



October 24, 2022

State Department of Housing and Community Development
2020 W. El Camino Ave, Suite 500
Sacramento, CA 95833

Re: Housing Element Grace Period and Builder's Remedy

Dear Director Gustavo Velazquez:

The San Francisco Planning Department was surprised to learn via Twitter, in your agency's email to Kevin Burke on October 6th, that jurisdictions would not be found to be in compliance with Housing Element Law during the 120-day grace period. Our department has been working closely with your staff in the Housing Policy Division for over three years, during which time we were clear about our intention to adopt the element within the grace period. We have diligently engaged with our communities, elected officials, and your agency to craft a compliant element that centers equity and elevates the needs of our most vulnerable residents. We recently met with your staff to strategize how we could reach a pre-certification letter prior to our adoption process to start in late January 2023, thereby ensuring sufficient time for certification by May 31st. At no time did HCD staff indicate that the City was in jeopardy of the outcomes spelled out in the October 6th email. In fact, your agency's August 8, 2022 response to our draft housing element only discusses the one-year vs. three-year rezoning penalty for not having a housing element by May 31; penalties that begin on January 31, 2024; and a generic note that some funding programs require a certified housing element.

We appreciate your staff's candid discussion with us on October 7th regarding the builder's remedy. We have looked more closely at the language and legislative history of Government Code 65589.5(d)(5) as well as 65589.5(f) and would hope that HCD could further clarify the scope of the builder's remedy and how these two sections might interact. Although we understand that the builder's remedy has been rarely, if ever, used in the past, recent reports indicate that jurisdictions – even those like San Francisco who have been working diligently to adopt a compliant housing element – may be subject to developers seeking to bypass the approval process and ignoring existing zoning. Given the lack of case law regarding these two subsections of the code and the scale of non-compliance found in southern California, it seems reasonable to expect more guidance from the state about how the law could be implemented. Indeed, without this guidance, or indication that the remedy would be available on the timeline we discussed with your staff over the past three years, we did not assume such extreme consequences.

At the same meeting on the 7th, we also learned that HCD is not able to provide a list of those grants that require a certified Housing Element by January 31, 2023. We have gathered information from our sister agencies and Bay Area colleagues to try to identify which grants may be in jeopardy if San Francisco is unable to certify its element by the end of January. We are requesting that your agency confirm, complete and correct this information so that we can best prepare for the outcomes. Precedent actions or decisions related to similar enforcement in southern California jurisdictions would be helpful.

Grant programs that may require certification by Jan 31, 2023:

- AHSC – due in March; SF is applying for approximately \$40M in housing funding and \$20M in transportation funding
- TOD
- Caltrans Sustainable Transportation grants

Grant programs that allow for certification within the grace period or have deadlines after May 31, 2023:

- IIG – due in March; HCD will refer to compliance from last cycle if within 120 days; SF is applying for approximately \$10-20M in funding
- PLHA - HCD will refer to compliance from last cycle if within 120 days (note the awards will be by 2/28/23); SF is applying for approximately \$13M in funding
- MHP – due in March; says nothing in regulations or guidelines

I strongly urge you to consider taking the following steps by November 15, 2022 to give jurisdictions an opportunity to prepare accordingly for potential enforcement outcomes:

1. Issue consolidated guidance noting all grants that require Housing Element certification.
2. Issue a rule such that all funding requirements regarding Housing Element certification during cycle 6 consistently allow for grant application and grant allocations during the 120-grace period following the language provided in the Super NOFA grants:

“...housing elements must be compliant at award (not application), but if the award date is within 120 days of the housing element due date, HCD will determine compliance based on the fifth cycle. Jurisdictions that are undergoing HCD review or receiving HCD technical assistance at the time of the award are in a “presumptive state of substantial compliance,” but must be in actual compliance by the time of grant disbursement.”

3. Direct the Housing Policy Division to expedite the review of our second draft submittal so that our department can accelerate our adoption schedule by 4 months to meet the Jan 31, 2023 deadline. Early input from your office on the 2nd submittal will be critical to stay on a path towards compliance.

I sincerely hope that we can work together to achieve our mutual goal of advancing housing equity in California. We greatly value the expertise and professionalism of your staff and look forward to continuing this planning effort with them so that we can quickly begin the even greater work of implementation. Our purpose in writing to you is to reduce confusion around this process so that we can focus our resources instead on delivering housing to our city.

Sincerely,

Rich Hillis
Planning Director

cc:

Paul McDougall, Housing Policy Division, HCD
Sohab Mehmood, Housing Policy Division, HCD
David Zisser, Local Government Relations and
Accountability, HCD
Miriam Chion, Director of Community Equity
Division, SF Planning
Maia Small, Principal Planner, SF Planning
Shelley Caltagirone, Co-Project Manager, SF
Planning
James Pappas, Co-Project Manager, SF
Planning