SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 05/15/2024 TIME: 05:00:00 PM DEPT: C-69

JUDICIAL OFFICER PRESIDING: Katherine Bacal
CLERK: Calvin Beutler
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **30-2023-01312235-CU-WM-CJC** CASE INIT.DATE: 03/08/2023
CASE TITLE: **The People of California Ex Rel Rob Bonta vs. The City of Huntington Beach [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 4/26/2024 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The People's first amended petition for writ of mandate and complaint is **GRANTED in part** and **DENIED in part**.

Preliminary Matters

Petitioners/plaintiffs, The People of California ex rel. Rob Bonta and the California Department of Housing and Community Development (collectively "the People"), request judicial notice of 16 exhibits and four facts. ROA # 296 (citing Evid. Code § 452(c & h)). However, "judicial notice, by definition, applies solely to undisputed facts." *Barri v. Workers' Comp. Appeals Bd*. (2018) 28 Cal.App.5th 428, 437. Given this, the Court takes judicial notice only of the existence of the first 16 exhibits identified in petitioners' request.

The City of Huntington Beach, The City Council for the City Of Huntington Beach, and City Manager Al Zelinka (collectively, The "City") request judicial notice of four items. ROA # 320. The request is denied. The City's request for judicial notice of exhibit 1 [ROA # 373], a copy of the ruling in *City of Redondo Beach v. Rob Bonta*, (LACSC Case No. 22STCP01143), is granted.

The Court rules on the City's objections as follows:
- Objection numbers 2 and 3 to Matthew Struhar's declaration [ROA # 318] are overruled.
- Objection numbers 10, 11 and 14 to Melinda Coy's declaration [ROA # 319] are overruled.

The other portions of the aforementioned declarations to which objections were posed were not relevant to determining the petition and, thus, the Court need not rule on the objections.

Background

The People's first amended petition for writ of mandate and complaint seeks a writ of mandate under CCP section 1085 and an order for declaratory and injunctive relief under CCP section 1060. First Amend. Pet. ("FAP") [ROA # 58]. As to the first "cause of action," which seeks a writ of mandate under CCP section 1085, the FAP alleges the City Council "considered and did not pass Resolution 2023-14," and thus failed to approve a compliant housing element for the sixth cycle in violation of California's Housing Element Law (Gov. Code § 65580 *et seq*.). FAP ¶¶ 64, 68-70. The People also allege that the City's failure to act is arbitrary and capricious and lacking in evidentiary support. *Id.* As explained below, however, the People do not appear to be proceeding on this particular theory at this time.

As to the second cause of action for declaratory and injunctive relief, the FAP seeks a declaration that the City is not substantially compliant with California's Housing Element Law (Gov. Code, § 65580, *et seq*.), that the City's ADU and SB 9 project ban violated the Housing Crisis Act (Gov. Code, § 66300), the ADU laws (Gov. Code, § 65850 *et seq*.), and SB 9 (Gov. Code, §§ 65852.21, 66411.7), and that the City must comply with the ADU laws and SB 9. FAP ¶ 79.

In the City's first amended answer ("AA") (ROA # 303) the City denies the FAP's allegations regarding failing to approve a compliant housing cycle, asserting that the City is "not resisting its obligations under California's Housing Laws...." AA ¶ 40.

Standard of Review

Any interested party "may challenge a local government's housing element by a traditional mandamus action filed in the superior court under Code of Civil Procedure section 1085." *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 237, citing CCP §§ 65587(b); 65583(h). To determine whether a housing element "complied with the requirements of the Housing Element Law, the court's review 'shall extend to whether the housing element ... substantially complies with the requirements' of the law. (§ 65587, subd. (b))." *Id.* at 237, italics omitted. "Such a review is limited to whether the housing element satisfies the statutory requirements, 'not to reach the merits of the element or to interfere with the exercise of the locality's discretion in making substantive determinations and conclusions about local housing issues, needs, and concerns.'" *Id.* "The burden is on the challenger to demonstrate that the housing element ... is inadequate." *Id.,* citation omitted.

"Code of Civil Procedure section 1085 permits judicial review of ministerial duties as well as quasi-legislative and legislative acts. A trial court must determine whether the agency had a ministerial duty capable of direct enforcement or a quasi-legislative duty entitled to a considerable degree of deference." *County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 653, internal citation omitted. "A ministerial duty is one which is required by statute. 'A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists.'" *Id.* at 653–654.

"Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment." *Id.* "In determining whether a public agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. A court must ask whether the public agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires." *Id.* at 654, internal citations omitted.

Discussion

Administrative Record

At an earlier hearing, the Court requested supplemental briefing from the parties to address questions regarding the type of challenge the People assert under CCP section 1085, the scope of the record, and the administrative record itself. Minute Order [ROA # 331]. The Court heard oral argument as to the preliminary questions and took the matter under submission.

Although no appellate authority appears to directly address the issue of whether an administrative record is required on a writ of traditional mandate hearing concerning a challenge to a local government housing element, at least one court has proceeded with determining such a petition based on declarations and evidence without any citations in the opinion to an administrative record. See *Martinez v. City of Clovis*, *supra*, 90 Cal.App.5th at 234.

Here, the Court is faced with a petition for writ of mandate for which the People did not provide an administrative record, but the City did. City's Index and NOL of Admin. Record [ROA # 317, 338]. All parties also filed declarations and evidence in support of their positions. Given that all parties presented "extra-record" or "non-record" evidence for consideration, the Court considers the record and evidence presented, subject rulings on objections.

Suit Pre-Filing Requirements

As to local planning housing element review and submission, the Legislature requires that before the Attorney General may bring "any suit for a violation of the provisions identified in subdivision (j) related to housing element compliance," the "department [HCD] shall offer the jurisdiction [here, the City] the opportunity for two meetings in person or via telephone to discuss the violation, and shall provide the jurisdiction written findings regarding the violation." Gov. Code § 65585(k); see also § 65585(i) (department to provide a "reasonable time," no longer than 30 days, for the jurisdiction to respond). The City argues the FAP must be dismissed because the People failed to comply with the meet and confer requirements.

Here, HCD sent a letter to the City on February 22, 2023, to offer the City the chance to meet twice and to provide the City written findings regarding the alleged violation. City's AR 230-233. HCD gave the City "until March 8" to provide a written response before the Attorney General proceeded with filing suit. *Id;* Coy Decl. ¶ 18, Ex. K. HCD also offered for two meetings to be held within 14 days (i.e., up to March 8). *Id.*

The Attorney General waited until March 8, 2023, to file suit. ROA # 1. Under these facts, the City's argument that the People's petition must be dismissed for failure to meet and confer under section 65585(i) &(k) is not compelling. Additionally and contrary to the City's arguments, section 65585 does not require that the two meetings must occur before suit is filed; rather, the statute requires the department to offer the opportunity, within a reasonable time, for those meetings to occur. HCD did so. HCD and the City met twice shortly after the Attorney General filed its complaint. Villasenor Decl. [ROA # 321] ¶¶ 19-20, 22. As such, the City's argument that the FAP should be dismissed on procedural grounds is unsuccessful.

Whether The City's Housing Element Substantially Complies With The Requirements Of The Law

The People argue the City's Housing Element is invalid because the City has not updated it to substantially comply with the Housing Element Law for the current planning cycle, and the City refuses to adopt a Draft Housing Element Revision. MPA [ROA # 295] at 12-14.

A city's housing element must be adopted as part of its general plan, and the housing element must be revised in accordance with a statutory schedule. Gov. Code § 65302(c) (general plan must include housing element); 65588(e)(setting forth housing element revision schedule), 65588(f)(1) (setting forth timing for "planning period"). A city's revised housing element is due on the first day of a planning period. *Id.* The City's duty to adopt a legally compliant housing element is thus ministerial.

The FAP alleges October 15, 2021 was the statutory deadline for the City to adopt a sixth cycle housing element for the planning period covering October 2021 through October 2029. FAP ¶ 54; MPA at 9 (citing Coy Decl.[ROA # 298], ¶ 11, Ex. E at p. 4; § 65588, subds. (e), (f)(1)).

Coy attests that the Southern California Association of Governments member jurisdiction had until October 15, 2021 to adopt and submit to HCD a final housing element revision for the sixth planning cycle. Coy Decl. ¶ 11. She attaches a copy of HCD's housing element update schedule for the sixth planning cycle. *Id.,* Ex. E (listing a "housing element planning period" from October 15, 2021 – October 15, 2029; see also Ex. E at p.10 (citing Gov. Code § 65588(e)(5)). The City does not refute that the sixth housing element revision due date was October 15, 2021.

The People presented evidence that the City did not adopt its housing element by October 15, 2021. Coy Decl. ¶ 12. Although the City subsequently prepared a draft housing element revision, the City Council deadlocked and ultimately voted to reject the draft housing element revision. Struhar Decl. ¶¶ 3-4, Exs. 0 at p.18-20; and Ex. P at pp.10-20 (rejected Res. No. 2023-15). This shows the City failed to adopt the legally required sixth cycle housing element. Indeed, at oral argument the City conceded it has not adopted a sixth cycle housing element.

The City nonetheless asserts several arguments as to why, despite not adopting a housing element revision, the petition should be denied. Opp. at 14-25. The City's arguments can be categorized as follows: (1) Government Code Article 14 does not apply to the City and the FAP does not allege a claim under Article 5; (2) Government Code section § 65585(n) is unconstitutionally vague; (3) there are free speech constitutional issues at play, which the City presented in its lawsuit in federal court; and (4) to require the City to adopt a housing element would require the City to violate environmental laws, including the California Environmental Quality Act ("CEQA"). The Court addresses each argument in turn.

First, the City argues that Article 14 does not apply to charter cities such as itself. Here, the Court is bound to follow the Court of Appeal's ruling in this matter. *The People of California, et al. v. Superior Court* (Jan. 18, 2024) D083339 [ROA # 250] at pp. 2-3, citing § 65754, subd. (b). The City also has not shown that the FAP does not include a claim that would fall within Article 5. Article 5 requires a city to adopt a housing element in accordance with Housing Element Law. Gov. Code § 65302(c).

Second, the City argues that section 65585(n), which states that the Attorney General "may seek all remedies available under law including those set forth in this section," is unconstitutionally vague. The case law the City cites does not appear to support this argument. The City does not provide a pin cite for *Chicken Ranch Rancheria of Me-Wuk Indians v. Cal*. (2021) 42 F.4th 1024, and the case does not discuss section 65585. The case cite that the City supposedly provided for *FCC v. Fox TV Stations, Inc*., 561 U.S. 239, 240, leads instead to a discussion on dissent in *John Doe No. 1 v. Reed.*

Third, the City argues its lawsuit is currently pending before the Ninth Circuit on Appeal, and argues the federal lawsuit contains threshold constitutional issues that should be decided before a determination is made on the causes of action at issue in this suit. The Court of Appeal, however, directed this Court to vacate the stay that was previously imposed pending conclusion of the federal matter and to hear the matter. ROA # 250. Accordingly, the City's argument on this basis is also not compelling.

This leaves the City's remaining argument that to require the City to adopt a housing element with 13,368 high density units violates CEQA and would require the City to issue an objectionable and false statement of overriding considerations. Opp. at 4-5, 14-19. The City argues, both in its briefing and at oral argument, that *Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, is on point. The *Kalnel* appellate court held that the Density Bonus Act (concerning density bonus for housing development) is subordinate to the Coastal Act. *Id.* at 943-944.

Although the City draws some parallels between *Kalnel* and this case, there are simply too many materially distinguishable factors to consider *Kalnel* on point. *Kalnel* involved a writ of administrative mandate under CCP section 1094.5 concerning the Density Bonus Act and Coastal Act. None of those issues are central here, in this traditional mandamus action under section 1085 involving the Housing Element Law.

Kalnel does mention the Housing Accountability Act, and the FAP here also mentions the Housing Accountability Act (Gov. Code § 65589.5) in portions of the pleading. FAP ¶¶ 3, 10, 27, 42, 43, 45. However, neither the causes of action nor the prayer for relief in the FAP appear to expressly seek relief under the Housing Accountability Act. Moreover, to the extent petitioners would have wanted to seek relief under the Housing Accountability Act, such an action must be brought under CCP section 1094.5, which was not done here. Gov. Code § 65589.5(m)(1). Thus, the Court declines to extend the holding of *Kalnel*. *Kalnel* does not stand for the proposition that the Housing Element Law is necessarily subordinate to CEQA.

In response to the City's CEQA arguments, the People rely on *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715, for the proposition that the City does not have an obligation under CEQA to analyze or consider rejecting its own draft updated housing element. The *Sequoyah Hills* appellate court explained the city did not abuse its discretion by rejecting a project alternative that was not "feasible." *Id.* at 715; citing former Pub. Res. Code § 21081(c), now § 21081(b). The *Sequoyah Hills* authority, coupled with the Legislature's decision that determinations made by a city under the Housing Elements' regional housing needs are "exempt from the California Environmental Quality Act," supports the People's position that the City did not need to consider rejecting its draft updated housing element based on environmental regulations under CEQA. Gov. Code § 65584(g). Accordingly, the City has not shown that adopting a housing element for the sixth planning cycle would violate CEQA.

At the hearing, the City argued the State's housing mandate would essentially impose a 50% increase in an already fully built-out area. The City argued a wealth of evidence in the record shows the City Council engaged in a thoughtful decision-making process when it assessed the potential environmental harms that could result if they were to adopt the proposed housing element, and so they cannot be found to have engaged in an abuse of discretion and their decision was not arbitrary and capricious. See e.g., Council Member Tony Strickland Decl. [ROA # 322] ¶¶ 4-13; Jennifer Villasenor Decl. [ROA # 321] ¶¶ 4-14; Mayor Gracey Van Der Mark Decl. [ROA # 323] ¶¶ 4-14. The City cited to several cases for the proposition that on a mandamus action, the City cannot be compelled to engage in particular legislative acts.

The City Council's concerns about protecting the environment and complying with their duties and obligations under CEQA are well-intentioned and understandable. The Legislature here, however, created an exemption under CEQA for when a City needs to make determinations under the Housing Element's regional housing needs, so as not to run afoul of CEQA. Gov. Code § 65584(g). Thus, the City was required under its ministerial duty to adopt a legally compliant sixth cycle housing element. The law does not give the City discretion on whether to adopt a housing element at all, and so the City's arguments under the abuse of discretion/arbitrary or capricious standard are inapplicable.

This is not to say that the City's environmental concerns are not warranted. Rather, the City can both acknowledge the serious environmental concerns while also citing that it is legally infeasible to do anything other than comply with its obligation as to the regional housing needs allocation. The City may cite its obligation under the law to adopt a compliant housing element as a valid overriding consideration allowed by CEQA. Pub. Res. Code § 21081(b).

(The City also essentially argued that, in its view, the regional housing needs allocation should not be considered an overriding consideration to the environmental concerns. This issue, however, is expressly not before this Court and it appears the City is prosecuting it before the Ninth Circuit.)

Lastly, the City argues the Court should first hear the City's cross-petition before it rules on the FAP. Opp. at 26. Given that the parties agreed to continuing the date for cross-respondents to file a responsive pleading (ROA # 348), the Court rules on the FAP at this time.

Complaint for Declaratory Relief

The FAP also alleges a cause of action for declaratory relief under CCP section 1060. The People did not present any argument or authorities in support of its cause of action for declaratory relief. MPA in supp. of FAP [ROA # 295]. It may be that the parties wanted to defer ruling on this cause of action. If not, the Court declines to exercise its declaratory relief power on the grounds that a declaration is not necessary under the circumstances. See CCP § 1061.

Kennedy Commission's Petition in Intervention

At the hearing on the FAP, the parties acknowledged that the Kennedy Commission's first cause of action in the petition for intervention is essentially identical to the People's first cause of action in the FAP. Nonetheless, the City has filed a demurrer to the petition-in-intervention, which is currently set for hearing in November of 2024. ROA # 365. The City indicated it demurs to the Kennedy Commission's first cause of action on grounds of lack of standing. Accordingly, the Court will not issue a ruling on the first cause of action on the petition-in-intervention at this time. The parties are directed to meet and confer regarding the first cause of action in the petition-in-intervention in light of the Court's ruling on the FAP and provide the Court with an update at the next status conference.

Conclusion

For the reasons stated, the People's first amended petition for writ of mandate and complaint is **GRANTED** in part as to the first cause of action for a writ of mandate and **DENIED** in part as to the second cause of action for declaratory relief. The City must bring its housing element into substantial compliance with the Housing Element Law. Gov. Code §§ 65585(l), 65754(a), 65755(a). The minute order is the order of the Court.

The People to prepare the proposed writ and to serve notice on all parties within five court days of this ruling. The temporary order will be lifted as moot upon the writ being entered.

IT IS SO ORDERED.

Judge Katherine Bacal