

CASE NO. B333151

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT**

CALIFORNIANS FOR HOMEOWNERSHIP, INC.

Petitioner and Respondent on Appeal,

v.

CITY OF LA CAÑADA FLINTRIDGE

Respondent and Appellant.

RESPONDENT'S BRIEF

On Appeal from the Superior Court for the State of California,
County of Los Angeles, Case No. 23STCP00699,
Honorable James C. Chalfant

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I. INTRODUCTION

In recent years, the California Legislature has sought to address what it has described as a “housing supply and affordability crisis of historic proportions.” One of the central tools it has used to address this crisis is the Regional Housing Needs Allocation (“RHNA”) system, which requires each city in the state to adopt land use policies that allow for housing development sufficient to meet regional housing needs. To demonstrate compliance, each city must adopt a housing element as part of its general plan, and must update the housing element every eight years. In Southern California, the most recent round of updates was due on October 15, 2021.

The City of La Cañada Flintridge missed this deadline. Then it failed to meet the requirements for a special one-time deadline extension offered by the Legislature to delinquent Southern California jurisdictions. Then it failed to comply with the expedited rezoning requirement applied as a penalty to cities that failed to meet the first two deadlines.

So by early 2023, as many cities in the region had moved well past the housing element adoption process, La Cañada Flintridge found itself on an ever shrinking list of delinquent Southern California cities. It was in that context that Californians for Homeownership sued the City to compel it to complete the rezoning process. The trial court ordered the City to do so, and the City complied.

Now, on appeal, the City has mostly abandoned the arguments it made below, focusing instead on a new argument that the later-enacted, more specific penalty provisions in state housing element law should be invalidated because of a claimed conflict with other state law rules governing general plan elements.

Why is the City still pursuing this appeal? We don’t know. The City has already complied with the trial court’s judgment by completing its rezoning process. And to Californians’ knowledge, no other city or county

in California shares the City's views about purported conflicts between different provisions of state law. Indeed, cities regularly adopt their housing elements and rezoning ordinances simultaneously, despite La Cañada Flintridge's insistence that it is impossible to do so under state law.

The straightforward approach in this case is therefore to dismiss the City's appeal as moot.

But if the Court reaches the merits, it should affirm the well-reasoned decision of the trial court. The trial court correctly held that the City was subject to the Legislature's chosen penalties for housing element delinquents like La Cañada Flintridge: the one-year rezoning requirement and the statutory bar in subdivision (e)(4)(C)(iii) of Government Code section 65588. And these penalties are easily harmonized with other aspects of state planning law.

II. LEGAL AND FACTUAL BACKGROUND

A. The RHNA And Housing Elements System.

The Regional Housing Needs Allocation (“RHNA”) and housing element laws are critical components of the Legislature’s interconnected system for addressing California’s housing crisis. The RHNA system is a process for allocating housing production targets, generally every eight years. (Gov. Code § 65588.) It starts with an assessment of statewide housing needs by the state Department of Housing and Community Development (“HCD”). HCD allocates the state’s anticipated housing needs on a region-by-region basis, at different levels of affordability. (Gov. Code §§ 65584.01, 65588.) In most regions, including Southern California, this allocation is then distributed within the region by a local council of governments controlled by the region’s cities and counties.

After the RHNA allocation is final, each local government is required to embark on the process of updating the housing element of its general plan. At the core of a city’s housing element update is the “sites inventory,” a listing of potential sites for housing sufficient to accommodate its RHNA allocations in each of four income categories. If needed, the local government must make changes to its land use rules, including by rezoning land, as needed to enable housing production sufficient to meet the RHNA goals. (Gov. Code § 65583(c), 65583.2(h).)

The California Department of Housing and Community Development (“HCD”) plays a significant role in administering these laws. This role extends to enforcing deadlines and other procedural requirements, as well reviewing the substance of each housing element. When HCD has certified that a housing element complies with state law, that certification

creates a presumption of compliance in a subsequent judicial review proceeding. (Gov. Code § 65589.3.) And starting in 2025, HCD’s refusal to certify compliance will create a presumption of non-compliance. (Stats. 2024, ch. 269 [AB 2023].)

Whether or not HCD certifies a housing element, these presumptions are rebuttable and the courts are the final arbiters of compliance with state housing element law. In making that assessment, courts consider whether a housing element “substantially complies” with state law, which “[c]ourts have defined [] as *actual* compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form.” (*Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 237 [element failed to meet state law requirements for listing certain housing element sites and therefore did not substantially comply with state law, despite HCD’s certification] [internal quotation marks and citations omitted].)

B. The Rezoning Penalty For Late Housing Element Adoption.

Historically, there was no statutory penalty for failing to timely adopt a housing element. But in 2008, when the Legislature modified the update schedule for housing elements, it added a penalty provision. Under the new schedule, housing elements were required to be updated every eight years, but *tardy* local governments would be subjected to a new requirement for a mid-cycle housing element update after four years. (Stats. 2008, ch. 728 [SB 375].)

This schedule and penalty provision lasted through the fifth housing element update cycle. In 2021, however, the Legislature determined that the penalty created in 2008 was proving ineffective and unwieldy. In its

place, the Legislature adopted a new penalty: a city or county that adopted its housing element over 120 days late would be required to complete all housing element rezonings within one year of the housing element deadline, rather than the over-three-years afforded to cities that adopt housing elements timely. An Assembly analysis explains:

This bill would revise the penalty for failure to adopt a housing element in a timely way. It removes the existing requirement that non-compliant local governments update their housing element approximately every four years. According to the author and sponsors, this change is warranted because the existing approach has not proven effective in facilitating housing production, but it does require a substantial amount of additional work for local governments and the Department of Housing and Community Development (HCD).

In place of the existing requirement, this bill would require that any local government that fails to adopt its housing element within 120 days of the statutory deadline would only have one year from the housing element's statutory deadline to complete any required rezonings, instead of the current allotment of three years and 120 days. . . .

This bill also adds that, to avoid the expedited timeline, the housing element must be determined by HCD to be substantially compliant with housing element law. This change removes the circumstances where jurisdictions adopt non-compliant housing elements to avoid penalties.

(AA 926-927.) Additionally, the bill mandated that “[a] jurisdiction that adopts a housing element more than one year after the statutory deadline . . . shall not be found in substantial compliance with this article” until its rezoning is complete. (Gov. Code § 65588(e)(4)(C)(iii).) This statutory bar on a finding of compliance is the key statutory provision at issue this litigation.

As enacted in 2021, these new penalties applied to all housing

element updates developed as part of the sixth housing element cycle, including housing elements in Southern California. After the law was passed, however, jurisdictions in Southern California expressed concerns about the change, as it heightened the penalty for late adoption close to the due date for sixth cycle housing elements in the region. The region then successfully lobbied for a limited exception, enacted in 2022 and codified in Government Code section 65583.4(a).¹

Crucially, a local government only qualifies for the exception if it “adopts a sixth revision of the housing element *and the department finds the adopted element to be in substantial compliance with this article within one year of the statutory deadline*”—that is, by October 15, 2022. (Gov. Code § 65583.4(a)(3) [emphasis added].)

C. La Cañada Flintridge’s Housing Element And This Litigation.

The sixth cycle housing element deadline for local governments in Southern California, including the City, was October 15, 2021. (AA 60.) The City submitted its initial draft housing element update to HCD on October 3, 2021. HCD provided the results of its review on December 3, 2021. The City adopted its housing element on October 4, 2022. On December 6, 2022, HCD issued its determination that the City’s adopted housing element was legally inadequate.² On February 21, 2023, the City

¹ While the text of subdivision (a) of Government Code Section 65583.4 does not refer to Southern California, it is Californians’ understanding that the provision was the result of lobbying by the City of Los Angeles and other Southern California jurisdictions. Because the special exception is limited to jurisdictions with housing element due dates in 2021, Southern California jurisdictions are the primary beneficiaries of the exception.

² On January 12, 2023, the City met with staff at HCD. The City contends that HCD staff indicated compliance could be attained with “no substantive

adopted an amended housing element, which is the subject of this litigation. (AA 57.)

The City’s February 21, 2023 housing element requires that the City rezone parcels in order to meet the City’s obligations under housing element law. The document acknowledges that the deadline to complete these required rezonings was October 15, 2022. (AA 225.)

From 2022 through today, Californians for Homeownership has been engaged in a statewide impact litigation campaign to enforce state housing law and put an end to a culture of non-compliance with housing element requirements, particularly among mid-sized cities like La Cañada Flintridge. Unable to secure a commitment from the City that it would promptly comply with the law and respect state law penalties in the meantime, Californians sued the City, raising two causes of action under state housing element law. Following motion practice, the trial court determined that judgment could be issued in favor of Californians on its cause of action for failure to timely rezone, and Californians voluntarily dismissed the other cause of action, allowing judgment to be issued in its favor. (AA 971, 1003, 1006.)

III. ARGUMENT

A. This Appeal Should Be Dismissed.

Californians has filed a motion to dismiss this appeal as moot, in light of the City’s voluntary compliance with the judgment by the trial court. (*See Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal. App. 4th 852, 865 [“[T]he City’s voluntary compliance

changes or new data or policy decisions.” HCD has disputed this account. (AA 953.)

with the trial court's judgment and writ of mandate during the pendency of this appeal renders the appeal of the judgment moot.”]; *MHC Operating Ltd. P'ship v. City of San Jose* (2003) 106 Cal. App. 4th 204, 214.)

On August 16, 2024, the Court deferred consideration of the motion. Upon that deferred consideration, Californians respectfully requests that the Court grant the motion for the reasons stated in the moving papers.

B. The Trial Court Correctly Held That The Statutory Bar In Government Code Section 65588(e)(4)(C)(iii) Applied To The City, Precluding A Finding That The City’s Housing Element Was Substantially Compliant With State Law.

1. The Subdivision (e)(4)(C)(iii) Statutory Bar Applies To Judicial Review Of A City’s Housing Element.

In 2021, when the Legislature created the rezoning deadline penalty for late housing element adoption, it understood the risk that local governments would attempt to adopt untimely housing elements without complying with the new punitive rezoning deadline—the approach attempted by La Cañada Flintridge here. So the Legislature created a statutory bar to attaining housing element compliance for cities and counties that adopted housing elements after the rezoning deadline.

This statutory bar is codified in subdivision (e)(4)(C)(iii) of Government Code section 65588. As enacted, the provision provides that “[a] jurisdiction that adopts a housing element more than one year after the statutory deadline . . . shall not be found in substantial compliance with this article until it has completed the rezoning required” under the law.

The language of this provision was significantly amended during the legislative process. Originally, it provided that “[i]f a jurisdiction adopts a housing element more than one year after the statutory deadline, *the department [HCD] shall not find* that jurisdiction’s housing element to be

in substantial compliance with this article pursuant to section 65585 until all required rezoning is complete.” (*See* AA 939 [emphasis added].) The reference to “the department” was later removed, and the provision was restructured to mandate that the offending jurisdiction “shall not be found in substantial compliance” until it has completed the rezoning.

This history makes it clear that the Legislature intended this statutory bar to apply not only to HCD’s review of a local government’s housing element, but also to judicial review.

2. The Trial Court Correctly Determined That The Subdivision (e)(4)(C)(iii) Statutory Bar Applied To The City.

There is no dispute that the City was required to update its housing element by October 15, 2021. Because the City had not adopted its housing element by 120 days from that date, it became subject to the penalty requiring it to complete its rezoning within one year of the statutory deadline. (Gov. Code §§ 65583(c)(1)(A), 65583.2(c), 65588(e)(4)(C)(i).) The City’s housing element acknowledged that its rezoning was due by October 15, 2022. (AA 225.)

The City’s operative housing element was adopted on February 21, 2023, well over one year after the statutory deadline of October 15, 2021. The City is therefore subject to the statutory bar in subdivision (e)(4)(C)(iii) of Government Code section 65588.

The City nevertheless argues that it is subject to the special exception to the rezoning penalty provided to qualifying Southern California jurisdictions under subdivision (a) of Government Code section 65583.4. The exception in section 65583.4 is limited to circumstances where “[t]he local government adopts a sixth revision of the housing

element *and* [HCD] finds the adopted element to be in substantial compliance with this article *within one year of the statutory deadline*—that is, by October 15, 2022. (Gov. Code § 65583.4(a)(3) [emphasis added].)

Ultimately, the City did not obtain HCD certification by October 15, 2022, and could not benefit from the special extension in subdivision (a) of Government Code section 65583.4. It was therefore subject to the statutory bar prohibiting a finding of substantial compliance.

3. The Trial Court Correctly Held That The Substance Of The City’s October 4, 2022 Housing Element Was Irrelevant To The Application Of The Statutory Bar.

The City devotes a significant portion of its Opening Brief to the argument that its October 4, 2022 housing element substantially complied with state law. (AOB 36-39.) But the substance of this earlier version of its housing element is immaterial, for at least two reasons.

First, as the trial court noted, the City’s 2022 housing element is simply not the subject of this litigation. The City could have rested on that version of its housing element and, if litigation ensued, it could have argued that the 2022 document was substantially compliant with state law notwithstanding HCD’s refusal to certify it. Instead, the City chose to adopt a new version of its housing element in February 2023 in an effort to obtain HCD certification. It is that new version that is the subject of this litigation.

Second and more fundamentally, even if this litigation did concern the October 4, 2022 housing element, and even if the City was correct that the document met all of the requirements in housing element law, the City would still be subject to the statutory bar. The 2022 housing element was

indisputably adopted over 120 days after the October 15, 2021 housing element deadline in Southern California. For that reason, the City was subject to the one-year rezoning deadline unless it could meet the strict requirements for the special exception in subdivision (a) of Government Code section 65583.4. (*See* Gov. Code §§ 65583(c)(1)(A), 65583.2(c), 65588(e)(4)(C)(i).) But as we explain above, this special exception requires that a local agency adopt a compliant housing element *and* have that housing element certified by HCD within one year of the missed deadline. There is no dispute that HCD’s certification came *after* the one-year trigger date, and only after the February 2023 amendment, which was itself adopted after the trigger date. The one-year rezoning deadline and the statutory bar therefore apply to the City, regardless of the quality or substance of its housing element.

C. The City’s Argument Based On Government Code Section 65860 Was Not Presented Below And Has No Basis In The Law.

1. The City Did Not Present Any Argument Based On Section 65860 In The Trial Court.

The City’s primary argument on appeal is focused on a purported conflict the City has identified between the specific statutory penalty for delinquent housing elements in subdivision (e)(4)(C)(iii) of Government Code section 65588, and the general provisions governing zoning and general plan consistency in section 65860. (AOB 29-36.) This conflict is so important, the City says, that it should be addressed by this Court despite the absence of a continuing conflict between the parties.

But as a threshold matter, this argument is brand new on appeal. Government Code section 65860 was not referenced in the multiple briefs that the City filed in the trial court.

An argument not presented at the lower court is considered to be

waived. (*JRS Prod., Inc. v. Matsushita Elec. Corp. of Am.* (2004) 115 Cal.App.4th 168, 178 [“Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider.”].) And a theory that is inadequately briefed at the trial court may also be treated as a forfeited new theory. (*See Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 768-770 [finding defendants forfeited argument by only raising it in its trial court briefing “in their reply papers in a cursory manner”]; *Haydon v. Elegance at Dublin* (2024) 97 Cal.App.5th 1280, 1286 [declining to consider argument made for the first time in the trial court as part of reply brief, where party “provided no reasoned argument to support this assertion.”].)

The closest the City came to making this argument in the trial court was a single sentence in its moving papers, in which the City asserted that “[a] city cannot move forward with rezoning until it adopts a substantially compliant housing element.” (AA 865). But this bare assertion, without any citation to section 65860 or any other statute, is a far cry from a real effort to present this argument—now the centerpiece of the City’s appeal—to the trial court.

We nevertheless acknowledge that the Court has the discretion to consider new legal arguments on appeal, in appropriate cases. To that end, we address the merits of the City’s new argument below.

2. There Is No Conflict Between The Statutory Bar In Subdivision (e)(4)(C)(iii) Of Government Code Section 65588 And The Consistency Requirement In Section 65860.

The City’s conflicting statutes argument seems to be this: because the law requires general plan and zoning consistency and ordinarily *allows* a “reasonable time” to attain that consistency following adoption of a

general plan amendment, a local agency is *prohibited* from attaining consistency through simultaneous adoption of the general plan and zoning amendments. But that prohibition is absent from the text of section 65860, and it is difficult to imagine what purpose such a prohibition would serve.

The City's argument attempts to manufacture a conflict between two provisions in the Government Code that are easily reconciled. Indeed, Californians is not aware of any other city or county that shares the City's concerns, and simultaneous housing element and rezoning adoption is a common practice. Instead, giving the various provisions of the Government Code their natural meaning, there were two perfectly lawful options available to the City after it failed to satisfy even Southern California's extended housing element deadline. The City could—as other cities did—adopt its housing element and rezoning *simultaneously*, providing for immediate substantial compliance with housing element law. Or it could adopt the housing element first and the rezoning later, in which case its housing element would be statutorily deemed out of substantial compliance during the intervening period. Neither of these options conflicts with Government Code section 65860.

The City chose the latter option, and was therefore subject to a period of non-compliance while it completed the rezoning process. Upon completion of the rezoning process—which occurred following the trial court's order—the statutorily mandated period of non-compliance automatically ended, and the City's housing element thereafter enjoyed a presumption of validity based on HCD's certification.

3. There Is No Rule Preventing A Local Agency Subject To The Statutory Bar From Subsequently Attaining Substantial Compliance By Completing The Rezoning Process, Just As The City Did Here.

In order to create the specter of a conflict between state statutes where none exists, the City says that there is an “unresolved question of law” as to whether an agency’s housing element is “valid” if it does not substantially comply with housing element law. If a housing element is invalid because it is not substantially compliant, the City argues, then it can never serve as the basis for rezoning, and it is therefore impossible for a city to rezone to obtain substantial compliance. Essentially, the City says it would be stuck in an infinite loop, unable to attain compliance due to the subdivision (e)(4)(C)(iii) statutory bar and therefore unable to ever complete its rezoning to escape from the statutory bar. (AOB 32-33.)

But there is no provision in section 65860 that *prohibits* a city from bringing its zoning into consistency with a general plan element merely because that general plan element has not been deemed “substantially compliant” with state law. And no one other than the City itself has suggested that a housing element might be considered facially “invalid,” prohibiting rezoning, merely because it does not meet the legal requirements for substantial compliance with housing element law. This is a concern entirely of the City’s own invention.

And the City’s interpretation is fundamentally inconsistent with the legislative intent as demonstrated by the recent adoption of the subdivision (e)(4)(C)(iii) statutory bar and other features of housing element law. The Legislature plainly did not intend these recent amendments to create an infinite loop that would necessitate the provision’s invalidation, eliminating the primary penalty for late adoption. Instead, the Legislature must have intended the natural interpretation shared by Californians, HCD, the trial court, and (it appears) every other city and county in California: that a local

agency can free itself from the statutory bar by completing its rezoning process, just as La Cañada Flintridge did after being ordered to do so by the trial court.

Indeed, other provisions of state housing law make it clear that the penalty for not achieving “substantial compliance” with housing element law is *not* complete invalidation. For example, subdivision (d) of Government Code section 65589.5, a provision often called the “builder’s remedy,” provides *limited* relief from general plan requirements for local agencies without substantially compliant housing elements. Among other limits, this relief only applies to projects at certain affordability levels. (Gov. Code §§ 65589.5(d) & (h)(3).) And the Legislature has enacted extensive new limits on this “builder’s remedy” that will become effective for projects proposed starting in 2025. (Stats. 2024, ch. 268 [AB 1893].) So the Legislature has made clear that a general plan housing element is not wholly invalid merely by virtue of failing to meet the “substantial compliance” standard.

4. Even If There Is A Conflict Between The Statutory Bar In Subdivision (e)(4)(C)(iii) And The Consistency Requirement In Section 65860, That Conflict Should Be Decided In Favor Of The Statutory Bar’s More Recent And More Specific Provisions.

The City concedes that subdivision (e)(4)(C)(iii) of Government Code section 65588 was adopted more recently than the consistency requirement in section 65860. And the City acknowledges that the courts favor resolving statutory conflicts in favor of more recent enactments. (AOB 34; *see Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 311) Additionally, conflicts are generally resolved in favor of the more specific provision, and there is no dispute that subdivision (e)(4)(C)(iii)—which governs only housing elements, and only in certain delinquent localities—is more specific than the general consistency

requirement that controls all general plan elements in all cities and counties. (*Id.* at 310; *State Dept. of Pub. Health v. Superior Ct.* (2015) 60 Cal.4th 940, 960-961.)

The City responds by arguing that these two provisions are so wildly at odds that the subdivision (e)(4)(C)(iii) statutory bar amounts to a “repeal by implication” of section 65860, a disfavored outcome. (AOB 35.)

The parties agree that invalidation of a state statute is a disfavored outcome. But it is the City, not Californians, that is advocating for the invalidation of a state statute. Instead, to the extent that the court agrees that there is a conflict between these statutes, that conflict should be resolved by giving effect to both. This is particularly important because of the statutory bar’s critical role as the primary penalty for tardy housing element adoption. The Legislature adopted the one-year rezoning penalty and the statutory bar as a replacement for an earlier penalty that was found to be ineffective. (AA 926.) If the court invalidates the penalty, local agencies will have little incentive to timely adopt housing elements and the Legislature will be sent back to the drawing board to craft a new penalty.

The Court can harmonize these statutes by holding that local agencies are free to rezone either simultaneously with or a reasonable time after adopting their housing elements, but that an agency that chooses the latter approach and is subject to subdivision (e)(4)(C)(iii) is out of substantial compliance during the period between housing element adoption and rezoning.

D. The Declaration Of Melinda Y. Coy Is Immaterial To The Court’s Determination Of This Appeal.

In the trial court, Californians introduced a declaration from Melinda Y. Coy, a senior staffer at HCD. (AA 951.) The purpose of this declaration was to confirm the status of HCD’s review of the City’s

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court Rule 8.204(c)(1))

The text of this brief consists of 4614 words (including footnotes) as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: October 21, 2024

By /s/ Matthew P. Gelfand
Matthew P. Gelfand

Document received by the CA 2nd District Court of Appeal.

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to this action. My business address is 525 S. Virgil Ave. Los Angeles, California 90020. On October 21, 2024 I served the documents entitled RESPONDENT'S BRIEF on the interested parties in this action follows:

- on the Clerk of the Superior Court for the County of Los Angeles, by depositing in the U.S. mail, postage prepaid.
- by electronic service through TrueFiling on all registered parties, including as set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 21, 2024 at Los Angeles.

/s/ Matthew P. Gelfand
Matthew P. Gelfand