



**TOWN OF LOS GATOS
COUNCIL AGENDA REPORT**

MEETING DATE: 09/03/2024

ITEM NO: 1

DATE: August 29, 2024
TO: Mayor and Town Council
FROM: Gabrielle Whelan, Town Attorney
SUBJECT: Conduct a Study Session to Receive Information on and Discuss Senate Bill 330, Builder's Remedy, Density Bonus Law, Existing Litigation Outcomes, Proposed State Laws, and the Town Planning Application Review Process

RECOMMENDATION:

Conduct a Study Session to Receive Information on and Discuss Senate Bill 330, Builder's Remedy, Density Bonus Law, Existing Litigation Outcomes, Proposed State Laws, and the Town Planning Application Review Process.

BACKGROUND AND DISCUSSION:

The purpose of this study session is for the Town Council and members of the public to receive and discuss information regarding the Town's processes for reviewing planning applications and applicable state laws such as Senate Bill 330, the Builder's Remedy, and Density Bonus Law. Staff and special counsel will provide:

- 1) A Summary of Senate Bill 330, the Builder's Remedy, and Density Bonus Law;
- 2) An Overview of the Town's Planning Application Review Process; and
- 3) A Summary of Litigation Outcomes to Date and Proposed State Laws.

Summary of the Builder's Remedy, Senate Bill 330, and Density Bonus Law

1) **The Builder's Remedy**

The Builder's Remedy is codified in Government Code Section 65589.5, a copy of which is attached as Attachment 1. This law has been codified for a long time, but was not commonly referenced by applicants until 2015. Government Code Section 65589.5(d) sets forth five grounds on which a city or town can disapprove a housing development project that includes 20 percent lower income housing. Per Government Code Section 65589.5(d)(5), one of those

Reviewed by: Town Manager, Assistant Town Manager, and Community Development Director

BACKGROUND AND DISCUSSION (continued):

grounds is that the city or town has an adopted housing element that substantially complies with state law and the project is inconsistent with the zoning ordinance and general plan designation.¹ Subsection (d)(1) is known as the "Builder's Remedy," because if a city or town does not have a housing element complying with state law, this finding cannot be made to deny a project that is inconsistent with the general plan and zoning.

Government Code Section 65589.5(d) also sets forth four additional grounds upon which cities or towns can deny or modify projects. In addition, Government Code Section 65589.5(f)(1) provides that ". . . 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. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on site and proposed by the development."

2) Senate Bill 330

Senate Bill 330 (2019) enacted Government Code Section 65941.1 (Attachment 2) to authorize a "vesting" process for housing development applicants. If applicants submit a preliminary application with the information required by the statute, the applicants vest to the Town standards in place at the time the preliminary application was submitted. In cities and towns without HCD-approved housing elements, applicants have submitted SB 330 preliminary applications and are taking the position that the housing element does not conform with state law, and they are "vested" to the Town's status of not having a certified Housing Element.

3) Density Bonus Law

The state Density Bonus Law, codified at Government Code Sections 65915-65918 (Attachment 3), gives housing developers a "density bonus" in exchange for including specified percentages of affordable housing. The amount of the density bonus increases with the percentage of affordable units included in the proposed project, up to a 100 percent bonus for mixed-income projects, or no density limit for some affordable projects. In addition to the density bonus, project applicants are entitled to seek incentives or concessions and waivers or reductions of development standards. The statute also provides that, so long as the requisite percentages of affordable housing are provided, applicants can seek incentives or concessions and waivers even if the applicant is not utilizing the density bonus.

¹ The Town's "Regional Housing Needs Allocation" is determined by the Association of Bay Area Governments and establishes the number of housing units that the Town needs to accommodate.

BACKGROUND AND DISCUSSION (continued):

"Incentives and concessions" are defined as:

- a) A reduction in site development standards or a modification of zoning code or architectural design requirements, such as a reduction in setback or minimum square footage requirements; or
- b) Approval of mixed use zoning; or
- c) Other regulatory incentives or concessions which actually result in identifiable and actual cost reductions.

The number of "incentives and concessions" available is based on the percentage of affordable units in the project. Cities and towns are required to grant "concessions or incentives" unless they find that the proposed concession or incentive does not result in identifiable and actual cost reductions, would have a "specific, adverse impact" that cannot be mitigated on public health or safety or certain historical properties, or would be contrary to state or federal law.

"Waivers" can be sought if a city or town development standard would physically prevent the density bonus project (as proposed) from being built at the permitted density and with the granted concessions or incentives. A city or town is not required to waive or reduce development standards that would cause a "specific, adverse impact" that cannot be mitigated on public health or safety, harm certain historical properties, or be contrary to state or federal law. The waiver or reduction of a development standard does not count as an incentive or concession, and there is no limit on the number of waivers that may be requested or granted. Examples of development standards for which waivers can be sought are: setback and lot coverage requirements; and height limits. The most recent published case on waivers states that they must be provided for buildings "as designed."

In addition, there are reduced parking standards for density bonus projects.

The Town's Processes for Reviewing Planning Applications

A Workflow Diagram of the Town's review process is attached as Attachment 4 to this staff report. A more detailed description follows.

1) Senate Bill 330 Preliminary Application

If an applicant submits a Senate Bill 330 preliminary application, Town staff confirms that all of the elements required by Government Code Section 65941.1 have been submitted. Once staff has confirmed that all of the required information has been submitted, the preliminary

BACKGROUND AND DISCUSSION (continued):

application materials are posted on-line and, if the proposed project is three stories or more, notice cards are mailed to all properties within 1000 feet of the project site.

2) Formal Application

If an applicant wishes to retain the vesting rights afforded by an SB 330 preliminary application, an applicant has 180 days from the date a complete SB 330 preliminary application was submitted to submit a formal application. Town staff reviews the formal planning application for completeness. If the formal application is incomplete, the applicant has 90 days to submit a complete application. If a complete application is not submitted within that timeframe, the vesting afforded by Senate Bill 330 ends.

An applicant can submit a non-vested formal planning application at any time. When Town staff receives a formal planning application, the first step is technical review. The Planning Division, the Building Division, the Santa Clara County Fire Department, and the Public Works Engineering group list incomplete items and identify inconsistencies with Town standards. The applicant resubmits an application to address those comments. Staff reviews the resubmittal to determine whether the previous comments have been resolved. This process can be repeated as many times as needed until all comments have been addressed. (For Builder's Remedy projects, the applicant may ask the Town to consider the application at a public hearing regardless of any remaining inconsistencies.) Concurrently with the review process, Town staff oversees environmental review of the impacts of a proposed project. Once the environmental review has been completed and Town staff's review process has come to an end, the project is scheduled for public hearings. There is a limit of five public hearings for all housing development projects, including single-family homes.

Summary of Litigation Outcomes To Date

The court decisions issued to date have primarily involved determinations by cities that Builder's Remedy planning applications are incomplete and therefore cannot be processed. To date, courts have held that cities are required to take in Builder's Remedy planning applications for processing. Barbara Kautz, a partner with the law firm of Goldfarb & Lipman, is closely monitoring this litigation and will verbally summarize the cases decided to date.

Proposed State Laws

The Legislature appears ready to approve two bills, AB 1886 and AB 1893, that are intended to make it much easier for developers to use the Builder's Remedy and that allow developers with

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BACKGROUND AND DISCUSSION (continued):

existing Builder's Remedy projects to modify their projects to take advantage of the new provisions. Outside counsel will provide a brief summary of these bills.

CONCLUSION:

Staff looks forward to a discussion of these topics.

COORDINATION:

This report was coordinated with the Community Development Department and the Town Manager's Office.

FISCAL IMPACT:

There is no fiscal impact associated with this study session.

ENVIRONMENTAL ASSESSMENT:

This study session is not a project subject to CEQA, because no action will be taken.

Attachments:

1. Builder's Remedy Statute
2. SB 330 Preliminary Application Statute
3. Density Bonus Statute
4. Workflow Diagram of Town's Planning Application Review Process