

California’s “Builder’s Remedy” for Affordable Housing Projects: A View from the Legislative History

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California’s Housing Accountability Act (HAA) contains two seemingly contradictory provisions. On the one hand, the “builder’s remedy” prohibits cities from denying an affordable housing project on the basis of its zoning code or general plan if the city lacks a compliant housing element. On the other hand, a savings clause appears to protect cities’ authority to apply “development standards” to the very same project. Uncertainty about the scope of the savings clause likely thwarts developers from pursuing builder’s remedy project approvals. This paper begins by detailing each provision and the complex challenges associated with interfacing them. It next demystifies the relationship between the provisions by drawing from the HAA’s legislative history. Finally, it suggests two ways of reconciling these provisions in a manner that faithfully adheres to their legislative intent, as well as the HAA’s internal directive to advance housing development. Anticipating future builder’s remedy lawsuits, this paper’s primary goal is to inform a court’s decision to properly construe these provisions in a way that streamlines housing development rather than impedes it.

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INTRODUCTION

Last year marked the 40th birthday of California’s Housing Accountability Act (“HAA”). Yet, California finds itself amid a severe housing crisis, with dismal prospects of ensuring safe, comfortable, and affordable housing for all its residents.

The HAA has evolved over the past four decades from a modest law guiding cities to approve housing development projects to the likes of a pro-housing manifesto.¹ The first of many attempts to strengthen the HAA transpired when the California legislature added a “builder’s remedy” in 1990.² The California builder’s remedy permits developers who propose affordable housing projects in cities without a compliant “housing element” to bypass local zoning and general plan standards.³ (A “housing element” is a state-mandated plan to accommodate a city’s share of the regional housing need.)⁴ The builder’s remedy was originally lauded as a transformative measure for its potential to render local planning standards inoperative.⁵

Despite its inaugural ambition, the builder’s remedy has not radically increased state housing production—in fact, it has rarely, if ever, been used.⁶ Its substandard trajectory may be credited, in part, to the difficulties associated with interfacing the builder’s remedy with a different provision of the HAA, the savings clause for development standards. Specifically, where the builder’s remedy enables approval of an affordable housing project despite inconsistency with local zoning and general plan standards,⁷ the savings clause cedes indistinct discretion back to the local government to apply development standards to the very same project.⁸

¹ Cf. Cal. Stats. 1982, ch. 1438 with CAL. GOV’T CODE § 65589.5 (2022).

² S.B. 2011, 1990-1991 Reg., Cal. Legis. Sess. (1990) (now codified as CAL. GOV’T CODE § 65589.5(d)).

³ CAL. GOV’T CODE § 65589.5(d).

⁴ CAL. GOV’T CODE § 65582(f).

⁵ News coverage from 1990 reveals that many understood S.B. 2011 as a forceful anti-NIMBY measure. For example, an article in the San Francisco Chronicle described the bill as “designed to bludgeon exclusive suburban communities into accepting low-income housing projects” and “one of the biggest legislative surprises of the current session.” Vlæ Kershner, *Bill to Force Cities to Build Low-Income Housing Gets OK*, S.F. CHRON., Aug. 10, 1990 (on file with author).

⁶ Canvassing developers, housing advocates, and the California Department of Housing and Community Development (“HCD”) staffers, Christopher S. Elmendorf and Timothy N. Duncheon found just one attempt to use the builder’s remedy, which ultimately failed. In that case, a homeowner attempting to legalize an existing second unit that lacked the required off-street parking spaces tried to use the builder’s remedy to circumvent local standards. However, the city claimed an off-street parking requirement constituted a “health and safety” standard and thus an appropriate ground for denial under the HAA. The homeowner chose not to sue. See Christopher S. Elmendorf and Timothy N. Duncheon, *When Super-Statutes Collide: The Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 ECOLOGY LAW Q., 16 (2022). See also BAY AREA COUNCIL, 4 HOUSING & DEVELOPMENT REPORT, no. 5, May 1991 (on file with author).

⁷ See CAL. GOV’T CODE § 65589.5(d)(5).

⁸ See CAL. GOV’T CODE § 65589.5(f)(1).

Put simply, nobody has ever settled which development standards are eliminated by the builder's remedy and which are preserved by the savings clause.

Since the builder's remedy kicks into force when cities fall out of compliance with California's Housing Element Law, and since several California cities already have, or will do so during the upcoming planning cycle,⁹ resolving the open question about which city-proposed development standards are precluded by the law versus which are preserved is vital to streamlining the development process. This begs the question: Is utilizing the HAA builder's remedy a plausible conduit to project construction, or can a city retaliate by saddling the project with so many costly and elusive development standards that it becomes too expensive and complicated, or perhaps impossible, to build?

This paper answers the aforementioned inquiry in three parts. Section I elucidates the HAA's structure by first describing the special protections for affordable projects furnished by the builder's remedy and then discussing the peculiar savings clause for development standards. A hypothetical from the City of Davis, California, demonstrates how the looming uncertainties in the coaction of these provisions deter developers who may otherwise pursue builder's remedy project approvals.

Section II delves into the legislative record of the HAA, focusing on the bill which yielded the builder's remedy, the savings clause, and several subsequent, relevant amendments. The legislative history reveals that the builder's remedy and savings clause were originally harmonious and only became incongruous after a 2004 amendment inadvertently removed crucial language linking a city's ability to apply development standards to its prior adoption of a housing element. This inadvertence explains why no text in any bill file—a collection of archived documents from a particular bill's journey through the legislature—comprehensively addresses the discrepancies between the builder's remedy and the savings clause. Since no explicit legislative directive exists, this section engages in a micro- and macro- level analysis of the law's documented history to clarify the intent and effect of each provision in relation to the other.

Section III suggests that a court tasked with settling the apparent conflict between the builder's remedy and the savings clause should foreground the

⁹ Housing Element Law has ratcheted up in recent years. More robust compliance measures for local jurisdictions combined with higher regional allocations mean that cities will struggle to meet their housing targets. Some recent changes include: A.B. 1397 (2017), which established stricter requirements for how a jurisdiction establishes its housing element site inventory, S.B. 35 (2017), which renders multifamily housing project approvals ministerial if a city fails to issue building permits for its share of the regional housing need, and S.B. 330 (2019) which prohibits local agencies from subjecting projects to new ordinances, rules or fees enacted after submission of the project application. See Ass. Of Bay Area Gov't, *Housing Element Law: Changes from 1990 to the Present* (2020), https://abag.ca.gov/sites/default/files/rhna_background.pdf; Josh Stephens, *Cities Struggle to Comply With Tougher Housing Element Rules*, CAL. PLAN. & DEV. REP. (Feb. 14, 2022) <https://www.cp-dr.com/articles/cities-struggle-comply-tougher-housing-element-rules>.

legislative inadvertence discussed in Section II, the law’s extended history of reducing barriers to housing development, and the codified legislative directive to construe the HAA broadly in the interest of housing. This framework reveals a clear terminus for the courts: Builder’s remedy-approved projects should not be obstructed by city-imposed “saved” development standards. It concludes by suggesting strategies to accomplish this end.

I. THE STRUCTURE OF THE HOUSING ACCOUNTABILITY ACT

A. *Builder’s Remedy Protections for Affordable Housing Projects*

The first version of the HAA, which was enacted in 1982, pronounced relatively unobtrusive instructions directing local governments to approve housing projects that complied with local standards.¹⁰ Now codified in subdivision (j), the original language specifies that a city cannot disapprove a project, or condition it to be developed at a lower density, if the project complies with all local standards unless the city finds that the project would have non-mitigatable health or safety impacts.¹¹ Subdivision (j) has been construed and reaffirmed to apply to all housing projects, whether market-rate or affordable.¹²

Eight years later, legislators amended the HAA to encompass greater protections for affordable projects upon the recognition that affordable housing encountered the most local resistance.¹³ These protections, nicknamed the “builder’s remedy,”¹⁴ prohibit a city from denying a project or conditioning approval in a manner that renders it infeasible unless the city can make one of several specific findings.¹⁵ Codified in subdivision (d), the permitted findings are:

- (d)(1) The local government has a substantially compliant housing element and has met or exceeded its share of the regional housing need;
- (d)(2) The housing project has an adverse, non-mitigatable impact on health or safety;

¹⁰ Cal. Stats. 1982, ch. 1438 (now codified as CAL. GOV’T CODE § 65589.5(j)).

¹¹ *Id.*

¹² *Honchariw v. County of Stanislaus*, 200 Cal.App.4th 1066, 1070 (2011) (“[Section] 65589.5(j) applies to housing development projects generally, not just affordable housing.”) (*quoting* *LLC v. City of Pacifica*, 234 F.Supp.2d 1053, 1058 (N.D. Cal. 2002).)

¹³ Cal. Stats. 1990, ch. 1439.

¹⁴ The “builder’s remedy” concept outgrew from fair housing litigation in New Jersey. There, the state supreme court imposed an “affirmative obligation on every ‘developing municipality’ to provide a realistic opportunity of its fair share of low- and moderate-income housing.” The remedy has been reaffirmed “as a means of forcing municipal compliance with fair housing obligations imposed by the *Mount Laurel* doctrine.” See John P. Mueller, *Local Government—The New Jersey Supreme Court Reaffirms the Builder’s Remedy as the Solution to Mount Laurel Litigation*, 34 RUTGERS L. J. 1277, 1280-1284 (2003).

¹⁵ CAL. GOV’T CODE § 65589.5(d).

- (d)(3) The housing project violates state or federal law, and there is no feasible method to comply;
- (d)(4) The site where the project was proposed is designated for agriculture or resource preservation; or
- (d)(5) The proposed project is inconsistent with the city's zoning ordinance or general plan land use designation, and the city has a substantially compliant housing element.¹⁶

Subdivision (d)(5) of the builder's remedy is particularly interesting because it conditions a city's authority to apply its general plan and zoning on the city having a substantially compliant housing element.¹⁷ Thus, builder's remedy-approved structures may be of a different character than what the city planned for.¹⁸ (Since a general plan is tantamount to a city's "constitution,"¹⁹ this may agitate cities, or NIMBY factions within,²⁰ that consider affordable housing an incompatible land use near affluent single-family neighborhoods.)²¹

¹⁶ *Id.*

¹⁷ Some background on the Housing Element Law serves as helpful context. The Housing Element Law provides that in each eight-year cycle, the total state housing need is divided first among regions, then to each jurisdiction based on demographic factors. After a city or county receives its regional housing need allocation ("RHNA"), it updates its housing element for review by HCD, the agency tasked with determining housing element compliance with state law. The city's housing element is deemed substantially compliant if it has sufficiently adhered to statutory guidelines in demonstrating its strategy for accommodating its "fair share" of the regional housing need. CAL. GOV'T CODE § 65584 *et seq.*; *see also* Fonseca v. City of Gilroy, 148 Cal.App.4th 1174, 1185 (2007). ("Substantial compliance...means actual compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form...judicial review of a housing element for substantial compliance with the statutory requirements does not involve an examination of the merits of the element or of the wisdom of the municipality's determination of policy.") (quotations removed).

¹⁸ *See* Letter from Robert Martinez, Dir., Office of Local Gov't Affairs to Leroy Greene, Sen., Cal. State Senate (May 7, 1990) ("This office is concerned that enactment of S.B. 2011 would require local jurisdictions to approve development projects which may not be consistent with their existing general plan or local zoning ordinances.") (on file with author); Letter from Kenneth Emanuels, Legis. Advoc., City of Oakland to Leroy Greene, Sen., Cal. State Senate (June 11, 1990) ("We believe this bill requires a series of ambiguities to first be clarified including...Would the city not have the authority to condition a project on complying with the city's general plan, zoning and development standards?") (on file with author).

¹⁹ Assemb. Comm. on Local Gov't, analysis of S.B. 2011, as amended June 21, 1990, p. 4 (on file with author).

²⁰ NIMBY stands for "Not In My Backyard." It is a colloquial term used to describe residents of a locality who oppose new (usually affordable) development, and advocate for stringent land use restrictions. *See* Peter D. Kinder, *NIMBY*, BRITANNICA (2023) <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon>.

²¹ *See* Annie Lowrey, *Four Years Among the NIMBYS*, THE ATLANTIC (May 5, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/san-francisco-bureaucracy-housing-crisis/629719/>; Michelle Robertson, *Incensed by NIMBYism, an East Bay city manager quits: 'My conscience won't allow it.'* SFGATE (Oct. 12, 2018), <https://www.sfgate.com/bayarea/article/steven-falk-ab-2923-bart-housing-bill-resign-nimby-13266545.php>; Conor Dougherty, *The Twilight of the*

To illustrate the potentially severe consequences of subdivision (d)(5), consider a hypothetical from the City of Davis, California, which currently lacks a substantially-compliant housing element.²² Here, if Mr. Smith, a developer, proposes a 16-unit project on a site zoned for single-family homes, and the project does not (1) violate a health or safety standard,²³ (2) violate a state or federal requirement,²⁴ or (3) encroach on agricultural lands,²⁵ the city lacks the discretion to deny the project or impose conditions that render it infeasible.²⁶ Accordingly, the City of Davis must approve the project although it violates the density standards promulgated by the local zoning code. Regaining land use control will require the City of Davis to amend its housing element and receive certification from the California Department of Housing and Community Development (“HCD”)—something that may be easier said than done.²⁷

Theoretically, the builder’s remedy provides an easier path to affordable housing project approvals in cities that lack a substantially compliant housing element. However, the savings clause for development standards appears to be a troublesome hurdle. In short, developers fear cities will retaliate against them for using the builder’s remedy by imposing burdensome and costly development standards onto their affordable projects.

B. *The Puzzling Savings Clause for Development Standards*

Alongside the builder’s remedy, legislators added a savings clause for development standards to the HAA in 1990.²⁸ The current version of the savings

NIMBY, N.Y. TIMES (June 5, 2022), <https://www.nytimes.com/2022/06/05/business/economy/california-housing-crisis-nimby.html>.

²² In December 2021, the City of Davis fell out of compliance with state Housing Element Law for failing to identify enough nominal zoned capacity to accommodate its regional housing need for low-income households. Letter from Melinda Coy, Senior Hous. Accountability Manager, Cal. Dep’t of Hous. & Cmty. Dev., to Michael Webb, City Manager, City of Davis (Dec. 8, 2021) (“The revised element identifies a shortfall of adequate sites to accommodate the regional housing need for lower income households.”) (on file at <https://www.hcd.ca.gov/community-development/housing-element/docs/yoldavisdraftoutadopted120821.pdf>).

²³ See CAL. GOV’T CODE § 65589.5(d)(2).

²⁴ See CAL. GOV’T CODE § 65589.5(d)(3).

²⁵ See CAL. GOV’T CODE § 65589.5(d)(4).

²⁶ CAL. GOV’T CODE § 65589.5(d).

²⁷ See Letter from Melinda Coy, Senior Housing Accountability Manager, Dept. of Housing and Community Development to Michael Webb, City Manager, City of Davis (Dec. 21, 2021) (HCD suggests a six-page list of suggestions to amend the City of Davis housing element before the City can regain compliance with the law.) (on file at <https://www.hcd.ca.gov/community-development/housing-element/docs/yoldavisdraftoutadopted120821.pdf>). See also CAL. GOV’T CODE § 65585; Press Release: *122 Southern California Cities fail to Comply with State Housing Law*, YIMBY LAW (Feb. 24, 2022), <https://www.yimbylaw.org/press/press-release-122-southern-california-cities-fail-to-comply-with-state-housing-laws>; *Housing Element Review and Compliance Report*, CAL DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/compliance-report> (last visited July 5, 2022).

²⁸ S.B. 2011, 1990-1991 Reg., Cal. Legis. Sess. (1990) (now codified as CAL. GOV’T CODE §

clause is codified in subdivision (f)(1) and permits a city to apply local development standards which are (1) objective, (2) quantifiable, (3) written, (4) “applied to facilitate and accommodate development at the density permitted on the site and proposed by the development,” and (5) “consistent with meeting the jurisdiction’s share of the regional housing need.”²⁹

The first mystery of the savings clause, simply stated, is the conflict between the requirement that development standards be objective and the requirement that they apply in a particular way. The HAA objectivity standard was promulgated by the legislature and recently interpreted by the California Court of Appeal in *California Renters Legal Advocacy and Education Fund v. City of San Mateo*.³⁰ In that case, a city denied a housing project based on an alleged inconsistency with a design guideline.³¹ After bringing suit for improper project denial under the HAA, the developer argued that requiring the standard to be imposed based on the city’s interpretation meant that the standard was not objective for the purposes of subdivision (f)(1). The California Court of Appeal ruled for the developer, stating that “a project is consistent with applicable objective standards ‘if there is substantial evidence that would allow a reasonable person to conclude that the [project] is consistent, compliant, or in conformity with such standards.’”³² The Court continued that an objective standard involves “no personal or subjective judgment by a public official” and is “uniformly verifiable by reference to an external and uniform benchmark or criterion,” which is available and knowable to both the developer and the local government.³³ In essence, if a development standard can only be executed according to the city’s “interpretive gloss,” the standard is not objective.³⁴

Importing the HAA objectivity standard to subdivision (f)(1) illuminates an internal conflict within the clause. The final sentence of the paragraph reads: “However, the development standards, conditions, and policies shall be *applied* to facilitate and accommodate development at the density permitted on the site and proposed by the development.”³⁵ This use of “apply” suggests the city has the discretion to interpret or apply development standards in various ways, which is inconsistent with the HAA’s definition of objectivity as glossed by *California*

65589.5(f)(1)).

²⁹ CAL. GOV’T CODE § 65589.5(f)(1).

³⁰ Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo, 68 Cal.App.5th 820 (2021).

³¹ The development guideline at issue required “a transition or step in height” for any adjacent buildings with more than one-story variation in height. In interpreting this guideline, the developer argued trellises provided an adequate transition. The city argued a step in height was necessary. *Id.* at 832.

³² *Id.* at 836.

³³ *Id.* at 840.

³⁴ *Id.* at 844.

³⁵ CAL. GOV’T CODE § 65589.5(f)(1).

Renters.

The second mystery of the savings clause ponders the applicability of development standards that potentially reduce the density of a proposed project. A developer will argue that density-reducing development standards should be waived to comply with the savings clause requirement that development standards be “applied to facilitate and accommodate. . .the density proposed by the development.”³⁶ This interpretation squares with the language in the California Density Bonus Law, which was enacted just three years before the HAA³⁷ and serves principally the same objective of furthering affordable housing development.³⁸ The Density Bonus Law permits a developer to increase the density of a project despite its inconsistency with local zoning, in exchange for his agreement to preserve a certain percentage of the units for affordable housing.³⁹ Interestingly, subdivision (e)(1) of the Density Bonus Law requires cities to waive development standards that “physically preclude” the density proposed by the project.⁴⁰ A developer attentive to broader patterns in the California housing framework may argue that, similar to the Density Bonus Law, the word “apply” in the HAA savings clause actually means “waive” if the development standard undermines the proposed density of a project. On the contrary, a city will argue that if legislators meant to waive development standards, they would have used that language in the text.

These ambiguities render the savings clause difficult to interface with the builder’s remedy. Per the builder’s remedy, a city lacking a compliant housing element cannot deny or condition to render an affordable housing project infeasible based on inconsistency with the general plan or zoning standards.⁴¹ This means there is theoretically unlimited density on any site because, for example, a city cannot reject a project for being denser than permitted by the city’s written standards. Yet, per the savings clause, a city may “apply” development standards to the very same project.⁴² The following example illustrates the challenges developers face from the threat of “saved” development standards.

Suppose Mr. Smith proposes a 16-unit, three-story affordable housing project on a 1/8-acre lot zoned for residential one- and two-family homes in the City of

³⁶ *Id.*

³⁷ Cal. Stats. 1979, ch. 1207.

³⁸ CAL. GOV’T CODE § 65917 (“[I]t is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter shall contribute significantly to the economic feasibility of lower income housing in proposed developments.”).

³⁹ CAL. GOV’T CODE § 65915.

⁴⁰ CAL. GOV’T CODE § 65915(e)(1) (“In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section.”).

⁴¹ See CAL. GOV’T CODE § 65589.5(d)(5).

⁴² See CAL. GOV’T CODE § 65589.5(f)(1).

Davis, which is currently out of compliance with the Housing Element Law.⁴³ Though Mr. Smith's 16-unit housing project exceeds the density permitted by the local zoning, the City of Davis is statutorily prohibited per subdivision (d)(5) of the builder's remedy from denying the project unless it makes another specific subdivision (d) finding.⁴⁴ The City of Davis, unable to make any subdivision (d) finding, grants project approval.

Yet, per subdivision (f)(1) of the savings clause, the City of Davis can theoretically apply "saved" development standards to complicate Mr. Smith's project.⁴⁵ One such standard could declare, "No principal building shall exceed two stories or thirty feet in height."⁴⁶ This standard is undoubtedly objective, quantifiable, and written, fulfilling some of the savings clause requirements.⁴⁷ However, fulfilling the other subdivision (f)(1) requirements proves more difficult. For one, Mr. Smith and the City of Davis will certainly disagree about whether the development standard is consistent with the jurisdiction's regional housing need.⁴⁸ While Mr. Smith would argue it is inconsistent because it precludes the density of his proposed project, the City would argue that there is no logical inconsistency between the height limit *in this zoning district* and the city's obligation to accommodate its share of the regional housing need, because the city has discretion to rezone *other* parts of the city for more housing. Additionally, it is unclear how this standard could be "applied to facilitate and accommodate development at the density. . . proposed by the development"⁴⁹ if it would be physically impossible for Mr. Smith to build 16 units in two stories or less. The City would argue that the height limitation is preserved as a "saved" design standard under subdivision (f)(1), while Mr. Smith would counter that it is waived. Citing subdivision (d)(5), he would contend that because the City lacks a compliant housing element and the density-precluding standard renders the project infeasible,⁵⁰ the City cannot apply the standard to the project. The

⁴³ See City of Davis discussion, *supra* note 23.

⁴⁴ See CAL. GOV'T CODE § 65589.5(d).

⁴⁵ See CAL. GOV'T CODE § 65589.5(f)(1).

⁴⁶ This height limitation exists in the City of Davis Zoning code. It is an example of a development standard that cannot serve as grounds for project denial under the builder's remedy if the City of Davis has fallen out of substantial compliance with Housing Element Law, but arguably may be "saved" by the savings clause. See DAVIS, MUNICIPAL CODE § 40.04A.050 Height Regulations (2022), https://library.qcode.us/lib/davis_ca/pub/municipal_code/item/chapter_40-article_40_04a-40_04a_050. For contrast, a design standard that reads something like "A new multi-unit structure (where allowed) should not overwhelm existing single-family structures," would not be saved by (f)(1) because it is not objective.

⁴⁷ See CAL. GOV'T CODE § 65589.5(f)(1).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Housing Accountability Act Technical Assistance Advisory Memorandum from Megan Kirkeby, Deputy Director, Division of Housing and Policy Development at the Department of Housing and Community Development to Planning Directors and Interested Parties (September 15, 2020) ("Conditions that should be analyzed for their effect on density and project feasibility (for affordable

statutory language has no clear answer about which interpretation is correct.

As demonstrated, the savings clause poses an obstacle to developers who contemplate using the builder’s remedy as a conduit to project approval. Resolving which development standards are precluded versus which are preserved will increase certainty for interested parties throughout the development process, paving the way for more frequent use of the builder’s remedy.

II. THE EVOLUTION OF THE BUILDER’S REMEDY AND SAVINGS CLAUSE: A VIEW FROM THE LEGISLATIVE RECORDS

This section delves into the legislative history of the HAA to discern the political forces that brought about the seemingly incongruent builder’s remedy and savings clause. It begins with an analysis of S.B. 2011, the bill that added both provisions to the HAA in 1990, and then addresses a series of subsequent, relevant amendments. Tracking the HAA’s evolution uncovers three principal takeaways. First, S.B. 2011 added both provisions to the law, but in a seemingly harmonious manner. Accordingly, neither legislators nor laypersons paid much attention to the politically-conceded savings clause when maintaining that the 1990 bill would be transformative. Second, the apparent conflict between the savings clause and the builder’s remedy was generated by a language substitution added by A.B. 2348 in 2004. Though A.B. 2348 sought to strengthen the HAA and limit local government discretion, it inadvertently deviated from that objective by removing the language that tethered the use of the savings clause to a city’s prior adoption of a housing element. Finally, S.B. 2011’s express sentiments of preserving local government land use control starkly contrast with later sentiments which are keener on furthering the statewide interest in housing.

A. *Senate Bill 2011 (1990): The Origin of the Builder’s Remedy and the Savings Clause*

The S.B. 2011 bill history illuminates that while the builder’s remedy was conceptualized from the start of the drafting process, the savings clause was inserted later to ameliorate concerns raised by the bill’s opposers.

1. The Original Bill

Eight years after enacting the original version of the HAA, legislators were unimpressed by the law’s effects on housing production.⁵¹ California had only

projects) include, but are not limited to, the following: design changes, conditions that directly or indirectly lower density, reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning or zoning.”) (on file at <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf>).

⁵¹ S.B. 2011 Question & Answer Paper from Sen. Leroy Greene, Nov. 19, 1990 (“The author, Senator Leroy Greene, also believes the bill will provide cities and counties with the backing it needs

met 16 percent of its total statewide goal for low-income units by 1990.⁵² High housing costs remained the norm⁵³ because cities regularly failed to create housing elements that planned for their fair share of the regional housing need⁵⁴ and rejected viable affordable projects under NIMBY pressures.⁵⁵

To counteract local governments' dereliction of their responsibilities to plan for and build more housing, Senator Leroy Greene proposed amendments to the HAA in 1990. This bill, S.B. 2011, was sponsored by the California Chamber of Commerce, which advocated that "an adequate supply of affordable housing in all income categories" was essential to state economic growth.⁵⁶ It was supported by an unusual coalition of developers, pro-housing organizations, and advocates for the poor.⁵⁷

As initially proposed, S.B. 2011 prohibited a local government from disapproving an affordable housing project or conditioning the project in any way that rendered it infeasible unless it made one of three specific findings.⁵⁸ The permitted findings were:

- (d)(1) The project is not needed to meet the jurisdiction's share of the regional housing need;
- (d)(2) The development would have an adverse impact on public health or

to approve low-income projects over local objections") (on file with author).

⁵² See Letter from Ann Harrington, California Coal. for Rural Hous. to Assemb. Comm. on Local Gov't, Cal. State Assemb. (June 21, 1990) (The Coalition's March 1990 report, *Local Progress in Meeting the Low-Income Housing challenge*, concluded the state is meeting "only 16% of our total statewide need for low-income housing.") (on file with author); Assemb. Comm. on Local Gov't, analysis of S.B. 2011, as amended June 21, 1990, at 3 (on file with author).

⁵³ Cal. State Sen., Sen. Third Reading analysis of S.B. 2011, as amended May 15, 1990, at 2 ("This bill . . . makes Legislative findings and declarations about the lack of affordable housing, and the causes of high housing costs related to local government actions . . .") (on file with author).

⁵⁴ Cal. State Sen., Sen. Third Reading to concur in Assemb. Amend. for S.B. 2011, as amended Aug. 28, 1990, at 5 ("Nevertheless, the majority of housing elements are obsolete or are out of compliance with state law according to HCD. In addition, most jurisdictions are unwilling or unable to meet their low-income housing goals.") (on file with author).

⁵⁵ Cal. State Sen., Sen. Third Reading analysis of S.B. 2011, May 15, 1990, at 4 ("[T]he excessive cost of housing in California is partially caused by local governments that limit the supply of affordable housing . . .") (on file with author). See also Letter from Dave Kilby, President, Cal. Chamber of Com. to Senate Members, Cal. State Senate, (May 21, 1990) ("Because of NIMBY (not in my backyard) attitudes, we're seeing a number of local jurisdictions denying affordable housing projects, which only exacerbates jobs-housing imbalance and results in increased traffic congestion and other obvious deteriorating effect on our quality of life.") (on file with author).

⁵⁶ Letter from Dave Kilby, President, Cal. Chamber of Com. to Senate Members, Cal. State Senate, (May 21, 1990).

⁵⁷ The bill's original supporters were California Building Industry Association, California Chamber of Commerce, California Business Properties Association, Associated General Contractors, California Housing Council, California Coalition for Rural Housing, California Rural Legal Assistance, Jericho, and Western Center on Law and Poverty. Sen. Comm. on Hous. & Urb. Aff., analysis of S.B. 2011, as amended Apr. 5, 1990, at 3-4 (on file with author).

⁵⁸ *Id.* at 2.

safety, which could not otherwise be mitigated; or

- (d)(3) Denying or conditioning the project is required to comply with state or federal law.⁵⁹

During the bill’s evolution, legislators added supplementary grounds for denial for situations where a project prematurely converted agricultural land and where a project was proposed in an area that had an overconcentration of low-income housing.⁶⁰ Additionally, the first finding was split into two subdivisions to clarify the circumstances when a housing project is “not needed.”⁶¹ By enactment, the first of these subdivisions read, “The jurisdiction has adopted a housing element pursuant to this article and the development project is not needed for the jurisdiction to meet its share of the regional need of low-income housing.”⁶² The other subdivision—which is the predecessor to the provision that is the focus of this paper—read, “The development project is inconsistent with the jurisdiction’s general plan land use designation as specified in any element of the general plan. . .and the jurisdiction has adopted a housing element pursuant to this article.”⁶³

California cities and pro-local government organizations expressed outrage at the limitations S.B. 2011 would impose on their discretion to deny affordable housing projects. They worried the bill tipped the scale too far against local government land use control.⁶⁴ An Assembly Committee on Housing and Community Development bill summary outlines their opposition:

“[T]his bill will put planning for housing in the hands of the developers, rather than local government, by restricting the ability of a city or county to deny a housing project due to important local land use policies, such as avoiding overconcentration of low-income housing in a given neighborhood and avoiding placement of housing near incompatible land uses. Further, by

⁵⁹ *Id.*

⁶⁰ Cal. Stats. 1990, ch. 1439.

⁶¹ See Letter from Victor Pottorff, CSAC Legis. Dir., Cnty. Supervisors Ass’n of Cal. to Sam Farr, Assemb. Chair, Assemb. Local Gov’t Comm. (June 26, 1990) (highlights that original “not needed” language could be interpreted to prevent project denials even by jurisdictions that have adopted housing elements).

⁶² Cal. Stats. 1990, ch. 1439.

⁶³ *Id.*

⁶⁴ For example, the County of San Diego Opposition Letter states, “S.B. 2011 would erode the land use authority of local agencies by restricting their discretion to deny or condition approval of development projects that are incompatible with local conditions or land use standards There is no valid basis for prohibiting local agencies from denying or conditioning approval of housing plans that do not conform to general plans. The ability to deny or impose conditions on projects is necessary for local agencies to protect the integrity of their general plans, zoning regulations, and development policies.” Many other local agencies expressed similar sentiments. Letter from Patricia Gayman, Sacramento Representative, Cnty. of San Diego to Leroy Greene, Senator, Cal. State Senate (Aug. 1, 1990) (on file with author).

restricting a city or county's ability to condition a housing development, citizen opposition to low- and moderate-income housing will increase because projects might not be compatible with the existing neighborhood."⁶⁵

In response to these sentiments, legislators negotiated with cities and pro-local government organizations to garner support.⁶⁶ This manifested as a series of political concessions to the bill's opposers—the most important of which was the savings clause for development standards.

2. Addition of the Savings Clause for Development Standards

The savings clause was added to S.B. 2011 only after⁶⁷ several California cities and pro-local government organizations expressed their concerns that builder's remedy-approved projects would be incompatible with adjacent land uses.⁶⁸ For example, the League of Cities prefaced something akin to the savings clause in its opposition letter, suggesting the addition of a provision that would allow jurisdictions to “condition approval of an affordable housing project to ensure that it will be compatible with adjacent uses, while meeting the bill's restriction that conditions are impermissible if they would make the project infeasible.”⁶⁹ The letter emphasizes that unattractive, low-income housing projects cause vigorous community opposition and that preserving a local government's ability to apply development standards is exceptionally important to preserving community character.⁷⁰

⁶⁵ Cal. State Sen., Sen. Third Reading analysis of S.B. 2011, May 24, 1990, at 4. *See also* Letter from Victor Pottorff, CSAC Legis. Dir., Cnty. Supervisors Ass'n of Cal. to Leroy Greene, Senator, Cal. State Senate (Mar. 6, 1990) (“This bill severely restricts the ability of a city or county to deny a housing project due to important state and local land use policies, such as preventing the premature conversion of agricultural land, avoiding overconcentration of low-income housing projects within a given neighborhood, addressing the jobs/housing imbalance within suburban communities, and avoiding placement of housing near incompatible land uses such as airports, railroads, freeways and heavy industry.”) (on file with author).

⁶⁶ Letter from Teri Bressler, Consultant, Senate Hous. & Urb. Aff. Comm., to S.B. 2011 opposers (July 27, 1990) (“This package of amendments represents an offer of compromise from Senator Greene and the Sponsors. We are willing to make these amendments before the Assembly Local Government committee if, taken in total, they will remove opposition of the various groups receiving this memo.”) (on file with author).

⁶⁷ *Compare* Cal. State Sen., Sen. Third Reading analysis of S.B. 2011, May 24, 1990, at 2, *with* Assemb. Comm. on Local Gov't, analysis of S.B. 2011, as amended June 21, 1990, at 2 (bill summaries after mid-June 1990 begin to include references to the savings clause) (on file with author).

⁶⁸ The Cities of San Diego and Oakland are two who opposed the bill. There are several others. *See* City of San Diego Opposition Letter, April 9, 1990; City of Oakland Opposition Letter, June 11, 1990 (on file with author).

⁶⁹ Letter from Sheryl Patterson, Legis. Att'y, The League of Cal. Cities to Teri Bressler, Consultant, Senate Hous. & Urb. Aff. Comm., Dave Kilby, President, Cal. Chamber of Com., and Ann Harrington, Cal. Coal. for Rural Hous. (Apr. 6, 1990) (on file with author).

⁷⁰ *Id.* (“If a project is constructed so that has no roof overhangs, flat or uniform roof lines, minimal landscaping, carports facing the street, a single monstrous building rather than multiple structures, or is otherwise ugly; the community will never allow another ‘low income’ housing project

Responding to these concerns, legislators proposed the addition of a savings clause for development standards.⁷¹ The first version read:

“Nothing in this section shall be construed to prohibit a local agency . . . from requiring compliance with zoning and development standards which facilitate and encourage the development of low- and moderate-income housing, as long as the local agency has adopted and is implementing a housing element pursuant to this article and the housing element includes or incorporates by reference these zoning and development standards.”⁷²

This first draft of the savings clause is relatively tempered compared to the ultimately enacted version. While it provided that a local government could apply development standards to an affordable project, it required those standards to “facilitate and encourage” affordable housing. It also required cities to include or incorporate by reference their development standards into their housing element, so HCD has an opportunity for review during the housing element certification process.⁷³ HCD only certifies a housing element if it demonstrates the city’s plan to accommodate its entire fair share of the regional housing need.⁷⁴ Thus, this earlier version granted HCD the ability to conduct a holistic review of city-imposed development standards to ensure they “facilitated and encouraged” housing development in the context of the city’s larger plan. If not, HCD could deny certification of the jurisdiction’s housing element and request that unacceptable standards be removed or amended.⁷⁵

This moderate version of the savings clause was unsatisfactory to the bill’s opposers. For example, the County Supervisors Association of California argued that some development standards, such as off-street parking requirements and design requirements that encourage community conformity, should apply to affordable housing projects regardless of not “facilitat[ing] and encourag[ing]” housing development.⁷⁶ The Assembly Committee on Local Government then amended the savings clause to read:

to be constructed, regardless of the provisions of your bill. Lawsuits and community pressure for the council to deny the project and violate the law will result.”)

⁷¹ Letter from Teri Bressler, Consultant, Senate Hous. & Urb. Aff. Comm. to S.B. 2011 opposers (July 27, 1990) (“This package of amendments represent an offer of compromise from Senator Greene and the Sponsors. We are willing to make these amendments before the Assembly Local Government committee if, taken in total, they will remove opposition of the various groups receiving this memo.”) (on file with author).

⁷² S.B. 2011, Draft Amendments, June 21, 1990 (on file with author).

⁷³ See discussion of Housing Element Law certification process, *supra* note 18.

⁷⁴ See discussion of Housing Element Law certification process, *supra* note 18; See also CAL. GOV’T CODE § 65585.

⁷⁵ See discussion of Housing Element Law certification process, *supra* note 18; See also CAL. GOV’T CODE § 65585.

⁷⁶ Letter from DeAnn Baker, Legis. Analyst, Cnty. Supervisors Ass’n of Cal. to Sam Farr, Assemb. Chair, Assemb. Local Gov’t Comm. (June 26, 1990) (on file with author).

“Nothing in this section shall be construed to prohibit a local agency from requiring the development project to comply with development standards and policies appropriate to and consistent with meeting the quantified objectives relative to the development of housing, as required in the housing element pursuant to subdivision (b) of Section 65583.”⁷⁷

This ultimately enacted version of the clause⁷⁸ made three distinct but related changes that strengthened local government control, especially when combined with the traditional deference afforded to cities on land use issues.⁷⁹ First, it reduced state oversight by eliminating the requirement that development standards be included or incorporated by reference to the housing element. Second, it introduced the idea of “quantified objectives” relative to housing development, which allowed a city to evade planning for its entire regional housing need allocation if it claimed to have inadequate resources.⁸⁰ Finally, it lowered the bar for acceptable development standards from those that “facilitate and encourage” housing to those that are “appropriate and consistent” with “quantified objectives” relative to housing.

Regarding the first change, the new version of the savings clause decreased the opportunity for state oversight. The former version required that a city include or incorporate by reference its development standards into its housing element, which meant that HCD had statutory authority to review development standards within the housing element certification process.⁸¹ The new version makes no similar reference.⁸² Consequently, cities are less accountable for ensuring their

⁷⁷ Assemb. Comm. on Local Gov’t, Author’s draft amendments to S.B. 2011, as amended Aug. 6, 1990, at 4 (on file with author).

⁷⁸ Cal. Stats. 1990, ch. 1439.

⁷⁹ Traditionally, local government land use decisions were presumed valid and receive substantial deference from the courts so as not to invoke separation of powers concerns. *Carty v. City of Ojai* illustrates this standard: “The function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed.” *Carty v. City of Ojai*, 77 Cal.App.3d 329, 333 n.1 (Cal. Ct. App. 1978). See also Cecily Talbert Barclay & Matthew S. Gray, *California Land Use & Planning Law*, 43 (36 ed. 2018).

The traditional standard is discussed in this section because it was operative for most of the history of the HAA. However, in 2017, an amendment to the HAA added subdivision (f)(4), which reverses traditional deference to cities. It reads “For purposes of this section, a housing development project or emergency shelter 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.” CAL. GOV’T CODE § 65589.5(f)(4). For a discussion about the addition of this new standard, see section II.B.4.

⁸⁰ See CAL. GOV’T CODE § 65583(b)(2).

⁸¹ CAL. GOV’T CODE § 65585.

⁸² HCD can still review development standards in the “analysis of constraints” section of a housing element. However, because development standards are not explicitly “incorporated” into the housing element in their own section, changing them does not trigger HCD review. Additionally, incorporating development standards into another section makes it more likely that HCD misses

development standards are compatible with building their share of the regional housing need.

Second, the added “quantified objectives” concept provides a limited escape hatch for cities. Per the government code definition, “quantified objectives shall establish the maximum number of housing units by income category, including extremely low income, that *can be constructed*, rehabilitated, and conserved over a five-year time period.”⁸³ This means that a housing element with incorporated “quantified objectives” focuses on the realistic construction capacity of a city based on available resources while treating the regional housing need as something more like an aspirational goal.⁸⁴ This concept gives cities some leeway to evade their obligations to plan for the entire regional housing need by asserting they have inadequate resources and infrastructure to fulfill that goal.⁸⁵ For contrast, a more robust state housing law would force cities to come up with the necessary resources to provide for their entire housing need, even if it means making sacrifices elsewhere in the budget.

Finally, the new version lowered the threshold for acceptable development standards. Where development standards previously had to “facilitate and encourage” housing construction, they now only need to be “appropriate and consistent” with the city’s “quantified objectives” relative to housing.⁸⁶ The earlier version’s “facilitate and encourage” language made it possible for a challenger to defeat a development standard in court by showing that the development standard did not *affirmatively* further housing construction. This high bar for acceptable development standards functioned, in essence, as a quasi-limitation on the deference afforded to cities. In contrast, the new version’s “appropriate and consistent” language substantially lowers the bar for satisfactory development standards. A challenger would have more difficulty showing that a development standard is not “appropriate and consistent” with the quantified objectives relative to housing because doing so would require him to assess *every* housing regulation in his local jurisdiction. Furthermore, given the traditional deference afforded to local governments on land use decisions,⁸⁷ a court would generally uphold a development standard if there was any reasonable argument it was “appropriate and consistent” with a city’s quantified objectives.

Despite these apparent concessions, the enacted savings clause did have one redeeming quality that limited local discretion: Only cities that had adopted a

something. See CAL. GOV’T CODE §§ 65583-65585.

⁸³ CAL. GOV’T CODE § 65583(b)(2).

⁸⁴ *Id.*

⁸⁵ See CAL. GOVT. CODE §§ 65583, 65585. See discussion of Housing Element Law certification process, *supra* note 18.

⁸⁶ Cf. S.B. 2011, Draft Amendments, July 7, 1990 (on file with author) with Cal. Stats. 1990, ch. 1439.

⁸⁷ See discussion of traditional deference afforded to cities on land use issues, *supra* note 80.

housing element could apply saved development standards. This prerequisite is implicit in the clause's requirement that saved development standards be consistent with a housing element's mandatory "quantified objectives" subsection.⁸⁸ Put another way, a city lacking a housing element could not demonstrate the consistency of its development standards with its quantified objectives. . .because it had not adopted any. In effect, the housing element prerequisite rewarded cities compliant with the Housing Element law by permitting their use of the savings clause, while exhibiting zero tolerance for cities that shirked their responsibility to develop housing.

Importantly, the housing element prerequisite in the savings clause preserved its harmony with the builder's remedy because, per subdivision (d)(5), the applicability of a city's zoning or general plan standards was similarly contingent on the city's prior adoption of a housing element.⁸⁹ So, under the builder's remedy *and* the savings clause no housing element meant *all* local standards were precluded no matter whether they were written in the zoning code or imposed by the city post-hoc. In his post-enaction explainer, Senator Leroy Greene, the S.B. 2011 author, confirmed this understanding:

"[A]s long as the city or county development standards and zoning requirements are consistent with the objectives stated in the housing element, the city or county may impose such standards and policies on the project This appears to supersede Section 65589.5(d) of the bill which prohibits a city or county from conditioning approval of such a project infeasible for development for the use of low-and moderate-income households."⁹⁰

In all, the builder's remedy and the savings clause were compatible when enacted in 1990 because each made retaining local discretion contingent on the city's prior adoption of a housing element.

One final point addresses the quality of adopted housing elements discussed in this section. In 1990, neither subdivision expressly required that the city's housing element be substantially compliant with state law (as is mandated today).⁹¹ However, compliance was at least implicit in both. Specifically, the builder's remedy referenced Section 65588 of the Housing Element Law, which required the adoption of a housing element on a schedule.⁹² Likewise, the savings clause required setting "quantified objectives" pursuant to Section 65583(b). This

⁸⁸ See CAL. GOV'T CODE § 65589.5(f)(1); see also CAL. GOV'T CODE § 65583 ("The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.")

⁸⁹ See CAL. GOV'T CODE § 65589.5(d)(5).

⁹⁰ S.B. 2011 Question & Answer Paper from Sen. Leroy Greene, Nov. 19, 1990 (on file with author).

⁹¹ Cf. Cal. Stats. 1990, ch. 1439 with CAL. GOV'T CODE § 65589.5 (2022).

⁹² See Cal. Stats. 1990, ch. 1439 and CAL. GOV'T CODE § 65588.

section of the Housing Element Law describes a housing element’s mandatory contents and provides that they must maintain, preserve, improve, and develop housing.⁹³

3. Reactions

Notwithstanding the politically-conceded savings clause, legislators and laypersons believed S.B. 2011 would be a transformative housing measure—for better or for worse.

The San Francisco Chronicle described S.B. 2011 as a “powerful bill designed to bludgeon exclusive suburban communities into accepting low-income housing projects” and “one of the biggest legislative surprises of the current session.”⁹⁴ Similarly, the Los Angeles Times described the bill as “anti-NIMBY legislation” and a “controversial measure,” and suggested that “[l]ocal government uniformly sees the bill as an unbridled attempt to take away its planning control.”⁹⁵

Legislators’ sentiments are evidenced by the competing messages that Governor Deukmejian received before signing the bill into law. On the one hand, the Governor’s Office of Planning and Research (OPR) recommended vetoing the bill, expressing that “S.B. 2011 does not provide sufficient local control regarding the ability of localities to reasonably condition or deny the approval of housing developments.”⁹⁶ To the contrary, the Assembly Committee on Housing and Community Development and the Assembly Committee on Local Government, in a joint memorandum of support, wrote that S.B. 2011 “makes a constructive change” and is a “refreshing compromise that allows private initiative (and money) to help solve our housing problems”⁹⁷

B. Subsequent Tweaks

This section tracks the evolution of the builder’s remedy and the savings clause through several subsequent amendments to the HAA, to highlight the point when the clauses became incongruent. The selected bills spanning from 1991 to 2005 exhibit that amendments to both provisions have uniformly and unequivocally strengthened the law to promote housing, excluding one important caveat. In 2004, A.B. 2348 replaced the housing element prerequisite in the savings clause

⁹³ See Cal. Stats. 1990, ch. 1439 and CAL. GOV’T CODE § 65583(b).

⁹⁴ Vlae Kershner, *Bill to Force Cities to Build Low-Income Housing Gets OK*, S.F. CHRON., Aug. 10, 1990 (on file with author).

⁹⁵ Bradley Inman, *Low-Cost Housing Bill Stirs Outcry*, L.A. TIMES, Sep. 23, 1990 (on file with author); Ray Tessler, *Cities Face New Pressure to Provide ‘Fair Share’ of Affordable Housing*, L.A. TIMES, Aug. 5, 1990 (on file with author).

⁹⁶ Bus., Transp. & Hous. Agency, Enrolled B. Rep. for S.B. 1711, as amended Aug. 27, 1992, at 3 (on file with author).

⁹⁷ Assemb. Comm. on Hous. & Cmty. Dev. And Assemb. Comm. on Local Gov’t, analysis of S.B. 2011 (Aug. 27, 1990) at 1 (on file with author).

with new language, which effectively untethered it from the builder's remedy.

However, the A.B. 2348 bill history is comprised exclusively of pro-housing sentiments, illuminating that this effect was likely the result of a legislative inadvertence, rather than an explicit attempt to preserve or increase local control.

The final bill describes the addition of interpretive guidance to the HAA. This guidance sheds light on legislative intent and is included to aid the future reconciliation of the builder's remedy and savings clause.

1. Senate Bill 1711 (1992)

S.B. 1711 targeted laws pertaining to community redevelopment⁹⁸ and amended several adjacent laws for clarifying purposes.⁹⁹ These amendments included changes to the builder's remedy and the savings clause which diminished local discretion.

S.B. 1711 amended the builder's remedy by tightening the subdivision (d)(2) ground for denial, clarifying that a specific adverse impact on health or safety is "significant and unavoidable, based on objective, identified written public health or safety standards, policies, or conditions."¹⁰⁰ This change ensured that subdivision (d)(2) is used rarely—only when there is a concrete health or safety risk, and *not* to deny projects based on inconsistency with zoning or the general plan.¹⁰¹

S.B. 1711 also amended the savings clause by inserting a requirement that saved development standards be "written."¹⁰² This amendment ensures that saved development standards are preconceived, rather than invented post-hoc to dissuade a developer from building a particular project.¹⁰³

⁹⁸ Sen. Comm. On Local Gov't, Summary of Redevelopment Reforms in S.B. 1711 (Oct. 5, 1992) at 1 (on file with author).

⁹⁹ Governor's Off. of Plan. and Rsch., Enrolled B. Rep. for S.B. 1711, as amended Aug. 28, 1992, at 4 (on file with author).

¹⁰⁰ S.B. 1711, Cal. State Sen., Conference Rep. Analysis of S.B. 1711, as amended Aug. 28, 1992, at 4 (on file with author).

¹⁰¹ Governor's Off. of Plan. and Rsch., Enrolled B. Rep. for S.B. 1711, as amended Aug. 28, 1992, at 4 ("S.B. 1711 would eliminate some of the potential areas of abuse within the existing redevelopment law by extending and clarifying several statutes governing the activities of those agencies.") See also Language for Both SB 1711 and AB 3330 to Strengthen Housing Performance, August 24, 1992 (explains that the purpose of adding a narrow definition for concrete health or safety risk was added to limit the ability of local governments to turn down housing) (on file with author).

¹⁰² Cal. State Assemb., Amend. in Assemb. for S.B. 1711, as amended July 10, 1992, at 9 (on file with author).

¹⁰³ Cf. Cal. Renters Legal Advocacy and Education Fund, *supra* note 31, at 846. ("[T]he HAA does not prevent local agencies from establishing and enforcing appropriate design review standards. But those standards must be objective and they must be in place at the time an application is complete.")

2. Assembly Bill 2348 (2004)

A.B. 2348 codified several amendments recommended by a Housing Element Working Group¹⁰⁴ that convened to "develop a consensus on key Housing Element reform areas."¹⁰⁵ One objective of the working group was to increase housing development certainty,¹⁰⁶ in part, by reducing the discretion of local governments.¹⁰⁷ The Enrolled Bill Report for the resultant bill highlights that A.B. 2348 "represents a consensus amongst all housing stakeholders and the Legislature to break-down barriers that would prevent the production of housing. . ." ¹⁰⁸ and legislators voted unanimously to pass it.¹⁰⁹ Efforts to reduce housing development barriers are evident in the amendments to both the builder's remedy and the savings clause.

A.B. 2348 amended the builder's remedy in ways intended to "facilitate the development of affordable housing by . . . strengthening protections against arbitrary project denials."¹¹⁰ Most importantly, it added a requirement to subdivision (d)(5) that a housing element be in "substantial compliance" with state law.¹¹¹ This requirement was probably tacit in the law already,¹¹² but A.B. 2348 made compliance explicit.¹¹³

Likewise, A.B. 2348 amended the savings clause in several important ways. First, it required saved development standards to be "applied at the density permitted on the site and proposed by the development"¹¹⁴ to preclude density-

¹⁰⁴ The Housing Element working group included "local governments, Councils of Governments (COG), planners, builders, and affordable housing advocates." Bus., Transp. & Hous. Agency, Enrolled B. Rep. for A.B. 2348, at 5 (on file with author).

¹⁰⁵ Governor's Off. of Plan. and Rsch., Enrolled B. Rep. for A.B. 2348, Aug. 23, 2004, at 1 (on file with author).

¹⁰⁶ *Id.* (on file with author).

¹⁰⁷ *Id.*, at 9 (on file with author).

¹⁰⁸ *Id.*, at 2 (on file with author).

¹⁰⁹ Enrolled Bill Memorandum to Governor, Sept. 30, 2004, at 1 (Assembly voted 78-0 and the Senate voted 13-0 to pass A.B. 2348) (on file with author).

¹¹⁰ Sen. Rules Comm., Off. of Sen. Floor Analysis for A.B. 2348, as amended Aug. 23, 2004, at 6-7 (on file with author).

¹¹¹ Governor's Off. of Plan. and Rsch., Enrolled B. Rep. for A.B. 2348, Aug. 23, 2004, at 4 (on file with author).

¹¹² See discussion of implicit compliance with Housing Element Law, *supra* Section II.A.2.

¹¹³ Two other changes to the builder's remedy occurred in this bill. First, it added language to subdivision (d)(5) which specified that a city cannot deny an affordable project on a site that is identified for low-income housing in a jurisdiction's housing element, even if the project is inconsistent with the zoning ordinance and general plan land use designations. See Sen. Rules Comm., Off. of Sen. Floor Analysis for B. Rep. for A.B. 2348, as amended Aug. 23, 2004, at 4 (on file with author).

Additionally, it removed the ground for denial based on the over-concentration of affordable housing in a particular area. The bill removed this ground because it had been used "contrary to the objective of providing new housing for overcrowded or overpaying lower income families." See Sen. Rules Comm., Off. of Sen. Floor Analysis for A.B. 2348, as amended Aug. 23, 2004, at 6 (on file with author); Bus., Transp. & Hous. Agency, Enrolled B. Rep. for A.B. 2348, at 7 (on file with author).

¹¹⁴ Sen. Rules Comm., Off. of Sen. Floor Analysis for A.B. 2348, as amended Aug. 23, 2004, at

reducing standards such as excessive parking requirements.¹¹⁵ Second, it added requirements that saved development standards be “objective” and “quantifiable,”¹¹⁶ signaling another push to further restrict their use. Finally, it replaced the requirement that saved development standards be consistent with “quantified objectives. . . as required in the housing element” with a condition they are consistent with “meeting the jurisdiction’s share of the regional housing need.”¹¹⁷ This substitution intended to impose more demanding criteria for saved development standards. Where the former language permitted standards that were consistent with the realistic construction capacity of the city,¹¹⁸ the new language raised the bar by authorizing only standards that aligned with the city’s strategy to meet its *entire* regional housing need.

Despite the intent of the final change, it had unintended effects. Because all jurisdictions receive a regional housing need allocation regardless of whether they have adopted a housing element, replacing the “quantified objectives” language with the “regional housing need” language inadvertently removed the housing element prerequisite that was previously implicit in the savings clause.¹¹⁹ This disrupted the formerly harmonious relationship between the savings clause and the builder’s remedy because the builder’s remedy still made applying local standards contingent on a city’s adoption of a housing element, while the savings clause no longer did.

Cities today may argue that the removal of the housing element prerequisite from the savings clause evinces an explicit attempt to increase local control. Conversely, the A.B. 2348 legislative history indicates the opposite; there was unanimous support for changes to streamline housing development by reducing city discretion.¹²⁰ Furthermore, replacing the “quantified objectives” language

6-7 (on file with author).

¹¹⁵ Sen. Rules Comm., Off. of Sen. Floor Analysis for A.B. 2348, as amended Aug. 23, 2004, at 7 (amended savings clause attempted to limit “unrealistic development standards, such as excessive parking requirements” and to combat “community opposition” that “can often derail a project.”) (on file with author).

¹¹⁶ Sen. Rules Comm., Off. of Sen. Floor Analysis for A.B. 2348, as amended Aug. 23, 2004, at 6-7 (on file with author).

¹¹⁷ Cf. Cal. Stats. 1990, ch. 1439 (“Nothing in this section shall be construed to prohibit a local agency from requiring the development project to comply with development standards and policies appropriate to and consistent with meeting the quantified objectives relative to the development of housing, as required in the housing element pursuant to subdivision (b) of Section 65583.”) with Cal. Stats. 2004, ch. 724 (“Nothing in this section shall be construed to prohibit a local agency from requiring the housing development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584.”).

¹¹⁸ See Cal. Gov’t Code § 65583(b)(2). See also discussion of quantified objectives, *supra* Section II.A.2.

¹¹⁹ See discussion of S.B. 2011, *supra* Section II.A.2.

¹²⁰ Governor’s Off. of Plan. and Rsch., Enrolled B. Rep. for A.B. 2348, Aug. 23, 2004, at 9 (on file with author).

with the “regional housing need” language seemed facially consistent with that goal because, in theory, the “regional housing need” language established stricter criteria for saved development standards. However, in practice, the removal of the “quantified objectives” language also rendered the savings clause inconsistent with the builder’s remedy and generated the present ambiguity about which development standards are precluded versus which are preserved. Supporting the presumption that this effect was likely the unforeseen result of an oversight rather than an explicit attempt to preserve local discretion., neither the report detailing the Housing Element Working Group meetings nor the A.B. 2348 bill history addresses the seemingly incongruent relationship between the savings clause and the builder’s remedy.¹²¹

3. Senate Bill 575 (2005)

S.B. 575 intended to close additional “loopholes” in the HAA.¹²² Pursuing this goal, it amended the builder’s remedy in several ways.

First, S.B. 575 amended subdivision (d)(1) to clarify that this ground for denial only applies if the jurisdiction has met or exceeded its share of the regional housing need for the specific income category proposed for the project.¹²³ This provision intended to “preclude a local government from claiming that future development yet to be approved would be used to meet its share of the regional housing need as a reason to disapprove a proposed affordable housing project.”¹²⁴

Second, it clarified that “inconsistency with a zoning ordinance or general plan land use designation does not constitute a specific, adverse impact on public health or safety” for the purposes of subdivision (d)(2).¹²⁵ This amendment added a safeguard to ensure cities cannot abuse the “health or safety” ground for denial.

Third, it amended subdivision (d)(5) to clarify that cities could not deny or condition a project proposed for any residential or commercial site that permits housing if they had not identified adequate sites for their housing element inventory.¹²⁶ This provision further reduced local government discretion to deny or condition proposed affordable housing projects.

¹²¹ See Final Report to the Assembly and Senate Housing Committees, Housing Element Working Group Report (2004).

¹²² Bus., Transp. & Hous. Agency, Enrolled B. Rep., as amended Aug. 18, 2005, at 1 (on file with author).

¹²³ Bus., Transp. & Hous. Agency, Enrolled B. Rep., as amended Aug. 18, 2005, at 3 (on file with author).

¹²⁴ Bus., Transp. & Hous. Agency, Enrolled B. Rep., as amended Aug. 18, 2005, at 4 (on file with author).

¹²⁵ Bus., Transp. & Hous. Agency, Enrolled B. Rep., as amended Aug. 18, 2005, at 3 (on file with author).

¹²⁶ Bus., Transp. & Hous. Agency, Enrolled B. Rep., as amended Aug. 18, 2005, at 3 (on file with author).

4. Assembly Bill 1515 (2017)

Unlike the previous amendments described in this paper, A.B. 1515 did not substantively change the builder's remedy nor the savings clause.¹²⁷ It is included because these amendments inserted interpretive guidance to the HAA including a series of exhortations that describe the law's former shortfalls and directions for future interpretation. For example:

“The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing for all economic segments of California’s communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled.”¹²⁸

and:

“It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.”¹²⁹

These exhortations clarify that courts should always resolve confusion about intent or questions about interpretation in a manner that most effectively furthers housing development.

A.B. 1515 also reversed the presumption of validity that cities traditionally received on land use decisions.¹³⁰ After A.B. 1515, 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.”¹³¹ In simpler terms, the project is consistent, compliant, and in conformity with local standards if any reasonable developer could deem it so, even if the city disagrees.

This new evidentiary standard applies to the entire HAA. A bill summary from the California Senate explicitly invokes subdivision (j)¹³² when stating that the

¹²⁷ In 2017, the substantive changes to the HAA added an attorney’s fees provision for petitioners that sued for HAA violations, gave judges the power to fine cities that violate the HAA, and increased local reporting requirements. *See* Cal. Stats. 2017, ch. 378; Sen. Rules Comm., Analysis of S.B. 167, as amended July 13, 2017, at 4-6.

¹²⁸ CAL. GOV’T CODE § 65589.5(K). *See also* A.B. Cal. Stats. 2017, ch. 378.

¹²⁹ CAL. GOV’T CODE § 65589.5(L).

¹³⁰ *See* A.B. 1515, S. Rules Comm., Office of the Sen. Floor Analysis, July 13, 2017, at 4 (“This bill requires courts to give less deference to a local government’s consistency determination.”).

¹³¹ CAL. GOV’T CODE § 65589.5(f)(4).

¹³² *See* discussion of CAL. GOV’T CODE § 65589.5(j)’s applicability to the entire HAA, *supra*

new evidentiary standard applies if the jurisdiction “rejected or conditioned the project on inconsistency with a local plan . . . or other similar provision.”¹³³ Thus, local governments now bear the burden of proof to show that their decisions conform to HAA requirements, and courts grant less deference to local governments on their decisions.¹³⁴ This heightened evidentiary standard demonstrates legislative efforts to make it easier for a challenger to prevail on a claim that a city violated the HAA. This is significant because a lawsuit (or the threat of one) may prompt cities to take more seriously their housing obligations.

III. A DECISION FOR THE COURTS?

Section II reveals two critical takeaways from the legislative history of the HAA. First, the apparent conflict between the builder’s remedy and the savings clause was likely the result of a legislative inadvertence. Specifically, A.B. 2348 untethered the savings clause from the builder’s remedy by removing the housing element prerequisite from the savings clause. So although the bill intended to streamline housing development, it had the opposite effect by generating confusion about the nature and extent to which the HAA preserved local discretion to apply development standards. Second, the sampling of legislative history illuminates the HAA’s extended history of being strengthened in favor of affordable housing development.

A court tasked with settling the apparent conflict between the builder’s remedy and the savings clause should use a framework incorporating the HAA’s legislative history with its clear legislative directive to construe the statute “with the fullest possible weight to the interest of . . . housing.”¹³⁵ These factors support a clear terminus: Builder’s remedy-approved projects should not be obstructed by city-imposed “saved” development standards.

Two possible approaches may fulfill this outcome:

One strategy could be for a court to deem any standard that a city imposes on a builder’s remedy-approved project as presumptively invalid. After all, a city that lacks a compliant housing element has not adequately planned to meet its “fair share” of the regional housing need and thus has no way of knowing whether the development standard is consistent with fulfilling its statutory mandates. Overcoming this presumption would require the city to demonstrate that *all* its development standards, considered as a whole, are compatible with meeting the regional housing need. The benefits of this strategy are two-fold. First, it would prompt a city defending a development standard to do a piece of the required analysis for a substantially compliant housing element. Second, it would

note 13.

¹³³ Sen. Rules Comm., Off. of the Sen. Floor Analysis for A.B. 1515, July 13, 2017, at 4-5.

¹³⁴ A.B. 1515, Cal. State Assemb., Concurrence in Sen. Amendments, July 13, 2017, at 3.

¹³⁵ CAL. GOV’T CODE § 65589.5(L).

recalibrate the provisions to the 1990 intent by effectively re-tethering a city's ability to apply saved development standards to its compliance with the Housing Element Law.

Another strategy would be for a court to permit "saved" development standards but establish that they are waived if they cannot be applied without undermining the proposed density of a builder's remedy-approved project. This strategy, which replicates the Density Bonus Law approach of "physically preclud[ing]" standards that restrict the proposed density of a project,¹³⁶ offers a reasonable interpretation of the conflicting requirements that "saved" development standards be "objective" and be "applied at the density permitted on the site and proposed by the development."¹³⁷ Under this approach, cities retain some discretion to impose objective development standards but are substantially limited in that they may only set standards that indisputably *do not* preclude the proposed density of a project. The parallels between the Density Bonus Law and the HAA support the appropriateness of this interpretation because both statutes similarly permit developers to circumvent local planning standards for housing development purposes. This approach is undoubtedly less heavy-handed than the former suggestion and still allows dense, builder's remedy-approved projects to move forward. However, it would be less effective at streamlining housing development because cities would still have leeway to apply some saved development standards to builder's remedy-approved projects.

CONCLUSION

The HAA's legislative history illuminates that the savings clause should no longer be an obstacle to builder's remedy-project approvals. Settling this apparent conflict once and for all will render the builder's remedy a plausible conduit for project approval and provide a pathway for developing much-needed affordable housing throughout the state.

¹³⁶ CAL. GOV'T CODE § 65915(e)(1).

¹³⁷ See discussion of Density Bonus Law, *supra* Section I.B.