

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

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WHAT IS THE BUILDER'S REMEDY?

A statute that **currently** says a city may not deny a housing development project that includes at least **20%** affordable housing 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 “**State Housing Element Laws**”.





The Builder's
Remedy has
been around
since 1990, so
why is it
coming up
now?

- The housing crisis won't go away
- Perceived NIMBYISM
- Increased State engagement in the Housing Element process
- Savvy developers' counsel
- Clarifying judicial opinions

What happens
when a
Developer files
a Builder's
Remedy
application?

- **The developer has no legal obligation to follow general plan land use designations** (e.g., single-family residential zone) or zoning code development standards (e.g., height, setbacks)
- **City has a legal obligation to process the application under certain statutory deadlines** or face a “deemed approval” (SB 330, SB 8, Permit Streamlining Act)
- **CEQA still applies**
- **City legislative bodies (e.g., Council, planning commission) have extremely limited discretion** to deny or conditionally approve the project.

Under what circumstances can a city deny or conditionally approve the project?

- The city has a compliant housing element and has met or exceeded its RHNA allocation.
- The project would have a specific, adverse impact upon public health or safety that can't be mitigated.
- Denial or conditions are required to comply with state law or federal laws.
- Insufficient water/wastewater facilities to serve the project.
- **The project is inconsistent with the city's zoning ordinance/general plan land use designate when the application was deemed complete, and the jurisdiction has adopted a revised housing element compliant with Housing Element laws.**

What happened in Santa Monica?

- The City's 6th cycle housing element was not adopted by October 15, 2021, the statutory deadline.
- The City worked cooperatively with HCD to revise its Housing Element draft and HCD issued its pre-approval letter on September 6, 2022.
- The City adopted the HCD pre-approved Housing Element draft on October 11, 2022.
- Developers filed 15 Builder's Remedy Applications between September 6, 2022, and October 11, 2022.

Location	Details	Case No.
3030 Nebraska Avenue/3025 Olympic Boulevard (“Nebraska/Olympic”)	1601 units/15 stories	23ENT – 0050
1925 Broadway	405 units/18 stories	23ENT – 0031
1435 5th Street	375 units/13 stories	23ENT – 0056
1518-1524 7th Street	200 units/11 stories	23ENT – 0041
601 Colorado Avenue	200 units/15 stories	23ENT – 0012
707 Colorado Avenue/1557 7th Street	200 units/16 stories	23ENT – 0028
2901 Santa Monica Boulevard	190 units/12 stories	23ENT – 0051
1435-1437 6th Street	170 units/16 stories	22ENT – 0319
1441-1443 Lincoln Boulevard	170 units/16 stories	23ENT – 0009
1238 7th Street	75 units/10 stories	22ENT – 0312
1238-1242 10th Street (“1242 10th Street”)	200 units/18 stories	23ENT – 0055
1007 Lincoln Boulevard	95 units/15 stories	23ENT – 0066
1038 10th Street	95 units/14 stories	23ENT – 0065



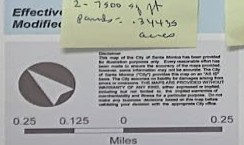
City of Santa Monica Districting Map



1-7500 sq ft
Parcel = .1721763
acres

2-7500 sq ft
Parcels = .344353
acres

Multiphase
to 24/acre

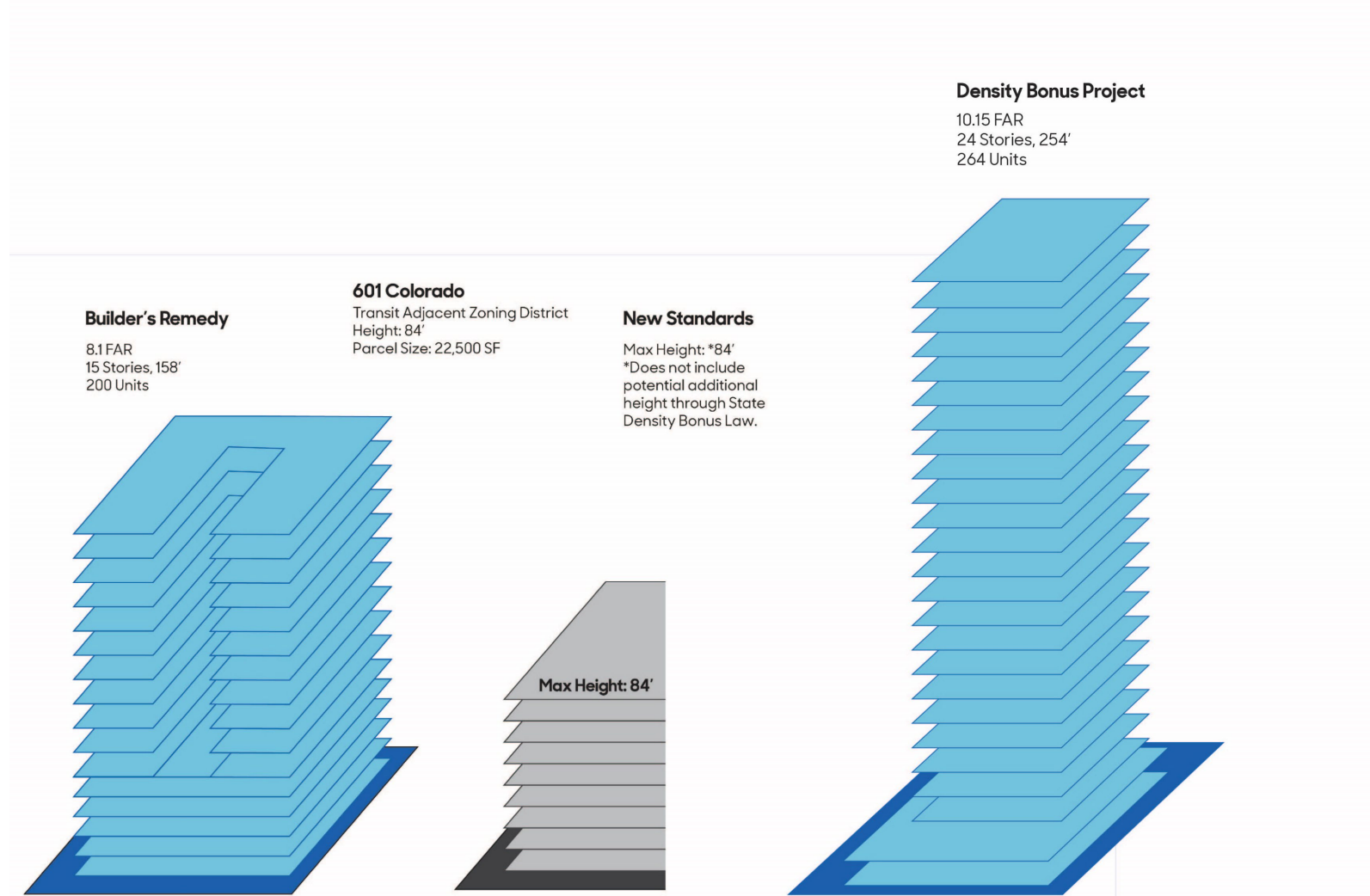


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|---|--|---|--|---|
| <ul style="list-style-type: none">R1 - Single-Unit ResidentialR2 - Low Density ResidentialR3 - Medium Density ResidentialR4 - High Density ResidentialOP1 - Ocean Park Single-Unit ResidentialOPD - Ocean Park DuplexOP2 - Ocean Park Low Density Residential | <ul style="list-style-type: none">OP3 - Ocean Park Medium Density ResidentialOP4 - Ocean Park High Density ResidentialMUBL - Mixed-Use BoulevardGC - General CommercialNC - Neighborhood CommercialIC - Industrial Conservation | <ul style="list-style-type: none">OC - Office CampusHMU - Healthcare Mixed-UseOF - OfficefrontCC - Civic CenterPL - Institutional/Public LandsOS - Parks and Open SpaceRMH - Residential Mobile Home Park | <ul style="list-style-type: none">Bergamot Plan Area<ul style="list-style-type: none">MUC - Mixed Use CreativeOCS - Conservation, Creative SectorCAC - Conservation, Art CenterBTV - Bergamot Transit VillageDowntown Community Plan<ul style="list-style-type: none">LT - Lincoln TransitionNV - Neighborhood VillageBC - Bayside ConservationTA - Transit AdjacentOT - Ocean TransitionWT - Wilshire Transition | <ul style="list-style-type: none">Zoning Overlays<ul style="list-style-type: none">A - Off Street ParkingBCN - Beach Overlay DistrictELS - Established Large Site OverlayGMP - Gateway Master Plan AreaPPC - Pedestrian-Priority CorridorRP - Ground Floor Retail Priority |
|---|--|---|--|---|

What happened next?

- City accepted the applications.
- City did code conformance review (followed SB 330, SB 8, PSA).
- Standoff with the developer over ambiguities in the statute because the City had obtained certification of its Housing Element.
- Negotiated a settlement that gave the developer additional local density bonus but limited density overall.
- AB 1287 (double density bonus law) went into effect on Jan 1, 2024 **and mooted the settlement.**

Builder's Remedy Application vs. Housing Element vs. Submitted Application: 601 Colorado Ave



Lessons Learned



Adopt your Housing Element on time with early and frequent check-ins with HCD's technical staff. 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.



Remember that HCD can decertify the housing element for post certification violations.

AB 1893

**BUILDER'S REMEDY
2.0**



Effective Date & Applicability

- AB 1893 revises the HAA (Gov. Code 65589.5)
- AB 1893 will take effect on **January 1, 2025**
- Existing BR projects can choose to be subject to the HAA as it existed on the date the project submitted a preliminary application or choose be subject to any or all of the provisions in AB 1893.

Vesting the Builder's Remedy

- Under AB 1893 (with AB 1886) the relevant date for determining whether a housing element is in substantial compliance is **the date the application was deemed complete**
- This **resolves the vesting issue** – as long as the housing element was not compliant on the day the application was deemed complete, then this prong of the Builder's Remedy is, and remains, satisfied.

Density Requirements

- AB 1893 imposes a **maximum base density** on Builder's Remedy projects
- AB 1893 also establishes **minimum densities** for BR projects.
- BR projects are eligible for **density bonuses** using the HAA density as base density
- BR projects that are eligible for a density bonus get **2 extra incentives/concessions**
- BR projects get multiplied density bonus benefits for including **extremely low-income** units

Development Standards

- BR projects are only subject to standards in a zone **that allows the density and unit type proposed by the applicant.**
- If no such zone exists, the developer can **mix and match** standards from existing zones that facilitate the proposed density and unit type.
- Local agency cannot apply standards that:
 - Render the project infeasible
 - Preclude the project from being constructed **as proposed by the applicant.**
- Limitations on sites abutting **industrial uses**

Affordability Requirements

- New affordable unit options:
 - 100% lower income units or 100% moderate income units
 - 7% of base units for extremely low-income households
 - 10% of base units for very low-income households
 - 13% of base units for lower income households
- Local agencies can impose **inclusionary housing requirements**, but they are subject to limits and require the agency to make findings
- Affordable units in BR projects must have a comparable bedroom and bathroom count as market rate units

Processing Requirements

- Cannot require a **general plan amendment, specific plan amendment, or rezone**
- Cannot impose requirement not generally required of a project of the same type and density.
- Creates a path for BR projects to use the streamlined, ministerial review procedures in **AB 2011** and **SB 35**.
- Project deemed complete before January 1, 2025, can be revised to be a BR project without having to resubmit a preliminary application, even if the revision results in the number of residential units or square footage of construction changing by 20 percent or more.

Definition of “Disapproval”

“Disapprove the housing development project” includes:

- Course of conduct undertaken for an improper purpose, such as **to harass or to cause unnecessary delay or needless increases in the cost** of the proposed project, that effectively disapproves the project
- Failing to comply with the **5-hearing rule** in Gov. Code Section 65905.5
- Violating the application completeness determination requirements in the **Permit Streamlining Act**
- If a local agency determines that an application is still incomplete after **two resubmittals**, the local agency bears the burden of establishing that the determination is not an effective disapproval
- Requiring a BR applicant to get a **general plan amendment, specific plan amendment, or rezone**
- Determining that a **preliminary application has expired** for any reason other than those explicitly stated in Gov. Code Section 65941.1.

THE BUILDER'S REMEDY IN THE TRIAL COURTS

For the most part, cities have not fared well.

And the Legislature and Governor have removed most defenses and ambiguities with the passage of AB 1893 and AB 1886.

State's goal is to allow Builder's Remedy projects to move forward – regardless of inconsistencies with local plans.



What Issues Are Resolved in New Legislation?

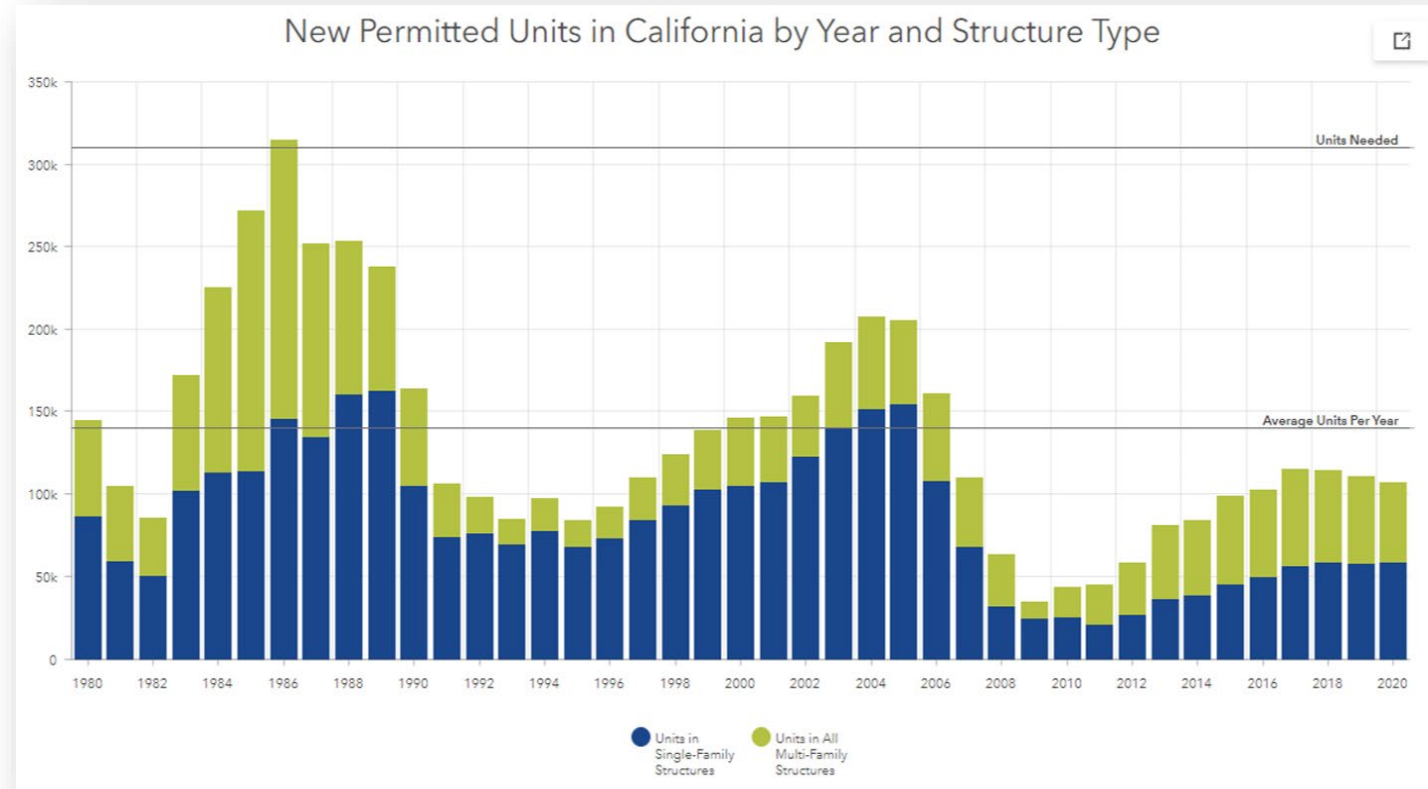
- **HCD approval needed:** Housing Element not adequate unless court or HCD approval.
 - **Application for general plan or zoning amendment:** Can't be required.
 - **Adequacy determined:** when preliminary application submitted.
 - **Eliminated conflicts with other statutory provisions**
- 

What Issues Remain?

- **Preliminary application:** What if not completed within 90 days after receive incomplete letter?
- **Coastal Act:** Does a BR application need to comply with the Local Coastal Plan?
- **Requirement for voter approval:** Is a vote needed for an adequate housing element?
- **Retroactive effect of AB 1893/AB 1886:** How do these apply to decisions made before January 1, 2025?

WHY IS THE LEGISLATURE DETERMINED TO ADVANCE THE BUILDER'S REMEDY?

- Hundreds of bills have not had the desired effect.
- About 30% of cities without HCD-approved housing elements



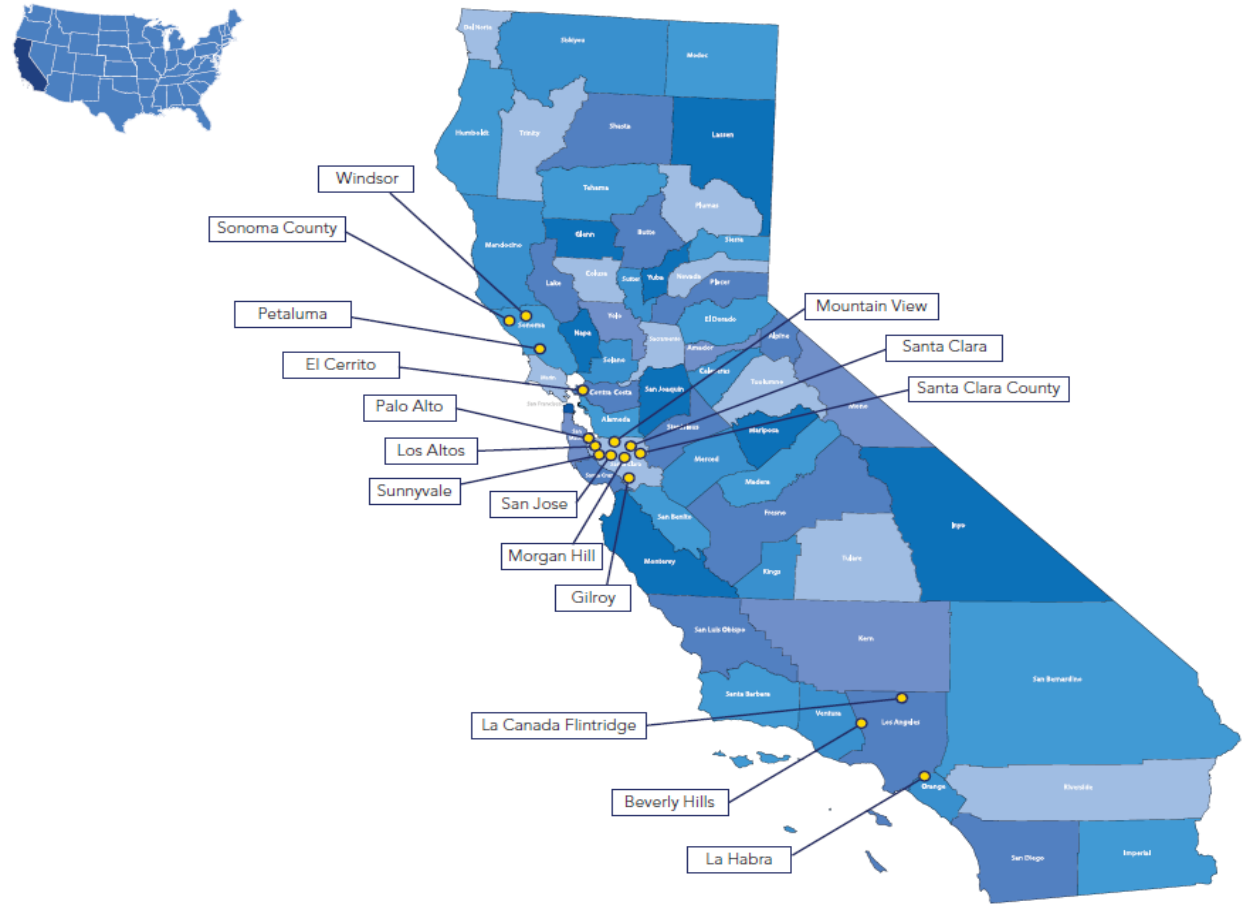
TENS OF THOUSANDS OF UNITS IN BR PROJECTS

Just one law firm represents
about 10,000 units in 50 projects.

Proposed where:

- More than 2x allowed density
- Below minimum density
- Residences not allowed at all

BUILDER'S REMEDY PROJECT MAP



Holland & Knight

www.hklaw.com



Will this solve
the housing
crisis?

Many Causes



- Labor shortages
- Construction costs
- Material shortages
- Obsolete technology
- Interest rates
- **Corporate ownership**
- **Inequality**
- **Airbnb and second homes**
- Zoning and planning approvals

TAKEAWAY

Although there are many causes of high housing costs, it's easiest for the state to act against local government while ignoring the other causes. So the Builder's Remedy is now an experiment to see if eliminating local zoning will "solve" the problem of high housing costs.

