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As Deadline for Housing Element Certification Passes, "Builder's Remedy" and AB 1398 Remedies Loom for Noncompliant Bay Area Cities and Counties

By: Whitney Hodges and Daniel S. Maroon

As of January 31st, the deadline for many Bay Area cities and counties to adopt legally compliant Housing Elements now has passed, and many jurisdictions remain without certifications from the California Department of Housing and Community Development ("HCD") that their 6th Cycle Housing Element Updates ("6th Cycle") substantially comply with state law. As such – and until HCD certifies that these housing elements substantially comply – the Housing Accountability Act's ("HAA") "Builder's Remedy" is now available in a range of Bay Area jurisdictions.

Additionally, under Assembly Bill 1398 ("AB 1389"), should these jurisdictions fail to obtain HCD's determination of substantial compliance within 120 days of the deadline (or May 31, 2023), these jurisdictions will be required to rezone the candidate sites identified in the 6th Cycle before HCD can find the 6th Cycle in compliance with the Housing Element Law. Therefore, Bay Area developers may soon have at least two remedial options that would provide much needed leverage in for their housing projects.

I. Background

Enacted in original form in 1969, the Housing Element Law (Govt. Code §§ 65580 et seq.) requires that all cities and counties in California engage in detailed planning for their residential needs by including housing as an element of their comprehensive plans. The Housing Element process is intended to focus the attention of local government policymakers on identifying land sites for housing, and on policy actions that would make it easier or less expensive to provide additional housing units. The Housing Element Law requires that the housing element include, among other things, an inventory of land suitable and available for residential development.

When the inventory in an local government's Housing Element does not identify sites sufficient to meet the government's share of the regional housing needs assessment at all income levels without rezoning, the Housing Element must identify sites that can be developed for housing within the planning period.[1] The Housing Element must commit to rezone sites to make up any shortfall between the amount of low- and very low-income units identified in the inventory and the needs assessment.

Once a local update has been drafted, HCD reviews it to gauge whether the plan can enable the targeted number of units — including specific amounts of housing for households of very low-, low-, moderate-, and "above moderate" incomes. If so, HCD certifies the Housing Element. If not, the jurisdiction may change its plan to incorporate

[1] Govt. Code § 65583(c)(1).

HCD's suggestions. If the element is adopted without satisfying HCD's concerns — or fails to be updated at all — the city or county is regarded as noncompliant. Including Builder's Remedy and AB 1398, that judgment limits its eligibility for certain state and federal funds for affordable housing and renders it more vulnerable to lawsuits that can halt development in the community. Undeniably, there have been frequent conflicts between state and local policymakers over housing element compliance.

II. Builder's Remedy

Strictly speaking, the HAA requires that an adopted Housing Element be found substantially compliant by HCD before the deadline. Because certain jurisdictions covered by the Association of Bay Area Governments waited until just before the January 31, 2023 deadline to adopt their new 6th Cycle and send them to HCD, they have not received certifications from HCD in time to forestall activation of the Builder's Remedy.

The Builder's Remedy is an entitlements streamlining option for housing development projects that becomes available once a jurisdiction falls out of compliance with the state's housing element law. Specifically, under the HAA, cities and counties may only disapprove housing development projects with at least 20% of the units for sale or rent to lower-income households or 100% of the units for sale or rent to moderate-income households by making one of five specific findings. One such finding is as follows:

> The housing development project is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete ***and*** the jurisdiction has adopted a housing element in substantial compliance with state housing element law.[2]

Under this language, in order to disapprove a qualifying housing development project on the ground that it is inconsistent with a zoning ordinance and General Plan, a city or county must *also* have adopted a Housing Element that substantially complies with the state Housing Element Law. By negative implication, failing to have an approved Housing Element prevents cities and counties from disapproving housing development projects on the ground that they conflict with a zoning ordinance and General Plan. Practically speaking, this means that so long as a jurisdiction does not have an HCD-approved Housing Element, it will be very difficult for it to disapprove qualifying housing projects that violate its zoning ordinance or General Plan.

In anticipation of Bay Area jurisdictions falling out of compliance, housing advocacy groups have taken to declaring a "zoning holiday" in jurisdictions without HCD-certified 6th Cycles. Project applicants should be aware, however, that cities and counties may point to a separate provision of the HAA to attempt to impose certain development standards onto qualifying housing projects. Specifically, the HAA states that "nothing [in the HAA] shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards … appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need."[3] There is no official guidance as to what constitutes a development standard (which could be implemented under Section 65589.5(f)(1)) or a zoning standard (which could not be implemented under Section 65589.5(h)(5)), let alone when a development standard is "appropriate to, and consisted with" meeting a jurisdiction's regional housing need.

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[2] Govt. Code § 65589.5(h)(5). (Emphasis added.)

[3] Govt. Code § 65589.5(f)(1).

In light of this and other uncertainties – including environmental review – relating to the Builder's Remedy, project applicants should proceed with caution. While the Builder's Remedy may present a unique opportunity for entitlements streamlining in noncompliant Bay Area jurisdictions, invoking the remedy will require strategic planning to avoid foreseeable pitfalls.

III. AB 1398

A new statute, AB 1398, imposes additional penalties upon jurisdictions that fail to timely adopt Housing Elements. Specifically, AB 1398 requires a local government that fails to adopt a Housing Element that HCD has found to be in substantial compliance with state law within 120 days of the statutory deadline to complete the rezoning of sites identified in the 6th Cycle no later than 1 year from the statutory deadline for the adoption of the housing element. Additionally, AB 1398 prohibits a jurisdiction that adopts a Housing Element more than 1 year after the statutory deadline from being found in substantial compliance, as described above, until required rezoning is completed, as specified.[4]

If a local government fails to complete the rezoning by the deadline, a local government may not disapprove a housing development project, nor require a conditional use permit, planned unit development permit, or other locally imposed discretionary permit, or impose a condition that would render the project infeasible, if the housing development project: (A) is proposed to be located on a site identified in to the 6th Cycle; and (B) complies with applicable, objective General Plan and zoning standards and criteria.[5] For purposes of this provision, a housing development project is defined as a residential development having at least 49% of the housing units for very low-, low-, and moderate-income households.[6] The application is considered to be for design review and does not constitute a "project" for purposes of the California Environmental Quality Act (Pub. Res. Code §§ 21000 *et seq.*) ("CEQA").[7] As usual, any subdivision of sites will be subject to the Subdivision Map Act (Govt. Code §§ 66410 *et seq.*).[8]

For property owners of the sites identified in the 6th Cycle, the mandatory rezoning would allow owner-occupied and rental multifamily residential "use by right" so long as these sites meet statutory minimum density standards.[9] Unless a subdivision is required, development of these sites would not require discretionary agency approvals or CEQA review – cutting down what is typically a very time-consuming and controversial process.

As this rezone "remedy" is only available to sites identified in the 6th Cycle, its use by developers is limited by availability of qualifying property. Thus, whether this mandatory rezone will actually result in more housing is yet to be seen. Jurisdictions in Southern California Association of Governments and San Diego Association of Governments are already subject to the mandatory rezoning under AB 1398 with only one known projects attempting to take advantage of the resultant upzone.

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[4] Govt. Code § 65583(c)(1)(A).

[5] Govt. Code § 65583(g)(1).

[6] Govt. Code § 65583(g)(4).

[7] *Id.*

[8] *Id.*

[9] Govt. Code § 65583.2(h)

A matrix of the differences between Builders Remedy and AB 1398 is included below.

	BUILDER'S REMEDY	AB 1398
WHAT IT IS	***Summary*** Generally, the HAA limits a local government's authority to deny, make infeasible or reduce the density of housing development projects. However, the "Builder's Remedy" provision in the HAA imposes further limitations on a local governments that are deemed noncompliant with their state-mandated housing plans. Specifically, under this remedy, in such an instance, the local government loses the ability to approve or deny projects with affordable housing components, even if inconsistent with existing zoning or general plan land use designations – and those projects, instead, are automatically approved unless very specific findings can be made. Presumably, under this remedy, housing development would be allowed at any density and any height.	***Summary*** If a local government fails to adopt a Housing Element update that the HCD has found to be in substantial compliance with state law within 120 days of the statutory deadline, AB 1398 requires the local government to complete the rezoning of sites identified in the housing element update no later than one (1) year from the statutory deadline for the adoption of the housing element. AB 1398 prohibits a jurisdiction that adopts a housing element more than one (1) year after the statutory deadline from being found in substantial compliance, as described above, until required rezoning is completed, as specified.
	Analysis The HAA protects affordable housing projects by enumerating the exclusive grounds on which a local government may deny a project or render it "infeasible." Specifically, local governments may only block a qualifying project if it can prove that one of the following conditions is met: 1) The local government has a "substantially compliant" housing element and has "met or exceeded" its share of regional housing need for the types of housing the project would provide. 2) The project would have "a significant, quantifiable, direct, and unavoidable impact" on public health or safety, "based on objective, identified written…standards…as they existed on the date the [project] application was deemed complete." 3) The project violates a "specific state or federal law" and there is "no feasible method" to comply without rendering the project "unaffordable to low- and moderate-income households." 4) The project site is zoned for agricultural or resource preservation or lacks adequate water or wastewater service. 5) The project is inconsistent with the local government's zoning and the land-use designation of its general plan (as of the date the application was deemed complete), and the local government "has adopted a revised housing element in accordance with [statutory deadlines] that is in substantial compliance" with the Housing Element Law.	***Analysis*** If a local government fails to complete the rezoning by the deadline, a local government may not disapprove a housing development project, nor require a conditional use permit, planned unit development permit, or other locally imposed discretionary permit, or impose a condition that would render the project infeasible. The resultant application shall be for design review and shall not constitute a "project" for purposes of CEQA. A housing development project application may be denied for any of the five (5) reasons identified for denial of a Builder's Remedy application (Govt. Code § 65589.5(d)).

	BUILDER'S REMEDY	AB 1398
	The negative implication of paragraph (5) is that if a local government lacks a substantially compliant housing element, the local government may not use its zoning code or general plan to deny or render infeasible an affordable housing project. Unless the project is on resource lands, the grounds for denial are very narrow: health/safety, inadequate water or sewer, or violation of a "specific" state or federal law. A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. The Legislature has also declared that health/safety violations within the meaning of the HAA "arise infrequently." (Govt. Code § 65589.5(a)(3).)	
QUALIFICATIONS	A housing development project must include 20% of the units in the project must be extremely low-, very low- or low-income households or 100% moderate-incomes households. A "housing development project" is defined as "a use" consisting of any of the following: A. Residential units only. B. Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use. C. Transitional housing or supportive housing. According to the State HAA Technical Assistance Advisory, the development can consist of attached or detached units and may occupy more than one parcel so long as the development is included in the same development application.	The housing development project must be: (A) proposed to be located on a site required to be rezoned pursuant to the adopted housing element update; and (B) complies with applicable, objective general plan and zoning standards and criteria. A housing development project is defined as a residential development having at least 49% of the housing units for very low-, low-, and moderate-income households.
HOW IT WORKS	Submit development application pursuant to Senate Bill (SB) 330. Dependent upon the approvals required (i.e., subdivision, rezone, development permit), CEQA and public hearing compliance may be triggered.	Submit development application pursuant to SB 330. Application is proceeded ministerially unless an approval under the Subdivision Map Act is requested.

	BUILDER'S REMEDY	AB 1398
HURDLES	***Builder's Remedy is judicially untested*** ***There is an internal inconsistency in Govt. Code § 65589.5*** Govt. Code § 65589.5 (f)(1) states that "nothing" in the HAA "shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards." This seems contrary to Govt. Code § 65589.5(d)(5) (above). To date, there has been no judicial or administrative guidance about how (d)(5) and (f)(1) fit together. ***While Builder's Remedy requires approval of a project, it does not eliminate the need for compliance with a discretionary hearing process or requirement to obtain additional discretionary approvals.*** Additional discretionary approvals can allow local governments to condition projects, that could further pile on costs for builder's remedy projects by requiring infrastructure upgrades like new sewer connections. Local governments can also potentially exact revenge by making other applications from developers more unpleasant, by subjecting them to things like additional scrutiny or longer processing times. ***No CEQA Exemption*** The HAA does not exempt projects from CEQA, and though CEQA has some exemptions for housing projects, they require compliance with the city's general plan and zoning. Accordingly, any builder's remedy project would almost certainly have to run the gauntlet of an EIR. ***Economic Infeasibility*** Because developers must dedicate at least 20% of units for low-income families or 100 percent for middle-income ones, the projects could be infeasible in less expensive areas with lower profit margins.	***AB 1398 is judicially untested*** ***No precedent*** ***Only applicable to sites identified in the housing element update*** ***Economic infeasibility***
CODE SECTIONS	Housing Accountability Act (Govt. Code § 65589.5) Builder's Remedy – (Govt. Code § 65589.5(d))	Housing Element Law (Govt. Code §§ 65580 *et seq.*) AB 1398 – (Govt. Code § 65583(c)(1)(A))
EXAMPLES	Santa Monica Redondo Beach San Francisco	Seaside Ridge – Del Mar

For More Information, Please Contact:

Whitney Hodges
Partner
619.338.6542
whodges@sheppardmullin.com

Daniel S. Maroon
Associate
415.774.2969
dmaroon@sheppardmullin.com