

# Holland & Knight

OCTOBER 21, 2022

## "Builder's Remedy": Bay Area Will Soon Face a Powerful Housing Tool

By Missing the January 2023 Housing Element Deadline, Door Opens to Compliance Tool Already Taking Southern California by Storm

*Holland & Knight Alert*

Deborah Brundy | Ryan Michael Leaderman | Tamsen Plume | William E. Sterling | Genna Yarkin

<https://www.hklaw.com/en/insights/publications/2022/10/builders-remedy-bay-area-will-soon-face-a-powerful-housing-tool>

### Highlights

- As the Jan. 31, 2023, statutory deadline to submit compliant housing elements for the 6th Regional Housing Need Assessment (RHNA) Cycle looms over Bay Area governments, all eyes are on the penalties associated with missing the deadline.
- Several jurisdictions have disputed whether they are afforded a 120-day "grace period" or whether one penalty in particular, colloquially known as "Builder's Remedy," kicks in as of the deadline for compliance.
- Builder's Remedy is a housing development streamlining tool that provides developers the option to file an application for a housing development project with at least 20 percent affordable housing that is not in conformance with a jurisdiction's zoning or General Plan.

As the Jan. 31, 2023, statutory deadline to submit compliant housing elements for the 6th Regional Housing Need Assessment (RHNA) Cycle looms over Bay Area governments, all eyes are on the penalties associated with missing the deadline, which are currently in effect in portions of Southern California. One penalty in particular, colloquially known as "Builder's Remedy," has captured many imaginations with its promise to limit jurisdictions' authority to deny qualifying housing projects. Several jurisdictions have disputed whether they are

afforded a 120-day "grace period" or whether Builder's Remedy kicks in as of the deadline for compliance.

## **There Is No 120-Day "Grace Period" for Adopting a Compliant Housing Element**

Until this week, many jurisdictions, including San Francisco and several other Association of Bay Area Governments (ABAG) jurisdictions, thought that the California Department of Housing and Community Development (HCD) would allow a 120-day "grace period" after the official Jan. 31, 2023, adoption deadline, during which time the consequences of noncompliance would be stayed.<sup>1</sup> This inaccurate interpretation appears to result from a misreading of a *separate* statutory provision, and a misunderstanding of HCD's authority under the Housing Accountability Act (HAA).<sup>2</sup> HCD has confirmed, however, that there is no "grace period," heightening the possibility that the powerful Builder's Remedy will soon be available in many of the Bay Area's key housing markets.<sup>3</sup>

### **What Is "Builder's Remedy"?**

In a nutshell, Builder's Remedy is a housing development streamlining tool that provides developers the option to file an application for a housing development project with at least 20 percent affordable housing that is not in conformance with a jurisdiction's zoning or General Plan. So long as the local government does not have a HCD-certified housing element, the local governmental agency would have very limited ability to deny such a qualifying housing development project.

While the HAA generally restricts local governments' options for disapproving certain housing development projects, Subdivision (d) of the HAA provides further restrictions on the disapproval of housing "for very low, low-, or moderate-income households," which the HAA defines as a project that contains either 1) 20 percent low-income housing, or 2) 100 percent moderate-income housing. Cal. Gov. Code § 65589.5(h)(3). For ease of reference, this Holland & Knight alert will refer to such projects as "affordable housing" projects.

Under Subdivision (d), local governments cannot disapprove affordable housing projects unless they make written findings that one of five circumstances, ranging from violations of public health and safety standards as well as state and federal law to lack of sufficient water and sewer capacity, applies. Four of these circumstances should arise only infrequently, leaving the fifth circumstance as the default avenue for disapproval in most instances. To disapprove a project under Government Code Section 65589.5, Subdivision (d)(5), the local government must find as follows:

"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.**" Emphasis added.

Critical to this determination is a compliant housing element. Without one, a jurisdiction cannot deny the project **at all** – even if it does not comply with the local government's applicable development standards. This inability for a noncompliant jurisdiction to disapprove a project under HAA Subdivision (d)(5) is the "Builder's Remedy." Although Builder's Remedy has long been a provision of Subdivision (d) of the HAA, it is the fact that portions of Southern California are without compliant housing elements, and the possibility that Bay Area jurisdictions will soon become noncompliant, that now puts the specter of this powerful remedy at the forefront of the debate about California's housing crisis and the role of local control.

## **Other Penalties for Jurisdictions That Fall Out of Compliance**

Although Builder's Remedy has emerged as the highest-profile penalty, others exist as well. These remedies are also statutory and will take effect upon the deadline. Jurisdictions that fail to timely adopt a compliant housing element will be required to harmonize their zoning with their housing element on an expedited basis.

Noncompliant jurisdictions may also face enforcement actions from the HCD or from the California Attorney General's office.<sup>4</sup> Finally, a compliant housing element is a prerequisite for receiving community development block grant funds, which can have a meaningful impact on jurisdictions' budgets.<sup>5</sup>

## Recommendations and Cautionary Notes

Similar to many Southern California jurisdictions that had an earlier housing element statutory deadline, it is anticipated that many Bay Area jurisdictions will also not meet the Jan. 31, 2023, statutory deadline. With numerous jurisdictions across the state out of compliance with housing element law, Builder's Remedy presents both unique opportunities and uncertainties. In particular, the intersection between Builder's Remedy and California Environmental Quality Act (CEQA) remains untested. Jurisdictions may try to use CEQA to regain discretionary authority over Builder's Remedy projects. Whether that tactic will prove effective remains to be seen, given that CEQA may not be used to do that which other statutes prohibit. Pub. Res. Code, § 21004; CEQA Guidelines § 15040(e). To the extent that a jurisdiction eventually has a HCD-certified housing element, filing a Senate Bill (SB) 330 preliminary application to vest development rights prior to the HCD certification of the housing element can provide strong developer protections for Builder's Remedy. HCD recently opined in technical assistance relating to an affordable housing project in Santa Monica, that "...if the [SB 330] 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."<sup>6</sup> Thus, Builder's Remedy has the potential to become a powerful tool for the development of housing, streamlining the entitlement process.

Those interested in pursuing projects in noncompliant jurisdictions may wish to consider the inclusion of 20 percent low-income units to qualify for the protections afforded under Builder's Remedy. Please reach out to the authors, your Holland & Knight attorney or another

member of the [West Coast Land Use and Environmental Group](#) to discuss these issues further.

## Notes

<sup>1</sup> See, e.g., Sarah Klearm an, "[S.F. got the state's housing deadline wrong – so did Berkeley, Oakland and San Jose](#)," *Silicon Valley Business Journal*, Oct. 14, 2022.

<sup>2</sup> Specifically, after adopting a housing element, jurisdictions must complete a rezoning process to facilitate the development set forth in the housing element. Jurisdictions that adopt a compliant housing element by the deadline, or within 120 days thereafter, have three years to complete this rezoning process; jurisdictions that miss the deadline must complete it on an expedited basis. Cal Gov. Code § 65583(c)(1)(A).

<sup>3</sup> Sarah Klearm an, "[S.F. got the state's housing deadline wrong – so did Berkeley, Oakland and San Jose](#)," *Silicon Valley Business Journal*, Oct. 14, 2022; (per David Zisser, head of HCD's Housing Accountability Unit, "[t]here is no room for interpretation there.").

<sup>4</sup> See generally HCD, "[Accountability and Enforcement](#)."

<sup>5</sup> See, e.g., Health & Safety Code § 50829 (conditioning receipt of community development block grant funds on housing element compliance). See also HCD, "[Willows' 6th Cycle \(2021-2029\) Adopted Housing Element](#)" (Feb. 15, 2022) (explaining that housing element compliance is a prerequisite for receiving CalTrans Sustainable Communities grant and HCD's Permanent Local Housing Allocation funding).

<sup>6</sup> See HCD, "3030 Nebraska Avenue, Santa Monica – Letter of Technical Assistance," Oct. 5, 2022; ("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.").

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