Association of Bay Area Governments

Technical Assistance for Local Planning
HOUSING

DISCLAIMER: This document is intended solely as a technical overview of the provisions of certain provisions of the Housing Accountability Act. It is not intended to serve as legal advice regarding any jurisdiction's specific policies or any proposed housing development project. Local staff should consult with their city attorney or county counsel when determining the applicability of these provisions to any proposed housing development project in their jurisdiction.

The "Builder's Remedy" and Housing Elements

There have recently been press reports regarding the so-called "Builder's Remedy" that can be used to avoid local zoning requirements when a locality's housing element does not substantially comply with state law. These reports have stated that, if a locality has a noncompliant housing element the city or county must approve the housing development project, regardless of the local zoning.

The "Builder's Remedy" arises from the Housing Accountability Act (Government Code Section 65589.5[1]; the HAA). This paper describes the provisions of the HAA that constitute the "Builder's Remedy" and how they may apply to a proposed housing development project.

How Does the "Builder's Remedy" Work?

The HAA requires that cities and counties make one of five findings to deny, or to apply conditions that make infeasible, a housing development project "for very low, low- or moderate-income households" or an emergency shelter. (Section 65589.5(d).) A housing development project with 20 percent of the total units available to lower income households or with all of the units available for moderate or middle income households may qualify as housing "for very low, low- or moderate income households" (see detailed description below). Any of the five findings would allow denial of an eligible project:

1. The city or county has met or exceeded its Regional Housing Needs Allocation (RHNA) for the proposed income categories in the development.
2. The housing development or emergency shelter would have a specific adverse impact on public health and safety, and there is no way to mitigate or avoid the impact without making the development unaffordable. The impact must be based on objective, written public health or safety standards in place when the application was deemed complete.
3. The denial or condition is required to meet state or federal law, and there is no feasible method to comply without making the development unaffordable.
4. The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agriculture or resource preservation or there are not adequate water or sewage facilities to the serve the project.

[1] All future references are to the Government Code unless otherwise specified.

5. The project is inconsistent with both the zoning ordinance and the land use designation as specified in any general plan element. **However, a city or county cannot make this finding if it has not adopted a housing element in substantial compliance with state law**.

If a locality has not adopted a housing element in substantial compliance with state law, developers may propose eligible housing development projects that do not comply with either the zoning or the general plan. The term "Builder's Remedy" is used to describe the situation where a local agency may be required to approve an eligible housing development project because it cannot make one of the other four findings.

Are Projects Using the "Builder's Remedy" Exempt from CEQA Review?

The HAA contains no exemptions from the California Environmental Quality Act. The HAA states specifically that nothing relieves the local agency from making the required CEQA findings and otherwise complying with CEQA. (Section 65589.5(e).) However, there is a growing debate as to the interplay between the Builder's Remedy and CEQA. A project may be exempt from CEQA under other provisions of CEQA, other state laws, or the CEQA Guidelines. Agencies may wish to consult their legal counsel regarding the appropriate CEQA review.

When Does a Housing Element No Longer Comply with State Law? Is There a Grace Period If the Housing Element Is Not Adopted by the Due Date?

Housing elements are required to comply with current state housing element law on the established due date (**January 31, 2023** in the ABAG region). State law has changed significantly since fifth cycle housing elements were adopted, and it would be unlikely that a fifth cycle housing element would substantially comply with current state law. If a sixth cycle element has not been adopted by the due date, the housing element would likely be out of compliance with state law until a complying sixth cycle housing element is adopted. **There is no grace period**, even for the period when a housing element is being reviewed by the Department of Housing and Community Development (HCD).

HCD approval is not required for a housing element to be found substantially compliant with state law. State law provides that a city or county may adopt its own findings explaining why its housing element is substantially compliant with state law despite HCD's findings. (Section 65585(f).) However, HCD is authorized to refer agencies to the Attorney General if it finds a housing element out of compliance with state law. (Section 65585(j).)

Are a Local Agency's Development Standards Null and Void If the Housing Element is Not in Compliance with State Law?

No, the local agency's development standards are not null and void if the housing element is not in substantial compliance with state law. The "Builder's Remedy," however, may require a local agency to approve an eligible housing development project despite its noncompliance with local development standards. Conversely, other projects may be challenged because a finding of general plan consistency cannot be made if the general plan is out of compliance with state law.

What Projects Are Eligible to Use the "Builder's Remedy"?

The "Builder's Remedy" applies only to a housing development project "for very low, low- or moderate-income households" and to emergency shelters. The HAA defines a "housing development project" as either:

- Residential units only;
- Mixed-use developments with at least two-thirds of the square footage designated for residential use; or

- Transitional housing or supportive housing.[2] (Section 65589.5(h)(2).)

"Housing for very low, low-, or moderate-income households" includes either:

- 20% of the total units sold or rented to lower income households;
- 100% of the units sold or rented to moderate income households; or
- 100% of the units sold or rented to middle income households.[3]

Monthly housing costs for lower income households cannot exceed 30 percent of 60 percent of median income, adjusted for household size, and the units must remain affordable for 30 years. Monthly housing costs for moderate income households cannot exceed 30 percent of 100 percent of median income. There are no standards in the HAA for housing costs for middle income households. (Sections 65589.5(h)(3), (h)(4).)

An emergency shelter is housing with minimal supportive services for homeless persons that is limited to occupancy of six months or less by a homeless person. No individual or household may be denied emergency shelter because of an inability to pay. (Section 65582(d); Health & Safety Code Section 50801(e).)

[2] As defined in Section 65582.
[3] Those earning no more than 150 percent of median income.