ROB BONTA
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 879-1300
Telephone: (510) 879-0816
Facsimile: (510) 622-2270
E-Mail: David.Pai@doj.ca.gov

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VIA EMAIL (confirmed by U.S. Regular Mail)
(tony.strickland@surfcity-hb.org; City.Council@surfcity-hb.org)
Mayor Strickland and City Councilmembers
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

RE: Proposal to Cease Processing Permit Applications Under SB 9, SB 10, or ADU-related State Laws

Dear Mayor Strickland and Honorable Councilmembers:

We write regarding the unlawful action related to SB 9, agendized as Item Number 26 on the February 21, 2023 regular meeting agenda of the Huntington Beach City Council (File No. 23-1702). That item directs the City Manager to "cease the processing of all applications/permits brought to the City by developers under SB 9, SB 10, or 'State law related' ADU projects, until the courts have adjudicated the matter(s)." The item also directs the City Attorney to "take any legal action necessary to challenge SB 9 and SB 10 and the laws that permit ADU's." If adopted, the directive to cease processing such applications would be in direct violation of SB 9, the Housing Crisis Act, and may give rise to claims under the Housing Accountability Act. We urge the Council to decisively reject this unlawful proposal.

A. Prohibiting the Processing of All SB 9 Project Applications Violates State Law

Directing the City Manager to cease processing all applications under SB 9 would violate not only SB 9 itself, but also the Housing Crisis Act. Depending on the specifics of an SB 9 permit application, it would also violate the Housing Accountability Act.

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 (*i.e.,* duplexes), 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).) As the Department of Housing and Community Development (HCD)'s SB 9 Fact Sheet explains, ministerial review is where the "public official merely ensures that the proposed development meets all the applicable objective standards for the proposed action but uses no

special discretion or judgment in reaching a decision."[1] The statute provides that an SB 9 project may be denied only if the legislative body finds a project poses significant, quantifiable, direct, and unavoidable impacts—based on objective, identified written findings—to public health or safety on a case-by-case, project-specific basis. (Gov. Code §§ 65852.21, subd. (d); 66441.7, subd. (d); 65589.5, subd. (d)(2).) Nothing in SB 9 permits a City to reject any and all SB 9 projects "to protect the quality and lifestyle" of "well-established single-family neighborhoods." (Burns Memorandum, February 21, 2023).

Further, we understand that in 2022, the City Council adopted a zoning amendment establishing objective development and design standards for SB 9 projects. (See City of Huntington Beach's Zoning Text Amendment 22-002.) Thus, it is unclear how the City Council can direct its City Manager to cease the processing of any SB 9 applications on the grounds that any SB 9 project would be inconsistent with the City's current zoning. Moreover, to date, there does not appear to be any SB 9 permit applications to the City, which makes this misguided and unlawful proposal even more puzzling.

The Housing Crisis Act of 2019 prohibits the City from imposing any moratorium, or similar restriction or limitation, on housing development with exceptions limited only to specific and imminent threats of health and safety. (Gov. Code § 66300, subd. (b)(1)(B)(i).) Any development policy, standard, or condition enacted on or after January 1, 2020, that does not comply with the Housing Crisis Act shall be deemed void. (See Gov Code § 663300, subd. (b)(2).) The proposed action item directs the City Manager to stop processing any and all SB 9 applications until a court adjudicates whatever action the City Attorney may take to challenge SB 9. Such a directive violates the Housing Crisis Act.

Finally, we note that SB 9 permit applications may be protected under the Housing Accountability Act. (Gov. Code § 65589.5, subd. (h)(2) [defining housing development projects].) If an SB 9 permit application conforms to the City's own objective development and design standards, the City may only deny such a project based on findings of certain specified health and safety threats. Specifically, the HAA requires the City to find that the project poses a health and safety threat and that those dangers are "significant, quantifiable, direct, and unavoidable," and that such findings are based on "objective, identified, written … standards … as they existed on the date the application was deemed complete." (Gov. Code § 65589.5, subd. (d)(2).). Disagreements over whether SB 9 is inconsistent with a city's zoning does not, standing alone, constitute a specific, adverse impact on public health or safety under the HAA. (Gov. Code § 65589.5, subd. (d)(2)(A).) Further, a categorical ban of SB 9 applications on the basis that the City Attorney is being instructed to challenge SB 9 in court is not a valid basis to cease the processing of those permit applications.

In addition to the state's enforcement powers, housing organizations and aggrieved applicants have actionable legal rights and remedies under the HAA. We note that the HAA also

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[1] See https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf

empowers the court to, upon a finding that a city acted in bad faith, award attorneys' fees and costs to the prevailing plaintiff or petitioner. (Gov. Code § 65589.5, subd. (k)(1)(a).) As the City is aware, having recently unsuccessfully defended itself against HAA claims brought by various nongovernmental organizations, courts have not been shy in awarding these fees and costs against the City.

B. Prohibiting the Processing of ADU Projects Also Violates State Law

State ADU law requires ministerial approval of, and sets the minimum requirements for, ADU development, while permitting local governments to establish their own ADU programs. (See Gov. Code § 65852.2, subd. (a)(1), (e)(1), and (g).) Although the agenda item does not attempt to define what the phrase "state law related ADU projects" is meant to refer to, there is no question that a categorical ban of any type of ADU application—"state law related" or otherwise—violates state law because ADUs are required to be ministerially approved. (Gov. Code § 65852.2, subd. (a)(3), (b)(1), (e)(1).) Indeed, HCD will issue a Notice of Potential Violation with regard to this particular aspect of the agenda item.

C. The Directive's Reference to SB 10 is Nonsensical Given that SB 10 is a Voluntary Mechanism Which the City Has Chosen Not to Invoke

Finally, we note that SB 10 permits—but does not require—cities and counties to enact ordinances to allow up to 10 dwelling units on any parcel, at a height specified in the ordinance, if the parcel is located within a transit-rich area or urban infill site. (Gov. Code § 65913.5.) It is, therefore, a voluntary, opt-in upzoning law. Given that the City of Huntington Beach has not chosen to invoke SB 10, we can discern no reason to direct the City Attorney to challenge SB 10 or the City Manager to stop processing SB 10 project applications.

Agenda Item No. 26 is not only misguided, it is unlawful. As we stated in our letter to City Attorney Gates just one week ago, our office stands ready to enforce state housing laws if necessary.

Sincerely,

DAVID PAI
Supervising Deputy Attorney General

For ROB BONTA
Attorney General

cc: City Attorney Michael E. Gates (Michael.Gates@surfcity-hb.org)

DP: dp