

What is the “Builder’s Remedy” and how can it help with our State’s Housing Crisis?

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In California, the Department of Housing & Community Development (HCD) has identified local governments as a major culprit for why we’ve amassed such momentous housing issues. The department has acknowledged that in order for the private market to adequately address the housing needs and demands of Californians, local governments must adopt plans and regulatory systems that provide opportunities for (and do not unduly constrain) housing development. (HCD)

In the Housing Accountability Act (HAA), the legislature found and declared that (A) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California. (B) California housing has become the most expensive in the nation. The excessive cost of the state’s housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing. (C) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration. (D) Many local governments do not give adequate attention to the economic, environmental, and so-

cial costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects. (Cal. Gov. Code § 65589.5 (a)(1))

The state has been trying to get cities to allow more housing to be built for decades. Because most jurisdictions in California are not producing enough housing, the state government launched several programs aimed to make building housing faster, cheaper, and easier since local governments failed to provide such environments. In the last few years, the Yes In My Backyard (YIMBY) movement has been increasingly present in state governments. The movement has been successful in passing various bills focused on streamlining housing development. Streamlining creates a framework for which the state can allow housing development to be built, bypassing the local jurisdiction’s zoning and procedures if the project meets the requirements of the bill. One streamlining tool that has gained a lot of recognition as of late is called the “Builder’s Remedy.” This tool, outlined in the Housing Accountability Act of 1982, has not been used until recently with the passing of amendments to the act found in SB 167 as well as other major housing bills: SB 330, SB 8, and AB 215.

The “Builder’s Remedy” is essentially used to describe a set of criteria outlined within the HAA that stipulates specific requirements that when met, would allow developers to bypass local jurisdiction zoning and procedures.

The “Builder’s Remedy” only applies to housing developments for very low, low- or moderate-income households and emergency shelters. (Cal. Gov. Code § 65589.5(h) (2).) These projects can include either: 20% of the total units sold or rented to lower-income households; or 100% of the units sold or rented to moderate- or middle-income households. For lower-income households, monthly housing costs cannot exceed 30 percent of 60 percent of the area median income, adjusted for household size, and the units must remain affordable for 30 years. For moderate-income households, monthly housing costs cannot exceed 30 percent of 100 percent of the area median income. (Cal. Gov. Code § 65589.5(h)(3), (h)(4).) In the original bill, passed in 1982, developers of these projects had to comply with local zoning codes, making these types of developments unfeasible. Today, after amendments were made to strengthen the bill, lawmakers included the specification that if jurisdictions’ housing elements, their plans that dictate how they will meet local housing needs, are non-compliant with state law and HCD then developers do not need to comply with local zoning and procedures. There are now only 4 ways in which a city not in noncompliance can reject a project of this type.

1. The city or county has met or exceeded its Regional Housing Needs Allocation (RHNA) for the proposed income categories in the development.
2. The housing development or emergency shelter would have a specific adverse impact on pub-

lic health and safety, and there is no way to mitigate or avoid the impact without making the development unaffordable. The impact must be based on objective, written public health or safety standards in place when the application was deemed complete.

3. The denial or condition is required to meet state or federal law, and there is no feasible method to comply without making the development unaffordable.

4. The project is proposed on land zoned for agriculture or resource preservation OR that there is insufficient water or sewage facilities to serve the project (Cal. Gov. Code § 65589.5)

The amendments also strengthened the HAA by ensuring that local governments do not unfairly hinder the development of legally compliant housing projects. For example, the amendments increased the amount of evidence a jurisdiction needs to show to legally reject an application and clarifies that a jurisdiction must pay the plaintiff's attorney fees if the court finds they violated the HAA. Additionally, if a non-compliant local government does not comply with the HAA within 60 days of a court order, it will be fined a minimum of \$10,000 per housing unit (California YIMBY).

This inherently increases the feasibility of projects in cities previously hostile to development that are desirable to live in. It creates two pathways for these types of cities. First, they can avoid litigation by creating housing elements that are compliant with state law and approved by HCD, maintaining local control but being "forced" to upzone. Two examples we are seeing this outcome in are Alameda and San Francisco. The second pathway cities can take is to remain non-compliant and deal with legal

consequences. We have seen this create a cycle in which developers propose projects using Builder's Remedy, cities reject the project, and developers subsequently sue the cities. This is currently ongoing in Santa Monica and Huntington Beach. The trend for which path a city takes is often political and related to its track record on its openness to housing development. A researcher in Berkeley found that "If developers know they can invoke the builder's remedy, they still face hurdles to getting projects built, including requirements for potentially lengthy environmental reviews, that might discourage them. And developers might also make a political calculation that trying to invoke the penalty, and taking their fight to a courtroom, isn't worth the ill will it could buy them with local governments." Developers are less likely to invoke the Builders Remedy when they actually care about their relationship with the city and believe the city would be willing to work with them. If the city has always been hostile then that relationship wouldn't hinder whether the developer uses the builder's remedy as much. (Savidge)

What determines if a jurisdiction's housing element is compliant with HCD among other things is if it provides zoning and land to adequately build the amount of housing deemed necessary through the Regional Housing Needs Allocation (RHNA) process. This process involves HCD determining the regional housing need at a variety of affordability levels for each region's planning body or "council of governments" (COG), with input from the Department of Finance (DOF). In the Bay Area, our COG is called the Association of Bay Area Governments (ABAG). After this consultation with COGs regarding demographics and housing data, HCD issues the final regional housing need numbers for the region, which are

broken down by income categories. The determination accounts for both the existing and projected housing needs in each region. The COG is responsible for allocating the housing need amongst all of the jurisdictions (cities/counties) within that region using a methodology approved by HCD that promotes more economically and racially integrated communities by allocating housing to high-resource, job-rich areas, while also meeting the state's greenhouse gas reduction goals by encouraging infill development and the protection of environmental resources. (HCD)

Additionally, as part of jurisdictions getting their housing element approved, they need to provide HCD with an inventory of sites they claim are suitable for residential development, and an analysis of government constraints that hinder a jurisdiction from meeting its housing needs. So while jurisdictions themselves are not responsible for the actual development of housing, they need to prove that they allocated sufficient land for the amount of housing development they've been designated and have a process that will allow for development to take place. (HCD) As a result, housing policy in California rests largely on the effective implementation of local general plans and, in particular, local housing elements. As a result, housing policy in California rests largely on the effective implementation of local general plans and, in particular, local housing elements. (HCD)

Housing elements for this latest, the sixth, cycle in the Association of Bay Area Governments (ABAG) region, were required to comply with the current state housing element law by January 31, 2023. Housing element compliance requires both local approval and acceptance by HCD. Housing elements that were not adopted by the due date are out of compliance with state law until a complying hous-

ing element is adopted. There is no grace period, meaning any jurisdiction out of compliance that receives builders' remedy projects must honor the projects as proposed or face litigation. (ABAG)

In the past, opponents of housing developments have weaponized the California Environmental Quality Act (CEQA), to block projects. Luckily, while projects using the "Builder's Remedy" are not exempt from CEQA Review through the HAA, they may be exempt from CEQA under other provisions of CEQA, other state laws, or the CEQA Guidelines (ABAG). These include projects that are consistent with the Regional Transportation Plan & Sustainable Communities Strategy (RTP/SCS), projects within a half-mile of a major transit stop that are 200 units or less, and projects that are 6 units or less. (ABAG)

There are varying degrees of ease at which the Builder's Remedy could be applied. If a city missed the housing element deadline and did not adopt a new housing element, that is the best grounds for using Builder's Remedy. If the city adopted a housing element but HCD did not or has not approved it yet, Builder's Remedy will also apply but may require more litigation. Developers who wish to build a Builder's Remedy project must file an SB330 preliminary application, which includes a non-binding site plan and elevations. They will also be required to file a full application within 180 days. (YIMBY Law) This creates vested rights and locks in development requirements, standards, and fees.

So, is the Builder's Remedy solving housing problems? Currently, it is too early to tell. There have been tens of thousands of units proposed through the Builder's Remedy across California, especially in Southern California. These projects are being met with hostility from local governments,

contributing to ongoing legal battles, and resulting in no projects being built. Looking at YIMBY bills that have passed, in conjunction with the State Attorney General's aggressive approach to tackling the housing crisis and enforcing housing laws, it is likely that the majority of these projects will win their lawsuits against the city and will be able to be built as proposed. That is without complying with local zoning. This will ultimately aid these cities in reaching their housing targets, despite all the legal pushback. With the help of AB 215, which expands the State Attorney General's authority to enforce housing laws, grants HCD power to hire/appoint outside counsel, and created the Attorney General's Housing Strike Force, opponents to projects will face powerful opponents. (SCAG) With that being said, the Builder's Remedy will have done significantly more to building inclusionary housing in historically exclusionary areas than any existing legislation to date. One way it helps, perhaps indirectly, is that it incentivizes cities to pass compliant housing elements with sufficient upzoning to meet their target housing numbers as well as pulling back red tape to ease the building process.

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