



California’s “Builder’s Remedy” for Noncompliance w/ Fair-Share Planning Law

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SPUR presentation – Nov. 8, 2022

1. The Big Idea

If a city is out of compliance w/ Housing Element Law, it forfeits authority to use zoning or general plan to deny affordable projects (20% low-income or 100% moderate) or impose conditions that render project “infeasible.”



1.1 Permissible grounds for denial

Per GC 65589.5(d), to deny an affordable project or “condition approval in a manner that renders the ... project infeasible for development for the use of very low, low-, or moderate-income households,” a city must make **written findings** supported by **preponderance of** evidence in record that:

1. City is in compliance with Housing Element Law & has met its affordable-housing target (“RHNA”)
2. Project violates written, objective health/safety standard that was in effect when application was deemed complete
3. Denial is required to comply w/ “specific state or federal law”
4. Project site is “zoned for agriculture or resource preservation” or lacks “adequate water or wastewater facilities”
5. Project is inconsistent with zoning / GP and city is in compliance with Housing Element Law

2. Origins

Business & nonprofit alliance, circa 1990.



2.1 There were big hopes & dreams...

San Francisco Chronicle
August 22, 1990

Bill to Force Cities to Build Low-Income Housing Gets OK

By Vlade Kershner
Chronicle Sacramento Bureau

Sacramento

A powerful bill designed to bludgeon exclusive suburban communities into accepting low-income housing projects sailed through a major Assembly committee test yesterday on its way to becoming one of the biggest legislative surprises of the current session.

Under the measure, local communities that are not building their state-mandated "fair share" of low-income housing units could be forced to approve less costly housing presented to them by developers, even if it is inconsistent with zoning rules or general plans.

By a 15-to-3 vote, the Ways and Means Committee sent the bill to the Assembly floor, where passage appears likely, lobbyists said. It has already been approved by the Senate. Governor Deukmejian has not stated his views on the measure.

The bill by Senator Leroy Greene, D-Carmichael, is supported by an odd coalition of liberal

housing advocates and conservative business groups who agree that the state needs more affordable housing.

It is especially aimed at 116 communities statewide — including 18 in the Bay Area — that proponents say have built no lower income housing in recent years.

"It's an anti-NIMBY bill," said Thomas Cook of the Bay Area Council, a proponent of the measure, referring to the acronym for the "not-in-my-back-yard" syndrome, in which local residents almost reflexively oppose projects such as high-density housing that they believe jeopardize tranquility and property values.

The bill could force city councils to accept high-density developments in the middle of single-family residential areas. But Cook said it probably would never get that far because cities threatened with losing local zoning control would quickly get serious about meeting their low-income housing targets.

"Atherton's share is 24 units — they could easily do it without

without using more than 30 percent of their incomes.

The bill would not guarantee that developers would propose projects in an area. For example, officials in Moraga — which the report said has built only 6 percent of its low-income housing target — insist they have been unable to persuade developers to build the projects because high land values make low-income housing an unattractive investment.

But Cook said the threat of loss of control will make town officials promote the projects more actively. In Moraga's case, he said, the bill's passage could mean second-story apartments in the downtown commercial area.

The legislation is opposed by some Republicans, who say it is wrong to take away local control.

"The bill doesn't let cities and counties have much to say about what kind of housing they have in their communities and where they're going to have it," said Assemblyman Bill Baker, R-Danville. "Local governments should be the ones who decide what they want to do, not the state of California."

2.2 And fears.

STATE LAW WILL IMPOSE THIS ON BURLINGAME IF WE DON'T TAKE ACTION

File: SB 2011

Bill to Force Cities to Build Low-Income Housing Gets OK

Senate Bill 2011 passed
and became law in 1990.

By Vase Kershner
Chronicle Sacramento Bureau

Sacramento

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"Atherton's share is 24 units — they could easily do it without changing the character of the town by doing a small multifamily project downtown or allowing second units in the back of lots," Cook said.

The 18 Bay Area communities cited by the California Coalition for Rural Housing as building no lower-income units in the 1980-88 period are Albany, Atherton, Brisbane, Burlingame, Clayton, Colma, Danville, Dublin, East Palo Alto, Emeryville, Half Moon Bay, Hillsborough, Lafayette, Monte Sereno, Piedmont, Ross, San Carlos and Saratoga.

The above excerpts are from the San Francisco Chronicle 8/23/90 p.A1

Dear Burlingame Resident,

I fought California Senate Bill 2011 but it became law in 1990. One of my reasons for running is to draw attention to the effect this law could have on Burlingame so citizens will contact state legislators and ask them to overturn or modify it. Currently it could have a Draconian effect on California cities and towns. To forestall any construction of low-income buildings in our residential neighborhoods, Burlingame needs to update the Housing Element in the General Plan as both San Mateo and Hillsborough are now doing. It won't be easy, but we need to do it.

There are arguments cities can make to fight low-cost housing developments in court, such as citing health and safety codes, but the outcome depends on individual judges. Should the issue be brought to court, it would be in Burlingame's favor to be in the process of updating the Housing Element. If the city loses in court, a developer could conceivably build a highrise building in the middle of a R1 neighborhood, ignoring setbacks and zoning requirements. I don't believe we should gamble with Burlingame's beauty.

If elected to the Burlingame City Council, I will work to overturn this law at the League of Cities Convention and will fight to preserve our neighborhoods.

Sincerely,

P.S. I really need your help! It's been a long time since I retired from the City Council when I decided not to run for a second term. Many in Burlingame don't know how hard I fought to prevent several R1 neighborhoods from being rezoned for apartments.

Yes, I will help Dorothy Cusick to get elected to the City Council so she can work to preserve Burlingame's neighborhoods.

Enclosed is a contribution. (It doesn't have to be large to be greatly appreciated.)

— You may use my name as an endorsement — I will give a coffee.

— I will help distribute flyers to friends and neighbors.

Name _____

Address _____

Phone _____ Please send to: Dorothy Cusick Campaign
P.O. Box 117486
Burlingame, CA 94011

3. Quiescence (1991 – 2021)



3.1 First use was a failure...

Albany Steamrolls Region's First SB2011 Challenge

Last year, Governor Deukmejian signed Senate Bill 2011, designed to provide a better enforcement mechanism for housing element law. But the bill's effectiveness has been called into question after an unsuccessful attempt to use it in the city of Albany.

A homeowner applied to the City Council last year to **legalize an existing second unit**. But the city's zoning ordinance has a voter-established requirement for **at least two off-street parking spaces per new unit**. Unable to provide the extra parking, the homeowner failed to win approval. The homeowner then applied to the city's planning director for legalization under SB 2011, which

provides that a local jurisdiction without a legal housing element may not deny an affordable housing project. Albany's housing element is obsolete.

A city may, however, make a finding under SB 2011, "based on substantial evidence," that "the development project as proposed would have a specific, adverse impact upon the public health or safety." **The planning director found that the second unit "would have adverse impacts on the public health and safety by increasing the potential for residents to park on the street."** . . . Cumulatively, similar waivers of parking requirements would have adverse impacts elsewhere." The frustrated homeowner has decided not to appeal.

3.2 People gave up or forgot about it



3.3 But the playing field has changed

- Stronger [housing element requirements](#): SB 828 (RHNA's), AB 1397 (sites), AB 686 (AFFH)
- [High-level political commitment](#) to making housing element process work
- HAA remade as [super-statute](#): AB 1515 ("reasonable person"), SB 167 (deemed to comply, atty fees);
- New ministerial approval pathways (SB 35, AB 2011)
- SB 330 "preliminary application" vesting rule

3.3 But the playing field has changed



Chris Elmendorf @CSElmendorf · Oct 5

Big builders-remedy news out of Santa Monica:

@California_HCD weighs in on proposed project, says that developer's filing of "preliminary application" while city is out of compliance with housing element law "vests" the project's eligibility for builder's remedy. 1/8

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San Mateo, CA 94403
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October 5, 2022

Dave Rand
Rand Paister & Nelson LLP
633 W. Fifth Street, 64th floor
Los Angeles, CA 90071

Dear Dave Rand:

RE: 3030 Nebraska Avenue, Santa Monica – Letter of Technical Assistance

This letter is in response to your September 16, 2022, request for technical assistance regarding the implementation of the Housing Accountability Act (HAA), particularly those provisions that require housing element compliance, in the context of the proposed multi-family residential development in Santa Monica at the address noted above. The inquiry pertains to the relationship of preliminary applications to projects that invoke the provisions of subdivision (d)(5) of Government Code section 65589.5 once a housing element has been found in substantial compliance with State Housing Element Law.

Background

A housing development project with housing for very low-, low-, or moderate-income households¹ cannot be denied (or approved in a way such that conditions render the inclusion of affordable housing infeasible) unless one of five potential written findings, based upon a preponderance of the evidence in the record, can be made. (Gov. Code, § 65589.5, subd. (d).) Under subdivision (d)(5), a jurisdiction can only deny a qualifying project if both of the following criteria are satisfied: (1) The project is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation and (2) the jurisdiction has a housing element in substantial compliance with State Housing Element Law. Therefore, the status of a jurisdiction's housing element is of critical importance when determining the applicability of the provisions of subdivision (d)(5).

Analysis

The question posed in your September 16, 2022, request is as follows:

If a preliminary application is submitted to a jurisdiction without a compliant Housing Element, and the jurisdiction subsequently achieves Housing Element compliance during the project's entitlement process, do the rights vested by the preliminary application continue to apply?

The answer is "yes." The submittal of a complete preliminary application pursuant to Government Code section 65941.1 vests the right to develop a housing development project in accordance with the ordinances, policies, and standards in effect when a preliminary application is submitted. (Gov. Code § 65589.5, subd. (c)(1).) Therefore, if the submittal occurs at a time when the jurisdiction does not have a compliant housing element, any potential benefits afforded to the applicant as a result of the jurisdiction's noncompliant status would remain throughout the entitlement process even if the jurisdiction subsequently achieves compliance during the entitlement process.

If you have questions or need additional information, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,

Melinda Coy
Proactive Housing Accountability Unit Chief

¹ "Housing for very low-, low-, or moderate-income households" means that either (A) at least 20 percent of the total units shall be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65508 of this code. (Gov. Code, § 65589.5, subd. (h)(3).)



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4. Complications

- CEQA
- Is city really noncompliant?
- Internal tensions
- Possible implied density limit



4.1 CEQA v. HAA

San Francisco Chronicle

THE VOICE OF THE WEST

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A HEARST NEWSPAPER

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OPEN FORUM

S.F. helped gut state's housing laws

By Chris Elmendorf

For the past several years, California legislators have worked feverishly to tighten the screws on cities that arbitrarily deny housing projects. Last week, however, a state court gave cities a massive escape hatch, allowing them to delay projects as long as they want and no matter how ludicrous their reasons.

At issue was the infamous 469 Stevenson St. project, "the poster child for the insanity" that is San Francisco housing politics. The developer seeks to replace a valet parking lot with 500 homes, many affordable, just one block from a BART station and in a priority development area as identified by the region's climate plan.

After the project was approved, a neighborhood gadfly appealed its environmental study to the Board of Supervisors, which then decided it had to be redone. The appellant publicly trumpeted his intention to pressure the developer into downsizing the project and "donating" a portion of the site to the city. Supervisors made clear they did not intend to approve the project unless the developer worked out a deal. They justified this by demanding more analysis of possible gentrification impacts in the environmental report. But gentrification is not an environmental impact within the meaning of the California Environmental Quality Act, known as CEQA.

In response, Gov. Gavin Newsom's housing enforcement team launched an



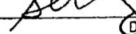
Santiago Mejia/The Chronicle 2021

The 469 Stevenson St. project saga is "the poster child for the insanity" that is San Francisco housing politics.

FILED
San Francisco County Superior Court

OCT 21 2022

CLERK OF THE COURT

BY:  Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

10 YES IN MY BACK YARD, a California
11 nonprofit corporation; and SONJA TRAUSS,
12 Petitioners and Plaintiffs,
13 vs.
14 CITY AND COUNTY OF SAN
15 FRANCISCO; SAN FRANCISCO BOARD
OF SUPERVISORS; and DOES 1-35,

Case No. CPF-22-517661
ORDER RE: DEMURRER

Hearing Judge: Hon. Cynthia Ming-mei Lee
Time: 9:30 a.m.
Place: Department 503
Hearing Date: September 9, 2022

4.2 Is city really noncompliant?

- Just because HCD found a city's housing element noncompliant doesn't mean courts will agree.
- Old cases say that a housing element complies as a matter of law if city checked all the statutory boxes, regardless of the housing element's "merits" or HCD's determination of noncompliance. E.g., *Fonseca v. City of Gilroy* (2008), 148 Cal.App.4th 1174.
- Are these cases still good law? I've argued they're not, but the Legislature hasn't addressed it squarely.

4.3 Zoning vs “development standards”

“[N]othing in this section shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction’s share of the regional housing need pursuant to Section 65584. However, the development standards, conditions, and policies 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).

- How is a court (or anyone else) supposed to figure out whether a “development standard” is consistent with RHNA?
- How can an *objective* standard be applied to “facilitate” different densities?
- Does this provision even apply if city lacks compliant housing element?

4.4 Implied limits on density?

- The HAA says nothing about limits on size or density of builder's remedy projects
- But HAA is codified as part of housing element article of Gov't Code, and Housing Element Law was enacted together with Least Cost Zoning Law, which states...
- "Nothing in this section shall be construed to require a city ... in which less than 5 percent of the total land area is undeveloped to zone a site within an urbanized area ... for residential uses at densities that exceed those on adjoining residential parcels by 100 percent."