



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/news/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/news/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/news/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/news/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/news/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.)