
SENATE COMMITTEE ON HOUSING
Senator Nancy Skinner, Chair
2023 - 2024 Regular

Bill No: AB 1886 **Hearing Date:** 6/18/2024
Author: Alvarez
Version: 6/11/24 Amended
Urgency: No **Fiscal:** Yes
Consultant: Alison Hughes

SUBJECT: Housing Element Law: substantial compliance: Housing Accountability Act

DIGEST: This bill clarifies that a housing element or amendment is not considered substantially compliant with housing element law until the local agency has adopted a housing element that the Department of Housing and Community Development (HCD) has determined is in substantial compliance with housing element law, as specified.

ANALYSIS:

Existing law:

- 1) Requires each city and county to adopt a housing element, which must contain specified information, programs, and objectives, including:
 - a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs;
 - b) A statement of the community's goals, quantified objectives, and policies relative to affirmatively furthering fair housing and to the maintenance, preservation, improvement, and development of housing; and
 - c) A program that sets forth a schedule of actions during the planning period, and timelines for implementation, that the local government is undertaking to implement the policies and achieve the goals and objectives of the housing element.

- 2) Requires a planning agency to submit a draft housing element revision to HCD at least 90 days prior to adoption of a revision of its housing element pursuant to statutory deadlines, or at least 60 days prior for a draft amendment. Requires the local government to make the first draft revision of the housing element available for public comment for at least 30 days and, if any comments are received, requires the local government to take at least 10 business days after

the 30 day public comment period to consider and incorporate public comments into the draft revision prior to submitting it to HCD.

- 3) Requires HCD to review the draft and report its written findings to the planning agency within 90 days of its receipt of the first draft submittal for each housing element revision or within 60 days of receipt of a subsequent draft amendment or an adopted revision or adopted amendment to a housing element. Prohibits HCD from reviewing the first draft submitted for each housing element revision until the local government has made the draft available for public comment for at least 30 days and, if comments were received, has taken at least 10 business days to consider and incorporate public comments.
- 4) Requires HCD, in its written findings, to determine whether the draft element or draft amendment substantially complies with housing element law.
- 5) Requires a local government's legislative body to consider HCD's findings prior to the adoption of its draft element or draft amendment, and provides that if HCD's findings are not available within the time limits specified, the legislative body may act without them.
- 6) Requires a legislative body to take one of the following actions, if HCD finds that the draft element or draft amendment does not substantially comply:
 - a) Change the draft element or draft amendment to substantially comply; or
 - b) Adopt the draft element or draft amendment without changes, in which case the legislative body must include in its resolution of adoption written findings that explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with housing element law despite HCD's findings.
- 7) Requires the planning agency to submit a copy of an adopted housing element or amendment promptly to HCD following adoption.
- 8) Requires HCD to review adopted housing elements or amendments and report its findings to the planning agency within 60 days.
- 9) Requires HCD to review any action or failure to act by a local government that it determines is inconsistent with an adopted housing element or housing element law, including any failure to implement any program actions included in the housing element. Requires HCD to issue written findings to the local government as to whether the action or failure to act substantially complies with housing element law, and provide a reasonable time no longer than 30 days for the local government to respond to the findings before taking any other action, including revocation of substantial compliance.

- 10) Authorizes HCD, if it finds that an action or failure to act under (9) does not substantially comply with housing element law, and if it has issued findings that an amendment to the housing element substantially complies with this article, to revoke its findings until it determines that the local government has come into compliance.
- 11) Requires HCD to notify the local government and authorizes HCD to notify the office of the Attorney General that the local government is in violation of state law if HCD finds that the housing element or an amendment to the element, or any action or failure to act under (9), does not substantially comply with housing element law or that any local government has taken an action in violation of various specified housing laws.
- 12) Requires local governments on an eight-year housing element cycle with insufficient sites inventories to complete the rezoning of sites, including adoption of minimum density and development standards, no later than three years after either the date the housing element is adopted, as specified, or the date that is 90 days after the receipt of comments from HCD, whichever is earlier, unless the deadline is extended pursuant to existing law.
- 13) Notwithstanding (12), requires a local government that fails to adopt a housing element that HCD has found to be in substantial compliance with the law within 120 days of the statutory deadline for adoption of the housing element to complete the rezoning of sites no later than one year from the statutory deadline for adoption of the housing element.
- 14) Prohibits a local agency, pursuant to the Housing Accountability Act (HAA) from disapproving specified housing development projects or conditioning the approval of the housing development in a manner that renders the housing development infeasible for very low-, low-, or moderate-income households, unless it makes written findings that the jurisdiction has adopted a housing element that has been revised consistent with existing law, that is in substantial compliance with housing element law, and the jurisdiction has met or exceed its share of the housing needs allocation (RHNA) for the planning period, for the income category proposed for the housing development project, if the disapproval or conditional approval is not based on housing discrimination, as specified in existing law.
- 15) Requires a court, if it finds any portion of a general plan, including a housing element, out of compliance with the law, to include within its order or judgment one or more of the following remedies for any or all types of developments or any or all geographic segments of the city or county until the city or county has complied with the law, including;

- a) Suspension of the city's or county's authority to issue building permits;
 - b) Suspension of the city's or county's authority to grant zoning changes and/or variances;
 - c) Suspension of the city's or county's authority to grant subdivision map approvals;
 - d) Mandating the approval of building permits for residential housing that meet specified criteria;
 - e) Mandating the approval of final subdivision maps for housing projects that meet specified criteria; and
 - f) Mandating the approval of tentative subdivision maps for residential housing projects that meet specified criteria.
- 16) Defines a “compliant housing element” to mean an adopted housing element that has been found to be in substantial compliance with the requirements of housing element law by HCD.

This bill:

- 1) Requires each city and county, in addition to providing a copy of the adopted element or amendment, to also provide any findings that the draft element or draft amendment substantially complies with housing element law, despite other findings by HCD.
- 2) Requires HCD, within 60 days of receiving any findings by the city that their housing element substantially complies with housing element law despite findings by HCD, to review those findings and report its findings to the planning agency.
- 3) Provides that a housing element shall be considered to be in substantial compliance with housing element law when the local agency adopts the housing element or amendment for the current planning period in accordance with housing element law and either of the following apply:
 - a) HCD finds that the adopted housing element or amendment is in substantial compliance with housing element law and HCD's compliance finding have not been superseded by subsequent contrary findings by the department or by a decision of a court of competent jurisdiction.
 - b) A court of competent jurisdiction determines that the adopted housing element or amendment substantially complies with housing element law and the court's decision has not been overturned or superseded by a subsequent court decision or by statute.

- 4) Provides, for purposes of the HAA, that for purposes of a local agency's approval, conditional approval, or disapproval of a housing development project, a housing element or amendment shall be considered in substantial compliance with housing element law only if the element or amendment was in substantial compliance as determined by HCD or a court of competent jurisdiction, when a preliminary application or a complete application was submitted. This provision is declaratory of existing law.
- 5) Adds legislative intent that clarifications made to housing element law by this bill are intended to ratify the regulatory interpretation by a specific memo issued by HCD on March 16, 2023, as specified.

COMMENTS:

- 1) *Author's statement.* "Despite being a powerful tool to incentivize housing in cities that are refusing to build enough, the so-called Builder's Remedy, which prohibits a city without a compliant housing element from denying a project based on its zoning code or general plan, was largely unused for decades. However, given the recent change in support for more housing, which has shifted the power dynamic between local governments and developers, we have seen a significant uptick in Builder's Remedy projects. Unfortunately, we are also beginning to see Builder's Remedy related lawsuits after cities erroneously reject projects using self-certification arguments. This issue directly results from a lack of clarity in the code related to compliance with Housing Element Law. AB 1886 seeks to resolve this problem by clarifying that HCD determination of compliance is the trigger for the Builder's Remedy, development standards only apply if a city is in compliance, and Builder's Remedy projects remain eligible if the application was submitted while the city was not in compliance."
- 2) *Background: housing elements.* Cities and counties are required to develop a housing element as part of the general plan every eight years (every five years for some rural areas). Cities must submit their housing element to HCD for approval by a specified date and currently most local governments should have adopted their housing element or be in the process of finalizing their sixth housing element. Each local agency receives a total number of housing units to plan for broken down by income category. The housing element must identify programs to increase the supply of housing, address inequities in the housing market, and reduce barriers to producing housing and an inventory of sites that are zoned for housing at the density necessary to result in housing. Out of 598 cities, 212 have not adopted a compliant housing element and are therefore considered out of compliance with the law.

Local governments have a statutory deadline to submit a housing element based on region. Ninety days before the deadline to adopt a housing element, cities must submit a draft to HCD. HCD is required to review the draft element within 90 days of receipt and provide written findings as to whether the draft amendment substantially complies with housing element law. If HCD finds that the draft element does not substantially comply with the law, the local agency may either make changes to the draft element to substantially comply with the law or adopt the element and make findings as to why a local agency it complies with the law despite the findings of the department. Following adoption of a housing element, a local agency submits it to HCD. When a local government adopts its housing element without making the changes HCD provides, the process is called “self-certification.” Despite the fact that the process allows a local agency to adopt a housing element without making the changes required by HCD to be in substantial compliance, a local agency is not considered compliant until receiving ultimate approval from HCD.

- 3) *Consequences of not complying with housing element law.* Over the last seven years, the Legislature has strengthened the consequences for local agencies who are out of compliance or who amend their zoning after their housing element is found compliant. Local agencies cannot qualify for state funding for affordable housing, or infrastructure for affordable housing without a compliant housing element. AB 72 (Santiago, Chapter 72, Statutes of 2017) gave HCD explicit authority to find a local agency’s housing element out of substantial compliance if it determines that the local agency acts or fails to act in compliance with its housing element, and allows HCD to refer violations of law to the Attorney General (AG). Both the AG and HCD have units with dedicated staff to enforce housing element law and other land use laws passed by the legislature. The AG can also sue a city for non-compliance and the court can issue fines up to \$10,000 a day after the local agency fails to comply for an additional 12 months. After an additional six months of non-compliance, the court may increase the fines by six times.

In addition, an action can be brought to challenge the validity of a local agency’s general plan, including a housing element. If a court determines that a housing element does not substantially comply with housing element law, the court is required to take actions, including suspending the local government’s authority to issue any kind of building permit (renovations, commercial and residential building permits); suspending the local agency’s authority to grant zoning changes and/or variances; suspending the local agency’s authority to grant subdivision map approvals; mandating the approval of building permits for residential housing that meet specified criteria; mandating the approval of final subdivision maps for housing projects that meet specified criteria; and mandating the approval of tentative subdivision maps for residential housing

projects that meet specified criteria. If HCD has determined that a city's adopted housing element does not substantially comply with state law, a party may send a notice to the city within two years of the adoption of that housing element, and a cause of action for that party to challenge the housing element will accrue (at the latest) 60 days after the notice is sent.

Lastly, if a local government fails to adopt a substantially compliant housing element, it can be subject to the "builders remedy" in the HAA (see comment 4).

- 4) *Housing Accountability Act (HAA)/Builder's Remedy.* In 1982, the Legislature enacted the HAA, the purpose of which was to ensure that a city does not reject or make infeasible housing development projects that contribute to meeting the housing need determined pursuant to the housing element law without a thorough analysis of the economic, social, and environmental effects of the action and without complying with the HAA. The HAA restricts a city's ability to disapprove, or require density reductions in, certain types of residential projects. The HAA does not preclude a locality from imposing developer fees necessary to provide public services or requiring a housing development project to comply with objective standards, conditions, and policies appropriate to the locality's share of the RHNA.

One such constraint on local governments authority to disprove housing, which has gained recent attention is the "Builder's Remedy." The Builder's Remedy prohibits a local government from denying a housing development that includes 20% lower-income housing that does not conform to the local government's underlying zoning, if the local government has not adopted a compliant housing element. A number of developers have attempted to use the Builders Remedy in the last few years.

- 5) *Self-certification.* In order to avoid the penalties and consequences for failing to comply with housing element law, some local governments have attempted to "self-certify" their housing elements.

For example, the City of Beverly Hills "self-certified" its housing element – *i.e.*, adopted a housing element that had not been certified as substantially compliant with housing element law by HCD – by failing to adopt the necessary changes HCD required to be in compliance. In January of 2023, Californians for Homeownership sued the City of Beverly Hills for failing to adopted a housing element that included adequate sites to meet the city's RHNA obligations. The court found in favor of the plaintiff and suspended the city's authority to take any of the actions previously listed. On March 18, 2024, HCD

approved Beverly Hills' revised housing element, a plan that creates capacity for 3,100 additional housing units.

Another example is the City of La Cañada Flintridge, which failed to adopt a compliant housing element. Using the Builder's Remedy, a developer proposed a project for 80 units of affordable housing on church-owned land that was not zoned for housing or for density to accommodate the proposed project. The City denied the project and developer sued. The City of La Cañada Flintridge argued it was not required to process an application under the HAA to approve a housing development that did not comply with their underlying zoning because it had "self-certified" its housing element. The court ruled that the city was not in compliance despite the fact that it had "self-certified" and found the housing element the city adopted out of compliance with housing element law for various reasons.

- 6) *Let's be clear.* Although the statute is clear that HCD (and not a local government) determines whether a housing element is in compliance with the law – a point reinforced by the courts, as noted in the examples above – this bill would further clarify that a housing element is not in compliance until both a local agency has adopted a housing element and HCD has found the element in compliance. This bill would eliminate arguments made by local governments that by "self-certifying" or adopting a housing element that does not reflect HCD's findings, the local government satisfies the requirement for compliance per the "builder's remedy."

The bill also makes clear that these changes are declaratory of existing law and consistent with guidance provided by HCD in a memo dated March 16h, 2023, which states in relevant part that "where a jurisdiction submits an 'adopted' housing element before submitting an initial draft or before considering HCD's findings on an initial draft, HCD will consider the 'adopted' to be an initial draft for purposes of both HCD's review and the jurisdiction's statutory compliance" and that "a jurisdiction does not have the authority to determine that its adopted element is in substantial compliance but may provide reasoning why HCD should make a finding of substantial compliance."

- 7) *Opposition.* Several cities are opposed to this bill because it "takes away" the opportunity for self-certification regardless of whether HCD concurs with the submitted housing element. Cities write that they should be entitled to this process if there is a good faith disagreement with HCD.

RELATED LEGISLATION:

AB 2023 (Quirk-Silva, 2024) — creates a rebuttable presumption of invalidity in any legal action challenging a local government's action or failure to act if HCD finds that the action or failure to act does not substantially comply with the local government's adopted housing element or housing element obligations, among other changes. *This bill is set to be heard in the Senate Housing Committee on June 24, 2024.*

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

POSITIONS: (Communicated to the committee before noon on Wednesday, June 12, 2024.)

SUPPORT:

California Building Industry Association (Co-Sponsor)
SPUR (Co-Sponsor)
Abundant Housing LA
California Apartment Association
California Building Industry Association (CBIA)
California Chamber of Commerce
California Community Builders
California Hispanic Chamber of Commerce
California Housing Consortium
California Housing Partnership Corporation
California Rural Legal Assistance Foundation, INC.
California YIMBY
Circulate San Diego
CivicWell
East Bay YIMBY
Fieldstead and Company, INC.
Grow the Richmond
Housing Action Coalition
Housing California
Housing Trust Silicon Valley
How to ADU
LeadingAge California
Mountain View YIMBY
Napa-Solano for Everyone
Northern Neighbors
Peninsula for Everyone

People for Housing Orange County
Progress Noe Valley
Public Interest Law Project
San Diego Housing Federation
San Diego Regional Chamber of Commerce
San Francisco YIMBY
San Luis Obispo YIMBY
Santa Cruz YIMBY
Santa Rosa YIMBY
South Bay YIMBY
Southside Forward
Streets for People
Urban Environmentalists
Ventura County YIMBY
YIMBY Action

OPPOSITION:

Catalysts for Local Control
Cities Association of Santa Clara County
City of Beverly Hills
City of Carlsbad
City of Cloverdale
City of Corona
City of Elk Grove
City of Fairfield
City of Fullerton
City of Grass Valley
City of Huntington Beach
City of Lakeport
City of Manhattan Beach
City of Norwalk
City of Oakdale
City of Palm Desert
City of Rancho Cucamonga
City of Rancho Palos Verdes
City of Rancho Santa Margarita
City of San Luis Obispo
City of Santa Clarita
City of Santa Paula
City of Yorba Linda
League of California Cities

Livable California

Los Angeles County Division, League of California Cities

Save Lafayette

Tri-valley Cities of Dublin, Livermore, Pleasanton, San Ramon, and Town of Danville

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