

California Department of Justice Office of the Attorney General 		Legal Alert	
Subject: Senate Bill 1037 (Wiener, 2024) - Housing Element: Enforcement.		No. OAG 2025-002	Contact for information: housing@doj.ca.gov
		Date: May 15, 2025	

TO: All Cities, Counties, Local Agencies, and other interested parties.

The California Attorney General's Office ("Attorney General") issues this legal alert to help California local officials, such as council members, planning directors, city attorneys, and county counsel, understand new requirements of state housing law under Senate Bill 1037.

SENATE BILL 1037

What Does SB 1037 Do?

Effective January 1, 2025, SB 1037 (Wiener, 2024) amended the Planning and Zoning Law by adding Government Code Section 65009.1. SB 1037 increases court-ordered civil penalties for local agencies' failure to comply with certain state law housing mandates. Specifically, the law requires a court, in an action brought by the Attorney General or the California Department of Housing and Community Development ("HCD"), to impose specified civil remedies against cities (including charter cities), counties, and local agencies that fail to:

1. Timely adopt their housing element revisions pursuant to the schedule set forth in Government Code Section 65588, subdivision (e); and/or
2. Ministerially approve, without discretionary review, any planning or permitting application related to a housing development project that state law requires be approved ministerially.

What is Ministerial Approval?

A ministerial approval process is one where the relevant state law requires that consideration of a development proposal involves no personal judgment by the public official as to the wisdom or manner of carrying out the project. Instead, the public official's review of the project application is limited to ensuring that the proposed development meets the lawful objective standards in effect at the time that the application is submitted to the local government. A ministerial decision involves only the use of fixed standards or objective measurements, including compliance with applicable law, and a public official cannot use special discretion or personal, subjective judgment in deciding whether or how the project should be carried out.

By way of example, state law requires a local agency to ministerially approve a planning or permitting application, without discretionary review, for the following types of projects: certain ADUs under Government Code Section 66323, developments under Government Code Section 65913.4, lot splits under Government Code Section 66411.7, subdivisions under Government Code Section 66499.41, building permits under Government Code Section 65913.4.5, by-right housing under Government Code Section 65589.4, agricultural employee housing under Health and Safety Code Section 17021.8, and housing development projects under Chapter 4.1 (commencing with Section 65912.100) of Division 1 of Title 7 of the Government Code.

What Are the New Civil Penalties?

SB 1037 provides that a court shall order the following remedies if it finds, in an action brought by the Attorney General or HCD, that a city, county, or local agency violated the housing element or ministerial approval requirements discussed above and the city, county or local agency's acts or omissions were arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair:

1. A civil penalty of, at minimum, \$10,000 per month, and not exceeding \$50,000 per month, for each violation, accrued from the date of the violation until the date the violation is cured.
2. All costs of investigation and prosecution of the action, whenever the Attorney General or HCD prevails in the civil action.
3. Other relief the court deems appropriate, which includes equitable and injunctive relief, provisional or otherwise.

Timing: The penalties accrue from the date of the violation and until the violation is cured. Because there is no retroactivity provision in SB 1037, penalties for any violations pre-dating the bill's effective date shall accrue from the law's January 1, 2025 effective date onwards.

Non-exclusive/cumulative: The liability, penalties, and remedies imposed by SB 1037 are in addition to any other liability, penalties, and remedies available by law, including the remedies available to any other party seeking to enforce the laws enumerated in Government Code Section 65585, subdivision (j) and attorneys' fees pursuant to Code of Civil Procedure Section 1021.5. By way of example, this could include suspension of a city's permitting authority in accordance with Government Code Section 65755.

Continued Failure to Comply with A Court Order Regarding Untimely Housing Element Revisions Will Result in Additional Penalties

Where (1) the Attorney General or HCD has brought an action to enforce timely adoption of housing element revisions under Government Code Section 65588, subdivision (e), (2) a court has ordered a city, county, or local agency to bring its housing element into compliance, and (3) the city, county, or local agency does not comply with the court's order in accordance with the timeline set forth in Government Code Section 65754, SB 1037 mandates that the court order, or modify its existing order, to:

1. Impose the maximum penalty of \$50,000 per month until the city, county, or local agency has substantially complied with Government Code Section 65754.
2. Impose all of the remedial provisions set forth in Government Code Section 65755, subdivision

(a), until the city, county, or local agency has substantially complied with Government Code Section 65754. By way of example, these remedial provisions include suspending permitting authority, suspending zoning changes or variances, suspending subdivision map approvals, and mandating the approval of permits and subdivision maps for qualifying projects.

What Is Done with the Money Collected from SB 1037 Civil Penalties?

Any civil penalty levied pursuant to SB 1037 must be deposited into the Building Homes and Jobs Trust Fund for the sole purpose of supporting the development of affordable housing located in the affected jurisdiction, to be expended within five years of deposit. Additionally, cities, counties and local agencies may not use funds already dedicated to affordable housing to pay for these penalties.

Hypothetical Examples of SB 1037's Application

To assist local officials in understanding the practical effects and implementation of SB 1037, below are hypothetical scenarios to illustrate circumstances where a city, county, or local agency could be liable for penalties under SB 1037. These limited factual hypotheticals are intended solely for illustrative purposes.

Example 1 (Housing Element): HCD has certified a city's housing element that was timely adopted. Subsequently, the city takes certain actions in violation of state housing laws and/or its own housing element. HCD notifies the city that its actions are unlawful and demands corrective action, but the city refuses to remedy the violation. Accordingly, HCD decertifies the city's housing element. Upon decertification, the city no longer has a certified housing element.

Does SB 1037 Apply? No. The city would not accrue penalties under SB 1037 because Section 65009.1, in part, applies only to "the adoption of housing element revisions pursuant to the schedule set forth in subdivision (e) of Section 65588," and not to violations of housing element programs that the city previously adopted. However, the city is still subject to other statutory penalties for lack of a certified housing element.

Example 2(a) (Ministerial Approval/Objective Standards): A city has received an application for a SB 9 (Atkins, 2021) urban lot split on a parcel zoned for single family residences. The city's municipal code provides that applications for SB 9 lot splits must comply with landscaping requirements in the single-family zone. The code's landscaping requirements for a single-family zone require "landscaping that is aesthetically pleasing and matches the character of the surrounding neighborhood." In reviewing the application, the city believes that the proposed landscaping is unsightly. The city notifies the applicant that due to the unappealing landscaping, the lot split must proceed through a discretionary process. The applicant challenges the landscaping requirements and the determination that the application is not subject to ministerial approval and notifies HCD of the decision. In investigating the dispute, HCD finds that the landscaping requirements in the city's municipal code are not objective standards in compliance with Government Code Section 66411.7, subdivision (c). Despite HCD's efforts to work with the city, the city refuses to ministerially approve the SB 9 application on the basis of the landscaping. HCD files a writ of mandate to compel the City to approve the application.

Does SB 1037 Apply? Yes, if the court finds the city's denial of the application was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established policy, unlawful, or procedurally unfair. Under this

scenario, the court must impose SB 1037 penalties, accruing from the date of violation until the date the violation is cured.

Example 2(b) (Ministerial Approval/Imposing Additional Local Standards): Under SB 684 (Caballero, 2023), a city has received a parcel map to subdivide one lot into four parcels and an application to build a housing development project. The parcel map meets all of the requirements of SB 684, and the city ministerially approves the parcel map pursuant to Government Code Section 66499.41. However, in reviewing the housing development project, the city finds that the project does not include enclosed parking in compliance with the city's municipal code. Accordingly, the city notifies the applicant that the project does not qualify for ministerial approval, pursuant to Government Code Section 65852.28, and must go through the traditional discretionary process. The applicant challenges the determination that the project does not qualify for ministerial approval. The city responds to the applicant that the city is authorized to impose objective zoning, subdivision, and design standards in accordance with SB 684. The applicant notifies HCD of the city's determination. In investigating the dispute, HCD finds that although the city's requirement for enclosed parking is objective, it is explicitly prohibited by SB 684 itself. (Gov. Code § 65852.28, subd. (b)(2)(D).) Despite HCD's efforts to work with the city, the city refuses to ministerially approve the application based on the enclosed parking requirement. HCD files suit.

Does SB 1037 Apply? Yes, if the court finds the city's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established policy, unlawful, or procedurally unfair. Under this scenario, the court must impose SB 1037 penalties, accruing from the date of violation.

Example 3(a) (Penalties): A county fails to timely adopt its housing element. Two years past the deadline, the county adopts its housing element, which also requires mandatory rezoning. The county's housing element cannot be certified until it has completed the rezoning, pursuant to Government Code Section 65588. Despite efforts by HCD to assist the county, the county refuses to complete its mandatory rezoning. The Attorney General and HCD bring suit against the county. The court finds that the county's refusal to follow state law was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established policy, unlawful, or procedurally unfair.

Which penalties apply? Under this scenario, in addition to issuing a writ to compel the county to rezone and bring its housing element into substantial compliance with state law, the court must award financial penalties: (1) in a minimum of \$10,000 and up to \$50,000 per violation per month, and (2) investigation and prosecution costs. Additionally, under SB 1037, a court is authorized to award other existing penalties under the law, such as suspending the county's ability to issue building permits except for those creating new housing units pursuant to Government Code Section 65755.

Example 3(b) (Penalties): In the same suit described in Example 3(a), over a year has now passed since the court's order, and the county has not complied with completing the required rezoning.

Which penalties apply? The court is now required to impose the maximum penalty of \$50,000 per month per violation. Additionally, because the relief sought under SB 1037 is in addition to any other liability, penalties,

and remedies imposed by any other law, if the county has not complied with the court's order, penalties under Government Code Section 65585, subdivision (l)¹ now begin to accrue as well.

Example 4 (Separate Penalties for Separate Violations): A city failed to timely adopt its housing element. Additionally, the city's municipal code fails to address approvals and development for certain by-right housing projects, and the city's planning staff has a practice of refusing to accept applications under AB 2011 (Wicks) because the city has not yet completed an implementation memorandum. An applicant attempted to submit a housing development project application under AB 2011, but the city declined to accept it, stating that the city's implementation memo is not yet complete. The applicant reported this incident to HCD. Despite HCD's objection to the city's draft housing element deficiencies and technical assistance regarding the ministerial nature of AB 2011, the city adopted its draft housing element, refusing to incorporate any further changes. HCD reviewed the housing element and determined that it was not substantially compliant with the housing element laws. The Attorney General and HCD then bring a petition for writ of mandamus challenging (1) the city's compliance with timing requirements of Government Code Section 65588 and (2) the city's refusal to process the AB 2011 application. A court finds both of the city's actions to be arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established policy, unlawful, or procedurally unfair.

Which penalties apply? Under this scenario, the city's failure to adopt a timely housing element and its failure to process a ministerial application result in two separate violations under SB 1037. Accordingly, the court awards separate SB 1037 penalties: (1) \$20,000 per month on account of the city's deficient housing element and (2) \$15,000 per month on account of the failure to process the ministerial application.

Example 5 (Accrual Date): A city failed to timely adopt its housing element and the Attorney General and HCD brought a writ of mandate against the city in December 2023. The court found in favor of the Attorney General and HCD and issued an order in May 2024 compelling the city to bring its housing element into compliance with the housing element laws within 120 days.

When do the penalties start accruing? Although the violation occurred prior to 2025, the SB 1037 penalties would not start accruing until January 1, 2025, which is the date SB 1037 took effect. If the city did not comply with the court's order by January 1, 2025, as a result of the city's failure to comply with the court's order within the timeline set forth in Government Code Section 65754, the court is obligated to amend its order to (1) impose the maximum penalty of \$50,000 per month from January 1, 2025 moving forward and (2) suspend the city's various permit and subdivision map approval until the city substantially complies with the court's order. (Gov. Code § 65009.1, subd. (d)(2).)

¹ Section 65585, subdivision (l) requires a court to impose a penalty on local agencies that fail for one year to comply with an order directing the jurisdiction to bring its housing element into substantial compliance with the Housing Element law. The penalty ranges from \$10,000 to \$100,000 per month, increasing in instances of continued non-compliance up to \$60,000 to \$600,000 per month.