CITY OF HUNTINGTON BEACH
PLANNING COMMISSION COMMUNICATION

TO: Planning Commission

FROM: Michael Gates, City Attorney

DATE: February 7, 2023

SUBJECT: ZONING TEXT AMENDMENT (ZTA) NO. 2023-001 (Prohibition on "Builders Remedy" Applications)

At the December 20, 2022, City Council Meeting, the City Council provided direction to the City Attorney's office to prepare an ordinance prohibiting Builder's Remedy applications (see attachment A). This memorandum and draft ordinance were prepared in response to the Council's direction.

Background:

Health and Safety, and protecting the environment, is of paramount concern to the City of Huntington Beach. The concept of a "Builder's Remedy" is derived from the Housing Accountability Act (HAA) (Government Code Section 65589.5). Builder's Remedy provides that certain high density, affordable housing development projects cannot be denied by a City unless the City makes written findings. More specifically, Builder's Remedy in the HAA allows a developer to build a project without any City oversight or approval if the City is deemed by the State to be out of compliance with other State housing laws.

The City of Huntington Beach (like most cities in the U.S.) uses zoning as the legal mechanism to control development on land within their jurisdiction, primarily by designating land for certain uses or categories of uses (zones). This practice took off in 1920s and 30s after the United States Supreme Court affirmed municipalities' constitutional authority to regulate property through zoning ordinances in the landmark case of Village of Euclid v. Ambler Realty Co ."Euclidean zoning," allows cities to define parcels based on distinct residential or industrial/commercial use. Euclidean zoning began as a way to mitigate negative effects of industrial and urban development (light and air pollution) on residences by separating those uses and another tool or alternative to nuisance tort law.

Builders Remedy under the HAA however allows a developer to place a project in any zoning district in the City, which would recreate and perpetuate the nuisance problems zoning was set up to prevent. And, once a project is built, the nuisance problems and inconsistencies with surrounding properties would be permanent. Under Builder's

Remedy, housing projects could be could be built near environmentally sensitive areas (pitting CEQA against the HAA) or next to industrial sites where residents will be subject to diminished air, light and sound quality because of being next to large industrial complexes. Allowing developers to bypass the City's discretion and process to request a rezone of a parcel, and allow the developer instead the unilateral control over where he or she can develop a housing project will eviscerate zoning in the City and allow housing to be built in areas that would compromise the health, and safety of the residents or compromise the environment.

While the HAA contains no exemptions from the California Environmental Quality Act, (the HAA states specifically that nothing relieves the local agency from making the required CEQA findings and otherwise complying with CEQA); the HAA would force the City to make CEQA findings for approval or face the consequences of failing to comply with the HAA; thus, pitting the two State laws against each other.

California Environmental Quality Act:

This item is exempt from California Environmental Quality Act (CEQA), pursuant to Section 15061(b), the general rule that CEQA only applies to projects which have the potential for a significant effect on the environment. While this amendment will clarify existing zoning regulations, it does not authorize any development that will result in direct physical changes to the environment.

Recommendation:

That the Planning Commission take the following actions:

A) Find that Zoning Text Amendment (ZTA) No. 23-001 is exempt from California Environmental Quality Act, pursuant to Section 15061(b), the general rule that CEQA only applies to projects which have the potential for a significant effect on the environment

B) Recommend approval of Zoning Text Amendment No. 23-001 with findings (Attachment B) by approving the draft City Council Ordinance and forward to the City Council for consideration.

Attachments:
A – City Council Staff Report, Dec. 20, 2022 (H item Councilmember McKeon)
B – Draft City Council Ordinance

CITY OF HUNTINGTON BEACH
CITY COUNCIL MEETING – COUNCIL MEMBER ITEMS REPORT

TO: THE HONORABLE MAYOR AND CITY COUNCIL

FROM: CASEY MCKEON, CITY COUNCILMEMBER

DATE: DECEMBER 20, 2022

SUBJECT: OPPOSE RHNA MANDATE AND ADOPT AN ORDINANCE TO BAN BUILDER'S REMEDY DEVELOPMENTS

Since 2018, the State has passed a flurry of housing laws that not only seek to commandeer the City's local ability (local control and discretion) to zone its territory, but the State also imposes a host of heavy burdens, unfunded State mandates, and zoning mandates. This includes the 2021 Regional Housing Needs Assessment (RHNA) mandate for Huntington Beach to zone 13,368 units via the 6th Cycle Housing Element Update. Many have expressed that the "fix" to fight these State mandates is in Sacramento, i.e., to fix State laws by the Legislature. While this is not untrue, the fight for local control can still, also be had in the courts.

For perspective, if the City were to honor this 13,368 RHNA by zoning for, and eventually building for that quota at a 20% affordable threshold, then that would mean that approximately 30,000 new total units of high density housing would be built. This would increase the City's current housing inventory by approximately 36 percent. These mandates, and the State's intrusion and commandeering are reckless and unsustainable - both for the City's residents' livability and the tax and strain on its infrastructure that is all designed and maintained for its current housing levels.

The 13,368 RHNA is really no mandate at all. It is flawed. While the State claims that its housing laws have preemptive effect, even over Charter cities, no preemptive effect can be upheld by laws that are demonstrably flawed and unsupported by evidence, supported by a rational basis. Earlier this year the California State Auditor released a scathing report that the "The Department of Housing and Community Development Must Improve Its Processes to Ensure That Communities Can Adequately Plan for Housing". This scathing report indicates that HCD's methodology is flawed. This is precisely what the City Attorney had argued to City Council in 2020, that when SCAG/HCD made its RHNA determination for Huntington Beach of 13,368 units, the State agencies violated their own State laws in their methodology and their application to Huntington Beach. Huntington Beach is a Charter City and according to the California Constitution, local zoning has historically been a "municipal affair" subject to Home Rule Charter City authority. While that local right has eroded over the years with additional invasive State legislation and unfavorable court rulings, the California Constitution remains and Huntington Beach's Charter City status must be defended and asserted.

RECOMMENDED ACTION

Authorize the City Attorney to:

1. Challenge the State‘s RHNA mandate for Huntington Beach, including its validity and any laws in support of such a mandate over the City as a Charter City, by taking whatever legal action is required; and

2. Return to City Council at the City Attorney's earliest convenience with an ordinance banning "Builder’s Remedy" developments from taking place in Huntington Beach. Development without proper approvals is already not legal in the City, but this Ordinance is essential to make it clear to the entire community that Huntington Beach will fight any developer that seeks to develop pursuant to "Builder’s Remedy" laws.

Legislation Details (With Text)

File #:	22-1096 **Version:** 1		
Type:	Councilmember Items	**Status:**	Agenda Ready
File created:	12/12/2022	**In control:**	City Council/Public Financing Authority
On agenda:	12/20/2022	**Final action:**	
Title:	Submitted by Councilmember McKeon - Oppose RHNA Mandate and Adopt an Ordinance to Ban Builder's Remedy Developments		
Attachments:	1. 2022-12-20 - McKeon - Challenge RHNA - Ban Builders Remedy v1, 2. 12/16 Sup Com - State Auditor Fact Sheet, 3. 12/16 Sup Com - RHNA State Auditor Report 2021-125, 4. 12/20 Sup Com - YIMBY Law Letter, 5. 12/20 Sup Com		

Date	Ver.	Action By	Action	Result
12/20/2022	1	City Council/Public Financing Authority	approved	Pass

Subject:

Submitted by Councilmember McKeon - Oppose RHNA Mandate and Adopt an Ordinance to Ban Builder's Remedy Developments

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ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF HUNTINGTON BEACH AMENDING CHAPTER 202.04 OF THE HUNTINGTON BEACH ZONING AND SUBDIVISION ORDINANCE PROHIBITING TO BUILDERS REMEDY APPLICATIONS (ZONING TEXT AMENDMENT NO. 23-001)

After due consideration of the findings and recommendations of the Planning Commission and all other evidence presented, the City Council finds that the aforesaid amendment is proper and consistent with the General Plan;

The City Council of the City of Huntington Beach does hereby ordain as follows:

SECTION 1. Section 202.04 of the Huntington Beach Zoning and Subdivision Ordinance is hereby amended to read as follows:

202.04 (p) The City expressly prohibits the processing or approval of any application for a housing development project or a any project not in conformance with the zoning and General Plan land use designation, including all applicable City laws, zoning and land use regulations, and other environmental laws, such as CEQA, regardless of the so-called "Builder's Remedy" (under the Housing Accountability Act or any other State law), that portend to allow developers of affordable housing projects to bypass the zoning code and general plan of cities that are out of compliance with the Housing Element Law.

This express prohibition requires that all project applicants conform to the applicable zoning and General Plan land use designations regardless of the City's status with regard to Housing Element Law.

SECTION 3. This Ordinance shall become effective 30 days after its adoption.

PASSED AND ADOPTED by the City Council of the City of Huntington Beach at a regular meeting thereof held on the _____ day of _____, 2023.

_____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

APPROVED AS TO FORM:

_____
City Manager

_____
Director of Community Development