

Date of Hearing: April 27, 2011

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

Norma Torres, Chair

AB 1220 (Alejo) – As Amended: April 25, 2011

SUBJECT: Land use and planning: cause of actions: time limitations

SUMMARY: Revises the statute of limitations and remedies for specified housing-related challenges. Specifically, this bill:

- 1) Requires a specified notice to be filed with the local government within five years after an action to adopt, amend, or revise a housing element, actions relating to the Least Cost Zoning Law, annual limits on housing permits, and the adequacy of a density bonus ordinance.
- 2) Excludes from the types of challenges that may be brought during this time period any action related to the Housing Accountability Act, the Subdivision Map Act, or the application of a Density Bonus ordinance to a particular project, all of which are project-specific actions.
- 3) Requires a challenging party to first serve the city or county with a notice identifying the deficiencies in the housing element, and allows the city or county 60 days to correct the deficiency, following which a dissatisfied party may file an action in court. No court filing can be initiated under this bill more than 5 years after the underlying action by the local government.
- 4) Provides that a housing element from a prior planning period may not be challenged if the city or county has adopted a revised housing element for the new planning period.
- 5) Provides that in any action or proceeding brought pursuant to the foregoing provision, no remedy, and no injunction pursuant to Government Code Section 65754.5, shall abrogate, impair, or otherwise interfere with the full exercise of the rights and protections granted to (1) an applicant for a tentative map pursuant to Section 66474.2, or (2) a developer pursuant to Government Code Sections 65866 and 66498.1.
- 6) Provides that if a third-party challenges the adequacy of a housing element in court and the court finds that the housing element substantially complies with all of the requirements of housing element law, the element shall be deemed to be in compliance for purposes of state housing grant programs.
- 7) State that it is the intent of the Legislature to modify the court's opinion in *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4<sup>th</sup> 1561, with respect to the interpretation of Section 65009 of the Government Code.

EXISTING LAW:

- 1) Under the Planning and Zoning Law, specifies that "except as provided under subdivision (d)," no action or proceeding shall be maintained in any of the following cases by any person

unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision:

- a) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan;
- b) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance;
- c) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan;
- d) To attack, review, set aside, void, or annul the decision of a legislative body to adopt, amend, or modify a development agreement;
- e) To attack, review, set aside, void, or annul any decision related to applications for conditional use permits and variances, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit;
- f) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed above.

[Government Code Section 65009(c)]

- 2) Specifies that in the case of an action or proceeding challenging the adoption or revision of a housing element, the action or proceeding may, in addition, be maintained if it is commenced and service is made on the legislative body within 60 days following the date that the Department of Housing and Community Development reports its findings on a jurisdiction's adopted housing element or adopted amendments to a housing element [Government Code Section 65009(c)].
- 3) Under subdivision (d), provides that an action or proceeding shall be commenced and the legislative body served within one year after the accrual of the cause of action, if the action or proceeding meets both of the following requirements:
  - a) It is brought in support of or to encourage or facilitate the development of housing that would increase the community's supply of housing affordable to persons and families with low or moderate incomes; and,
  - b) It is brought with respect to actions taken on the Housing Element, Housing Accountability Act, Subdivision Map Act, Density Bonus, or housing development approval.

[Government Code Section 65009(d)]

- 4) Specifies that a cause of action brought pursuant to subdivision (d) shall not be maintained until 60 days have expired following notice to the city or county specifying the deficiencies of the general plan, specific plan, or zoning ordinance, and specifies that a cause of action brought pursuant to subdivision (d) shall accrue 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first [Government Code Section 65009(d)]

- 5) Provides that in any action filed on or after January 1, 1991, to challenge the validity of a housing element, there shall be a rebuttable presumption of the validity of the element or amendment if the Department of Housing and Community Development (HCD) has found that the element substantially complies with the requirements of the law.
- 6) Requires a court, if it finds any portion of a general plan, including a housing element, out of compliance with the law, to include within its order or judgment one or more of the following remedies for any or all types of developments or any or all geographic segments of the city or county until the city or county has complied with the law, including:
  - a) Suspension of the city or county's authority to issue building permits;
  - b) Suspension of the city or county's authority to grant zoning changes and/or variances;
  - c) Suspension of the city or county's authority to grant subdivision map approvals;
  - d) Mandating the approval of building permits for residential housing that meet specified criteria;
  - e) Mandating the approval of final subdivision maps for housing projects that meet specified criteria; and,
  - f) Mandating the approval of tentative subdivision maps for residential housing projects that meet specified criteria.

(Government Code Section 65009)

FISCAL EFFECT: None

COMMENTS:

Background

The Planning and Zoning Law requires cities and counties to prepare and adopt a general plan, including a housing element, to guide the future growth of a community. Following a staggered statutory schedule, cities and counties located within the territory of a metropolitan planning organization (MPO) must revise their housing elements every eight years, and cities and counties in rural non-MPO regions must revise their housing elements every five years. These five- and eight-year periods are known as the housing element planning period.

Before each revision, each community is assigned its fair share of housing for each income category through the regional housing needs assessment (RHNA) process. A housing element must identify and analyze existing and projected housing needs, identify adequate sites with appropriate zoning to meet its share of the RHNA, and ensure that regulatory systems provide opportunities for, and do not unduly constrain, housing development. The Department of Housing and Community Development (HCD) reviews both draft and adopted housing elements to determine whether or not they are in substantial compliance with the law.

The Planning and Zoning Law and the Subdivision Map Act also includes a number of sections governing zoning and entitlements specifically related to housing, including:

- The Housing Accountability Act, which requires a city or county to make one or more specified findings in order to disapprove a particular housing development.
- A provision requiring cities and counties, when adopting an ordinance which limits the number of housing units which may be constructed on an annual basis, to make findings as to the public health, safety, and welfare benefits that justify reducing the housing opportunities of the region.
- Density bonus law, which requires cities and counties to grant a developer a density bonus, incentives, and concessions when the developer proposes to include specified percentages of affordable housing within a development.
- The Least Cost Zoning Law, which requires cities and counties to designate and zone sufficient vacant land for residential use with appropriate standards to meet housing needs for all income categories and to contribute to producing housing at the lowest possible cost.
- A requirement that, when determining whether to approve a tentative subdivision map, a city or county shall apply only those ordinances, policies, and standards in effect as of the date the developer's application is deemed complete.

Prior to a recent court decision, it was generally understood that current law allowed a party to challenge the adequacy of a city's or county's housing element at any time during a planning period, provided that the challenger brought the action "in support of or to encourage or facilitate the development of housing that would increase the community's supply of [affordable] housing." The challenging party was required first to serve the city or county with a notice identifying the deficiencies in the housing element. After 60 days or the date on which the city or county took final action in response to the notice, whichever occurred first, the challenging party had one year to file the action in court. This process and statute of limitations also applied to actions brought pursuant to the housing-related statutes listed above.

In 2006 Urban Habitat Program brought suit to challenge the City of Pleasanton's housing policies, including the city's annual cap on housing permits and the city's cap on the aggregate number of permissible housing units, both of which Urban Habitat claimed were insufficient to allow the city to meet its RHNA obligation. In 2008, the First District California Court of Appeals issued an unpublished decision in the case of *Urban Habitat Program v. City of Pleasanton* allowing the case to proceed with respect to some causes of action, but ruling that the challenge to the housing element itself was time-barred. The court stated:

Although the statute does not specify the time within which [a deficiency] notice must be given, it is our conclusion that the statute must be interpreted as containing a time limit within which this requirement must be met... In sum, a party bringing a challenge governed by section 65009, subdivision (d), has 90 days from the date a legislative action is taken or approval is given to notify the local land use authority of any claimed deficiencies in such an action or approval. Its claim then accrues 60 days after it gives this notice.

In other words, instead of being able to initiate a challenge to a deficient housing element at any time during the planning period, housing advocates and other interested parties may now only initiate such a challenge by submitting a deficiency notice within 90 days of the housing element's adoption.

The statutory language interpreted by the court and at issue in this bill was added to statute by AB 998 (Waters), Chapter 1138, Statutes of 1983, a bill sponsored by the League of California Cities and the California Building Industry Association. AB 998 created a short statute of limitations period for land use decisions generally but provided a specific exception to protect the ability to challenge deficient housing elements. AB 998 specified, for challenges in support of low- and moderate-income housing requirements, that the petitioner must notice local government 60 days prior to filing action, and that a one-year statute of limitations would then begin on the first day that the legislative body fails to act. The law was silent on when the 60-day notice had to be served, the prevailing interpretation of which was that the notice could be served at any point during the housing element planning period, which at the time was five years for all jurisdictions.

In the intervening 25 years between the passage of AB 998 and the *Urban Habitat* ruling, housing advocates filed and successfully settled at least eleven cases in which the 60-day deficiency notice was sent more than 90 days after adoption of the city's or county's housing element. In none of these cases was the timeliness on the advocates' suit contested. Likewise, six bills amended other portions of this statute during those intervening years, and there was never any controversy surrounding the lack of a deadline for housing advocates to serve a deficiency notice nor any attempt to change the statute in this regard.

#### Purpose of the Bill

According to the author, AB 1220 has been introduced to modify the court's in opinion in *Urban Habitat*. AB 1220 allows an entity challenging an action in support of affordable housing to serve the deficiency notice up to five years after the city's or county's action. The bill provides that after 60 days or the date on which the city or county takes final action in response to the notice (whichever occurs first), the challenging party has one year to file an action in court, except that the lawsuit may not be filed more than five years after the city's or county's action.

Current law (Government Code Section 65009) requires a court, if it finds any portion of a general plan, including a housing element, out of compliance with the law, to include within its order or judgment one or more of the following remedies for any or all types of developments or any or all geographic segments of the city or county until the city or county has complied with the law:

- Suspend the authority of the city or county to issue building permits.
- Suspend the authority of the city or county to grant zoning changes and/or variances.
- Suspend the authority of the city or county to grant subdivision map approvals.
- Mandate the approval of building permits for residential housing that meet specified criteria.

- Mandate the approval of final subdivision maps for housing projects that meet specified criteria.
- Mandate the approval of tentative subdivision maps for residential housing projects that meet specified criteria.

AB 1220 clarifies that in any action or proceeding brought pursuant to the notice and accrual provisions of Government Code Section 65009 described above, neither the court remedies described above nor any injunction against the development of a housing project shall abrogate, impair, or otherwise interfere with the full exercise of the rights and protections granted to an applicant for a tentative map or a vesting tentative map under specified provisions of the Subdivision Map Act or to a developer under a specified provision relating to development agreements.

Under current law, HCD operates a number of grant programs to which cities and counties may apply. In many cases, the law requires a city or county to have an HCD-approved housing element in order to be eligible for funding. AB 1220 provides that if a third-party challenges the adequacy of a housing element in court and the court finds that the housing element substantially complies with all of the requirements of housing element law, the element shall be deemed to be in compliance for purposes of state housing grant programs.

#### Arguments in Support

According to the sponsors of AB 1220, the California Rural Legal Assistance and Housing California, "The court's decision in *Urban Habitat* misinterpreted the statute of limitations for challenging an inadequate housing element, and eliminated the 25-year-old 'Affordable Housing Exception' that has ensured compliance with the law. This erroneous interpretation shortened the statute of limitations from 5 years to 90 days and makes effective enforcement of housing element law nearly impossible. AB 1220 would restore the Affordable Housing Exception while also making some modest reforms to ensure that the interests of all stakeholders are balanced. The restoration of the law is consistent with the Legislature's original intent and corrects the court's plainly erroneous interpretation of the statute."

#### Arguments in Opposition

Opponents, including the California Chapter of the American Planning Association, the League of California Cities, the Regional Council of Rural Counties, and the California State Association of Counties, argue that by allowing a five-year statute of limitations to sue a city or county challenging the adoption of a housing element, AB 1220 will "encourage a broad array of expensive lawsuits that do not differentiate between major noncompliance with state law or a small difference in interpretation. This will leave local agencies, businesses, and developers unfairly open to uncertainty long after decisions have been made."

#### Previous Legislation:

This bill is identical to AB 602 (Feuer, 2010). That bill was vetoed by Governor Schwarzenegger with the following veto message:

"Local governments face numerous potential legal liabilities when land is developed. One of the protections and assurances provided to local governments in order to encourage them to move forward with land development is that there is a reasonable statute of limitations on when a legal claim can be filed. Existing law gives interested parties sufficient time to bring an action, and extending this period to five years could result in uncertainty for local governments."

Double-Referred:

This bill was also referred to the Local Government Committee, where it is scheduled to be heard on May 11, 2011, should it pass out of this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Rural Legal Assistance Foundation (co-sponsor)  
Housing California (co-sponsor)  
Bay Area Council  
California Association of Realtors  
California Coalition for Rural Housing  
Century Housing  
Community Housing Improvement Program  
Congress of California Seniors  
Mammoth Lakes Housing, Inc.  
Mercy Housing  
San Diego Housing Federation  
Self-Help Enterprises  
Silicon Valley Leadership Group  
Southern California Association of Non-Profit Housing  
TransForm

Opposition

American Planning Association, California Chapter  
California State Association of Counties  
Cities of Cypress and Fullerton  
City of Mission Viejo  
Civil Justice Association of California  
League of California Cities  
Regional Council of Rural Counties  
Santa Clara County

Analysis Prepared by: Anya Lawler / H. & C.D. / (916) 319-2085