



TOWN OF PORTOLA VALLEY

STAFF REPORT

TO: Mayor and Town Council

FROM: Laura Russell, Planning & Building Director
Cara Silver, Town Attorney

DATE: December 14, 2022

RE: Housing Element Update and Discussion

RECOMMENDATION

Staff recommends that the Town Council receive a report, take public comment, and provide any feedback on the Housing Element Update, schedule and associated actions.

MEETING PURPOSE

The Town Council last reviewed the Housing Element on [July 13, 2022](#). This staff report provides a summary of Housing Element update activities that have occurred since then, followed by a summary of legal issues that have emerged since previous Town Council review to ensure the Town Council and members of the public have easy access to the latest information.

BACKGROUND

The Housing Element is part of Portola Valley's General Plan and identifies policies and programs to meet the housing needs of the Town's current and future residents. State law (Government Code Sections 65580-65589.8) requires that every city/town and county in California adopt a Housing Element approximately every eight years. Portola Valley's current Housing Element covers the planning period from 2014-2022 and was adopted in 2015. The new Housing Element will cover 2023-2031 and is called the 6th Cycle. In addition, the State Department of Housing and Community Development (HCD) reviews and certifies that each jurisdiction's Housing Element meets all the requirements of the law.

Every jurisdiction in California receives a target number of homes to plan for. This is called the Regional Housing Needs Allocation or RHNA (pronounced 'ree-nuh'). Cities/towns do not need to build the housing, but do need to put in place the proper zoning and address constraints so the private sector can build the housing. The RHNA is broken down by income category. Portola Valley's income specific RHNA is:

Income Level	Number of Units
Very Low Income (<50% of Area Median Income)	73
Low Income (80% of Area Median Income)	42
Moderate Income (80-120% of Area Median Income)	39
Above Moderate Income (>120% of Area Median Income)	99
Total	253

Consistent with statutory requirements, the Housing Element must be adopted by the Town and certified by HCD by January 2023. After that, there is a 120-day period for the Town to work with HCD on certification; however, it should not be thought of as a “grace period” or extra time for the Town. Rather, it is an opportunity to resolve any final issues with HCD.

Ad Hoc Housing Element Committee and Community Engagement

The Ad Hoc Housing Element Committee (AHHEC) was formed to provide recommendations to the Town Council on the Housing Element Update, explore options to minimize the impacts of additional housing units, maximize public participation, and communicate information on the Committee’s progress and recommendations to residents. AHHEC members included representatives from the Town Council; Planning Commission; Race and Equity Committee; Architectural and Site Control Commission; and community members.

The AHHEC met 15 times since August 2021 to advance its charge to develop a Housing Element that complies with State law and will be certified, while maintaining Town values. Agendas, staff reports, zoom recordings, and presentation materials are available on the [Committee's webpage](#). The AHHEC meetings were extremely well attended with typical attendance about 40-50 and the key meetings about housing sites having over 150 attendees.

As the Town Council is aware, the Town does not currently have any zoning districts that allow multifamily housing. Historically, the Town has met its RHNA obligations primarily through ADUs and a few Affiliated Housing units. Given the increase in the RHNA allocation with Cycle 6 and the changes to State law, the AHHEC needed to consider different options for meeting the Town’s RHNA. The Committee decided on a patchwork approach that includes multiple strategies to develop housing. The AHHEC considered safety first, through hazard constraint mapping, then expressed a preference that new housing be distributed throughout the community to the extent feasible.

In June 2022, the Town released the Public Review Draft Housing Element. It was made available online at www.portolavalley.net/housingelement, distributed to the community through the Town’s website, eNotification (over 450 members), PV Forum, social media, and direct email to the Town’s committee members, businesses, and institutions. Town committees were invited to discuss the Housing Element. Public comments were received from June 8th to July 13th and forwarded to the Town Council for review.

Draft Housing Element

After Town Council review on July 13th and final revisions at the direction of a Council Subcommittee, the [Initial HCD Draft Housing Element](#) was sent to the State for review. After completion of the 90-day review period, the Town received the official [HCD Comment Letter](#) on November 9th. The Ad Hoc Housing Element Committee met on November 10th to discuss how to implement the comments.

DISCUSSION

On [March 23, 2022](#), Town Council received a staff report on the status of the Housing Element Update process, consequences of non-certification, the work plan, and timing. At that time, the Town Council directed staff to complete the Housing Element, zoning code amendments, environmental analysis, conforming General Plan amendments and associated work prior to January 31, 2023. There was acknowledgement that it would be very challenging to meet that timeline but that every effort should be made. In response to that direction, the staff/consultant team have been developing technical work and bringing it through a public review process with the Planning Commission.

Current Status

Key elements of the Housing Element Update and associated work are as follows:

- **Review under the California Environmental Quality Act (CEQA)** – An [Initial Study / Mitigated Negative Declaration](#) (IS/MND) has been prepared. [Public comments](#) were received from October 28 to November 29, 2022. The Planning Commission held a public meeting on [November 16](#) to receive public comments. A Response to Comments document is being prepared and will be released to the public when complete.
- **Housing Element Update** – Staff and consultants are updating the Housing Element in response to HCD comments. The Planning Commission has reviewed the revised approach to the Voluntary Upzoning (Opt In) program and Section 7 Programs. Other amendments are well underway.
- **Conforming General Plan Amendments** - Each element of the General Plan (sometimes called chapters) must be consistent, so when one chapter is updated, it may trigger minor conforming amendments to other chapters, as is the case with the Housing Element update. Materials related to the conforming General Plan Amendments were released to the community with a cover memo in advance of the Planning Commission meetings to allow additional time for review and consideration.
- **Zoning Code amendments** to implement the policies in the General Plan including three new zoning districts with basic development standards: 1) a new multi-family district allowing up to four dwelling units per acre; 2) a new multi-family district allowing 20 dwelling units per acre; and 3) a mixed-use district allowing residential uses up to six dwelling units per acre. Additionally, the amendments would codify the Affiliated Housing Program and update the zoning map.

Relationship between Housing Element and Safety Element

State law now requires Housing Elements to be updated concurrently with Safety Elements. Logically it makes sense for the Safety Element to be prepared before the Housing Element, as many residents have urged. However, in Portola Valley the Safety Element is largely dependent on current fire mapping and, unfortunately, neither the State nor the Woodside Fire Protection District have completed their mapping. Accordingly, the major Housing Element sites were chosen based on (1) locations with low or moderate fire hazard and (2) adjacency to evacuation routes. When selecting these sites the following sources were consulted: the 2008 Moritz Vegetation map, the 2008 Cal Fire Fire Severity Zone Map, Zeke Lunder's 2022 analysis and WFPD's Flame Mapper preliminary model results. (See Attachment 1.)

Emerging Legal Issues

In the past few years, the State Legislature has passed a series of new laws requiring the Housing Element to incorporate additional information and analysis (e.g. no net loss, Affirmatively Furthering Fair Housing, requirements for special needs housing). While previous housing element cycles had few consequences for towns failing to adopt compliant housing elements, that is not the case anymore. Further, at one time there was no consequence if the units of the inventory did not actually get built. However, new laws now wrestle away local zoning control away from towns that do not see projects materialize. Finally, the State has created and funded a Housing Enforcement Unit which scrutinizes housing element compliance throughout the full cycle.¹ Finally, multiple State laws have been adopted recently in a continuing attempt by the Legislature to take away local zoning control in the area of housing development.

Consequences for Non-Compliant Housing Elements

As discussed above, state law requires jurisdictions to submit draft and adopted Housing Elements to HCD for review. Although HCD is required to make a determination regarding whether a Housing Element substantially complies with state law, in the event of a disagreement between a jurisdiction and HCD regarding substantial compliance, the issue is ultimately left to the courts to decide.

The potential consequences of a court determination of non-compliance are severe. Litigation may be brought by any interested party (Gov. Code 65587(b)) or the office of the Attorney General (Gov. Code 65585). If a court finds that the jurisdiction's Housing Element is inadequate, it must include one or more of the following remedies in its order:

- Suspension of the jurisdiction's authority to issue building permits or related permits while permits are outstanding for housing projects;
- Suspension of the jurisdiction's authority to grant zoning changes, variances, and map approvals;
- Mandated approval of residential housing projects (Gov. Code 65755). Essentially, until the jurisdiction adopts a compliant Housing Element, a court is empowered to

¹ A recent example of the Enforcement Unit's work is the California Attorney General's immediate reaction when the Town of Woodside characterized its entire Town as a wildlife corridor in order to avoid the application of SB 9. The Woodside Town Council promptly rescinded that action upon the Attorney General's actions.

halt all building permits (including remodels and additions) in the jurisdiction other than permits for new housing projects.

- If the lawsuit is brought by a housing advocate or developer, the town is also responsible for the plaintiff's attorney's fees.

In addition, recent legislation expanded the authority of the Office of the Attorney General to enforce housing element law. In suits brought by the Office of the Attorney General, a court is required to impose fines on jurisdictions that consistently refuse to adopt a compliant Housing Element. The fines range from a minimum of \$10,000 per month, up to \$600,000 per month. If a jurisdiction has not adopted a compliant Housing Element within 18 months following a court order, the court may appoint a receiver to take all governmental actions necessary to bring the jurisdiction's Housing Element into compliance (Gov. Code 65585). In addition, the Town may not be eligible for State housing funds. The State has made a "compliant Housing Element" an eligibility requirement for State housing funds. There have also been discussions of having a compliant Housing Element as an eligibility requirement for State transportation funds.

And most recently, there has been statewide discussions about a "builder's remedy" in the Housing Accountability Act (HAA) and jurisdictions with non-compliant Housing Elements. In short, the builder's remedy refers to a provision of the Housing Accountability Act (HAA) that obligates a jurisdiction that does not have a compliant housing element to approve certain affordable housing projects even if the projects are inconsistent with local zoning or general plan regulations. A memo outlining builder's remedy is included in Attachment 2.

Finally, and perhaps most significantly, if the Town is late in submitting its Housing Element and does not complete the rezonings needed to accommodate the full RHNA allocation within one year of the Housing Element due date, the Town loses local control over the following:

- Sites needed to accommodate any unaccommodated **low or very low income** housing must be zoned with minimum density of 20 units/acre and development standards that permit at least 16 units per site at a density of at least 16 units. (§ 65583.2(h).)
- Sites accommodating **low or very low income** housing must provide for "by right" approval of projects with at least 20 percent of the units affordable to low or very low income.²

² "By right" approval means review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary review that would constitute a "project" under CEQA. to all laws, including, but not limited to, the local government ordinance implementing the Subdivision Map Act. A local ordinance may provide that "use by right" does not exempt the use from design review. However, that design review shall not constitute a "project" under CEQA. Use by right for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5 (objective criteria). (§ 65583.2(i).)

NEXT STEPS

The tentative upcoming schedule is as follows:

- January 4, 2023 – Planning Commission public hearing on the Housing Element and all associated work. The Commission will make a formal recommendation to the Town Council
- January 11, 2023 – Town Council Public Hearing to consider the Housing Element and all associated work
- January 18, 2023 – Special Meeting if Needed – Continue discussion of Housing Element and all related work
- January 25, 2023 – Second reading of ordinance to adopt zoning code amendments
- Resubmittal to HCD

ATTACHMENTS

1. December 7, 2022 Memo regarding Housing Inventory Sites and Updated Fire Information
2. October 18, 2022 Memo from Town Attorney re Builder's Remedy

Additional information is available online at www.portolavalley.net/housingelement.



TOWN OF PORTOLA VALLEY STAFF MEMO

TO: Planning Commission

FROM: Laura Russell, Planning & Building Director

DATE: December 7, 2022

RE: Supplemental Information regarding Fire Maps

At the Planning Commission meetings held in November, the Commission requested additional information regarding fire mapping in Town and what maps are being used. In particular, there was a question as to why the 2008 Cal Fire Map was included in the Housing Element rather than the 2008 Moritz Map. As background, the 2008 Cal Fire Map shows the very high fire severity zones in Portola Valley. These maps are created based on fire risk factors established and modeled by Cal Fire. The 2008 Moritz report was commissioned by the Town to survey the existing vegetation on both private property and right of way to assist in a comprehensive vegetation management program. The Town incorporated the Moritz Map into the 2010 version of the Safety Element.

State General Plan law mandates the contents of each element/chapter of the General Plan and requires these chapters to be consistent with one another. General plan law requires fire hazards to be discussed in the Safety Element and requires towns to include fire maps on file with the Office of the State Fire Marshal in their Safety Elements ([Government Code 65302](#)):

- (3) Upon the next revision of the housing element on or after January 1, 2014, the safety element shall be reviewed and updated as necessary to address the risk of fire for land classified as state responsibility areas, as defined in Section 4102 of the Public Resources Code, and land classified as very high fire hazard severity zones, as defined in Section 51177. This review shall consider the advice included in the Office of Planning and Research's most recent publication of "Fire Hazard Planning, General Plan Technical Advice Series" and shall also include all of the following:
 - (A) Information regarding fire hazards, including, but not limited to, all of the following:

(i) Fire hazard severity zone maps available from the Office of the State Fire Marshal.

(ii) Any historical data on wildfires available from local agencies or a reference to where the data can be found.

(iii) Information about wildfire hazard areas that may be available from the United States Geological Survey.

(iv) General location and distribution of existing and planned uses of land in very high fire hazard severity zones and in state responsibility areas, including structures, roads, utilities, and essential public facilities. The location and distribution of planned uses of land shall not require defensible space compliance measures required by state law or local ordinance to occur on publicly owned lands or open space designations of homeowner associations.

(v) Local, state, and federal agencies with responsibility for fire protection, including special districts and local offices of emergency services.

The 2008 map was prepared by Cal Fire and is the official map on file with the State Fire Marshal. Therefore, it must be included in the Safety Element. In addition, the currently proposed draft of the Safety Element also includes the 2008 Moritz Fuel Hazard Assessment Report and builds off of the 2022 fire memo prepared by the Town's fire hazard consultant Zeke Lunder of Deer Creek Resources. The Town's current fire consultant Zeke Lunder, cautions against relying on the Moritz Map beyond its stated purpose of vegetative management:

"The 'Moritz Map', created by Ray Moritz, does a decent job of characterizing the highest hazard areas within the Town. However, the initial map is nearly 15 years old, and it appears to miss several areas with Very High hazards in steep canyon areas. Also, by calling almost the entire town 'high' hazard, Moritz's map lacks subtlety. There is a wide variety of conditions within the areas Moritz paints broadly as 'high' hazard, and in many of these areas, concerted vegetation management could greatly reduce hazards. Since vegetation can be managed, especially on areas of milder slope, it is not reasonable to exert there is nowhere safe in town to build higher-density developments. Thorough and well-designed wildfire mitigations are possible, wildfire hazard is not chiseled in stone." (Exhibit 2.)

Both the 2008 Cal Fire Map and 2008 Moritz Report are now outdated. Accordingly, the Woodside Fire Protection District (WFPD) is currently preparing a state of the art fire hazard map. Once the WFPD map is finalized it will be considered by the Town for incorporation into the Safety Element. Meanwhile, other available fire mapping resources (such as the 2008 Moritz Fuel Hazard Assessment Report and the 2022 fire memo prepared by the Town's consultant Deer Creek Resources) have all been incorporated into the Safety Element. The available fire maps were shared with the Ad Hoc Housing Element Committee, as well as a presentation by Zeke Lunder, prior to their selection of housing sites. The key elements of all those fire resources are shown in Figures 4-5 through 4-7 of the Draft

Housing Element. In addition, the Draft Housing Element references the Safety Element which also discusses the Moritz Map.

Given community interest, the Town has mapped the Housing Sites on the Moritz Map (see Exhibit 1). Below is a table showing the types of vegetation existing as of 2008 as depicted in the Moritz Map.

PVHE HOUSING SITES BY VEGETATION

Housing Site	Type of Vegetation
The Sequoias	Fire-Prone Oak Woodland (highest)/Fire-Prone Urban Forest (high)
Christ Church	Mowed grass (low)/Fire-Prone Urban Forest (high)
4394 Alpine	Fire-Prone Urban Forest (high)
Willow Commons Pipeline Project	Fire-Prone Urban Forest (high)
4370 Alpine	Fire-Prone Urban Forest (high)
Ladera Church	Fire-Prone Urban Forest (high)
Vacant portion of the Ford Field	Fire-Prone Urban Forest (high)
Glen Oaks	Mowed Grass (low)/ Fire-Prone Oak Woodland (highest)
Stanford Wedge Pending Project	Fire-Prone Urban Forest (highest)/Chaparral (highest)

As both the Cal Fire and Moritz Maps are outdated, staff coordinated with the WFPD for their review of the sites based on the best information available today. On December 1, 2022, the Fire Marshal reported that he had asked the District's current mapping consultant, Flame Mapper, to assess the five housing inventory sites on Alpine. Flame Mapper concluded that all of the parcels, except the Stanford site, would be Moderate. The sites are not in the Very High or High areas. Once the sites are built, then the moderate would be reduced to low. In regard to the Stanford site, with no building the site would be considered high, but as with the others, once built out, it would be reduced to a moderate. (See Exhibit 3.)

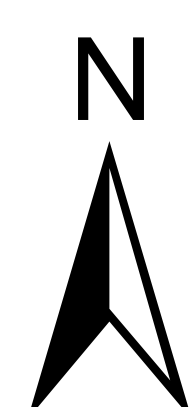
Exhibits

1. Housing Element Sites Plotted on 2008 Moritz Map
2. Updated December 2, 2022 Deer Creek Memo
3. Emails between Laura Russell and Fire Marshal Don Bullard

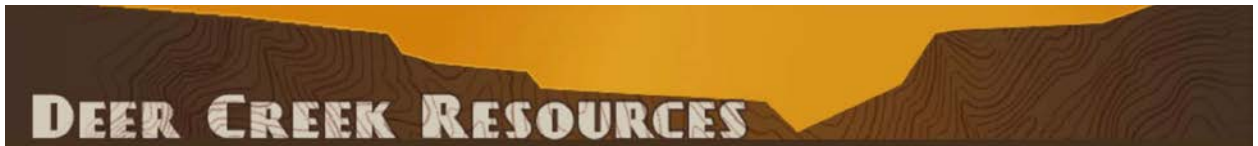


- CH (h+) CHAPARRAL (highest)
- CS (h) COASTAL SCRUB (high)
- FPO (h+) FIRE-PRONE OAK WOODLAND (highest)
- FPUF (h) FIRE-PRONE URBAN FOREST (high)
- FPUF (h+) FIRE-PRONE URBAN FOREST (highest)
- GR (m) GRASSLAND (moderate)
- MEF (h+) MIXED EVERGREEN FOREST (highest)
- MG (l) MOWED GRASS (low)
- RF (h) REDWOOD FOREST (high)
- US (m) URBAN SAVANNAH (moderate)
- VIN (l) VINEYARD (low)

0 1,200 2,400
Feet



Basemap: Town of Portola Valley
Vegetation Data Source: Moritz Arboricultural Consulting
Map: TRA Environmental Sciences, Inc.
October 2008



Deer Creek Resources - 2 Crusader Ct # 2, Chico, CA 95973 - (530) 891-0471

MEMO

TO: Carla Violet, Urban Planning Partners

FROM: Zeke Lunder, Wildfire Analyst at Deer Creek Resources

SUBJECT: Portola Valley Potential Housing Sites and Wildfire Hazard

DATE: 12/02/2022

Carla,

I have reviewed the June 2022 draft maps for potential new housing sites in Portola Valley. DCR was involved in the initial vetting of potential project sites for wildfire hazards, the sites identified in these maps appear to follow the guidance we provided in our earlier memo (attached below) on wildfire issues as related to residential development.

The selected sites appear consistent with the direction we provided in our earlier memo, and we feel that the sites identified in this map are the best available sites in the overall context of the Portola Valley community. The proximity of these sites to major thoroughfares and their location on fairly-flat ground make them more defensible from wildfire than other sites on steep ground, in heavier fuels, or with poorer access. These sites are also located in close proximity to the Woodside Fire Protection District's Station 8. Their proximity to both Alpine and Portola Road make them preferable from an evacuation standpoint. With respect to the projects fronting the Alpine corridor, future development may allow for the construction of a wider evacuation lane benefiting the entire community. Also, the proposed housing sites located close to Highway 280 have the least likelihood of increasing the evacuation time of other residents in the case of a larger fire. As with any development in fire-prone areas like Portola Valley, the buildings and grounds will need to be designed with wildfire safety in mind.

The Town of Portola Valley faces potential wildfire evacuation challenges *with or without* new development, and should prioritize vegetation management to the maximum extent possible within the right-of-way of Alpine Road and Portola Valley Road.

Moritz Map

The 'Moritz Map', created by Ray Moritz, does a decent job of characterizing the highest hazard areas within the Town. However, the initial map is nearly 15 years old, and it appears to miss several areas with Very High hazards in steep canyon areas. Also, by calling almost the entire town 'high' hazard, Moritz's map lacks subtlety. There is a wide variety of conditions within the areas Moritz paints broadly as 'high' hazard, and in many of these areas, concerted vegetation management could greatly reduce hazards.

The Moritz Map:

FUEL HAZARD MAP

Portola Valley General Plan Update



Since vegetation can be managed, especially on areas of milder slope, it is not reasonable to exert there is nowhere safe in town to build higher-density developments. Thorough and well-designed wildfire mitigations are possible, wildfire hazard is not chiseled in stone.

Note, the Moritz Map's characterization of "very high" and "high" hazard zones are based on vegetation fuel type (as described in the 2008 Fuel Hazard Assessment Study¹) whereas the CalFire's definition of Very High and High Fire Hazard Severity Zones are based on multiple factors. The Fire Hazard Severity Zone maps are developed using a science-based and field-tested model that assigns a hazard score based on the factors that influence fire likelihood and fire behavior. Many factors are considered such as fire history, existing and potential fuel (natural vegetation), predicted flame length, blowing embers, terrain, and typical fire weather for the area.²

Zeke Lunder

February 3, 2022 Memo:

In fall of 2021, Deer Creek Resources was contracted to conduct a cursory survey of wildfire hazards to inform the update of the Portola Valley General Plan's Housing and Hazard Elements. DCR Wildfire Analyst, Zeke Lunder, conducted a 2-day site survey of the community, and assessed existing vegetation, property ownership and building footprint maps, fire history, historic weather, and terrain mapping data. This document summarizes DCR's observations.

What Wildfire Hazards Exist in the Project Area?

Many areas of high and extreme wildfire hazard exist within the Portola Valley community. The highest-hazard areas are generally on steeper slopes of canyons or gullies, in difficult-to-access places where vegetation management is very difficult to accomplish. Hazards are amplified in east-west oriented canyon areas where the topography will funnel strong autumn winds, which tend to blow from the east or west.

¹ <https://www.portolavalley.net/home/showdocument?id=2420>

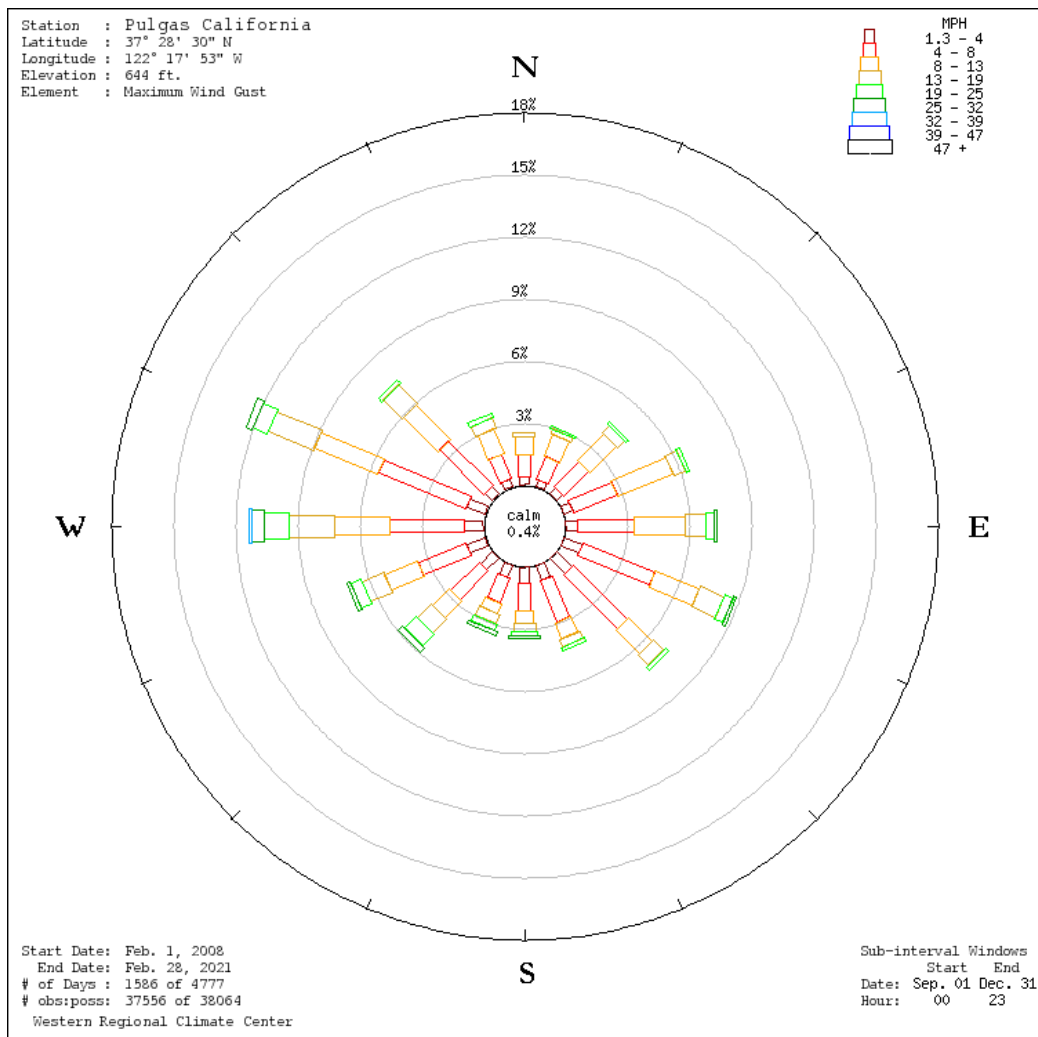
² <https://osfm.fire.ca.gov/divisions/community-wildfire-preparedness-and-mitigation/wildfire-preparedness/fire-hazard-severity-zones/>



Steep, inaccessible areas have some of the highest hazard. Slopes over 30% shown in red.

Wildfire Weather

While many firefighting resources are available to respond to fires starting in Portola Valley, the greatest threat to the community is not the typical roadside fire or structure fire which burns into the vegetation, rather, it is a wind-driven conflagration which occurs when weather conditions are so severe firefighting will be ineffective. This low-probability/high consequence event may only happen once in a century, but when it occurs, no amount of firefighting will stop it until the winds subside.



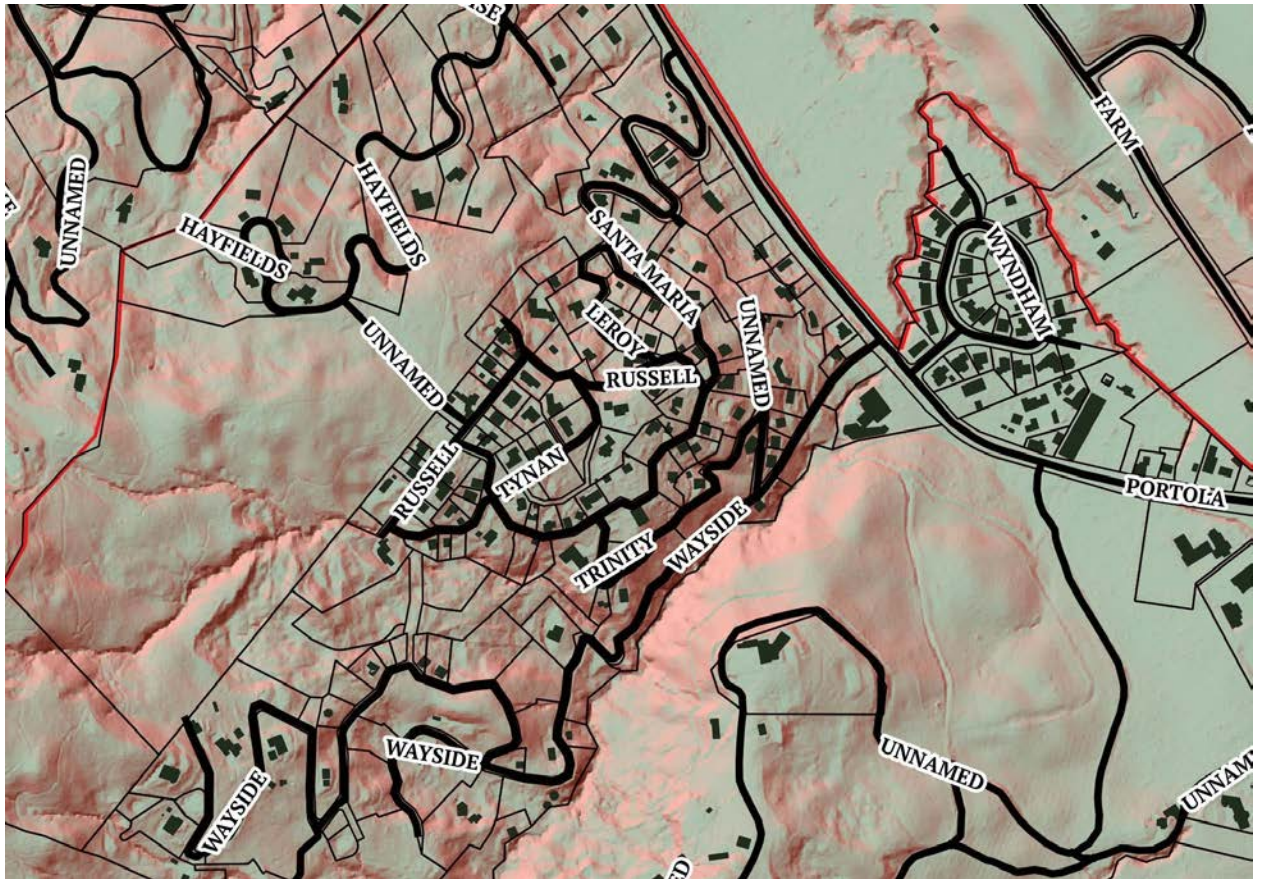
Wind rose for Pulgas weather station. Colors show peak gust, length of bar is frequency of occurrence.

Historic weather data suggests a catastrophic fire is most likely to burn into the area from the east, in the autumn. While less common than west winds, east winds are generally drier, and the strongest winds are often preceded by days of milder offshore winds, which can create critically-dry fuel moistures. As such, they bring the greatest wildfire threat. This increases the relative hazard to areas on the east side of town. Also, Alpine Road has heavy traffic loads and powerlines, both of which increase the likelihood of a wildfire ignition on the toe of the slope which could run uphill toward the west.

West Side of Town

Wayside Road, Santa Maria Ave, and Hayfields Road all have poor access, extremely heavy vegetative fuel loads, and exposure to east winds. As shown above, winds tend to come out of the west during the driest parts of the year, but these winds, coming off the ocean, are generally moister than the east winds. Fires burning from the west will be burning downhill into these areas, but under drought conditions, the recent CZU

Complex showed the potential for catastrophic fires in similar coastal forests. These areas west of Portola Road also have the potential for severe wildfire losses.



Steep, inaccessible areas have some of the highest hazard. Slopes over 30% shown in red.

Mapache/Westridge/Meadowood/Shawnee/Franklin Garden

While these areas still have high exposure to wildfire losses, they have a somewhat lower wildfire hazard than the steeper areas mentioned above. There are fewer deep gullies in this area, and generally safer access and better vegetation clearance along somewhat wider roads. Gentler slopes mean there is more developable land on each lot, and this may provide some opportunities for ADU development in these neighborhoods. Any future infill development in this area should be accompanied by improved vegetation management along main roads like Westridge (60-85 foot right-of-way) and Mapache (60 foot right-of-way).



Green areas are slopes less than 20%, possible ADU sites. Slopes over 20% shown in tan.



Which areas should PV avoid when siting new housing?

In general, the community should avoid building new dwellings on slopes over 20% where natural vegetation creates elevated wildfire hazards. 20% is not an absolute number. It may be possible to mitigate fire hazards on some slopes steeper than 20% where the dominant vegetation is grass or in areas with mature oaks with a grass understory.

The community should also avoid developing hillside areas where property lines, terrain, or other factors constrain access for vegetation management on slopes below a structure. Generally, this would mean the potentially developed property, at a minimum, should have roads or trails which make it possible to safely navigate a vehicle to the bottom of the property.

New multifamily housing should not be constructed on dead-end streets or in neighborhoods identified as having potential wildfire evacuation problems unless the developers create an actionable plan to mitigate known wildfire hazards, and Woodside Fire Protection District staff have reviewed and approved the plan. We recommend the Town maximize vegetation thinning within their right-of-way along major arterial travel routes.

Any development for which approval is contingent upon ongoing wildfire hazard mitigation vegetation management should require establishment of an endowment or special assessment which will fund vegetation maintenance in perpetuity.

From a wildfire perspective, areas along Alpine and Portola Roads are the safest option for new development. These areas are relatively flat, and will not be in the path of slope-driven wildfires. ADU development may be a good solution for increasing housing in areas less than 20% slope shown in figures, above.

Given high-hazard wildland fuels conditions and poor ingress and egress along narrow roads within the interior of the community, the proposed building sites identified in this plan are the safest options (from a wildfire standpoint) available. Vegetation along Alpine and Portola Roads creates wildfire hazards which could render both of these corridors dangerous during a wildfire evacuation event. Regardless of whether or not new development occurs within the Portola Valley community, thinning heavy vegetation and pruning up trees within the right-of-way of these two major travel routes should be undertaken as soon as possible.

Mapping Needs

Current wildfire hazard maps lack sufficient detail to be useful in developing site/project-specific wildfire hazard mitigation projects. However, more detailed mapping is not needed to identify many of the places with the most extreme wildfire hazards within Portola Valley. We (DCR) feel that we have sufficient data to support the recommendations stated in this report.

More detailed vegetation/fuels data would be helpful in triaging areas for wildfire hazard mitigation. This would be especially useful in developing mitigations for any new development within the community. A draft LiDAR-derived vegetation mapping dataset is nearly ready for release by San Mateo County. DCR reviewed this data and while it does an excellent job describing vegetative cover, it lacks detail for the understory vegetation which is the primary determinant of wildfire behavior. We suggest the Town of Portola Valley or Woodside Fire Protection District undertake detailed 3-dimensional mapping of the understory vegetation. This mapping should be done in consultation with wildfire behavior analysts so it is collected in a format which is compatible with predictive wildfire spread models.

From: [Laura Russell](#)
To: [Don Bullard](#)
Subject: Housing Element Sites
Date: Monday, November 14, 2022 5:04:00 PM

Hi Don,

Thanks for the update. Here are the housing element sites:

- Ford Field
- 4394 Alpine – vacant between Roberts and Willow Commons
- Glen Oaks equestrian center
- 4270 Alpine – corner of Nathorst
- Ladera Church – last parcel at the edge of Town going into Ladera

Laura

Laura C. Russell, AICP (she/her)
Planning & Building Director



Town of Portola Valley

650-851-1700 Ext. 218

www.portolavalley.net

Please visit www.portolavalley.net/virtualappointment for information on how to make an appointment for Planning and Building services.

From: Don Bullard <DJBullard@WoodsideFire.org>
Sent: Thursday, December 1, 2022 5:08 PM
To: Laura Russell <lrussell@portolavalley.net>
Subject: RE: Hosing Site Severity Zones

Laura,
I heard back today. As he ran the modeling for those five sites, he stated that as the parcels sit today, all of them, except the Stanford site, would be Moderate. Once the sites are built, then the moderate would then be reduced to low.

In regard to Stanford property, as it sits today with no building, the site is a high, but just as the others, once built out, it would be reduced to a moderate.

Best I can provide for now, hope this is helpful.

Don



Don Bullard
Battalion Chief / Fire Marshal / Fire Investigator
Woodside Fire Protection District | 808 Portola Road | Portola Valley, CA 94028
(650) 851-1594 | (650) 851-3960 FAX
djbullard@woodsidefire.org | www.woodsidefire.org

Mission Statement: To protect life, property and the environment through prevention, education, preparedness, and emergency response.

From: Laura Russell <lrussell@portolavalley.net>
Sent: Thursday, December 1, 2022 1:03 PM
To: Don Bullard <DJBullard@WoodsideFire.org>
Subject: RE: Hosing Site Severity Zones

Hi Don,

Thanks for the update. Time is tight, so please let me know when you hear something. Call any time.

Laura



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 HAA² 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

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

¹⁰ See [Housing Plan Delays Led to Loss of Local Control \(smdp.com\)](https://smdp.com/housing-plan-delays-led-to-loss-of-local-control/) 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 \(smdp.com\)](https://smdp.com/developers-capitalize-on-housing-element-fiasco-to-force-3968-undeniable-units-into-the-citys-pipeline/); [Housing Plan Delays Led to Loss of Local Control \(smdp.com\)](https://smdp.com/housing-plan-delays-led-to-loss-of-local-control/)

¹³ [Renegade California Developer Wants To Build Megaproject In NIMBY Stronghold \(reason.com\)](https://reason.com/california/renegade-california-developer-wants-to-build-megaproject-in-nimby-stronghold/)

¹⁴ [Renegade California Developer Wants To Build Megaproject In NIMBY Stronghold \(reason.com\)](https://reason.com/california/renegade-california-developer-wants-to-build-megaproject-in-nimby-stronghold/)

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

¹⁵ [California A.G. Says Anaheim NIMBYs Can't Block Women's Group Home \(reason.com\)](https://reason.com/news/anaheim-nimbys-cant-block-womens-group-home).

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.)