

1 Keith E. Diggs
2 YIMBY LAW
3 57 Post Street #908
4 San Francisco, CA 94104
5 (703) 409-5198
6 No fax number
7 keith@yimbylaw.org
8 State Bar No. 344182

FILED

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JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: B. Zoller, Deputy

Attorney for Petitioner Yes In My Back Yard

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF MARIN**

10 YES IN MY BACK YARD, a California
11 nonprofit public benefit corporation,

12 Petitioner,

13 v.

14 TOWN OF FAIRFAX,

15 Respondent.

Case No.: CIV 23 00248

**VERIFIED PETITION FOR WRIT OF
MANDATE**

(Code Civ. Proc. § 1085; Gov. Code §§ 65587,
65751)

16 Petitioner YES IN MY BACK YARD alleges as follows:

- 17 1. "California has a housing supply and affordability crisis of historic proportions." (Gov. Code
18 § 65589.5, subd. (a)(2).)
- 19 2. To address this crisis, the State's Housing Element Law (Gov. Code §§ 65580 *et seq.*) required
20 Bay Area cities and counties to adopt the sixth revisions of their housing elements by January 31, 2023.
- 21 3. The Town of Fairfax did not meet this deadline.
- 22 4. On behalf of the public interest in alleviating the housing crisis, Yes In My Back Yard petitions
23 the Court for a writ of mandate compelling the Town to adopt a revised housing element.

24 **PARTIES**

- 25 5. Petitioner Yes In My Back Yard is a California nonprofit public benefit corporation.
- 26 6. Yes In My Back Yard litigates for housing through its project YIMBY Law, whose mission is to
27 end the housing shortage and achieve affordable, sustainable, and equitable housing for all.
- 28 7. Respondent Town of Fairfax ("the Town") is an incorporated town in Marin County, California.

1 **JURISDICTION AND VENUE**

2 8. The Court has subject matter jurisdiction under Sections 65587 and 65751 of the Government
3 Code and Section 1085 of the Code of Civil Procedure.

4 9. The Court has personal jurisdiction over the Town consistent with Section 410.10 of the Code of
5 Civil Procedure.

6 10. Venue is proper under Sections 394–395 of the Code of Civil Procedure.

7 **STATUTORY BACKGROUND**

8 11. California’s Housing Element Law (Gov. Code §§ 65580 *et seq.*)¹ is the State’s main policy for
9 addressing the housing crisis.

10 12. A “housing element” is a mandatory element of a county’s or city’s general plan. (§ 65302, subd.
11 (c).)

12 13. “Notwithstanding subdivision (a)” of Section 65700, *all* the provisions of the Housing Element
13 Law apply to general-law and charter cities alike. (§ 65700, subd. (b).)

14 14. The Department of Housing and Community Development (“HCD”) is the State agency that
15 administers the Housing Element Law. (See Health & Saf. Code §§ 50400, 50459.)

16 15. The driving mechanism of the Housing Element Law is known as the “regional housing need
17 allocation” or “RHNA.” (Gov. Code §§ 65584.03, subd. (d); 65584.04, subd. (g)(2); 65584.05, subd.
18 (e)(1); 65584.06, subd. (f); 65584.07, subd. (b)(1); 65584.08, subd. (a)(4)–(5); 65584.09, subd. (a).)

19 16. Housing elements are updated on a cyclical basis. (See § 65588.)

20 17. Bay Area governments are now entering their sixth cycle of housing-element revisions.

21 18. Each cycle, HCD “determine[s] the existing and projected need for housing for each region” in
22 the State. (§§ 65584, subd. (a)(1); 65584.01.)

23 19. HCD allocates this RHNA to the regional council of governments, as applicable. (See §§ 65584–
24 65584.02.)

25 20. The regional council of governments then distributes its RHNA among its local governments.
26 (See §§ 65584.04–.05.)

27 21. HCD distributes the RHNA among local governments where no council exists. (§ 65584.06.)
28

¹ Subsequent references are to the Government Code unless otherwise specified.

1 22. With its share of the RHNA assigned, a locality must revise its housing element with a plan to
2 “make adequate provision for the [housing] needs of all economic segments of the community.”
3 (§ 65583.)

4 23. A housing element must provide “[a]n inventory of land” with zoned capacity “to meet the
5 locality’s housing need for [each] designated income level” by the end of the cycle. (§§ 65583, subd.
6 (a)(3).)

7 24. The site inventory must meet detailed and justiciable statutory requirements. (See § 65583.2.)

8 25. Where existing zoned capacity is insufficient to meet the RHNA, the locality must rezone for
9 sufficient capacity within three years (if timely and adequately revised) or one year (if not). (§ 65583,
10 subd. (c)(1)(A).)

11 26. A housing element must, in its site inventory and otherwise, “affirmatively further fair housing.”
12 (§ 65583, subds. (a)(3), (b), (c)(1), (c)(5), (c)(10)(A); 65583.2, subd. (c); see § 8899.50 [definition].)

13 27. A housing element must also “remove governmental . . . constraints to the maintenance,
14 improvement, and development of housing . . . for all income levels” where “appropriate and legally
15 possible.” (§ 65583, subd. (c)(3).)

16 28. A revision to a housing element must be prepared long before its adoption.

17 29. Housing Element Law spells out detailed requirements for public and administrative review.

18 30. “[T]he first draft revision of a housing element” must be made “available for public comment for
19 at least 30 days.” (§ 65585, subd. (b)(1).)

20 31. “[I]f any comments are received, the local government shall take at least 10 business days after
21 the . . . public comment period to consider and incorporate public comments into the draft.” (*Ibid.*)

22 32. “At least 90 days prior to adoption of a revision of its housing element,” the locality must submit
23 the draft to HCD for administrative review. (*Ibid.*)

24 33. HCD then makes “written findings” as to whether the draft “substantially complies” with the
25 Housing Element Law. (*Id.*, subd. (d).)

26 34. Only after HCD has had time to review a draft may the locality adopt it.

27 35. If HCD finds that a draft “does not substantially comply,” the locality can either “[c]hange” its
28 draft to comply or “[a]dopt” with “written findings” rebutting HCD’s findings. (*Id.*, subd. (f).)

1 36. Housing Element Law specifies consequences for failure to substantially comply.

2 37. A locality without a “revised housing element . . . in substantial compliance” is prohibited from
3 using its general plan and zoning standards to “disapprove” or “render[] . . . infeasible” any housing
4 development project meeting certain affordability requirements. (§ 65589.5, subs. (d)(5), (h)(3).)

5 38. As described above, a locality that fails to obtain HCD’s finding of substantial compliance
6 within 120 days of the statutory deadline must complete all required rezoning within one rather than
7 three years. (§ 65583, subd. (c)(1)(A); see above ¶ 25.)

8 39. “[A]ny interested party” may petition for a writ of mandate compelling “compliance with the
9 provisions” of the Housing Element Law. (§ 65587, subd. (b); see also § 65751.)

10 40. “[I]f the court” in such a proceeding enters “final judgment in favor of the . . . petitioner,” then
11 the locality must “bring its . . . [housing] element . . . into compliance . . . within 120 days.” (§ 65754.)

12 41. “The court shall include” in such a judgment “one or more” additional specified provisions,
13 including suspension of nonresidential building permits and mandatory approval of residential building
14 permits, “until the [locality] has substantially complied.” (§ 65755, subs. (a)(1), (a)(4).)

15 42. “[T]he court may, upon a showing of probable success on the merits, grant the relief provided in
16 Section 65755 as temporary relief.” (§ 65757.)

17 43. “Notwithstanding . . . Section 65585,” a locality subject to a writ of mandate must submit a draft
18 revision of its housing element to HCD “at least 45 days prior to . . . adoption.” (*Id.*, subd. (a).)

19 44. The locality must then conform its zoning ordinance within 120 days of adoption. (*Id.*, subd. (b).)

20 45. “[A]ny action necessary” to comply with the writ is statutorily exempt from the California
21 Environmental Quality Act. (§ 65759, subd. (a); see also Pub. Res. Code §§ 21000 *et seq.*)

22 **STATEMENT OF FACTS**

23 46. Bay Area governments, including the Town, were due to adopt the sixth revision of their housing
24 elements on January 31, 2023. (See HCD, *Housing Element Update Schedule*, [https://www.hcd.ca.gov/
25 community-development/housing-element/docs/6th-web-he-duedate.pdf](https://www.hcd.ca.gov/community-development/housing-element/docs/6th-web-he-duedate.pdf), p.5.)

26 47. “At least 90 days prior” to this statutory deadline (Gov. Code § 65585, subd. (b); see above
27 ¶¶ 29–34), the Town had not submitted a draft revision of its housing element to HCD.

28 48. The Town has not adopted a sixth revision of its housing element.

1 49. Together with two other housing organizations, Yes In My Back Yard’s litigation project
2 YIMBY Law contacted the Town about its failure and inability to comply with Housing Element Law.

3 50. In a letter to the Town, YIMBY Law offered to “forgo immediate litigation” against the Town if
4 the Town would acknowledge in writing that it would:

- 5 a. “not be in substantial compliance” by the statutory deadline;
- 6 b. “be prohibited from rejecting any [affordable] housing development project based on
7 subdivision (d)(1) or (d)(5) of the Housing Accountability Act (HAA), Government Code
8 Section 65589.5,” from February 1, 2023, until such time as the Town adopts a
9 substantially compliant housing element; and
- 10 c. “be estopped” from invoking those subdivisions in any litigation arising from “any such
11 project that is the subject of an application or preliminary application submitted” during
12 that same period of time.

13 51. This letter was sent by email on December 16, 2022, to the Town’s manager, planning &
14 building services director, attorney, and clerk on behalf of its council.

15 52. The Town never responded to this letter.

16 **BENEFICIAL INTEREST**

17 53. “The availability of housing is of vital statewide importance . . .” (§ 65580, subd. (a).)

18 54. The Legislature has declared that the Town has a “responsibility” to “make adequate provision
19 for the housing needs of all economic segments of the community.” (*Id.*, subd. (d).)

20 55. Legalizing “the development of housing” is “essential” to achieving this goal. (*Id.*, subd. (f).)

21 56. The Legislature intends that housing elements “move toward” this goal. (§ 65581, subd. (b).)

22 57. The writ of mandate is sought in this action to enforce the Town’s public duty.

23 **FIRST CAUSE OF ACTION**

24 **Writ of Mandate to Compel Compliance with Housing Element Law**

25 **(Gov. Code §§ 65587, 65751; Code Civ. Proc. § 1085)**

26 58. Yes In My Back Yard incorporates and realleges all of the foregoing paragraphs.

27 59. Section 65587 of the Government Code, subdivision (b), provides that “any interested party”
28 may bring an action “to review the [Town’s] conformity with the [Housing Element Law].”

1 60. Yes In My Back Yard is “an[] interested party” under the Housing Element Law. (*Ibid.*)

2 61. Section 65587, together with Section 65751, provides that such an action “shall be brought
3 pursuant to Section 1085 of the Code of Civil Procedure.” (*Ibid.*)

4 62. Because the Town has not adopted a sixth revision of its housing element, and its statutory
5 deadline has passed, the Town is out of compliance with the Housing Element Law.

6 63. Yes In My Back Yard has no available administrative remedies.

7 64. Yes In My Back Yard has no plain, speedy, or adequate remedy in the ordinary course of law,
8 other than those sought herein.

9 65. Yes In My Back Yard is thus entitled to a writ of mandate.

10 **DEMAND FOR JUDGMENT**

11 WHEREFORE, Petitioner demands judgment against Respondent as follows:

12 1. A writ of mandate directing the Town to adopt a sixth revised housing element according to the
13 schedule in Section 65754.

14 2. An injunction or order providing relief under Section 65755.

15 3. A declaration that:

- 16 a. the Town is out of compliance with the Housing Element Law from February 1, 2023,
17 until the Town lawfully adopts a sixth revision of its housing element that substantially
18 complies with the Housing Element Law;
- 19 b. the Town is required, under subparagraph (A) of paragraph (1) of subdivision (c) of
20 Section 65583 of the Government Code, and under subdivision (c) of Section 65583.2 of
21 the Government Code, to complete all required rezoning by January 31, 2024;
- 22 c. the Town may not rely on paragraphs (1) or (5) of subdivision (d) of Section 65589.5 of
23 the Government Code, also known as the Housing Accountability Act or “HAA,” to
24 disapprove a housing development project—or condition approval in a manner that
25 renders such project infeasible—so long as such project meets the affordability
26 requirements described in paragraph (3) of subdivision (h) of the HAA;

27 4. Costs of suit;

28 5. Attorneys’ fees under Code Civ. Proc. § 1021.5 and as otherwise allowed by law; and

1 6. Such further relief as the Court deems just and proper.

2
3 Dated: February 1, 2023.

YIMBY LAW

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6 By: Keith E. Diggs
7 Attorney for Petitioner Yes In My Back Yard

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VERIFICATION

I, Sonja K. Trauss, declare:

1. I am the Executive Director of Yes In My Back Yard, the Petitioner in this action.
2. I have read the foregoing Petition, and know the stated facts to be true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 1, 2023 at Oakland, California.



By: Sonja K. Trauss
Executive Director, Yes In My Back Yard

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