

How Developers Seized Upon Builder's Remedy in Noncompliant Cities

Josh Stephens on Oct 31, 2022

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Dave Rand

For all of the housing production laws passed in Sacramento over the past few years, nothing has shaken California's local planning community as much as the recent use of the so-called "[Builder's Remedy](#)," which has been part of the Housing Accountability Act for 30 years.

The Builder's Remedy essentially forces a jurisdiction to approve certain proposed housing developments that include 20% low-income units if the jurisdiction's housing element is out of compliance with the state. In past cycles of the Regional Housing Needs Assessment program, achieving compliance was not particularly difficult, so opportunities to invoke the Builder's Remedy were scarce. But compliance is harder as the result of recent laws, especially SB 828 in 2018, which vastly increased the number of units cities must plan for.

Now the Builder's Remedy has led to the approval -- virtually overnight -- of nearly 5,000 units in Santa Monica, an 8% increase in the housing stock in a city that is notoriously resistant to new development. Another Builder's Remedy project has been filed in Beverly Hills and South Pasadena may see one as well.

To understand the Builder's Remedy, *CP&DR* interviewed the lawyer behind the Santa Monica Builder's Remedy projects: Dave Rand of the newly formed boutique housing-focused law firm of [Rand Paster & Nelson](#). Rand was a longtime partner at Armbruster Goldsmith & Delvac. He represents WSC Communities, the development firm behind the Santa Monica projects.

When did you realize that the Builder's Remedy might be viable?

It's been in the Housing Accountability Act in some form since 1990. My skepticism about utilizing it in the past had to do with timing and questions around the ability to vest the project. If you file an application for a builder's remedy project when the city has a non-compliant housing element, that's fine. But I had real concerns that, because the Builder's Remedy doesn't exempt you from a discretionary process or CEQA, at some point during the entitlement process, the city would come into compliance and then the application would go up in smoke. It did not make sense to me to encourage a developer to take that level of risk when we couldn't predict that the application in the Builder's Remedy protection would exist, come time for approval. I'm not aware of one of these projects ever getting approved or built.

That's what led me to work with HCD and seek a clarification that you vest a builder's remedy application under the city's noncompliant housing element at the time of submittal of an SB 330 preliminary application. That clarification, which HCD confirmed and issued in writing, was hugely important. Now we're very confident that, when we file the application, starting with the preliminary application, which is a very intentionally streamlined process, the noncompliant status of the city's housing element will be locked in. The Builder's Remedy protection will remain, even if the city comes into compliance prior to the project being ready for approval.

As far as you're aware, has it ever been used in the 30 some odd years? Are there any successful cases or has this just been on paper until now?

There is an interesting dynamic occurring in some cities that are being sued for affordable housing violations and are subject to settlement agreements whereby the settlement agreements include provision requiring the city to process Builder's Remedy projects. That's happened, and they continue to facilitate some of these projects. But no, I don't know of an actual project that's had shovel in the ground.

Where were the Santa Monica projects in the pipeline prior to noncompliance?

The Santa Monica sites have had projects approved on them quite some time ago under very different economic conditions. Those projects were too small to be viable at this stage, given the significant increase in construction costs and interest rates and the macroeconomic environment that we're dealing with.

The city of Santa Monica is undertaking a rezoning effort that's required through its now-adopted housing element. And this was an opportunity for the developer to not wait for the rezoning to commence, but to start actually moving projects forward and do it in a way where they had more flexibility from the zoning. These projects are bigger than the prior approvals, but they're also more consistent with the upzoning that has been planned through the housing element. More significant in terms of density, but also significantly more affordable housing provided.

We were working on the preparation of these applications as we were waiting for HCD's clarification. And once the clarification came in, that is really what gave us the confidence to be able to move forward and file the preliminary applications. Filing a preliminary application is a real streamline event. We were able to schedule the filings and file these 15 projects very quickly, over the span of just a couple of weeks. And that's what locked us our position in. So long as the applicant files a complete application within six months of the preliminary application file and date, we'll be off and running.

What did Santa Monica do wrong? Did the council or the planning department not fully appreciate what could happen with Builder's Remedy?

I'm not going to say the city did anything wrong. They had a process. That process took some time. It's not an easy thing to develop a housing element, meet all the state law requirements and satisfy all the needed political constituencies and decision-makers. I don't fault the city necessarily in that regard. They had to do what they had to do.

Ultimately that effort did not comply with state housing timeframes. The planning department staff made it very clear to the decision-makers every step of the way that one of the consequences of non-compliance is lack of zoning control and the ability for applicants to propose general plan and zoning noncompliant projects. That was made expressly clear.

You know how people are: you can hear things, but until it happens, it's not really real. One of the most significant consequences of these particular filings is that now cities know that this is real. What I foresee is that cities will move with much greater speed and seriousness in adopting their housing elements now that they know that they could be open to applicants filing these sorts of projects that don't comply with their zoning regulations. I think as you'll see housing elements season begin up north, you'll see different timeframes in different speed than we saw in many of the SCAG jurisdictions.

Roughly how many cities do you see as being open to Builder's Remedy applications at present?

There's a lot of municipalities in the SCAG region that are still out of compliance. October 15 was a very significant date under SB 197, the budget trailer bill, which essentially gave cities up until October 15 to get certified. And if they did not get certified by October 15, then they remain out of compliance, not only until their housing element gets certified, but also until they complete mandatory rezoning.

Many of the jurisdictions in the SCAG region have rezoning obligations because the RHNA allocation was so substantially increased over the fifth cycle. They had to take steps to increase their zoning capacity and change land use designations and change zoning. That effort now for cities that are out of compliance today needs to be completed before they become substantially compliant under housing element law. Depending on the jurisdiction, that can mean a fair bit of work. In addition to a number of jurisdictions that are out of compliance, I think there's some jurisdictions that could be out of compliance for quite some time.

Do you expect a rush of Builder's Remedy applications or is it really a case by case depending on a city's economics and developers' capacities and risk tolerance?

It's more the latter. Commentators have speculated that this is largely going to be a phenomenon you will see in particularly high-resource areas. The cost of developing a project unsubsidized with 20% of the total units for

deed-restricted low income is extremely expensive. To make those projects pencil, you need to be in jurisdictions where the market rate rents are high enough to be able to make that work. That's, frankly, not a lot of places.

But, I have found it interesting that I have received calls for developers interested in doing these kinds of projects all over. Cities like Compton for example, where applicants have been looking to increase density potential doing a 100-percent moderate-income project, or maybe even a hundred percent affordable prospects.

We'll see if any of those projects go forward, if they can make them work. Right now, developers are struggling with the perfect storm of economic conditions. I think that's part of the reason why there was such intense interest in the Builder's Remedy after the Santa Monica projects because a lot of developers thought, "well, maybe this is a way forward." It's not going to work in the majority of cases in my view, but that's why I think people are evaluating it.

If a city is opposed to a proposed Builder's Remedy project, what are its remedies?

The Builder's Remedy does not exempt you from the California Environmental Quality Act. But there are ultimately limitations to that, that the ability for a city to slow-boat a CEQA document is not unlimited.

If the project is large enough, an EIR could be required, and we know how lengthy and cumbersome that can be. But what I have been saying is the majority of projects that I think will be filed are going to be in transit priority areas in the infill context. Projects where aesthetics are less than significant under the law, where VMT is a benefit and not going to be an impact. The impacts are likely to be limited to temporary intermittent construction type impacts.

Is the city really going to turn down 400 affordable units because there is a temporary intermittent construction noise impact? We'll have that conversation, but that's a fight I'm willing to have.

Does Builder's Remedy prevent cities from making development agreements and getting public benefits from them? Or if you're a city, it is tough luck?

It does prevent a city from acquiring a development agreement, but what I would say is that cities today who are looking for public benefits around housing projects are primarily looking for affordable housing. The Builder's Remedy is going to give more affordable housing than you would typically get through the development agreement process. From a community benefit perspective, these projects have it baked in.

Is Builder's Remedy going to make up for California's housing shortage?

It's not for every project. It's not for every city. As potentially consequential as I think it could be, there has been some irrational exuberance around this. It could be an additional tool in the toolbox, but it's, it's not going to proliferate in the way some have speculated. It takes a lot for one of these projects to make sense and to go forward. That may change if there's some legislative changes around this, but at the moment it's real. And it's a consequence for cities to not take their housing element process seriously, but it's, it's not like you're going to see these popping up in every neighborhood.

Conducted October 28, this interview has been condensed and edited for clarity.

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