

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 | Facsimile: 415.837.1516
www.allenmatkins.com

Caroline G. Chase
E-mail: cchase@allenmatkins.com
Direct Dial: 415.273.7455 File Number: 394728.00001/4902-8997-4610.1

Via Electronic Mail

July 1, 2025

William C. Mazzota
ALESHIRE & WYNDER, LLP
wmazzota@awattorneys.com

Re: Notice of HAA Violations - Builder's Remedy Project at 11841 Upland Way, Cupertino, California

Mr. Mazzota:

We write on behalf of our client, Nageshwara Vempaty ("Applicant"), the owner of the property located at 11841 Upland Way, Cupertino, California 95014 ("Property"). As you are aware, the Applicant proposes a six-unit mixed-income housing development project on the Property ("Project"). There is no doubt that the Project continues to qualify for the "Builder's Remedy" under the Housing Accountability Act ("HAA") pursuant to the timely submittal of a SB 330 preliminary application, a full development application ("Project Application"), and a Project Application resubmission.

On June 6, 2025, the City of Cupertino ("City") Planning Division erroneously concluded that the Project is no longer vested on the basis that the Project Application had not been deemed complete within 90 days following the City's first incompleteness determination. The City's position was confirmed in a subsequent letter from your office dated June 20, 2025. We understand that the City is currently litigating in defense of this position; however, its interpretation of Government Code section 65941.1(e)(2) is clearly incorrect for the reasons set forth in our letter dated June 13, 2025 (attached as Exhibit A and incorporated herein). There is no ambiguity that this provision allows for multiple 90-day periods.

Again, the City is also in violation of the HAA under Government Code section 65589.5(h)(6)(D) because its actions constitute "a course of conduct undertaken for an improper purpose, such as to harass or to cause unnecessary delay or needless increases in the cost of the proposed housing development project, that effectively disapproves the proposed housing development without taking final administrative action."

This letter is submitted for purposes of providing the City the requisite "written notice detailing the challenged conduct and why it constitutes disapproval to the local agency established under Section 65100." (Gov. Code § 65589.5(h)(6)(D)(i)). The City's conduct effectively disapproves the Project

William C. Mazzota
July 1, 2025
Page 2

without taking final administrative action in that the City flatly refuses to process the Project Application for the Project under the Builder's Remedy.

The City must comply with the HAA. Government Code section 65589.5(h)(6)(D) further provides:

- “Within five working days of receiving the applicant’s written notice described in clause (i), the local agency shall post the notice on the local agency’s internet website, provide a copy of the notice to any person who has made a written request for notices pursuant to subdivision (f) of Section 21167 of the Public Resources Code, and file the notice with the county clerk of each county in which the project will be located. The county clerk shall post the notice and make it available for public inspection in the manner set forth in subdivision (c) of Section 21152 of the Public Resources Code.”
- “The local agency shall consider all objections, comments, evidence, and concerns about the project or the applicant’s written notice and shall not make a determination until at least 60 days after the applicant has given written notice to the local agency pursuant to clause (i).”
- “Within 90 days of receipt of the applicant’s written notice described in clause (i), the local agency shall issue a written statement that it will immediately cease the challenged conduct or issue written findings that comply with both of the following requirements:”
 - “The findings articulate an objective basis for why the challenged course of conduct is necessary.”
 - “The findings provide clear instructions on what the applicant must submit or supplement so that the local agency can make a final determination regarding the next necessary approval or set the date and time of the next hearing.”
- “If a local agency continues the challenged course of conduct described in the applicant’s written notice and fails to issue the written findings described in clause (iv), the local agency shall bear the burden of establishing that its course of conduct does not constitute a disapproval of the housing development project under this subparagraph in an action taken by the applicant.”
- “If an applicant challenges a local agency’s course of conduct as a disapproval under this subparagraph, the local agency’s written findings described in clause (iv) shall be incorporated into the administrative record and be deemed to be the final administrative action for purposes of adjudicating whether the local agency’s course of conduct constitutes a disapproval of the housing development project under this subparagraph.”

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

William C. Mazzota

July 1, 2025

Page 3

Please be advised that the City's HAA violations will be promptly reported to HCD, which may in turn refer the enforcement matter to the California Attorney General.

Regards,



Caroline G. Chase

Cc: Tina Kapoor, Acting City Manager
Ben Fu, Community Development Director
Emi Sugiyama, Senior Planner

Enclosure

Exhibit A

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 | Facsimile: 415.837.1516
www.allenmatkins.com

Caroline G. Chase
E-mail: cchase@allenmatkins.com
Direct Dial: 415.273.7455 File Number: 394728.00001/4934-0970-8876.4

Via Electronic Mail

June 13, 2025

Ben Fu, Community Development Director
City of Cupertino
benjaminf@cupertino.gov

Re: Continued Vesting of Builder's Remedy Project at 11841 Upland Way, Cupertino, California

Mr. Fu:

We write on behalf of our client, Nageshwara Vempaty ("Applicant"), the owner of the property located at 11841 Upland Way, Cupertino, California 95014 ("Property"). As you are aware, the Applicant proposes a six-unit mixed-income housing development project on the Property ("Project"). There is no doubt that the Project continues to qualify for the "Builder's Remedy" under the Housing Accountability Act ("HAA") pursuant to the timely submittal of a SB 330 preliminary application, a full development application ("Project Application"), and a Project Application resubmission.

On June 6, 2025, the City of Cupertino ("City") Planning Division erroneously concluded that the Project is no longer vested on the basis that the Project Application had not been deemed complete within 90 days following the City's first incompleteness determination. We understand that the City is currently litigating in defense of this position; however, its interpretation of Government Code section 65941.1(e)(2) is clearly incorrect for the reasons set forth below. There is no ambiguity that this provision allows for multiple 90-day periods.

As explained in the petition for writ of mandate filed on April 8, 2025, with the Superior Court of Santa Clara County in the related lawsuit against the City¹:

- On February 12, 2025, HCD issued a letter to the Town of Los Gatos, advising Los Gatos that "under the PSA [Permit Streamlining Act], the 90-day period for a developer to resubmit an application after an incompleteness determination resets with each incompleteness determination."

¹ Case No. 25CV462924. Exterior quotation marks omitted below.

Ben Fu, Community Development Director
June 13, 2025

Page 2

- In other words, HCD confirmed that the HCA [Housing Crisis Act] refers to, and incorporates, the PSA's iterative process whereby each time an applicant resubmits an application and receives an incompleteness determination, the applicant receives another 90 days to respond before the preliminary application expires.
- HCD similarly acknowledged this iterative process in an August 22, 2024 Notice of Violation to the City of Beverly Hills, wherein HCD informed Beverly Hills "that the 90-day deadline resets after each incompleteness determination. A project with multiple incompleteness letters and responses may have multiple 90-day periods."
- This iterative process was adopted in a recent Los Angeles Superior Court ruling, which concluded "that when an applicant receives an incompleteness determination pursuant to section 65943 – not just the first incompleteness determination – an applicant has 90 days to respond." (*Janet Jha v. City of Los Angeles, et al.* (Los Angeles Sup. Ct., Case No. 23STCP03499)).

Furthermore, on June 5, 2025, the California Attorney General issued a legal alert to all local agencies, including the City, highlighting recent amendments to the HAA and the recent Superior Court decisions interpreting the HAA's provisions regarding the Builder's Remedy ("Attorney General Legal Alert").² As explained in the Attorney General Legal Alert: "Consistent interpretation and application of the HAA statewide, including processing Builder's Remedy applications without delay, is essential to reaching our collective mandate to resolve the housing shortage crisis."

We caution that as explained in the Attorney General Legal Alert, consequences for the City's failure to "properly implement the Builder's Remedy" could include the following, which "emphasize the importance of the HAA and the Legislature's intent to further promote housing development projects"³:

- **Referral to or Intervention by the Attorney General:** Where a local government has received a complete Builder's Remedy application after the housing element deadline in Government Code section 65588, subdivision (e), but before HCD has issued a substantial compliance certification for the local government's housing element, the local government's refusal to process the Builder's Remedy application in accordance with the law may result in HCD notifying the Attorney General of an HAA violation pursuant to Government Code section 65585, subdivision (j). (See also Gov. Code, § 65585.01 [providing HCD and the Attorney General an automatic right to intervene in existing third-party enforcement actions].)

² Legal Alert from the California Department of Justice Office of the Attorney General to all Cities, Counties, Local Agencies and other interested parties, June 5, 2025.

³ Exterior quotation marks omitted below.

Ben Fu, Community Development Director

June 13, 2025

Page 3

- **HAA Penalties:** Where a court has found that a local government has violated the HAA, a local government is potentially exposed to certain penalties under the HAA, including attorney's fees, and a minimum fine of \$10,000 per unit of the proposed project pursuant to Government Code section 65589.5, subdivision (k). If a court finds that a local government acted in bad faith in violating the HAA and failed to follow a court's order or judgment, fines pursuant to Government Code section 65589.5, subdivision (k) will be multiplied by a factor of five. (Gov. Code, § 65589.5, subd. (l).) If a court has found that a local government previously violated the HAA within the planning period, the fines will be multiplied by an additional factor for each previous violation. (*Ibid.*)
- **HAA Appeal Bond Provision:** Where a local government appeals a court order finding that the local government violated the HAA, the local government must post an appeal bond pursuant to Government Code section 65589.5, subdivision (m). The appeal bond provision is evidence of the Legislature's intent that the HAA be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5, subd. (a)(2)(L).)

Please also be aware that pending Assembly Bill 712 would expand the remedies for a developer or nonprofit housing corporation that prevails in a lawsuit to enforce the HAA (and other state housing laws) against a local agency to include reasonable attorneys' fees and costs of suit.

We further caution that the California Attorney General has taken an active role in defending Builder's Remedy projects over the past year. For example, the Attorney General recently intervened in *California Housing Defense Fund, et al. v. City of La Cañada Flintridge*⁴ by petitioning the Los Angeles Superior Court for a writ of mandate requiring La Cañada Flintridge to process the developer's Builder's Remedy application in accordance with state law. On March 4, 2024, the Superior Court granted that petition for writ of mandate. As explained in the Attorney General Legal Alert⁵:

- In ordering La Cañada Flintridge to process the Builder's Remedy application in accordance with state law, the Superior Court focused on three key points:
 - The Legislature has expressed its intent that the HAA "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5, subd. (a)(2)(L); *Cal. Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 854).

⁴ Super. Ct. L.A. County, Apr. 5, 2024, Case No. 23STCP02614.

⁵ Exterior quotation marks omitted below.

Ben Fu, Community Development Director
June 13, 2025

Page 4

- Pursuant to the HAA, a Builder's Remedy application vests at the time of submission of a complete preliminary application.
- The refusal to process a timely Builder's Remedy application is a violation of the HAA.
- Specifically, as to the first point, the court held that a "disapproval" of a Builder's Remedy application is broadly interpreted under the HAA.
- Finally, the court concluded that the disapproval of the developer's Builder's Remedy application, and La Cañada Flintridge's refusal to process the application as a Builder's Remedy application, was a violation of the HAA.
- La Cañada Flintridge appealed, and on February 28, 2025, the superior court ordered La Cañada Flintridge to either post an appeal bond of \$14 million, pursuant to Government Code section 65589.5, subdivision (m), or dismiss its appeal. On March 4, 2025, La Cañada Flintridge dismissed its appeal.

The City's position that the Project's SB 330 preliminary application is no longer vested constitutes an unlawful disapproval of a housing development project in violation of the HAA under Government Code section 65589.5(h)(6)(H) for "mak[ing] a written determination that a preliminary application . . . has expired or that the applicant has otherwise lost its vested rights under the preliminary application" for an improper reason. The City is also in violation of the HAA under Government Code section 65589.5(h)(6)(D) because its actions constitute "a course of conduct undertaken for an improper purpose, such as to harass or to cause unnecessary delay or needless increases in the cost of the proposed housing development project, that effectively disapproves the proposed housing development without taking final administrative action."

We request that the City retract its erroneous position in writing by June 20, 2025. Otherwise, we will be forced to report these HAA violations to HCD, which may in turn refer the enforcement matter to the California Attorney General.

Thank you in advance for your cooperation.

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

Ben Fu, Community Development Director

June 13, 2025

Page 5

Regards,



Caroline G. Chase

Cc: Tina Kapoor, Acting City Manager
Emi Sugiyama, Senior Planner