), 66411.7, subd. (a).) However, SB 9 exempts some areas from its application, including areas with recognized historic value. (Gov. Code, §§ 65852.21, subd. (a)(6), 66411.7, subd. (a)(3)(E).)

The Ordinance prohibits the development of SB 9 duplexes in the City's "landmark districts." (Ordinance, ¶ G.) That is inconsistent with SB 9, which only exempts SB 9 projects "on … or within a site that is designated or listed as a city or county landmark or historic property or district pursuant to a city or county ordinance." (Gov. Code, §§ 65852.21., subd.

(a)(6), 66411.7, subd. (a)(3)(E).) SB 9 thus exempts from its application projects on or within a site that is (1) designated or listed as a landmark, (2) designated or listed as an historic property, or (3) designated or listed as an historic district. The term "district" in subdivision (a)(6) is modified only by the word "historic." To the extent the exemption is at all ambiguous, it must be read narrowly so as to not undermine the objectives of SB 9. As a result, SB 9 cannot be read to include so-called "landmark districts" within this exemption.

This narrow exemption from SB 9 is intended to ensure that cities retain ample discretion to protect historic resources, including historic districts. But by the City's own admission, "landmark districts" are not "historic districts." According to the City's Historic Preservation Commission, "landmark district" status depends on whether a sufficient number of buildings or structures within the district "represent one or more of a defined historic, cultural, development and/*or* architectural context." (emphasis added). As the "or" makes clear in the preceding definition, "landmark districts" are not limited to historic resources, and thus the City's effort to bar SB 9 projects in the City's "landmark districts" violates the plain language of the statute.

The breadth of the City's ordinance concerning "landmark districts" compounds the SB 9 violation. Under the City's Municipal Code, a "landmark district" includes "any grouping of contiguous properties" that meet three specified criteria: (1) a simple majority of property owners in the putative district supports the designation; (2) the group of properties "represents a significant and distinguishable entity of Citywide importance and one or more of a defined historic, cultural, development, and/or architectural context(s)"; and (3) 60 percent of the properties contribute to that representation. (Municipal Code, §17.62.040, subd. (D).) Unlike the City's process for designating landmarks or historic resources, this process allows the creation of "landmark districts" without regard to their historic value. And because only 60 percent of the properties need to contribute to the characteristics of a landmark designation, any ban on SB 9 applications by virtue of a "landmark district" designation has the potential of applying to sites that do nothing to contribute to a "defined historic, cultural, development, and/or architectural context."

This is particularly concerning because, when the City first adopted its "landmark district" ordinance in 2002, there were only three locally designated historic districts in the City. Since then, the City appears to have designated 20 additional "landmark districts." Our office, moreover, is aware of local efforts to create new "landmark districts" specifically for the purpose of avoiding SB 9. We note that those who do not own property, including those who are priced out of the City, will not have any meaningful input in the City's decision to curb its housing supply through the designation of more "landmark districts." Yet those people bear the significant brunt of the impact of such decisions, leaving their grave housing insecurity concerns unaddressed, and the statewide housing crisis unabated.

Although we do not doubt the City's good faith effort to construe SB 9's exemption, the Ordinance is nevertheless inconsistent with SB 9 on its face and contrary to the law.

C. By Banning Duplex Housing in Its "Landmark Districts," the Ordinance May Also Violate the Housing Crisis Act

The Ordinance appears to prohibit, without exception, all duplex housing projects on single-family lots in "landmark districts." This provision of the Ordinance may also violate the Housing Crisis Act of 2019, codified at Government Code section 66300.

For sites "where housing is an allowable use," the City cannot enact a development policy that would have the effect of imposing "a moratorium or similar restriction or limitation on housing development … within all or a portion of the jurisdiction of" the City, "other than to specifically protect against an imminent threat to the health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium or for projects specifically identified as existing restricted affordable housing." (Gov. Code, § 66300, subd. (b)(1)(B)(i).) We are unaware that the City made any such findings justifying this de facto ban on duplex housing in its "landmark districts." Even if the City did, it seems unlikely that such a ban, on duplex or other forms of multifamily housing, is necessary to protect against an imminent threat to either the health or safety of people living within a "landmark district." Note, further, that the City also would need authorization from the Department of Housing and Community Development ("HCD") before enforcing such a moratorium or restriction. (Gov. Code, § 66300, subd. (b)(1)(B)(ii).)

Given the existence of multifamily housing in bungalow courts that appear to be already designated as individual landmarks, as noted on the City Planning Commission's own website (https://www.cityofpasadena.net/planning/planning-division/design-and-historic-preservation/historic-preservation/projects-studies/bungalow-courts-in-pasadena/), it is unclear if the City intended its Ordinance to have such far-reaching implications. HCD, our sister agency, will be contacting you shortly with its own letter of inquiry, and we trust the City will fully cooperate to resolve any ambiguities with respect to this and any other issues raised by HCD.

D. The City Cannot Avoid the Application of State Law by Declaring Itself a Historic District or Exempting Specific Plan Areas

The staff report accompanying the Ordinance noted that the Planning Commission would explore creating a citywide historic overlay district. (Staff Report, p. 2.) Although local governments have discretion in identifying local landmarks, historic properties, and historic districts, the City cannot use its discretion to categorically exempt itself from SB 9. To the contrary, SB 9 contemplates exemptions solely for specific sites or districts within a city—not the entire city. (Gov. Code, §§ 65852.21, subd. (a)(6), 66411.7, subd. (a)(3)(E).) Adopting a citywide historic overlay for the purpose of evading SB 9 would be an abuse of discretion.

The staff report also noted that the Planning Commission would consider proposing to exempt specific plan areas from SB 9. (Staff Report, p. 2.) SB 9 requires the City to provide a ministerial approval for any proposal for duplex housing or a lot split on any parcel, with specific enumerated exceptions, "within a single-family residential zone." (Gov, Code, §§ 65852.21, subd. (a), 664411.7, subd. (a).) It contains no requirement that qualifying parcels be located in a

general plan area or a specific plan area. Indeed, such a requirement would render SB 9 ineffective, as it would enable local governments to evade SB 9 by simply expanding specific plan areas. This, too, would be an abuse of discretion.

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Under the California Constitution, any restriction on housing development must bear a real and substantial relationship to the welfare of the affected region. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 609.) Any restriction that has the practical effect of limiting housing development, or rendering such development infeasible, "is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of" the City. (Evid. Code, § 669.5, subd. (a).) As the City considers a permanent SB 9 ordinance, it must be mindful of its obligations under State law.

As outlined above, we have concluded that Pasadena's urgency ordinance violates both the Government Code's mandates for urgency ordinances, as well as the letter of SB 9. Accordingly, we request that the City take prompt action to repeal and/or amend the ordinance to be consistent with state law, and do so no later than 30 days from the date of this letter.

Sincerely,

MATTHEW T. STRUHAR
Deputy Attorney General

For ROB BONTA
Attorney General

Cc: City Attorney Michele Beal Bagneris
Steven Olivas, Planning Commission Chair