



## SPECIAL MEETING AGENDA

**Date:** 8/5/2026  
**Time:** 6:30 p.m.  
**Locations:** [Zoom.us/join](https://zoom.us/join) – ID# 822 5307 1410 and  
City Council Chambers  
751 Laurel St., Menlo Park, CA 94025

**City Councilmember Combs will be participating from:**  
123 W. 44th St.  
New York NY, 10036

**Vice Mayor Wise will be participating from:**  
Hamburgo 195  
Juárez, Cuauhtémoc  
06600 Cuauhtémoc  
CDMX, Mexico

[Reunión del Ayuntamiento forma de solicitud de interpretación presencial en español](#) – Por favor, envíelo la forma 72 horas antes de la reunion. También puede solicitarlo llamando a la oficina del secretario municipal al 650-330-6620.

[City Council Meeting In-person Spanish Interpretation Request Form](#) – please submit at least 72-hours before the meeting. You can also request this service by calling the city clerk's office at 650-330-6620.

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How to participate in the meeting

- Submit a written comment online up to one-hour before the meeting start time:  
[city.council@menlopark.gov](mailto:city.council@menlopark.gov)
- Attend in person in the City Council Chambers
- Access the meeting real-time online at:  
[Zoom.us/join](https://zoom.us/join) – Meeting ID 822 5307 1410
- Access the meeting real-time via telephone at:  
(669) 900-6833  
Meeting ID 822 5307 1410  
Press \*9 to raise hand to speak

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## Special Session

### A. Call To Order

**B. Roll Call**

**C. Closed Session**

- C1. Conference with legal counsel – anticipated litigation  
(Paragraph (2) of subdivision (d) of Gov. Code Section 54956.9)  
Significant exposure to litigation: One case  
Documentation related to this agenda item are attached to this agenda (Attachment).

**D. Adjourn to Closed Session**

**E. Call To Order**

**F. Report from Closed Session**

**G. Adjournment**

At every regular meeting of the City Council, in addition to the public comment period where the public shall have the right to address the City Council on any matters of public interest not listed on the agenda, members of the public have the right to directly address the City Council on any item listed on the agenda at a time designated by the chair, either before or during the City Council's consideration of the item.

At every special meeting of the City Council, members of the public have the right to directly address the City Council on any item listed on the agenda at a time designated by the chair, either before or during consideration of the item. Special meetings of the City Council do not provide the opportunity for public comment on items not on the agenda (Cal. Gov. Code Section 54956).

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# Allen Matkins

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## **Via Email**

August 3, 2026

Deanna M. Chow  
Community Development Director  
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701 Laurel St.  
Menlo Park, CA 94025  
Email: DMChow@menlopark.gov

Nina F. Doherty  
City Attorney  
City of Menlo Park  
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*Re: 80 Willow Road (PLN2023-00049)  
AB 712 Notice*

Dear Ms. Chow and Ms. Doherty:

Pursuant to Government Code section 65914.2(b)(2)(A)(i)(II), applicant Willow Project, LLC (“Applicant”) hereby provides notice to the City of Menlo Park of its intent to commence legal action against the City to enforce the City’s compliance with the State’s housing reform laws, as defined in subdivision (d)(2) of that Government Code section.

The City has continually and consistently refused to comply with the Housing Accountability Act (Gov. Code, § 65589.5), the state Density Bonus Law (Gov. Code, § 65915), and the Affordable Housing and High Road Jobs Act of 2022 (Gov. Code, §§ 65912.100 et seq.). The City’s unlawful actions are summarized in the attached July 29, 2026 letter from the California Department of Justice (“AB 712 Letter”), incorporated by reference as if set forth in full herein. As stated therein, the City wrongfully made inconsistency findings per Government Code sections 65912.121 and 65912.123, including adding new findings that were prohibited under Section 65912.124(a)(2).

Allen Matkins Leck Gamble Mallory & Natsis LLP  
Attorneys at Law

Deanna M. Chow  
Nina F. Doherty  
August 3, 2026  
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Applicant's lawsuit will allege factual and legal allegations in substantially the same manner as set forth in the AB 712 Letter. In the event that Applicant is the prevailing party in the lawsuit, the Court shall award Applicant attorney's fees and costs, and shall impose fines upon the City pursuant to Government Code section 65914.2, subdivisions (b)(1) and (b)(2).

The AB 712 Letter unequivocally rejects each of the City's bases for its refusal to process the project in accordance with Government Code section 65912.124(a)(3)'s streamlined, ministerial review process. As such, the City is required to approve the project within 90 days from the date of the AB 712 Letter, which equates to **October 27, 2026**.

Finally, the AB 712 Letter determined that the City's practice of requiring Applicant to pay the City Attorney's fees is unlawful. To date, Applicant has paid City Attorney charges totaling approximately \$300,000, which the City is obligated to refund.

Very truly yours,



David H. Blackwell

Attachment (AB 712 Letter)

cc: Matthew Struhar, Esq. ([Matthew.Struhar@doj.ca.gov](mailto:Matthew.Struhar@doj.ca.gov))  
Oisin Heneghan, Willow Project, LLC ([oisin@n17.dev](mailto:oisin@n17.dev))



C A L I F O R N I A  
DEPARTMENT OF JUSTICE

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July 29, 2026

**VIA E-MAIL**

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**RE: NOTICE REGARDING 80 WILLOW ROAD (PLN2023-00049)**  
**(GOV. CODE, § 65914.2.)**

Ms. Chow and Ms. Doherty:

Thank you for meeting with us recently to discuss the application for a housing development project (“Project”) at 80 Willow Road in Menlo Park. The Office of the Attorney General remains concerned that the City has not handled the application in accordance with the Affordable Housing and High Road Jobs Act of 2022 (the “Act”). (Gov. Code, §§ 65912.100-65912.140.)<sup>1</sup> As we discussed, records show that the City untimely asserted additional grounds to support its initial determination that the Project was ineligible for streamlined approval under the Act. Because the City cannot change its rationale for finding the Project ineligible for streamlined approval from its initial rationale, and because the City’s initial rationale is incorrect, the City’s handling of the application for this Project would represent a violation of the Act.

The City’s treatment of the Project also violates the Housing Accountability Act (the “HAA”) in two respects. First, the City is failing to afford the Project the protections to which it is entitled under the builder’s remedy. (§ 65589.5, subd. (d)(5)-(6).) Second, the City is unlawfully requiring the Project applicant to pay for the City’s legal counsel in connection with the City’s review of the Project, which goes beyond the limited authority the HAA reserves to local agencies to impose fees on development applicants. (See *id.*, subd. (f)(3).) That practice

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<sup>1</sup> All statutory references are to the Government Code unless otherwise indicated.

also violates Section 65914.2 (“A.B. 712”), which prohibits the City from requiring project applicants to indemnify the City for any litigation-related expenses.

## **I. Background**

### **a. The Project**

80 Willow Road LLC (the “Applicant”) submitted its preliminary application on December 7, 2023, followed by a formal development application on May 24, 2024. The Project is a mixed-use, mixed-income housing development that would adjoin the City of Palo Alto’s Timothy Hopkins Creekside Park (the “Park”) and other urban uses in Menlo Park. As currently proposed, the Project would develop 665 new housing units, 15 percent of which would be affordable to lower-income households. The City determined that the Project application was complete on November 14, 2024.

### **b. The City’s First AB 2011 Determination Letter**

On June 22, 2024, the City sent the Applicant the City’s determination that the Project was ineligible for streamlined approval under the Act (the “First Determination Letter”). The City concluded that the Project was inconsistent with certain of the Act’s site criteria and development standards for mixed-income housing development. The City did not find any inconsistencies with the Act’s affordability criteria.

***The City’s initial inconsistency findings under Section 65912.121.*** The City alleged that the Project site did not satisfy three site criteria for mixed-income housing under the Act. (First Determination Letter at p. 2.) First, the City alleged that the Project site did not sufficiently abut parcels developed with urban uses, as the Act requires 75 percent of a development site to abut urban uses. (*Ibid.*) According to the City, the Project site adjoined the Park, which the City claimed to be a non-urban use. (*Ibid.*) By the City’s math, that meant that only 40 percent of the Project site’s perimeter abutted urban uses. (*Ibid.*)

The other two site criteria are from Section 65913.4. (See § 65912.121, subd. (g).) The City claimed that, because the Project site included jurisdictional wetlands under the United States Fish and Wildlife Service Manual (the “Manual”), Part 660 FW 2 (June 21, 1993), the Project site failed to comply Section 65913.4(a)(6)(C). (First Determination Letter at p. 2.) The City also claimed that, because “environmental studies have identified the Project Site as habitat for California red-legged frog and central California coast steelhead (*Oncorhynchus mykiss*),” the Project constituted habitat for listed species. (*Ibid.*)

***The City’s initial inconsistency findings under Section 65912.123.*** With the First Determination Letter, the City found the Project inconsistent with four development standards, but only two of which the City continues to determine conflict with the Project. First, the City found that the Project exceeded the density restrictions under Section 65912.123(b). (First Determination Letter at p. 3.) Second, the City found that the Project exceeded the Act’s height restrictions under Section 65912.123(c). (*Ibid.*)

**c. The Applicant's First Reply Letter**

On October 10, 2025, the Applicant submitted a revised application under the Act and a reply letter (the "First Reply Letter") to address the alleged inconsistencies asserted in the First Determination Letter. For the site criteria, the Applicant noted that the Legislature, in adopting A.B. 2243, included public parks in the Act's definition of "urban uses." (First Reply Letter at pp. 1-2.) In addressing wetlands and habitat, the Applicant also drew a distinction between the Project site and the legal parcel on which the site is located. (*Id.* at p. 2.) The Applicant explained that, while the legal parcel hosting the site includes protected wetlands and habitat, the Project site itself would not. (*Ibid.*)

For the development standards flagged in the First Determination Letter, the Applicant noted that A.B. 1893, which reformed the builder's remedy, mooted the City's finding that the Project was inconsistent with Act's density restrictions. (*Id.* at p. 3.) The Applicant further explained how A.B. 2243 allowed project proponents under the Act to take advantage of the Density Bonus Law, which addressed the City's finding that the Project was inconsistent with the Act's height restrictions. (*Ibid.*)

**d. The City's Second Determination Letter**

On November 7, 2025, the City submitted a second determination letter (the "Second Determination Letter") to address the resubmitted Project and the First Reply Letter. The City again found the Project inconsistent with the Act's objective planning standards, but it made new inconsistency findings separate from those in the First Determination Letter.

***The City's subsequent inconsistency findings under Section 65912.121.*** With the Second Determination Letter, the City found, for the first time, that the Project was inconsistent with the Act because the Project site was not "located within a zone where office, retail, or parking are a principally permitted use." (§ 65912.121, subd. (a).) According to the City, the Project site is zoned C-1, and the City's C-1 zone does not have any permitted uses. (Second Determination Letter at p. 2.) Because any development in the C-1 zone requires a conditional use permit, the City reasoned that the Project site does not satisfy Section 65912.121(a). (*Ibid.*)

The City continued to find the Project inconsistent with Section 65912.121(e)'s requirement that urban uses surrounded 75 percent of project sites. (*Id.* at p. 3.) In making that finding, the City took the position that the City of Palo Alto's lands adjoining the Project site are not a park. (*Ibid.*) The City also rejected the Applicant's argument distinguishing between sites and parcels. (See *ibid.*) By treating the Project site as coterminous with the legal parcel on which the Project site is located, the City continued to find that the Project site included protected wetlands and habitat for protected species. (*Id.* at p. 4-5.)

***The City's subsequent inconsistency findings under Section 65912.123.*** The City faulted the Project for failing to comply with the Act's height limits, parking setbacks, and frontage requirements, despite acknowledging that these development standards are subject to the Density Bonus Law's incentives, concessions, and waivers. (*Id.* at pp. 7-8.) The City also took the position, for the first time, that the Project was not a housing development project for purposes of

the Act or the HAA, as required by Section 65912.123(a). (*Id.* at pp. 2-3.) The City took this position because the total residential gross square footage, by the City’s calculation, only accounted for 61.18 percent of the Project’s total gross square footage. (*Ibid.*) The City did not find the Project inconsistent with any standard set forth under Section 65912.123(a) in its First Determination Letter.

#### **e. Subsequent Correspondence**

The Applicant responded to the Second Determination Letter on November 19, 2025, in which it faulted the City for improperly making new inconsistency findings in violation of the Act. The City responded on December 18, 2025, reiterating the positions it asserted in its Second Determination Letter, and taking the position that there was nothing improper in the City finding the Project inconsistent with additional objective planning standards that were not cited in the First Determination Letter. The Applicant replied to that letter on December 24, 2025. Since then, the City has continued to find the Project inconsistent with multiple planning standards.

On May 6, 2026, the City submitted its latest determination letter (“May 6 Determination Letter”), in which it reiterated its bases for finding the Project ineligible for streamlined approval under AB 2011. But the City conceded other points to the Applicant, including that the Project satisfies the residential area requirements necessary to qualify as a housing development project under the HAA.

## **II. Legal Analysis**

### **a. The City’s Treatment of the Project Violates the Act**

The City cannot apply the Act’s objective planning standards in a manner inconsistent with Section 65912.124(a). For mixed-income developments under the Act, Section 65912.124(a) requires local governments to make an initial inconsistency determination within 60 or 90 days, depending on the size of the proposed development. (§ 65912.124, subd. (a)(1).) Absent a timely initial finding that a development conflicts with a particular of the Act’s standards, the Act requires the local government to treat the proposed development as consistent with that standard. (§ 65912.124, subd. (a)(4).) That is true now, and it was true before A.B. 2243 took effect last year. (See former § 65912.124, subd. (b), eff. Jan. 1, 2024 [“If the local government fails to provide the required documentation pursuant to subdivision (a), the development shall be deemed to satisfy the required objective planning standards.”].)

A.B. 2243 reinforced this understanding of the Act. With A.B. 2243, the Legislature amended the Act to provide that, “[i]n any subsequent review of the application determined to be in conflict with the objective planning standards specified in this article, the local government shall not request the development proponent to provide any new information that was not stated in the initial list of items that were determined to be in conflict.” (§ 65912.124, subd. (a)(2)(B).) In other words, once a local government makes an inconsistency determination, the Act prohibits the local government from asserting newly discovered bases to find a proposed A.B. 2011 project inconsistent with the Act’s objective planning standards.

According to the City, it was allowed to find additional inconsistencies from those identified in the First Determination Letter because, before A.B. 2243 took effect, the Act did not specify that the City had to provide the Applicant “with an exhaustive list” of objective planning standards that conflicted with the Project. (§ 65912.124, subd. (a)(2)(A).) That point ignores A.B. 2243’s express prohibition on requiring development proponents “to provide any new information that was not stated in the initial list of items that were determined to be in conflict.” (*Id.*, subd. (a)(2)(B).) That prohibition applies to “*any* subsequent review of the application determined to be in conflict with” the Act’s objective planning standards. (*Ibid.*, italics added.) The term “any” is all-inclusive. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 635.) By using the term “any,” the Legislature stated its intent to prohibit local governments from making *any* post-hoc inconsistency findings in *any* subsequent review of *any* A.B. 2011 applications, including those that, like this one, that were submitted and found inconsistent with the Act before A.B. 2243 became law.

For these reasons, the Act prohibits the City from finding new inconsistencies with the Act’s standards that were not identified in the First Determination Letter. With the May 6 Determination Letter, the City is accordingly violating the Act by finding that the Project conflicted with the Act’s standards in the following ways:

- By finding that the Project site was not located within a zone where office, retail, or parking were a principally permitted use (§ 65912.121, subd. (a));<sup>2</sup>
- By finding that Project was not surrounded by urban uses based on the Project site’s parcel configuration (§ 65912.121, subd. (e));<sup>3</sup>
- By finding that the Project did not satisfy the Act’s affordability criteria concerning the Project’s affordable units (§ 65912.122, subd. (d));

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<sup>2</sup> Although the City’s zoning code provides that there are no permitted uses on the Project site absent a conditional use permit, the City’s general plan designates the Project site as commercial, and the general plan provides that the commercial designation accommodates commercial uses. (See General Plan, City of Menlo Park (Nov. 29, 2016) at LU-12, LU-13, LU-15.) We thus do not believe that the City can rely on its zoning code to treat commercial uses at the Project site as only conditionally permitted for purposes of AB 2011. (See §§ 65912.101, subd. (u), 65912.121, subd. (a).) “The tail does not wag the dog.” (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541.) “The general plan is the charter to which the ordinance must conform.” (*Ibid.*)

<sup>3</sup> This is not to say that all of the site criteria listed in Section 65912.121 constitute waivable standards, but the site criteria concerning infill development in commercial zones qualify as “planning standards” for purposes of the Act given that other laws treat such requirements as planning standards. (See, e.g., §§ 65913.4, subds. (a)(2)(A) [treating an infill site requirement as a planning standard], (a)(2)(C) [treating base zoning as a planning standard].) For more information, we refer you to HCD’s Affordable Housing and High Road Jobs Act of 2022 Draft Guidelines, available here: <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/draft-ab-2011-guidelines.pdf>.

- By finding that the Project is not a housing development project (§ 65912.123, subd. (a)); and
- By finding that the Project did not satisfy the Act’s development standards concerning parking setbacks and frontage (§ 65912.123, subd. (d)(1)).

Because these alleged conflicts were not identified in the City’s First Determination Letter, the City cannot rely on these alleged conflicts to determine that the Project is not eligible for streamlined approval under the Act.

**b. The Project Is Consistent with the Act’s Objective Planning Standards**

The First Determination Letter sets the parameters of the City’s subsequent review of the Project under the Act. Based on the information provided by the Applicant in response to the First Determination Letter, we have concluded that the City’s handling of the Project application has been inconsistent with the Act.

*The Project site adjoins urban land uses.* In the First Determination Letter, the City found that less than 75 percent of the Project site adjoined urban land uses. Section 65912.121(e) requires at least 75 percent of a project site to adjoin urban land uses for a proposed development to qualify for streamlined approval under the Act. (§ 65912.121, subd. (e).) At the time, as the City noted, the Act’s definition of “urban uses” did not expressly include parks, open space, or natural areas, and the Project site adjoins the Park. A.B. 2243, however, amended the Act to define “urban uses” as including a “public park that is surrounded by other urban uses....” (§ 65912.101, subd. (x).) Because the Park is a public park surrounded by other urban uses, it is an urban use for purposes of the Act, and the Project site thus complies with Section 65912.121(e).

The City’s argument that A.B. 2243 has no effect on its initial determination regarding the site perimeter is unavailing. First, the City argues that the Park is not a park. (See, e.g., Second Determination Letter at p. 3.) That would be news to the City of Palo Alto, whose municipal code provides that the Park “is hereby reserved for park, playground, recreation or conservation purposes.” (City of Palo Alto Mun. Code, § 22.08.290.) Parks may serve open-space or conservation purposes. (See, e.g., Pub. Resources Code, § 5902, subd. (i) [defining “park” for purposes of the California Wildlife, Coastal, and Park Land Conservation Act as meaning “a tract of land with outstanding scenic, natural, open-space, or recreational values, set apart to conserve natural, scenic, cultural, or ecological resources for present and future generations, and to be used by the public as a place for rest, recreation, education, exercise, inspiration, or enjoyment”].) The City cannot escape the effect of A.B. 2243 by describing the Park as “open space ... preserved for its environmental value....” (May 6 Determination Letter at p. 6, internal quotation omitted.)

Second, the City conflates the Project site with the legal parcel hosting the site. The Legislature recently added Section 65912.103.5 to the Act, and that statute restricts the City’s “review of the property or site ... to the area described as being physically disturbed by construction in the application for streamlined, ministerial review and shall not include, unless expressly stated otherwise, other contiguous or noncontiguous areas even if under the ownership

or control of the project proponent.” (§ 65912.103.5.) The Act thus directs the City to only consider the Project site itself, not the parcel on which the Project site is located, in determining eligibility for streamlined approval.

***The Project complies with the Act’s density standards because it is a builder’s remedy project.*** The HAA specifies that builder’s remedy projects are consistent with the Act’s density standards under Section 65912.123(b). (See § 65589.5, subd. (f)(6)(F)(i).) To avoid this effect, the City has contended that the Project is not a housing development project as defined by the HAA. (See §§ 65589.5, subd. (h)(3), 65912.101, subd. (i).) In the May 6 Determination Letter, the City makes only one point to support this argument, which is that the Project includes a hotel.

The Project is not subject to the HAA’s restrictions on hotel development because the application was deemed complete before A.B. 1893 took effect and because the Project is a builder’s remedy project. The HAA is not ambiguous on this point:

For a housing development project application that is deemed complete before January 1, 2025, the development proponent for the project may choose to be subject to the provisions of this section that were in place on the date the preliminary application was submitted, or, if the project meets the definition of a builder's remedy project, it may choose to be subject to any or all of the provisions of this section applicable as of January 1, 2025.

(§ 65589.5 subd. (f)(7)(A).)<sup>4</sup>

There is no dispute that the Project application was deemed complete before January 1, 2025. Nor is there any dispute that the Project satisfies the requirements for the builder’s remedy, aside from the fact that the Project includes a hotel. The HAA’s hotel restrictions took effect as part of A.B. 1893, which entitles the Applicant to “choose to be subject to any or all of the provisions of this section applicable as of January 1, 2025.” (*Ibid.*) The HAA thus allows the Applicant to disregard A.B. 1893’s restrictions on hotels while also taking advantage of A.B. 1893’s relaxed affordability provisions. For that reason, the Project is a builder’s remedy project notwithstanding its inclusion of a hotel.

***The Project is entitled to the protections of the Density Bonus Law.*** The Act allows project applicants to use incentives, concessions, and waivers or reductions of development standards under the Density Bonus Law “to deviate from the objective standards in” Section 65912.123(c) and (d)(2)-(3). (§ 65912.124, subd. (f)(2).) The Density Bonus Law prohibits local governments from applying “any development standard that will have the effect of physically precluding the construction of a development” entitled to densities, concessions, or incentives

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<sup>4</sup> To only apply this provision to builder’s remedy projects that satisfy the precise requirements of A.B. 1893 would have the effect of negating this provision altogether, as this provision entitles builder’s remedy applicants to opt in or out of *any* provision that A.B. 1893 added to the HAA. To date, the City has not offered a persuasive explanation for why A.B. 1893’s hotel provisions are different from, say, the HAA’s new density requirements for builder’s remedy projects. Nor could it. (See § 65589.5, subd. (a)(2)(L) [“It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.”].)

under the Density Bonus Law. (§ 65915, subd. (e)(1).) The Applicant is accordingly entitled to a waiver of the height restriction the City seeks to enforce against the Project, and the City cannot enforce the height restriction under the plain terms of the Density Bonus Law. (See *ibid.*)<sup>5</sup> Moreover, the City cannot enforce local development standards to prevent the Project from being developed at the density proposed by the Applicant.

***The Project site is neither a protected wetland nor habitat for protected species.*** The Act incorporates several criteria from Section 65913.4. Relevant here, Section 65913.4 does not allow for streamlined, ministerial approval if a project site is wetlands “as defined in the [Manual].” (§ 65913.4, subd. (a)(6)(C).) In addition, the statute does not allow for streamlined approval on a site that is habitat “for protected species identified as candidate, sensitive, or species of special status by state or federal agencies, fully protected species, or species protected by the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code), or the Native Plant Protection Act (Chapter 10 (commencing with Section 1900) of Division 2 of the Fish and Game Code).” (§ 65913.4, subd. (a)(6)(J).)

The site itself must be protected wetlands or habitat for protected species, as the Act provides that the Project site is not coterminous with the legal parcel. (See § 65912.103.5.) Here, the Applicant has provided evidence that the Project site is neither protected wetlands nor habitat for protected species, even if the legal parcel on which the site sits includes such wetlands or habitat. Despite that evidence, the City nevertheless found that the Project site includes wetlands and habitat for protected species based solely on evidence that such conditions exist elsewhere on the parcel. The City has identified no evidence to support a finding that the *site itself* is protected wetlands or habitat for protected species.

For those reasons, the City cannot continue to find the Project inconsistent with the Act’s objective planning standards.

### **c. The City Cannot Require the Applicant to Pay the City’s Attorney’s Fees**

Our office is informed that the City is requiring the Applicant to pay its attorney fees in connection with the City’s consideration of the Project. The City’s municipal code provides that

[a]s a condition precedent to issuance of any permit for construction or demolition for a covered project, the applicant shall pay to the city a cash fee sufficient to compensate the city for all direct and indirect expenses incurred in administering the permit. The amount of this fee shall be determined in accordance with the City Council approved master fee schedule.

(City of Menlo Park Mun. Code, § 12.48.070.)

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<sup>5</sup> In the May 6 Determination Letter, the City acknowledged that, *should the Applicant receive a waiver of the height restriction*, the Project would be deemed compliant with Section 65912.123(c). (See May 6 Determination Letter at p. 9.)

The City's master fee schedule, however, does not mention hourly fees for legal counsel to advise the City in its consideration of a housing development project. Nothing in the municipal code or the master fee schedule places applicants on notice that they will be liable for attorney's fees if the City procures counsel. Moreover, under the HAA, conditions of approval must be objective, which means their application cannot depend on the subjective judgment of a public official, and they must be "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (§ 65589.5, subd. (h)(9).) Applicants cannot verify, by reference to any uniform benchmark, in advance whether the City will procure the services of counsel to consider a particular project application. And although recovering costs related to permit processing may be permitted, those fees cannot exceed the reasonable cost of providing those charged services. (See § 66014.) Based on the City's conduct of issuing successive inconsistency determinations, and the purported legal bases for those letters, the fees incurred appear to do nothing more than to support the subjective judgment of public officials to refuse to process and approve the project under strained interpretations of state law. Indeed, the City's conduct runs the risk of rendering the project infeasible by charging exorbitant legal fees, which would further implicate the HAA.

To be sure, nothing in the HAA "shall be construed to prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the housing development project or emergency shelter." (§ 65589.5, subd. (f)(3).) But that only narrowly protects the City's authority to impose impact fees based on the increased demand for public services created by new housing developments. (See *ibid.*; see also § 66001 [the Mitigation Fee Act].) And the Mitigation Fee Act expressly excludes fees incurred in processing application fees from its definition of development impact fees. (See § 66000, subd. (b).) Moreover, the City cannot charge excessive fees, and even where they can charge fees, it must be to cover the costs of providing public services to the Project and its residents. (See § 66014.) And the City cannot impose new fees or increase its fees without complying with the Mitigation Fee Act's procedures. (See § 60016, subd. (a).) In short, the Mitigation Fee Act does not contemplate assessing fees for legal services incurred in reviewing project applications for consistency with state housing law, and so, for the City to charge such fees, it must be pursuant to an objective standard as defined by the HAA.

Finally, effective January 1, 2026, the City's fee-shifting requirement also violates A.B. 712. A.B. 712 prohibits local agencies from requiring a housing development applicant "to indemnify, defend, or hold harmless the public agency in any manner with respect to an action brought by the applicant, or any other person, alleging that the public agency violated the applicant's rights or deprived the applicant of the benefits or protections provided by a housing reform law." (§ 65914.2, subd. (c)(1).) Any "requirement, condition of approval, or agreement in violation" of Section 65914.2(c)(1) "is against public policy and void and unenforceable." (*Id.*, subd. (c)(2).) The record here suggests that the City is requiring the applicant to pay for legal services procured in the anticipation of litigation, not for legal services procured to ensure compliance with state law. At this point, the City's successive determination letters are tantamount to prelawsuit communications, not legal review of the project for compliance with state housing law.

For those reasons, the City should cease requiring the Applicant to pay for its legal services in connection with its review of the Project application.

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The Act and the HAA both constitute housing reform laws for purposes of A.B. 712. (See § 65914.2, subd. (d)(2)(A).) The City's actions with respect to the Project application, as set forth above, would represent a violation of both laws.

Sincerely,

*/s/ Matthew T. Struhar*  
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For     ROB BONTA  
         Attorney General

MS: