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February 13, 2023

Michael Gates, Esq.
City Attorney
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

RE: Proposed Ordinance Prohibiting Builder's Remedy Applications Under the Housing Accountability Act

Dear City Attorney Gates:

We write to advise you that the proposed *Zoning Text Amendment No. 2023-001* to be considered for approval at the February 14, 2023 meeting of the City of Huntington Beach Planning Commission is contrary to state law.

The proposed ordinance purports to prohibit all applications to build affordable housing projects under the so-called "Builder's Remedy" provided for by the Housing Accountability Act (HAA). The proposal responds to a December 2022 directive from the City Council instructing you to draft an ordinance to "make it clear to the entire community that Huntington Beach will fight any developer that seeks to develop pursuant to Builder's Remedy laws."[1] There is no legal basis under the HAA or any other state law that allows Huntington Beach to override the HAA by categorically prohibiting any and all Builder's Remedy projects based on speculation that such projects could raise unspecified environmental or health concerns. We write to caution you before the City proceeds any further in adopting such an ordinance in conflict with state law.

The Builder's Remedy is designed to boost housing production for not only the most vulnerable residents, but also middle-income households. It is triggered only if the City shirks its basic duty to provide its residents with a substantially compliant Housing Element. (See Gov. Code § 65589.5, subd. (d)(5) [colloquially known as the "Builder's Remedy" provision], and subd. (h)(2)(C)(3) [defining affordable housing projects under the HAA to mean projects that comprise of 20% low-income, or 100% moderate-income, housing units].)

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[1] See Council Member Items Report 22-1096, dated December 20, 2022, with subject line, "Oppose RHNA Mandate and Adopt an Ordinance to Ban Builder's Remedy Developments."

The suggested findings in support of the ordinance attempt to justify this blanket prohibition based on the speculative assertion that affordable housing projects authorized under the HAA "*could* be built near environmentally sensitive areas that could harm the environment or next to industrial sites where residents will be subject to diminished air, light and sound quality because of being next to large industrial complexes." (Emphasis added.)

To the extent the ordinance is motivated by concerns about impacts on environmentally sensitive areas or the health of the City's residents, state law provides mechanisms for the City to address such issues. First, with regard to environmentally sensitive areas, the HAA expressly provides that the California Environmental Quality Act (CEQA), as well as the California Coastal Act, apply to HAA projects. (Gov. Code § 65589.5, subd. (e).) Cities are not relieved of their duty to comply with CEQA when reviewing and approving such projects. And if the project violates a specific state or federal law, the HAA does not mandate the project's approval if there is no feasible method to comply without rendering the project unaffordable to low- and moderate-income households. (Gov. Code § 65589.5, subd. (d)(3).). Any good faith attempt at applying these laws would reveal that the HAA, CEQA, and the Coastal Act are complementary of, and not pitted against, each other. (See, e.g., *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010 185 Cal.App.4th 924 [holding that CEQA does not require environmental review of concerns a city had no discretion to consider]; *Banker's Hill, et al. v. City of San Diego* (2006) 139 Cal.App.4th 249 [upholding a city's determination that a housing project fell within CEQA's urban infill development exemption]; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1352 ["Unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantive evidence" under the CEQA].)

Second, with regard to the possibility that a Builder's Remedy project could be proposed adjacent to an industrial site that could subject residents to "diminished air, light and sound quality," the HAA permits cities like Huntington Beach to deny a particular project based on specified health and safety threats if certain findings are made. 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).). Zoning and general plan inconsistency 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, the statutory scheme is clear that HAA's health and safety exemption may be invoked only on a case-by-case, project-specific basis; nowhere does the HAA suggest that generalized concerns regarding "nuisance problems" can be invoked to flat-out prohibit a class of HAA-eligible projects. The proposed ordinance, therefore, directly conflicts with the HAA.

Courts have made clear that cities like Huntington Beach are not exempt from and may not enact ordinances overriding state housing laws including the HAA. (See, e.g., *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820 [HAA]; *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277 [SB 35]; *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683 [Surplus Lands Act]; *Coalition Advocating Legal*

Housing Options v. City of Santa Monica (2001) 88 Cal.App.4th 451 [ADUs]; *Buena Vista Gardens Apartments Assn v. City of San Diego* (1985) 175 Cal.App.3d 289 [Housing Element Law]; *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18 [housing anti-discrimination laws].) "The HAA is today strong medicine precisely because the Legislature has diagnosed a sick patient. We see no inconsistency between the provisions of the HAA and the California Constitution." (*California Renters Legal Advocacy & Education Fund,* 68 Cal.App.5th at p. 854.)

Finally, we note that although the suggested findings in support of the draft ordinance cite environmental and health concerns, your February 7, 2023 memorandum to the Planning Commission asserts more generally that allowing construction of HAA affordable housing projects would create "nuisance problems." The implication that housing low-to middle-income families is a "nuisance problem" is deeply troubling. Huntington Beach, like all cities in California, should be encouraging housing developers to propose more affordable housing projects, not restricting and stigmatizing them. To the extent the City is concerned about its ability to deny a housing project that is inconsistent with an outdated zoning code and General Plan, the City should be directing its resources to updating and adopting, well before the statutory deadline, a substantially compliant Housing Element certified by the Department of Housing and Community Development

The Attorney General urges you to reconsider your position in accordance with state law and stands ready to take action to enforce California's housing laws if necessary.

Sincerely,

DAVID PAI
Supervising Deputy Attorney General

For ROB BONTA
Attorney General

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