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13

14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

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

19 Petitioner and Plaintiff,

20 v.

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

24 Respondents and Defendants.

25
26 ELLIOT NAYSSAN; ROBhana, INC.;
NHD TERRACE, LLC; and ROES 1 through
27 100, inclusive,

28 Real Parties in Interest.

Case No. 19STCP03740

Assigned for All Purposes to:
Hon. Mitchell L. Beckloff, Dept. 86

**RESPONDENTS' OPPOSITION BRIEF
ON ISSUES RELATED TO TRANSIT
ORIENTED COMMUNITIES PROGRAM**

**[FILED HEREWITH:
RESPONDENTS' OPPOSITION BRIEF
ON PROJECT SPECIFIC ISSUES;
REQUEST FOR JUDICIAL NOTICE
(EXHIBITS A – H)]**

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1 **I. INTRODUCTION**

2 In November 2016, City of Los Angeles (“City”) voters approved Measure JJJ, an initiative
3 ordinance that amended City laws in order to increase affordable housing production. The text at
4 Section 6 of Measure JJJ codified a new Transit Oriented Communities (“TOC”) Affordable
5 Housing Incentive Program in the zoning “Exceptions” section of the Los Angeles Municipal Code
6 (“TOC Program”). The TOC Program incentivizes new housing in areas of the City well-served
7 by public transit. It allows projects that provide specified percentages of affordable housing to
8 obtain density increases and other development standard exceptions, also known as “incentives.”
9 The TOC Program has become a critical voter-approved strategy to address the chronic shortage –
10 and pervasive unaffordability – of housing for City residents. Since its adoption, the TOC Program
11 has generated more than 35,000 housing units, including over 7,500 affordable housing units.

12 By challenging a 120-unit residential TOC project at 10400 Santa Monica Boulevard
13 (“Project”), Petitioner Fix The City, Inc., attempts to undo this strategic voter-approved response
14 to the housing shortage. Petitioner uses the City’s June 2019 Project approval as a vehicle to
15 collaterally attack the 2017 TOC Guidelines that implement the TOC Program (“TOC
16 Guidelines”). Petitioner claims the TOC Guidelines “fatally conflict” with Measure JJJ because
17 they were not adopted by ordinance, fail to adequately require labor standards compliance, and
18 constitute an improper amendment to Measure JJJ and the City’s zoning codes due to the use of a
19 “Tier” system that provides a range of more than three incentives. These arguments conflict with
20 express provisions of Measure JJJ and try to unlawfully control the City’s discretion in interpreting
21 its zoning code and implementing reasonable guidelines.

22 The legislative record shows that the City’s preparation, adoption and implementation of
23 the TOC Guidelines thoughtfully followed the process and authority outlined by Measure JJJ and
24 other City laws. In addition, Petitioner’s Opening Brief on Issues Related to Transit Oriented
25 Communities Program (“Opening Brief”) fails to meet the high burden of proof required to show
26 that the City’s actions were clearly erroneous. Measure JJJ, Section 6, expressly provides the
27 Department of City Planning (“DCP”) and City Planning Commission (“CPC”) with the authority
28 to prepare and adopt the TOC Guidelines. That authority is entirely consistent with the City

1 Charter. The case law cited in the Opening Brief also shows that there is no unlawful delegation
2 of legislative authority here. The initiative expressly established minimum eligibility thresholds,
3 and expressly directed the DCP to implement those thresholds based on proximity to public transit.

4 The plain language and legislative history of Measure JJJ explain that compliance with the
5 construction Labor Standards in Measure JJJ, Section 5A, (“Labor Standards”) is not a threshold
6 eligibility requirement for the TOC Program. The TOC Program at Measure JJJ, Section 6, does
7 not list the Labor Standards as a threshold eligibility requirement for the approval of “TOC
8 Incentives” defined by Section 6 (“TOC Incentives”). Instead, Section 6 lists the Labor Standards
9 as an optional method of qualifying for a category of additional, undefined “incentives.” In
10 contrast, Measure JJJ, Section 5A lists the Labor Standards as a threshold eligibility requirement
11 for specified legislative approvals, like zone changes. Petitioner asks this Court to impose an
12 asserted requirement on the TOC Program where none exists. Notably, the Labor Standards do not
13 apply to the Project here because the Project did not use this optional method of qualifying for
14 incentives and did not seek any of the legislative approvals listed in Measure JJJ, Section 5A.

15 The TOC Guidelines provide a range of development standard incentives based on four
16 Tiers that correspond to a project’s proximity to public transit. This incentive system is legally
17 supported and entitled to deference as the City’s official interpretation of the codified TOC
18 Program. The TOC Program is one of many zoning code “Exceptions” that allow a project to
19 deviate from regular development standards without a legislative amendment. The use of a Tier
20 system refines Measure JJJ text that identifies the TOC Program incentive area as “each one-half
21 mile radius” around a “Major Transit Stop.” The variety of development standards subject to an
22 incentive (*i.e.*, height, parking) reflects the fact that Measure JJJ refrains from limiting the types of
23 development standards subject to an incentive. It also reflects the broad understanding of the term
24 “incentives” in Measure JJJ, Government Code Section 65915, and the Los Angeles Municipal
25 Code (“LAMC”). Lastly, the number of incentives provided by the TOC Guidelines is delineated
26 by the text of Measure JJJ itself. The City thus adopted valid TOC Guidelines that met the
27 fundamental policy directives of the TOC Program, and accordingly awarded valid incentives to
28 the Project.

1 As the Opening Brief confirms, all of Petitioner’s claims regarding the TOC Guidelines are
2 untimely facial challenges. The facts of the Project add no material to Petitioner’s purported “as
3 applied” claims. The gravamen of each claim in the Opening Brief is to attack the provisions of
4 the TOC Guidelines or the manner of their adoption. These claims are not unique to the Project,
5 and could have been asserted when the TOC Guidelines were adopted in 2017. Consequently, the
6 claims are now barred by the 90-day statute of limitations in Government Code Section 65009.
7 The Petition should therefore be denied in its entirety.

8
9 **II. STATEMENT OF FACTS**

10 **A. Voters Passed Measure JJJ With Access to Voter Information That Described**
11 **Its Distinct Sections Including The Transit Oriented Communities Program.**

12 In June 2016, the City Council placed Initiative Ordinance JJJ, commonly referred to as
13 “Measure JJJ,” on the November 2016 ballot, where it ultimately passed (hereafter “Measure JJJ”).
14 (*See* Request for Judicial Notice in Support of Petitioner’s Opening Brief [“Pet.’s RJN”], Ex. 2 &
15 Ex. 6, p. 1.) The Voter Information Pamphlet published the full text of Measure JJJ and contained
16 the City’s official summary of the ordinance. The summary identifies those provisions that apply
17 to specified legislative requests like general plan amendments and zone changes. (Pet.’s RJN,
18 Ex. 1, p. 17.) It separately explained the TOC Program which would require the City to “create an
19 affordable housing incentive program for developments located near major transit stops.” (*Id.*)

20 Measure JJJ explained to voters its multiple program sections. Measure JJJ included
21 Section 6, titled “Transit Oriented Communities Affordable Housing Overlay”. (Pet.’s RJN, Ex. 1,
22 pp. 36-39.) It then separately enumerated the provisions that would apply to legislative actions,
23 such as Section 5.A titled: Affordable Housing and Good Jobs (“Section 5A”). (Pet.’s RJN, Ex. 1,
24 pp. 25-33.) Section 5A mandated compliance with certain affordable housing provisions and
25 “Labor Standards” for projects seeking specified legislative approvals. (*Id.*, pp. 17, 25-33 [Section
26 5(A)].) Other Measure JJJ sections added new monitoring and reporting requirements for
27 community plans, and revisions to the Affordable Housing Trust Fund administration. (*Id.*, p. 17,
28 20-24 [Sections 3 and 4], 33-36 [Section 5(B)].)

1 The voter pamphlet also contained arguments that explained these separate programs. In
2 the voter pamphlet’s Argument in Favor of Initiative Ordinance JJJ, the proponents emphasized
3 when the Section 5A Labor Standards apply: “If a developer wants planning or zoning changes,
4 then 30% of the construction workers must be from local communities who need jobs the most,
5 including veterans” (emphasis in original). (*See, e.g.*, Pet.’s RJN, Ex. 1, p. 9.) Then in a separate
6 paragraph, it distinctly referred to the TOC Program under Section 6, stating, “Angelenos ... are
7 being pushed farther and farther away from their jobs adding more and more traffic throughout the
8 City. [Measure JJJ] will build more housing near transit stops to reduce congestion.” (*Id.*)

9 **B. Measure JJJ Amended City Law To Create Distinct Standards Related to**
10 **Specified Legislative Approvals, Housing Trust Fund Projects, And TOC**
11 **Program Approvals.**

12 Measure JJJ consists of five sections that each amended different sections of the Los
13 Angeles Municipal Code (“LAMC”) and Los Angeles Administrative Code (“LAAC”). Sections
14 3, 4, 5A, 5B, and 6 are discussed in detail below.

15 1. Section 6 Added the TOC Program to the LAMC As An Exception to City
16 Zoning Code Requirements With A Labor Standards Option.

17 Measure JJJ, Section 6 (“Section 6”), amended LAMC Section 12.22, titled: “Exceptions.”
18 It added Subdivision 31, titled “Transit Oriented Communities Affordable Housing Incentive
19 Program” (“TOC Program”), to LAMC Section 12.22, Subsection A. (AR 0008, AR 0018.) This
20 amendment codified the TOC Program under the City’s “Comprehensive Zoning Plan” at LAMC
21 Chapter I, Article 2. (AR 0018. *See also* Respondent’s Request for Judicial Notice (“Resps.’
22 RJN”), pp. 25, 50 [Ex. C – LAMC § 12.22].) Los Angeles Municipal Code Section 12.22 includes
23 other zoning exceptions, such as the City’s State Law Density Bonus Program (“Density Bonus
24 Program”) which exempts specified affordable housing projects from height standards, setbacks,
25 and other development standards. (Resps.’ RJN, pp. 34-42 [Ex. C – (LAMC § 12.22.A.25)].) Like
26 the Density Bonus Program, the TOC Program also authorizes a suite of relaxed development
27 standards that a developer may request in exchange for specified levels of affordable units.
28 Developers cannot utilize both programs, but may elect to participate in either. (AR 0019.)

The TOC Program text provides that:

1 A Housing Development located within a TOC Affordable Housing Incentive Area
2 shall be eligible for TOC Incentives if it provides minimum required percentages
3 of On-Site Restricted Affordable Units, meets any applicable replacement
4 requirements of California Government Code Section 65915(c)(3), and is not
seeking and receiving a density or development bonus under the provisions of
California Government Code Section 65915¹ or any other State or local program.

5 (AR 0019 [LAMC § 12.22.A.31(b)(1)].) The TOC Program text directs the DCP² to grant three
6 categories of “TOC Incentives” labeled: “Residential Density Increase,” “Parking,” and
7 “Incentives and Concessions” (collectively “TOC Incentives”). For a Residential Density Increase,
8 the text directs the DCP to create “rates that shall meet or exceed a 35% increase” in residential
9 density, through adjustments to floor area ratios, minimum square feet per dwelling unit (or both),
10 and different levels of density depending on base zone and density. (AR 0019-20 [LAMC
11 § 12.22.A.31(b)(1)].) The text also directs the DCP to develop standards for allowing parking
12 reductions, and for awarding “up to” three additional “incentives or concessions,” such as open
13 space reductions or exceptions to other development standards. (*Id.*) The text does not proscribe
14 the range or type of development standard exceptions that constitute the category of three additional
15 “incentives or concessions.”

16 The text expresses no threshold Labor Standards requirement for every TOC project. It
17 instead provides an optional Labor Standards path to incentives, stating that the DCP “shall identify
18 incentives for projects that adhere to the Labor Standards required in Section 5.” (AR 0019 [LAMC
19 § 12.22.A.31(b)(1)]; Pet.’s RJN, Ex. 1, p. 37.)

20 The TOC Program required that the DCP prepare TOC Guidelines to provide “eligibility
21 standards, incentives and other necessary components” of the TOC Program, and then required the
22 CPC to “make a recommendation to adopt or reject” them. (AR 0019-20 [LAMC § 12.22.A.31(b),
23 (c)].) The TOC Program includes its own definitions, which differ substantively from the separate
24 definitions provided in Section 5A of Measure JJJ. (*Compare* AR 0015 [defining “Project” under
25 Section 5A] *to* AR 0020-21 [defining “Eligible Housing Development” under Section 6].)

26 _____
27 ¹ Government Code section 65915 comprises the State Density Bonus Law.

28 ² The “DCP” in this Opposition Brief refers to both the Department of City Planning, and the
Director of Planning (“Planning Director”), acting in his or her official capacity.

1 projects using monies from the City’s Affordable Housing Trust Fund to comply with labor
2 standards that are substantially similar to the Labor Standards at Section 5A.

3
4 **C. The Planning Director and CPC Approved The TOC Guidelines In
Accordance With The TOC Program**

5 In accordance with the TOC Program text, the Planning Director, through staff, prepared
6 the TOC Guidelines, obtained a recommendation to adopt the guidelines from the CPC on May 25,
7 2017, and released them on September 22, 2017. (*See* AR 0050; AR 0307; AR 0019-20, Resps.’
8 RJN, p. 50 [Ex. C – LAMC 12.22.A.31(b), (c)].) Technical clarifications to the TOC Guidelines
9 were submitted to the CPC on February 26, 2018, and also subsequently released for use.
10 (AR 0345.) The TOC Guidelines provide a limited set of “by-right” “Base Incentives” and a menu
11 of “Additional Incentives” that are approved through a public review process. (AR 0057.)

12 The Planning Director’s May 25, 2017, Recommendation Report explained that the TOC
13 Guidelines were developed within the context of Measure JJJ “as well as the City’s existing Density
14 Bonus program, while considering the range of existing zoning and development intensity.”
15 (AR 0061-62.) To implement the requirements of the TOC Program, the DCP developed Tiers 1
16 through 4 to award TOC Incentives (*i.e.*, increased floor area ratios, height) that allow greater
17 density and building intensity at increasing levels based on proximity to transit. (AR 0057. *See*
18 *also* AR 0350 [defining Tiers 1-4], and 0354-56 [providing tier-based incentives].) For example,
19 Tier 3 projects must be located less than 750 feet from a Metrolink Rail Station or bus stop with
20 both Regular and Rapid services, less than 1,500 feet from a bus stop that has two intersecting
21 Rapid bus lines, or less than one half-mile from a Metro Rail Station. (AR 0350.) Tier 3 projects
22 are awarded a higher level of density, a greater floor area ratio, and greater reductions in parking,
23 setbacks, and other development standards, in contrast to Tier 1 projects that may be up to 2,640
24 feet from a transit stop. (AR 0354-57.) Tier 3 projects must also provide a higher percentage of
25 affordable housing. (AR 0352.)

26 The Planning Director made refinements to the TOC Guidelines in response to public
27 comments. (AR 0063-68.) The DCP considered an economic analysis that compared the initially
28 proposed incentives with the resulting increase in development costs. (AR 0060-61, 0038-49

1 [Keyser Marston Associates, Density Analysis Summary, TOC Program].) It also reduced density
2 increases in certain zones to ensure compatibility with existing communities. (AR 0354-55.)

3 Since adoption of the TOC Guidelines, the City has published a “Housing Progress
4 Dashboard” that summarizes the total units proposed, approved, and constructed as a result of the
5 TOC Program, City Density Bonus Program, and through legislative approvals such as zone
6 changes. (Resps.’ RJN, p. 71-74 [Ex. E].) As of 2019 and 2020, the TOC Program generated 42%
7 and 37% of all new housing proposals. (Resps.’ RJN, p. 84 [Ex. F, p. 1].) “Since its inception, the
8 TOC Program has generated 35,060 units of housing, including 7,540 units of affordable housing.”
9 (Resps.’ RJN, p. 91 [Ex. G, p. 1].)

11 **III. STANDARD OF REVIEW**

12 Courts construe a local ordinance enacted by a citizens’ initiative, like Measure JJJ, “under
13 the same principles of construction applicable to statutes enacted by the Legislature.” (*Farmers*
14 *Ins. Exch. v. Superior Ct.* (2006) 137 Cal.App.4th 842, 851.) Courts first look to the plain language
15 to “examine the statutory language, giving the words of the statute their ordinary and usual meaning
16 and construing them in the context of the statute as a whole and the overall statutory scheme.”
17 (*Ibid.*) “Extrinsic materials, such as analyses and arguments contained in the official ballot
18 pamphlet, may be used to interpret ambiguous language or to confirm the plain meaning of the
19 provision.” (*Protect Our Benefits v. City & Cty. of San Francisco* (2015) 235 Cal.App.4th 619,
20 633.) Such materials, however, “may not be used to add to or rewrite the provision to conform to
21 an assumed intent that is not apparent in its language.” (*Id.* [internal citations omitted].)

22 The TOC Guidelines serve as the DCP’s interpretation of the TOC Program codified at
23 LAMC Section 12.22.A.31, and as a result it “is entitled to great weight unless it is clearly
24 erroneous or unauthorized.” (*Berkeley Hills Watershed Coal. v. City of Berkeley* (2019) 31
25 Cal.App.5th 880, 896; citing *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th
26 1173, 1193. See also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1,
27 12.) “Greater deference is accorded an agency’s interpretation where the agency has expertise and
28 technical knowledge, especially where the legal text to be interpreted is ... entwined with issues of

1 fact, policy, and discretion.” (*Berkeley Hills Watershed Coal.*, 31 Cal.App.5th at 896 [substantial
2 deference should be provided to city attorney’s interpretation of zoning ordinance, due to technical
3 expertise regarding zoning requirements, knowledge of impacts to neighborhoods and local
4 community, familiarity with rationale for the ordinance, responsibility for its implementation, and
5 special knowledge about practical implications of possible interpretations].)

6
7 **IV. ARGUMENT**

8 **A. The City Charter and Municipal Code Expressly Authorize the Adoption of**
9 **the TOC Guidelines by the Planning Director and City Planning Commission.**

10 Petitioner’s argument that the DCP and CPC exceeded their authority in adopting the TOC
11 Guidelines is contrary to explicit provisions in the City Charter, LAMC, and Measure JJJ. (*See*
12 *Opening Brief at 10:9-11:10.*) Section 6 of Measure JJJ amended the LAMC to expressly authorize
13 the DCP and CPC to adopt the TOC Guidelines through the procedure that was followed in 2017.
14 These specific voter-approved authorizing provisions are entirely consistent with the DCP and
15 CPC’s more general authorization to adopt guidelines found in the City Charter and LAMC.

16 As a charter city, the City of Los Angeles and its voters are entitled to enact zoning
17 provisions in the municipal code, like the TOC Program provisions at LAMC Section 12.22.A.31.
18 The City’s zoning code and general plan provisions are governed primarily by the LAMC, Chapter
19 I and the City Charter. Charter cities have the power of “municipal home rule” with respect to all
20 matters of local concern. (*Lindell Co. v. Bd. of Permit Appeals of City & Cty. of San Francisco*
21 (1943) 23 Cal.2d 303, 310 [internal citations omitted].) The adoption of zoning procedures and
22 development regulations within a charter city’s limits is “undeniably a municipal affair over which
23 a charter city has supreme control.” (*Ibid.*, citing *Brougher v. Board of Public Works* (1930) 107
24 Cal.App. 15, 24 [denying challenge to a zoning ordinance that allowed varying height requirements
25 within the same district].) The electorate, through a valid citizen’s initiative, may also enact zoning
26 provisions in a charter city’s municipal code. (*San Diego Bldg. Contractors Assn. v. City Council*
27 (1974) 13 Cal.3d 205. *See also* Resps.’ RJN, p. 2 [Ex. A – Los Angeles Charter § 450 (authorizing
28 any ordinance that the City Council may adopt to be adopted by a vote of the electors of the City)].)

1 The City Charter and LAMC – including the provisions cited in Petitioner’s Opening Brief
2 – expressly authorize the CPC to prepare and adopt guidelines for implementing the City’s zoning
3 code, or to delegate that authority to the DCP. (*See* Opening Brief, p. 10, [*citing* City Charter,
4 § 550, which provides, “[the DCP] shall have and exercise all the powers and duties provided for
5 it in the Charter or by ordinance”]; *id.*, pp. 10-11, citing LAMC, § 11.5.4 [authorizing the CPC to
6 adopt guidelines for administering the zoning code, and the delegation of such authority to “others
7 by adoption of a resolution by Council”]. *See also* Resps.’ RJN, pp. 7-8 [Ex. B – LAMC § 12.03
8 (defining “City Planning Commission” as having the authority to adopt guidelines and to delegate
9 such authority by ordinance)].) The passage of Measure JJJ as a citizen’s initiative satisfies the
10 requirement that the delegation of authority occur by ordinance of the City Council. (*San Diego*
11 *Bldg. Contractors Assn.*, *supra*, 13 Cal.3d at 210; Resps.’ RJN, p. 2 [Ex. A – City Charter § 450].)

12 The TOC Program text indisputably requires the DCP to prepare the TOC Guidelines in
13 conjunction with the CPC: “the Director of Planning shall prepare TOC Affordable Housing
14 Incentive Program Guidelines ... that provide the eligibility standards, incentives, and other
15 necessary components of this TOC Incentive Program.” (AR 0019-20; Resps.’ RJN, p. 50 [Ex. C
16 – LAMC § 12.22.A.31(b), (c)].) This delegation of authority to the DCP is entirely consistent with
17 City Charter Section 550 and LAMC Sections 12.03 and 11.5.4. The initiative ordinance also
18 specifies that the CPC “shall review ... and shall by vote make a recommendation to adopt or reject
19 the TOC Guidelines.” (AR 0020.) That is the process followed here. (*See* AR 0050; AR 0307).

20 Petitioner’s argument that the City was required to adopt the TOC Guidelines by ordinance
21 (Opening Brief at 10:10-23) ignores the above laws and well-established case law upholding
22 legislative and administratively approved exceptions to underlying zoning. (*Tustin Heights Assn.*
23 *v. Bd. of Supervisors of Orange Cty.* (1959) 170 Cal.App.2d 619, 633–34; *Rubin v. Board of*
24 *Directors* (1940) 16 Cal.2d 119, 124 [distinguishing “spot zoning” and zoning amendments from
25 variances or exceptions that allow administrative approval of zoning standard deviations]. *Accord,*
26 *San Diego Cty. v. McClurken* (1951) 37 Cal.2d 683, 691 [“the granting or denial of variances rests
27 largely in the discretion of the body designated by the zoning ordinance for that purpose, and a
28 denial of a variance will not be disturbed in the absence of a clear showing of abuse of discretion”].)

1 The TOC Guidelines do not need to be directly adopted by ordinance because Measure JJJ,
2 codified the TOC Program in the LAMC. The TOC Program text then expressly delegated
3 authority to the DCP and CPC to adopt TOC Guidelines, and then administratively award TOC
4 Program incentives to projects consistent with the guidelines. (AR 0019-21.)

5 **B. Measure JJJ Set Fundamental Policy And Provided Adequate Public**
6 **Safeguards To Avoid An Unlawful Delegation of Legislative Authority When**
7 **The DCP Adopted the TOC Guidelines**

8 The Opening Brief cites no authority supporting its claim that an ordinance process was
9 required to adopt the TOC Guidelines. The purpose of the unlawful delegation doctrine “is to
10 assure [1] that truly fundamental issues will be resolved by the Legislature and [2] that a grant of
11 authority is accompanied by safeguards adequate to prevent its abuse.” (*Kugler v. Yocum* (1968)
12 69 Cal.2d 371, 376.) There was no unlawful delegation of legislative power to the DCP or CPC,
13 and the cases cited by Petitioner admonish against finding an unlawful delegation here.

14 A fundamental policy set forth in the TOC Program text is that the TOC Guidelines “shall
15 apply to all Housing Developments located within a one-half mile radius of a Major Transit Stop.”
16 (AR 0019; Resps.’ RJN, p. 50 [Ex. C – LAMC § 12.22.A.31(a)].) Developing affordable housing
17 in close proximity to public transportation therefore constitutes the fundamental policy priority of
18 the TOC Program. (*See* AR 00309.) The TOC Program text established minimum thresholds for
19 three categories of TOC Incentives, and instructed the DCP to implement those thresholds by
20 adopting and implementing the TOC Guidelines. (AR 0019-20 [LAMC § 12.22.A.31(b)(2): DCP
21 shall grant increased residential density “at rates that meet or exceed a 35% increase” and provide
22 “up to either two or three incentives or concessions” (emphasis added)].)

23 In *Kugler*, the California Supreme Court ruled that a local ordinance may lawfully delegate
24 authority to inferior boards provided that the ordinance includes adequate safeguards to protect the
25 public against the arbitrary or unreasonable exercise of power by the lower board. (*Id.* at 381, fn.
26 8.) The important consideration is whether the delegation of legislative power “furnishes adequate
27 safeguards to those who are affected by the administrative action.” (*Id.* at 381–82.) As a result,
28 the *Kugler* Court directed lower courts to apply the unlawful delegation doctrine sparingly: “Only
in the event of a total abdication of [legislative] power, through failure either to render basic policy

1 decisions or to assure that they are implemented as made, will [a] court intrude on legislative
2 enactment because it is an ‘unlawful delegation....’” (*Kugler*, 69 Cal.2d at 384. *Accord*, *Hess*
3 *Collection Winery v. Agric. Lab. Rels. Bd.* (2006) 140 Cal.App.4th 1584, 1605.) More recently, in
4 *Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 716, the court
5 denied an unlawful delegation claim where a general plan authorized projects with significantly
6 increased density based on staff findings that the project would provide “community benefits.”

7 Here, the TOC Program text directed the DCP to develop guidelines based on specific,
8 minimum standards for density increases and affordability requirements. The criteria set forth by
9 the TOC Program were much more specific than the general standards upheld in *Sacramentans for*
10 *Fair Planning*. In the two cases cited by Petitioner alleging unlawful delegation, the courts denied
11 both claims. (*Kugler*, *supra*, 69 Cal.2d at 377 [formula for establishing city firemen’s salaries did
12 not constitute unlawful delegation]; *Groch v. City of Berkeley* (1981) 118 Cal.App.3d 518 [city did
13 not unlawfully delegate authority to inferior board in making findings according to “general welfare
14 standard” or that demolition would be “materially detrimental” to the City’s housing needs].)

15 The text of the TOC Program provided adequate safeguards for the DCP to prepare and
16 implement the TOC Guidelines. It did so by establishing proximity to transit as the overarching
17 policy, and by providing three general categories of TOC Incentives as minimum thresholds that
18 the TOC Guidelines were required to implement in more detail. The TOC Guidelines provide a
19 prescriptive, menu-based suite of TOC Incentives that were informed in part by economic
20 forecasting and public comments. (AR 0060-61, AR 0038-49, AR 0352-53. *See also* AR 0432-37
21 [TOC Program application referral form].) The TOC Program text also required the TOC
22 Guidelines to be submitted to the CPC for review and recommendation, thus providing a public
23 review process that imposed additional safeguards. (AR 0020.) In fact, the CPC directed certain
24 changes to the TOC Guidelines, and the DCP incorporated these changes prior to releasing the final
25 public draft. (AR 285. *See also* AR 1785, 1878-82.) These measures confirm that Measure JJJ
26 provided adequate safeguards to prevent the DCP from adopting arbitrary TOC Guidelines.

27 Based on the above, Petitioner’s application of the unlawful delegation doctrine in this case
28 is impermissibly broad. The TOC Guidelines were designed to carry out the fundamental transit-

1 oriented and affordable housing policies of the TOC Program. In preparing the TOC Guidelines,
2 the DCP reasonably established Tiers 1-4 to implement the minimum thresholds required for
3 density increases and other zoning exceptions provided by the TOC Program.

4
5 **C. The Plain Language And Legislative History of Measure JJJ Establish
6 Optional Labor Standards Compliance Under the TOC Program**

7 The TOC Program at Measure JJJ, Section 6, references Labor Standards compliance as an
8 optional path to additional “incentives,” but not as a basic eligibility requirement for the statutorily
9 defined class of “TOC Incentives.” The Labor Standards for projects seeking legislative approvals
10 authorized by Measure JJJ, Section 5A, do not apply to every TOC Program approval separately
11 authorized by Measure JJJ, Section 6. Petitioner misconstrues the plain language of Measure JJJ
12 when it argues that the TOC Guidelines alter the basic eligibility requirements of the TOC Program
13 by making this distinction. (*See* Opening Brief at 11:11-13:8.) Both the initiative’s text and
14 legislative history support the City’s interpretation memorialized by the current TOC Guidelines.

15 The plain text of Measure JJJ supports the validity of the TOC Guidelines. Measure JJJ,
16 Section 6 does not list the Section 5A Labor Standards among the basic eligibility criteria for TOC
17 Incentives. Section 6 states that a “Housing Development” is “eligible for TOC Incentives if” it:
18 (1) is located in a “TOC Affordable Housing Incentive Area”; (2) provides required percentages of
19 affordable units; (3) meets replacement unit requirements of Government Code Section 65915; and
20 (4) is “not seeking and receiving” a development bonus under another state or local program.
(AR 0019-21; Resps.’ RJN, p. 50 [Ex. C – LAMC § 12.22.A.31(b)(1)].)

21 None of the other basic eligibility provisions in Section 6 reference or implicate the Labor
22 Standards of Section 5A. Section 6 states: “This Transit Oriented Communities Affordable
23 Housing Incentive Program, and the provisions contained in the TOC Affordable Housing
24 Incentive Program Guidelines, shall apply to all Housing Developments that are located within a
25 one-half mile radius of a Major Transit Stop.” (AR 0019; Resps.’ RJN, p. 50 [Ex. C – LAMC
26 § 12.22.A.31(a)].) An “Eligible Housing Development” is “a Housing Development that includes
27 On-Site Restricted Affordable Units at a rate that meets or exceeds the minimum requirements to
28 satisfy the TOC Incentives, as determined by the [DCP] and as set forth in paragraph (b)(1) above.”

1 (AR 0020-21; Resps.’ RJN, p. 50 [Ex. C – LAMC § 12.22.A.31(g)].) “Housing Development” is
2 defined as the construction, or addition of five or more residential units, remodeling of a building
3 with five or more residential units or a mixed use development with residential units. (AR 0021.)

4 The TOC Program text requires the DCP to identify a category of “incentives” for Labor
5 Standards compliant projects, not the defined category of “TOC Incentives.” The text expressly
6 refers to Labor Standards only once, at language codified as LAMC Section 12.22.A.31(b)(1):

7 In creating the TOC Guidelines, the DCP shall identify incentives for projects that
8 adhere to the Labor Standards required in Section 5 of [Measure JJJ] provided, that no
9 such incentives will be created that have the effect of undermining the affordable
housing incentives contained herein. (AR 0019 [emphasis added].)

10 The sentence does not state that all projects “shall adhere” to Labor Standards, or that DCP shall
11 only identify incentives for projects that comply with Labor Standards. It also does not direct the
12 DCP to identify the defined class of “TOC Incentives,” and instead uses the term “incentives,”
13 signaling an avoidance of the meaning associated with the term “TOC Incentives.” “Where
14 different words or phrases are used in the same connection in different parts of a statute, it is
15 presumed the Legislature intended a different meaning.” (*Briggs v. Eden Council for Hope &*
16 *Opportunity* (1999) 19 Cal.4th 1106, 1117.)

17 In contrast, the text applicable to legislative projects at Measure JJJ, Section 5A, expressly
18 states that projects “shall comply with the job standards in subdivision (i),” and that “[a]ll building
19 and construction work on the project will be performed at all tiers by contractors which [meet the
20 Labor Standards.]” (AR 0008, 0014 [Measure JJJ, § 5.A(a), (i) (emphasis added)].) Measure JJJ’s
21 plain language makes it unreasonable for Petitioner to infer that the Labor Standards are a basic
22 TOC Incentive eligibility requirement. The initiative’s text confirms that eligibility criteria
23 between Sections 5A and 6 cannot be mixed and matched because the TOC Program text refrains
24 from including Labor Standards as a basic eligibility requirement.

25 A review of the Measure JJJ legislative history is unnecessary to reach these conclusions,
26 because the above referenced plain language expressly identifies where the Labor Standards apply,
27 if at all. (*See Farmers Ins. Exch. v. Superior Ct.* (2006) 137 Cal.App.4th 842, 851.) Petitioner’s
28 argument that the legislative history requires Labor Standards compliance for all TOC Incentives

1 (Opening Brief at 13:8-15:25), impermissibly seeks to rewrite Measure JJJ “to conform to an
2 assumed intent that is not apparent in its language.” (*Protect Our Benefits, supra*, 235 Cal.App.4th
3 at 633.) Courts may consider legislative history where it buttresses the plain meaning of a statute
4 – not to override its clear terms. (*Briggs, supra*, 19 Cal.4th at 1120-21.)

5 Measure JJJ’s organizing structure, its legislative amendments, and the distinct eligibility
6 and programmatic elements of each initiative section, are also factors that may be considered in
7 supporting the City’s plain language reading of Measure JJJ. (*Berkeley Hills Watershed Coal.*,
8 *supra*, 31 Cal.App.5th at 896.) The initiative’s overall structure of distinct programs confirms that
9 Labor Standards compliance may not reasonably be implied as a basic threshold requirement for
10 all TOC projects. Each section of Measure JJJ enacted distinct amendments to the LAMC and
11 LAAC. The Section 6 TOC Program operates independently of the provisions in Sections 3
12 through 5 regarding community plan amendments, trust fund projects and other legislative project
13 approvals. As Petitioner’s Opening Brief noted, the TOC Program is more akin to a ministerial or
14 quasi-adjudicatory program, which is a significant distinction between the other sections of
15 Measure JJJ involving specified types of legislative approvals, or affordable housing trust fund
16 projects. (*See* Opening Brief at 5:22-23.) Because these programs are distinct, the Labor Standards
17 have been distinctly referenced in Section 6 to facilitate an elective path to additional “incentives.”
18 The internal structure of the TOC Program text at Section 6 also supports the City’s interpretation.
19 (*See Farmers Ins. Exch., supra*, 137 Cal.App.4th at 851.) The TOC Program is structured to
20 provide an elective, menu-based suite of TOC Incentives that developers may request in exchange
21 for satisfying listed eligibility criteria. As discussed earlier, the Labor Standards are not referenced
22 as an eligibility requirement for the statutorily defined class of “TOC Incentives,” but as an
23 eligibility requirement for additional “incentives.”

24 The legislative history of Measure JJJ further confirms that the TOC Program is
25 independent of the other Measure JJJ programs, and therefore has an independent use for the Labor
26 Standards. The creation of a standalone TOC Program was clearly referenced and enumerated in
27 the ballot question, impartial analysis, and official summary for Measure JJJ. (*See* Pet.’s RJN, Ex.
28 1, p. 7 [Ballot Question – dividing Measure JJJ into discrete components including “an affordable

1 housing incentive program for developments near major transit stops”]; *id.*, p. 8, [Impartial
2 Summary – Measure JJJ “creates an affordable housing incentive program with increased density
3 and reduced parking requirements in areas within a one-half mile radius around a major transit
4 stop”]; *id.*, p. 17 [Official summary – five components of Measure JJJ, with fifth component an
5 “affordable housing incentive program for developments located near major transit stops”].)

6 There is no basis for implying that Labor Standards are a basic eligibility requirement for
7 all TOC projects merely because voter information discussed the Labor Standards as an important
8 consideration for voters. The Impartial Analysis cited by Petitioner focused its discussion on the
9 general plan provisions of Measure JJJ, likely because those provisions comprised the bulk of the
10 initiative’s text. In fact, approximately twelve pages of Measure JJJ’s text was spent on the general
11 plan provisions in Sections 3, 4 and 5A, whereas the TOC Program under Section 6 was
12 approximately three pages. (AR 0003-0021; Pet.’s RJN, Ex. 1, pp. 20-39.)

13 Lastly, none of the cases cited in the Opening Brief support Petitioner’s argument. In
14 *People v. Valencia* (2017) 3 Cal.5th 347, for example, the ballot materials in that case “did not
15 make any reference to three strike inmates.” (Opening Brief, p. 15, citing *People v. Valencia*,
16 *supra*, at 365 [emphasis added].) Here, as noted above, the ballot question, impartial analysis, and
17 official summary clearly referenced and enumerated the creation of a separate TOC Program with
18 separate eligibility criteria. In *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th
19 842, the court refused to imply a private right of action against insurers. Although the initiative
20 provided a right to initiate any proceedings permitted by “this chapter”, the applicable chapter of
21 the Insurance Code did not provide the required clear expression of legislative intent in order to
22 create a private right of action. (*Id.*) Here, on the other hand, the City Charter and Measure JJJ
23 expressly delegated authority to the DCP to prepare TOC Guidelines, and expressly omitted Labor
24 Standards from the eligibility criteria for the defined class of TOC Incentives.

25 **D. The Tier System Of Development Standard Exceptions Based on Proximity To**
26 **Transit, Or Incentives, Reasonably Implements the TOC Program And Is**
27 **Entitled to Deference.**

28 The Planning Director’s May 25, 2017, Recommendation Report explained the DCP’s basis
for tiering TOC Incentives according to proximity to transit. The Recommendation Report shows

1 that implementation of the TOC Guidelines required the DCP to use its significant technical
2 expertise regarding the City’s zoning code, and familiarity with related policies. This is especially
3 true where the TOC Program text incorporated provisions of the City and state density bonus law,
4 and where it required harmonization with existing general plan and zoning policies.

5 In developing the Tier system the DCP noted, “[r]ather than creating incentives to allow for
6 uniform 50% bigger, higher, and denser buildings, the TOC Guidelines propose a more strategic
7 approach that reflects the City’s priority policy objectives, including the protection of areas that
8 have been purposefully planned for lower intensity and allowing greater intensity of incentives near
9 high quality transit stations.” (AR 0058-59.) As a result, the TOC Guidelines were designed to
10 “provide incentive increases ranging from 50% to 80% in the number of allowable units on a given
11 site, depending on the Tier. For projects located in a Restricted Density (RD) Zone, these increases
12 are limited to a range of 35% to 45%.” (AR 0058-59.) In addition, the DCP obtained an economic
13 analysis of the TOC Program from City consultants and responded to numerous public comments
14 regarding the TOC Program. (AR 0038-49; AR 0063-68.)

15 Petitioner cites no authority supporting its argument that the creation of “Tiers” constituted
16 unlawful legislative amendments to the City’s zoning code or Measure JJJ. (Opening Brief at
17 15:26-17:23.) This argument ignores the plain language of Measure JJJ, which codified the TOC
18 Program under the Exceptions section of the zoning code. As such, the TOC Program authorizes
19 development standard exceptions, or incentives, without the need for a further legislative
20 amendment to the zoning code. The Tier system in no way amends the zoning of any property, or
21 Measure JJJ. Rather, the TOC Guidelines provide housing development incentives, or exceptions
22 to development standards, for those who voluntarily choose to take advantage of the TOC Program.

23 The City’s interpretation of the TOC Program, codified in the LAMC, is entitled to
24 substantial deference by this Court. As noted above, the City’s interpretation of its own zoning
25 code “is entitled to great weight unless it is clearly erroneous or unauthorized.” (*Berkeley Hills*
26 *Watershed Coal., supra*, 31 Cal.App.5th at 896.) In *Berkeley Hills Watershed Coalition*, the court
27 applied the well-established *Yamaha* rule in determining the standard of review where an agency
28 is directed to prepare guidelines or regulations: “Greater deference is accorded an agency’s

1 interpretation where the agency has expertise and technical knowledge, especially where the legal
2 text to be interpreted is... entwined with issues of fact, policy, and discretion.” (*Id.*, citing *Yamaha*
3 *Corp. of America, supra*, 19 Cal.4th 1, 12)

4 The DCP’s interpretation, expressed by the current TOC Guidelines, is afforded greater
5 deference because the TOC Program directed the DCP to prepare and implement TOC Guidelines.
6 (*Id.*) In doing so, the DCP was required to use considerable expertise to craft and implement the
7 TOC Guidelines consistent with the TOC Program, and within the context of the City’s existing
8 ordinances and policies. The technical, economic considerations, and public comments disclosed
9 in the record demonstrate that the DCP applied a significant level of expertise in preparing the TOC
10 Guidelines and implementing the TOC Program. As such, the TOC Guidelines should be accorded
11 substantial deference in line with the factors discussed in *Berkeley Hills Watershed Coalition*.

12 The TOC Guidelines should be upheld because they faithfully execute the clear policy
13 direction of the TOC Program text. The DCP reasonably established Tiers 1-4 to award TOC
14 Incentives in increasing amounts, based on proximity to public transit. This was done to account
15 for variations in base zone densities, respond to public concerns, and harmonize the TOC Program
16 with the City’s existing zoning policies. As a result, the Tiers must be upheld because Petitioner
17 has failed to prove that the DCP’s interpretation of the TOC Program is clearly erroneous.

18
19 **E. The Offer Of Additional Incentives And Labor Incentives Reasonably
Implements the TOC Program And Is Entitled to Deference.**

20 Petitioner’s argument that the TOC Guidelines’ allowance of Additional Incentives or
21 Labor Standards incentives constituted an impermissible amendment to the zoning code or Measure
22 JJJ is also unsupported. (Opening Brief at 15:26-17:23.)

23 The TOC Program text authorizes the award of three Base Incentives, up to three Additional
24 Incentives, and optional Labor Standards incentives. The TOC Program describes three categories
25 of “TOC Incentives”: (1) a “Residential Density Increase” consisting of density increases that meet
26 or exceed a 35% increase in total units, through adjustments to minimum square feet, floor area
27 ratio, *or both*; (2) “Parking” reductions; and (3) up to three “Incentives and Concessions” in
28 accordance with Government Code Section 65915(d)(2). The TOC Guidelines expressly define

1 the density increases, adjustments of floor area ratio, and parking reductions as the “Base
2 Incentives,” and the last category of three incentives and concessions as the menu of “Additional
3 Incentives.” (AR 0019-20; Resps.’ RJN, p. 50 [Ex. C – LAMC 12.22.A.31(b)(2)(i), (ii), (iii)];
4 AR 0501-06 [TOC Guidelines, VI, VII].) Finally, the TOC Program directs the DCP to identify
5 additional “incentives” (plural) for projects that adhere to the Labor Standards under Measure JJJ,
6 Section 5. The TOC Guidelines define these as “two Additional Incentives from the menu” of
7 Additional Incentives in the TOC Guidelines. (AR 0019; Resps.’ RJN, p. 50 [Ex. C – LAMC
8 § 12.22.A.31(b)(1)]; AR 0500, 0503-05 [TOC Guidelines, IV.6, VII].)

9 The TOC Guidelines correctly provide three Additional Incentives and two Labor Standards
10 incentives according to the plain language of the TOC Program text; this interpretation is entitled
11 to substantial deference. (*Berkeley Hills Watershed Coal.*, *supra*, 31 Cal.App.5th at 896.)

12 **F. The City Has Discretion To Understand The Term “Incentive” Through City**
13 **and State Density Bonus Law, Thus The 10400 Santa Monica Boulevard**
14 **Project Received Valid TOC Incentives**

15 Deviations from height, yard and open space development standards are valid TOC
16 Incentives because they fall within the third category of TOC Incentives. (AR 0020. *See also*
17 Resps.’ RJN, p. 50 [Ex. C – LAMC § 12.22.A.31(b)(2)(iii)].) The City has discretion to broadly
18 define this third category of TOC Incentives because the TOC Program text does not define the
19 term “incentives”, proscribe the types of development standards that fall into to this third category,
20 or restrict the types of development standards that fall into this third category. As a result, the term
21 “incentives” includes exceptions to the wide range of development standards expressed in the TOC
22 Guidelines. This understanding is supported by the TOC Guidelines, the TOC Program text,
23 LAMC Section 12.22.A.25, State Density Bonus Law, and Section 5 of Measure JJJ. Petitioner
24 fails to invalidate the height, yard, open space, and TOC Guideline Additional Incentives.

25 Departures from height, yard, and open space requirements indisputably fall within the
26 understanding of “incentives” in the TOC Guidelines. This is because the Menu of Additional
27 Incentives (“Menu”) in the TOC Guidelines explicitly includes deviations, or exceptions, from City
28 development standards involving yards, open space, and height among other specified types of
development standards. (AR 0503-05 [TOC Guidelines, VII].)

1 The TOC Program text gave the Planning Director and CPC the discretion to define the
2 types of development standard variations that would constitute the third category of TOC
3 Incentives. The TOC Program text authorized the Director of Planning and CPC to prepare and
4 adopt the TOC Guidelines that provide the incentives for the TOC Program. (AR 0019-20; Resps.’
5 RJN, p. 50 [Ex. C – LAMC § 12.22.A.31(b), (c)].) Except for the directive to prepare guidelines
6 that provide “incentives,” the TOC Program text did not restrict the type or range of development
7 standards constituting “incentives.” (AR 0020. *See also* Resps.’ RJN, p. 50 [Ex. C – LAMC
8 § 12.22.A.31(b)(2)(iii)]; *Cal. Assn. for Health Serv’s. at Home v. State Dept. of Health Serv’s.*
9 (2007) 148 Cal.App.4th 696, 708-710 [court compelled review but not discretionary setting of rates
10 stating, “it is not a function of the writ of mandamus in this setting to compel the setting of rates,
11 regardless of plaintiffs’ showing of inadequacy [of the rates].”].)

12 A broad definition of “incentives” for the TOC Program is informed and supported by the
13 broad definition of “incentive” in the City’s Density Bonus Program. It is appropriate to consider
14 the City’s Density Bonus Program, because it is also codified in the development standards
15 “Exceptions” section, LAMC Section 12.22, and referenced in the TOC Program text at LAMC
16 Section 12.22.A.31(e). In this other Exceptions program, the term “incentive” is broadly defined
17 as “a modification to a City development standard or requirement of Chapter I of this Code
18 (zoning).” (Resps.’ RJN, p. 35 [Ex. C – LAMC § 12.22.A.25(b)].) A review of the Density Bonus
19 Program Menu of Incentives shows some of the different types of development standards that arise
20 from LAMC Chapter I, and are subject to exception. These development standards include, height,
21 yard, and open space, similar to the list of Additional Incentives in the TOC Guidelines. (*See*
22 *generally*, Resps.’ RJN, p. 39 [Ex. C – LAMC § 12.22.A.25(f) Density Bonus Program Menu of
23 Incentives listing potential modifications to requirements in LAMC Chapter I].)

24 Case law supports the Court and the City giving the term “incentives” in the TOC Program
25 the same range of meaning as the term “incentive” in the City’s Density Bonus Program, because
26 it is in the same “Exceptions” section of the LAMC. (Resps.’ RJN, pp. 34-42, 50-51 [Ex. C –
27 LAMC § 12.22.A.25, § 12.22.A.31].) “When a term appears in different parts of the same act, or
28 in related sections of the same code, the term should be construed as having the same meaning in

1 each instance.” (*Lewis v. Superior Ct.* (1999) 19 Cal.4th 1232, 1268 [construing the term “‘heard’
2 or one of its cognate forms” as equivalent across multiple sections of the Code of Civil Procedure].)

3 The text of Measure JJJ also demonstrates that the initiative drafters intended a broad
4 definition of the term “incentives” in the TOC Program based on the understanding of that term in
5 State Law Density Bonus at Government Code Section 65915. First, Measure JJJ defined the term
6 “incentives” at Measure JJJ, Section 5 by incorporating the broad State Density Bonus Law
7 definition of “incentives” in Government Code Section 65915. Second, the TOC Program text
8 demonstrated an understanding and acceptance of State Density Bonus Law through multiple
9 references to Government Code Section 65915 and directing the City to grant up to three
10 “incentives or concessions” based on the requirements in Section 65915(d)(2). (*See* AR 0013
11 [LAMC § 11.5.11(e), “incentives or concessions” refers to Gov. Code § 65915(k)]; AR 0019-20;
12 Resps.’ RJN, p. 50 [Ex. C – LAMC § 12.22.A.31(b)(1), (2)]; Gov. Code § 65915(k)(1)
13 [“concession or incentive” means a “reduction in site development standards or a modification of
14 zone code requirements”]; Gov. Code § 65915(o)(1) [“development standard” includes “a site or
15 construction condition, including but not limited to, a height limitation, a setback requirement...an
16 onsite open-space requirement...”].) Thus, the City’s understanding of the term “incentives”
17 memorialized by the TOC Guidelines is well supported, and entitled to substantial deference.
18 (*Berkeley Hills Watershed Coal., supra*, 31 Cal.App.5th at 896.)

19 The Opening Brief’s final argument about incentives fails because it reflects the flaws in
20 each of Petitioner’s prior assertions regarding the same, disputed features of the TOC Guidelines –
21 Tiers, Additional Incentives and Labor Standards. (Opening Brief at 17:24-18:19.) Petitioner is
22 correct that the Project’s approval is dependent on the incentives provided by the TOC Guidelines.
23 However, Petitioner fails to identify any authority preventing the City from approving the 10400
24 Santa Monica Boulevard Project with the incentives for height, yard and open space. The City
25 awarded valid TOC Incentives to the Project through a code exception, which makes a legislative
26 approval unnecessary. No legislative approval, such as a height district amendment or zone change,
27 is required as discussed in above Section IV(B). The TOC Program and its guidelines constitute a
28 voter-created exception that avoids the need for a legislative approval.

1 The Project meets all applicable criteria under the TOC Guidelines for Tier 3 Base and
2 Additional Incentives. It is located within one-half mile from the future Purple line Century City
3 and Constellation rail station. (AR 0810, AR 0849.) This is a Major Transit Stop as defined by
4 the TOC Guidelines. (AR 0496 [TOC Guidelines, II.6, (allowing consideration of stops under
5 construction or included on the plan), III.1 (referencing Pub. Res. Code 21155 definition of Major
6 Transit Stop)]; Pub. Res. Code § 21155(b).) Accordingly, the Project is located within a one-half
7 mile radius of a Major Transit Stop. (AR 0019.) The DCP correctly determined that, based on the
8 proximity of the Project to transit, the Project qualified for Tier 3 incentives. (AR 0850.) The
9 Project proposes the construction of a 120-unit residential building with 12 units set aside for
10 Extremely Low Income households. (AR 0838.) Thus, the Project meets the definition of an
11 Eligible Housing Development under the TOC Program. (AR 0020-21.)

12 Petitioner does not dispute these facts, but instead argues that the Project received three
13 “Additional Incentives” not authorized by the TOC Program text: reduced side yards, an additional
14 height increase, and reduced open space requirements. As discussed above, the plain language of
15 the TOC Program provides Eligible Housing Developments with three Additional Incentives.
16 (AR 0019-20.) The Project received Base Incentives of increased residential density, an adjusted
17 floor area ratio and reduced parking, each of which is specifically identified in the “TOC
18 Incentives” provision of the TOC Program text. That provision also provides that an Eligible
19 Housing Development “may be granted up to either two or three incentives or concessions.”
20 (AR 0020.) Based on the 12 Extremely Low Income Units, the Project was entitled to receive the
21 approved three Additional Incentives for its Tier 3 Project. (AR 0812.)

22 Based on the above, the Opening Brief has failed to identify any grounds to invalidate the
23 list of Tiers or incentives in the TOC Guidelines, or to invalidate their application to the Project.

24 **G. Petitioner’s Attack On The TOC Guidelines Is Time-Barred.**

25 All of Petitioner’s challenges to the TOC Program are time-barred pursuant to Government
26 Code Section 65009(c)(1). As discussed above, every argument asserted in Petitioner’s Opening
27 Brief relates to the adoption of the TOC Guidelines or whether the adopted TOC Guidelines are
28 consistent with voter initiative Measure JJJ. The gravamen of each of these claims is a pure facial

1 attack on the TOC Program which could have been timely asserted within 90 days after the TOC
2 Guidelines were adopted by the CPC on September 27, 2017. As this action was not filed until
3 August 30, 2019, Petitioner’s claims should thus be dismissed based on the statute of limitations.

4 Government Code Section 65009 identifies multiple grounds under which the TOC
5 Guidelines are protected by the 90-day limitations period. First, the TOC Guidelines are protected
6 as quasi-legislative rules attached to an initiative ordinance. (*See* Gov. Code § 65009(c)(1)(C).)
7 Second, they are the result of City Planning Commission and Director of Planning actions pursuant
8 to initiative ordinance Measure JJJ. (*See* Gov. Code § 65009(c)(1)(E).) Third, case law also
9 indicates the TOC Guidelines are separately protected because they have the dignity of the enabling
10 initiative ordinance Measure JJJ. (*See Yamaha Corp. of America v. State Bd. Of Equalization*
11 (1998) 19 Cal.4th 1, 10.) As a consequence, the TOC Guidelines are also protected by the 90-day
12 limitations period as a “zoning ordinance.” (Gov. Code § 65009(c)(1)(B).) Section 65009 has
13 been broadly interpreted to apply to a variety of planning and zoning actions. (*See 1305 Ingraham*
14 *LLC v. City of Los Angeles* (2019) 32 Cal.App.5th 1253, 1260-61 (scope of Gov. Code § 65009
15 broadly interpreted to cover a “decision” by operation of law); *Honig v. San Francisco Planning*
16 *Dept.* (2005) 127 Cal.App.4th 520, 527-28 (applying Gov. Code § 65009(c)(1)(E) to bar untimely
17 challenge to planning commission building permit approval pursuant to Gov. Code § 65903).)

18 Petitioner will undoubtedly argue that the statute of limitations defense should be denied
19 based on this Court’s August 31, 2020 Order Denying Respondent’s Motion to Strike Portions of
20 the Petition (“Order”). However, that Order addressed only whether the Petition alleged sufficient
21 grounds to survive a motion to strike. The Order concluded that Petitioner pleaded as-applied
22 challenges to the project approvals for 10400 Santa Monica Boulevard, citing *Travis v. County of*
23 *Santa Cruz* (2004) 33 Cal.4th 757. (*See* Order at 6, citing Pet., ¶¶ 5, 6, 28.)

24 By contrast, Petitioner’s merits briefing raises no as-applied claims – only facial challenges.
25 The Project here provides no value to the claims against the TOC Guidelines. Section A of the
26 Opening Brief argues that the CPC and DCP lacked authority to adopt the TOC Guidelines.
27 Sections B and C assert that the guidelines failed to implement the Labor Standards. Sections D
28 and E claim that the incentives and Tiers are inconsistent with Measure JJJ. Section F then argues

1 that the Project’s approval dependent upon the TOC Guidelines is invalid, solely because the
2 guidelines are facially invalid based on the earlier arguments. Petitioner’s interest in bringing this
3 lawsuit has little to do with the specific Project. Rather, Petitioner’s states its primary aim is to
4 uphold the “good jobs” and affordable housing promises to voters. (Opening Br. at 4:20-23.)³

5 *Travis* should be held to its facts, and should not be expanded to allow a third-party non-
6 applicant like Petitioner to bring facial claims under a purported “as-applied” theory each time a
7 project is approved under the TOC Guidelines. Expanding *Travis* beyond the facts of an owner-
8 applicant-petitioner allows all third-parties to “evade the statute of limitations for facial challenges
9 to a zoning ordinance merely by filing something it terms an ‘as-applied’ challenge. It is the nature
10 or gravamen of the [petitioner’s] action that determines when the limitations period begins, not the
11 label the [petitioner] affixes to its pleadings.” (*County of Sonoma v. Superior Court* (2010) 190
12 Cal.App.4th 1312, 1329-30; *accord*, *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3
13 Cal.App.5th 621, 627-28 [2nd Appellate Dist. barred a challenge brought more than 90 days after
14 ordinance enactment, stating “[t]his 90-day limitation applies even if the facial challenge is part of
15 an as-applied challenge.”]). Applying *Travis* beyond its facts improperly divorces the language of
16 that opinion from the facts and issues before that court. (*Kinsman v. Unocal Corp.* (2005) 37
17 Cal.4th 659, 680 [“language in a judicial opinion is to be understood in accordance with the facts
18 and issues before the court. An opinion is not authority for propositions not considered.”].)

19 All of Petitioner’s claims thus challenge the manner of adoption of the TOC Guidelines, or
20 the specific terms of the TOC Guidelines adopted by the CPC in 2017. Unlike the plaintiff in
21 *Travis*, this action does not involve any approval or permit sought by Petitioner, or otherwise alter

22
23 ³ Petitioner’s request for equitable relief to restrain current City process that follows the TOC
24 Guidelines on a theory that the current process violates Measure JJJ is an attempt to recast a direct
25 attack on the TOC Guidelines. (See Opening Brief at 6, fn.2.) That claim is time-barred by
26 Government Code Section 65009. (See *Venice Coalition to Preserve Unique Community*
27 *Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 51 [barring under Government Code
28 Section 65009 a challenge to the approval process “embodied in the specific plan,” stating, “Venice
Coalition claims it is only challenging the City’s ongoing failure to ensure that [Venice Sign-Off]
projects ‘respect the scale, massing, character, and landscape of existing neighborhoods’ as
required by the [Venice Land Use Plan or LUP]. This argument, however, is an attempt to recast
what is essentially a challenge to the specific plan itself as being inconsistent with the LUP.”].)

1 any real property interest of Petitioner. (See 33 Cal.4th at 764.) There, the California Supreme
2 Court ruled that the facial challenges to an ordinance were in substance challenging the
3 enforcement of the ordinance and the imposition of conditions on plaintiffs’ own property, as
4 opposed to “injury *solely* from a law’s enactment.” (Id. at 767-68.) The claim was deemed timely
5 because “to the extent Travis seeks a finding that the Ordinance cannot be applied against him, and
6 relief in the form of removal of the conditions on his permit, his challenge is to the County’s
7 adjudicatory decision imposing the conditions and comes within section 65009, subdivision
8 (c)(1)(E).” (Id. at 769.) Petitioner here was not the recipient of the Project approval challenged,
9 and thus has no takings claim analogous to the *Travis* plaintiffs. The facial challenges to the TOC
10 Guidelines have nothing to do with enforcing land use regulations against Petitioner or its property.

11 Each of Petitioner’s arguments was ripe upon the adoption of the TOC Guidelines, and
12 nothing prevented Petitioner from filing its challenge at that time. For these reasons, all of
13 Petitioner’s merits claims are now time-barred by Government Code Section 65009(c)(1).

14
15 **V. CONCLUSION**

16 For the reasons set forth above, the City respectfully requests that the Court deny the
17 Petition in its entirety, and grant such further relief as the Court may deem necessary and proper.

18
19 DATED: May 10, 2021

MEYERS NAVE

20
21 By: 

22 SHIRAZ D. TANGRI

ROBIN BARAL

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LOS ANGELES CITY PLANNING

COMMISSION, and VINCENT P. BERTONI

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PROOF OF SERVICE

**Fix The City, Inc. v. City of Los Angeles, et al.
Case No. 19STCP03740**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 707 Wilshire Blvd., 24th Floor, Los Angeles, CA 90017.

On May 10, 2021, I served true copies of the following document(s) described as **RESPONDENTS' OPPOSITION BRIEF ON ISSUES RELATED TO TRANSIT ORIENTED COMMUNITIES PROGRAM** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address tstephens@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on May 10, 2021, at Los Angeles, California.



Teresa Stephens

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SERVICE LIST
Fix The City, Inc. v. City of Los Angeles, et al.
Case No. 19STCP03740 (Lead Case)

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