

Date of Hearing: April 24, 2024

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Juan Carrillo, Chair

AB 2023 (Quirk-Silva) – As Amended March 21, 2024

SUBJECT: Housing element: inventory of land: rebuttable presumptions

SUMMARY: Creates 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. Specifically, **this bill:**

- 1) 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 its housing element obligations.
- 2) Establishes that in any action filed on or after January 1, 1991, taken to challenge the validity of a housing element, there is a rebuttable presumption of the invalidity of the housing element or amendment if HCD has found that the element or amendment does not substantially comply with housing element law.
- 3) Requires, for adoption of the seventh and all subsequent revisions of the housing element, rezonings to be completed no later than one year from the statutory deadline for adoption of the housing element.
- 4) Notwithstanding 3), for adoption of the seventh and all subsequent revisions of the housing element, requires rezonings to be completed no later than three years after either the date the housing element is adopted or the date that is 90 days after receipt of comments from HCD, whichever is earlier, unless the deadline is extended pursuant to existing law, if the local government complies with all of the following:
 - a) The local government submits a draft element or draft amendment to HCD for review at least 90 days before the statutory deadline for adoption of the housing element;
 - b) The local government receives from HCD findings that the draft element or draft amendment substantially complies with housing element law on or before the statutory deadline for adoption of the housing element; and
 - c) The local government adopts the draft element or draft amendment that HCD found to substantially comply with housing element law no later than 120 days after the statutory deadline.
- 5) Requires any change to a draft element or draft amendment, made by a legislative body due to a lack of substantial compliance with housing element law, to conform to existing law timelines for public comment, HCD and stakeholder review, and consultation, as specified. Provides that this does not constitute a change in, but is declaratory of, existing law.

- 6) Provides that the existing law requirement for a planning agency to promptly submit a copy of its housing element or amendment to HCD following adoption shall not be construed to excuse a legislative body from complying with the existing law requirement for the legislative body to take certain actions if HCD finds that the draft element or draft amendment does not substantially comply with housing element law. Provides that this does not constitute a change in, but is declaratory of, existing law.
- 7) Makes conforming and technical changes.

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 (GOV) § 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. (GOV § 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. (GOV § 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. (GOV § 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. (GOV § 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. (GOV § 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. (GOV § 65585(f))
- 8) Requires the planning agency to submit a copy of an adopted housing element or amendment promptly to HCD following adoption. (GOV § 65585(g))
- 9) Requires HCD to review adopted housing elements or amendments and report its findings to the planning agency within 60 days. (GOV § 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. (GOV § 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. (GOV § 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. (GOV § 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. (GOV § 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. (GOV § 65583(c)(1)(A) and GOV § 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. (GOV § 65589.3)

FISCAL EFFECT: This bill is keyed fiscal.

COMMENTS:

- 1) **Timely Adoption and Implementation of Housing Elements:** One important tool in addressing the state's housing crisis is to ensure that all of the state's 539 cities and counties appropriately plan for new housing. Such planning is required through the housing element of each community's General Plan, which outlines a long-term plan for meeting the community's existing and projected housing needs. Cities and counties are required to update their housing elements every eight years in most highly populated parts of the state, and five years in areas with smaller populations. Cities must adopt a legally valid housing element by their statutory deadline for adoption. Failure to do so can result in certain escalating penalties, including exposure to the "builder's remedy" as well as public or private lawsuits, financial penalties, potential loss of permitting authority, or even court receivership. Local governments that do not adopt a compliant housing element within 120 days from their

statutory deadline also must complete any rezones within one year of their deadline, rather than the three years afforded to on-time adopters.

Among other things, the housing element must demonstrate how the community plans to accommodate its share of its region's housing needs. To do so, each community establishes an inventory of sites designated for new housing that is sufficient to accommodate its fair share. Where a community does not already contain the existing capacity to accommodate its fair share of housing, it must undertake a rezoning program to accommodate the housing planned for in the housing element. Depending on whether the jurisdiction met its statutory deadline for housing element adoption, it will have either one year (if it failed to meet the deadline) or three years (if it met the deadline) from its adoption deadline to complete that rezoning program.

- 2) **Rebuttable Presumption:** HCD is the expert agency charged with reviewing local housing elements for compliance with the law and issuing findings as to whether the housing element meets the law's requirements. Once HCD agrees that a local housing element complies with the law, the housing element has a rebuttable presumption of validity in a legal challenge. This means that HCD's finding of compliance receives deference in court and a party challenging the validity of the element has a high bar to meet to prove that HCD was incorrect.

However, the author and sponsors point out there is no comparable provision that establishes a rebuttable presumption of invalidity for a housing element that HCD has found does not meet legal requirements or for an action or failure to act that does not substantially comply with a local government's adopted housing element. Under existing law, a finding of noncompliance by HCD is therefore much easier to ignore or overcome than would be a finding entitled to a legal presumption of noncompliance.

- 3) **One-Year vs. Three-Year Rezone Allowance:** Before 2022, jurisdictions that failed to adopt a housing element within 120 days of the statutory deadline were required to complete their rezoning program no later than three years and 120 days from that statutory deadline. Jurisdictions that had completed and adopted their housing element within appropriate timelines were afforded three years from either the date the housing element was adopted, or from the date that is 90 days after receipt of comments from HCD, whichever was earlier, to complete their rezones.

In 2021, AB 1398 (Bloom), Chapter 358, significantly modified this provision by instead requiring late adopters to complete their rezones no later than one year after their statutory deadline to adopt a housing element. That bill also clarified a local government had to adopt a housing element that HCD had found to be in substantial compliance with housing element law by the 120-day cutoff in order to still be eligible for the three-year rezone window – not simply a housing element in general, which may or may not have been deemed compliant by HCD.

Despite these changes, the sponsors point out some local governments have sought to rush to adopt draft housing elements very close to the 120-day grace period cutoff – before HCD has provided written findings on their draft – in order to stay within the three-year rezone allowance rather than the one-year timeline, with the hope that HCD would deem the draft compliant after the fact. This potentially rewards local governments who are not following

the letter of the law with regard to timelines that require submittal of a draft element to HCD at least 90 days before the statutory deadline, and other requirements that a local government's legislative body must consider HCD's findings prior to the adoption of its draft element or draft amendment.

This bill proposes to tighten this provision for the seventh and subsequent cycles by requiring, in order for a local government to stay within the three-year rezone period, the local government to have submitted a draft element to HCD at least 90 days before the statutory deadline for adoption, have received written findings from HCD by the statutory deadline that the draft substantially complies with housing element law, and have adopted the draft no later than 120 days after the statutory deadline. If any of those conditions are not met, the locality would be subject to the one-year rezone timeframe instead.

- 4) **Arguments in Support.** According to the California Rural Legal Assistance Foundation and the Public Interest Law Project, the bill's cosponsor, "[AB 2023] would create a rebuttable presumption of invalidity for housing elements that HCD finds are noncompliant, setting a higher standard for jurisdictions to dispute or disregard HCD's noncompliance determination. This change will bring parity to the system and encourage jurisdictions to adopt and implement stronger housing elements that incorporate changes sought by HCD. It will also discourage attempts by jurisdictions to resort to the courts to challenge HCD's efforts to get them to follow the specific obligations of Housing Element Law. Second, it will require jurisdictions to get HCD sign-off on their draft housing element by the statutory adoption deadline in order to be allowed up to three years to complete rezonings. If they meet this deadline, they will still have the existing 120-day 'grace period' to complete the process of formally adopting the housing element."
- 5) **Arguments in Opposition.** According to Livable California, "...HCD, as an administrative agency of the State, already enjoys a long standing standard of review by a court that makes it very difficult for a court to reverse an HCD decision. It can only be reversed for an abuse of discretion which only occurs when it fails to support its decision by substantial evidence in the light of the whole record. AB 2023 accomplishes nothing other than creating confusion as the proper standard of review for HCD decisions. It should be rejected."

REGISTERED SUPPORT / OPPOSITION:

Support

California Rural Legal Assistance Foundation [Sponsor]
 Public Interest Law Project [Sponsor]
 California Apartment Association
 California Housing Partnership Corporation
 Construction Employers' Association
 Yimby Law

Opposition

Livable California

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