

TRICKS AND TRAPS IN REVIEWING HOUSING PROJECTS: HOW TO PROTECT YOUR CITY

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AGENDA

- Housing Applications
- Incompleteness Determinations
- Fees and Consistency
- Specific, Adverse Impact, Health and Safety Findings
- Trial Court Cases on Interpreting Specific Adverse Impacts
- Enforcement and the Attorney General
- Possible Penalties
- HCD Letters and Responses
- Possible Resolution of Housing Disputes





an avalanche of new housing bills

**OVER 250 BILLS HAVE BEEN ENACTED SINCE
2017 TO 'SOLVE' CALIFORNIA'S HOUSING CRISIS**

PROCESSING HOUSING APPLICATIONS

Preliminary Applications Gov't Code 65941.1

Applicant has 180 days to submit a development application.

Incompleteness Letters

(Permit Streamlining Act Gov't Code §§ 65940 et seq., 65941 and 65943)

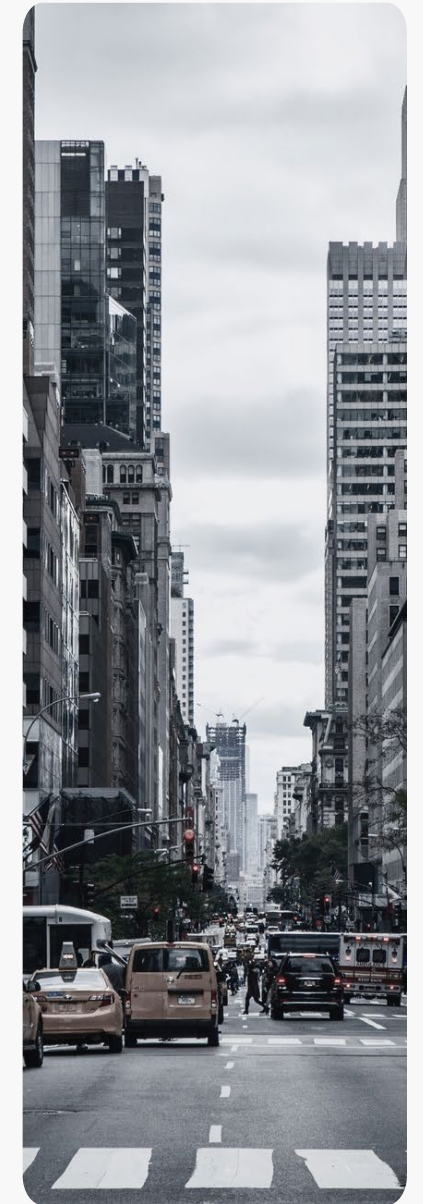
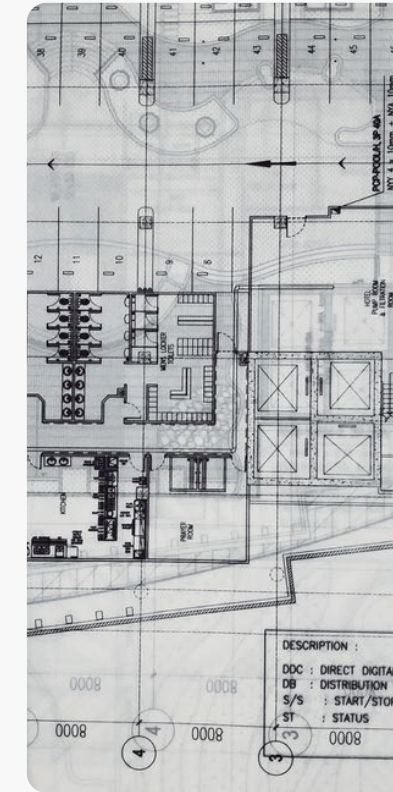
- Can only include items on completeness checklists
- 30 days from submittal of an application to provide incompleteness letter – if it's not in the checklist/letter, you can't require it
- After second resubmittal, must provide an appeal
- If preliminary application, 90 days to resubmit after an incompleteness letter

INCOMPLETENESS AS A DISAPPROVAL UNDER THE HAA

Govt 65589.5(H)(6)(F), 65943

- If include item not on checklist, or item not on first incompleteness letter
- Application deemed incomplete when reasonable person would deem it complete, and city upholds decision of incompleteness on appeal

Burden on agency to establish incompleteness
after second determination





Schedule of Fees

- Preliminary application: fees estimate within 30 business days, if asked (Gov't § 65941.1(b).)
- Within 30 business days of final approval, city must provide an itemized list and a good faith estimate of all fees and exactions. (Gov't § 65943.1)
- Final approval means that “the housing development project has received all necessary approvals to be eligible to apply for, and obtain, a building permit or permits.”

consistency determination

Projects up to 150 units: 30 days

Projects more than 150 units: 60 days

After submittal of completed application

If not, deemed consistent - and the city loses any arguments that the project does not comply with objective standards.

Gov't § 65589.5(j)(2)(A)



post-entitlement permit approvals

Gov't Code §§65589.5, 65913.3, and 65913.3.5

Must have detailed list of information needed

15 business days for completeness determination – failure to provide list
= deemed complete

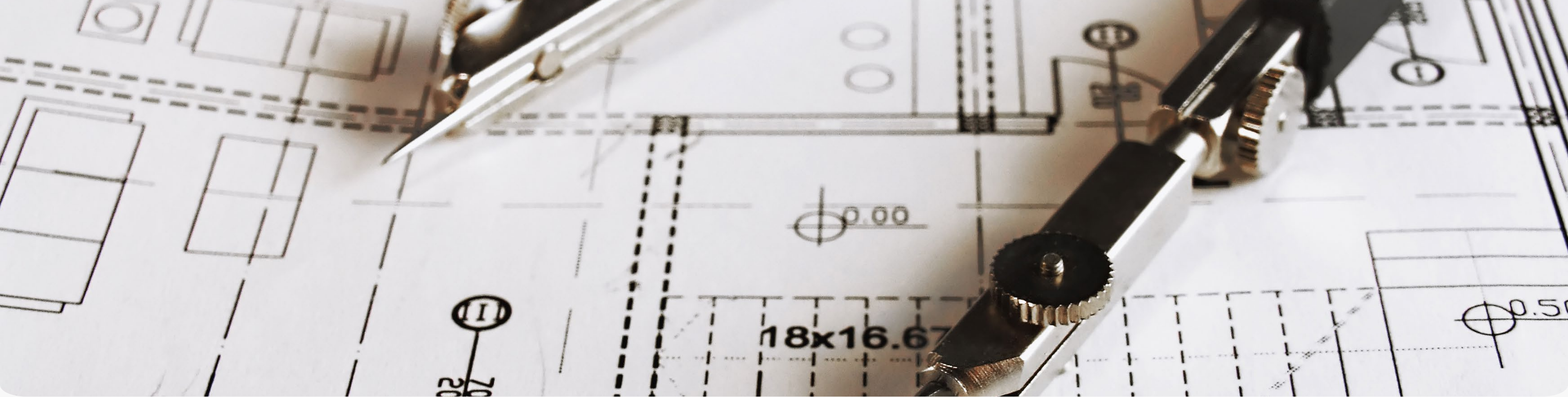
Complete application

- 25 units or fewer: 30 business days
- 26+ units: 60 business days
- To provide approval or full set of comments with a comprehensive request for revisions
- Timeline tolled if outside agency involved

Noncompliant applications: must provide an appeal right

- 25 units or fewer: appeal decision must issue within 60 business days
- 26 or more, decision must issue within 90 business days





ADUs+JADUs/SB 9/SB 684

Must ministerially approve or deny within 60 days of a complete application
If not acted upon, deemed approved

Gov't Code § 66310 et seq. (ADUs/JADUs); 65852.21, 66411.7 (SB 9); 65852.28, 66499.41, and 65913

sb35/affordable housing developments in commercial zones (ministerial approval)

Must determine completeness

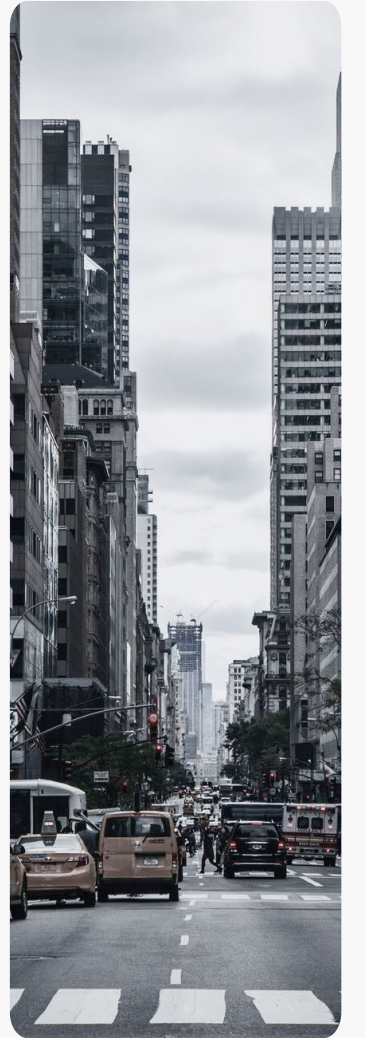
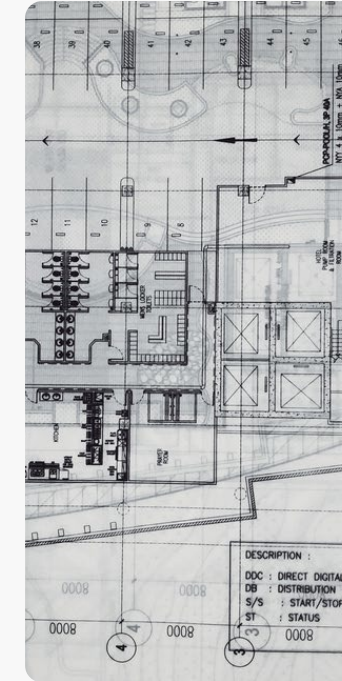
Regardless of completeness status, must determine consistency

- Up to 150 units: 60 days
- Over 150 units: 90 days
- May indicate that cannot determine consistency based on the plans submitted
- 30 days to review a resubmittal after finding of inconsistency

After determination of consistency: approval

- Up to 150 units: 60 days
- Over 150 units: 90 days

(Gov't Code 65913.4; 65912.110, 65912.210)



Specific, adverse impact findings



Housing projects may be denied if agency makes findings, supported by a preponderance of the evidence, of specific adverse impacts that cannot be mitigated.

- The city must have adopted an objective, written public health or safety standard that was in effect on the date that the application was deemed complete
- Violation of the health or safety standard must have a “significant, quantifiable, direct, and unavoidable impact”
- There can be no feasible way to mitigate the impact except by denying the project or reducing the density.



trial court cases on specific adverse impact health & safety findings

Three trial courts have rejected cities' arguments that specific health and safety impacts justified housing denials.

- *California Renters Legal Advocacy and Education Fund (CaRLA) v. City of Huntington Beach* The city failed to identify an objective, written public health and safety standard relating to ingress/ egress.
- *THNC Canyon Oaks LLC v. City of Calabasas* The city cited increased fire evacuation time but the Court held there was no city standard.

Both cities failed to make findings that there was no feasible method to mitigate or avoid the asserted impact.

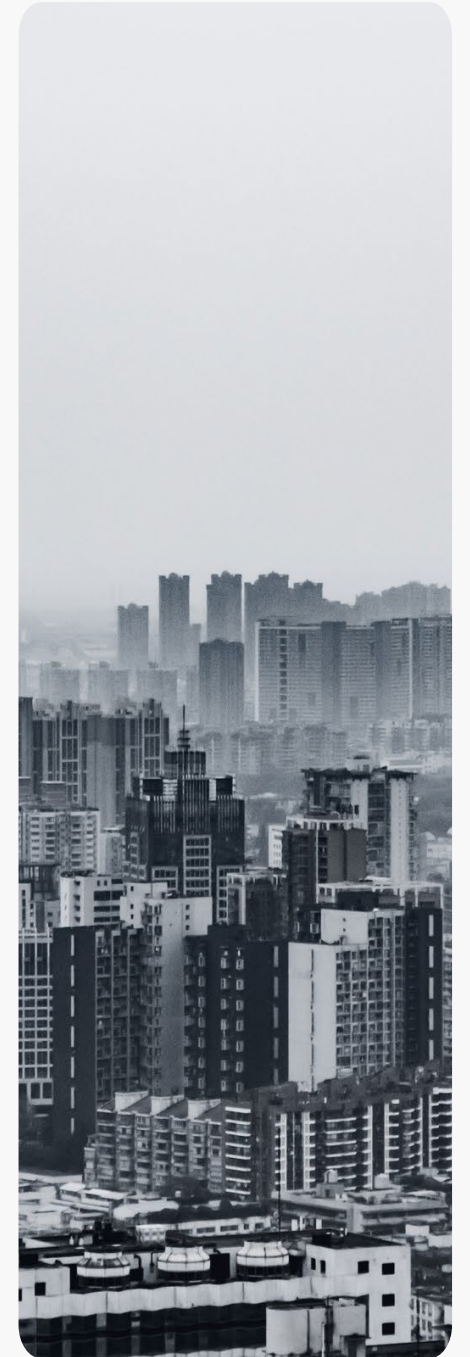
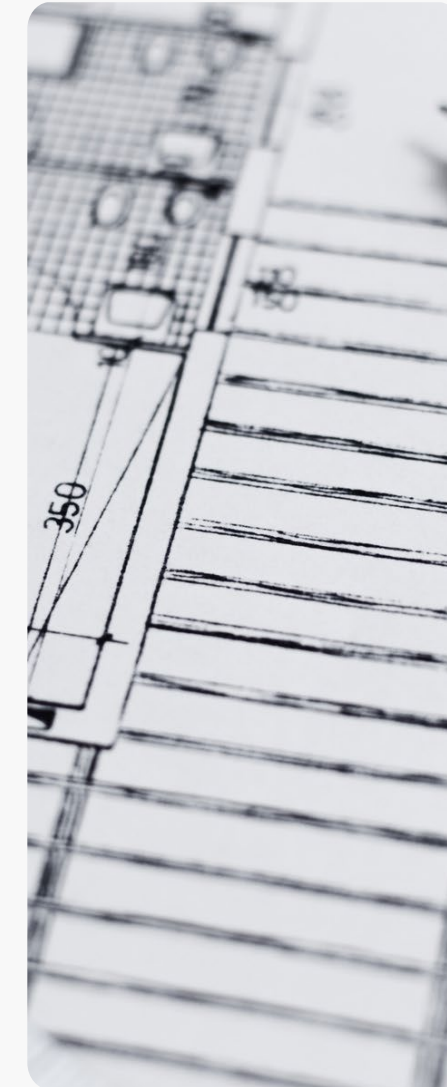
trial court cases on specific adverse impact findings

Specific Fire Safety Impacts Are Difficult to Demonstrate.

Besides *TNHC Canyon Oaks*, in *Justin Mi v. City of San Marino*, the city based a housing denial on lack of compliance with the fire code. The court disagreed with the Fire Chief's interpretation of the relevant provisions, and held that asserted deficiencies could have been easily mitigated by requiring more detailed plans.

public health and safety impact : t h r e e k e y p o i n t s

- There must be an objective health and safety standard that was in effect when the project was deemed complete, and it must clearly apply to the project;
- City needs specific evidence that failing to comply with the standard would have a “significant, quantifiable, direct and unavoidable impact. (e.g. evidence in EIR, consultant report, memo drafted by expert staff person, e.g. Fire Chief.)
- The city must demonstrate no feasible method of mitigation.





powerful enforcement. potent remedies.

Recent legislation substantially strengthens the role of HCD and of the Attorney General's office in enforcing housing laws. Government Code section 65585 requires that HCD review any local agency's "action or failure to act" that HCD has determined is inconsistent with an adopted housing element or with the Housing Element Law. (§ 65585(i)(1)(A).)

HCD is required to issue written findings to the agency regarding whether the act or failure to act in question substantially complies with the Housing Element Law; the jurisdiction then has no longer than 30 days to respond to the finding.

revoking housing element compliance finding

If HCD finds that the action or failure to act does not substantially comply with the Housing Element Law, then it has the power to revoke a previous finding that the agency's Housing Element substantially complies with state law. (§ 65585 (i)(1)(B).)

If HCD revokes a finding of compliance, then the agency is potentially exposed to the Builder's Remedy.

An amendment effective January 1, 2025, creates a rebuttable presumption of the invalidity of the local agency action in any resulting lawsuit.

attorney general involvement

Section 65585 also gives HCD the power to notify the AG's office that an agency has violated the law.

The AG has standing to bring an enforcement action either on its own, or with HCD. (§ 65585(n).)

If the AG declines to bring an enforcement action, HCD is authorized to retain outside counsel to pursue a claim.





possible penalties

SB 1037, effective January 1, 2025, creates new remedies and penalties in actions brought by the AG or HCD. SB 1037 adds Section 65009.1, which authorizes serious penalties in actions brought by the AG or HCD to:

- (1) enforce adoption of housing element updates under the schedule in Section 65588(e); or
- (2) enforce any state law requiring a city, county, or local agency to ministerially approve an application for a housing development project. (§ 65009.1(a).)

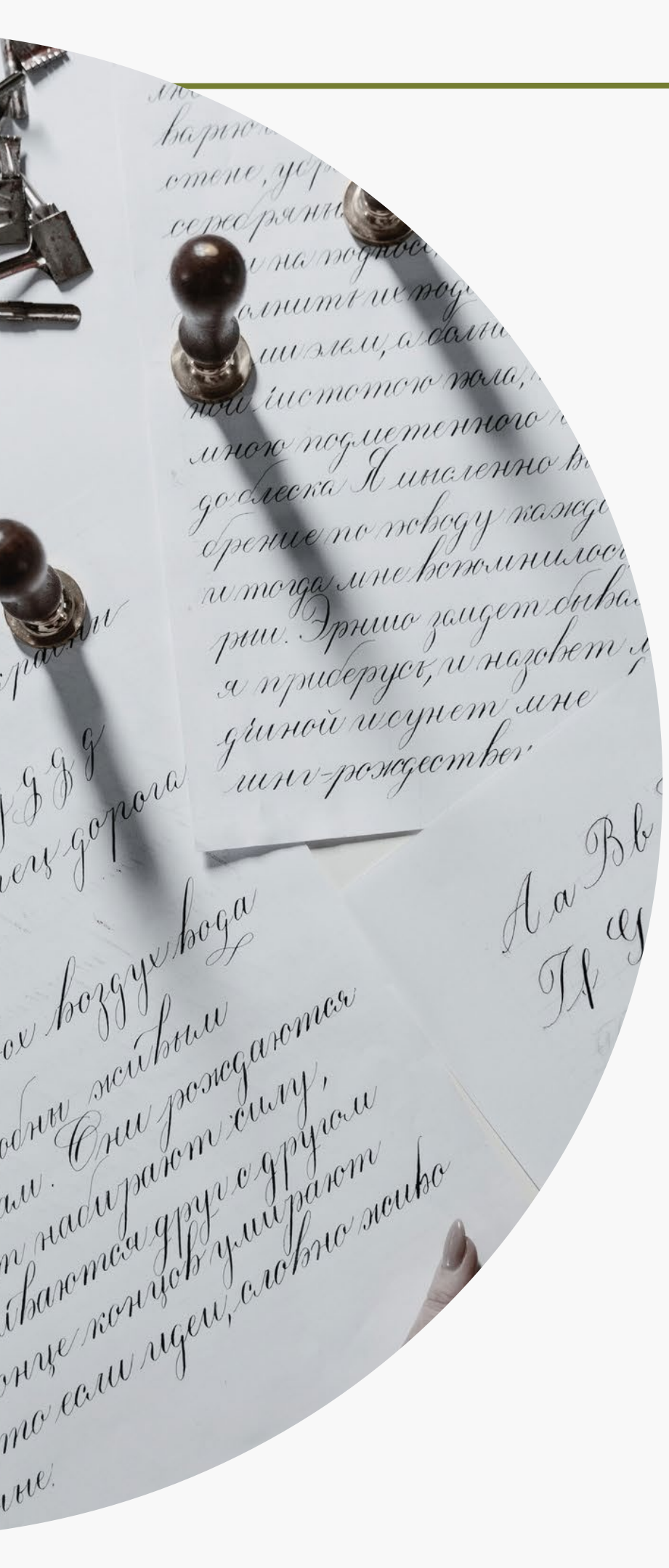
A hand holding a red card against a dark background.

possible penalties

These remedies include:

(1) a penalty for each violation of at least \$10,000, but no more than \$50,000, per month, accruing from the violation date until the violation is cured;

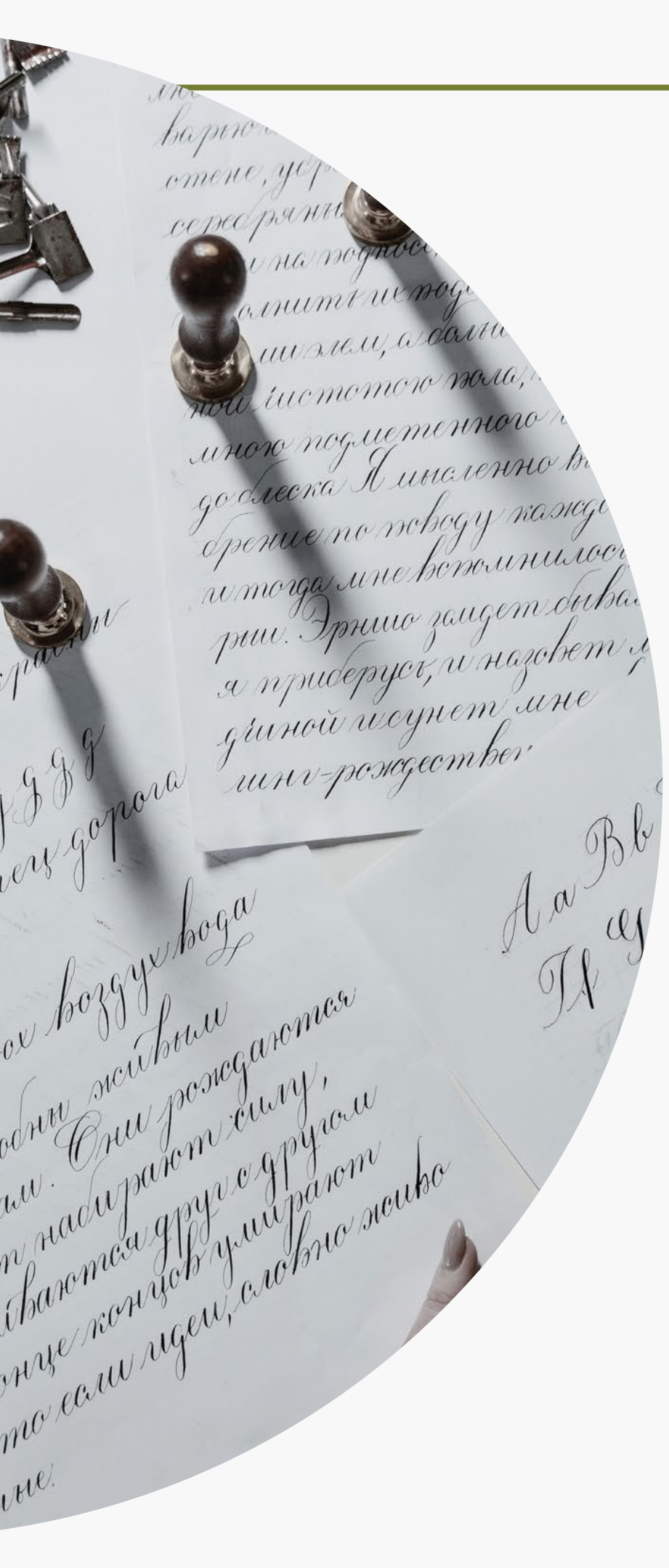
(2) all costs of investigating and prosecuting the action, including expert fees, reasonable attorneys' fees, and costs, whenever the AG or HCD prevails in a civil action to enforce state laws under this statute; and (3) other equitable or injunctive relief, including temporary or permanent injunctions. (§ 65009.1(a)(1)-(3).)



hcd letters

Many agencies have received HCD Letters of Technical Assistance and Notices of Violation. Agencies may request HCD Technical Assistance when facing novel questions of state law interpretation or when facing a developer request that the agency believes exceeds the requirements of state law.

HCD has also frequently issued letters in connection with pending housing development applications, urging the city to approve the housing, and/or disagreeing with the city's interpretation of a pertinent provision of the housing laws.



local agency response to hcd if disagreement exists

If an agency disagrees with HCD, it is helpful if the agency's response includes a thorough analysis of the statute in question, demonstrates the strength of the agency's position, and that the interpretation is made in good faith.

The agency's response to HCD affords a chance for HCD to hear the agency's side of the story, not just the version told to HCD by the developer and/or the housing advocates.

The strength of the city's response can assist in the defense of the litigation, as well as protect against a bad faith finding.

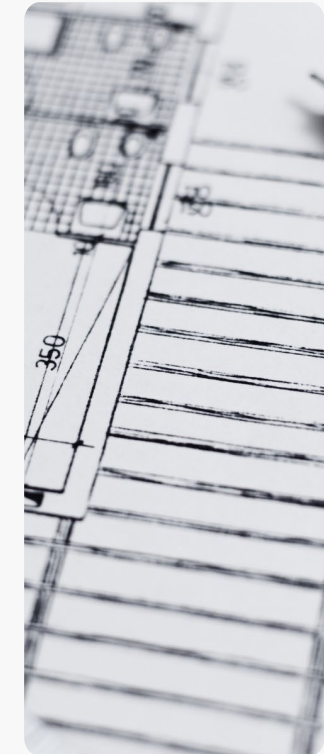
possible resolution

Housing litigation is expensive and presents the risk of significant downsides, financial and otherwise.

Government Code Sections 66030 et seq. establish a mediation process for land use disputes.

Prior to the AG bringing any suit for noncompliance, the AG is required to offer the local agency two meetings in person or remotely to discuss the violation. (§ 65585 (k).) Exceptions to the meet and confer obligation:

- Any suits brought for alleged violations of the HAA, SB 330, SB 35, and several other housing statutes
- Decisions by HCD to “de -certify” a housing element and subject a city to the Builder’s Remedy. (Id.)



creative resolution

Settlement discussions can be productive, since there is frequently developer interest in compromise.

As part of a settlement, the agency can consider offering expedited processing and other benefits.

Many local agencies and developers are willing to toll filing deadlines pending possible resolution.

A local agency cannot pre-commit to a revised project approval in a settlement agreement. If settlement is achieved, the agreement typically calls for the litigation to be stayed pending a final hearing on a revised project. If approved, then the case is dismissed, and the agency is released.



thank you



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Elena is a partner at Burke, Williams & Sorensen LLP. She currently serves as counsel for the Puente Hills Habitat Preservation Authority and the Burbank-Glendale-Pasadena Regional Housing Trust, as well as the Assistant City Attorney for the City of Lawndale, and Special Counsel for the City of Culver City.

Her areas of expertise include housing, zoning, and land use, First Amendment and constitutional law, as well as open government and conflicts laws.



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Dolores Bastian Dalton is currently a partner at Goldfarb Lipman, LLP. Ms. Dalton has been certified by the State Bar of California as a specialist in appellate law. She has extensive experience litigating and mediating land use, housing, public entity, enforcement, nonprofit and commercial disputes in state and federal trial courts, and on appeal.

Ms. Dalton is also a trained mediator and a member of the mediation panels for the California Court of Appeal for the Third and Sixth Districts.