

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

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March 19, 2024

Christopher Burton, Director, Planning Division  
City of San José  
200 East Santa Clara Street  
San José, CA 95113

Dear Christopher Burton:

**RE: City of San José's Denial of "Builder's Remedy" Project Applications – Notice of Potential Violation**

The California Department of Housing and Community Development (HCD) is aware that on or about January 31, 2024, the City of San José (City) deemed a number of preliminary applications "not eligible to be submitted under the Builder's Remedy" on the grounds that its June 20, 2023 adopted housing element was allegedly in substantial compliance with Housing Element Law despite subsequent contrary findings by HCD on August 28, 2023. In other words, the City made it clear that it would not accept an application or issue, under the Builder's Remedy, the required land use approvals or entitlements necessary for the proposed projects. Subsequently, however, City staff verbally informed HCD that the City is now accepting and processing those applications.

To avoid any confusion, HCD hereby advises that the City may be in violation of the Housing Accountability Act (HAA)<sup>1</sup> if the City either fails to process those applications or ultimately denies those applications based upon inconsistency with zoning and general plan land use designations pursuant to Government Code section 65589.5, subdivision (d)(5). Furthermore, the City may be in violation of the Permit Streamlining Act (PSA)<sup>2</sup> if the City's actions have the effect of barring the submittal of a full application within the statutory 180 calendar days of the preliminary application.

**Housing Element Compliance**

The following are key dates related to the City's 6<sup>th</sup> Cycle housing element:

- **September 16, 2022.** The City submitted a draft housing element to HCD for initial review (Version 1).

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<sup>1</sup> Gov. Code, § 65589.5.

<sup>2</sup> Gov. Code, § 65941.1.

- **December 15, 2022.** HCD found that Version 1 required revisions to substantially comply with Housing Element Law.<sup>3</sup>
- **January 31, 2023.** The statutory deadline for the City to adopt a housing element in substantial compliance with State Housing Element Law.
- **June 20, 2023.** The City Council adopted a revised housing element (Version 2).
- **June 29, 2023.** The City submitted Version 2 for HCD's review.
- **August 28, 2023.** HCD found that Version 2 required additional revisions to substantially comply with State Housing Element Law.
- **November 30, 2023.** The City submitted a revised housing element (Version 3) for HCD's review. The City did so without further action or re-adoption by the City Council pursuant to Section 10 of Council Resolution No. RES2023-263, dated June 26, 2023, which directed and authorized the Director of Planning, Building, and Code Enforcement, or his or her designee, to "make all non-substantive changes to the housing element to make it internally consistent or to address any non-substantive changes or amendments requested by HCD to achieve certification."
- **January 29, 2024.** HCD found Version 3 in substantial compliance with State Housing Element Law "as of January 29, 2024."

As indicated by the key dates listed above, the City's adopted housing element was not in substantial compliance with State Housing Element Law from February 1, 2023 through January 28, 2024. The City acknowledged HCD's August 28, 2023 findings of noncompliance by submitting a revised housing element (Version 3) to HCD on November 30, 2023. Examples of substantive revisions that were required for Version 3 to be in substantial compliance include the following:

- **Governmental Constraints (Gov. Code, § 65583, subd. (a)(5)).** Analysis of the City's permit processing procedures for potential constraints on housing supply, including cost, timing, financial feasibility, approval certainty, and ability to achieve maximum densities.
- **Affirmatively Furthering Fair Housing (Gov. Code, § 65583, subd. (c)(10)(A)).** Prioritization of contributing factors to fair housing and analysis of the City's trends including disability, familial status, and education in comparison to the region.
- **Sites Inventory (Gov. Code, § 65583, subd. (a)(3)).** Sufficient detail of the assumptions and methodology used to demonstrate realistic capacity estimates of the sites inventory, including comparable properties and their densities and affordability levels.

Because of these and other revisions in Version 3, HCD issued a letter of substantial compliance to the City on January 29, 2024.

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<sup>3</sup> Gov. Code, § 65580 et seq.

A local jurisdiction cannot self-certify or determine that its own housing element substantially complies with Housing Element Law.<sup>4</sup> Instead, a local jurisdiction has two options upon receiving HCD's determination that its draft housing element is not in substantial compliance. First, it can revise the draft element to substantially comply with HCD's findings. Second, it can adopt the draft element without changes, and include in its resolution of adoption written findings explaining why it believes the draft element substantially complies with Housing Element Law.<sup>5</sup> Ultimately, HCD has a statutory mandate to determine whether a housing element substantially complies with Housing Element Law.<sup>6</sup>

### **Housing Accountability Act (HAA)**

Under the HAA, a jurisdiction shall not disapprove a qualifying affordable housing development<sup>7</sup> on the basis that the project does not comply with the local zoning and general plan if the developer submits all statutorily required preliminary application materials, or has a complete development application,<sup>8</sup> while the City's housing element is out of substantial compliance with Housing Element Law.<sup>9</sup> This provision of the HAA is colloquially known as the "Builder's Remedy." The submittal of a preliminary application, or a complete development application, while the jurisdiction is out of substantial compliance vests the applicant's right to invoke the Builder's Remedy, even if the jurisdiction subsequently achieves compliance.<sup>10</sup>

Therefore, the City cannot reverse the vesting of a preliminary application or disapprove a qualifying Builder's Remedy project on the grounds that the City's housing element is now substantially compliant. To be sure, such projects may still be disapproved under the HAA if, upon a preponderance of the evidence, the City makes written findings as to other reasons unrelated to zoning or general plan inconsistency.<sup>11</sup> In addition, projects under the Builder's Remedy are still required to comply with California Environmental Quality Act (CEQA), unless exempt under other provisions of CEQA or other state streamlining laws. The HAA specifically states nothing relieves the local agency from making the required CEQA findings and otherwise complying with CEQA.<sup>12</sup>

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<sup>4</sup> Housing Compliance Memo. HCD, March 16, 2023, <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/memos/HousingElementComplianceMemo03162023.pdf>; see Order on Petitions for Writ of Mandate and Complaints for Declaratory Relief, *Cal. Housing Defense Fund v. City of La Canada Flintridge* (Superior Court of Los Angeles County, March 4, 2024) Case No. 23STCP02614.

<sup>5</sup> Gov. Code, § 65585, subd. (f)(2).

<sup>6</sup> Gov. Code, § 65585, subds. (i)-(j).

<sup>7</sup> Gov. Code, § 65589.5, subd. (h)(3).

<sup>8</sup> Gov. Code, § 65589.5, subd. (h)(5).

<sup>9</sup> Gov. Code, § 65589.5, subd. (d)(5).

<sup>10</sup> Gov. Code, § 65589.5, subd. (o)(1).

<sup>11</sup> See, e.g., Gov. Code, § 65589.5, subds. (d)(2)-(4).

<sup>12</sup> Gov. Code, § 65589.5, subd. (e).

### **Potential Violation of the HAA**

After June 20, 2023, but before the City of San Jose achieved substantial compliance on January 29, 2024, a number of developers filed project applications invoking the Builder's Remedy. On or about January 31, 2024, the City issued letters (Denial Letters) in response to those applications claiming that the projects were "not eligible to be submitted under the Builder's Remedy" on the basis that the City Council found that its June 20, 2023 housing element (Version 2) substantially complied with Housing Element Law (See Enclosure, example Denial Letters). However, HCD did not find the City's housing element in substantial compliance until January 29, 2024.

By precluding the right of developers who submitted preliminary applications between June 20, 2023 through January 28, 2024, the City potentially "disapproved" the projects<sup>13</sup> in violation of the HAA. However, on March 7 and March 14, 2024, HCD staff met with the City to discuss the City's Denial Letters. During those conversations, City staff verbally explained that, despite language to the contrary in the Denial Letters, the City *is* accepting Builder's Remedy applications and will not disapprove such projects for being inconsistent with zoning and general plan land use designations. However, the City has not confirmed as much in writing. Therefore, HCD advises that the City be aware that not processing the applications in accordance with the HAA would be a violation of state law.

### **Potential Violation of the Permit Streamlining Act (PSA)**

Furthermore, HCD is evaluating whether the City's Denial Letters violated the PSA by effectively preventing developers from submitting, or by failing to process, full development applications, or by imposing unlawful application requirements.<sup>14</sup> Therefore, HCD advises the City to confirm in writing to affected applicants and HCD that the City will process full development applications, following preliminary applications submitted from June 20, 2023 to January 28, 2024 that invoked the Builder's Remedy.

### **Conclusion and Next Steps**

The City's improper Denial Letters to developers that submitted preliminary applications under the Builder's Remedy constitutes a potential violation of the HAA and PSA. The City has until April 18, 2024 to provide a written response to this Notice, including its proposed plan to address the processing of these applications. In addition, the City's written response should include the following information for HCD to evaluate the scope and extent of the potential violation:

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<sup>13</sup> Gov. Code, § 65589.5, subd. (h)(6).

<sup>14</sup> Gov. Code, §§ 65941.1, 65943.

- **A list of all preliminary applications submitted under the Builder's Remedy between June 20, 2023 through January 28, 2024.** The list must contain the date of the preliminary application submittal, the project address(es), the total number of housing units proposed, the percentage of affordable units, and, if applicable, the total number of units previously approved and entitled for the project site.
- **A list of all project applicants who received Denial Letters and copies of each letter.** The list must contain the name of the applicant, their project address(es), the date the letter of ineligibility was issued, and the listed contact information in the City's permit system, including email and phone number.
- **All correspondence from the City of San Jose to project applicants who submitted under the Builder's Remedy between June 20, 2023 through January 28, 2024.** Please also include any preliminary application notices of expiration, if issued.
- **Copies of notices or letters the City sent in response to formal applications submitted under the Builder's Remedy.** Please include any notices of completeness pursuant to Government Code section 65943, and notices of consistency with applicable objective standards pursuant to Government Code section 65589.5.

HCD will consider the City's written response before taking further action authorized by Government Code section 65585, subdivision (j)(1), including, but not limited to, referral to the California Office of the Attorney General.

Please note, HCD must reject an application for Prohousing Designation if it determines that the applicant has not met threshold requirements, including compliance with state housing laws or if HCD discovers that the applicant is violating state housing laws, including the HAA.<sup>15</sup> Therefore, the City is ineligible for Prohousing Designation until the City takes corrective action to accept and process applicable Builder's Remedy applications without further delay. If you have any questions or would like to discuss the content of this letter, please contact Grace Wu of our staff at [Grace.Wu@hcd.ca.gov](mailto:Grace.Wu@hcd.ca.gov).

Sincerely,



Melinda Coy  
Proactive Housing Accountability Chief

cc: Rosalynn Hughey, Deputy City Manager and Acting Housing Director  
Johnny Phan, Chief Deputy City Attorney  
Ruth Cueto, Supervising Planner  
Jared Ferguson, Principal Planner

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<sup>15</sup> CCR, § 6604.1, subds. (b)(4), (c), (d)(2).

Enclosures

City of San Jose. Letter to Vicky Kwoh Ching regarding 2222 Senter Road, dated February 1, 2024.

City of San Jose. Letter to Vince Rivero, Stuart Whang, Paul Lee, and Xavier Campos regarding 2159 Chisin Street, dated February 1, 2024.

February 1, 2024

**VIA EMAIL ONLY**

Vince Rivero  
SVEP Consultants LLC  
1154 Park Avenue  
San José, CA 95126  
vince@svepconsultants.com

Stuart Whang & Paul Lee  
Pocola LLC  
108 North Yanez Avenue  
Monterey Park, CA 91754  
[saralee@us.attorneys.com](mailto:saralee@us.attorneys.com)

Xavier Campos  
SVEP Consultants LLC  
1154 Park Avenue  
San José, CA 95126  
xavier@svepconsultants.com

**LOCATION AND ADDRESS:** North of the intersection of Chisin Street and Chisin Court (2159 Chisin Street)

**RE: File No. PRE23-260,** a Senate Bill 330 Preliminary Application for the construction of 36 single-family residences on an approximately 33.2-gross-acre site.

Dear Mr. Rivero, Mr. Whang, Mr. Lee, and Mr. Campos,

The City of San José (“City”) confirms receipt of a Senate Bill 330 (“SB330”) Preliminary Application for 2159 Chisin Street on December 6, 2023. The preliminary application included a cover letter dated December 5, 2023, along with the executed application and site plans and elevations. The purpose of this letter is to inform you that the City will not accept any future formal development applications under the Builder’s Remedy for projects that submitted an SB330 Preliminary Application after June 20, 2023.

According to the SB330 Preliminary Application, you seek approval of a residential development project pursuant to a provision of the Housing Accountability Act, informally known as the “Builder’s Remedy.” The proposed project located at 2159 Chisin Street has a General Plan designation of Open Space, Parklands, and Habitat and is zoned A(PD) Planned Development (File No. PDC90-012). The Open Space, Parklands, and Habitat land use designation and Planned Development Zoning District (File No. PDC90-012) do not allow the kind of residential development proposed in your SB330

Preliminary Application. Generally, such a proposal would require compliance with state law, including the California Environmental Quality Act (“CEQA”) and Housing Accountability Act (“HAA”); and City requirements including a General Plan Amendment, Rezoning, Site or Planned Development Permit, Demolition Permit, Tree Removal Permit, Grading Permit, Building Permit, and other related permits/approvals.

The City acknowledges that Government Code Section 65589.5(d)(5) authorizes jurisdictions to deny a qualifying project if both of the following criteria are satisfied: (1) the project is inconsistent with a jurisdiction’s zoning ordinance and general plan land use designation; and (2) the jurisdiction has a Housing Element in substantial compliance with the state’s Housing Element Law (Gov. Code, § 65580 et seq). On June 20, 2023, the City Council adopted a resolution approving the 2023-2031 Housing Element and finding that the Housing Element substantially complies with state law. That resolution included a provision further directing and authorizing the Director of Planning, Building, and Code Enforcement to make all non-substantive changes to the Housing Element to make it internally consistent or to address any non-substantive changes or amendments requested by HCD to achieve certification.

After months of consultation with HCD and various members of the public and stakeholder groups, the City addressed all consistency and non-substantive issues in the Housing Element. On January 29, 2024, HCD certified the City’s 2023-2031 Housing Element. Notably, Government Code Section 65589.5(d)(5) requires a housing element be in substantial compliance with the Housing Element Law and does not require HCD certification. Substantial compliance under the Housing Element Law is ultimately a question of law. While HCD’s findings are instructive, they are advisory. (Gov. Code, § 65585, subd. (a); *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1193.)

Since your SB330 Preliminary Application was submitted after June 20, 2023, when the City adopted a substantially compliant Housing Element, the project is not eligible to be submitted under the Builder’s Remedy. As your proposed project does not comply with state law and the City’s General Plan land use designation or zoning, you may not proceed with a formal development application under the Builder’s Remedy. You may withdraw your current SB330 Preliminary Application or let it expire on its own term. Further, you may submit the following applications to be considered concurrently by the City:

- General Plan Amendment to amend the existing General Plan land use designation to a land use designation that would support the proposed residential development.
- Conforming or Planned Development Rezoning to rezone the site from the A(PD) Planned Development Zoning District to a new Zoning District for the associated General Plan Amendment.
- Development/Use Permit Application to allow the development of the project.
- Subdivision/Lot Merger Application to allow the subdivision of the land to support the proposed project.

The City reserves all rights and remedies available now and in the future under state law, not limited to the California Environmental Quality Act, Subdivision Map Act, Housing Accountability Act, the Housing Element Law, and whether Senate Bill 330 vests applications submitted under the Builder’s



Remedy, including the right to fully implement the provisions of state law and reject the proposed project consistent with the provisions of state law and local regulations.

Should you have any questions, you may contact Planning through Division Manager John Tu at [John.Tu@sanjoseca.gov](mailto:John.Tu@sanjoseca.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "John Tu", written in a cursive style.

John Tu  
Division Manager  
City of San José

February 1, 2024

**VIA EMAIL ONLY**

Vicky Kwoh Ching & Wu-Chung Hsiang  
General Partners  
HC Investment Associates L.P.  
63 Crescent Drive  
Palo Alto, CA 94301  
[vickymings@gmail.com](mailto:vickymings@gmail.com)

Melanie Griswold  
1787 McDaniel Avenue  
San José, CA 95126  
[mg@hestia-re.com](mailto:mg@hestia-re.com)

**LOCATION AND ADDRESS:** Northeast side of Senter Road between Quinn Avenue and Wool Creek Drive (2222 Senter Road)

**RE: File No. PRE23-233**, a Senate Bill 330 Preliminary Application for the construction of a mixed-use development consisting of 372 multifamily residential units and approximately 4,130 square feet of commercial space configured in three seven-story building on an approximately 3.62-gross-acre site.

Dear Ms. Ching,

The City of San José (“City”) confirms receipt of a Senate Bill 330 (“SB330”) Preliminary Application for 2222 Senter Road on November 8, 2023. The preliminary application included a cover letter dated November 6, 2023, along with the executed application and site plans and elevations. The purpose of this letter is to inform you that the City will not accept any future formal development applications under the Builder’s Remedy for projects that submitted an SB330 Preliminary Application after June 20, 2023.

According to the SB330 Preliminary Application, you seek approval of a residential development project pursuant to a provision of the Housing Accountability Act, informally known as the “Builder’s Remedy.” The proposed project located at 2222 Senter Road has a General Plan designation of Combined Industrial/Commercial and is zoned A(PD) Planned Development (File No. PDC06-119). The Combined Industrial/Commercial land use designations and Planned Development Zoning District (File No. PDC06-119) do not allow the kind of residential development proposed in your SB330 Preliminary Application. Generally, such a proposal would require compliance with state law, including the California Environmental Quality Act (“CEQA”) and Housing Accountability Act (“HAA”); and City requirements including a General Plan Amendment, Rezoning, Site Development Permit,

Demolition Permit, Tree Removal Permit, Grading Permit, Building Permit, and other related permits/approvals.

The City acknowledges that Government Code Section 65589.5(d)(5) authorizes jurisdictions to deny a qualifying project if both of the following criteria are satisfied: (1) the project is inconsistent with a jurisdiction's zoning ordinance and general plan land use designation; and (2) the jurisdiction has a Housing Element in substantial compliance with the state's Housing Element Law (Gov. Code, § 65580 et seq). On June 20, 2023, the City Council adopted a resolution approving the 2023-2031 Housing Element and finding that the Housing Element substantially complies with state law. That resolution included a provision further directing and authorizing the Director of Planning, Building, and Code Enforcement to make all non-substantive changes to the Housing Element to make it internally consistent or to address any non-substantive changes or amendments requested by HCD to achieve certification.

After months of consultation with HCD and various members of the public and stakeholder groups, the City addressed all consistency and non-substantive issues in the Housing Element. On January 29, 2024, HCD certified the City's 2023-2031 Housing Element. Notably, Government Code Section 65589.5(d)(5) requires a housing element be in substantial compliance with the Housing Element Law and does not require HCD certification. Substantial compliance under the Housing Element Law is ultimately a question of law. While HCD's findings are instructive, they are advisory. (Gov. Code, § 65585, subd. (a); *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1193.)

Since your SB330 Preliminary Application was submitted after June 20, 2023, when the City adopted a substantially compliant Housing Element, the project is not eligible to be submitted under the Builder's Remedy. As your proposed project does not comply with state law and the City's General Plan land use designation or zoning, you may not proceed with a formal development application under the Builder's Remedy. You may withdraw your current SB330 Preliminary Application or let it expire on its own term. Further, you may submit the following applications to be considered concurrently by the City:

- General Plan Amendment to amend the existing General Plan land use designation to a land use designation that would support the proposed residential development.
- Conforming Rezoning to rezone the site from the A(PD) Planned Development Zoning District to a Conforming Zoning District that conforms with the associated General Plan Amendment.
- Development/Use Permit Application to allow the development of the project.
- Subdivision/Lot Merger Application to allow the subdivision of the land to support the proposed project.

The City reserves all rights and remedies available now and in the future under state law, not limited to the California Environmental Quality Act, Subdivision Map Act, Housing Accountability Act, the Housing Element Law, and whether Senate Bill 330 vests applications submitted under the Builder's Remedy, including the right to fully implement the provisions of state law and reject the proposed project consistent with the provisions of state law and local regulations.

Should you have any questions, you may contact Planning through Division Manager John Tu at [John.Tu@sanjoseca.gov](mailto:John.Tu@sanjoseca.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "John Tu". The signature is fluid and cursive, with the first name "John" written in a larger, more prominent script than the last name "Tu".

John Tu  
Division Manager  
City of San José