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Fix the City, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FIX THE CITY, INC., a California nonprofit corporation,

Petitioner and Plaintiff,

v.

CITY OF LOS ANGELES, a municipal corporation; LOS ANGELES CITY PLANNING COMMISSION; VINCENT P. BERTONI, in his capacity as Director of City Planning for the City of Los Angeles; and DOES 1 through 100, inclusive,

Respondents and Defendants.

530 NORTH FRANCISCA, LLC, a California limited liability corporation; BANARSI AGARWAL; and ROES 1 through 100, inclusive,

Real Parties in Interest.

Case No.: 20STCP03529
Related Case No. 20STCP01569
Related Case No. 19STCP03740

Assigned to Hon. Mitchell L. Beckloff

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Action Filed:	October 26, 2020
Trial Date:	February 25, 2022
Time:	9:30 a.m.
Dept.:	86

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INTRODUCTION

Respondents City of Los Angeles, Los Angeles City Planning Commission, and Vincent P. Bertoni (collectively "Respondents") and Real Parties in Interest 530 North Francisca, LLC and Banarsi Agarwal (collectively "Real Parties") have filed a Joint Opposition to the Petition for Writ of Mandate ("Joint Opposition") that simply ignores critical facts and law. As set forth in Petitioner Fix the City's ("Petitioner's") Opening Brief, the project at 10757 Wilkins Avenue ("the Project") does not conform to the requirements of the Westwood Community Multi-Family Specific Plan ("Specific Plan"), departing from the Plan's clear standards in ways that are *not* addressed by the incentives afforded to the Project under the Transit Oriented Communities program. Respondents provide no basis to ignore the requirements of the Specific Plan.

Equally problematic, the Joint Opposition does not address the failure of the City to ensure that three required replacement units were provided in the Project, a mandatory requirement for granting *any* incentives under the TOC program, as well as under state density bonus laws. This requirement is critical to ensure that residential units that are protected by the City's rent stabilization program today are not eliminated from the rental market altogether. Without this requirement, there will be less affordable housing, not more – undermining the very purpose of Measure JJJ. Older housing stock like the current rental apartments at 10757 Wilkins Avenue could be demolished and the newly constructed units would not be subject to registration under the Rent Stabilization Ordinance ("RSO"). In addition to the Project being a full unit short, none of the units are required to serve as "replacement units" under the RSO which defeats the City's objectives in specifically requiring replacement units for *any* demolition of RSO units since 2006. The Joint Opposition does not demonstrate that this requirement did not apply to the Project, and cannot demonstrate that it was satisfied.

For these reasons, the approval of the Project was arbitrary and capricious and an abuse of discretion, which must be set aside.

ARGUMENT

I. THE PROJECT DOES NOT COMPLY WITH WESTWOOD COMMUNITY MULTI-FAMILY SPECIFIC PLAN REQUIREMENTS

The Joint Opposition argues that the TOC program may supersede the requirements of a specific plan, relying principally on provisions in the TOC Guidelines and *not* city ordinances. As the Joint

Opposition makes clear, Measure JJJ, as codified at Los Angeles Municipal Code ("LAMC") section 12.22 A. 31 (see Petitioner's Request for Judicial Notice ("RJN"), Exh. 6), contains no express statement regarding the applicability of the TOC program in instances where the City has adopted a specific plan. (See Joint Opposition Brief ("Opp."), p. 14:18-26.) The Joint Opposition relies on language in LAMC section 12.22 A.31(a) that provides that the TOC program "shall apply to all Housing Developments that are located within a one-half mile radius of a Major Transit Stop." (RJN, Exh. 6, p. 1.) But there is no language in Measure JJJ itself that states that the requirements of conflicting specific plan ordinances are not to be applied to project located in specific plan areas.

Repeal by implication is strongly disfavored as a principle of statutory interpretation. (E.g., *People v. Siko* (1988) 45 Cal.3d 820, 824 [silence on a provision does not support the "remarkable conclusion that the Legislature creates exceptions to a specific code section merely by failing to mention it].) "[A]ll presumptions are against a repeal by implication." (*Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 176.) "Absent an express declaration of legislative intent, we will find an implied repeal 'only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476–477 [quoting *In re White* (1969) 1 Cal.3d 207, 212].)

The Specific Plan requirements are intended to prevail over other requirements of the Municipal Code. "Whenever this Specific Plan contains provisions which differ from the provisions contained in Chapter I of the Los Angeles Municipal Code, *the Specific Plan shall prevail and supersede the applicable provisions of that Code.*" (RJN, Exh. 1, p. 10 [emphasis added].) The Specific Plan may be amended in accordance with the procedure of Los Angeles Municipal Code section 11.5.7, which also provides for granted adjustments or modification to the requirements of the Specific Plan on a project-by-project basis. (See RJN, Exh. 4, pp. 3-5.) The Joint Opposition contends that Measure JJJ's statement that all properties within a half mile transit are eligible for TOC incentives, when paired with the express language in the Specific Plan addressing differing provisions in the Municipal Code, provides no support for this implied repeal of the Specific Plan requirements for TOC projects, at least

under this Specific Plan.[1] Indeed, the Municipal Code contains a process for specific plan adjustments which was not followed here. (RJN, Exh. 1, p. 10; Exh. 4, pp. 3-4.) There are also provisions that allow exceptions to specific plan standards. (RJN, Exh 4, p. 4.) The City instead treated the TOC Incentive program as if it superseded the requirements of the Specific Plan. Given the existing municipal code provisions regarding departure from specific plan requirements, and the language of this Specific Plan expressly prevailing over conflicting provisions of the municipal code, the general language in Measure JJJ should not be deemed to control over these more specific provisions.

The Joint Opposition also relies heavily on the TOC Guidelines (Opp., pp. 15-17), but these guidelines do not have the weight of an ordinance. Measure JJJ's scope must be determined first, as the Guidelines cannot conflict from or expand the authority granted to the Planning Commission in the ordinance. (*Aguirre v. Lee* (1993) 20 Cal.App.4th 1646, 1653 [While the legislative body may delegate to an administrative board the authority to "adopt and enforce reasonable rules for carrying into effect the expressed purpose of an ordinance[;] [i]t may not delegate to the board the discretion to adopt regulations that abridge, enlarge, extend or modify the enabling statute."].) The Guidelines are not an ordinance nor in the Municipal Code.

Moreover, the Project does not meet the requirements of the Westwood Community Multi-Family Specific Plan, including requirements are not addressed by TOC Incentives. Notably, section 6 C of the projects that are across the street and within 200 feet of an R1 zone: each level above the first habitable level must be set back 10 feet from the level below it. Step-backs are not required for structures with a height of 33 feet or less. (RJN, Exh. 1, p. 12.) As Petitioner and the appellants below pointed out, the project failed to satisfy this "step-back" requirement on the front façade, even though the property is clearly within 200 feet of an R-1 zone. (See AR440, ZIMAS map showing parcel and abutting R-1 parcels.) Fix the City specifically cited this section of the Specific Plan and its step-back requirement in a letter to the City Planning Commission. (AR0947.) The applicant was not granted an incentive to depart from this step back requirements. (AR0274-275.)

[1] This is an as-applied challenge, so the question presented is whether this Specific Plan's requirements should take precedence over the requirements of the TOC program, not whether *any* specific plan might, which is not before the court.

The TOC program does not supersede the Specific Plan. Nor do the TOC Guidelines provide incentives that allow disregarding the Specific Plan's step back requirements. The Project's approval should be set aside for these reasons.

II. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT THE THREE UNITS ON SITE WERE NOT SUBJECT TO "REPLACEMENT"

In order to grant a density bonus under the TOC program, the City was legally required to determine whether replacement units were provided as required by the TOC program, and by state law. (See RJN, Exh. 6, p. 1 [LAMC 12.22 A.31 (b)(1), referring to requirements of Government Code § 65915, subd. (c)(3)(A)].) As the Director's Determination explained it, "[t]he Transit Oriented Communities Affordable Housing Incentive Program Guidelines also requires a Housing Development to meet any applicable housing replacement requirements of California Government Code Section 65915(c)(3) as verified by the Department of Housing and Community Investment (HCIDLA) prior to the issuance of any building permit." (AR0267, AR0275.) Without adequate replacement units, then, awarding incentives under the TOC program is improper, meeting the standard of an arbitrary and capricious act. Furthermore, a project that results in *less* affordable housing defeats the objectives of Measure JJJ.

The Joint Opposition states in a footnote that FTC failed to exhaust its administrative remedies on this issue by failing to raise it in "its appeal." (Opp., p. 19, fn.4.) Just one page earlier, the Joint Opposition notes that "[d]uring the administrative review process at issue, FTC submitted a comment letter to the Westwood Design Review Board asserting that the Project was required to replace three rental units pursuant to Government Code section 65915. (AR 99.)" Of course, Petitioner did not actually have an administrative appeal remedy: neighbors Helena Freeman, John Gaustad, Cecilia Evans, and Carl Shusterman were the appellants. (AR0332, 335, 337, 339.) And as discussed herein, both appellants and Fix the City raised the issue of inadequate replacement units to the City during the approval process.

The Joint Opposition does not contest that state law requires replacement units, but misleadingly argues that the replacement unit requirements "do not apply to Project." (Opp., p. 17:21.) The Joint Opposition contends that Petitioner did not address the "substantial evidence" in the record supporting the determination that no replacement units were required. However, the evidence cited in the Joint

Opposition simply repeats the conclusion of the July 5, 2019, ***provisional*** determination by HCIDLA regarding replacement units. (Opp., pp. 18:18-19:16.) Relying on this, the Joint Opposition insists that the units on the project site "do not constitute 'rental' units that require replacement." (Opp., p. 17:14-15.) However, the repetition of an erroneous and inaccurate statement does not make it true.

HCIDLA's July 2019 provisional determination is clearly erroneous, because it failed to address a relevant legal factor in determining whether replacement units are required. As the Director's Determination put it, state law "requires applicants of Density Bonus projects to demonstrate compliance with the housing replacement provisions which require replacement of rental dwelling units that either exist at the time of application of a Density Bonus project, or have been vacated or demolished in the five-year period preceding the application of the project. This applies to all pre-existing units that have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income; ***subject to any other form of rent or price control***; or ***occupied a by Low or Very Low Income Household***." (AR0275 [emphasis added].)

HCIDLA's July 2019 letter states at the outset that its analysis is not yet complete: "Information about the existing property for the five (5) years prior to the date of the Application is required in order to make a determination. HCIDLA received the Application on or about June 13, 2019, so HCIDLA must collect data from June 2014 to June 2019.) (AR0062.) This data does not appear in the record, and appears not have been provided, leaving this provisional determination as the final word on the topic at the time of the Project's consideration by the Director and at the hearing before the City Planning Commission.[2]

The HCIDLA provisional determination notes that, in a number of databases, the property has "a use code of '0300-Residential-Three Units'" and that "the property contains a multifamily structure." (AR0062.) "Per the Rent Stabilization Ordinance (RSO) Unit, the property received an exemption from the RSO because it was Ellis'd in 2003." (*Ibid.*) The provisional determination says "the Owner has not applied for a new Building Permit but has applied for Demolition Permits." (*Ibid.*) The analysis

[2] It is also notable that on the application, the applicant did not provide proof of filing with the Housing and Community Investment Department (AR0013) and on the "Primary Checklist and Deemed Complete for Case Filing" form, one of the only boxes not checked on the form is for proof of filing with HCIDLA. (AR0022, AR0586).)

concludes, "HCIDLA has determined that there were no residential units built or demolished on the properties within the last five (5) years." (*Ibid.*) But this analysis does not address the question whether any units on the property were *rented* in the last five years, and this is a key question. If the three units on site were returned to the rental market they were legally subject to the RSO, and if the income of the tenants cannot be verified, the units are deemed to be occupied by low income tenants in proportion to the such tenants in rental housing in the city in general. (Gov. Code, § 65915, subd. (c)(3)(B)(i).)

The Joint Opposition concedes that under the City's Ellis Act provisions, units that are withdrawn from the rental market "are no longer considered 'rental dwelling units' for purposes of the replacement units in Government Code section 65915(c)(3) **unless and until the withdrawn units are returned to the rental market**, even though the site remains designated as an RSO property." (Opp., p 18:13-15.) And that is precisely what happened here. The applicant admitted as much in multiple documents filed in connection the application and the TOC incentive process. In the May 3, 2019 "Department of City Planning Application," the applicant listed for "Present Use: Three Units-Apartment complex," and on the next page, listed as the "Number of Market Rate Units" as "3." (AR0011-12.) The application was completed under penalty of perjury and signed by Real Party in Interest Benarsi Agarwal. (AR0015.)

On the "Environmental Assessment Form," (AR0029) the applicant was asked if the property "contain[ed] any vacant structure," to which the answer was yes (AR0031). In response to the question "how long it has been vacant," the applicant answered "approximately 4-6 months," and specifically stated that 3 residential dwelling units would be removed as a result of the project. (*Ibid.*)

On the January 2, 2019 "Transit Oriented Communities- Referral Form" (AR0148), the applicant completed Item 12, Replacement Units, answering "Yes" to the question "Units subject to the Rent Stabilization Ordinance not already listed above?" (AR0153.) On the same form, the applicant listed the number of existing units as three 2-bedroom units (AR0149.) The form notes that, "Per AB2556, are the number of replacement units and number of bedrooms equivalent to that being demolished (as shown on Existing Development Table on page 2 above)?" (AR0153.) The applicant answered (incorrectly): "Yes." (*Ibid.*) Of course, this is consistent with what is shown in ZIMAS, which also appears in the record. (AR0040.)

In multiple places, the applicant revealed that, unsurprisingly, the units that were removed from the rental market under the Ellis Act in 2003 had been returned to the rental market during the more than 15 years between 2003 and the 2019 submittal of the application, and the applicant even conceded that these units were subject to the RSO. Yet this information was entirely ignored by Planning staff, the Director, and the City Planning Commission when reviewing the Project's request for incentives under the TOC Guidelines. Instead, they all relied on the initial determination of HCIDLA, all the while acknowledging that this determination was only a provisional one. Staff stated at the City Planning Commission that "pursuant to the determination made by the Los Angeles Housing and Community Investment Department, dated July 5, 2019, AB 2556 determined that no units are subject to replacement under AB2256 (sic) **provisional and subject to verification** by HCID LA's rent division." (AR0927:17-21.) The same statement appears in the Director's Determination (AR0275), and the Appeal Recommendation Report (AR0364).

Thus, the record is clear that (a) there were units rented at the 10757 Wilkins property within 4-6 months of the submittal of the application and (b) that the determination the City exclusively relied upon regarding the status of these properties was provisional and failed to address whether the previously withdrawn properties had been returned to the rental market. As a matter of law, the return of properties withdrawn from the market under the Ellis Act subjects them to re-regulation under the RSO, a premise that the Joint Opposition does not dispute.

While the Joint Opposition provides a copy of the recorded "Notice of Intention to Withdraw Accommodations from Rent or Lease," in its Request for Judicial Notice, it provides no update since July 2003 on the use of the property in 10757 Wilkins. (Joint Opp. RJN, Exh. 4.) Under Evidence Code section 412, "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Yet there is no evidence proffered that this building has sat empty since 2003 (indeed, the evidence in the record is that the units were vacated 4-6 months prior to the application submittal (AR0031)).

The record also contains the testimony of Mr. John Gaustad, whose home abuts the property. (AR0921.) Mr. Gaustad noted the three units (which, as a neighbor, would likely include the

observation of human living in those units), and expressed the belief that the units were subject to rent control. (*Ibid.*) He elaborated, "Planning Department records are inconsistent with and in conflict with other public records, such as ZIMAS, which shows the three preexisting units are subject to rent control. . . . my research indicates the most recent landlord declaration filed with the Housing Department was August 2003. It's my understanding there have been multiple landlords and owners of this property since 2003. And Planning Department's file, as well as current records, do not conclusively indicate this property to be exempt from rent control for the applicable five-year period." (*Ibid.*) Moments later, Real Party in Interest Agarwal commented, and made no response at all to Mr. Gaustad's observations about rental units. (AR0924:13-20.)

Petitioner has obtained a certified copy of the Declaration of Registration for the property at 10757 Wilkins Avenue, as of February 7, 2022. (Petitioner's Reply Request for Judicial Notice ("Reply RJN"), Exh. 11.) The document explains that it is a record of "residential rental properties which have bene registered in accordance with the Los Angeles Rent Stabilization Ordinance (RSO) and Housing Regulations." (*Ibid.*) The records show that during the period July 1, 2018 to June 30, 2019, three out of three units at this property were registered and RSO fees had been paid. (*Ibid.*)

It is a both a state and city policy to ensure that *any* rent controlled units existing within 5 years of an application for a development project that will demolish those units are replaced with an equal number of replacement units. The three units that everyone agrees exist at 10757 Wilkins Avenue pre-date 1978 and were subject to rent control. The applicant's own statements on the record concede that these units are subject to rent control. (AR0153.) The applicant acknowledged that the units had not been vacant for more than 4-6 months in 2019. (AR0031.) The registration records of the Los Angeles Housing Department are consistent with these statements, showing rental units registered in 2018-2019, just before the application was submitted. (Reply RJN, Exh. 11.) Withdrawal of the units in 2003 does not permanently shield them from rent control, if they are subsequently re-rented. Nothing in the Joint Opposition goes so far as to claim that the units were not actually rented, only that they are not "rental" units. As the record makes clear, these units were indeed re-rented, and therefore were subject to replacement. As the parties agree, a project must "meet[] any applicable replacement requirements of

California Government Code Section 65915(c)(3),” in order to be eligible for TOC Incentives. (RJN, Exh. 6, p. 1.) Otherwise, the project would not be an “Eligible Housing Development.” (*Id.* at p. 3.)[3]

Thus, the determination whether a project is providing sufficient replacement units must be made at the time the TOC Incentives are awarded, not simply “prior to the issuance of any building permit,” as the Director’s Determination stated. (AR0267.) It was arbitrary and capricious for the City Planning Commission and the Planning Director, in light of the evidence in the record, to rely exclusively on a provisional determination of HCIDLA without undertaking any inquiry as to the current rental status of three existing on-site units, particularly where the application materials disclosed that these units were, in fact, being rented. The Project should have been required to provide three replacement units, and is therefore not an “Eligible Housing Development” that is qualified to receive TOC Incentives.

CONCLUSION

The City abused its discretion by approving the Project at 10757 West Wilkins, because it allowed significant departures from the requirements of the Specific Plan without compliance with the Plan’s procedure for adjustment or exception. In addition, the approval was invalid because the Project did not satisfy the applicable replacement unit requirements. The entitlement must be rescinded.

DATED: February 10, 2022

Respectfully Submitted,
STRUMWASSER & WOOCHER LLP
Fredric D. Woocher
Beverly Grossman Palmer

By _____
Beverly Grossman Palmer

Attorneys for Petitioner and Plaintiff Fix the City, Inc.

[3] The replacement unit requirements of Government Code 65915(c)(3) are detailed. If the units are occupied at the time of the application, all units must be replaced at the same affordability level as the occupants or if no information about the income category of the occupants is known, in the same proportion of lower income renter households to renter households in the jurisdiction. (Gov. Code, 65915, subd. (c)(3)(B)(i).) If the units were vacated within the five years prior, the units must be replaced at income levels of the prior occupants, or in proportion to low income renters in the jurisdiction. (*Id.*, at (B)(ii).) For rent controlled units, a jurisdiction may either require such units to be affordable or require such units to be replaced “in compliance with the jurisdiction’s rent or price control ordinance.” (*Id.*, at (C)(i)-(ii).) Units must have the same number of bedrooms as the removed units. (*Id.* at (D).) Since the City wrongly failed to determine whether replacement units were required, none of this analysis was conducted by the City to evaluate how replacement unit compliance would be met.

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Fix The City v. City of Los Angeles et al.*
L.A.S.C. Case No. 20STCP03529
Related Case No. 20STCP01569
Related Case No. 19STCP03740

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024. My electronic mail address is jthomson@strumwooch.com.

On **February 10, 2022**, I served the foregoing document(s) described as **PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on all appropriate parties in this action, as listed on the attached Service List, by the method stated:

☒ If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by causing the documents to be sent to One Legal, the Court's Electronic Filing Services Provider for electronic filing and service. Electronic service will be effected by One Legal's case-filing system at the electronic mail addresses indicated on the attached Service List.

☐ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

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

Executed on **February 10, 2022**, at Los Angeles, California.

Jeff Thomson

SERVICE LIST

Fix The City v. City of Los Angeles et al.
L.A.S.C. Case No. 20STCP03529
Related Case No. 20STCP01569
Related Case No. 19STCP03740

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