

Moore, Tania

From: Kalmick, Dan
Sent: Tuesday, March 7, 2023 2:46 PM
To: Moore, Tania
Subject: Fwd: Notice of Potential Violation
Attachments: HuntingtonBeachNOPV030623.pdf

Dan Kalmick
Council Member, City of Huntington Beach
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(657) 360-4796

From: Heaton, Brian@HCD <Brian.Heaton@hcd.ca.gov>
Sent: Monday, March 6, 2023 4:31:56 PM
To: CITY COUNCIL <city.council@surfcity-hb.org>
Cc: Zelinka, Al <Al.Zelinka@surfcity-hb.org>; David Pai <david.pai@doj.ca.gov>; Strickland, Tony <Tony.Strickland@surfcity-hb.org>; Zisser, David@HCD <David.Zisser@hcd.ca.gov>; Gates, Michael <Michael.Gates@surfcity-hb.org>
Subject: Notice of Potential Violation

Mayor Strickland and City Councilmembers,

Attached please find the Notice of Potential Violation regarding the City's proposed "Builder's Remedy" Ordinance.

Regards,



Brian Heaton, AICP
Senior Housing Accountability Manager, Housing Accountability Unit
Housing and Community Development
2020 W. El Camino Avenue, Suite 500 | Sacramento, CA 95833
Phone: 916.776.7504

SUPPLEMENTAL COMMUNICATION

Meeting Date: 3/7/2023

Agenda Item No.: 16/23-226

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

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
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March 6, 2023

Mayor and City Council
City of Huntington Beach
Via: City.Council@surfcity-hb.org
2000 Main Street
Huntington Beach, CA 92648

Dear Mayor Tony Strickland; Mayor Pro Tem Gracey Van Der Mark; and City Councilmembers Rhona Bolton, Pat Burns, Dan Kalmick, Casey McKeon, and Natalie Moser:

RE: Ordinance to Ban "Builder's Remedy" Projects under the Housing Accountability Act – Notice of Potential Violation

The California Department of Housing and Community Development (HCD) is aware that on March 7, 2023, the City Council of the City of Huntington Beach (City) will consider proposed Builder's Remedy Ordinance No. 4285 / Zoning Text Amendment No. 23-001 (Ordinance),¹ which would "prohibit[] 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, 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."²

The purpose of this letter is to notify the City if the City Council adopts the Ordinance, the City will be in violation of the Housing Accountability Act (HAA) (Gov. Code, § 65589.5), State Housing Element Law (Gov. Code, §§ 65580-65589.11), Affirmatively Furthering Fair Housing (AFFH) obligations (Gov. Code, § 8899.50), and other laws.

¹ Agenda for City Council/Public Financing Authority, March 7, 2023, Item 16, File # 23-226, available at <https://huntingtonbeach.legistar.com/View.ashx?M=A&ID=992151&GUID=BD8D2F30-EF5E-4A0E-9865-EAE6057CACCA>.

² Ordinance No. 4285, available at <https://huntingtonbeach.legistar.com/View.ashx?M=F&ID=11690185&GUID=1581CD58-6E01-41B0-A4A7-D5188A67064F>.

In addition, adoption of the Ordinance may also constitute a violation of fair housing laws related to land use (Gov. Code, § 65008, subd. (b)) and be considered a moratorium on housing development in violation of the Housing Crisis Act (HCA) of 2019 (Gov. Code, § 66300). In the event that the City Council adopts the Ordinance, this letter serves as a Notice of Violation (NOV).³

Challenges to the HAA are not new and are unlikely to succeed. Similar challenges 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.⁴ In 2020, the City of Huntington Beach brought a challenge to the applicability of several state housing laws to the City because of its charter city status. That challenge failed in Los Angeles Superior Court. The City's new challenges will suffer the same fate, ultimately resulting in a waste of City staff time, court resources, and taxpayer dollars.

HCD urges the City Council to avoid such waste by declining to approve the Builder's Remedy Ordinance. In addition, the City Council has an opportunity at its upcoming hearing to correct violations contained in HCD's February 22, 2023, NOV⁵ by approving file number 23-227 to "[d]irect the City Manager to process SB 9 type lot subdivision applications and ADU applications...."⁶

Adoption of the Ordinance Would Violate the HAA

Government Code section 65589.5, subdivision (d)(5), allows a local agency to disapprove an affordable housing project that "is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan" if "the jurisdiction has adopted a revised housing element ... that is in substantial compliance...."

³ This letter incorporates by reference Notices of Potential Violation previously sent by HCD to the City on February 13, 2023, and January 9, 2023, regarding the proposed ban on "Builder's Remedy" projects. ³ Agenda for City Council/Public Financing Authority, March 7, 2023, Item 18, File # 23-227, available at

<https://huntingtonbeach.legistar.com/View.ashx?M=F&ID=11690187&GUID=F76CF013-586E-4E99-B84B-E9BC733EEAC1>.

⁴ 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."]

⁵ This letter incorporates by reference the NOV previously sent by HCD to the City on February 22, 2023, regarding the City Council's direction to the City Manager to "cease the processing of all applications/permits brought to the City by developers under SB 9, SB 10, or State law related to [Accessory Dwelling Unit (ADU)] projects, until the courts have adjudicated the matter(s)."

⁶ Agenda for City Council/Public Financing Authority, March 7, 2023, Item 18, File # 23-227, available at <https://huntingtonbeach.legistar.com/View.ashx?M=F&ID=11690187&GUID=F76CF013-586E-4E99-B84B-E9BC733EEAC1>.

Therefore, because the City does not have a substantially compliant housing element, it may not disapprove an affordable housing project for inconsistency with the zoning and land use designation. This limitation is known as the “Builder’s Remedy.”

Therefore, the adoption of the Ordinance would be a blatantly unlawful attempt to exempt the City from the HAA and will be rendered void under principles of preemption.

Adoption of the Ordinance Would Violate the HCA

The legal effect of the Ordinance is a moratorium on housing developments submitted under the Builder’s Remedy statute and other laws. It is therefore a violation of the HCA, which prohibits a local government from “[i]mposing a moratorium or similar restriction or limitation on housing development ... within all or a portion of the jurisdiction ... other than to specifically protect against an imminent threat to the health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium ...” (Gov. Code, § 66300, subd. (b)(1)(B)(i).) The HCA further requires that the local government shall not enforce such “a moratorium or other similar restriction on or limitation of housing development until it has submitted the ordinance to, and received approval from, [HCD].” (Gov. Code, § 66300, subd. (b)(1)(B)(ii).) If HCD denies approval, “that ordinance shall be deemed void.” (*Ibid.*) HCD categorically refuses to approve the City’s significant limitation on housing development in the form of the Ordinance. Without HCD approval, the Ordinance will be “deemed void” under the HCA.

Adoption of the Ordinance Would Violate Fair Housing Laws

Jurisdictions in California have AFFH obligations, including a duty to “overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” (Gov. Code, § 8899.50.) Further, state law prohibits jurisdictions from taking actions that are materially inconsistent with the obligation to AFFH. (Gov. Code, § 8899.50, subd. (b).)

The totality of the City’s actions, including its February 21 decision to prohibit processing ADU permits, and its decision to adopt the proposed Builder’s Remedy Ordinance, together represent a violation of this obligation.⁷ For example, the “Builder’s Remedy” deals exclusively with affordable housing developments. (Gov. Code, § 65585, subd. (d)(5).) By targeting affordable housing projects through the Ordinance, the City is violating its AFFH responsibilities.

In addition, limiting an ordinance to just affordable housing developments that qualify for protections under Government Code section 65589.5, subdivision (d) (the Builder’s Remedy), could pose a violation of fair housing law (Gov. Code, § 65008), which, among other provisions, prohibits the enactment or administration of ordinances that

⁷ See HCD’s February 22, 2023, NOV.

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.

Adoption of the Ordinance Would Violate Other State Housing Laws

Further, 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,” the Ordinance contradicts other state laws that do not require conformance with both zoning and general plan designations. For example, the Ordinance could interfere with housing laws, including but not limited to the following:

- State Density Bonus Law (Gov. Code, §§ 65915-65918), which allows for an increased density beyond the general plan and zoning, for the density bonus to be based on the highest allowable density regardless of zoning, and for waivers to the development standards in the zoning code to be applied in order to achieve that density.
- Streamlined Ministerial Approval Process (also known as “SB 35 Processing”) (Gov. Code, § 65913.4, subd. (a)(5)(A)), which states that in the event that the zoning ordinances and the general plan are “mutually inconsistent,” a development shall be deemed consistent with the objective zoning standards related to housing density, as applicable, if the density proposed is compliant with the maximum density allowed within that land use designation of the general plan regardless of zoning.
- SB 6 (Gov. Code, § 65852.24) and AB 2011 (Gov. Code, § 65912.110), which allow for residential development on commercially zoned land where the zoning may not already allow residential.
- State ADU Law (Gov. Code, § 65852.2), which requires ministerial approval of ADUs in specific zones.
- SB 9 (Gov. Code, §§ 65852.21, 66411.7), which allows for lot splits and duplexes under certain conditions.
- AB 2097 (Gov. Code, § 65863.2), which preempts local minimum parking standards when a project is within one-half mile of public transit.

Housing Element Compliance

The adoption of an ordinance limiting the applicability of state laws, including the HAA, represents a new governmental constraint to the production of housing. As you are aware, the City’s housing element is currently out of compliance with State Housing Element Law. While HCD found on September 30, 2022, that the draft housing element met statutory requirements at the time of review, the adoption of the Ordinance will alter HCD’s prior determination. The Ordinance and its impacts on housing development must be addressed in the housing element before HCD can find that the City has attained statutory compliance. Per the February 22, 2023, NOV, the City’s timeline for housing element compliance is inconsistent with Government Code section 65588,

subdivision (e), and by failing to timely adopt a substantially compliant 6th cycle housing element, the City is in violation of State Housing Element Law (Gov. Code, § 65585). Pursuant to the February 22, 2023, NOV, HCD is already in the process of scheduling two meetings to discuss the City's failure to adopt a compliant housing element. (Gov. Code, § 65585, subd. (k).)

Conclusion and Next Steps

HCD has enforcement authority over the HAA, the HCA, AFFH, and State Housing Element Law, among other state housing laws. HCD must review any action or failure to act that it determines to be inconsistent with either an adopted housing element or Government Code section 65583. HCD must then issue written findings to the locality. (Gov. Code, § 65585, subd. (i).) Additionally, HCD must notify a locality when that locality takes actions that violate certain housing laws. (Gov. Code, § 65585, subs. (i)(1), (j).)

HCD has already notified the Office of the Attorney General that, if the City Council adopts the Ordinance, the City will be in violation of the state laws referenced in this letter. (Gov. Code, § 65585, subd. (j).)

If you have any questions or would like to discuss the content of this letter, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a long horizontal flourish extending to the right.

David Zisser
Assistant Deputy Director
Land Use and Local Government Relations

cc: Al Zelinka, City Manager
Michael E. Gates, City Attorney
David Pai, Supervising Deputy Attorney General