A Tale of Three Cities (and one State)

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It's difficult to open a newspaper these days without reading about the general lack of housing in California and in the Bay Area, particularly the lack of affordable housing. As the California Supreme Court noted at the start of its opinion upholding the San Jose inclusionary housing ordinance recently in *Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435 (emphasis added):

> *Health and Safety Code section 50003, subdivision (a), currently provides: "The Legislature finds and declares that . . . there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income . . . can afford. This situation creates an absolute present and future shortage of supply in relation to demand . . . and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all its residents."*
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> *This statutory language was first enacted by the Legislature over 35 years ago, in the late 1970s. . . . It will come as no surprise to anyone familiar with California's current housing market that the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades. Rather, these problems have become more severe and have reached what might be described as epic proportions in many of the state's localities. All parties in this proceeding agree that the lack of affordable housing is a very significant problem in this state.*

One response from the State Legislature has been to enact increasingly strict laws designed to remove discretion from the housing entitlement process at the local level. In the last part of this paper, we will discuss the major bills pending in the Legislature as of this writing. After a review of the existing major housing legislation, the second part of the paper discusses three lawsuits that my firm has been involved in that were filed against cities for denying housing developments.

1) The Major Housing Statutes

The most important housing statutes are the Housing Element Law, Govt. Code Section 65583 et seq., the Housing Accountability Act, Govt. Code Section 65589.5, and the Density Bonus Law, Govt. Code Section 65915. There are not many reported decisions dealing with the effect of these laws in requiring cities and counties to approve

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housing developments. For example, there are many reported cases on the Housing Element Law; however, these cases almost uniformly deal with the adequacy of housing elements themselves, rather than with decisions made to implement development entitlements pursuant to an adopted housing element. Similarly, for the Housing Accountability Act, there is only one reported case that deals directly with a city's compliance with the requirements within the Act: *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066 (*Honchariw 1*); (2013) 218 Cal.App.4th 1019 (*Honchariw 2*). And finally, there are only a handful of cases under the Density Bonus Law.

The Housing Element Law has been on the books since 1980. The housing element is, of course, one element of the general plan. It is by far the most heavily statutorily-regulated element. Almost every year there have been amendments to the Housing Element Law that have strengthened the obligation for localities to have an ever-more-detailed housing element and to live by it.

There are a number of requirements for housing elements that are far more extensive than for other general plan elements. For example:

- Generally speaking, housing elements have to be updated every seven years, while there is no general requirement for periodic updating of general plans.

- Housing elements are certified by the State Department of Housing and Community Development (HCD). While a housing element can be valid even if HCD has refused to certify it (see *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174), in practice that is no longer feasible. Since 2014, if a locality has an uncertified housing element, that locality is not eligible for a variety of state and regional funding programs. This has put enormous pressure on localities to obtain certification for their housing elements. Generally speaking, certification requires convincing HCD that the housing element has met all statutory requirements, including providing for affordable housing.

In the housing element update process, the Local Regional Governmental Association (in the Bay Area, the Association of Bay Area Governments) provides a regional housing needs allocation ("RHNA") to each city and county within its region. The locality must accommodate its RHNA numbers in its housing element. This means that there must be sufficient land available within the city that could accommodate, at full development, the city's entire RHNA amount of housing. This land must be available for development "by right," that is, without requiring use permits or other discretionary permits, and must be free of other constraints that could prevent the development of housing.

In a letter sent to the Town of Los Gatos in connection with the case discussed below, HCD explained the "by right" requirement as follows: "While design review is allowed under the statute, by right decision making must follow development standards

that are objective, fixed, predictable, clear, quantifiable, written, warrant little to no judgment and should be applied in a manner that affirmatively facilitates development." In particular, with regard to low income housing, HCD requires that land be available for multi-family housing in an appropriate density of at least 10 to 30 units per acre, depending on the jurisdiction. See Govt. Code Section 65583.2(c)(3)(B).

The second major housing statute, the Housing Accountability Act, Govt. Code Section 65589.5 (commonly called the "Anti-NIMBY Law"), seeks to remove discretion from the entitlement process. More precisely, it allows discretion at the general plan and zoning stage, but requires that a locality that has general planned and zoned a piece of property for housing must allow development of a housing project that complies with its general plan and zoning, unless there are very specific objective reasons based on public health or safety criteria that could justify a denial of the project. An objective public safety criterion is defined very narrowly as: "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." Govt. Code Section 65589.5(j).

The Housing Accountability Act is confusingly written, in part because it has been extensively modified since its original adoption in 1982. Although it once seemed to many practitioners that it only applied to affordable housing projects, the *Honchariw 1* case held that it applies to non-affordable projects as well. However, a hyper-technical interpretation in *Honchariw 2* restricts the award of attorney's fees, which is mandatory for an affordable project that is wrongly denied under the Act, to not apply to non-affordable projects. In order to arrive at this result, the *Honchariw 2* Court had to decide, for example that "housing development" as used in statute has a different meaning from "housing development project," also used in the statute. There is even a section of the opinion that focuses on the significance of the use of the word "the."

The third major statute, the Density Bonus Law, Govt. Code Section 65915, is designed to provide incentives to developers to include affordable housing in their projects. There are three main aspects of the Density Bonus Law that are mandatory and preempt local ordinances to the contrary:

- There is a complicated set of tables by which, depending upon the percentage of affordable units and their affordability level, developers are entitled also to add to the project a certain number of "bonus" market rate units. The maximum bonus is 35 percent, which is reached, for example, if the project contains 11 percent very low income (affordable to 50 percent area median income), 20 percent low income, or 40 percent moderate income units. See Govt. Code Section 65915(f).

- Again depending upon affordability and number of units, a developer may be entitled to one or more incentives or concessions that would help make the project financially feasible. These can include, for example, relaxation of objective standards for setbacks, height, parking ratios, etc. See Govt.

Code Section 65915(d). In *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, the Court interpreted this provision broadly, holding that the city had to accept the project as it was proposed by the developer and could not force the developer to redesign the project or remove amenities.

- Finally, the developer is entitled to an unlimited number of waivers of the locality's physical standards that would otherwise make development of the project infeasible. See Govt. Code Section 65915(e).

(2) Three Cases involving the Housing Statutes

We will now turn to the description of three Superior Court lawsuits involving these statutes. The first two are relatively straightforward and involve the application of the Housing Accountability Act. The third is much more complex, and illustrates the interplay of the Housing Element Law, the Housing Accountability Act, and the Density Bonus Law.

In the first case, the owner of a small, 7300-square-foot parcel submitted an application to an unnamed city (unnamed because part of the case is ongoing) to remove an existing commercial building and redevelop the parcel with a mixed use project with four residential units (non-affordable) over commercial. The parcel is located in a struggling commercial district that is within the scope of a specific plan developed by the city 25 years earlier. The City Council denied the developer's applications for design review, use permit, and subdivision approvals based on findings that the project was inconsistent with several provisions of the specific plan applicable to the project.

The applicant filed a writ of mandamus under the Housing Accountability Act alleging that the city improperly denied the project because (1) its findings were based on subjective criteria in the specific plan; and (2) the specific plan was no longer viable and thus could not limit the development of the project. The court rejected the applicant's arguments, and found that the city did not violate the Housing Accountability Act by denying the project.

The applicant lost primarily because of inconsistency with the specific plan, even though city staff had not focused on this inconsistency. But the specific plan was still on the books, and the applicant had made no request to amend the specific plan to allow his project; thus, under the Housing Accountability Act, inconsistency with the specific plan formed a valid basis for denial.

In the second case, *AMG & Associates, Inc. v. City of Gilroy*, the developer had a much more sympathetic project, a 75-unit, 100-percent affordable senior housing complex. Gilroy had rezoned an area along Monterey Highway south of Tenth Street, in the southern part of the city, to allow the existing downtown to extend to the south. On the east side of the street, there are primarily auto-related businesses with no sidewalks along the road. Gilroy anticipated that development would proceed south from Tenth Street and would

gradually "gentrify" the area with housing and mixed used projects. However, what happened was that AMG acquired a vacant lot on the east side of the street at the very southern end of the district and applied for approval of its project.

The City of Gilroy has never been opposed to affordable projects, and to the author's knowledge as City Attorney has approved every one that has been proposed. However, the Council was concerned that this project was being proposed "out of order," i.e., at the end of the rezoned area that was furthest away from city services. They were worried that the seniors occupying the project would be potentially unsafe without any sidewalk access to commercial services on Tenth Street (about a half mile away).

Although the Council thus had great reservations about the suitability of this land for the project, the land was zoned appropriately, and the project conformed to the General Plan and zoning. The City did not turn down the project. The City required, however, as part of its approval that the developer install a sidewalk on public property leading all the way from the project frontage to Tenth Street. The developer had agreed to install an all-weather path, at a cost of about $80,000. A full sidewalk, with lighting, street trees, etc., would cost about $1.5 million. The Council compromised and required a partial sidewalk (without street trees or street lights) which would cost about $700,000. The developer took the position that an approval with that condition was tantamount to a denial of the project and provided the City with financial information to that effect.

The City Council nonetheless approved the project with the sidewalk condition, and the developer sued under the Housing Accountability Act. The case has recently been settled, and the development will proceed without the sidewalk. This case illustrates the effect of the Housing Accountability Act in the situation where a city had in fact zoned and planned the property for the kind of project proposed, but once the project was actually in the works, came to realize that a mistake in regulating the zoning and phasing of development had occurred. Under the Housing Accountability Act, the city does not get a second chance to correct its zoning, since it essentially must approve a conforming project.

The third case is much more complex, and involves the interrelationship of the Housing Element Law, the Housing Accountability Act and the Density Bonus Law. In that case, *Eden Housing et al. v. Town of Los Gatos*, the Town of Los Gatos had considered for many years how to deal with its last remaining large, undeveloped piece of property, the "North 40," approximately 40 acres of land bounded by Route 17 on the west, Los Gatos Boulevard on the east, Highway 85 on the north, and Lark Avenue on the south. There were some 16 homes on the property, some commercial structures along Los Gatos Boulevard, and some dying orchards. The property had mostly been in the ownership of one family, which had been farming it off and on for 70 years.

The Town started planning for a possible development of this property in 1999, but those plans went nowhere. In the Town's general plan adopted in 2010, the property was proposed for as many as 750 housing units, plus commercial development, with the proviso that a specific plan would be required. A developer, Grosvenor USA Limited, agreed to finance the preparation of a specific plan, although it had no control over the content. The specific plan itself was developed over the span of several years, involving scores of public

meetings, including a committee specially formed for that purpose that contained Town Council members and planning commissioners, as well as members of the public. A full environmental impact report was prepared for the plan. Ultimately the plan provided for much less development than had been proposed in the original general plan (which was amended when the specific plan was adopted to conform to the specific plan). It allowed 270 units of residential development, and 435,000 square feet of commercial development. The plan contained many restrictions and requirements, including height limitations, a requirement for 30% open space, etc.

While the specific plan was being developed, the Town was having difficulty getting its housing element certified. HCD was requiring that the Town designate at least 13.5 acres of land for by right development at a density of at least 20 units per acre in order to make the land potentially available for affordable housing. After HCD refused to certify a draft of the housing element that provided for zoning overlays over other property in Town (which in itself was the result of a highly contentious process), the Town used the North 40 to satisfy HCD, and required that at least 13.5 acres of the North 40 be developed at 20 units per acre.

Grosvenor brought in SummerHill Homes LLC, which is primarily a residential developer, since Grosvenor's interest was mainly in the potential commercial development. While the specific plan was being formulated, Grosvenor and SummerHill filed an application for a project that was modified several times in the course of the hearings to make sure that it conformed to the evolving specific plan, which was not finally adopted until 2015. The project ultimately included 320 residential units, including density bonus units, and about 66 ksf of commercial space. Along the way they brought in a third applicant, Eden Housing, which would build a 49-unit very low income senior affordable project over a Grosvenor-constructed market hall structure. This affordable project would be partly subsidized by SummerHill and Grosvenor.

Although the specific plan went through many iterations and was discussed at countless meetings, there was very little public controversy associated with its adoption. The main opponents appeared to be downtown business interests who feared that the potential commercial use of the North 40 area would become competition for downtown, several miles away.

The project application also initially engendered very little opposition—until the applicants were required to erect story poles for the planned structures. Town policy required that the poles be erected at all corners of each potential building, with orange netting strung between the poles. This required more than 500 poles to be erected at a cost of several hundred thousand dollars. Once the poles were up, residents realized that these structures would be visible from many locations and opposition quickly developed. Residents felt the project was "too massive," "not Los Gatos," would cause traffic problems, etc. A group formed called "Town, Not City" to oppose it. The Council was flooded with emails and petitions, and at the hearings many opponents testified.

The applicants maintained throughout that their project was entitled to by right approval under the Housing Element, that objective findings could not be made to deny it

under the Housing Accountability Act, and that the requested density bonus and minor height waiver requested under the Density Bonus Law were mandatory.

As one might imagine, the council hearings were a real circus. Ultimately in September 2016, the City Council voted down the project (which actually involved an application for vesting tentative map and architecture and site approval) by a three-to-two vote. Less than a month later, the applicants sued the Town, claiming that the denial violated the Housing Element Law, the Housing Accountability Act and the Density Bonus Law. A 13-volume administrative record was prepared, and the case proceeded as an administrative mandamus case under Code of Civil Proc. Section 1094.5. In late March 2017, the case was tried in an approximately three-hour hearing in front of a Superior Court Judge. Two and a half months later he issued a writ that ordered the Town to rescind its denials and to reconsider the project under the requirements of the Housing Accountability Act, specifically Section 65589.5(j), which requires that in order to deny the project, the Town would have to make findings of specific public health and safety violations based upon specific objective standards and criteria in effect at the time the application was deemed complete.

The project returned to the Town Council with strong staff support advising the Council that they legally could not turn down the project this time. The opposition was much less intense, as many opponents had apparently decided that the court order would have to be obeyed and that they would focus their attention on perceived traffic impacts from development of Phase 2 of the North 40 (the largely commercial remaining half). Nonetheless there was opposition, and there ended up being negotiations over conditions of approval of the project. On August 1, 2017, the project was finally approved by the Town Council. Significantly, in the face of a clear court order and a very strong staff recommendation of approval, the motion to approve barely garnered three votes. One councilmember voted against the project and one voted something like: "Not here; you haven't been listening to me for 6 1/2 years . . . ," which was recorded as an abstention.

3) <u>Pending Housing Bills in the State Legislature</u>

As of this writing, there are a number of pending housing bills in the State Legislature, some of which may be passed or amended by the time of the panel discussion. These are in several categories, but all are aimed at making it harder for cities to deny housing, and particularly affordable housing, projects.

(a) Housing Element Law

SB 35 (Wiener) aims to force localities that have fallen behind in their production of units that fulfill their RHNA to provide a streamlined, ministerial approval process for qualifying housing developments.

It creates a process whereby HCD shall determine, based on the last production report submitted by the locality, whether the number of units that have been issued building permits is less than the locality's share of regional housing needs, by income category, for that reporting period. If HCD determines that the locality has not kept up

with the regional housing need, then the locality must provide a streamlined, ministerial approval process for qualifying housing developments for a four-year period. Expedited processing criteria are provided in the bill for certain projects in such non-compliant localities.

AB 1397 (Low) is intended to reduce a locality's ability to continue to adopt a housing element that identifies the same development sites as prior versions of the housing element. The inventory would have to include vacant sites and sites having not only a "potential for redevelopment" but a "realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level." The bill contains numerous other provisions, all aimed at forcing the locality to more realistically estimate housing land availability for development.

One bill that cities are very concerned about is SB 166 (Skinner), the "No Net Loss Housing Element Requirement." Current law requires that if a local government reduces the residential potential of a parcel identified in its Housing Element to fulfill its RHNA, and cannot make findings that the remaining sites are adequate to accommodate its RHNA, then the local government must identify sufficient additional, adequate, and available sites with an equal or greater residential density so that there is no net loss of residential unit capacity. This could happen if, for example, a parcel identified for development at 20 du/ac or higher was approved for development at a lower density than 20 du/ac. It would not be required if the land was approved at the appropriate density even if the approved project is not affordable.

This bill would change that requirement such that the local government must regularly update its housing inventory to make sites available that can accommodate its remaining unmet RHNA. If enacted, a local government that allows development of any identified parcel with fewer units by income category than identified in the jurisdiction's housing element for that parcel would need to make findings supported by substantial evidence as to whether or not remaining sites identified in the housing element can absorb the additional needs. If not, the local government must identify and make available within 180 days additional adequate sites to accommodate its RHNA by income level.

Finally, SB 72 (Santiago/Chiu) gives a major increase in enforcement powers to HCD. It requires HCD to review any action by a locality that it determines is inconsistent with an adopted housing element and its RHNA inventory and programs, and requires HCD to take steps to force local governments to comply with their housing elements. If HCD finds that a local agency is not acting in compliance with its adopted housing element, HCD must issue written findings to the locality as to whether the action substantially complies with the Housing Element Law, providing the locality 30 days to respond. If HCD finds that the housing element or an implementing action does not substantially comply with the Housing Element Law, or finds that the locality took action in violation of the HAA, the No Net Loss Requirement, the Density Bonus Law, or laws prohibiting discrimination against affordable housing, then HCD shall notify the locality

of that violation and may notify the attorney general that the locality is in violation of state law.

(b) Housing Accountability Act

AB 678, AB 1515, and SB 167 (Bocanegra, Daly, Skinner) are all aimed at significantly strengthening the requirements of the HAA. These three bills work together. AB 678 and SB 167 seem to be nearly, if not entirely, identical. AB 1515 is a companion bill that goes into effect only if either AB 678 and/or SB 167 are also adopted. Together, the bills make a number of changes in an attempt to strengthen the HAA, including:

- The standard of review in litigation would become preponderance of the evidence in the record, not the current substantial evidence standard (and note that per existing Govt. Code Section 65589.6, the locality has the burden of proof in court).

- There would be clarification that subsection (j), which applies to affordable and non-affordable projects, also requires that Subdivision Map Act applications for housing projects be decided based on objective criteria.

- If a local agency believes the proposed project is inconsistent with an applicable plan, etc., it must provide the applicant written documentation promptly to that effect. This would prevent what happened in the Los Gatos case described above, in which such (invalid) findings were made for the first time by the Town Council.

- A substantial change would be made in the standard for consistency. Subdivision (f)(4) would be revised to say that a housing development project shall be deemed "consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity."

- There would be broader remedies and harsher penalties. For example, the holding of *Honchariw 2* that attorneys' fees are not available to market-rate projects is reversed (as is that case's hair-splitting differentiation of the terms "housing development" and "housing development project"), and localities can be fined $10,000 per proposed housing unit if they do not comply with a court's judgment.

- The bills make clear that "disapprove the housing development project" includes any instance in which the local agency votes on a proposed housing development project application and the application is

disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit.