

Date of Hearing: April 24, 2024

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Juan Carrillo, Chair

AB 1886 (Alvarez) – As Amended April 15, 2024

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

SUMMARY: Clarifies that a housing element is substantially compliant with Housing Element Law, when both a local agency adopts the housing element and Department of Housing and Community Development (HCD) or a court finds it in compliance, for purposes of specified provisions of the Housing Accountability Act (HAA). Specifically, **this bill:**

- 1) Provides that when a planning agency adopts a housing element or amendment without changes after receiving feedback from HCD, the agency must submit to HCD its adopted element or amendment and its written findings that explain the reasons the legislative body believes that the draft element or amendment substantially complies with Housing Element Law, despite the findings of the department.
- 2) Requires HCD to review findings that explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with Housing Element Law, despite the findings of the department, make a finding as to whether the element or amendment is in substantial compliance with the law, and report that finding to the planning agency.
- 3) Provides that for purposes of disapproving or conditionally approving a housing development project for very low, low-, or moderate-income households, a housing element or amendment is considered substantially compliant with the Housing Element Law when both of the following conditions are satisfied:
 - a) The local agency adopts the housing element or amendment in accordance with existing law; and
 - b) HCD or a court of competent jurisdiction determines the adopted housing element or amendment is in substantial compliance with Housing Element Law.
- 4) Provides that, declaratory of existing law, a housing element or amendment shall continue to be considered in substantial compliance with Housing Element Law until either of the following occur:
 - a) HCD or a court of competent jurisdiction determines that the adopted housing element or amendment is no longer in substantial compliance with this article; or
 - b) The end of the applicable housing element cycle.
- 5) Provides that in any legal proceeding initiated to enforce the provisions of Housing Element Law, HCD's findings as to whether or not a local agency has a compliant housing element shall create a rebuttable presumption of validity as to whether the adopted element or amendment substantially complies with Housing Element Law.

- 6) Provides that for purposes of disapproving or conditionally approving a housing development project for very low, low-, or moderate-income households, a housing element or amendment shall be considered in substantial compliance, as determined by HCD or a court of competent jurisdiction, when a preliminary application, including all of the information required by SB 330 (Skinner), Chapter 654, Statutes of 2019, was submitted or, if a preliminary application was not submitted, when a complete application pursuant to SB 330 (Skinner) was submitted. This provision is declaratory of existing law.
- 7) Provides that no reimbursement is required by this bill as specified by California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by the bill.

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, including a quantification of the locality's existing and projected housing needs for all income levels; an inventory of land suitable and available for residential development; an analysis of potential and actual governmental and nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels; and a demonstration of local efforts to remove constraints that hinder the locality from meeting its share of the regional housing need, among other things;
 - 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, including actions that will be taken to make sites available during the planning period with appropriate zoning and development standards and with services and facilities to accommodate that portion of the local government's share of the regional housing need for each income level that could not be accommodated on sites identified in the sites inventory without rezoning, among other things. (Government Code (GC) Section 65583(a)-(c))
- 2) Requires a local government's inventory of land suitable for residential development to be used to identify sites throughout the community that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels. Defines "land suitable for residential development" to include:
 - a) Vacant sites zoned for residential use;
 - b) Vacant sites zoned for nonresidential use that allows residential development;

- c) Residentially zoned sites that are capable of being developed at a higher density, including sites owned or leased by a jurisdiction; and
 - d) Sites zoned for nonresidential use that can be redeveloped for residential use, and for which the housing element includes a program to rezone the site, as necessary and as specified. (GC 65583.2(a))
- 3) 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. For any subsequent draft revision, the local government must post the draft on its website and email a link to all individuals and organizations that have previously requested notices related to the housing element at least seven days before submitting the draft revision to HCD. (GC 65585(b)(1))
 - 4) 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. (GC 65585(b)(3))
 - 5) Requires HCD, in its written findings, to determine whether the draft element or draft amendment substantially complies with housing element law. (GC 65585(d))
 - 6) 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. (GC 65585(e))
 - 7) 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. (GC 65585(f))
 - 8) Requires the planning agency to submit a copy of an adopted housing element or amendment promptly to HCD following adoption. (GC 65585(g))
 - 9) Requires HCD to review adopted housing elements or amendments and report its findings to the planning agency within 60 days. (GC 65585(h))

- 10) 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. (GC 65585(i)(1)(A))
- 11) Authorizes HCD, if it finds that an action or failure to act under 10) 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. (GC 65585(i)(2)(B))
- 12) 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 10), does not substantially comply with housing element law or that any local government has taken an action in violation of various specified housing laws. (GC 65585(j))
- 13) 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. (GC 65583(c)(1)(A))
- 14) Notwithstanding 13), 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. (GC 65583(c)(1)(A) and GC 65588(e)(4)(C)(i))
- 15) Establishes a rebuttable presumption of the validity of a housing element or amendment in any action filed on or after January 1, 1991, taken to challenge the validity of a housing element, if HCD has found that the element or amendment substantially complies with housing element law. (GC 65589.3)
- 16) Prohibits a local agency from disproving a housing development project, that includes either 20%, very low, low income housing, 100% moderate income housing, an emergency shelter, or including farmworker housing condition the approval of the housing development in a manner that renders the housing development infeasible for very low, low, or moderate income households, or an emergency shelter, including through the use of design review standards, unless it makes written finding, based on a preponderance of the evidence 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 (GC 65598.5).

- 17) 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 or county's authority to issue building permits;
 - b) Suspension of the city or county's authority to grant zoning changes and/or variances;
 - c) Suspension of the city 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. (GC 65755)
- 18) 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 the department pursuant to Section 65585. (GC 65589.9)

FISCAL EFFECT: This bill is keyed fiscal and contains a state-mandated local program.

COMMENTS:

- 1) **Bill Summary.** AB 1886 clarifies that the Department of Housing Community Development (HCD) or a court determine whether a housing element is compliant with state law. This bill requires a housing element or amendment to be considered in substantial compliance with the Housing Element Law only if the element or amendment was determined to be in substantial compliance when a preliminary application or complete application was submitted, as specified. This bill is sponsored by SPUR and CBIA.
- 2) **Author’s Statement.** According to the author, “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. 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 substantial compliance, and Builder’s Remedy projects remain eligible if the application was submitted while the city was not in compliance.”

- 3) **Housing Element.** 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 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 believes that the draft element or draft amendment substantially complies with the law despite the findings of the department. Following adoption of a housing element, a local agency submits the element to HCD. When a local government adopts their housing element without making the changes HCD provides, the process has been 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.

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.

The City of Beverley Hills "self-certified" their housing element but failed to adopt the necessary changes HCD required to be in compliance. In January of 2023, Californians for Homeownership sued the City of Beverley Hills for failing to adopt a housing element that included adequate sites to meet the city's regional housing needs allocation (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 Beverley Hills' housing element, a plan that creates capacity for 3,100 additional housing units. Local agencies with non-compliant housing elements are also subject to the Builders Remedy.

- 4) **Housing Accountability Act (HAA) and the Builder's Remedy.** In 1982, the Legislature enacted the Housing Accountability Act (HAA). The purpose of the HAA is to help 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.

The City of La Cañada Flintridge 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 they were not required to process an application under the HAA to approve a housing development that did not comply with their underlying zoning because they had "self-certified" their housing element by adopting a housing element, even though it was not certified as compliant by HCD. The court ruled that the city was not in compliance despite the fact that they had "self-certified" and found the housing element the city adopted out of compliance with Housing Element Law for various reasons.

Although statute is clear that HCD determines if a housing element is in compliance, this bill would further clarify that a housing element is in compliance when both a local agency has adopted a housing element and HCD had 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.

- 5) **Rebuttable Presumption.** Existing law establishes a rebuttable presumption of the validity of a housing element or amendment in any action filed on or after January 1, 1991, taken to challenge the validity of a housing element, if HCD has found that the element or amendment substantially complies with housing element law. This bill restates the rebuttable presumption for purposes of legal proceedings.
- 6) **Arguments in Support.** According to the sponsor, SPUR, “AB 1886 clarifies that HCD or a court of competent jurisdiction determines whether the housing element substantially complies with the law and, therefore, when the Builder’s Remedy may be utilized. Existing law affirms such projects submitted during the period of non-compliance must be accepted.”
- 7) **Arguments in Opposition.** The city of Garden Grove writes in opposition, “AB 1886 encourages builder’s remedy projects by eliminating self-certification for the purpose of what it means to have a housing element ‘in substantial compliance with the law.’ The ‘builder’s remedy’ allows a developer to choose any site other than a site that is identified for very low-, low-, or moderate-income housing, and construct a project that is inconsistent with both the city’s general plan and zoning. AB 1886 facilitates such projects for those cities that have a good faith disagreement based in substantial evidence.”
- 8) **Related Legislation.**
- a) AB 1893 (Wicks) would set density and objective standards for housing development projects that cannot be denied or provided conditional approval if a local agency does not have a compliant housing element. This bill is pending in this Committee. .
 - b) AB 2023 (Quirk-Silva) would create a rebuttable presumption of invalidity in any legal action challenging a local government’s action or failure to act if the Department of Housing and Community Development (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 pending in this Committee.
- 9) **Double-Referral.** This bill was double-referred to the Committee on Housing and Community Development where it passed out on a 7-0 vote on April 10, 2024.

REGISTERED SUPPORT / OPPOSITION:

Support

Abundant Housing LA
 California Apartment Association
 California Building Industry Association
 California Building Industry Association (CBIA)
 California Chamber of Commerce
 California Community Builders
 California Hispanic Chambers of Commerce
 California Yimby
 Circulate San Diego
 Civicwell

Construction Employers' Association
East Bay for Everyone
East Bay Yimby
Fieldstead and Company, INC.
Grow the Richmond
Housing Action Coalition (UNREG)
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
People for Housing Orange County
Progress Noe Valley
San Diego Housing Federation
San Francisco Bay Area Planning and Urban Research Association (SPUR)
San Francisco Yimby
San Luis Obispo Yimby
Santa Cruz Yimby
Santa Rosa Yimby
Southside Forward
Spur
Streets for People
Urban Environmentalists
Ventura County Yimby
Yimby Action
Yimby Democrats of San Diego County

Oppose

City of Corona
City of Garden Grove
Fullerton; City of
New Livable California
Placentia; City of
Stanton; City of

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