# Tricks and Traps in Reviewing Housing Projects: How to Protect Your City

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*Dolores Dalton, Partner, Goldfarb & Lipman, LLP*
*Elena Gerli, Partner, Burke, Williams & Sorensen, LLP*

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# How to Protect Your City

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Prepared by:

**Dolores B. Dalton**
Partner
Goldfarb & Lipman LLP
1300 Clay Street, 11th Floor
Oakland, CA 94612
510-836-6336
ddalton@goldfarblipman.com

**Elena Q. Gerli**
Partner
Burke, Williams, & Sorensen LLP
444 South Flower Street, 40th Floor
Los Angeles, CA 90071
213-236-0600
egerli@bwslaw.com

**Barbara Kautz**
Partner
Goldfarb & Lipman LLP
1300 Clay Street, 11th Floor
Oakland, CA 94612
510-836-6336
bkautz@goldfarblipman.com

## Introduction

Over 250 bills have been enacted since 2017 to "solve" California's extraordinarily high housing prices. The majority of these have been aimed at local government processing of housing projects. This avalanche of bills, with their myriad details and strict timelines, has been nearly impossible for overworked planners to understand or to incorporate into their procedures. As a consequence, there are frequent mistakes made, with projects being "deemed complete" or "deemed consistent," even when the applications are neither complete nor consistent. Even when mistakes are not made, cities and their attorneys must respond to novel claims from newly aggressive developers and their state allies, the Department of Housing and Community Development (HCD) and the Attorney General, and new causes of action contained in prolix and poorly drafted bills. Even those cities that are most supportive of and welcome housing development may encounter these claims.

This paper discusses the most frequent traps encountered by cities in reviewing housing developments and will suggest strategies to protect cities from both litigation and mistakes, especially in light of new housing laws effective in 2025. The paper first discusses issues with processing applications; then discusses the "specific, adverse impact" finding needed to deny housing projects; and then suggests strategies for working with HCD, the Attorney General, and developers in attempting to reach consensus.

## PROCESSING HOUSING APPLICATIONS

### I. Preliminary Applications (Gov't Code § 65941.1)[1]

A project proponent can submit a preliminary application prior to submitting a development application, which must include the information enumerated in Section 65941.1(a). A preliminary application "freezes" most zoning and development standards at the time of the preliminary application is submitted, with some exceptions listed in Section 65589.5(o). The <u>applicant has 180 days to submit a full development application</u> and must complete the application within 90 days of "receiving the agency's written identification of the necessary information." The interpretation of the 90-day limit is the subject of current litigation, as discussed below.

The agency has no obligation to review the preliminary application to ensure that it contains the required enumerated information; the burden is entirely on the applicant. If the preliminary information does not contain the required information, it is not effective. Nonetheless, some cities do review the preliminary application and advise applicants how to complete it. Whether or not to do this depends on the city's policies and practice.

[1] All further references are to the Government Code unless otherwise stated.

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

- Agency must compile lists of what is required from any applicant for a development project, and make the list available on its website; any changes must be updated to the website within 30 days. §§ 65940, 65940.1.

- <u>Agency has 30 days from submittal to determine incompleteness and provide comprehensive list – if not provided, deemed complete</u>. Applicant has another 30 days for resubmittal. After second resubmittal, city **must** provide an appeal right, although a city may elect to provide an appeal right after each submittal. § 65943.

- <u>For projects initiated through a preliminary application</u>: If the public agency determines that the application for the development project is not complete pursuant to Section 65943, the development proponent shall submit the specific information needed to complete the application within 90 days of receiving the agency's written identification of the necessary information. If the development proponent does not submit this information within the 90-day period, then the preliminary application shall expire and have no further force or effect. § 65914.1(e)(2).

    - HCD has interpreted this provision to provide applicants with as many 90 day periods as they need to complete their application, based on two Los Angeles County Superior Court decisions by the same trial court.[2] This remains an issue in other current litigation.

### A. Per Gov't Code § 65589.5(h)(6)(F), an incompleteness determination under Gov't Code § 65943 may be a disapproval if:

- The agency makes a determination or subsequent determination that the application is incomplete and includes an item in its determination that is not required on the agency's submittal requirement checklist; or, in a subsequent determination, asks for an item that was not on the first determination of incompleteness. The agency has the burden to prove the item is on the checklist.

- The agency makes a determination that the application is incomplete and a reasonable person would determine that the applicant has submitted all the items on the checklist, and the agency upholds its determination in an appeal pursuant to Section 65943(c).

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[2] *Jha v. City of Los Angeles, LACSC Case No. 23STCP03499; YIMBY v. City of Los Angeles, LACSC Case No. Case No. 21STCP03883;Town of Los Gatos v. Arya Properties, LLC.*

- If the agency determines an application is incomplete after 2 resubmittals, the agency has the burden to show the determination is not a disapproval. [Note also the requirement to provide an appeal.]

If these administrative decisions are considered to be a disapproval, an applicant may immediately file suit, arguing that the city did not make the findings required under Sections 65589.5(f), and the city will be responsible for the applicant's attorneys' fees if the applicant is successful. To enable the city to correct any mistakes, we recommend that cities provide an appeal process for <u>all</u> incompleteness decisions and include the ability to request an appeal in incompleteness letters. Note that a decision on an appeal of an incompleteness letter must be made within 60 days (§ 65943(c)), which may require that the appeal go directly to the City Council.

## III. Schedule of fees must be provided.

A project proponent who has submitted a preliminary application can request an <u>estimated</u> schedule of fees applicable to the proposed development, and the city must provide it within <u>30 business days</u>. The applicant can also request the same information from other public agencies, which must provide this information "without delay." The estimate is provided for "informational purposes only" and does not bind the city. § 65941.1(b).

Within <u>30 business days</u> of final approval, city **must** provide an itemized list and a good faith estimate of all fees and exactions. 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." § 65943.1.

## IV. Determination of consistency with zoning code and development standards. (Gov't Code § 65589.5(j)(2)(A).)

A determination that a proposed housing project is "inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision must be provided <u>within 30 days of receipt of a completed application for project of up to 150 units</u>, and <u>within 60 days for projected of more than 150 units</u>. Failure to meet these timelines results in the project to be "deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

The written determination must include documentation that identifies "the provision or provisions, and an explanation of the reason or reasons [the city] considers the housing development to be inconsistent, not in compliance, or not in conformity."

Although this provision has been in effect since 2018, some planning departments still do not seem to be aware of this provision and do not regularly provide consistency letters.

Note that once the consistency letter has been provided, or the deadline has passed to provide the letter, neither the Planning Commission nor the City Council (nor the public) has the ability to determine that the project is inconsistent with a provision that either the staff found consistent, or that was "deemed consistent" because the staff failed to find it inconsistent. Hence it is critical that the staff have an established procedure and method for determining inconsistency. Some cities now include in their application forms a list of standards and request applicants to show how the project is consistent with those standards.

## V. Post entitlement permit approvals (Gov't Code §§ 65589.5, 65913.3, and 65913.3.5)

City must provide a detailed list of information that will be required from any applicant for a post-entitlement phase permit, and post a complete, approved application as a sample, on the city's website.

> "Post-entitlement phase permit" includes all nondiscretionary permits and reviews filed after the entitlement process has been completed that are required or issued by the local agency to begin construction of a development that is intended to be at least two-thirds residential, excluding discretionary and ministerial planning permits, entitlements, and other permits and reviews that are covered under Chapter 4.5 (commencing with Section 65920). A post-entitlement phase permit includes, but is not limited to, all of the following:
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> (i) Building permits, and all inter-departmental review required for the issuance of a building permit.
>
> (ii) Permits for minor or standard off-site improvements.
>
> (iii) Permits for demolition.
>
> (iv) Permits for minor or standard excavation and grading.
>
> (B) A local agency may identify by ordinance a threshold for determining whether a permit constitutes a "minor" or "standard" permit for the purposes of this paragraph, which shall be supported by written findings adopted by the jurisdiction.
>
> (C) A post-entitlement phase permit does not include a permit required and issued by the California Coastal Commission, a special district, a utility that is not owned and operated by a local agency, or any other entity that is not a city, county, or city and county. § 65913.3(j)(3)(A).

City must make a completeness determination within 15 business days of application submittal. Incompleteness letter can only include items on the posted list. If the city does not provide an incompleteness letter, the application is deemed complete.

For housing development projects with 25 units or fewer, the city must, within 30 business days of a complete application, "complete the review and either return in writing a full set of comments to the applicant with a comprehensive request for revisions or return the approved permit application on each post-entitlement phase permit requested," and immediately notify the applicant by email and if applicable by posting on the city's website. For projects of 26 units or more, the city's review must be completed and immediately transmitted within 60 business days of a complete application. § 65913.3(c).

The timeline does not apply if the city makes a finding, supported by a preponderance of the evidence, of a specific adverse impact, i.e., "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete."

If the post-entitlement permit requires approval by an outside agency, the timeline is tolled for the amount of time it takes for the outside agency to issue the permit. This does not provide the City with any additional time. The code has procedural requirements for how to notify the applicant.

If the city determines that the application is noncompliant the city must provide the applicant with "a list of items that are noncompliant and a description of how the application can be remedied by the applicant within the time limits specified above. The applicant must be permitted to rectify the application, and the same timelines apply to resubmittals.

An applicant provided an incompleteness letter or denial must be provided with an appeal right. For projects up to 25 units, the city issues ma written decision within 60 business days after the appeal is submitted, and for projects of 26 or more units, the decision must issue within 90 days. Failure to meet these timelines is a violation of the Housing Accountability Act (HAA), § 65589.5.

For SB 35 projects (Gov't Code § 65913.4), the timelines in that section shall apply for post-entitlement permits.

Digital Post-entitlement Permits (§65913.3.5):

Cities are required to provide an option for post-entitlement permits to be applied for, completed, and retrieved via an internet website by the dates shown below. In the interim, applications for post-entitlement permits must be accepted by email.

A city located in a county with a population of 1,100,000 or greater, or a local agency with a population of 75,000 or greater in any county, as determined by the 2020 census, was required to comply with subdivision (b) on January 1, 2024. (This deadline could be extended by 2 years based on certain findings.)

Local agencies with a population of fewer than 75,000 in a county with a population of fewer than 1,100,000, and counties with populations of fewer than 75,000 in unincorporated areas, must comply by January 1, 2028, and can get a 5-year extension based on certain findings.

## VI. ADUs/JADUs (Gov't Code §§ 66310 et seq., § 66317(a))

If there is an existing single-family or multifamily dwelling on the lot, city must approve or deny an application for an ADU or JADU within 60 days of receipt of a completed application, and if not acted upon within that timeline application is deemed approved. If the application is incomplete, the city must respond within 30 days, as described previously.

For ADU/JADU applications for proposed single family or multifamily dwellings, a city may delay approving or denying the permit application until the city approves or denies the permit application to create the new single-family or multifamily dwelling. The ADU/JADU application must be considered ministerially.

Note that, Gov't Code § 65852.27 provides that cities must have a program for preapproval of ADU plans, and these plans must be approved within 30 days of receiving a completed application.

## VII. Two-unit developments and urban lot splits (Gov't Code §§ 65852.21, 66411.7 (SB 9))

City must approve or deny within 60 days of receipt of a completed application, and if not acted upon within that timeline applications are deemed approved. Any decision to disapprove a 2-unit development or urban lot split must be accompanied by a full set of written comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant. Completeness determinations must be made within 30 days.

## VIII. Small housing developments/subdivisions of 10 or fewer units (Gov't Code §§ 65852.28, 66499.41, and 65913.4.5 (SB 684))

City must approve or deny ministerially within 60 days after receipt of a completed application, and if not acted upon within that timeline applications are deemed approved. Any decision to disapprove the development/subdivision must be accompanied by a full set of comments to the applicant in writing with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant. Completeness determinations must be made within 30 days

## IX. Affordable housing developments in commercial zones and mixed-income housing developments along commercial corridors. (Gov't Code § 65912.110 et seq., § 65912.120 et seq. (AB 2011))

A city must first determine whether a development submitted under this article is complete. But regardless of whether the application is complete or not, the city shall determine, in writing, whether the development is consistent or inconsistent with the objective planning standards specified in the Government Code within the following timeframes:

(A) Within 60 days after a project proposal is submitted if the project has 150 units or less.

(B) 90 days if the project contains more than 150 units.

(C) 30 days to review a resubmittal in response to the local agency's findings that a project does not meet objective planning standards.

City cannot request information that was not requested in the initial consistency letter.

If the application was incomplete, the city may indicate that it cannot determine consistency based on the plans submitted. Once the local government determines that a development submitted pursuant to this article is consistent with the objective planning standards specified in this article, it shall approve the development within the following timeframes:

(A)Within 60 days of the date that the development is determined to be consistent with the objective planning standards specified in this article, if the development contains 150 or fewer housing units.

(B)Within 90 days of the date that the development is determined to be consistent with the objective planning standards specified in this article, if the development contains more than 150 housing units.

## X. Multifamily housing developments of 2 or more units (Gov't Code § 65913.4 (SB 35))

### A. Tribal scoping consultation

Subdivision (b) requires a developer who intends to build an SB 35 project to submit to the city a notice of intent to build an affordable housing project in the form of a preliminary application (§ 65941.1). Within 30 days of receipt of the notice, the city must begin a scoping consultation "with any California Native American tribe that is traditionally and culturally affiliated with the geographic area."

Timeline: City must provide formal notice of the developer's intent to submit an SB 35 application "to each California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed development within 30 days of receiving that notice of intent."

Any Native American tribe that wishes to engage has 30 days to accept the invitation. The city must then begin the consultation within 30 days of receipt of the tribe's response.

The language of the statute suggests that the deadlines are directory rather than mandatory, as the statute provides for no consequences if the deadlines are missed. However, given the courts' proclivity for ruling in favor of developers, the recommendation is to abide by the timelines as strictly as possible, at least on the city side.

It should be noted that in the updated HAA, § 65589.5(h)(6)(D), project disapproval includes failure to "cease a course of conduct undertaken for an improper purpose, such as … to cause unnecessary delay …, that effectively disapproves the proposed housing development without taking final administrative action…," so unnecessarily delaying the tribal consultation period to stall a project may lead to a determination that the city violated the HAA.

However, once the city meets its timelines and engages with the tribe, the dates for meetings and the success of the consultation are entirely within the control of the tribe. If no agreement can be reached with the tribe, or if the applicant refuses to do studies demanded by the tribe, the consultation will fail, and the applicant cannot use the streamlined, ministerial provisions of SB 35 for the project.

### B. Projects in certain opportunity zones (§ 65913.4(q))

The City Council (Planning Commission in city with population of greater than 250,000) must hold a public meeting within 45 days after a project proponent submits a notice of intent, but before the project proponent submits a development application, for a development proposed in a census tract that is designated either as a moderate resource area, low resource area, or an area of high segregation and poverty on the most recent "CTCAC/HCD Opportunity Map" published by the California Tax Credit Allocation Committee and the Department of Housing and Community Development. If the city fails to provide the hearing, the project proponent must hold a public meeting on the proposed development before submitting a development application.

The proponent must attest in writing that it attended the meeting and reviewed the testimony and written comments. However, there is no requirement that the proponent respond to any of the comments made.

### C. Completeness and consistency determinations (§ 65913.4(c))

The city must first determine if the application is complete, as described above. However, as with AB 2011, <u>regardless of whether the application is complete or not,</u> if the city determines that "a development submitted pursuant to this section is in conflict with any of the objective planning standards" provided in subdivision (a) of Section 65913.4, the city must "provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards, as follows:

(A) Within 60 days of submittal of the development to the local government pursuant to this section if the development contains 150 or fewer housing units.

(B) Within 90 days of submittal of the development to the local government pursuant to this section if the development contains more than 150 housing units.

(C) Within 30 days of submittal of any development proposal that was resubmitted to address written feedback provided by the local government pursuant to this paragraph."

Failure to meet the above timelines results in the projects being deemed to meet the standards. If the application was incomplete, the city may indicate that it cannot determine consistency based on the plans submitted. If the city finds that the project complies with the criteria and standards of SB 35, the city must issue the permit. The Planning Director's decision regarding consistency is determinative, and, effectively, cannot be appealed or overruled.

**D. Design Review (§ 65913.4(d))**

Design review by planning commission "or any equivalent board or commission" responsible for design review. Any design review shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction. Design review shall be completed, and if the development is consistent with all objective standards, the local government shall approve the development as follows and shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect, as applicable:

(A) Within 90 days of submittal of the development to the local government pursuant to this section if the development contains 150 or fewer housing units.

(B) Within 180 days of submittal of the development to the local government pursuant to this section if the development contains more than 150 housing units.

Given the limits on design review, many cities have made the entire SB 35 process entirely ministerial and completed at the staff level. Possibly conditions could be added regarding design details, but the authority to do that is not clear. HCD's Guidelines advise that only standard conditions can be applied to SB 35 projects.

### E. Construction and entitlements (§ 65913.4(g))

If an approved project includes public investment in housing affordability and at least 50% of the units are affordable, entitlements do not expire.

Otherwise, approvals remain valid for 3 years. Approvals remain valid during construction, provided construction is in progress, as defined.

### F. Modifications (§ 65913.4(h))

A development proponent can request a project modification prior to issuance of a building permit. The modification must be approved as long as the project remains in compliance with the requirements of Section 65913.4(a).

The city must analyze the modification "for consistency with the objective planning standards using the same assumptions and analytical methodology that the [city] originally used to assess consistency for the development that was approved for streamlined, ministerial approval…."

Consistency must be determined within "60 days after submission of the modification, or within 90 days if design review is required."

## <u>"SPECIFIC, ADVERSE IMPACT" FINDINGS</u>

**<u>Housing Accountability Act (Gov't Code § 65589.5) – Applicable to All Housing Development Projects</u>.** The Housing Accountability Act requires that, *if a project complies with all objective standards*, then, to deny or reduce the density of an application for a housing development project, a city must provide written findings supported by a preponderance of the evidence that both of the following exist:

> "(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.
>
> "(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." § 65589.5(j)(1).

Most housing development projects with an affordability component (with the exception of those with four units or less, which are not eligible for a density bonus, § 65915(i)) must be found to be consistent with all objective standards – even if they request major variations from local development standards. That is because state density bonus law (§§ 65915 *et seq.*) allows unlimited waivers from local development standards, plus from one to seven "concessions," for senior housing and for any housing project with at least 5 percent very low-income units. The receipt of waivers and concessions "shall not constitute a valid basis on which to find a proposed housing development project is inconsistent…with an applicable plan, program, policy, ordinance" etc.

As a result, all housing projects that are entitled to waivers and concessions must be found to be consistent with local standards, and the "specific health and safety" finding listed above must be made if the city desires to deny the project or reduce the density.

The "specific health and safety impact" finding includes three components:

- <u>The city must have adopted an objective, written public health or safety standard</u> that was in effect on the date that the application was "deemed complete" (the date that either a complete preliminary application was submitted, or the date that a project application was found complete if a complete preliminary application was not submitted. (§ 65589.5(h)(5).)

  Often project opponents will provide information regarding possible safety impacts, such as the project's effect on evacuation times during fires. However, unless the city has adopted, objective standards regarding evacuation times, this information cannot be used to deny or reduce the density of a project.

  Additionally, if cities are considering adopting health and safety standards, applicants may seek to avoid them by filing preliminary applications, so that the project is "deemed complete" before the safety standard can go into effect.

- <u>Violation of the health or safety standard must have a "significant, quantifiable, direct, and unavoidable impact."</u> While an environmental impact report (EIR) may find a "significant and unavoidable impact," unless the impact is based on an objective and adopted health or safety standard, that impact cannot be used to deny or reduce the density of the project, although it may be used to impose mitigation measures.

- <u>There can be no feasible way to mitigate the impact except by denying the project or reducing the density.</u> One way to mitigate the impact is simply to require that the standard be met. However, if this is not feasible, then the project may conceivably be denied or the density reduced.

All of these findings must be supported by a preponderance of the evidence, rather than substantial evidence.

**<u>Trial Court Cases</u>**. There are at least three recent trial court cases where cities denied housing projects based, at least in part, on the "specific health & safety" finding. In all three cases, the trial court ruled against the city.

In two of the cases, *California Renters Legal Advocacy and Education Fund (CaRLA) v. City of Huntington Beach*[3] and *TNHC Canyon Oaks LLC v. City of Calabasas,*[4] the courts concluded that the cities failed to identify an objective, written public health or safety standard on which their finding was based. In *CaRLA*, the city found that there would be a negative impact on health and safety due to unsafe ingress/egress conditions, but the Court found that this was not based on any objective standard. In *TNHC Canyon Oaks,* the city cited increased fire evacuation time but the Court held that there was no city standard. Many of the city's other health and safety findings contradicted statements in the EIR prepared for the project, so the Court concluded that the city's findings were not supported by the preponderance of the evidence. The courts also held that both cities failed to make a finding that there was no feasible method to mitigate or avoid the asserted impact and stated that, in fact, the record showed that there were feasible methods to mitigate the asserted impacts.

In the third case, *Justin Mi v. City of San Marino*,[5] the City based its denial on the project's asserted lack of compliance with the Fire Code. However, the Court disagreed with the Fire Chief's interpretation of the relevant Fire Code provisions and so concluded that the project was not inconsistent with the Fire Code. The City had also found that the project did not provide sufficient hydrants because the plans weren't complete enough; the Court held that that problem could have been easily mitigated by requiring more detailed plans. In relation to one asserted violation, the Court held that the record did not have any evidence from a knowledgeable person, such as the Fire Chief, stating that the asserted violation would cause a specific, adverse impact.

**<u>So here are the lessons from these three cases</u>**:

1. There must be an objective health and safety standard that was in effect when the project was "deemed complete," and the standard must clearly apply to the project.

2. There must be evidence that failing to comply with the standard would have a "significant, quantifiable, direct, and unavoidable impact." This evidence could be provided by an EIR, by a consultant's written findings, or by a memo drafted by a knowledgeable staff person, such as the Fire Chief, Public Works Director, or City Engineer.

3. The city must clearly explain why the asserted impact cannot be feasibly mitigated. If it is feasible to mitigate the impact by imposing the standard or adopting other conditions, the city must take that action rather than denying the project.

Most efforts to use the "specific, adverse impact" finding fail because no relevant objective health and safety finding was in effect when the project was "deemed complete."

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[3] Case No. 30-2020-01140855, Orange County Superior Court (October 4, 2021).

[4] Case No. 21STCP01819, Los Angeles County Superior Court (November 27, 2023).

[5] Case No. 21STCP01830, Los Angeles County Superior Court (January 17, 2023).

## HOUSING LAWS ENFORCEMENT: WORKING WITH HCD AND THE ATTORNEY GENERAL'S OFFICE

### 1. Powerful Enforcement, Potent Remedies

Recent legislation substantially strengthens the role of HCD and of the Attorney General's office in enforcing housing laws. Notably, Government Code section 65585, in addition to requiring the submittal of housing elements to HCD for review and a determination whether the element substantially complies with state law, also requires that HCD review <u>any</u> 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 itself. (§ 65585(i)(1)(A).) The review extends to any alleged failure to implement any program actions included in the housing element. (*Id.*) The section requires that HCD 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, prior to HCD and/or the Attorney General (AG) taking further enforcement action. (*Id.*)

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)(C).) If HCD revokes a finding of compliance, then the agency is potentially exposed to the Builder's Remedy. Further, and crucially, if the question of the validity of the act or failure to act is litigated, an amendment effective January 1, 2025 creates a rebuttable presumption of the invalidity of the local agency action in the lawsuit, if HCD has found that the action did not comply either with the adopted housing element, or with state law. (§ 65585(i)(1)(B).)

Section 65585 also gives HCD the power to notify the AG's office that an agency has violated the law, if HCD has found that a housing element is not substantially compliant or that the agency has committed an act or has failed to act in a manner that complies with the adopted element or with the Housing Element Law. (§ 65585 (j).) HCD may also notify the AG if HCD has determined that an agency has violated any one of a number of housing statutes, including but not limited to the Housing Accountability Act (HAA) (§ 65589.5), the Housing Crisis Act of 2019 (SB 330) (§§ 65941.1, 65943 and 66300), SB 35 (§ 65913.4), and many others. (§ 65595(j).) The AG has standing to bring an enforcement action either on its own, or with HCD. (§ 65585(n).)

Further, 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).) These remedies include: (1) a penalty for each violation of at least $10,000, but no more than $50,000, <u>*per month*</u>, 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).)

Moreover, any penalties imposed under Section 65009.1 may not be paid out of funds already dedicated to affordable housing. (§ 65009.1(c)(2).) Failure to pay penalties can result in the Controller intercepting available state and local funds. (§ 65009.1(c)(3).) Civil penalties are paid to the state's Building Homes and Jobs Trust Fund, to support affordable housing in the particular community.[6] Additional penalties may be imposed to enforce timely adoption of housing element revisions if—despite a court order—cities or counties fail to meet the deadlines in Section 65754, which requires in part: (1) bringing the housing element into compliance within 120 days of the court's order; and (2) submitting to HCD for its review a draft of the revised housing element at least 45 days before adoption.

Failure to meet these deadlines requires the court to impose the following additional penalties: (A) if not already imposed, the court must modify its prior order to impose the *maximum* penalty of $50,000 per month for each month until the agency has substantially complied with Section 65754; and (B) if not already imposed, the court must impose *all* of the remedial provisions in Section 65755(a) until substantial compliance is achieved, including:

1. Suspending authority to issue building permits and all other related permits, with limited exceptions;

2. Suspending authority to grant zoning changes, variances;

3. Suspending the authority to grant subdivision map approvals;

4. Mandating approval of all applications for building permits and related construction permits for housing projects with an approved final subdivision map, parcel map, or plot plan, subject to some exceptions;

5. Mandating approval of final subdivision maps for housing projects that conform to an approved tentative map;

6. Mandating approval of any tentative subdivision map for a housing project that meets certain requirements.

[6] If the state does not spend the money placed in the Trust Fund after five years, the funds may be used anywhere in the state. (§§ 65009.1(c)(1),(4)().)

(§§ 65009.1(d)(2)(B), 65755.)[7]

The new remedies apply *in addition* to any others already available, and apply to all cities, including charter cities. (§§ 65009.1(d)(1), 65009.1(e)(1), 65885(j)(1)-(26).) Attorneys' fees under Code of Civil Procedure section 1021.5, which a court may award to a successful party in any action resulting in the enforcement of an important right affecting the public interest, remain available, in addition to the remedies set forth in this new section. (§ 65009.1(e)(1).)

### 2. Responding to HCD Letters

Many cities have received HCD Letters of Technical Assistance and Notices of Violation, relating to the city's interpretation of the Housing Element Law, the Permit Streamlining Act, the HAA, density bonus law (§§ 65915 *et seq.*), and other housing statutes. 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. The city's response to HCD presents an opportunity to add information and arguments that the court will eventually view as part of the administrative record in any resulting litigation. If HCD has issued a letter, it will almost certainly be in the administrative record; likewise, the city's response will be included.

If the city disagrees with HCD as to the meaning and effect of a particular statute addressed in either a Letter of Technical Assistance or Notice of Violation, it is helpful if the city's response include a thorough analysis of the statute in question, demonstrating the strength of the city's position, and that the city's interpretation is made in good faith. Consider attaching relevant sections of legislative history, and trial court or appellate decisions in which courts have agreed with the city's interpretation, not HCD's. It is rarely the case that HCD will become convinced due to the power of the city's arguments, but the strength of the city's response can assist in the defense of the litigation, as well as protect against a bad faith finding. However, litigation or possibly a threat to "de-certify" the city's housing element are likely if the city does not ultimately comply with HCD's finding.

The city's response to HCD also affords an opportunity to inform HCD about relevant facts regarding the underlying housing application, timeline, etc.—in other words, a chance for HCD to hear the city's side of the story, not just the version told to HCD by the developer and/or the housing advocates. Further, lawsuits by developers and housing advocates invariably include attempts by the plaintiffs to "poison the well" by portraying the city as a bad housing actor with a history of shirking housing duties. This picture is often misleading and inaccurate; many cities have strong records of multiple approvals, with many projects in the pipeline, and substantial progress towards meeting RHNA. Consider including helpful

[7] Certain housing projects must be exempted from the prohibition on further approvals. (§ 65009.1(d)(2)(C)(i)-(iv).) In other words, cities, counties, and local agencies are still required to issue certain approvals for housing development projects even if their land use approval authority has otherwise been suspended.

facts about the city's pro-housing actions in the response to HCD. These facts, if in the record, can be useful in convincing a judge that the city is not the bad actor portrayed by the plaintiff.

### 3. Potential Resolution

The Legislature has significantly strengthened the state's enforcement powers, and created presumptions in HCD's favor that weaken the ability of cities to defend against either a state enforcement action or a developer or housing advocate's lawsuit for a supposed violation of the housing laws. Housing litigation is expensive and presents the risk of significant downsides, financial and otherwise. City Councilmembers often face pressure from constituents to litigate a denial of a housing project. There can also, however, be an interest in confidentially discussing potential resolution of the dispute, to avoid the expense and risk of litigation.

Notably, Government Code Sections 66030 et seq. establish a mediation process for any use disputes, including the approval or denial of a development project. (Section 66031(a)(1). Section 66032 provides that time limits with respect to the action shall be tolled while the mediator conducts the mediation. Section 66034 states that if mediation is unsuccessful, the court in its discretion may schedule a judicial settlement conference.

When HCD and/or the AG has threatened a lawsuit, consider scheduling a confidential settlement meeting. Indeed, prior to the AG bringing any suit for alleged housing element noncompliance, the AG is required to offer the local agency two meetings in person or remotely to discuss the violation. (§ 65585 (k).) The meet and confer obligation, however, does not apply to any suits brought for alleged violations of the HAA, SB 330, SB 35, and several other housing statutes, nor does it apply to a decision by HCD to "de-certify" a housing element and subject a city to the Builder's Remedy. (*Id.*) And notably, the meet and confer duty applies only to a suit brought by the AG, not by a developer or housing advocacy group. If engaged in a meet and confer with the AG, it is helpful for the city to present as strong a position as possible, with factual and legal support. This can help dissuade the AG from taking on the risk of an adverse decision in an enforcement action.

Settlement discussions with developers can also be productive, since there is frequently an interest in compromising on elements of a proposed project in order to avoid the delay and expense of litigation. As part of a settlement the city can consider offering expedited processing and other benefits. In order to protect the confidentiality of those discussions, it is helpful to have all parties sign a confidentiality agreement. Evidence of settlement discussions is arguably inadmissible anyway under Evidence Code section 1152, but a written confidentiality agreement reminds all parties that confidentiality is a material term. Disputes under the housing laws can also be mediated, although it can be challenging to find a mediator with sufficient land use experience. If there is a mediation, Evidence Code section 1119 strongly protects the confidentiality of mediation-related discussions.

In our experience, the AG and HCD have in some cases expressed support for resolution and agreed to refrain from either intervening in the developer lawsuit or commencing an enforcement action, if the developer and the city can resolve the dispute. Of course, any potential revised project, housing element amendment or other legislative action that results from settlement discussions must be subject to a public hearing. The city cannot pre-commit to either a project approval or a legislative amendment in a settlement agreement. (See, e.g., *108 Holdings, Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186, 194 ("a municipality may not contract away its legislative and governmental functions.") The settlement agreement can be drafted to provide that the litigation is stayed pending a public hearing on a revised project. The agreement can state that if a revised project is approved, then the city is released and the action is dismissed with prejudice. Alternatively, if the revised project is denied, or approved with conditions unacceptable to the plaintiff, then the stay will be lifted and the parties will continue to litigate.