WHAT IS THE "BUILDER'S REMEDY?"

WHERE CAN IT BE DONE IN OC?



When Orange County cities lack a compliant housing element, what can developers do?

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About Ken Stahl



- Professor of Law and Director of the Environmental, Land Use and Real Estate Law Program at Chapman University Fowler School of Law
- Of Counsel, Miller Starr Regalia
- Litigated successful HAA lawsuits on behalf of developers and housing organizations
- Advise developers on the entitlement process and protections offered by state housing law
- Worked with People for Housing for 5 years

https://www.chapman.edu/our-faculty/kenneth-stahl#gsc.tab=0

https://www.msrlegal.com/our-people/kenneth-stahl

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Watch the Presentation Online

https://youtu.be/WNplpRKUqbc



Takeaway

- Many cities in Orange County and throughout the state are out of compliance with state housing law and face a potential penalty called the "builder's remedy."

- Under the Builder's Remedy law, jurisdictions subject to the penalty potentially must approve any proposed housing development project with at least 20% lower-income or 100% moderate income housing on almost any site, *regardless of the locality's General Plan and zoning standards*

- The Builder's Remedy presents a great opportunity, but there are also some risks.

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- This slide show is a summary, not the full contents of the presentation.

- This presentation is not legal advice.

- I highly recommend you consult with a land use attorney before pursuing a Builder's Remedy project. The law is very complicated.

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Agenda

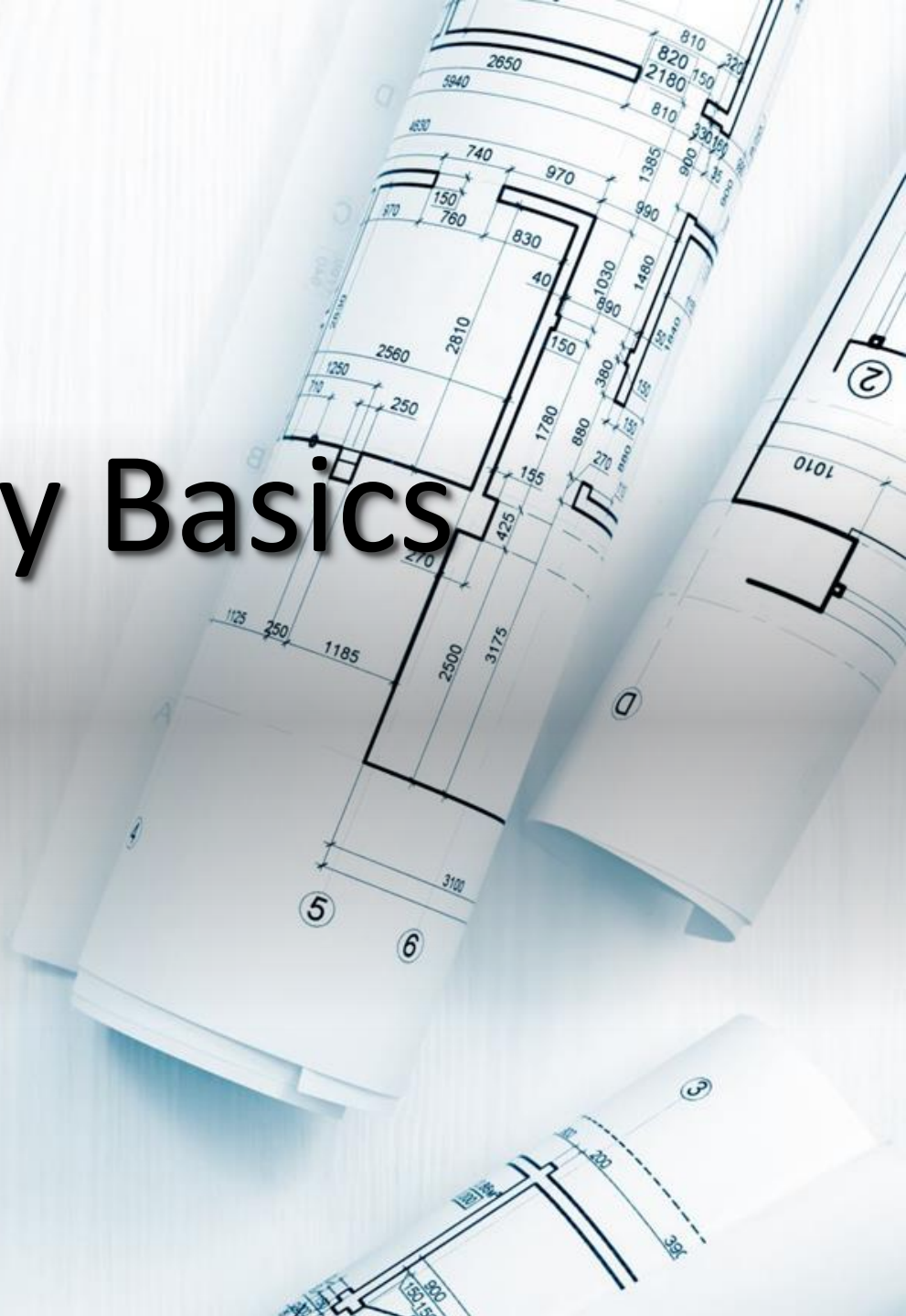
1)Builder's Remedy Basics

2)Evaluating Builder's Remedy Sites

3)Timing and Application Process

4)Risks Involved and Tips on How to Navigate Them

Builder's Remedy Basics



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Builder's Remedy Basics



Every local jurisdiction (city and county) is required to have a "housing element" in its General Plan that accommodates its fair share of the regional housing need.

This housing element must be updated every eight years, and submitted to the State Department of Housing and Community Development (HCD) for approval.

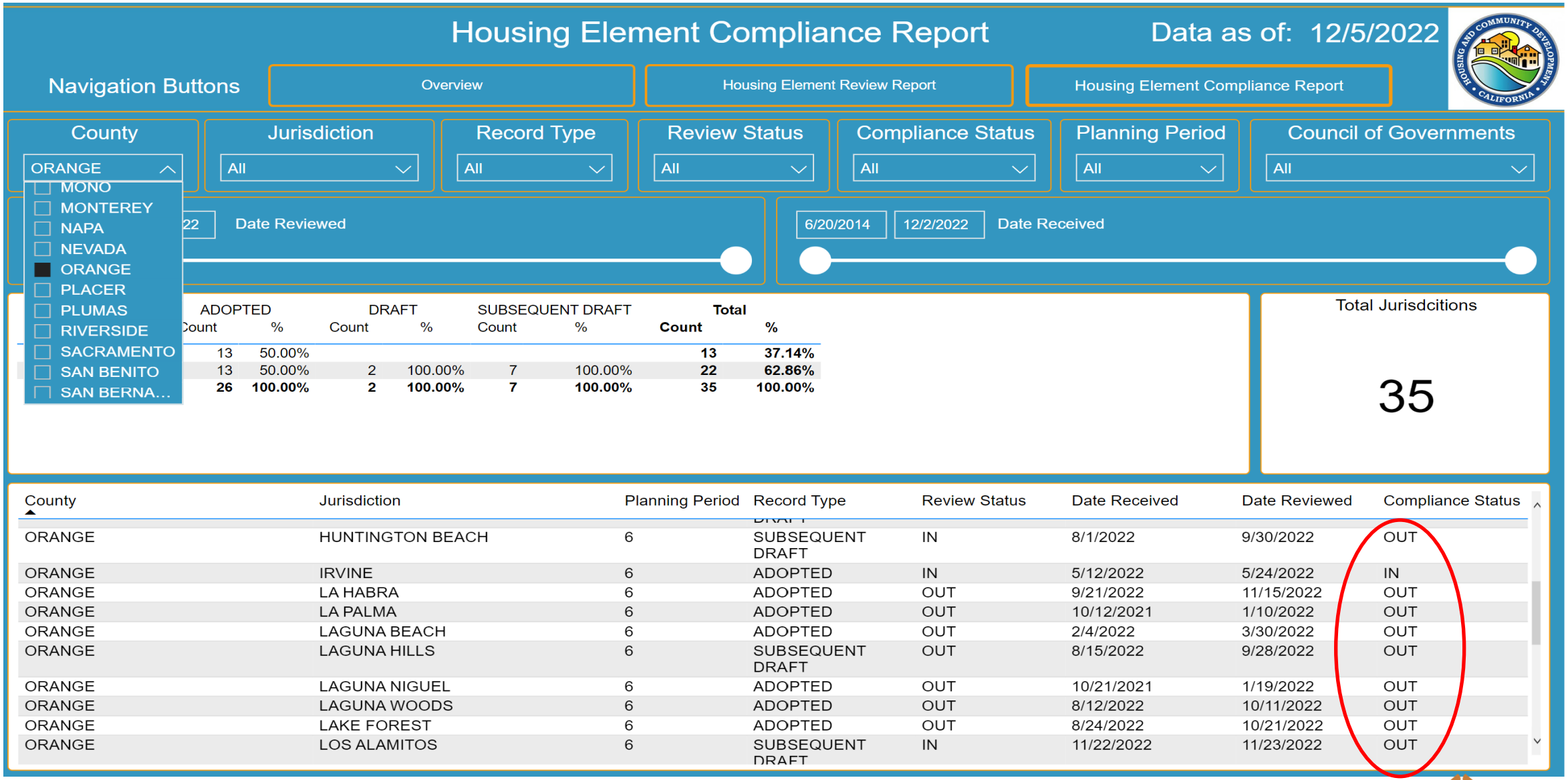
To date, most jurisdictions in Orange County and throughout Southern California do not have "compliant" housing elements according to HCD.

Bay area deadline is in January. Many cities likely to be out of compliance as well.

Lack of compliance triggers Builder's Remedy…

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Full report: https://www.hcd.ca.gov/planning-and-community-development/housing-open-data-tools/housing-element-review-and-compliance-report

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Builder's Remedy Basics

•"Builder's Remedy" is a name given to a part of a statute called the Housing Accountability Act, a powerful law that has been made more potent in recent years.

•Gov. Code section 65589.5(d): A local agency shall not disapprove a housing development project with at least 20% lower-income or 100% moderate income housing, or condition approval of such housing in a manner that renders the housing development project infeasible "unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:…"

•(5) The housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article….

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Builder's Remedy Basics

•Summary: Subject to narrow exceptions, if the jurisdiction does not have a "substantially compliant" housing element, the jurisdiction may not deny a housing project with at least 20% lower-income or 100% moderate income units, or condition the project in a manner that renders the project infeasible, even if the project is inconsistent with the development standards in the General Plan and zoning ordinance.



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Evaluating Builder's Remedy Sites



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Evaluating Builder's Remedy Sites

Target cities that are out of compliance and do not have housing elements currently under review by HCD

Best case is cities that have not adopted housing elements

Look for cities that are likely to be out of compliance for a few months. Is your city actively working on revising its HE?

Housing element deadline

City adopts* a housing element

HCD Certifies the adopted housing element

Best case | *Arguable* | *Difficult*

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Timing and Application Process



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Timing and Application Process

•Senate Bill 330 Permits applicants to file a “preliminary application” with relatively minimal information that freezes jurisdiction’s development standards in place.

•Many cities have their own forms, but they all have to accept the state form.

•You will need a non-binding **site plan** and **elevations**.

•You have 180 days to file a full application after submission of preliminary application.

•File SB 330 application while city is out of compliance



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Risks Involved and Tips to Navigate Them

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Risks Involved and Tips on How to Navigate Them



- Lots of unknowns as Builder's Remedy is untested
- CEQA: Builder's Remedy does not provide a CEQA exemption. There are questions about whether a city can use CEQA to indefinitely delay a project the city knows it cannot deny.
- Statute Requires "Substantial Compliance," which does not necessarily mean full compliance. Court is not bound by HCD's determination and could find substantial compliance even where HCD has found non-compliance
- Applicability of Builder's Remedy in Coastal Zone is Uncertain
- Others

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Risks Involved and Tips on How to Navigate Them

On the plus side…

- HAA is an extremely pro-housing statute. It states that it must be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." 65589.5(a)(2)(L).

- Burden of Proof is On the City

- Applicant or 3rd party housing org is entitled to reasonable attorney fees if they win

- Courts should resolve doubts in favor of housing. Will they?

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Risks Involved and Tips on How to Navigate Them

- Consult an attorney!
- Consider sites that qualify for a CEQA exemption
- Avoid projects with significant environmental impacts
- Fewer local regulatory constraints, lower risk
- Consider jurisdictions where elected officials will support the project



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Good resources:

Chris Elmendorf, Law Prof at UC Davis, Primer on California's Builder's Remedy

https://escholarship.org/uc/item/38x5760j

HCD Technical Advisory Memo on HAA

https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf

YIMBY Law Slide Presentation on Builder's Remedy

https://www.yimbylaw.org/buildersremedy

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