

BUILDER'S REMEDY

Developers are increasingly turning to the Housing Accountability Act to gain project approval.

By SHERRY KARABIN

labusinessjournal#LABJ@pressreader.com

labusinessjournal#LABJ@p

When The Ratkovich Co. submitted an application to build 1,061 residential units on unused land in Alhambra in May 2017, Brian Saenger, the company's president and chief executive, said he had no idea of the difficulties that would lie ahead.

After nearly four years and over 20 public hearings, the city council adopted a resolution on Oct. 25, 2021 denying the project known as The Villages at The Alhambra, which had been reduced to 790 units by that time.

The following year, Ratkovich filed a lawsuit in Los Angeles Superior Court, arguing the project was denied based on a hodgepodge of classic anti-development "justifications," adding the city misrepresented what its own staff and consultants found regarding the project's consistency with the city's general plan and misrepresented its compliance with city parking requirements.

The case summary said the council determined the development "would not be in the public interest because the project included insufficient affordable housing; construction laborers would not be paid a living wage; and petitioners did not provide an adequate community benefit payment."

Textbook example

"The Villages is a textbook example of exactly the type of urban in-fill living that people want and need. Instead, the City of Alhambra has chosen to outright deny the project over petty objections such as carpools," Saenger said at the time.

When Superior Court Judge Mary H. Strobel upheld the city's decision this February, Ratkovich re-filed its application under a provision of the state's Housing Accountability Act, known as the Builder's Remedy.

It wasn't the first developer to do so. In fact, it was following a path already forged by those seeking to build in Santa Monica.

The 1990 provision allows developers that meet certain affordable housing requirements or other criteria to bypass a city's existing zoning laws when a jurisdiction fails to comply with state housing-element requirements.

According to the California Department of Housing and Community Development's July 12 Housing Element Review and Compliance Report, there are 43 jurisdictions in L.A. County listed as out of compliance, including the city of Alhambra.

Under Ratkovich's Builder's Remedy



Leader: Brian Saenger, president and chief executive of The Ratkovich Co.

RINGO H.W. CHIU/LABJ

application, the company has agreed to set aside 158 units for low-income individuals.

Ratkovich had already voluntarily set aside 84 units in its 2017 proposal.

The application is still under review by city officials, and Saenger said the company is working to address issues as they are raised by the city.

"I think it's unfortunate that it had to come to this when the city clearly has a housing deficit and yet refused to approve our 2017 application," said Saenger. "This issue goes well beyond this community, as the state continues to battle a housing and homelessness crisis with municipalities putting up roadblocks to the development that is so desperately needed."

Laying the groundwork

As Ratkovich continues to work with officials in Alhambra, the city of Santa Monica is slowly fading into the background after capturing the spotlight in 2022.

During the time that its housing-element plan failed to meet state requirements, the city received more than a dozen applications for high-density projects that bypassed existing zoning rules, including 14 filed by WSC Communities, which sought to put up large apartment buildings.

Cameron Kalunian, a partner at law firm Lewis Brisbois Bisgaard & Smith, said that when Santa Monica's housing element was approved last October, it couldn't simply dismiss the applications.

"HCD recently clarified that a developer who submits a preliminary application under the Builder's Remedy maintains a vested right to develop that property even if a city or county becomes in compliance prior to the project's approval," said Kalunian, vice chair of the firm's national construction practice group.

In fact, this year Santa Monica and WSC Communities entered into an agreement that ended litigation between the two parties.

The agreement, which was approved by the Santa Monica City Council on May 9, calls for WSC Communities to suspend 13 of its Build-

er's Remedy applications and re-file 10 with height and floor ratios that comply with the city's new zoning code.

City planners have promised to review the applications and have the option of granting additional local incentives, including a 15% inclusionary requirement for off-site affordable housing units, providing owners more flexibility "to pool affordable housing units into one 100% affordable housing project to satisfy off-site inclusionary requirements for multiple market-rate projects."

Neil Shekhter, chief executive officer of NMS Properties Inc., which will manage the assets that will be built by WSC, said he expects the projects will move forward, adding approximately 4,000 apartment units to the city.

"We plan to meet the city's new requirements, including providing affordable units," said Shekhter.

The one WSC development that's not subject to the agreement is a property at 1433 Euclid Street. The proposal calls for the construction of an 18-story building with 200 apartments, far exceeding the maximum three-story height that's currently allowed.

Beverly Hills is the latest city with a housing element that is listed as out of compliance to experience an influx of applications.

When asked when the issue began, HCD's communications office stated, "HCD has conducted multiple reviews on the City of Beverly Hills' housing element, beginning in the summer of 2021, and has not yet found the City's housing element in compliance with State Housing Element Law."

According to Beverly Hills Public Information Manager Lauren Santillana, a total of five applications have been filed, including four preliminary and one formal entitlement,

where the applicant has requested review under the Builder's Remedy.

That application was filed by Leo Pustilnikov for 125-129 S. Linden Dr. and includes 165 units and a 73-room hotel. The other four are seeking to build more than 350 units collectively.

Santillana, citing ongoing litigation, declined to comment.

Greater awareness

Given that the Builder's Remedy has been available for decades, why has it taken so long for developers to make use of it?

Fred Gaines, chair of the Valley Economic Alliance and managing partner of the land use, zoning and environmental law firm Gaines & Stacey, said recent changes to the laws make it easier for the state not to certify a jurisdiction's housing element.

"Developers are aware of this, and they now see a large number of opportunities," said Gaines.

There's also a significant demand for housing, especially affordable units, due to the homelessness crisis.

But recent changes to the laws have added major hurdles, time and costs for developers seeking to get projects approved.

For example, Measure JJJ, which was passed by voters in November 2016, requires developers building 10 or more residential units seeking general plan amendments or certain zoning changes to include affordable housing or pay into the city's Affordable Housing Trust Fund.

Projects must also use licensed contractors, hire from local and disadvantaged

areas and state- or federally-approved apprenticeship programs and pay prevailing wages.

De'Andre Valencia, senior vice president of the Building Industry Association of South-



Shekhter



Gaines

THE
RATKOVICH
COMPANY

THE RATKOVICH CO.

HEADQUARTERS: Downtown

YEAR FOUNDED: 1977

BUSINESS: Real estate development

PRESIDENT/CEO: Brian Saenger

FOUNDER: Wayne Ratkovich

NOTEABLE: Ratkovich has renovated 18 historic buildings in L.A. to date. Projects include the redevelopment of the 1.8-million-square-foot mixed-use property dubbed The Bloc in downtown and the 28-acre Hercules Campus in Playa Vista.



Assets: Projects on which developers are utilizing the Builder's Remedy: 1433 Euclid St. in Santa Monica, above left, and The Alhambra, above, to which The Ratkovich Co. seeks to add multifamily housing.

ern California's Los Angeles/Ventura Chapter, said adhering to the contractor rules isn't always that simple.

"We are happy to hire local people, but the problem is there are not enough qualified contractors in the area to do the building," said Valencia.

The multifaceted requirements often lead to a years-long approval process with high costs or applications that are discarded because they are no longer financially viable.

"Currently, the only type of housing that seems to be penciling out is above moderate-income housing, and projects that rely on subsidies from the state or federal government can also go up, but housing that serves moderate-income individuals, also known as workforce housing, is not getting done," said Valencia.

There's also a scarcity of temporary housing, which further contributes to the homelessness problem in the state, said Valencia.

A developer's panacea?

The lengthy approval process and other issues that go along with construction can make the Builder's Remedy look pretty attractive.

"If you are a developer who is willing to comply with the affordable requirements laid out in the Builder's Remedy, you can side-step zoning rules that might only allow for a five-story development and build a larger skyscraper," said Gaines. "It's a huge incentive,

but it's not without its legal hurdles, because jurisdictions are fighting back."

And Lewis Brisbois' Kalunian cautions that while the Builder's Remedy does remove a major obstacle, it's not carte blanche for development.

"There are five reasons that a jurisdiction can deny an application, ranging from a failure to meet state or federal law to the preservation of agriculture or natural resources," said Kalunian.

"The Builder's Remedy prohibits a jurisdiction from denying a project using the fifth reason, inconsistencies with zoning and land use based on a municipality's failure to comply with the housing element."

"This is extremely consequential because municipalities most typically and easily use zoning and land use to control development within their borders," said Kalunian.

To fall under the Builder's Remedy, a project must be entirely residential or a mixed-use development with at least two-thirds of the square footage set aside for rental or owner residency.

In addition, either 100% of the units sold or rented must be moderate-income housing or 20% must be designated as low-income units.

Projects that meet the definition of transitional or supportive housing are also covered.

While it can help speed up the approval process, Valencia said the Builder's Remedy is not a first choice for developers.

"We don't want to use the Builder's Remedy," said Valencia. "Ideally, every jurisdiction would have an approved housing element and we would work with city planners to get our projects approved."

"But that's not what is happening," Valencia

said. "Unfortunately there are too many NIM-BYs, where either the city council or neighbors make it extremely hard for projects to be approved."

"Places like Huntington Park, which is out of compliance, have come out and said they don't care, so we are left with the Builder's Remedy," said Valencia.

Even if a developer is considering it, Shekher said it's not always a viable option.

“Developers are aware of this, and they now see a large number of opportunities.”

FRED GAINES
Gaines & Stacey

"It does not make sense in communities with low rent, since there is an affordable-housing element that must be provided," said Shekher. "But in communities with high rents, it can help reduce the lengthy approval process."

Still, he admits, for people in need of affordable housing, it can be a "great thing."

'Reform needed'

Although the Builder's Remedy may lead to some additional housing in the long run, Stuart Waldman, president of the Valley Industry Commerce Association, said it alone will not solve the homelessness crisis.

"Developers are looking outside the state because of the onerous legislation that takes on years and additional costs to a project," said Waldman. "We need real reform. Municipal governments are denying good projects while the city continues to have a deficit of about 500,000 units."

"I know Mayor Karen Bass wants to make some changes, and I think we may see some tangible proposals over the next couple of months," said Waldman. "I was very disappointed that Gov. Newsom's reform proposals did not include multifamily housing."

"Until the landscape changes, I think we will continue to see more applications filed under the Builder's Remedy," said Waldman.

Daniel Yukelson, executive director of the Apartment Association of Greater Los Angeles and a former Beverly Hills planning commissioner, said what many jurisdictions fail to realize is that building housing, including market rate, will not only address the scarcity problem, it will also help offset the rising costs of rents in the city.

"Costs automatically go down when the supply is plentiful," said Yukelson. "Right now, regulations are making it too difficult to build. There are multiple hurdles for developers and numerous ways to stop a project. In this environment, developers are encouraged to turn to things such as the Builder's Remedy to cut through the massive red tape."

"In L.A. County, an estimated 60,000 people sleep on the street each night, and you would think that cities would be rushing to approve housing, but that's not happening, so the Builder's Remedy is becoming more of a last resort to get projects approved," said Valencia.