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“Builder's Remedy" Reform Bill Approved by Governor Newsom

Article By:

Caroline Guibert

Jordan Wright

On September 19, 2024, Governor Gavin Newsom approved Assembly Bill (AB) 1893 (Wicks), which significantly modifies the “Builder’s Remedy” under the Housing Accountability Act (Government Code section 65589.5 et seq.) (HAA), effective January 1, 2025.

As explained in our prior legal alert, the Builder’s Remedy applies when a local jurisdiction has not adopted an updated Housing Element in substantial compliance with State Housing Element Law (Gov. Code § 65580, et seq.), in which case the local jurisdiction cannot deny a qualifying housing development project even if it is inconsistent with the local general plan and zoning ordinance (subject to limited exceptions).

The following is a summary of the notable HAA amendments that apply to qualifying Builder’s Remedy projects under AB 1893. Please note that AB 1893 also amends other sections of the HAA.

Project “Grandfathering” & Conversions

AB 1893 includes the following provisions to help advance pipeline projects:

- Builder’s Remedy projects with a housing development project application “deemed complete” before January 1, 2025, would be “grandfathered,” meaning that the existing version of the HAA will apply to the project unless the project sponsor chooses to be subject to any of the new or modified HAA provisions under AB 1893.
- “Deemed complete” is defined to mean that a SB 330 preliminary application (pursuant to Government Code section 65941.1) has been submitted or, absent that, a complete (full) development application has been submitted (pursuant to Government Code section 65943).
- An existing Builder’s Remedy project may be converted to an AB 1893 Builder’s Remedy project, so long as the original housing development project application is “deemed

complete" before January 1, 2025 – "even if the revision results in the number of residential units or square footage of construction changing by 20 percent or more" (i.e., even if vesting under SB 330 would not otherwise be retained.) This means that under that scenario, the density of the Builder's Remedy project could be increased or decreased to meet AB 1893 maximum and minimum density requirements (see below) without losing vesting.

Combined Projects – Potential Streamlined Ministerial Review

AB 1893 contemplates the combination of a Builder's Remedy project with other state housing laws that provide for streamlined ministerial (i.e., no CEQA) project approval:

- A Builder's Remedy project may be combined with AB 2011, in which case it "shall be deemed to be in compliance with the residential density standards for purposes of complying with [AB 2011]" (Government Code section 65912.123). This means that if the Builder's Remedy project otherwise qualifies for streamlined ministerial approval under AB 2011, non-compliance with AB 2011 minimum and maximum density requirements will be disregarded. Please refer to our legal alert for information about AB 2243 (Wicks), which amends AB 2011, effective January 1, 2025.
- A Builder's Remedy project may be combined with SB 35, in which case it "shall be deemed to be in compliance with the objective zoning standards, objective subdivision standards, and objective design review standards for purposes of complying with [SB 35]" (Government Code section 65913.4(a)(5)). This means that if the Builder's Remedy project otherwise qualifies for streamlined ministerial approval under SB 35, non-compliance with objective local standards will be disregarded. Please refer to our prior legal alert for information about SB 35, which was recently amended by SB 423 (Wiener).

Reduced Affordability Requirements

AB 1893 modifies on-site affordability requirements for Builder's Remedy projects as follows:

- Reduces the affordability requirement for mixed-income Builder's Remedy projects from 20% lower income to 13% lower income, 10% very low-income, **or** 7% extremely low-income (as each is defined).
- Requires compliance with local affordable housing requirements that, as of January 1, 2024, required a greater percentage of affordable units or a deeper level of affordability, unless compliance would render the project infeasible – pursuant to written findings by the local agency supported by a preponderance of evidence. This creates a high threshold for the local agency and if a "reasonable person" could find otherwise, "the project shall not be required to comply with that requirement."
- Caps the local affordable housing requirement, if any, to a maximum of 20% and where 20% is required, the required income level cannot be deeper than lower income.
- Eliminates the affordability requirement for Builder's Remedy projects consisting of 10 units or fewer (excluding any density bonus units) if the project site is smaller than one acre and the project proposes at least 10 dwelling units per acre.
- Requires the affordable units to be affordable for 45 years (rental) or 55 years (ownership) and have a comparable bedroom and bathroom count as the market rate units.

Mixed-Use Projects

AB 1893 allows for a wider variety of mixed-use housing development projects:

- Recall that under existing law, at least two-thirds of the project square footage must be designated for residential use to qualify as a “housing development project” under the HAA.
- That requirement would be reduced to 50% for projects proposing at least 500 net new residential units, so long as no portion of the project would be designated for use as a hotel, motel, bed and breakfast inn, or other transient lodging (except for a residential hotel, as defined in Health and Safety Code section 50519) (collectively, “Transient Lodging”).
- That requirement would also be reduced to 50% for qualifying projects involving the demolition of existing non-residential use(s) on the site, as specified. Transient Lodging would also be prohibited under that scenario.
- Recall that the HAA definition for a “housing development project” is cross-referenced in AB 2011, so these amendments will also benefit mixed-use AB 2011 projects.

Maximum Density

AB 1893 newly imposes the **greater of** the following density maximums for Builder’s Remedy projects – prior to any density bonus under the State Density Bonus Law:

- 50% greater than the minimum density deemed appropriate to accommodate housing for the local jurisdiction pursuant to Government Code section 65583.2(c)(3)(B) (e.g., 30 dwelling units per acre in a metropolitan jurisdiction).
- Three times the density allowed by the general plan, zoning ordinance, or state law (whichever is greater).
- The density specified for the project site in the Housing Element.
- 35 **additional** units per acre if the project site is within one-half mile of a “major transit stop” or is a “very low vehicle travel area” or a “high or highest resource census tract” (as each is defined).

Minimum Density

AB 1893 newly imposes the following density minimums for Builder’s Remedy projects:

- On sites that have a minimum density requirement and are located within one-half mile of a “commuter rail station” or a “heavy rail station” (as each is defined), the residential density of the project must not be less than the minimum residential density required on the site.
- On all other sites that have a minimum density requirement, the residential density of the project must not be less than the **lower of** (i) the local agency’s minimum residential density or (ii) 50% of the minimum residential density deemed appropriate to accommodate housing for the jurisdiction, as specified in Government Code section 65583.2(c)(3)(B) (e.g., 30 dwelling units per acre in a metropolitan jurisdiction).

Density Bonus Projects

AB 1893 includes provisions that pertain to Builder’s Remedy projects that also utilize the State Density Bonus Law:

- A Builder’s Remedy project that is also a density bonus project will qualify for two additional incentives/concessions.

- The local agency must grant a density bonus based on the number of dwelling units "proposed and allowable" under the Builder's Remedy (see above).
- The State Density Bonus Law does not specifically address extremely low-income units, which may be provided to satisfy AB 1893 affordability requirements (see above). Accordingly, AB 1893 provides that (i) all on-site affordable units (including extremely low-income units) must be counted as affordable units in determining whether the project qualifies for a density bonus and (ii) projects with extremely low-income units will be eligible for the same density bonus benefits provided to a project that dedicates three percentage points more units to very low-income households.

Industrial Use Proximity Prohibition

AB 1893 newly prohibits Builder's Remedy projects on a project site that **abuts** a site where more than one-third of the square footage on the site has been used within the past three years by a "heavy industrial use" or a "Title V industrial use" (as each is defined in Government Code section 65913.16). Notably, this prohibition does not apply to the project site itself.

Local Requirements

AB 1893 specifically authorizes a local agency to require a Builder's Remedy project to comply with local objective, quantifiable, written development standards, conditions, and policies (collectively, "Local Requirements"), subject to the following limitations:

- Local Requirements must not render the project infeasible, and the local agency will bear the burden of proof in making that finding.
- Local Requirements must not involve "personal or subjective judgement by a public official and [must be] uniformly verifiable by reference to an external and uniform benchmark or criterion…."
- Local Requirements must be based on the general plan designation and zoning classification that allow the density and unit type "proposed by the applicant," which is defined to mean "the plans and designs as submitted by the applicant, including, but not limited to, density, unit size, unit type, site plan, building massing, floor area ratio, amenity areas, open space, parking, and ancillary commercial uses."
- Local Requirements may be modified via incentives/concessions, waivers/reductions of development standards and/or reduced parking ratios authorized under the State Density Bonus Law.
- The local agency cannot "preclude" a Builder's Remedy project that meets applicable Local Requirements, as modified pursuant to the State Density Bonus Law (where applicable), "from being constructed as proposed by the applicant."

Local Agency Restrictions

AB 1893 provides that a qualifying Builder's Remedy project:

- Shall be deemed consistent, compliant and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, redevelopment plan and implementing instruments (or other similar provision) for all purposes.
- Shall not require a general plan amendment, specific plan amendment, rezoning, or other legislative approval.

- Shall not require any approval or permit not generally required of a project of the same type and density.
- Shall not be deemed a nonconforming lot, use, or structure for any purpose.
- Shall not be subject to any additional Local Requirements (e.g., increased fees) based on utilization of the Builder's Remedy.

New Developer Protections

- AB 1893 provides that disapproval of a qualifying housing development project (including but not limited to a qualifying Builder's Remedy project) by a local agency also includes any instance where the local agency "[f]ails to cease a course of conduct undertaken for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the proposed housing development project, that effectively disapproves the proposed housing development without taking final administrative action" if specified conditions are met (which pertain to notice by the applicant and findings made by the local agency if it disagrees).
- Recall that a local agency cannot disapprove a qualifying housing development project unless it makes specified findings based on a preponderance of the evidence in the record. (Gov. Code § 65589.5(d).) Therefore, this new provision would make it easier for project sponsors to prove that a local agency stalling for the purpose of suspending a disfavored housing development project has violated the HAA.
- See AB 1893 (Government Code section 65589.5(h)(6)) for additional grounds which constitute disapproval of a housing development project under the HAA, which includes amendments also proposed under AB 1413 (Ting).

Implications

AB 1893 is an attempt to "modernize" the Builder's Remedy by providing clarity to developers, local jurisdictions, and courts to avoid the "legal limbo" described by Attorney General Rob Bonta. As part of that compromise, specified requirements will be imposed on Builder's Remedy projects, including a new "cap" on residential density where no codified limit currently exists. In return, the clarifications made by AB 1893 and the reduced affordability requirement for mixed-income projects could help prompt additional Builder's Remedy projects in jurisdictions that have failed to comply with State Housing Element Law.

Companion Bill – AB 1886

AB 1886 (Alvarez) has also been approved by the Governor and will be effective on January 1, 2025. AB 1886 would also help facilitate Builder's Remedy projects by making the following clarifying amendments to existing law:

- A local jurisdiction cannot "self-certify" its Housing Element. AB 1886 ratifies a prior California Department of Housing and Community Development (HCD) determination, which provides that HCD will consider an "adopted" Housing Element to be an initial draft because "a jurisdiction does not have the authority to determine that its adopted element is in substantial compliance but may provide reasoning why HCD should make a finding of substantial compliance."
- A Housing Element will be deemed substantially compliant with State Housing Element Law when: (i) the Housing Element has been adopted by the local jurisdiction and (ii) the local

jurisdiction has received an affirmative determination of substantial compliance from HCD or a court of competent jurisdiction.

- Housing Element compliance status is determined at the time the SB 330 preliminary application (pursuant to Government Code section 65941.1) is submitted for the Builder's Remedy project, which is consistent with HCD's prior determination that the Builder's Remedy is vested on that filing date. If a SB 330 preliminary application is not submitted, then the compliance status will be determined when a complete (full) development application is filed for the Builder's Remedy project (pursuant to Government Code section 65943).

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