

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

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July 2, 2024

Sharon Goei, Community Development Director
City of Gilroy
7351 Rosanna Street
Gilroy, CA 95020

Dear Sharon Goei:

RE: Gilroy 315 Las Animas Ave. Project – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) received a request for technical assistance regarding the application of the Housing Accountability Act (HAA)¹ to the housing development project proposed at 315 Las Animas Ave. Among other provisions, the HAA limits the ability of a local government to deny a housing development project when it does not have a compliant housing element. The purpose of this letter is to provide technical assistance for the benefit of both the City of Gilroy (City) and the Project applicant regarding eligibility under the law.

Project Description and Background

HCD understands that the proposed project involves the construction of 501 units, of which 20 percent would be affordable to lower-income households, consisting of multi-family residential uses such as apartments and townhouses on an approximately 27-acre site. On July 5, 2023, the applicant submitted a preliminary application to vest rights for the project under the HAA. At the time, Gilroy did not have a substantially compliant adopted housing element; HCD found the City's adopted housing element in substantial compliance on August 21, 2023.

Following the full application submittal of the project on December 12, 2023, the City determined the application to be incomplete on January 11, 2023. In the City's written response to the applicant, the City identified a number of items on its application submittal requirement checklist that were not provided. For example, the application does not include a site plan that includes all required components, nor was a conceptual stormwater control plan submitted.²

¹ Gov. Code, § 65589.5.

² See Exhibits A, SITE PLAN (page 7) and D, CONCEPTUAL STORMWATER CONTROL PLAN (page 15) in the City's application submittal details document, available at <https://www.cityofgilroy.org/DocumentCenter/View/7554/Application-Submittal-Details-?bidId=>.

The City also asserted that Government Code section 65589.5, subdivision (d)(5) (i.e., the “Builder’s Remedy”), is not applicable because the City had already found its housing element in compliance when it adopted a draft element on May 1, 2023. The applicant maintains that the project should be eligible for the Builder’s Remedy and, as a result, the items identified by the City do not apply. This raises the following two questions:

Question #1: Is a local government authorized to find its housing element to be in substantial compliance prior to receiving HCD’s formal written determination?

No, a local government cannot “self-certify” its housing element. A jurisdiction does not have the authority to determine that its adopted housing element is in substantial compliance.³ In addition, a jurisdiction is “in compliance” as of the date of HCD’s letter finding the adopted housing element in substantial compliance.⁴ Therefore, based on HCD’s understanding of the timeline of events described in this letter, the proposed project is eligible for the protections of the Builder’s Remedy.

Question #2: Are housing development projects that seek to use the Builder’s Remedy obligated to submit all items listed on the local government’s application submittal requirement checklist?

It depends. Generally, a project that is subject to the Builder’s Remedy, like any other project, must submit the items listed on the local government’s application checklist pursuant to the Permit Streamlining Act (PSA).⁵ In other words, the mere fact that a project has the protection of the Builder’s Remedy does not preclude a local government from requiring all items on its typical application submittal checklist. At the same time, a local government cannot require items from a Builder’s Remedy project that are not included in the application checklist required for other projects.

However, under the HAA, a local jurisdiction may not disapprove a project that is protected by the Builder’s Remedy for inconsistency with a jurisdiction’s general plan and zoning ordinance.⁶ Therefore, as HCD recently clarified in a letter to Beverly Hills,⁷ a local jurisdiction may not refuse to process or approve a project subject to the Builder’s Remedy due to an applicant’s refusal to submit a general plan amendment or

³ See HCD Memorandum regarding Summary and Clarification of Requirements for Housing Element Compliance, March 16, 2023, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/memos/HousingElementComplianceMemo03162023.pdf>.

⁴ See HCD Letter of Technical Assistance to the City of La Canada Flintridge, March 22, 2023, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/la-canada-flintridge-ta-032223.pdf>.

⁵ Gov. Code, §§ 65940, subd. (a)(1); 65941, subd. (a); 65943, subd. (a).

⁶ Gov. Code, § 65589.5, subd. (d)(5).

⁷ HCD Letter of Support and Technical Assistance to Beverly Hills, June 26, 2024, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/beverly-hills-hau-1071-losta-062624.pdf>.

zoning change requested or required by the jurisdiction to resolve such an inconsistency without violating the intent of the HAA.

Please note that the Builder's Remedy also does not categorically prevent local governments from disapproving eligible housing development projects. Government Code section 65589.5, subdivisions (d)(2) through (d)(4) provide alternative means of denial. Furthermore, under subdivision (e), local governments are required to comply with the California Environmental Quality Act and the California Coastal Act, as applicable.

Conclusion

As described above, under Housing Element Law, the City cannot self-certify its housing element ahead of HCD's determination. Under the PSA, the City can impose the same application submittal requirements for housing development projects subject to the Builder's Remedy as it does for other projects. However, the City may not disapprove a project protected by the Builder's Remedy for failure to submit a general plan amendment or zoning change without violating the intent of the HAA.

Given the City is currently processing the project application, HCD also reminds the City of its obligation under the PSA to review the project in a timely manner. HCD remains committed to supporting the City of Gilroy in facilitating housing at all income levels and hopes the City finds this clarification helpful. If you have questions or need additional information, please contact David Ying at david.ying@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
Local Government Relations and Accountability