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MEMORANDUM

TO: Mayor London N. Breed
Honorable Members of the Board of Supervisors
Honorable Members of the Planning Commission

FROM: Austin Yang
Audrey Pearson
Deputy City Attorneys

DATE: October 27, 2022

RE: Housing Element Update Process

Because of questions raised, including in the press, about the legal ramifications for San Francisco of the State's deadlines for updating the City's housing element, we are providing a public summary of the requirements and potential implications. We attach a recent technical advisory bulletin from the Association of Bay Area Governments that also addresses the legal obligations associated with the upcoming deadlines, the significance of those deadlines, and potential areas of legal risk. On October 20, 2022, the Planning Commission considered a revised schedule for approving the City's sixth revision to the housing element of the City's General Plan that is consistent with the summary of the procedural requirements and deadlines described below in this memorandum.

I. Summary

Over the last few years changes in State law have substantially revised many of the deadlines and legal obligations that apply to the housing element of the City's General Plan and have increased the potential consequences for failure to comply with those deadlines and obligations.

- Under State law, the City's updated housing element is due on January 31, 2023. The housing element must identify and analyze the jurisdiction's existing and projected housing needs (82,069 additional units); include a statement of goals, policies and objectives for the preservation, improvement and development of housing; and identify adequate sites for housing for all economic segments of the community.
- To have a housing element that is substantially compliant with housing element law, both the Planning Commission (the "Commission") and the Board of Supervisors (the "Board") must act before the January 31 deadline. First, the Commission must certify the environmental impact report, approve the housing element, and submit the proposed housing element to the Board. Then the Board must adopt an ordinance approving it, subject to approval or veto by the Mayor. The Board may only approve or reject the Commission's proposal; it may not make any amendments to it.
- Failure to have a substantially compliant housing element by January 31, 2023 could have significant consequences. First, it could expose the City to penalties, including the loss of certain grant funds. Second, it could also activate the so-called "builder's

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remedy,” which is based on a provision of the Housing Accountability Act that arguably prevents the City from requiring compliance with local planning and zoning codes in certain projects for low- and moderate-income housing.

- As part of the housing element, the City must identify sites to meet the latest Regional Housing Needs Assessment (“RHNA”) goals, or 82,069 new units. If the City does not have sufficient capacity to accommodate the RHNA goals, it must rezone sites to meet these goals. Generally, the rezoning must occur within three years of the deadline, or by January 31, 2026. But if the City does not adopt a housing element that the Department of Housing and Community Development (“HCD”) determines to be in substantial compliance with the housing element law by May 31, 2023 (120 days from January 31, 2023), the City would have only one year, or until January 31, 2024 to rezone.
- The risk that the City could be subject to these penalties or other enforcement actions is least if the City adopts the housing element by January 31, 2023. If the City adopts the housing element after January 31, 2023, the risk is likely significantly greater that the consequences noted above could occur. Although many of the funding programs that require a compliant housing element have a grace period of 120-days from January 31, 2023 before penalties accrue, the “builder’s remedy” and judicial remedies in state law do not expressly provide for any grace period.

II. Overview of Process and Implications

A. Process for Adopting and Implementing the Housing Element

1. Housing Element Law

Under State law, every city and county must have a general plan, and each general plan must include a housing element. State law requires that a housing element identify and analyze the jurisdiction’s existing and projected housing needs, include a statement of goals, policies and objectives for the preservation, improvement and development of housing, and identify adequate sites for housing for all economic segments of the community. (Gov. Code § 65583.) Housing element deadlines are specified in the Government Code. Generally, jurisdictions must update their housing elements every eight years – each period is known as a “cycle” in State law. For the sixth cycle, the City’s housing element is due on January 31, 2023. The sixth cycle revision covers housing goals for 2023 to 2031.

In preparing its housing element, the City is required to consider guidelines adopted by HCD, and may submit drafts of the housing element to HCD for review prior to adoption. (Gov. Code § 65583.1.) This review process must include public participation, and provide time for HCD to provide feedback on whether the draft of the housing element substantially complies with the housing element law. (Gov. Code §§ 65583.1, 65585(d).)

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Under State law, if HCD has determined that the draft housing element substantially complies with the housing element law, the City may adopt the housing element without further amendment. But, if HCD determines that the draft does not substantially comply with the housing element law, the City has two choices: either (1) revise the draft and bring the housing element into substantial compliance consistent with HCD's comments, or (2) adopt the draft without changes, and make findings explaining why the City believes the draft housing element substantially complies with the housing element law, despite HCD's findings. (Gov. Code § 65585(f).) Lastly, if HCD fails to provide comments on the draft within the 60-day period, the City may adopt the housing element. (Gov. Code § 65585(e).)

Following the Board's adoption of the housing element, HCD has up to 90 days to review the adopted housing element, and report its findings. (Gov. Code § 65585(h).) Even after adoption, the 90-day period, and a determination of compliance, HCD may periodically review any actions (or failure to act) that it determines are inconsistent with the housing element law, such as failure to implement a program in the housing element. (Gov. Code § 65583(i)(1)(A).) The City would have up to 30 days to respond to any written determination from HCD. (*Id.*)

2. CEQA and General Plan Requirements

Adoption of the housing element is considered a project under CEQA, and the Planning Department has been preparing an environmental impact report ("EIR"). The Department published a draft of the EIR on April 20, 2022 and made it available for public comment. The Commission must certify the housing element final EIR prior to adopting and recommending the housing element for approval by the Board. Certification of the housing element EIR is scheduled for November 17, 2022.

Because the housing element is a General Plan element, the Commission must initiate the adoption of the housing element. (Charter § 4.105; Planning Code § 340.) Once the Commission adopts and recommends the housing element for approval, the Board will consider an ordinance amending the General Plan. The ordinance would be subject to the usual procedural steps for legislation, including a committee hearing, two readings at the full Board, and review by the Mayor.

3. Rezoning Following Adoption of Housing Element

As part of the planning process, HCD, together with the Association of Bay Area Governments, determined the City's housing goal for the sixth cycle for low-, moderate-, and above moderate-income households. For this cycle, the City must plan for 82,069 units. Because the City's existing zoning is not sufficient to accommodate this number of units, the City will need to rezone parts of the City. Under State law, if the City adopts a substantially compliant housing element by January 31, 2023, the City generally has three years to accomplish the rezoning. (Gov. Code § 65583(c)(1)(A).)

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B. Consequences for a Non-Compliant Housing Element

Since it first passed the housing element law in 1969, the State Legislature has increased the consequences for jurisdictions that do not have a substantially compliant housing element and also augmented enforcement of those consequences. Current penalties for not having a compliant housing element are potentially significant. Possible consequences include the following:

- Shortened timelines for completing any required rezoning. If the City does not adopt a housing element that HCD has found to be in substantial compliance within 120 days of the January 31, 2023 deadline, the City would have to rezone to accommodate the RHNA by January 31, 2024.
- Ineligibility for certain grant funds affecting affordable housing and transit programs. Eligibility varies from grant to grant.
- Judicial remedies that could include financial penalties, and judicial intervention in adopting a court-approved housing element.
- Constrained local land use authority to deny affordable housing developments under the Housing Accountability Act, even when the project “is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation,” the so called “builder’s remedy.” (Gov. Code § 65589.5(d)(5).) This provision is potentially in tension with a related section of the Housing Accountability Act, which would allow a city to “objective, quantifiable, written development standards, conditions, and policies... appropriate to, and consistent with, meeting the jurisdictions share of the regional housing need.” In southern California, where the housing element deadline has already passed, several jurisdictions are dealing with “builder’s remedy” projects. Santa Monica, for example, has 16 such projects pending. To date, we are unaware of any legal case addressing the “builder’s remedy.”

Attachment: Association of Bay Area Government’s Technical Assistance re: Housing Element and “Builder’s Remedy”

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DISCLAIMER: This document is intended solely as a technical overview of the provisions of certain provisions of the Housing Accountability Act. It is not intended to serve as legal advice regarding any jurisdiction's specific policies or any proposed housing development project. Local staff should consult with their city attorney or county counsel when determining the applicability of these provisions to any proposed housing development project in their jurisdiction.

The “Builder’s Remedy” and Housing Elements

There have recently been press reports regarding the so-called “Builder’s Remedy” that can be used to avoid local zoning requirements when a locality’s housing element does not substantially comply with state law. These reports have stated that, if a locality has a noncompliant housing element the city or county must approve the housing development project, regardless of the local zoning.

The “Builder’s Remedy” arises from the Housing Accountability Act (Government Code Section 65589.5¹; the HAA). This paper describes the provisions of the HAA that constitute the “Builder’s Remedy” and how they may apply to a proposed housing development project.

How Does the “Builder’s Remedy” Work?

The HAA requires that cities and counties make one of five findings to deny, or to apply conditions that make infeasible, a housing development project “for very low, low- or moderate-income households” or an emergency shelter. (Section 65589.5(d).) A housing development project with 20 percent of the total units available to lower income households or with all of the units available for moderate or middle income households may qualify as housing “for very low, low- or moderate income households” (see detailed description below). The five findings which would allow denial of an eligible project can be summarized as follows:

1. The city or county has met or exceeded its Regional Housing Needs Allocation (RHNA) for the proposed income categories in the development.
2. The housing development or emergency shelter would have a specific adverse impact on public health and safety, and there is no way to mitigate or avoid the impact without making the development unaffordable. The impact must be based on objective, written public health or safety standards in place when the application was deemed complete.
3. The denial or condition is required to meet state or federal law, and there is no feasible method to comply without making the development unaffordable.
4. The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agriculture or resource preservation or there are not adequate water or sewage facilities to the serve the project.

¹ All future references are to the Government Code unless otherwise specified.

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5. The project is inconsistent with both the zoning ordinance and the land use designation as specified in any general plan element. **However, a city or county cannot make this finding if it has not adopted a housing element in substantial compliance with state law.**

If a locality has not adopted a housing element in substantial compliance with state law, developers may propose eligible housing development projects that do not comply with either the zoning or the general plan. The term “Builder’s Remedy” is used to describe the situation where a local agency may be required to approve an eligible housing development project because it cannot make one of the other four findings.

Are Projects Using the “Builder’s Remedy” Exempt from CEQA Review?

The HAA contains no exemptions from the California Environmental Quality Act. The HAA states specifically that nothing relieves the local agency from making the required CEQA findings and otherwise complying with CEQA. (Section 65589.5(e).) A project may be exempt from CEQA under other provisions of CEQA, other state laws, or the CEQA Guidelines.

When Does a Housing Element No Longer Comply with State Law? Is There a Grace Period If the Housing Element Is Not Adopted by the Due Date?

Housing elements are required to comply with current state housing element law on the established due date (**January 31, 2023** in the ABAG region). State law has changed significantly since fifth cycle housing elements were adopted, and it would be unlikely that a fifth cycle housing element would substantially comply with current state law. If a sixth cycle element has not been adopted by the due date, the housing element would likely be out of compliance with state law until a complying sixth cycle housing element is adopted. **There is no grace period**, even for the period when a housing element is being reviewed by the Department of Housing and Community Development (HCD).

HCD approval is not required for a housing element to be found substantially compliant with state law. State law provides that a city or county may adopt its own findings explaining why its housing element is substantially compliant with state law despite HCD’s findings. (Section 65585(f).) However, HCD is authorized to refer agencies to the Attorney General if it finds a housing element out of compliance with state law. (Section 65585(j).)

Are a Local Agency’s Development Standards Null and Void If the Housing Element is Not in Compliance with State Law?

No, the local agency’s development standards are not null and void if the housing element is not in substantial compliance with state law. The “Builder’s Remedy,” however, may require a local agency to approve an eligible housing development project despite its noncompliance with local development standards. Conversely, other projects may be challenged because a finding of general plan consistency cannot be made if the general plan is out of compliance with state law.

What Projects Are Eligible to Use the “Builder’s Remedy”?

The “Builder’s Remedy” applies only to a housing development project “for very low, low- or moderate-income households” and to emergency shelters. The HAA defines a “housing development project” as either:

- Residential units only;
- Mixed-use developments with at least two-thirds of the square footage designated for residential use; or



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- Transitional housing or supportive housing.² (Section 65589.5(h)(2).)

“Housing for very low, low-, or moderate-income households” includes either:

- 20% of the total units sold or rented to lower income households;
- 100% of the units sold or rented to moderate income households; or
- 100% of the units sold or rented to middle income households.³

Monthly housing costs for lower income households cannot exceed 30 percent of 60 percent of median income, adjusted for household size, and the units must remain affordable for 30 years. Monthly housing costs for moderate income households cannot exceed 30 percent of 100 percent of median income. There are no standards in the HAA for housing costs for middle income households. (Sections 65589.5(h)(3), (h)(4).)

An emergency shelter is housing with minimal supportive services for homeless persons that is limited to occupancy of six months or less by a homeless person. No individual or household may be denied emergency shelter because of an inability to pay. (Section 65582(d); Health & Safety Code Section 50801(e).)

² As defined in Section 65582.

³ Those earning no more than 150 percent of median income.