



The Builder's Remedy: Fear and Trembling and Local Control

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THE BUILDER'S REMEDY: FEAR AND TREMBLING AND LOCAL CONTROL

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PART ONE: WHAT IS THE BUILDER'S REMEDY?

The “**Builder’s Remedy**” is a provision in the Housing Accountability Act (Gov. Code § 65589.5, the “**HAA**”) that may prevent a city from denying certain housing development projects if the city does not have a housing element in substantial compliance with state law.¹ Specifically, a city may not deny a housing development project that includes at least 20% affordable housing for lower income households (or 100% of units affordable to moderate-income households) on the basis that the project is not consistent with the zoning ordinance or General Plan land use designation, unless the city has adopted a revised housing element that substantially complies with Article 10.6 of Government Code Title 7, Division 1, Chapter 3 (the “**State Housing Element Laws**”).²

1. Legislative tightening of the Builder’s Remedy statute

The original Builder’s Remedy provision (Gov. Code § 65589.5(d)) was enacted in 1990 (SB 2011). According to the legislative counsel’s digest, SB 2011 was enacted to encourage the infilling of existing urban areas and reflected legislative concerns regarding the lack of affordable housing. The SB 2011 version of the Builder’s Remedy was amended several times after 1990, reflecting continuing legislative concerns about the lack of affordable housing.

The current version (as of January 1, 2024) of Government Code section 65589.5(d) is summarized as follows:

A local agency shall not disapprove a housing development project, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:

(1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation.

¹ Gov. Code § 65589.5(d)(5). Unless otherwise specified, all citations are to the California Government Code.

² *Ibid.*

(2) The housing development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(3) The denial of the housing development project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(4) The housing development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.

(5) The housing development project or emergency shelter 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 revised housing element in accordance with Section 65588 that is in substantial compliance with Housing Element law.

The Builder's Remedy statute prohibits a local agency from disapproving a housing development project for very low, low-, or moderate-income households, or conditioning approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households unless it makes certain written findings, *based upon a preponderance of the evidence in the record*. Instead of the usual test for a local land use decision, which upholds the decision of the local agency so long as it is supported by substantial evidence on the record, the Builder's Remedy statute requires a higher level of review, which could result in an agency decision being overturned by a court after independent review of the agency decision.

Therefore, while it is still theoretically possible to condition or deny a housing development project, the local agency must give careful thought to laying an evidentiary foundation in the administrative record to support the agency's decision. For example, if the agency believes a housing development project could be approved at a lower density, it would be advisable to introduce expert testimony into the administrative record that the project at a lower density would still be feasible to support "housing for the very low, low-, or moderate income households" (currently defined as including a minimum of 20 percent of the total units sold or rented to lower income households or 100 percent of the units sold or rented to moderate income households).

Similarly, if a local agency were to conditionally approve a project at lower density on the grounds that it does not have adequate water or wastewater facilities to serve the project, it would be advisable to introduce engineer's testimony into the record to

support that decision. The agency would also need to anticipate evidence from the developer or third parties to the contrary.

Local agency decision makers need to understand that laying these evidentiary foundations will cost time and money, and still comes with significant legal risks. Courts may also likely take into consideration whether decisions are made due to community opposition rather than objective concerns that cannot be mitigated under reasonable circumstances. In this regard, the public statements of decision makers will matter.

Lastly, in evaluating the risks of conditionally approving or denying a housing development project, as discussed, above, local agencies should also weigh the legal consequences of failing to meet the evidentiary standard of review if the developer or third-party challenges the conditional approval or denial, particularly if a court finds the agency acted in bad faith. These risks include court-imposed penalties (\$10,000 per unit), court order compelling compliance, posting a bond to pay for delay damages in the event of an agency appeal, and attorneys' fees.

PART TWO: A CASE STUDY OF THE BUILDER'S REMEDY IN SANTA MONICA

1. Builder's Remedy Projects Filed in Santa Monica

Between July 2 and October 13, 2022, the City of Santa Monica ("**City**") received sixteen (16) preliminary applications from developers for housing development projects that were inconsistent with the City's land use designations as defined by its General Plan Land Use and Circulation Element ("**LUCE**") or its zoning code (collectively, the "**Builder's Remedy Applications**").

Collectively, these projects proposed 4,609 units of housing, including 950 affordable units; 6 – 15 stories; on either single or double 7,500 square foot lots. In short, these projects represented significantly higher density than allowed under then existing codes, including State density bonus law.

The Builder's Remedy Applications were filed prior to the City's adoption of its 6th Cycle (2021-2029) Housing Element Update on October 11, 2022, which the California Department of Housing and Community Development ("**HCD**") certified on October 14, 2022.

The timeline for HCD's approval of the City's Housing Element was as follows:

DATE	EVENT
March 4, 2021	RHNA Allocation; 8895 units, 70% affordable
May 24, 2021	Draft of 6 th Cycle Housing Element Published
June – July 2021	Council Hearings on draft
July 1, 2021	Transmittal of draft to HCD for review

August 30, 2021	HCD notice of deficiencies to draft
September 8, 20, 24, 2021	Three public hearings to walk Council and the community through the proposed deficiencies/corrections to the draft
October 12, 2021	Council adopts draft
February 8, 2022	HCD notice of deficiencies in adopted housing element
February – June 2022	Frequent consultation with HCD technical staff
July 8, 2022	Submittal of 2 nd draft housing element draft to HCD
September 6, 2022	HCD issues conformance letter
October 11, 2022	Council adopts 2 nd draft
October 14, 2022	HCD certifies 2 nd adopted Housing Element

All but one of the Builders Remedy Applications were filed before the City's HCD approved housing element was adopted on October 11, 2022, but after HCD had issued a substantial compliance letter, signaling that HCD would certify the draft if adopted. The timing of the filing of the preliminary applications was thus a subject of contention because the City believed in good faith that it could make the required fundings to deny or condition these projects because the findings would be made at the time of the discretionary approval, when the City's housing element had been certified by HCD. Conversely, the developer asserted that the status of the City's housing element would be retroactive to the date that the preliminary applications were filed.

a. Public comments will influence whether HCD makes a finding of Substantial Compliance

A city's planning agency must make the draft revision of a housing element available for public comment for at least 30 days and, if any comments are received, take at least 10 business days after the 30-day public comment period to consider and incorporate public comments into the draft revision prior to submitting it to HCD. Gov. Code § 65585. In the preparation of its findings on a draft housing element, HCD may consult with any public agency, group, or person. *Id.* Furthermore, *HCD must receive and consider any written comments from any public agency, group, or person regarding the draft or adopted element or amendment under review. Id.*

The City followed these requirements and submitted all its comments to HCD as part of the submittal of its first and second draft housing elements. The same developers that filed the preliminary applications for Builder's Remedy projects also provided numerous comments directly to HCD to either oppose or condition HCD's approval of the City's draft housing elements, and these comments were either disclosed in HCD's letters to the City or via emails produced in the Public Records Act request. Local agencies should thus anticipate that developers and other third parties will correspond directly with HCD about the sufficiency of the draft housing elements. This correspondence

may influence HCD's determination of substantial compliance, however, the Housing Element Laws mandate that HCD take these comments into consideration.

b. Assume that HCD will take 90-days to review a draft Housing Element for Substantial Compliance

At least 90 days prior to adoption of a revised housing element (and after the 30-day comment period), a city's planning agency must submit the draft to HCD for a written determination as to whether the draft substantially complies with Housing Element Laws. Gov. Code § 65585(d).

If HCD finds that the draft element or draft amendment does not substantially comply with this article, the City's legislative body must take one of the following actions:

Option 1: Change the draft element or draft amendment to substantially comply with this article.

Option 2: Adopt the draft element or draft amendment without changes. The legislative body shall include in its resolution of adoption written findings that explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with this article despite the findings of HCD. Gov. Code § 65585(f).

Like many other many other municipalities throughout the State, the adoption of the City's housing element was not straightforward. Despite the City's good faith efforts, HCD determined that its 1st adopted 6th cycle Housing Element was not in substantial compliance with Housing Element Laws after the City's submitted this draft to HCD.

After receiving HCD's comments, the City modified its draft to address HCD's comments and because the City believed that it had modified its draft to address HCD's comments, the City elected Option 1 and adopted the modified draft on October 12, 2021. Unfortunately, this adoption resulted in additional public comments (as described above) and HCD's second round of comments, wherein HCD determined that the City's adopted housing element was not substantially compliant.

Following HCD's second rejection, the City's planning staff engaged in several working consultations with HCD's technical staff over the next six months, and then resubmitted its 2nd draft housing element to HCD for its 90-day review on July 8, 2022. By then, the developers' representatives had been closely monitoring the City's progress. All sixteen preliminary applications were filed between July 2 and October 13, the day before HCD certified the City's adopted 2nd draft.

2. Legal Analysis – Fight or Settle?

Not surprisingly, the near simultaneous filing of preliminary applications for sixteen Builder's Remedy projects (4609 units) caused significant consternation within the City. The City Attorney's Office was thus tasked with evaluating the following issues:

1. Did the City have the legal ability to refuse to process the Builder's Remedy Applications?
2. If the City was obligated to process the Builder's Remedy Applications, what were the City's prospects of prevailing in litigation if the City were to deny or reduce the density of the Builder's Remedy Applications?

As to the first issue, the City Attorney's Office identified the risks of refusing to process Builder's Remedy applications, including that the failure of the City to process a pending application for a housing development project could also result in "deemed approvals" of these projects under SB 330, SB 8, and the Permit Streamlining Act ("PSA"), as further discussed, below.

As to the second issue, the City Attorney's Office identified the risks that while it would be possible to make the necessary findings to conditionally approve one or more of these projects, the City would have to spend significant resources on feasibility and technical consultants, and incur significant legal risks, if these conditions were challenged by the developers.

Assuming the resources were spent, and the risks accepted, the City's Planning staff focused on making the following findings:

- That the conditions would not cause the project to be infeasible for development of very-low, low-, or moderate-income households (Gov. Code § 65589.5(d), which would have to be supported by a feasibility analysis;
- That the project would cause specific adverse impacts because these projects were all infill development, and the City is built out with aging water and sewer infrastructure with either limited or full capacity (Gov. Code § 65589.5(d)(2)) in the localized areas in which the development was proposed, which would have to be supported by an engineering analysis; and
- That the City had obtained HCD's certification of its 6th Cycle Housing Element by the time these applications would be reviewed under the City's discretionary review process.

3. Builder's Remedy and SB 330 Application Processing Deadlines

To evaluate the City's risks, the City Attorney's Office examined the timelines for processing housing development projects, which are governed by the state law known as SB 330 or the "Housing Crisis Act of 2019" and the PSA. Among other things, SB 330 modified certain sections of the Housing Accountability Act (the "HAA") (Gov't Code sections 65589.5 – 65589.6) and the PSA (Gov't Code sections 65920 *et seq.*) to impose more objectivity in and expedited processing of permit applications for housing development projects through January 1, 2030.

SB 330³

SB 330 imposed significant new requirements on the City's ability to delay or prevent processing of applications for new housing development projects. Notably, SB 330 requires the following:

³ SB 330 (effective from January 1, 2020 – January 1, 2025) (amended Section 65589.5 of; amended, repealed and added Sections 65940, 65943, and 65950 of; added and repealed Sections 65905.5, 65913.10, and 65941.1 of; and added and repealed Chapter 12 (commencing with section 66300) of Division 1 of Title 7 of, the California Government Code, relating to housing).

- Requires that an application must be “deemed complete” if a preliminary application is submitted in accordance with Government Code section 65941.1 or, if the applicant has not submitted a preliminary application, has submitted a formal application found to be complete in accordance with Government Code section 65943. (HAA: Cal. Gov’t Code § 65589.5(h)(5))
- Requires that if the City considers a proposed housing development project to be inconsistent with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, it shall provide the applicant with written documentation identifying the exact inconsistencies within 30 days that the application is determined to be complete if the project contains 150 or fewer housing units; or within 60 days if the housing project contains more than 150 housing units. If the City fails to provide this analysis, the housing project shall be deemed consistent with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision. (HAA: Cal. Gov’t Code § 65589.5(j)(2))
- Requires that a housing project only be subject to the ordinances, policies, and standards adopted and in effect when a preliminary application is submitted, except as specified. (HAA: Cal. Gov’t Code § 65589.5(o))
- Requires that an application for a housing development project be deemed to have submitted a preliminary application upon providing specified information and upon payment of the application fee. (PSA: Cal. Gov’t Code § 65941.1 (a))
- Requires that the project applicant apply for the project that includes all information necessary for the City to review the application (the “formal application”) under the PSA within 180 days of submitting the preliminary application. (PSA: Cal. Gov’t Code § 65941.1 (d)(1))
- Requires the City to notify the applicant if the formal application is incomplete and provide the applicant with an exhaustive list of items that were not complete within 30 days after the City has received the application. (PSA: Cal. Gov’t Code § 65943(a))
- Requires the City to notify the applicant whether the application is complete after receiving all required materials. (PSA: Cal. Gov’t Code § 65943(a)) If the City fails to notify the applicant, the application is deemed complete. (PSA: Cal. Gov’t Code § 65943(b))
- If the formal application is not complete, requires that the project applicant submit the information needed to complete the application within 90 days of receiving the incomplete letter. If the applicant does not submit this information within the 90-day period, then the preliminary application “shall expire and have no further force or effect.” (PSA: Cal. Gov’t Code § 65941.1 (d)(2)).

- Establishes certain processing timeframes accordance with the applicable periods (PSA: Cal. Gov't Code § 65950)
 - 90 days from certification of an EIR for a housing development project.
 - 60 days from certification of an EIR for a housing development project with at least 49% of the units reserved for very low- or lower-income households or a project financed by tax credits
 - 60 days from the date of adoption of a negative declaration or determination that project is exempt from CEQA

SB 8⁴, which went into effect on January 1, 2022, clarified certain provisions of SB 330, including the following:

- SB 330 applies to housing development projects that involve no discretionary approvals, projects that involve both discretionary and nondiscretionary approvals, and projects that include a proposal to construct a single dwelling unit.
- The vesting period for ordinances, standards, and policies is extended from 2.5 to 3.5 years from receiving all approvals to obtain a building permit for affordable housing projects.

The Permit Streamlining Act (PSA)

Even before SB 330 was enacted, the PSA provided that the failure of an agency to act to approve or disapprove a development permit within the time limits prescribed by the PSA shall be “deemed approval” of the permit application for the development project. (PSA: Cal. Gov't Code § 65956) This provision of the PSA was not changed by SB 330.

Given the processing deadlines and potential for deemed approvals of the Builder's Remedy projects under SB 330, SB 8, and the PSA (as discussed, above), the City Attorney's Office concluded that it was necessary to review these applications for completeness and code conformance. Planning staff processed these applications as Development Review Permits, which is a discretionary process with Planning Commission as the decision-maker and City Council as the appeal body. At the time, it was anticipated that the Development Review Permit findings could be made to deny or conditionally approve some of these Builders Remedy applications, based upon the findings authorized under the Builders' Remedy statute, recognizing that these exceptions would likely be challenged by the developers.

4. The Settlement

Notwithstanding the City's decision to process the Builder's Remedy Applications, both the City and the developers understood the significant legal risks to both sides in proceeding with the City's discretionary review processes. For the City, the biggest risk was that the Builder's Remedy statute could be interpreted to require a substantially compliant housing element at the time the preliminary application was deemed

⁴ SB 8 (effective January 1, 2022) (extended SB 330 to January 1, 2030; amended Sections 65589.5, 65905.5, 65913.10, 65940, 65941.1, 65943, 65950, 66300, and 66301 of the Government Code, and amended Section 2 of Chapter 654 of the Statutes of 2019, relating to housing).

complete rather than at the time the discretionary review occurred. For the developer, the biggest risk was dedicating time and resources to fight the City – likely a two-year process.

Not surprisingly, the City and developers decided on a pragmatic approach and entered into lengthy and complicated negotiations, resulting in a settlement agreement that tolled the applications for most of these projects.

As outlined in the Settlement Agreement, during the tolling period, the City had the option to adopt an ordinance (retaining Council's full discretion to do so) before a mutually agreed upon deadline, that would facilitate the developers' use of the City's existing ministerial process for approvals of housing developments rather than the discretionary process used to implement the Builder's Remedy statute. If adopted, the ordinance would also provide additional development incentives that would allow for an on-site density bonus for off-site development of the affordable units, expedited permit processing, and parking incentives. This settlement worked, in part, because the City's existing streamlined ministerial process, coupled with the off-site density bonus, and State density bonus flexibility provided enough development incentives for the developers without the Builder's Remedy.

5. What Happened Post-Settlement

The City Council adopted the settlement ordinance, described above. However, after the ordinance was adopted, the State Legislature enacted AB 1287, which provided additional density bonus, incentives and/or concessions under State density bonus law.

In short, AB 1287, coupled with the City's existing streamlined ministerial processes, afforded enough development incentives to obviate the developer's election to use the Builder's Remedy or utilize the ordinance that added for a local density bonus for off-site development of affordable housing.

6. Takeaways from Santa Monica's Experience

- Adopt your Housing Element on time with early and frequent check-ins with HCD's technical staff. Don't assume that you are on the same page with HCD unless you get a 90-day letter with a determination that your housing element draft is substantially compliant with Housing Element Laws. HCD has refused to approve housing elements unless it previously approved a draft.
- Assume that developers and pro-housing advocates are talking to HCD directly during HCD's 90-evaluation period. Make regular Public Records Act requests because HCD will not usually share the letters unless you ask.
- Educate the councilmembers and public on the Builder's Remedy so that they understand that discretion in disapproving or conditionally approving these projects is extremely limited.
- Resign yourself to the fact that the State Legislature can always change the law to facilitate and incentivize housing development without local control.

PART THREE: THE BUILDER'S REMEDY IN THE COURTS

There are reportedly many Builder's Remedy projects in the state. One developer-side firm reported at a recent conference that it was representing applicants for 10,000 Builder's Remedy units throughout the state. But to date, we are not aware of any Builder's Remedy project that has been approved.

There are also as of yet no Court of Appeal decisions regarding the Builder's Remedy, although at least four cases have been appealed. (One of these was recently dismissed.) There have been at least six significant trial court decisions. For the most part, the decisions have not been particularly supportive of cities' arguments in opposition to use of the Builder's Remedy, and, in some cases, the courts have seemed to go out of their way to reject cities' claims. A list of the relevant trial court cases is attached, as well as recent filings; trial court Housing Accountability Act cases are listed as well, which may be relevant in specific cases.

The trial court decisions to date generally involve Builder's Remedy projects where a city has refused to process the project as a Builder's Remedy application, for various reasons. Where cities are processing these applications, in most cases review under the California Environmental Quality Act (CEQA) (usually an Environmental Impact Report (EIR)) is underway.

The issues raised in these cases can be divided into those related to the preliminary application; those related to the adequacy of the housing element; and asserted conflicts with other provisions of state law. This section describes the trial courts' decisions regarding these issues. It also notes how the proposed legislation discussed below resolves those issues.

1. Issues Related to the Preliminary Application

A preliminary application is an abbreviated project application, requiring far less information than cities normally require for project approval. (See Gov't Code § 65941.1.) Nonetheless, it vests projects in the general plans, zoning, and other development standards in place when it was submitted. (Gov't Code 65589.5(o).)

But for the preliminary application to remain valid, the applicant must submit a formal project application within 180 days. The city must review the application for completeness within 30 days under Section 65943. If found incomplete, the applicant must submit the information needed to complete the application within 90 days of receiving the incomplete letter. If the applicant does not submit this information within the 90-day period, then the preliminary application "shall expire and have no further force or effect." (PSA: Cal. Gov't Code § 65941.1 (d)(2)).

Many of these early cases deal with the status of project applications found to be incomplete.

Effect of Not Submitting Complete Application within 90 Days. Although the text of the statute appears to clearly require that a **complete** application be submitted within 90 days after the applicant receives a letter saying that the application is incomplete, one trial court determined that the application does not expire so long as the applicant keeps

submitting new applications within the 90-day period, citing the ability to resubmit incomplete applications provided by Section 65943.⁵

Note that courts will also do a searching review of the incompleteness determination to determine if: a) everything in the letter was listed in the application form; b) whether any comments are unrelated to completeness (such as whether the project is consistent with local zoning); c) whether any new comments are in subsequent completeness letters (not permitted); and whether all time limits were met.⁶

Whether an Application for a General Plan Amendment or Rezoning Can Be Required. Cities have required applicants for Builder's Remedy Projects to apply for general plan and zoning amendments, either because they desire to avoid legal nonconformities, or because they have determined that the projects are not eligible for the builder's remedy, and so general plan and zoning amendments are needed.

HCD on March 28, 2024, sent a letter to the City of Compton stating that general plan and zoning amendments could be required to avoid legal nonconformities, and then on June 26, 2024, reversed itself in a letter to Beverly Hills.

Two trial courts have treated a requirement to apply for general plan and zoning amendments as the denial of the application, either because the city is refusing to process the application or because the city has stated that the Builder's Remedy does not apply. Then the courts have found a violation of the HAA because the city did not make the findings for denial of the application found in the HAA – even though the city thought it was making a determination on the completeness of the application.⁷ Once a violation of the HAA is found, a city may not be able to appeal because some courts have required multimillion dollar bonds.

At least one court has also held that general plan and zoning amendments aren't required because they were not listed as a completeness requirement for design review, subdivision approval, etc., and consistency with local ordinances is not a completeness issue.⁸

AB 1893 states that no general plan or zoning amendment may be required for a Builder's Remedy project.

2. Issues Related to Housing Element Adequacy

The Builder's Remedy applies only if a housing element does not substantially conform with state law. Two issues have been litigated regarding the timing of the consistency determination, and, in addition, cities have attempted to defend the adequacy of their housing elements, despite HCD findings of inadequacy.

Whether the Preliminary Application Vests the Housing Element's Status. Cities have argued that, while the preliminary application vests the standards in effect when it was submitted, it does not vest the **status** of the housing element as in compliance with state law, or not; and the status of the housing element should be determined when a

⁵ *Jha II*. Abbreviations for these cases are listed on the attached list of cases.

⁶ See generally Gov't Code § 65943.

⁷ *La Canada-Flintridge II*; *Jha II*.

⁸ *Jha II*

decision is made on the project. If the housing element was inadequate when the Builder's Remedy application was filed but is adequate when a decision is made on the project, the Builder's Remedy should not apply.

To date, the trial courts that have considered this have all held or assumed that the housing element's status is determined when the preliminary application is submitted.⁹

AB 1893 states clearly that the housing element status is determined when the preliminary application is submitted.

Whether Housing Element Adequacy is Determined at Adoption, or When HCD Says It Conforms with State Laws. The statute allows a Builder's Remedy project to be denied if a city has **adopted** a housing element in accordance with state law. (Gov't Code § 65589.5(d)(5).) Nonetheless, HCD on March 16, 2023, issued a memo stating that a city is only in compliance when HCD issues its letter finding substantial compliance.

There are mixed decisions from the trial courts on this issue. One court agreed that a housing element later found in compliance by HCD to have been adequate when adopted.¹⁰ In two cases, a court exercised its independent judgment to determine adequacy.¹¹ Since it found the housing element not to comply with state law, the date of compliance was not at issue. In two cases decided by the same judge, the court agreed with HCD's view: the housing element was not adequate until HCD issued its letter.¹²

Proposed AB 1886 adopts HCD's interpretation and provides that a housing element is adequate only on the date HCD or a court determines adequacy. It also contains language stating that this position is "declaratory of existing law."

Whether the Housing Element is Adequate. A separate lengthy paper would be needed to discuss the courts' standards for determining the adequacy of housing elements. The lead appellate cases are *Fonseca v. City of Gilroy*¹³ and *Martinez v. City of Clovis*.¹⁴

Where cities involved in Builder's Remedy disputes have asserted that their housing elements are adequate, the trial courts have generally agreed with HCD. Where HCD found the element to be inadequate, the courts have agreed;¹⁵ and where HCD has approved a housing element, the courts have also agreed.¹⁶

Note that if AB 1886 is enacted, there will be little value to a city in attempting to have a court overrule HCD's view of the housing element's adequacy. Because the city will not be considered to be in compliance until either HCD or the court decides it is in compliance, it will be exposed to the Builder's Remedy until the litigation is concluded. Although cities often perceive HCD's comments as unsupported by the statutes, there will be few avenues by which to challenge these comments.

⁹ *La Canada-Flintridge II*; *Redondo Beach II*; *Jha II*.

¹⁰ *Redondo Beach I*.

¹¹ *La Canada-Flintridge II*; *Rancho Palos Verde*.

¹² *Redondo Beach II*; *Jha I*.

¹³ 148 Cal.App.4th 1174 (2007).

¹⁴ 90 Cal.App.5th 193 (2023).

¹⁵ *La Canada-Flintridge I & II*; *Beverly Hills*.

¹⁶ *Redondo Beach I*.

3. Issues Related to Conflicts with Other State Laws

Chris Elmendorf, a University of Davis law professor whose articles are credited with encouraging use of the Builder's Remedy, has pointed out that there is a conflict between the Builder's Remedy and other provisions of the HAA. In particular, Section 65589.5(f)(1) provides that:

(f)(1) Except as provided in subdivision (o), **nothing in this section shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584.** However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development **at the density permitted on the site** and proposed by the development.

"Nothing in this section shall be construed" is strong language; if the builder's remedy provisions are construed to mean no standards apply, doesn't this language become meaningless surplusage? And the last sentence allows only the "density permitted on the site." Because waivers under density bonus law can be required for most development standards, it is unclear what effect this provision might have on density bonus waivers, but an argument can be made that, as now drafted, this provision limits density bonus waivers as well.

No case has directly considered this provision, although in dicta one court stated that it did not apply to builder's remedy projects, because if a city had an inadequate housing element, its standards were per se inconsistent with meeting the city's share of the regional housing need.¹⁷

AB 1893 modifies this section to state that: a) it does not apply to Builder's Remedy projects; and b) it does not limit a project's eligibility for waivers and concessions under density bonus law.

4. Other Issues Raised

Other miscellaneous issues have been raised in other Builder's Remedy cases.

Compliance with Coastal Act. A trial court held that even Builder's Remedy projects had to comply with a community's Coastal Development Plan.¹⁸

Need for Voter Approval of Required Rezoning. If a community's housing element is approved more than 120 days after the due date (one year after the due date in the SCAG region), then the community must adopt any rezoning required by the housing element within one year of the housing element due date, or its housing element will not be considered to be in compliance with state law. (Gov't Code § 65588(e)(4)(C).)

¹⁷ *Jha II.*

¹⁸ *Redondo Beach II.*

A voter-adopted ordinance arguably required a vote of the electorate before the required zoning could be adopted. The city asserted that the requirement for a popular vote was preempted by state law, and the trial court agreed.¹⁹

5. Takeaways

Most arguments raised to date by cities in the trial courts have not been successful. And to the extent that they may have validity, the Legislature is encouraging use of the Builder's Remedy by eliminating these arguments.

It is interesting to ponder why the Legislature is not satisfied with the significant upzoning that has occurred as a result of this housing element cycle and seems determined to allow projects that exceed twice the density allowed by local zoning (which is allowed by density bonus law) – 23-story buildings proposed in single-family neighborhoods, for instance. The truth is that despite the hundreds of housing bills passed by the Legislature since 2017, fewer total units were built in 2023 than in 2017 – and over 20,000 of those units were accessory dwelling units. The rush to file Builder's Remedy projects has likely convinced the Legislature that if the development community is totally freed of the shackles of local regulation, perhaps the housing crisis will be “solved.” And so perhaps we should all resign ourselves to seeing if this theory works.

PART FOUR: DEVELOPER'S PERSPECTIVE

The Builder's Remedy presents both large potential incentives and large potential risks for developers. The biggest incentive is essentially a blank slate to develop a project that would not otherwise be permitted under the City's General Plan and or zoning regulations. Subject to a few limitations, the developer has a free hand to design the project they want rather than a project the city would otherwise allow. Submitting a Builder's Remedy project application is also a guaranteed way to get the city's attention - for better or worse - and can be used to potentially create negotiating leverage. The risks still lie in a less than clear legal landscape and the often-strong negative response that these applications evoke from City decision makers, community members and staff. The aggressive nature of Builder's Remedy applications also often results in a city review process with exceptionally high scrutiny and induces the local agency to employ oppositional tactics, of a kind not as commonly seen in the review process for routine projects.

Not surprisingly, these projects generally attract developers who are willing to take a higher risk - and who can afford to wait through a potentially lengthy approval process - to reap the higher rewards of an approved Builder's Remedy project or a modified project resulting from a negotiated settlement. Sometimes these developers have reached an impasse with the city on other existing projects and a Builder's Remedy is seen as a tool to break through the stalemate. On the other hand, many developers elect not to pursue Builder's Remedy projects, preferring to avoid the associated risks

¹⁹ *Redondo Beach I.*

and potential delays, and/or preferring to avoid the strong opposition - both from the city and the public - that is often evoked by these projects.

The willingness of developers to continue pursuing these projects will depend, in part, on future litigation outcomes, especially the eventual appellate decisions, and on future legislative changes, including the potential amendments to the Housing Accountability Act discussed below.

PART FIVE: PROPOSED LEGISLATION - AB 1893

Assembly Bill 1893 (AB 1893) has been adopted by the legislature, signed into law by the Governor and takes legal effect on January 1, 2025.

The existing language of AB 1893 allows developers with pending Builder's Remedy applications to "opt in" to its provisions, meaning that developers with pending applications may also choose *not* to opt in. AB 1893 provides that the applicant for projects that were deemed complete on or before January 1, 2025 "may choose to be subject to the provisions of this section that were in place on the date the preliminary application was submitted." For purposes of the previous sentence, "deemed complete" means that a preliminary application was submitted, not that the City actually deemed the full application complete. Consequently, developers with pending Builder's Remedy applications at the time the bill takes effect could choose to be subject to the provisions of the HAA as they exist now, rather than being subject to the changes made by AB 1893.

AB 1893 makes the following changes to the Housing Accountability Act:

1. Prohibit cities from requiring a general plan amendment or zone change for Builder's Remedy applications. AB 1893 provides that a Builder's Remedy project shall not be required to apply for, or receive approval of, a general plan amendment, specific plan amendment, rezoning, or other legislative approval.
2. Clarify that filing a preliminary application vests the Builder's Remedy. AB 1893 resolves the current legal ambiguity about whether filing a preliminary application vests the Builder's Remedy. Specifically, AB 1893 (in concert with AB 1886, a related bill) amends the HAA to state that, for purposes of the Builder's Remedy, a housing element is only considered to be in substantial compliance with state law if it was in substantial compliance with state law *on the date that the preliminary application was submitted* or, if a preliminary application was not submitted, then on the date that a complete application was submitted.
3. Establish site location requirements for Builder's Remedy projects. AB 1893 provides that Builder's Remedy projects may not abut a site where more than one-third of the square footage on the site has been used within the past three years by a heavy industrial use or a Title V industrial use, as those terms are defined in Section 65913.16.

4. Establish base density caps for Builder's Remedy projects. The base density caps are based on multiple factors. Density, as calculated before the application of a density bonus, would be capped at the greater of the following:

- (I) Fifty percent greater than the minimum density deemed appropriate to accommodate housing for that jurisdiction as specified in subparagraph (B) of paragraph (3) of subdivision (c) of Section 65583.2.
- (II) Three times the density allowed by the general plan, zoning ordinance, or state law, whichever is greater.
- (III) The density that is consistent with the density specified in the housing element.

Furthermore, projects receive an additional 35 dwelling units per acre if any part of the site is located within 1/2 mile from a major transit stop, within a very low vehicle travel area, or within a high or highest resource census tract.

AB 1893 provides that this density can be used as the base density for a density bonus. Consequently, the ultimate density of a Builder's Remedy project could be up to two times the base density allowed under AB 1893 if the developer seeks a 100% density bonus under Government Code Section 65915(v) and includes the required number of affordable units.

5. Establish a minimum density requirement. AB 1893 provides that the density of the project shall not be less the minimum density required on the site if the site (a) has a minimum density requirement and (b) is located within one-half mile of a commuter rail station or a heavy rail station. On all other sites with a minimum density requirement, the density of the project shall not be less than the local government's minimum density or one-half of the minimum density deemed appropriate to accommodate housing for that jurisdiction as specified in Government Code Section 65583.2(c)(3)(B), whichever is lower.
6. Clarify what development standards apply to a Builder's Remedy project. Under AB 1893, a city may require the project to comply with the objective development standards that apply in a general plan designation and zoning classification that allows the density and unit type²⁰ proposed by the applicant, or if no such zone exists, then the applicant may identify any objective, quantifiable, written development standards, conditions, and policies associated with a different general plan designation or zoning classification within that jurisdiction, that facilitate the project's density and unit type, and those shall apply. The project would also be allowed to request incentives and concessions, waivers of development standards, and reduced parking ratios under density bonus law.

²⁰ "Unit type" means the form of ownership and the kind of residential unit, including, but not limited to, single-family detached, single-family attached, for-sale, rental, multifamily, townhouse, condominium, apartment, manufactured homes and mobile homes, factory-built housing, and residential hotel.

7. Change the affordability requirements for a Builder's Remedy project. Current law requires a Builder's Remedy project to either restrict 20% of the total units for lower income households or 100% of the total units for moderate income households. Under AB 1893, a Builder's Remedy project would have the following options: (a) 100% of total units for lower income or moderate-income households; (b) 7% of total units for extremely low-income households; (c) 10% of total units for very low-income households; or (d) 13% of total units for lower income households. Under AB 1893, "total units" excludes any units added by a density bonus. Affordable units in the Builder's Remedy project must have a comparable bedroom and bathroom count as the market rate units.

Additionally, a project must still provide sufficient units to meet any relevant requested density bonus. Furthermore, a city can also require the project to comply with a local inclusionary housing requirement so long as it does not require that more than 20% of units be affordable; however, the city can only require this if it makes a finding that requiring compliance with the inclusionary housing ordinance will not render the project infeasible.

8. Provide two additional incentives/concessions to Builder's Remedy projects. AB 1893 provides that a Builder's Remedy project that qualifies for a density bonus under state density bonus law shall receive two incentives or concessions in addition to those granted by state density bonus law. This means, for example, that if a Builder's Remedy project restricted 15% of its base units for very low-income households, then it would be entitled to 3 incentives/concessions under state density bonus law (Government Code Section 65915(d)(2)(C)), and an additional 2 incentives/concessions under the HAA, for a total of 5 incentives/concessions.
9. Provide an additional density bonus and other benefits for a Builder's Remedy project that includes units for extremely low-income households. AB 1893 provides that a Builder's Remedy project that dedicates at least 7% of its units to extremely low-income households shall be eligible for the same density bonus, incentives or concessions, and waivers or reductions of development standards as provided to a housing development project that dedicates three percentage points more units to very low-income households under state density bonus law. For example, if a project dedicated 7% of its units to extremely low-income households, then it would be entitled to the same benefits provided by state density bonus law to a project that dedicated 10% of its units to very low-income households.
10. Clarify that a Builder's Remedy project can be combined with SB 35. AB 1893 provides that a Builder's Remedy project shall be deemed to comply with the local agency's objective zoning standards, objective subdivision standards, and objective design review standards for purposes of SB 35 (Government Code Section 65913.4). This would entitle the project to streamlined processing and

an exemption from CEQA, provided the project is located in a jurisdiction that is subject to SB 35, and the project otherwise complies with SB 35.

11. Add to the list of city actions that constitute “disapproval” of the project. In addition to the current definition of “disapproval,” AB 1893 provides that disapproval of a project would include the following: (a) failing to cease a course of conduct that effectively disapproves the project, subject to certain procedural requirements; (b) violating the 5-hearing rule under Government Code Section 65905.5; (c) violating provisions of the Permit Streamlining Act related to determining that the project application is complete; (d) requiring the project to obtain a general plan, specific plan, or zoning amendment, or imposing a requirement that applies to the project solely or partially on the basis that the project is a Builder’s Remedy project; and (e) determining that a preliminary application has expired in violation of Government Code Section 65941.1.

In summary, from a developer’s standpoint, AB 1893 attempts to strike a balance by reining in Builder’s Remedy projects to an extent but also clarifying currently unsettled legal issues and pushing back against some of the tactics cities have used to delay and frustrate these projects. From a local government standpoint, the bill allows enormous densities in many single-family areas (70 to 80 units/acre base density, which can be doubled), places no limits on heights or density bonus waivers, and eliminates the one benefit to cities: the 20 percent lower income requirement. Combined with AB 1886, it also makes HCD all-powerful, in that if HCD decertifies a community’s housing element, it subjects the local government to the builder’s remedy. In the end, the bill will likely expand the universe of developers who are willing to pursue these projects since it brings the Builder’s Remedy process more in line with familiar development tools, such as state density bonus law. It is unlikely, however, that this bill will resolve all issues and questions surrounding the Builder’s Remedy.

SUMMARY OF RECENT TRIAL COURT DECISIONS REGARDING STATE HOUSING LAWS

Builder’s Remedy and Housing Element Adequacy

Californians for Homeownership, Inc. v. City of La Canada-Flintridge (July 2023): Found that adequacy of site methodology was a matter for trial. City ordered to complete rezonings. Didn’t reach decision regarding builder’s remedy because no real project; CFH did not have standing. On appeal. (*La Canada I*)

Californians for Homeownership, Inc. v. City of Beverly Hills (September 2023): Found City’s site inventory inadequate. Seems to require site by site review. (Appeal dismissed by City after HCD approved revised housing element.) (*Beverly Hills*)

New Commune DTLA LLC v. City of Redondo Beach (October 2023): Found voter approval not needed for zoning changes required by housing element because preempted by state law.

Found housing element site inventory adequate. Found housing element adequate when adopted, not when HCD found adequate. On appeal. (*Redondo Beach I*)

New Commune DTLA LLC v City of Redondo Beach (February 2024): Found developer entitled to builder's remedy because housing element not approved by HCD when preliminary application submitted. However, could not be approved because inconsistent with local coastal plan. Appeal dismissed. (*Redondo Beach II*)

California Housing Defense Fund v. City of La Canada-Flintridge (600 Foothill Owner LP as RPI) (March 2024): Court independently reviewed adequacy of housing element and determined it didn't comply, so City subject to builder's remedy. Ordered City to process project and complete CEQA. (Applicant reportedly is refusing to submit to deposit funds for EIR because views EIR as an obstacle to development.) On appeal. (*La Canada II*)

Jha v. City of Los Angeles (March 2024) (decision on demurrer): City is subject to builder's remedy until HCD approves housing element. (*Jha I*)

Californians for Homeownership v. City of La Habra (June 2024): Court agreed that changes made to housing element after adoption were "non-substantial changes" authorized by City Council. On appeal.

Jha v. City of Los Angeles (July 2024) (decision on writ): Evaluated City's review of builder's remedy project. Held preliminary applications remain valid so long as applicant keeps resubmitting within 90 days of every completeness letter. City could not keep demanding that applicant comply with zoning or other requirements or apply for zoning amendments for application to be complete. Found that decision on completeness was a disapproval because it required modifications to conform with zoning and general plan; decision was also a violation of HAA because City didn't make disapproval findings. (*Jha II*)

Conjunction Junction LLC v. City of Rancho Palos Verde (August 2024). City demurrer regarding builder's remedy project upheld with leave to amend because of numerous deficiencies: action not ripe; did not allege project was a housing development project; did not adequately allege deficient housing element. Court held that court, not HCD, determines element adequacy. (*Rancho Palos Verde*)

HAA Claims

NRF Project Owner LLC v. City of Oceanside (May 2021): held that referendum overturning approval of a 585-unit project violated the Housing Crisis Act's moratorium provisions (weird reasoning). Appeal later dismissed.

JM Squared Development v. City of Simi Valley (May 2021): Court held that an assisted living project where no units included kitchens was a "housing development project" under the HAA. Not appealed.

CaRLA v. City of Huntington Beach (October 2021): Court held City violated the HAA in denying project because standards not objective, there was substantial evidence that the project was consistent, and preponderance of the evidence did not support the "specific adverse impact" finding. [Interesting twist that project not "deemed consistent" even though City had missed deadline for finding inconsistencies. Other courts disagree with this conclusion.] Appeals dismissed by parties.

YIMBY v. City of Los Angeles (July 2022): Court held City did not respond to resubmittal within 30 days and also did not provide written response to appeal within 60 days, so application “deemed complete.” City also refused to accept preliminary application, violating HAA. Also found that LA General Plan and zoning inconsistent, so no zoning amendment needed, and City violated HAA. (60-unit building in single-family zone.) Found bad faith and ordered City to approve project. Although the City’s position on the zoning/GP consistency was upheld by the Court of Appeal in *Snowball West Investments v City of LA*, LA could not appeal because Court set very high bond (at least eight figures).

TNHC Canyon Oaks LLC v. City of Calabasas (November 2023): City’s denial of project violated HAA because standards were not objective and many were not applicable, and preponderance of the evidence did not support “specific health & safety” finding (EIR disagreed with finding). City could not use failure to make CEQA override finding to deny project if it could not make “specific health & safety” finding. Also found City acted in bad faith and ordered city to approve project. No appeal filed.

SB 9 and Charter Cities

City of Redondo Beach v. Bonta (April 2024): SB 9 does not apply to charter cities. Narrow opinion. AG has appealed.

Cases Filed

Californians for Homeownership v. City of Beverly Hills: Beverly Hills found builder’s remedy application incomplete because did not include applications for general plan and zoning, following direction in HCD’s Compton letter. HCD changed its view before the hearing and said City could not require general plan and zoning applications.

Grand Santa Barbara LLC v. City of Santa Barbara: Applicant for builder’s remedy project did not bother appealing City’s extensive notice of incompleteness. Instead alleges that City cannot require any items unrelated to findings in Section 65589.5(d)(5).

Housing Advocacy Committee v. City of San Mateo: Challenges site inventory in HCD-approved housing element to require individual analysis of sites rather than use of generally applicable methodology.

Lazier v. City of Del Mar: Applicant for builder’s remedy project alleges City has failed to process project and effective denial under the HAA. Project is in the coastal zone and does not comply with the City’s CDP.

Legacy Point v. City of Industry: City found preliminary application did not contain all required information and project application was not completed within required time period, so project not eligible for builder’s remedy. Challenged under HAA (PSA not mentioned).

Gandolfi Investments LLC v City of Gilroy: City asserted housing element was adequate when preliminary application was filed, and application incomplete because rezoning and general plan amendment required.