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February 7, 2025

Christopher Burton, Director, Planning Division
City of San José
200 East Santa Clara Street
San José, CA 95133

Dear Christopher Burton:

RE: City of San José, AB 1893 Builder's Remedy and CEQA Class 32 Infill Exemption - Letter of Technical Assistance

The purpose of this letter is for the California Department of Housing and Community Development (HCD) to provide technical assistance to the City of San José (City) regarding whether a housing development project[1] that meets the definition of "builder's remedy" pursuant to Government Code section 65589.5 subdivision (h)(11) is precluded from a California Environmental Quality Act (CEQA) Class 32 Infill Exemption determination.[2]

Background

CEQA Class 32 Infill Exemption: A project may qualify for CEQA Class 32 infill exemption if it is characterized as in-fill development meeting the conditions described in subdivisions (a) through (e) of CEQA Guidelines section 15332. One condition is that projects are "consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations."[3]

Builder's Remedy, Pre-2025: Under the Housing Accountability Act (HAA) prior to January 1, 2025, a jurisdiction could not disapprove a qualifying affordable housing development[4] on the basis that the project did not comply with the local zoning and general plan if the project applicant submitted a complete preliminary application or had

[1] Gov. Code, § 65589.5, subd. (h)(2).
[2] CEQA Guidelines, Cal. Code Regs., tit. 14, § 15332.
[3] CEQA Guidelines, Cal. Code Regs., tit. 14, § 15332, subd. (a).
[4] Prior to January 1, 2025, a qualifying "affordable housing development" project was defined as "Housing for very low, low-, or moderate-income households" where either (A) at least 20 percent of the total units shall be sold or rented to lower income households as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the total units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code or Section 65008 of the Government Code.

a complete development application while the City's housing element was out of substantial compliance with Housing Element Law. This provision of the HAA is known as the "builder's remedy." However, projects protected under the builder's remedy are not exempt from CEQA pursuant to Government Code section 65589.5, subdivision (e).

In August 2024, HCD sent the City of San José an email stating, in part: "A project—including one protected under the Builder's Remedy—cannot utilize a Class 32 infill exemption when the proposed residential land use is inconsistent with the applicable general plan [land use] designation and policies as well as zoning designation and regulations, as specified in CEQA Guidelines section 15332, subdivision (a)." The email goes on to clarify that a project may be exempt from CEQA under other provisions of CEQA guidelines or other state laws, and that lawfully waived or conceded zoning standards under State Density Bonus Law (SDBL) are not considered "applicable" under CEQA Class 32 infill exemption.[5]

Builder's Remedy and Assembly Bill (AB) 1893: Subsequently, the Governor signed AB 1893 in September 2024, which amended the HAA and prescribed requirements and provisions that apply to a builder's remedy project[6], including that a builder's remedy project "shall be deemed to be consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, redevelopment plan and implementing instruments, or other similar provisions for all purposes…."[7] This law became effective on January 1, 2025 and can apply retroactively to housing development projects that submitted a complete preliminary application or were deemed complete prior to January 1, 2025.[8]

Question: Is a project that meets the definition of "builder's remedy" pursuant to Government Code section 65589.5, subdivision (h)(11), precluded from utilizing a CEQA Class 32 infill exemption?

No, lead agencies cannot rely on subdivision (a) of CEQA Guidelines section 15332 to preclude a project that meets the definition of "builder's remedy" pursuant to Government Code section 65589.5, subdivision (h)(11), from utilizing a CEQA Class 32 infill exemption. Pursuant to Government Code section 65589.5, subdivision (f)(6)(D)(iii), a qualifying builder's remedy project shall be deemed "consistent, compliant, and in conformity with an *applicable* plan…*for all purposes*, and shall not be considered as a nonconforming lot, use, or structure *for any purpose* [emphases added.]" It is HCD's understanding that clause (iii) also applies to CEQA Guidelines section 15332, subdivision (a).

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[5] *Wollmer v. City of Berkeley* (2011) 193 Cal. App. 4th 1329, 1347-1350.
[6] Gov. Code, § 65589.5, subd. (h)(11).
[7] Gov. Code, § 65589.5, subd. (f)(6)(D)(iii).
[8] Gov. Code, §§ 65589.5, subds. (f)(7) and (h)(5).

Conclusion

A builder's remedy project that meets the definitions prescribed in Government Code section 65589.5, subdivision (h)(11), is not automatically exempt from CEQA. The HAA specifically states that nothing in Section 65589.5 shall be "construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act…."[9]

However, a builder's remedy project is not automatically precluded from meeting the conditions required for a CEQA Class 32 infill exemption determination. AB 1893 amends the HAA to deem a qualifying builder's remedy project "consistent...with an applicable plan, program, policy, ordinance, standard, requirement, redevelopment plan and implementing structures, or other similar provisions for all purposes"[10] which would satisfy the condition outlined in subdivision (a) of CEQA Guidelines section 15332.

HCD would like to remind the City that, for purposes of a local agency's approval, conditional approval, or disapproval of a housing development project pursuant to the HAA, a local jurisdiction's housing element is in substantial compliance as of the date of HCD's letter or a court decision finding it in substantial compliance.[11]

As previously mentioned, HCD has statutory authority to enforce the HAA and Housing Element Law, among other state housing laws. Accordingly, HCD may review local government actions or inactions to determine consistency with these laws. If HCD finds that a local government's actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law.[12] If you have questions or need additional information, please contact Grace Wu at grace.wu@hcd.ca.gov.

Sincerely,



Shannan West
Housing Accountability Unit Chief

[9] Gov. Code, § 65589.5, subd. (e).
[10] Gov. Code, § 65589.5, subd. (f)(6)(D)(iii).
[11] Gov. Code, § 65589.55.
[12] Gov. Code, § 65585, subd. (j).