

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



February 13, 2023

Planning Commissioners:

Tracy Pellman, Butch Twining, Kayla Acosta-Galvan, Oscar Rodriguez, Ian Adam, Donn Strook, and Rick Wood
City of Huntington Beach
2000 Main Street
Huntington Beach, CA
92648

Dear Planning Commissioners:

RE: Ordinance to Ban “Builder’s Remedy” Projects under the Housing Accountability Act (HAA) – Notice of Potential Violation

The California Department of Housing and Community Development (HCD) is aware that the Planning Commission of the City of Huntington Beach (City) will soon consider Zoning Text Amendment (ZTA) No. 2023-001 (Prohibition on “Builders Remedy” Applications). This letter incorporates by reference a previous Notice of Potential Violation sent by HCD to the City dated January 9, 2023, which addressed the invalidity of the legal arguments raised in Council Member Items Report 22-1096 for the December 20, 2022, City Council meeting (attached). The purpose of this letter is to notify the City that the adoption of the proposed ordinance would be unlawful and in violation of the Housing Accountability Act (HAA) (Gov. Code, § 65589.5).

Adoption of the Ordinance Would Violate the HAA and other State Housing Laws

Specifically, adopting such an ordinance would be an unlawful attempt to preempt the application of the HAA. In addition, the ordinance language is overbroad and would also violate other state laws applicable to the City by prohibiting “the processing or approval of any application for a housing development project or any project not in conformance with the zoning and General Plan land use designation....” For example, this language could prohibit a developer from applying for a density bonus under State Density Bonus Law (Gov. Code, §§ 65915-65918), seeking ministerial permit processing under SB 35 (Gov. Code, § 65913.4), and utilizing new laws such as SB 6 (Gov. Code, § 65852.24) and AB 2011 (Gov. Code § 65912.110 respectively), among others that do not require conformance with both zoning and general plan designations. It could also limit housing developers from requesting general plan amendments, zoning changes, variances and other typical permitting requests.

In addition, limiting an ordinance to just affordable housing developments that qualify for protections under Government Code section 65589.5, subdivision (d), could pose a violation of fair housing law (Gov. Code, § 65008) which, among other provisions, prohibits the enactment or administration of ordinances that prohibit or discriminate against any residential development because the development is intended for occupancy by persons and families of very low, low, or moderate income. Such actions could also constitute a violation of the City's obligation to take no action that is materially inconsistent with its obligation to affirmatively further fair housing (Government Code § 8899.50, subd. (b)).

Furthermore, as stated in HCD's January 9, 2023, letter, the adoption of an ordinance limiting the applicability of state law would represent a new governmental constraint to the production of housing and would jeopardize the City's pursuit of housing element compliance.

Response to Suggested Findings of Approval

HCD reviewed Attachment No. 1, Suggested Findings of Approval for Zoning Text Amendment No. 23-001, and offers the following comments as it relates to the HAA:

- The HAA applies to all cities, including charter cities (Gov. Code, § 65585, subd. (g)).
- Findings Number 1 and 2 are declaratory of the existing general plan and zoning.
- Finding Number 3 is unnecessary to the application of the "Builder's Remedy," since, pursuant to Government Codes section 65589.5, subdivision (e), nothing in the HAA limits the application of the California Environmental Quality Act or Coastal Zone Requirements.
- The HAA does not guarantee the approval of a project if findings under Government Code section 65589.5, subdivision (d)(5), cannot be invoked. A jurisdiction can still apply Government Code section 65589.5, subdivision (d)(1-4). Finding Number 4 is; therefore, unnecessary as subdivision (d)(2) addresses possible nuisance violations on a project-by-project basis by allowing a jurisdiction to make findings of disapproval if a housing development project affordable to low- and moderate-income households "would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to or rendering the development of the financially infeasible." A "specific, adverse impact" refers to "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." However, it should be noted that inconsistency with the zoning ordinance or general plan land use designation

does not constitute a specific, adverse impact upon the public health or safety (Gov. Code, § 65589.5, subd. (d)(2)).

Challenges to the Housing Accountability Act

As stated in the January 9, 2023, letter, the legal challenges proposed in Items Report 22-1096 are not new and are unlikely to succeed. Similar challenges brought by other jurisdictions have failed. For example, the City's status as a charter city does not exempt it from state housing laws, despite the Home Rule doctrine. (See *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 310-315 [state housing law preempts conflicting charter city ordinance despite the Home Rule doctrine]; see also *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 846-851 [same]; *Buena Vista Gardens Apartments Association v. City of San Diego* (1985) 175 Cal.App.3d 289, 306 ["[I]f a matter is of statewide concern, then charter cities must yield to the applicable general state laws regardless of the provisions of its charter."])

Conclusion

HCD would like to remind the City that HCD has enforcement authority over the HAA, among other state housing laws. Accordingly, HCD may review local government actions and inactions to determine consistency with these laws. If HCD finds that a city's actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

HCD will continue to monitor the City's actions regarding the proposed ordinance, and if the City adopts an ordinance that violates state housing law, HCD will respond in order to remedy those violations. In addition, please be advised that the California Office of the Attorney General is also aware of this matter.

If you have questions or need additional information, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,



David Zisser
Assistant Deputy Director
Local Government Relations & Accountability

cc: State Attorney General's Office

Attachment: January 9, 2023, Letter to Huntington Beach

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



January 9, 2023

Al Zelinka, City Manager
City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648

Dear Al Zelinka:

RE: Preparation of Ordinance to Ban “Builder’s Remedy” Projects under the Housing Accountability Act (HAA) – Notice of Potential Violation

The California Department of Housing and Community Development (HCD) is aware that the City Council of the City of Huntington Beach (City) has directed the City Attorney to potentially challenge the Regional Housing Needs Allocation (RHNA) and prepare an ordinance that would affect the City’s implementation of the Housing Accountability Act (HAA) (Gov. Code, § 65589.5). Specifically, the ordinance would relate to the City’s handling of so called “Builder’s Remedy” projects – projects that would seek to use a provision of the HAA that limits the ability of a local agency to deny a project when the local agency does not have a housing element that has been found in substantial compliance with State Housing Element Law (Gov. Code, § 65589.5, subd. (d)(5)).

The City Council provided its direction on December 20, 2022, under Council Member Items Report 22-1096. HCD reviewed the written report and watched the recorded meeting session, both of which include discussion of the preemptive effect of state housing laws on the consideration of proposed development projects by local agencies. While the reviewed materials and meeting deliberations provided little detail as to the intended contents of the proposed ordinance, it did appear that the City intended to limit the application of the HAA. HCD will continue to monitor the City’s actions regarding the proposed ordinance, and if the City adopts an ordinance that violates state housing law, HCD will respond in order to remedy those violations.

Challenges to the Housing Accountability Act

The legal challenges proposed in Items Report 22-1096 are not new and are unlikely to succeed. Similar challenges brought by other jurisdictions have failed. For example, the City’s status as a charter city does not exempt it from state housing laws, despite the Home Rule doctrine. (See *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th

277, 310-315 [state housing law preempts conflicting charter city ordinance despite the Home Rule doctrine]; see also *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 846-851 [same]; *Buena Vista Gardens Apartments Association v. City of San Diego* (1985) 175 Cal.App.3d 289, 306 [“[I]f a matter is of statewide concern, then charter cities must yield to the applicable general state laws regardless of the provisions of its charter.”])

Challenges to the Regional Housing Needs Allocation (RHNA)

As you are aware, the final Regional Housing Needs Allocation Plan was adopted by the Southern California Association of Governments (SCAG) on March 4, 2021, and approved by HCD on March 22, 2021. Prior to the finalization of the plan, the process included considerations of appeals to individual RHNA allocations (Gov. Code, § 65584.05, subd. (b)). HCD understands that the City exercised this option, but that appeal was denied by SCAG. Courts have recently held that the process of determining RHNA **is not subject to judicial review**. (See *City of Irvine v. Southern California Assn. of Governments* (2009) 175 Cal.App.4th 506, 517-522 [the determination of a RHNA allocation is immune from judicial intervention]; see also *City of Coronado v. San Diego Association of Governments* (2022) 80 Cal.App.5th 21, 26 [agreeing with and confirming the *City of Irvine* decision].) Thus, the proposed legal challenge to the City’s RHNA will likely fail.

Housing Element Compliance

While the City’s housing element is currently out of compliance with State Housing Element Law, on September 30, 2022, HCD found that the draft housing element met statutory requirements at the time of review. HCD is eager to see the City achieve compliance; however, the adoption of an ordinance limiting the applicability of state law would represent a new governmental constraint to the production of housing and would jeopardize the City’s pursuit of housing element compliance. Importantly, if the City achieves housing element compliance, then the City would retain the option to utilize Government Code section 65589.5, subdivision (d)(5), when disapproving an affordable housing development.

Conclusion

Finally, HCD would like to remind the City that HCD has enforcement authority over the HAA, among other state housing laws. Accordingly, HCD may review local government actions and inactions to determine consistency with these laws. If HCD finds that a city’s actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

Al Zelinka, City Manager
Page 3

If you have questions or need additional information, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda Coy", with a long, sweeping horizontal stroke extending to the right.

Melinda Coy
Proactive Housing Accountability Chief