MEMORANDUM

TOWN OF PORTOLA VALLEY

TO: Mayor and Town Council

CC: Jeremy Dennis, Town Manager
Laura Russell, Planning and Building Director

FROM: Cara Silver, Town Attorney

DATE: October 18, 2022

RE: Summary of Builder's Remedy Under the Housing Accountability Act

Several council members have recently asked about the potential use in Portola Valley of a new legal theory referred to as the "builder's remedy." This memo (1) summarizes the components of the "builder's remedy" under the State Housing Accountability Act (HAA)[1]; (2) discusses its burgeoning use in Southern California in the Regional Housing Needs Allocation (RHNA), Cycle 6 and (3) highlights some uncertainties in using this un-tested theory in Portola Valley and elsewhere. Given the strong community interest in housing issues, this memo is also being released to the public.

I. Builder's Remedy

The builder's remedy is based on a 1990 provision in the HAA[2] which allows developers to bypass certain local zoning and general plan requirements as long as: (1) the project has a sufficient percentage of affordable units, as defined below; (2) the local jurisdiction does not have a certified Housing Element or identified sufficient sites on its

[1] Cal. Gov't Code § 65589.5.
[2] Cal. Gov't Code § 65589.5(d)(5) (B) provides:

> If the local agency has failed to identify in the inventory of land in its housing element sites that can be developed for housing within the planning period and are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels pursuant to Section 65584, then this paragraph shall not be utilized to disapprove or conditionally approve a housing development project proposed for a site designated in any element of the general plan for residential uses or designated in any element of the general plan for commercial uses if residential uses are permitted or conditionally permitted within commercial designations. In any action in court, the burden of proof shall be on the local agency to show that its housing element does identify adequate sites with appropriate zoning and development standards and with services and facilities to accommodate the local agency's share of the regional housing need for the very low, low-, and moderate-income categories.

operative Housing Element inventory to meet its current RHNA and (3) the project is located in a residential or commercial zone that permits some type of residential use.

To satisfy the affordability requirement, the project must provide either: (1) 20% of the units affordable to lower-income households; or (2) 100% of the units affordable to moderate-income households.

The remedy acts as a potential check on local jurisdictions that fail to submit substantially compliant Housing Elements to the state. The significance of the builder's remedy is that it is self-executing.[3] The more traditional remedies contained in the Housing Element statute require a civil lawsuit to enforce or a separate enforcement action brought by the California Department of Housing and Community Development (HCD) and/or the Attorney General.

The HAA contains limited grounds for denying or making "infeasible" a qualifying housing project. Specifically, local agencies may deny a 20% low-income or 100% moderate-income project only if the city proves that one of the following conditions is met:

1) The city has a "substantially compliant" housing element and has "met or exceeded" its share of regional housing need for the types of housing the project would provide.[4]

2) The project would have "a significant, quantifiable, direct, and unavoidable impact" on public health or safety, "based on objective, identified written…standards…as they existed on the date the [project] application was deemed complete."[5]

3) The project violates a "specific state or federal law" and there is "no feasible method" to comply without rendering the project "unaffordable to low- and moderate-income households."[6]

4) The project site is zoned for agricultural or resource preservation or lacks adequate water or wastewater service.[7]

5) The project is inconsistent with the city's zoning and the land-use designation of its general plan (as of the date the application was deemed complete), and the city "has adopted a revised housing element in accordance with [statutory deadlines] that is in substantial compliance with this article."[8]

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[3] In this respect it is similar to SB 35, a more recent amendment to Housing Element law which permits applicants to seek additional density for housing developments containing affordable housing in jurisdictions that have not permitted the required annual proportion of their RHNA allocation. On the other hand, the builder's remedy differs from SB 35 in that it does not require the project to be consistent with underlying zoning and development standards.

[4] Gov't Code 65589.5(d)(1).

[5] Gov't Code 65589.5(d)(2).

[6] Gov't Code 65589.5(d)(3).

[7] Gov't Code 65589.5(d)(4).

[8] Gov't Code 65589.5(d)(5).

To date the builder's remedy has not been widely used. This legal theory appears to have first received traction in an academic article written by U.C. Davis School of Law Professor Christopher S. Elmendorf called A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance. (Attachment A.) According to Elmendorf, the negative implication of the fifth finding above is that if a town lacks a substantially compliant housing element, the town may not use its zoning code or general plan to deny or render infeasible an affordable housing project.

Though the article focuses on the ambiguities of the 1990 provision and concludes that "the HAA's builder's remedy is so poorly drafted and confusing that developers of ordinary prudence haven't been willing to chance it", recent factors in Southern California have shifted the landscape.[9]

II. Recent Use of Builder's Remedy in Southern California

Given the potential power of the builder's remedy, it may seem surprising that developers have not taken advantage of it more often. The reasons for this are likely a confluence of factors creating a "perfect storm" for its use in Southern California. These factors include: numerous new Housing Element requirements in the RHNA Cycle 6; the quadrupling (or more) of most local agencies' RHNA allocations; the short time frames for certifying Housing Elements; HCD's stepped up enforcement of housing laws; shrinking local resources and COVID-19's impacts on workforce; the State's growing housing deficit and continuation of the housing crisis; the lack of adequately zoned sites in most cities to accommodate the increased housing demand; the failure of most Southern California cities to have a certified Housing Element, despite the legislature's intervention to provide an unprecedented one-year extension to Southern California; HCD's extensive comments on housing element drafts; the implementation of new Affirmatively Furthering Fair Housing (AFFH) requirements; and HCD's general support for legislative interpretations favoring housing production.

Below are three examples of how developers are attempting to use this remedy in Southern California. Southern California is approximately one year ahead of Northern California in the RHNA 6 cycle. To date, applicants have only filed builder's remedy applications in Southern California cities that were late in adopting their Housing Elements. Thus, we wouldn't expect to see these applications in Northern California until at least January 31, 2023, the date Northern California cities must adopt their Housing Elements. However, San Mateo County cities report that housing advocates are beginning to raise builder's remedy arguments at their recent Housing Element hearings.

1. *Santa Monica*

In Santa Monica, the 2021 Housing Element update was delayed in part by resident opposition to increased density and a shift in City Council policy direction to encourage

[9] Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 1 (Mar. 29, 2022).

non-profits to develop affordable housing projects on city-owned land, rather than rely on private housing development.[10] As a result, it took three years for Santa Monica to complete its Housing Element and environmental review and the City was without a certified Housing Element for approximately one year. In the weeks leading up to the final certification of the Housing Element (which just occurred on October 12, 2022), 14 housing applications not conforming to the underlying zoning density were filed under the builder's remedy.[11] These projects would yield more than 4,000 new units, including a 15-story residential tower at 330 Nebraska Avenue containing 1,600 market rate units and 400 affordable units.[12] These projects were filed, for the most part, by developers with a solid track record of building in Santa Monica.

2. Redondo Beach

Redondo Beach's RHNA Cycle 6 allocation was 2,500 new housing units. Redondo Beach has aggressively fought state mandates by appealing their RHNA allocation to HCD and by filing lawsuits against the State challenging the RHNA process, SB 9 and SB 10. The City Council's original Housing Element was rejected by the HCD for not realistically meeting its target. In particular, the department questioned the city's premise that existing offices and businesses would be shortly redeveloped into housing. The city revised and resubmitted its Housing Element, which was rejected by the HCD again in April 2022. During the period that Redondo Beach was out of compliance with Housing Element law, developer Leo Pustilnikov purchased a site containing an old power plant and filed a builder's remedy application to build a large development "featur[ing] residential towers up to 200 feet tall, containing a total of 2,290 units. . . . complemented by roughly 800,000 square feet of office, commercial, and hotel space, and over 5,000 parking spaces."[13]

When questioned why he had decided to pursue the builder's remedy, Pustilnikov stated that he had nothing to lose given Redondo Beach's rigid NIMBY stance and the lack of other opportunities to develop there. Therefore, while a developer would usually have concerns about staying on a friendly foot with the city officials who would be deciding the fate of the project, those concerns did not apply here.[14]

3. Anaheim

This month, the Attorney General and HCD also moved to intervene in a case brought by an Anaheim-based nonprofit attempting to build a homeless women's shelter in Anaheim. The city has refused to issue a conditional use permit for the shelter, and the state is arguing that the city's permitting requirements for transitional housing are noncompliant with state Housing Element and related mandates. Importantly for the

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[10] See Housing Plan Delays Led to Loss of Local Control (smdp.com) for a comprehensive history of Santa Monica's Housing Element process.
[11] The applicant also filed SB 330 pre-applications which serve to "vest" the zoning and development standards in place at the time of application.
[12] Developers capitalize on Housing Element fiasco to force 3,968 undeniable units into the city's pipeline - Santa Monica Daily Press (smdp.com); Housing Plan Delays Led to Loss of Local Control (smdp.com)
[13] Renegade California Developer Wants To Build Megaproject In NIMBY Stronghold (reason.com)
[14] Renegade California Developer Wants To Build Megaproject In NIMBY Stronghold (reason.com)

builder's remedy, the state is asking the court to find that Anaheim's Housing Element is not substantially compliant with state law. If the court agrees, this could open up Anaheim to builder's remedy claims.[15] This particular application of the builder's remedy is significant because it involves non-compliance with an already-certified element.[16]

III. Legal Hurdles to Applying Builder's Remedy

In his article, Professor Elmendorf details five ambiguities and hurdles in the law that he believes may impact the effectiveness of this tool for developers. An applicant seeking to assert a builder's remedy application in Portola Valley (or elsewhere) would have to address these issues.

1. Savings Clause for "Development Standards"

First, Elmendorf discusses the HAA's "savings clause," which states that "nothing shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards" related to the jurisdiction meeting its regional housing needs.[17] He points out that there is no judicial or administrative guidance on how the savings clause and the builder's remedy relate to each other and presents some hypothetical scenarios.

For example, could a city avoid the builder's remedy "by codifying in an ordinance labeled 'development standards' the very same restrictions that would normally be found in a zoning ordinance or general plan?" Or, on the other hand, might a city be obligated to waive any standard that would reduce a project's density "on the theory that the 'density permitted on the site' is unlimited"?

While Elmendorf argues that the notion of the savings clause negating the builder's remedy is "off the table," he acknowledges the uncertainty of which local development standards may apply to builder's remedy projects.[18]

2. Changing the Rule Mid-Process

Next, Elmendorf poses the question of what happens when a developer submits a qualifying project application when the city's Housing Element is non-compliant but then the city delays its decision on the project until it is compliant. Can the city find the developer to be in violation of the zoning code or general plan?

He argues that the answer is unclear and that the developer would have a strong argument that retroactive denial is unlawful. However, a locality could argue that its

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[15] California A.G. Says Anaheim NIMBYs Can't Block Women's Group Home (reason.com).

[16] However, the HAA does have an express remedy for non-compliance with the Housing Element law's requirement to zone for "emergency shelters." Cal. Gov't Code § 65589.5(d)(5) (C). Given this specific remedy it is not clear a court would also allow a builder's remedy for other applicants seeking to "piggyback" on this single deficiency.

[17] Gov't Code 65589.5(f)(1); Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 3–4 (Mar. 29, 2022).

[18] Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 4 (Mar. 29, 2022).

zoning code and general plan were only temporarily inapplicable to affordable housing projects.[19]

3. CEQA Delay

Elmendorf also points out that the HAA does not exempt projects from the California Environmental Quality Act ("CEQA"), and any housing-related CEQA exemptions still require compliance with local zoning rules and the general plan. The result is that builder's remedy projects would still be subject to environmental review.

Elmendorf poses a scenario where a city, unable to block a project because of the builder's remedy, instead uses CEQA to create endless environmental reviews of the project. He cites HCD's recent letter to San Francisco arguing that "strategic CEQA delays designed to kill or reduce the density of a housing project may violate the HAA." However, Elmendorf concludes that courts have yet to weigh in on this issue.[20]

4. Project Size Limits

Given the HAA's lack of size or density requirements for builder's remedy projects, Elmendorf then asks: "Does this mean that developers could build 20%-affordable apartment towers in neighborhoods of single-family homes?"

This answer is also unclear, but he cites both the Least Cost Zoning Law and the No Net Loss Law, both of which offer opportunities for cities to argue that the density of builder's remedy projects must be limited. However, he also acknowledges that this perspective could conflict with the legislature's underlying intent to promote housing development.[21]

5. Housing Element's Substantial Compliance with State Law

Finally, Elmendorf finds ambiguity in how courts may interpret a city's substantial compliance with the HAA. HCD may reject a city's Housing Element as not substantially compliant, but courts may take a more conservative approach and defer to the city's finding of compliance.

He cites *Fonseca v. City of Gilroy*[22] for the proposition that a city's bar for substantial compliance is relatively low. In particular, as long as a city's Housing Element "checks all the statutory boxes," then substantial compliance is met, even if the program fails to

[19] Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 4–5 (Mar. 29, 2022).
[20] Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 5 (Mar. 29, 2022).
[21] Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 5–6 (Mar. 29, 2022).
[22] Fonseca v. City of Gilroy, 148 Cal.App.4th 1174 (2007).

achieve its ends. On the other hand, he cites other legal scholars who have found that recent legislative reforms have abrogated this precedent.[23]

6. *Other Open Issues*

In addition to the above issues, application of this builder's remedy raises many other questions, including:

- Is the use capped by the number of 6th cycle RHNA, unfulfilled RHNA or the annual pro-rated unit application?
- Is the remedy available if the legislature extends the time for filing the Housing Element or if the application is filed during the "grace period"?[24]
- How is a pending builder's remedy application affected by a subsequent Housing Element certification? Does SB 330 sufficiently "vest" the application?
- Will wildfire risk and evacuation capacity satisfy the health and safety denial finding?
- How are CEQA issues, such as shade and shadow, land use, public services and wildfire, addressed?
- If CEQA finds a significant and unavoidable impact, is the local agency required to override?
- Who is the approving body?

IV. Conclusion

In one respect, use of the builder's remedy falls in line with the traditional remedies for housing element non-compliance: applicants clearly have the legal right to file a housing element compliance action and the courts have authority to appoint receivers to take over local land use authority, including the issuance of building permits for housing projects. On the other hand, a self-executing analogue of this remedy, without a civil lawsuit as a pre-requisite, is certainly a more powerful tool. Regardless of how the remedy is exercised, the recent applications filed in Southern California show that the potential loss of local control is not an idle threat. Failing to timely submit a Housing Element to HCD could expose Portola Valley to unwanted density in locations that are not zoned or planned for such density.

[23] Christopher S. Elmendorf, A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance 6–7 (Mar. 29, 2022).

[24] Technically, Northern California cities must submit their Housing Element to HCD for final certification by January 31, 2023. Thereafter, HCD has 120 days to review and certify the element. In past cycles, HCD permitted cities to file their Housing Element during this 120-day review period without penalty. Thus, this 120-day period was commonly referred to as the "grace period." However, based on recent discussions staff has had with HCD, HCD no longer views this 120-day period as a "grace period" and will consider the element late if filed during this period. It appears that other larger Northern California cities may have been viewing this "grace period" in the old manner. See S.F. got the state's housing deadline wrong — so did Berkeley, Oakland and San Jose (San Francisco Business Times.)

ATTACHMENT A

A Primer on California's "Builder's Remedy" for Housing-Element Noncompliance

March 29, 2022

Christopher S. Elmendorf
Martin Luther King, Jr. Professor of Law
UC Davis School of Law

Since 1990, California's Housing Accountability Act (HAA) has provided a so-called builder's remedy that allows developers of affordable housing projects to bypass the zoning code and general plan of cities that are out of compliance with the Housing Element Law. (Gov't Code § 65589.5(d).) To qualify, twenty percent of the units in the project must be affordable to lower-income households, or 100% affordable to moderate-income households.

Commentators originally expected this remedy to be very powerful and today it absolutely should be. The Legislature in recent years has greatly strengthened the Housing Element Law. Many high-price cities submitted woefully inadequate housing plans for the current planning period. The Department of Housing and Community Development (HCD) found most of these plans to be noncompliant. Yet developers aren't submitting builder's remedy projects, even in places where a 20% low-income project would "pencil." Why not?

The most probable answer is that the HAA builder's remedy is so poorly drafted and confusing that developers of ordinary prudence haven't been willing to chance it.

This primer briefly summarizes the principal sources of confusion and then describes two possible resolutions. Ideally, the Legislature would replace the existing builder's remedy with a substantively similar but more transparent remedy that draws on established bodies of law, specifically the Density Bonus Law and SB 35. Short of that, the Attorney General and HCD should issue a joint guidance memo propounding an official interpretation of the remedy—an interpretation the AG would defend in court if necessary.

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I. Legal Ambiguities Weaken the Force of the HAA Builder's Remedy

Subdivision (d) of the HAA protects affordable housing projects by enumerating what appear to be the exclusive grounds on which a city may deny such a project or render it "infeasible." Specifically, cities may block a 20% low-income or 100% moderate-income project only if the city proves that one of the following conditions is met:

1) The city has a "substantially compliant" housing element and has "met or exceeded" its share of regional housing need for the types of housing the project would provide. (Gov't Code 65589.5(d)(1).)

2) The project would have "a significant, quantifiable, direct, and unavoidable impact" on public health or safety, "based on objective, identified written…standards…as they existed on the date the [project] application was deemed complete." (Gov't Code 65589.5(d)(2).)

3) The project violates a "specific state or federal law" and there is "no feasible method" to comply without rendering the project "unaffordable to low- and moderate-income households." (Gov't Code 65589.5(d)(3).)

4) The project site is zoned for agricultural or resource preservation or lacks adequate water or wastewater service. (Gov't Code 65589.5(d)(4).)

5) The project is inconsistent with the city's zoning and the land-use designation of its general plan (as of the date the application was deemed complete), and the city "has adopted a revised housing element in accordance with [statutory deadlines] that is in substantial compliance with this article." (Gov't Code 65589.5(d)(5).)

The negative implication of paragraph (5) is that if a city lacks a substantially compliant housing element, the city may not use its zoning code or general plan to deny or render infeasible an affordable housing project. Unless the project is on resource lands, the grounds for denial are very narrow: health/safety, inadequate water or sewer, or violation of a "specific" state or federal law. The Legislature has also declared that health/safety violations within the meaning of the HAA "arise infrequently." (Gov't Code 65589.5(a)(3).)

But as we'll see momentarily, other provisions of the HAA muddy the picture, raising the prospect that there may be other grounds on which a city may render affordable projects infeasible.

A. What is saved by the savings clause for "development standards"?

While subd. (d) of the HAA prevents noncompliant cities from using their zoning code or general plan to deny an affordable housing project, paragraph (1) of subd. (f) states that "nothing" in the HAA "shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards …

appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need." Such standards "shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development." (Gov't Code 65589.5(f)(1).)

To date, there has been no judicial or administrative guidance about how (d)(5) and (f)(1) fit together. May a city evade the limitations of (d)(5) by codifying in an ordinance labeled "development standards" the very same restrictions that would normally be found in a zoning ordinance or general plan? Or does the proviso in (f)(1) about "facilitating and accommodating … the density permitted on the site and proposed by the development" mean that the city must waive any standard that would reduce the density of a builder's remedy project, on the theory that the "density permitted on the site" is unlimited (given that a noncompliant city is barred from using its zoning code or general plan to downsize an affordable project)?

And how is a superior court judge—with no expertise in economics, project finance, or city planning—supposed to determine whether a contested development standard is "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need"? Must developers who seek to entitle a builder's remedy project hire expert witnesses to analyze every burdensome development standard and opine on whether it is "appropriate"? May a city defend its application of an onerous standard on the ground that the city could, in theory, achieve its housing target (while retaining the standard in question) by liberalizing other rules that apply to other sites?

Hoping to find a hidden key that unlocks these mysteries, I and one of my students took a deep dive into the legislative history of (d)(5) and (f)(1). We came up with very little, though it can be said that both proponents and opponents of the bill that created these provisions thought it would vitiate zoning in cities without housing elements. A construction of (f)(1) that entirely negates (d)(5) is off the table. But the all-important question of *which* local development standards may be applied to builder's remedy projects (and how this is to be determined) remains unanswered.

B. Changing the rules midstream?

If a developer submits a builder's remedy project while a city is out of compliance with the Housing Element Law, and the city delays its decision on the project until it achieves compliance, may the city then deny the project for violating the city's zoning code or general plan? The answer is unclear.

The developer would have a strong argument that this kind of retroactive denial is unlawful. Under the Housing Crisis Act of 2019, a "housing development project shall be subject only to the ordinances, policies, and standards adopted *and in effect"* at the time the developer submitted a "preliminary application" for the project. (Gov't Code § 65589.5(o) [emphasis added].)[1] A

[1] Similarly, subd. (d) of the HAA stipulates that affordable projects may not be denied on the basis of "a change to the zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete." (Gov't Code § 65589.5(d)(5).) The adoption of a compliant housing element by a jurisdiction that had been out of compliance has the effect of rendering its zoning ordinance and general plan suddenly re-applicable, which is tantamount to a change in the zoning vis-à-vis any pending builder's remedy projects.

zoning or general plan provision that a city may not apply to a project because of the city's noncompliance with the housing element law is not "in effect" for purposes of that project.

A core purpose of the HAA is to provide "reasonable certainty to all stakeholders." (*CaRLA v. City of San Mateo*, 68 Cal. App. 5th 820, 842 (2021) [quoting Assem., 3d reading analysis of Assem. Bill No. 1515, as amended May 1, 2017, p. 2].) Just as the Court of Appeal held that San Mateo could not satisfy the HAA's objectivity requirement by "adding an after-the-fact interpretive gloss" to a design standard that was mushy at the time the project application was deemed complete (*id.* at 844), so too should courts reject a city's claim that different rules apply to an already-submitted project the moment the city achieves compliance with the Housing Element Law.

This argument, while strong, is not a certain winner. A city might respond that its zoning code and general plan was "in effect" at the time of the developer's preliminary application (Gov't Code § 65589.5(o)), just temporarily inapplicable to affordable housing projects. The city would concede that this gloss on subd. (o) creates uncertainty for developers, but insist that it's not the same type of uncertainty that so concerned the court in *CaRLA v. City of San Mateo*: the uncertainty of a fuzzy standard that could mean just about anything in application.

C. CEQA delay…forever?

The HAA does not exempt projects from CEQA, and though CEQA has some exemptions for housing projects, they require compliance with the city's general plan and zoning. Accordingly, any builder's remedy project would almost certainly have to run the gauntlet of an EIR.

A city that wants to defeat a builder's remedy project might well insist on round after round of ever more elaborate environmental studies, even after a legally sufficient draft EIR has been assembled and circulated for public comment. By deciding that each new study is deficient in some way, the city could delay the project indefinitely.

In a recent letter to San Francisco, HCD indicated that strategic CEQA delays designed to kill or reduce the density of a housing project may violate the HAA. But the department did not limn the line between permissible and unlawful CEQA delay. I have argued that the HAA, or CEQA, or background principles of administrative law *may* provide a remedy for a city's bad-faith refusal to approve a legally sufficient EIR for an HAA-protected project, but it remains to be seen whether the courts will agree.

D. Is there any limit on the size of a builder's remedy project?

Nothing in the HAA expressly limits the size or density of a builder's remedy project. Does this mean that developers could build 20%-affordable apartment towers in neighborhoods of single-family homes?

Once again, the answer is unclear. The HAA is codified as part of the Housing Element Article of the Government Code. The Least Cost Zoning Law, which was enacted as a companion to the Housing Element Law, provides that a city shall not be required to zone any parcel in an

urbanized, residential area for "densities that exceed those on adjoining residential parcels by more than 100%." (Gov't Code § 65913.1(b).) A court might construe this as an implied limitation on the density of a builder's remedy project.

It's also possible that a court would discover an implied limitation in the so-called "default" or "Mullin" densities for lower-income housing (30 dwelling units/acre in urban areas). The Housing Element Law deems zoning that allows this density suitable for lower-income housing. (Gov't Code § 65883.2(c)(3).)

A city arguing that state law tacitly limits the maximum density of a builder's remedy project could also invoke a strange provision of the No Net Loss Law, added by SB 166 in 2017. This provision states that if a city that hasn't achieved housing-element compliance within six months of the statutory deadline, it may not approve a project whose density is less than 80% of (1) "the maximum allowable residential density for that parcel" or (2) the Mullin density, whichever is greater. (Gov't Code § 65863 (b) & (g).) This arguably implies that there is *some* "maximum allowable residential density" on parcels in noncompliant cities, even though the city's general plan and zoning are inapplicable to affordable projects.[2]

The proposition that there is some implied limitation on the density of builder's remedy projects is certainly in tension with the HAA's codified statement of Legislative intent, to wit: "It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov't Code § 65589.5(a)(2)(L).) But a court could parry this instruction by expressing doubt about whether a too-drastic builder's remedy would violate the home-rule prerogatives of charter cities. This constitutional objection runs against the grain of precedents like *CaRLA v. City of San Mateo*, 68 Cal. App. 5th at 849 (holding that courts may not second guess whether legislative responses to the housing crisis are "advisable or effective," only whether they are "reasonably related" to the problem), but it wouldn't be the first time a narrow construction of a statute had been justified on the basis of a hand-wavy constitutional avoidance argument.

E. What is required for a housing element to "substantially comply" with state law?

A final and very serious complication for would-be developers of builder's remedy projects is that a court may well disagree with HCD's finding that the city's housing element does not substantially comply with state law.

Several old cases hold that if a housing element checks all the statutory boxes, it is substantially compliant as a matter of law, even if it's a recipe for failure. The "merits" of a housing element, such as whether "the programs adopted are adequate to meet their objectives," were declared irrelevant to compliance. (*Fonseca v. City of Gilroy*, 148 Cal.App.4th 1174 (2007).)

Legal scholars have argued that recent legislative reforms impliedly abrogate the old precedents, but this question is very much open. A city facing a builder's remedy project might well deny it,

[2] Alternatively, one could read "maximum allowable residential density for that parcel" as a reference to the density that would be allowed under the city's general plan and zoning if the city had a compliant housing element.

dare the developer to sue, and then argue in court that the city's housing element was substantially compliant all along notwithstanding HCD's finding to the contrary. The developer would have to persuade a court to overturn or distinguish precedents like *Fonseca*.

II. Suggestions for the Legislature, HCD, the Attorney General, and Developers

Here I offer some preliminary thoughts on how to make the best of the HAA builder's remedy, in light of the ambiguities described above.

A. Suggestions for the Legislature

The best way to resolve the builder's remedy conundrums would be for the Legislature to clean them up, borrowing from established frameworks such as the Density Bonus Law and SB 35. A builder's remedy that draws on established law would be easier for cities and developers to understand than something cut from whole cloth.

Specifically, I recommend that the Legislature (1) replace the HAA builder's remedy with a new "noncompliant-city density bonus" under the Density Bonus Law; (2) specify that projects become eligible for the bonus upon HCD's reasonable determination that the city is out of compliance with the Housing Element Law; (3) clarify that the normal vesting rules of the Housing Crisis Act apply to noncompliant-city density bonus projects; and (4) subject noncompliant cities to SB 35 streamlining on the same terms as cities that fail to submit their annual progress report.

Together, these reforms would provide "reasonable certainty to all stakeholders" (*CaRLA v. City of San Mateo*, 68 Cal. App. 5th at 842), while also alleviating municipal concerns about the potentially unlimited scale of HAA builder's remedy projects.

1. Replace the HAA builder's remedy with a "noncompliant city density bonus" of 100% and an automatic height bonus.

In cities without a substantially compliant housing element, I propose that developers of affordable projects within the meaning of the HAA receive a density bonus of 100% and a height bonus of three stories or 50% (whichever is greater), plus any incentives and concessions otherwise available under the Density Bonus Law. This reform would reasonably limit the size of builder's remedy projects, in keeping with the Least Cost Zoning Law's norm that cities not be forced to zone parcels in already-developed residential areas for more than twice the density of adjoining parcels. This reform would also resolve the conflict between the builder's remedy and the HAA's savings clause for "development standards," as the Density Bonus Law has a well-established framework governing which standards may be applied to a density-bonus project. Specifically, cities must waive any development standard that "physically precludes" the density of the project (unless it's necessary for health/safety) and the developer may claim other incentives and concessions depending on the share of affordable units in the project. (Gov't Code § 65915(d) & (e).)

Although the proposed noncompliant-city density bonus would limit the scale of builder's remedy projects, it would offer a substantially larger bump than is currently available to developers whose projects meet the HAA definition of an "affordable housing project" (20% low income or 100% moderate income). A 20% low-income project now qualifies for a bonus of 35%, and a 100% moderate income project qualifies for a bonus of 50%. (Gov't Code § 65915(f)(1) & (4).) The very largest bonus—an 80% increase in density and a three-story bump in height—is presently available only to 100% affordable projects (at least 80% low income) that are located within ½ mile of fixed transit. (Gov't Code § 65915(b)(1)(G) & (d)(2)(C).)

It's important that the noncompliant-city density bonus be substantially larger than the regular density bonuses available in cities whose housing plans comply with state law. The lawmakers who created the HAA builder's remedy back in 1990 envisioned it as a powerful inducement for cities to achieve housing-element compliance. It will only have this effect if local officials fear being forced to approve projects they want to deny.

2. Clarify that the normal vesting rules of the Housing Crisis Act apply to noncompliant-city density bonus projects

If a developer files a project application while a city is out of compliance with the Housing Element Law, the city should be required to grant the noncompliant-city density bonus and associated concessions whether or not the city achieves compliance before acting to approve or deny the application. The HAA should proscribe retroactive denials of builder's remedy projects in the same way it proscribes retroactive denials of other kinds of housing projects.

This clarification is absolutely essential for the builder's remedy to work. Otherwise cities will string along builder's remedy projects for years with makework requests for "further information" and other types of foot-dragging until the city finally achieves compliance, at which point the project will be summarily denied.

3. Make HCD determinations of noncompliance the trigger for the noncompliant-city density bonus

Cities should be required to grant the new density bonus to any qualifying project whose preliminary application was submitted between (1) the date of HCD's determination of noncompliance and (2) the date on which HCD or a court determines that the city has achieved compliance. This would be similar to the accelerated rezoning requirement of AB 1398 (2021), the trigger for which is HCD's determination of noncompliance rather than noncompliance as defined or adjudicated by courts. (Gov't Code §§ 65583(c)(1)(A), 65582.2(c).)

By making HCD's determination the trigger for the new density bonus, the Legislature would provide developers with some assurance that if they invest in a density-bonus project following HCD's finding of noncompliance, they won't have the rug pulled out from under them by a court's later disagreement with HCD.

Of course, a city should not face the builder's remedy if HCD's finding of noncompliance was wholly arbitrary. But just as the HAA protects developers' reliance on reasonable interpretations of the city's general plan and zoning standards, so too should it protect developers' reliance on reasonable findings of housing-element noncompliance by HCD. See Gov't Code § 65589.5(f)(4) ("For purposes of this section, a housing development project…shall be deemed consistent…with an applicable plan, program, policy, ordinance…or other similar provision if there is substantial evidence that would *allow a reasonable person to conclude* that the housing development project…is consistent….") (emphasis added).

4. **Update SB 35 so that cities that fail to adopt an HCD-approved housing element on time are subject to the same streamlining as cities that fail to submit their annual progress reports on time**

A city's failure to adopt an adequate housing element is a more serious form of noncompliance than its failure to submit an annual progress report to HCD. Thus, the SB 35 remedy for reporting failures, which requires cities to review certain development proposals ministerially, should also apply to cities without HCD-certified housing elements. This would prevent cities from using CEQA to thwart noncompliant-city density bonus projects, provided that the project is on a good-for-development site as defined by SB 35, and provided that the project satisfies SB 35's affordability and labor requirements. (Gov't Code § 65913.4.)

5. **Consider requiring noncompliant cities to provide a modest density bonus in single-family districts, and a more substantial bonus in commercial districts.**

The Density Bonus Law only applies to projects with five or more units (Gov't Code § 65915(i)), yet the vast majority of urban land is zoned for single-family homes only. Accordingly, there's a good case for requiring noncompliant cities to accommodate modestly denser development in their single-family zones, especially in high-opportunity neighborhoods and near transit.

It would be normatively backwards for the builder's remedy to operate as a harsher sanction on cities that have already zoned a lot of their land for multifamily housing than on the exclusionary suburbs where single-family zoning is ubiquitous. Then again, any remedy that applies in single-family zones should be carefully calibrated to minimize the risk of political backlash.

A reasonable, proportionate solution would be to require noncompliant jurisdictions to allow up to four units per parcel in single-family zones and to waive general plan, zoning, and development standards that "physically preclude" achieving this density. Four units per parcel is twice the density allowed under SB 9 (2021), the lot-split and duplex bill that rezoned single-family districts statewide. As such, the proposed "fourplex bonus" would be consistent with the Least Cost Zoning Law principle of not requiring cities to zone for more than twice the otherwise-allowed density in an already-developed residential district.

It may also be advisable to prescribe a standard height increase (perhaps one story) for which the "fourplex bonus" projects would automatically qualify.

"Fourplex bonus" projects should not be required to satisfy an affordability standard. The economics of small-scale densification in existing residential neighborhoods are tenuous, even in high-demand cities like San Francisco. If fourplex-bonus projects had to include deed-restricted, below-market-rate units, the suburbs would have little to fear from the new builder's remedy.

The noncompliant-city density bonus should also open up commercial and office districts for housing. Again, it would be backwards for the noncompliant-city density bonus to penalize more harshly the cities whose commercial districts also allow multifamily housing than the cities whose commercial districts exclude residential use. One reasonable solution would be to stipulate that while a city is subject to the noncompliant-city density bonus, it must allow residential use in its commercial and office districts and waive local development standards that physically preclude development of affordable housing projects (20% low-income or 100% moderate income) at twice the Mullin density in these districts.[3] Alternatively, the Legislature could provide that in commercial and office districts, noncompliant cities must allow residential use at any density and grant a form-based bonus that permits a residential or mixed-use project to be (say) 50% taller and occupy 50% more of the lot than would otherwise be allowed under the district's zoning.

B. Suggestions for the Attorney General and HCD

As of this writing, we are several months into 2022 legislative session and no lawmaker has introduced a builder's remedy fix. It seems very unlikely that the Legislature will tackle the problem before 2023 at the earliest. In the meantime, the best hope for clarifying the scope of the remedy is a joint opinion letter or technical advice memo from Attorney General Rob Bonta and HCD Director Gustavo Velasquez.

Positions advanced in such a memo wouldn't bind the courts, but under background principles of California statutory interpretation, courts must give some "weight" to agency views. (*Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 11-14 (1998).) A thoughtful guidance memo signed by the Attorney General and the HCD Director would be entitled to considerable weight, as it would embody "careful consideration [of the issues] by senior agency officials" (*id.* at 13), including the chief law enforcement officer of state.

By contrast, if HCD and the AG were to hold their fire until a live dispute over a builder's remedy project materializes, their views would count for less. A city could characterize their intervention on behalf of the project as a "litigating position in [a] particular matter," which per *Yamaha* is owed much less weight than an agency "ruling of general application." (*Id.* at 5.)

HCD is already warning cities that if they're out of compliance with the Housing Element Law, they may not rely on their zoning or general plan to deny an affordable project. This message has been conveyed through housing element webinars and the department's technical advisory on the HAA.

[3] SB 6 (2021) would have allowed Mullin-density projects in commercial districts statewide.

But to date, neither HCD nor the Attorney General has said anything about the ambiguities described in this primer. If they were to jointly publish a guidance document explaining the positions they're prepared defend in court, this would embolden developers who are on the fence about whether to propose a builder's remedy project. The department and the AG wouldn't have to tackle all the hard questions. It'd be enough for them to draw a line of defense around the core propositions they regard as essential and that they're ready to defend.

C. Suggestions for developers

The first order of business for any developer considering a builder's remedy project is to hire a crack land-use attorney. An experienced attorney would flag any health/safety issues, or "specific state or federal laws," that could doom the project. The attorney might also be able to negotiate a quick settlement in which the developer agrees to waive certain arguments (e.g., that the builder's remedy allows projects of unlimited density) and to immunize the city against certain HAA liabilities (e.g., potential fines), in return for the city committing to process the developer's application pursuant to certain agreed-upon rules (e.g., waiving development standards that physically preclude the density of the project).

The next consideration in which cities to target. Economics are part of the equation (where would a 20% low-income project pencil?), but so too is potentially large risk that a *court* will accept the city's argument that its housing element is in fact "substantially compliant" notwithstanding HCD's finding to the contrary (see Part I.E, above). This risk can't be avoided entirely, but it can be limited by targeting for the first builder's remedy projects the subset of cities that fail to adopt an HCD-approved housing element *within one year of the statutory deadline*.

According to a new provision of the Housing Element Law, a city that "adopts a housing element more than one year after the statutory deadline … shall not be found in substantial compliance … until it has completed [the required] rezoning." (Gov't Code § 65588(e)(4)(C)(iii).) Statutory context and legislative history suggest that "adopt a housing element" for purposes of this provision is likely to be interpreted to mean "adopt a housing element *that HCD finds to be adequate*."[4] In other words, if more than a year passes between the date on which the city's housing element was due and the date on which the city adopts a housing element that HCD

[4] Subparagraph (iii) of Gov't Code § 65588(e)(4)(C) elaborates on subparagraphs (i) and (ii), and subparagraphs (i) and (ii) are expressly addressed to cities that did not adopt, within 120 days of the statutory deadline, a housing element certified as substantially compliant *by HCD*. These cities have to adopt a new, better housing element, which is where subparagraph (iii) comes in. It would be weird—indeed, absurd—for a court to hold that a city's re-adoption of any trivially revised housing element, no matter how horrid, before the 1-year deadline, is enough to avoid the penalty for missing the 1-year deadline. The legislative history of AB 1398 (2021), which added these new provisions, also makes clear that the bill sponsors wanted the new consequences to be triggered by a jurisdiction's failure to adopt an HCD-approved housing element on time, not just any old housing element. See, e.g., Assem., concurrence in Senate amendments analysis of Assem. Bill No. 1398, as amended Sept. 3, 2021, p. 2 ("This bill also adds that, to avoid the expedited timeline, the housing element must be determined by HCD to be substantially compliant with housing element law. *This change removes the circumstances where jurisdictions adopt non-compliant housing elements to avoid penalties*.") (emphasis added).

determines to be sufficient, the city will not actually be in "substantial compliance" with the Housing Element Law until it completes its rezoning.

This is important because it establishes a defined temporal window in which the city is very unlikely to be regarded as substantially compliant *by a court*. By contrast, and as noted in Part I.E above, there is a real risk in other cases that courts will disagree with HCD's finding of noncompliance.

The first "one year late" deadline for 6th cycle housing elements in a major metropolitan region is April 15, 2022. This deadline applies to cities in San Diego County. As of this writing, ten of the region's nineteen jurisdictions are listed on HCD's compliance dashboard as noncompliant and not currently under review. I'd wager that most or all of these cities will fail to adopt by April 15 a housing plan that HCD considers adequate. (A month later, the one-year-tardy deadline will pass for the Sacramento region, bringing cities like Davis into the set of ripe targets.)

Looking beyond the "one year late" cities, developers considering a builder's remedy project might also try their luck in cities that have a long track record as bad actors and whose housing element appears to be egregiously noncompliant. As to these cities, courts may well agree with HCD's determination that the housing element in question is noncompliant, notwithstanding city-favoring precedents like *Fonseca v. City of Gilroy* (148 Cal. App. 4th 1174 (2007)).

I would caution against proposing builder's remedy projects in established residential neighborhoods if the project is more than twice as dense as the adjoining sites. While the legal argument for an implied limitation on the density of builder's remedy projects is a bit of a stretch (see Part I.D, above), the prudent developer can save themself some grief and legal expense if they conform their project to potential implied limitations. Also, I suspect that judges will be more likely to treat builder's remedy projects as protected by the HAA's anti-retroactivity norm if the judge thinks the physical scale of these projects is limited in some reasonable way. Accepting an implied limitation on the scale of builder's remedy projects may also help housing advocates persuade the courts to inter or distinguish the bad old precedents on housing element "substantial compliance." The same goes for CEQA. That is, courts will probably do more to protect builder's remedy projects against CEQA abuses if they see the remedy as reasonable and proportionate, not outlandish.

None of this should be taken legal advice. It's just what I would do if I wore the developer's shoes.