The California Builder's Remedy

The Housing Accountability Act[1] indicates that, if a city or county does *not* have a "substantially compliant" Housing Element, that jurisdiction cannot use its zoning or general plan standards to disapprove any housing project that makes 20% of its units affordable to Lower Income households[2] or 100% affordable to Moderate Income[3] households. In other words, cities that fail to pass a compliant housing element by their deadline, lose local control over housing development.

For example, if a city's zoning code prohibits buildings greater than 45 feet, a project sponsor can propose a 85 foot building, and, as long as the project contains 20% low income housing or 100% moderate income housing, the city cannot disapprove the proposal using its prohibition on buildings greater than 45 feet. "Design review standards," such as Pythonesque requirements to add a shrubbery around a doorway, are also preempted.

This opportunity is now available in more cities than ever before. Until recently, most cities sailed through the Housing Element process because the Housing Elements had minor requirements and little public attention. That has changed. In 2022, nearly 200 Southern CA cities missed their deadline to adopt a new Housing Element, and in 2023, all but 4 Bay Area cities missed the deadline. Check out our map of cities in and out of compliance here.

Housing advocates are now highly engaged, giving HCD the intel and political cover to deny certification to Housing Elements that do not meet state requirements. As a result, it is now possible for developers in some of California's most profitable cities to circumvent certain zoning standards when proposing projects that include 20% Lower Income or 100% Moderate Income set-asides. This is known as the Builder's Remedy, allowing for the development of housing in cities that do not have a Housing Element that is consistent with state law.

This remedy can be a powerful solution for projects that are limited by local zoning or political opposition. This strategy can serve as a new pathway to development, or as a powerful negotiating chip for plan compliant projects suffering pushback.

[1] CA Gov. Code §65589.5(d); copied below in Appendix A
[2] "Lower income" households earn less than 60% Area Median Income
[3] "Moderate Income" households earn up to 100% Area Median Income

A developer considering the Builder's Remedy should retain experienced land use counsel to help develop an application that strategically uses the Builder's Remedy. Developers should also be aware that approval under the Housing Accountability Act does not exempt a project from CEQA.

However, the benefits of the Builder's Remedy could outweigh these expenses and risks. Furthermore, utilizing the Builder's Remedy will have substantial systemic ripple effects; it will provide conclusive teeth to the RHNA process and ensure that cities across California are held accountable to massive upzoning.

Contact our colleagues at YIMBY Law to learn more and request support at hello@yimbylaw.org.

About YIMBY Action

YIMBY Action is a 501(c)(4) organization that advocates for welcoming communities where everyone can thrive by saying "YES" to more housing options. We are a network of pro-housing activists fighting for more inclusive housing policies and a future of abundant housing. We drive policy change to increase the supply of housing at all levels and bring down the cost of living in opportunity-rich cities and towns. **Learn more**

About Yes In My Back Yard / YIMBY Law

Yes In My Back Yard (YIMBY) is a 501(c)(3) organization that is on a mission to make housing abundant, affordable, and accessible. We advance the national discourse on housing, train and mobilize housing advocates, and enforce housing law through YIMBY Law (a DBA of YIMBY). **Learn more**

You Can Make This Work Possible!

At YIMBY Action and YIMBY Law, we make it our business to advocate for and monitor housing policy and spread the word about innovative opportunities to achieve abundant housing in our communities. We back up this progress with our extensive network of grassroots activists. To see more of this work, become a member of YIMBY Action or contribute a tax-deductible gift to YIMBY Law.

APPENDIX A

CA Government Code § 65589.5(d)

(d) A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (h) of Section 50199.7 of the Health and Safety Code, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the housing development project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:

> (1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation pursuant to Section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by Section 65008. If the housing development project includes a mix of income categories, and the jurisdiction has not met or exceeded its share of the regional housing need for one or more of those categories, then this paragraph shall not be used to disapprove or conditionally approve the housing development project. The share of the regional housing need met by the jurisdiction shall be calculated consistently with the forms and definitions that may be adopted by the Department of Housing and Community Development pursuant to Section 65400. In the case of an emergency shelter, the jurisdiction shall have met or exceeded the need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. Any disapproval or conditional approval pursuant to this paragraph shall be in accordance with applicable law, rule, or standards.
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> (2) The housing development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. The following shall not constitute a specific, adverse impact upon the public health or safety:
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> > (A) Inconsistency with the zoning ordinance or general plan land use designation.
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> > (B) The eligibility to claim a welfare exemption under subdivision (g) of Section 214 of the Revenue and Taxation Code.
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> (3) The denial of the housing development project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(4) The housing development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.

(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. For purposes of this section, a change to the zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete shall not constitute a valid basis to disapprove or condition approval of the housing development project or emergency shelter.

> (A) This paragraph cannot be utilized to disapprove or conditionally approve a housing development project if the housing development project is proposed on a site that is identified as suitable or available for very low, low-, or moderate-income households in the jurisdiction's housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation.
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> (B) 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.
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> (C) If the local agency has failed to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit, has failed to demonstrate that the identified zone or zones include sufficient capacity to accommodate the need for emergency shelter identified in paragraph (7) of subdivision (a) of Section 65583, or has failed to demonstrate that the identified zone or zones can accommodate at least one emergency shelter, as required by paragraph (4) of subdivision (a) of Section 65583, then this paragraph shall not be utilized to disapprove or conditionally approve an emergency shelter proposed for a site designated in any element of the general plan for industrial, commercial, or multifamily residential uses. In any action in court, the burden of proof shall be on the local agency to show that its housing element does satisfy the requirements of paragraph (4) of subdivision (a) of Section 65583.