Date of Hearing: May 1, 2013

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT
Norma Torres, Chair
AB 325 (Alejo) – As Introduced: February 13, 2013

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

SUMMARY: Allows up to three years after certain city or county actions, including the adoption of a housing element, for a party to initiate a challenge to the action if it is being brought "in support of or to encourage or facilitate the development of housing that would increase the community's supply of [affordable] housing."

Specifically, this bill:

1) States the intent of the Legislature to modify the court's opinion in *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, with respect to the interpretation of Section 65009 of the Government Code.

2) Provides that an entity initiating a challenge in support of affordable housing to a city or county action relating to housing element law, the Least Cost Zoning Law, annual limits on housing permits, or the adequacy of a density bonus ordinance may serve a deficiency notice up to three years after the city's or county's action.

3) Provides that after 60 days or the date on which the city or county takes final action in response to the deficiency notice, whichever occurs first, the challenging party has one year to file an action in court, except that the suit may not be filed more than three years after the city's or county's action.

4) Removes from the current list of city or county actions that a party may challenge pursuant to the notice and accrual provision described above those actions related to the Housing Accountability Act, the Subdivision Map Act, and the application of a Density Bonus ordinance to a particular project, all of which are project-specific actions.

5) Clarifies that in any action brought pursuant to the notice and accrual provisions described above, no legal remedy or injunction pursuant to 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.

6) Provides that a housing element from a prior planning period may not be challenged if the city or county has adopted housing element for the new planning period.

7) 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.

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 (HCD) reports its findings on a jurisdiction's adopted housing element or adopted amendments to a housing element [Government Code Section 65009(c)].

3) Under Government Code Section 65009(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 pursuant to Housing Element Law, the Housing Accountability Act, the Subdivision Map Act, Density Bonus Law, or a housing development approval.

   [Government Code Section 65009(d)]

4) Specifies that a cause of action brought pursuant to Government Code Section 65509(d) shall not be maintained until 60 days have expired following notice to the city or county

specifying the deficiencies, 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 HCD has found that the element substantially complies with the requirements of the law (Government Code Section 65589.3).

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. In its housing element, a jurisdiction must identify and analyze existing and projected housing needs, identify adequate sites with appropriate zoning to accommodate its share of the RHNA, and ensure that regulatory systems provide opportunities for, and do not unduly constrain, housing development. HCD reviews both draft and adopted housing elements to determine whether or not they are in substantial compliance with the law. Many of HCD’s grant programs require a city or county to have an HCD-approved housing element in order to be eligible for funding.

The Planning and Zoning Law and the Subdivision Map Act also include 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 an affordable housing project.

- A provision requiring cities and counties, when adopting an ordinance that limits the number of housing units that 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 apply only those ordinances, policies, and standards in effect as of the date the developer's application is deemed complete.

Current law provides 90 days to challenge a variety of local government actions, including the adoption or amendment of a general plan or specific plan, the adoption or amendment of a zoning ordinance, the adoption or amendment of any regulation attached to a specific plan, the adoption or amendment of a development agreement, and decisions related to applications for conditional use permits and zoning variances. This 90-day limit is set forth in Government Code Section 65009(c), which also specifies that the 90 days applies "except as provided in subdivision (d)."

Subdivision (d) relates to certain actions that are brought "in support of or to encourage or facilitate the development of housing that would increase the community's supply of [affordable] housing." Those actions include the adoption or amendment of a housing element. Under (d), the challenging party is 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 has one year to file the action in court. This process and statute of limitations is known as the "notice and accrual provision" and also applies challenges in support of affordable housing to actions related to the housing-related statutes listed above. Subdivsion (d) is silent on when the deficiency notice must be filed, and the prevailing interpretation prior to a 2008 court decision was that the lack of a specified timeframe meant that a party could challenge the adequacy of a city's or county's housing element at any time during the housing element planning period. At the time, the housing element planning period was five years for all jurisdictions.

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 housing element at any time during the planning period, housing advocates and other interested parties now only may 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 both the 90-day statute of limitations for most land use decisions and the specific exception related to challenges to housing elements and other specific actions if the challenge was brought in support of affordable housing. In the 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 of the 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 325 has been introduced to modify the court's opinion in *Urban Habitat.* AB 325 allows an entity challenging specified city or county actions, including the adoption of a housing element, where the challenge is brought in support of affordable housing, to serve the deficiency notice up to three years after the city's or county's action. The bill does not change the existing notice and accrual provisions. Cities and counties would still have 60 days to take a final action in response to the notice, and the challenging party would still have one year after the city's or county's final action in response to the notice to file an action in court.

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 325 clarifies that in any action or proceeding brought pursuant to the notice and accrual provisions of Government Code Section 65009, 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 325 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 325, the California Rural Legal Assistance Foundation, Housing California, and the Western Center on Law and Poverty, "Deficiencies in a housing element may only come to light when the plan is implemented, e.g. when an affordable development is proposed or a domestic violence or homeless shelter looks to open its doors. The old law, part of legislation sponsored by the League of California Cities in 1983, recognized that any harm or deficiency might not be known until a development was undertaken. That law allowed citizens to send a deficiency notice to the local government at any point during the planning period, and then bring suit if the locality did not fix its housing element. Far from opening a floodgate for litigation, only 11 suits were brought in 25 years. The simple existence of a real accountability mechanism spurred local governments to address the housing needs of all residents and obey the law."

Arguments in Opposition: Opponents, including the California Chapter of the American Planning Association, the League of California Cities, the Rural County Representatives of California, and the California State Association of Counties, argue that AB 325 "does not differentiate between major noncompliance with state law or a small difference in interpretation and targets jurisdictions that have made a major effort to comply with the housing element law." Opponents argue that the three-year statute of limitations creates too much uncertainty for local agencies and could lead to an increase in costly litigation at a time when state and local resources are limited. They additionally argue that the appropriate time for interested citizens to become involved with a community's housing element is when it is adopted, not three years later, and

that there is ample opportunity for interested parties to engage prior to adoption given that Housing Element Law specially requires outreach and public participation.

Staff Comments: Currently, 80% of all cities and counties have adopted a housing element that HCD has found to be in substantial compliance with the law. Another 10% have housing elements that are currently under review by HCD. The remaining 10% have either never submitted a housing element to HCD for review for the current planning period, have submitted a draft to HCD but have not adopted the element, or have adopted a housing element that HCD has found does not substantially comply with the requirements of the law. Current law establishes a rebuttable presumption of validity for a housing element that HCD has found to be in substantial compliance with the law. While it is true that a city or county can be sued over its adopted housing element whether or not HCD has found it to be compliance, the rebuttable presumption provides a high bar in terms of challenging an HCD-approved element. As far as staff is aware, only one suit has ever been brought against a housing element that HCD had found to be in substantial compliance with the law. Thus, realistically it is only the small minority of jurisdictions that HCD has found are not in compliance that is at risk of a lawsuit.

There are compelling reasons to provide a longer enforcement period for housing elements. The state generally does not enforce housing element law or other affordable housing laws directly. Enforcement relies on local governments' voluntary compliance with the possibility of citizen enforcement action, most often by affordable housing advocacy groups. There are not many of these nonprofit organizations in the state and their resources are always spread thin. They simply do not have the ability to monitor the adoption of all the state's housing elements in real time and immediately file deficiency notices. Moreover, most of these groups are local and faced with the fact that all jurisdictions within a region adopt their housing elements around the same time. The area covered by the Southern California Association of Governments, for instance, includes 200 jurisdictions, all of which must adopt their next housing element by October 15, 2013. As long as housing element law and other affordable housing laws rely on citizen actions for enforcement and the resources of nonprofit citizen groups are limited, effective enforcement requires allowing a meaningful opportunity to raise alleged violations more than 90 days after adoption. While prior to the Pleasanton case it was widely agreed that a challenge could be filed at any point during the housing element planning period, this bill offers a compromise by allowing potential challengers to serve a deficiency notice only within three years of adoption of the housing element.

In addition, in 2006, the Legislature enacted AB 32 (Nuñez), Chapter 488, the Global Warming Act of 2006, which requires the Air Resources Board to establish a statewide greenhouse gas emissions limit such that by 2020 California reduces its greenhouse gas emissions to the level they were in 1990. One of the key strategies to achieve the AB 32 mandate is to promote more compact forms of development in California. In 2008, the Legislature enacted SB 375 (Steinberg), Chapter 728, which requires the Air Resources Board to provide each major region of the state with greenhouse gas emission reduction targets for the automobile and light truck sector and requires the regional transportation plan to include a Sustainable Communities Strategy (SCS), including a regional land use plan, designed to achieve the targets for greenhouse gas emission reduction. Regional transportation planning agencies, however, do not have land use powers. Achieving the land use vision laid out in the SCS relies on cities and counties altering their general plans and zoning ordinances to allow the types of development the SCS contemplates. These city and county actions are voluntary, however. SB 375 contains no requirement for a city or county to conform its land use plans to the SCS.

Because a region's RHNA allocation must be consistent with the SCS, because housing element law requires cities and counties to identify adequately zones sites or rezone land to accommodate lower-income housing, and because density is the proxy for affordability, Housing Element Law is currently the only tool to get cities and counties to increase allowable housing densities needed to achieve the SB 375 regional greenhouse gas emission reduction targets. Without an effective way to enforce housing element law, the only tool to effectively ensure implementation of SB 375 at the local level is lost.

Previous Legislation: This bill is identical to AB 1220 (Alejo, 2011), which was vetoed by Governor Brown with the following veto message:

> "While I understand the value of using the courts to compel compliance with state housing goals, there should be a balance between a local government's planning authority and citizen oversight. This bill tilts that balance and creates too much uncertainty."

The bill is also substantially similar to AB 602 (Feuer, 2010). That bill was vetoed by Governor Schwarzenegger.

Double-Referred: This bill was also referred to the Local Government Committee, where it will be heard should it pass out of this committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Rural Legal Assistance Foundation (co-sponsor)
Housing California (co-sponsor)
Western Center on Law and Poverty (co-sponsor)
California Association of Realtors
California Coalition for Rural Housing
Non-Profit Housing Association of Northern California
Public Advocates

Opposition

American Planning Association, California Chapter
California State Association of Counties
Cities of Alameda, Alhambra, Burbank, Encinitas, Fremont, Fresno, Lakewood, Lathrop, Ontario, Rancho Cucamonga, Reedley, Santa Monica, Thousand Oaks, Torrance, Tulare, and Wasco
Civil Justice Association of California
Counties of Orange and Sacramento
League of California Cities
Rural County Representatives of California

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