



City Council

Developers capitalize on Housing Element fiasco to force 3,968 undeniable units into the city's pipeline



by Emily Sawicki
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Address	Market Rate Units	Affordable Units	# of Stories	Preliminary SB330 Application	Formal SB330 Application
1420-22 20th St	45	9	5	X	
1215 19th	0	34	6	X	X
1437 6th St	145	29	9	X	
601 Colorado	213	43	9	X	
1524 7th St	213	43	9	X	
1443 Lincoln Blvd	145	29	9	X	
3030 Nebraska (aka 3000 Nebraska Ave)	2000	400	15	X	
2901 Santa Monica Blvd	222	45	12	X	
1425 5th St (aka 1435 5th St)	360	72	10	X	
1557 7th (aka 707 Colorado)	215	43	9	X	
1238 7th St	70	14	10	X	
1925 Broadway	340	68	11	X	
Total	3968	829			

Get ready for Santa Monica's next development boom. Nearly 4,000 new housing units, including a 15-story residential building at Nebraska and Stanford, could be rubber stamped in Santa Monica after the City failed to produce a compliant Housing Element in 2021.

As of latest count, a 2,000-unit 15-story development is vested for 3030 Nebraska Avenue; a 222-unit 12-story development is vested for 2901 Santa Monica Boulevard; and an 11-story, 340-unit development is vested for 1925 Broadway. In total, 12 projects totaling 3,968 housing units have been submitted for approval since the City's local zoning ordinances were suspended due to its Housing Element (a document that describes how the city will meet State housing goals) falling out of compliance.

Exhibit 2
Item 7-C, November 3, 2022
Historical Advisory Board Meeting

<https://smdp.com/2022/10/12/new-15-story-project-automatically-approved-due-to-late-housing-element/>

The news was announced during the Tuesday, Oct. 11, Santa Monica City Council meeting, where council members unanimously approved the final version of the 2021-29 Sixth Cycle Housing Element, one year after its initial version was submitted, and later rejected, by the California Department of Housing and Community Development (HCD).

That rejection resulted in a major penalty for Santa Monica: Because of a 2019 state law, the ability to approve or reject certain housing projects was temporarily taken out of local leaders' hands through what is known as a "builder's remedy" application process.

"A builder's remedy project does not need to comply with zoning or General Plan standards — it can be much larger than the City would otherwise permit," according to a memo City staff prepared for council members this month. "The City cannot deny a builder's remedy project solely on the basis that it does not comply with the zoning ordinance or General Plan." The only grounds for denial, according to the memo, would be if a project is proven to "have a specific, adverse impact upon the public health or safety."

HCD correspondence with the City suggests all housing projects submitted since the City failed to meet a February compliance deadline have earned automatic permit approval, so long as they met the standard for serving low-and moderate-income households. That means any housing project that committed at least 20% of its units as affordable to lower income households or 100% as affordable to moderate income households makes the cut.

"If the 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," according to a letter submitted to the City by HCD Proactive Housing Accountability Unit Chief Melinda Coy last month.

Since February, the door has been open for housing developers to submit projects without restrictions under SB 330, the Housing Crisis Act of 2019 that "prohibits a local agency from disapproving, or conditioning approval in a manner that renders infeasible, a housing development project for very low, low-, or moderate-income households or an emergency shelter unless the local agency makes specified written findings based on a preponderance of the evidence in the record."

According to the Housing Crisis Act, such projects cannot be denied if they comply with zoning plans and criteria "that were in effect at the time the application was deemed to be complete." Because the Housing Element fell out of compliance, Santa Monica's zoning laws were suspended for more than six months of 2022, opening the door for a dozen (and counting) applications for new projects.

If and when the final revised Housing Element is approved — which seems certain, according to city staff — development rules will fall back under the purview of the City of Santa Monica. As of press time, the version was not yet formally approved, meaning, in the words of Councilmember Phil Brock, "anybody else can rush in" and submit a last-minute project for rubber stamp approval by the HCD.

All seven council members approved the final version of the Element, which upzones some commercial zones such as “commercial l boulevards north of the I-10 freeway (Wilshire, Santa Monica Boulevard, Broadway, Colorado, Olympic), Bergamot, and Downtown” with a goal of preserving lower density in more traditionally residential neighborhoods. The Housing Element must show the City has plans to allow for an additional nearly 9,000 new residential units to be constructed in the next decade, though due to HCD feedback city staff have amended that goal to 13,000 to ensure compliance in the final version.

That final version came too little, too late to allow development-averse council members to weigh in on the dozen projects now vested in the pipeline.

“We’re already, to put it lightly, 12 projects in the hole,” Councilmember Glean Davis said, later adding, “no matter what we do tonight.”

The final deadline for approval is Saturday. Should the revised version still fail to earn HCD approval, builder’s remedy projects could continue to be submitted until the City completes rezoning to meet its housing needs assessment. If constructed, the almost 5,000 new units would go a long way toward meeting Santa Monica’s state-mandated housing goals for this decade.

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Editor’s note: Internal City of Santa Monica documents provided prior to the publishing of this story listed “market rate” as well as “affordable” units for each of the 12 applications. The City later clarified that it defines “market rate” to mean all units. Therefore, the original version of this story included incorrect data. The story has now been updated with correct information.

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DISCLAIMER: This document is intended solely as a technical overview of the provisions of certain provisions of the Housing Accountability Act. It is not intended to serve as legal advice regarding any jurisdiction's specific policies or any proposed housing development project. Local staff should consult with their city attorney or county counsel when determining the applicability of these provisions to any proposed housing development project in their jurisdiction.

The “Builder’s Remedy” and Housing Elements

There have recently been press reports regarding the so-called “Builder’s Remedy” that can be used to avoid local zoning requirements when a locality’s housing element does not substantially comply with state law. These reports have stated that, if a locality has a noncompliant housing element the city or county must approve the housing development project, regardless of the local zoning.

The “Builder’s Remedy” arises from the Housing Accountability Act (Government Code Section 65589.5¹; the HAA). This paper describes the provisions of the HAA that constitute the “Builder’s Remedy” and how they may apply to a proposed housing development project.

How Does the “Builder’s Remedy” Work?

The HAA requires that cities and counties make one of five findings to deny, or to apply conditions that make infeasible, a housing development project “for very low, low- or moderate-income households” or an emergency shelter. (Section 65589.5(d).) A housing development project with 20 percent of the total units available to lower income households or with all of the units available for moderate or middle income households may qualify as housing “for very low, low- or moderate income households” (see detailed description below). The five findings which would allow denial of an eligible project can be summarized as follows:

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 public 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 that is surrounded on at least two sides by land being used for agriculture or resource preservation or there are not adequate water or sewage facilities to the serve the project.

¹ All future references are to the Government Code unless otherwise specified.



Regional Housing Technical Assistance Program

5. The project is inconsistent with both the zoning ordinance and the land use designation as specified in any general plan element. **However, a city or county cannot make this finding if it has not adopted a housing element in substantial compliance with state law.**

If a locality has not adopted a housing element in substantial compliance with state law, developers may propose eligible housing development projects that do not comply with either the zoning or the general plan. The term “Builder’s Remedy” is used to describe the situation where a local agency may be required to approve an eligible housing development project because it cannot make one of the other four findings.

Are Projects Using the “Builder’s Remedy” Exempt from CEQA Review?

The HAA contains no exemptions from the California Environmental Quality Act. The HAA states specifically that nothing relieves the local agency from making the required CEQA findings and otherwise complying with CEQA. (Section 65589.5(e).) A project may be exempt from CEQA under other provisions of CEQA, other state laws, or the CEQA Guidelines.

When Does a Housing Element No Longer Comply with State Law? Is There a Grace Period If the Housing Element Is Not Adopted by the Due Date?

Housing elements are required to comply with current state housing element law on the established due date (**January 31, 2023** in the ABAG region). State law has changed significantly since fifth cycle housing elements were adopted, and it would be unlikely that a fifth cycle housing element would substantially comply with current state law. If a sixth cycle element has not been adopted by the due date, the housing element would likely be out of compliance with state law until a complying sixth cycle housing element is adopted. **There is no grace period**, even for the period when a housing element is being reviewed by the Department of Housing and Community Development (HCD).

HCD approval is not required for a housing element to be found substantially compliant with state law. State law provides that a city or county may adopt its own findings explaining why its housing element is substantially compliant with state law despite HCD’s findings. (Section 65585(f).) However, HCD is authorized to refer agencies to the Attorney General if it finds a housing element out of compliance with state law. (Section 65585(j).)

Are a Local Agency’s Development Standards Null and Void If the Housing Element is Not in Compliance with State Law?

No, the local agency’s development standards are not null and void if the housing element is not in substantial compliance with state law. The “Builder’s Remedy,” however, may require a local agency to approve an eligible housing development project despite its noncompliance with local development standards. Conversely, other projects may be challenged because a finding of general plan consistency cannot be made if the general plan is out of compliance with state law.

What Projects Are Eligible to Use the “Builder’s Remedy”?

The “Builder’s Remedy” applies only to a housing development project “for very low, low- or moderate-income households” and to emergency shelters. The HAA defines a “housing development project” as either:

- Residential units only;
- Mixed-use developments with at least two-thirds of the square footage designated for residential use; or



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- Transitional housing or supportive housing.² (Section 65589.5(h)(2).)

“Housing for very low, low-, or moderate-income households” includes either:

- 20% of the total units sold or rented to lower income households;
- 100% of the units sold or rented to moderate income households; or
- 100% of the units sold or rented to middle income households.³

Monthly housing costs for lower income households cannot exceed 30 percent of 60 percent of median income, adjusted for household size, and the units must remain affordable for 30 years. Monthly housing costs for moderate income households cannot exceed 30 percent of 100 percent of median income. There are no standards in the HAA for housing costs for middle income households. (Sections 65589.5(h)(3), (h)(4).)

An emergency shelter is housing with minimal supportive services for homeless persons that is limited to occupancy of six months or less by a homeless person. No individual or household may be denied emergency shelter because of an inability to pay. (Section 65582(d); Health & Safety Code Section 50801(e).)

² As defined in Section 65582.

³ Those earning no more than 150 percent of median income.