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Public Law Update – Trial Court Holds City Without a Substantially Compliant Housing Element Must Process Builder's Remedy Application

The Builder's Remedy is a provision of the Housing Accountability Act (HAA), which limits the ability to condition or deny qualifying housing development projects in jurisdictions that have not adopted a substantially compliant housing element. Builder's Remedy projects must have a certain percentage of affordable housing and may not be denied based on inconsistencies with a city's zoning ordinance or general plan land use designation for a parcel.

Recently, a trial court considered whether the Builder's Remedy applied to a city with an adopted housing element that had not yet received Department of Housing and Community Development ("HCD") certification or adopted rezoning called for in its housing element. The court concluded that the Builder's Remedy applied, because a city that does not obtain HCD certification within one year of its housing element adoption deadline cannot be in substantial compliance with Housing Element Law until rezoning is completed. While this case is a trial court case and therefore does not create any binding legal precedent, the court's analysis does provide some important insight into the application of the Builder's Remedy in cities that have adopted their housing element but have not yet been certified by HCD. Crucially, the court did not completely reject the idea that cities can self-certify their housing elements and did not defer to HCD in determining whether a housing element substantially complied with State Housing Element Law.

The City of La Cañada Flintridge adopted and submitted its housing element to HCD on its statutory deadline of October 15, 2021. On December 3, 2021 HCD informed the City that significant revisions were required for the housing element to be in substantial compliance. On October 4, 2022, La Cañada adopted and submitted an updated version of its housing element to HCD. While La Cañada was waiting to receive comments from HCD on its updated housing element, a developer submitted a preliminary application for a mixed-use Builder's Remedy project to the City. Subsequently, on December 6, 2022, HCD deemed La Cañada's updated housing element non-compliant and sent La Cañada comments that the City needed to address before HCD would certify its housing element. Finally, on

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February 21, 2023, La Cañada adopted an updated version of its housing element, which addressed HCD's comments but did not complete the mandatory rezoning. In the resolution adopting the housing element, La Canada's city council certified that it was in substantial compliance with the State Housing Element law. HCD informed La Cañada that it would need to complete the required rezoning before its housing element was in substantial compliance.

On June 24, 2023, La Cañada determined that the proposed project did not qualify for the Builder's Remedy and, therefore, the application was incomplete because it failed to comply with the City's general plan, zoning standards, and residential density limitations and did not apply for amendments to those requirements. The City eventually determined that the proposed project application was complete but still determined that the project was inconsistent with the City's Downtown Village Specific Plan, zoning code, and density in its housing element. HCD ultimately certified La Cañada's housing element after the City completed the required rezoning.

On September 12, 2023, La Cañada completed its rezoning requirements and HCD determined that the City's February 21, 2023 housing element substantially complied with the law.

The developer sued La Cañada contending that the City was required to approve the project because its housing element was not certified when the project application was submitted and that the proposed project qualified for the Builder's Remedy. The Attorney General's Office and HCD intervened in the case on behalf of the developer.

The court ruled that La Cañada improperly determined that the project was not a Builder's Remedy project and ordered the City to process the project application as a Builder's Remedy project. The court reasoned that the City's determination that the project was not a Builder's Remedy project was a "disapproval" of the project under the HAA. The court found that a Builder's Remedy application is deemed complete when the preliminary application was submitted, siding with previous HCD guidance. The court also found that a city cannot be in substantial compliance with Housing Element Law until rezoning is completed if it has not obtained HCD certification within one year of the statutory deadline for housing element adoption.

These findings were enough for the court to conclude that the City was subject to the Builder's Remedy. However, in a non-binding discussion, the court suggested that the City's housing element at the time the developer submitted its preliminary application was not in substantial compliance with HCD's requirements to Affirmatively Further Fair Housing, Nonvacant Sites Analysis, realistic assessment of development capacity, and a requirement to zone for low-income housing. The court also rejected La Cañada's argument that

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certification of a housing element by HCD would be retroactive to when previous versions of the housing element were adopted by a city. This part of the court's decision was not central to the court's ruling, due to the lack of rezoning, but still may indicate how courts may defer to HCD rather than cities in Builder's Remedy disputes. The court did not conclude, however, that a housing element cannot be found substantially compliant until certified by HCD.

This is a trial court decision, so it is binding only on La Cañada. However, this is the first case that provides a court's view on when the Builder's Remedy applies, and it may signal how future courts consider similar issues. Questions remain regarding how the Builder's Remedy applies in jurisdictions that have not received HCD certification but that have adopted housing elements and associated rezonings. Moreover, the court did not state what standards, if any, may properly be applied to a project that qualifies for the Builder's Remedy. We will continue to monitor this case and provide future updates on any appellate court decisions, along with other Builder's Remedy cases that work their way through the courts.

Burke, Williams & Sorensen, LLP regularly advises clients on legal matters relating to land use and development projects, including the Builder's Remedy.

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