

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

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February 22, 2022

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: City Council's Direction to Cease Processing Accessory Dwelling Unit (ADU) Permits – Notice of Violation

The California Department of Housing and Community Development (HCD) is aware that yesterday, the City Council of the City of Huntington Beach (City) voted to approve a proposal to “direct 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).”¹ The City Council took this action despite receiving letters from both HCD and the California Office of the Attorney General warning that doing so would violate various state laws. Indeed, various City Councilmembers discussed these letters during yesterday’s hearing.

HCD finds that in refusing to process ADU permits, the City is in violation of state law, including but not limited to State ADU Law (Gov. Code, §§ 65852.150, 65852.2, 65852.22) and the Housing Crisis Act (HCA) of 2019 (Gov. Code, § 66300). In addition, HCD finds that the City Council’s actions will require the City to revise its draft housing element and re-submit it for HCD’s review. The 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).

¹ Agenda for City Council/Public Financing Authority Regular, and Special Meeting of the Housing Authority, February 21, 2023, Item 26, File # 23-172, available at <https://huntingtonbeach.legistar.com/LegislationDetail.aspx?ID=6028468&GUID=EBF79AC4-60E3-4BC4-BC9F-34115765B077>.

Finally, the City's actions raise concerns under Affirmatively Furthering Fair Housing (AFFH) requirements (Gov. Code, § 8899.50).²

The City Has Unlawfully Attempted to Preempt State ADU Law

The City Council's action is a blatant and unlawful violation of State ADU Law. Specifically, State ADU Law requires local governments to process ADU applications ministerially. For example, Government Code section 65852.2, subdivisions (a)(3)(A) and (b)(1), require permitting agencies to approve or deny ADU applications ministerially and without discretionary review within 60 days of a complete application's submittal. Under both provisions, "[i]f the local agency has not acted upon the completed application within 60 days, the application shall be deemed approved." In addition, Government Code section 65852.2, subdivision (e)(1), states "a local agency shall ministerially approve an application for a building permit within a residential or mixed-use zone to create" ADUs that meet specific requirements.

Moreover, the City, upon denying an ADU or junior ADU (JADU) application, must provide "in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant" (Gov. Code, § 65852.2, subd. (b)(2)).

Notably, Government Code section 65852.2, subdivision (a)(7), states, "No other local ordinance, policy, or regulation shall be the basis for the delay or denial of a building permit or a use permit under this subdivision."³ Under this statute, the City Council's direction to cease ADU application and permit processing cannot lawfully preclude the City from acting to approve or deny an ADU permit.

The City Is in Violation of the Housing Crisis Act of 2019

The proposed action also constitutes a violation of various provisions of the HCA. For example, the HCA prohibits a local government from "enact[ing] a development policy,

² In addition, although it is outside the scope of this letter, HCD notes that cessation of processing applications for proposed SB 9 projects would be in violation of SB 9 itself (Gov. Code, §§ 65852.21, 66411.7) and may constitute a violation of other laws, including but not limited to the HCA (Gov. Code, § 66300), Housing Accountability Act (Gov. Code, § 65589.5), and Permit Streamlining Act (Gov. Code, §§ 65905.5, 65913.10, 65940 et seq.). HCD has notified the Office of the Attorney General of these potential violations. For more information about SB 9, please refer to HCD's SB 9 Fact Sheet, available at <https://www.hcd.ca.gov/docs/planning-and-community-development/sb9factsheet.pdf>.

³ For more information about State ADU Law, please refer to HCD's Accessory Dwelling Unit Handbook (Updated July 2022), available at <https://www.hcd.ca.gov/sites/default/files/2022-07/ADUHandbookUpdate.pdf>.

standard, or condition” that would have the effect of “[c]hanging the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing general plan land use designation, specific plan land use designation, or zoning district in effect at the time of the proposed change, below what was allowed under the land use designation or zoning ordinances ... in effect on January 1, 2018.” (Gov. Code, § 66300, subd. (b)(1)(A).) The statute defines “reducing the intensity of land use” to include “any other action that would individually or cumulatively reduce the site’s residential development capacity.” (*Ibid.*)

Clearly, refusing to process ADU permits has the effect of reducing the residential development capacity of sites across the city, in violation of the HCA.

The HCA also 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).) Moreover, 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.*)

The City Council’s resolution directing the cessation of ADU permits functions like an ordinance and “a moratorium or similar restriction on housing development” and is therefore in violation of the HCA. HCD categorically refuses to approve the City’s significant limitation on housing development in the form of ADUs, such that the resolution is legally deemed void. (*Ibid.*)

The City Is in Violation of State Housing Element Law

While the City’s housing element is currently out of compliance with State Housing Element Law, HCD found on September 30, 2022, that the draft housing element met statutory requirements at the time of review. However, the City Council’s direction to cease processing ADU applications alters HCD’s prior determination, and the housing element must now be revised. Specifically, halting ADU applications represents a new – and significant – governmental constraint to the production of housing that must be addressed in the housing element and impacts the adequacy of the sites inventory.

Indeed, the City's current draft housing element projects the development of 563 new ADUs in the planning period to meet its regional housing needs allocation (RHNA)⁴ and includes several policies and programs related specifically to ADUs, including Policy 2.7⁵ and Programs 2D and 2E.⁶

HCD has made resources and technical assistance available to assist jurisdictions in creating comprehensive housing elements. As you are aware, the City received \$500,000 through the Local Early Action Planning Grants program for a variety of planning activities, including the development and adoption of the City's 6th cycle housing element. According to HCD records, the City has requested \$109,000 of the \$500,000 award; however, to date, HCD has disbursed only \$31,000.

Various consequences may apply until the City's noncompliance with State Housing Element Law is corrected. First, noncompliance will result in ineligibility or delay in receiving state funds that require a compliant housing element as a prerequisite, including, but not limited to, the following:

- Permanent Local Housing Allocation Program
- Local Housing Trust Fund Program
- Infill Infrastructure Grant Program
- SB 1 Caltrans Sustainable Communities Grants
- Affordable Housing and Sustainable Communities Program

Second, jurisdictions that do not meet their housing element requirements may face additional financial and legal ramifications. HCD may notify the Office of the Attorney General, which may bring suit for violations of State Housing Element Law. Further, state law provides for court-imposed penalties for persistent noncompliance, including financial penalties. For example, Government Code section 65585, subdivision (l)(1), establishes a minimum fine of \$10,000 per month, up to \$100,000 per month. If a jurisdiction remains noncompliant, a court can multiply those penalties by a factor of six. Other potential ramifications could include the loss of local land use authority to a court-appointed agent.

⁴ Huntington Beach Housing Element Update (Draft July 2022), pp. 4-15, B-48, B-49, B-51, available at <https://www.hcd.ca.gov/housing-elements/docs/huntington-beach-6th-draft080122.pdf>.

⁵ *Id.*, p. 4-4.

⁶ *Id.*, p. 4-15.

In addition to these legal remedies available in the courts, under the Housing Accountability Act (Gov. Code, § 65589.5, subd. (d)), jurisdictions without a substantially compliant housing element cannot rely on inconsistency with zoning and general plan standards as a basis for denial of a housing project for very low-, low-, or moderate-income households.⁷

The City's Actions Are Inconsistent with its Affirmatively Furthering Fair Housing Obligations

The City Council's decision to deny ADU permits is at odds with the City's AFFH obligations. ADUs can provide more affordable housing opportunities for low- and moderate-income households and provide access to higher-resource communities, helping 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, subd. (a)(1).)

Indeed, the City's own draft housing element notes that the provision of ADUs is a strategy for addressing the needs of senior residents, single-parent households, and extremely low-income (ELI) households, and 98 percent of the 563 projected ADUs in the draft housing element are allocated for very low-, low-, and moderate-income households.⁸

Conclusion and Next Steps

HCD has enforcement authority over State ADU Law, 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 Government Code sections 65583, 66300, or 8899.50, and may refer such violations to the Office of the Attorney General. (Gov. Code, § 65585, subds. (i)(1), (j).)

Under Government Code section 65585, subdivision (i), HCD must give the City a reasonable time, no longer than 30 days, to respond to these findings. HCD provides the City until March 8, 2023, to provide a written response to these findings before taking any of the actions authorized by section 65585, including referral to the Office of

⁷ For purposes of the Housing Accountability Act, housing for very low-, low-, or moderate-income households is defined as having at least 20 percent of units set aside for low-income residents or 100 percent of units set aside for middle-income residents. (Gov. Code § 65589.5, subd. (h)(3).)

⁸ Huntington Beach Housing Element Update (Draft July 2022), p. B-51.

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

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the Attorney General. As stated above, the City's response should include, at a minimum, a specific plan for corrective action.

In addition, in compliance with Government Code section 65585, subdivision (k), HCD would like to schedule two meetings in person or via telephone within the next 14 days to discuss the City's failure to adopt a compliant housing element.

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 stroke 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

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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, subds. (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 stylized 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