

# Recent Developments in State Housing Law

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# Presenters

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# Goals of the Legislature

- **Strengthen** housing element requirement to identify “adequate sites” for RHNA.
- **Connect** housing element requirement to identify “adequate sites” to approval of housing development on those sites.
- **Monitor** housing element implementation.
- **Maximize** Housing Accountability Act effectiveness.
- Authorize **inclusionary rental housing** ordinance.
- Provide **state funding** for planning and housing production.

# Housing Accountability Act

“The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval & construction of new housing for all economic segments of California’s communities by meaningfully and effectively **curbing the capability of local governments to deny, reduce the density of, or render infeasible** housing development projects. This intent has not been fulfilled.”

# Applicability

Applies to **ALL** “housing development projects” and emergency shelters:

- Residences only;
- Transitional & supportive housing;
- Mixed use projects with at least 2/3 the square footage designated for residential use.

Affordable AND market-rate.

# All Housing Development Projects

If complies with “objective” general plan, zoning, and subdivision standards, can only reduce density or deny if “specific adverse impact” to public health & safety that can’t be mitigated in any other way. (Section 65589.5(j); see *Honchariw v. County of Stanislaus* (2011).)

- Any relation to definition of “objective” in SB 35? (Section 65913.4(a)(5).)
- “Lower density” includes conditions “that have the same effect or impact on the ability of the project to provide housing.”

# All Housing Development Projects

If desire to deny or reduce density:

- Identify **objective** standards project does not comply with.
- If project complies with all, must make public health & safety finding.

# Affordable Projects

- Additional protections for projects:
  - Emergency shelters;
  - 20% low income; or
  - 100% moderate (120% of median) or middle income (150% of median).
- Must make specific findings to deny, **reduce density**, or add condition making project infeasible.



# Processing Housing Applications

- Must provide list of any inconsistencies with:
  - “Plan, program, policy, ordinance, standard, requirement or similar provision”;
  - Within 30-60 days of completeness;
  - Explaining why inconsistent; or
  - “Deemed consistent.”
- ?? How to treat pipeline projects complete before January 1, 2018??

# Changes in Standard of Review

- City findings evaluated based on ‘preponderance of the evidence,’ not merely ‘substantial evidence’.
- “Deemed consistent” if: “substantial evidence that would allow a reasonable person to conclude” is consistent.
- ?? What’s the significance of these changes for decisions and litigation??

# Crime and Punishment

- If findings not supported by preponderance of the evidence, court must issue order compelling compliance within 60 days. If bad faith, may order approval.
- If city doesn't comply in 60 days, court must issue \$10,000 per unit fine and can order project approval.
- If court finds city acted in bad faith AND did not carry out court order in 60 days, court can multiply fine by 5. "Bad faith includes...an action that is frivolous or otherwise entirely without merit."

# Housing Accountability Act and the Coastal Act

- *Kalnel Gardens LLC v. City of LA* (2016): in dicta Court said Coastal Act trumps HAA (see Section 65589.5(e))
  - Coastal Act contains subjective criteria that must be met
- ?? Does change in standard of review specified in the HAA conflict with administrative mandate specified in the Coastal Act??

# Housing Accountability Act and CEQA

- *“The California Environmental Quality Act is the state’s premier environmental law.”*
- *Schellinger Bros. v. City of Sebastopol* (2009): must complete CEQA before can invoke HAA.
- *Sequoyah Hills HO Ass’n v. City of Oakland* (1993): upheld finding that legally infeasible to reduce density due to HAA.

# Housing Element Annual Reports

Table A

**Annual Building Activity Report Summary - New Construction  
Very Low-, Low-, and Mixed-Income Multifamily Projects**

Housing Development Information							Housing with Financial Assistance and/or Deed Restrictions		Housing without Financial Assistance or Deed Restrictions		
1	2	3	4				5	5a	6	7	8
Project Identifier (may be APN No., project name or address)	Unit Category	Tenure R=Renter O=Owner	Affordability by Household Incomes				Total Units per Project	Est. # Infill Units*	Assistance Programs for Each Development	Deed Restricted Units	Note below the number of units determined to be affordable without financial or deed restrictions and attach an explanation how the jurisdiction determined the units were affordable. Refer to instructions.
			Very Low-Income	Low-Income	Moderate-Income	Above Moderate-Income			See Instructions	See Instructions	
(9) Total of <b>Moderate and Above Moderate</b> from Table A			0	0	0	0					
(10) Total by income Table A/A3 ▶ ▶											
(11) Total <b>Extremely Low-Income</b> Units*											

\* Note: These fields are voluntary

# New Requirements

- Prior year **Applications**
  - Housing development applications received.
  - Units in all applications: approved & disapproved.
- **Sites** rezoned to accommodate RHNA.
- **Sites** identified or rezoned for No Net Loss.
- **Production Report**

Net new units entitled, permitted, or occupied.

  - ▣ For sale or rental.
  - ▣ RHNA income category.
  - ▣ Assessor Parcel Number.
- **SB 35 Report**
  - ▣ Applications & sites.
  - ▣ Units by type & RHNA .

# When Are They Due?

- Now applicable to charter cities.
- HCD to publish new reporting forms.
  - HCD will publish each report online.
- Annual Reports due by April 1 each year.
  - What if HCD hasn't provided new forms before April 1?
  - Failure to submit two or more consecutive Annual Reports triggers SB 35 streamlining.



# 'No Net Loss'

- Regional Housing Need Allocation (RHNA)
  - Typically: 40% low and very low; 20% moderate; 40% above moderate.

## *Model City*

Lower Income (Very Low and Low)	Moderate Income	Above Moderate Income	TOTAL RHNA
400 units	200 units	400 units	1,000 units

# Site Inventory

- Must designate specific sites that can “accommodate” the RHNA at each income level during the planning period (65583.2).
- Sites “accommodating” lower income housing must be at “default densities” of 10 – 30 du/A.

APN	Zone	DU/A	Acres	Units	Use	Income Category
041-0042-002	R-3	20-30 du/ac	2.0	40	Vacant	Lower
037-0400-027	R-2	10-20 du/ac	0.75	7	Duplex	Moderate
038-0100-040	R-1	5-10 du/ac	4.5	22	Vacant	Above Moderate
039-1100-039	CMU	20 du/ac	1.5	25	Parking	Moderate

# When Applies

- Only applicable to **general law cities**.
- Applies when:
  - Any site in inventory either downzoned to permit fewer units; or approved with fewer units than shown in the inventory; OR
  - Site approved with fewer units at the income level shown in the inventory.

# Findings

- OK if:
  - Reduction consistent with GP and Housing Element; and
  - Remaining sites in Element are adequate at all income levels.  
Must quantify unmet need and remaining capacity by income level.
- If remaining sites are not adequate, can ID “additional, adequate, and available sites” so ‘no net loss.’
- Solely city’s responsibility unless developer’s application had lower density; developer has no responsibility for income level. City cannot deny because developer’s project results in need for additional sites.

# Options

- Remaining sites in Element adequate to meet the RHNA at all income levels; or
- Ways to “identify and make available”:
  - City approved more units on some site than shown in inventory or has other units at that income category; or
  - Other sites NOT in Element can make up difference; or
  - Another site “identified and made available.” (Rezoning)  
Time limit of 180 days for income category only.
- No housing element amendment seems to be required.

# Issues

- Need to review all planning approvals since start of projections period and see if a deficit.
- Impetus to require on-site inclusionary housing. Can projects be required to meet housing element income categories?
- Confusing provisions regarding CEQA review on site that may need to be rezoned as consequence of project approval.

# Streamlined Housing Approvals

Two new laws:

- Developer-initiated: SB 35 – Gov’t Code 65913.4.
- City-initiated: SB 540 – Gov’t Code 65620 *et seq.*

“Streamlined” means –

- Ministerial review and approval.
- No project-level CEQA review.

# Streamlined Housing Approval

## SB 35

HCD's **eligibility** determination:

- # of building permits issued is less than city's share of RHNA by income category for that *reporting period* (first  $\frac{1}{2}$  or last  $\frac{1}{2}$  of RHNA assessment cycle).
- City remains eligible until HCD's determination for next reporting period.



# Site Exclusions

- Sites in Coastal zone;
- Prime farmland or farmland of statewide importance;
- Wetlands;
- Delineated earthquake zone;
- FEMA floodplain unless flood plain development permit;
- FEMA floodway unless no rise certification;
- Habitat for protected species;
- Zoned for non-residential use (unless GP allows residential);

# Site Exclusions cont'd

- Site on which housing occupied by tenants demolished in last ten years;
- Site with existing rental housing occupied by tenants in last ten years required to be demolished;
- Site with historical structure required to be demolished for project; and
- Site is subject to Mobilehome Residency Law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act or the Special Occupancy Act.

# The Project

- Multifamily on site in which 75% adjoins parcels that are developed with urban uses.
- Inclusionary requirement:
  - 10% below 80% of AMI if annual report reflects fewer units of above-moderate approved than required (if 10 or more units) [or higher local requirement];
  - 50% below 80% of AMI if annual report reflects fewer units of below 80% of AMI issued building permits than required [or higher local requirement]; or
  - If both, then developer chooses.

# The Project cont'd

- Consistent with “objective zoning standards and objective design review standards.”
- “Objective” means:
  - ✓ No personal or subjective judgment.
  - ✓ Uniformly verifiable by reference to an external and uniform benchmark or criterion.
- Consistent with housing density if density is compliant with maximum density.
- General plan standards override inconsistent zoning standards.

# The Project Cont'd

- Development proponent has certified that either development is a “public work” or that all construction workers will be paid at least the general prevailing wage rate. Requirement for “skilled and trained workforce.”
- Exception: Project includes 10 or fewer units and project is not a “public work.”

# Project Exclusions

- Project requires demolition of existing housing subject to affordability restrictions; rent control; or occupied by tenants within the previous 10 years
- Project in site of housing occupied by tenants and demolished within previous 10 years
- Project requires demolition of historic structure
- Project involved subdivision of land unless (1) received tax credit financing; or (2) paid prevailing wages and skilled and trained workforce will be used.

# City Response

## Inconsistent with Objective Standards

- If in conflict with “objective planning standards,” then provide written documentation:
  - ✓ Within 60 days of **submittal** if 150 units or fewer.
  - ✓ Within 90 days of **submittal** if more than 150 units.

If fail to provide documentation, development deemed to satisfy “objective planning standards.”

# City Response

## Ministerial Review

- No public hearing required.
- Review shall be “objective and strictly focused” on assessing compliance with:
  - Criteria required for streamlined projects; and
  - Reasonable objective design standards published before submission of development application and broadly applicable.
- Within 90 days of **submittal** (150 units); within 180 days of **submittal** (151+ units).



# City Response

## Parking Requirements

- No parking required if located within  $\frac{1}{2}$  mile of public transit; or within an architecturally and historically significant historic district; or when on-street parking permits are required but not offered to occupants of the development; or when there is a car share vehicle located within one block of the development.
- Otherwise: one space per unit.

# Expiration of Approval

- No expiration if public investment in housing affordability where 50% of units are affordable to below 80% AMI.
- No expiration so long as vertical construction has begun and is in progress.
- Automatic expiration after 3 years except one-time, one-year extension of significant progress toward construction.

# Streamlined Housing Approval SB 540

## Workforce Housing Opportunity Zone

*An area of contiguous or non-contiguous parcels identified on a city's housing element inventory for which a type of specific plan (**and EIR**) providing for between 100 and 1500 residential units is prepared. Ministerial approval of development within the WHOZ that satisfies all requirements of the specific plan.*

# The Specific Plan

- Not more than 50% of a city's RHNA may be included.
- Development within the Zone must be consistent with adopted SCS/APS.
- Specific plan includes:
  - ✓ Uniformly adopted mitigation measures for traffic, water quality, natural resource protection, etc.;
  - ✓ Uniformly adopted development policies such as parking ordinances, grading ordinances, habitat protection, reduction of GHG emissions;
  - ✓ Design review standards; and
  - ✓ Source of funding for infrastructure and services.

# Review of Specific Plan

- Plan reviewed every 5 years.
- “Changed conditions” or “new circumstances” analysis required under CEQA conducted with review (Pub. Res. 21166).
- HCD funding might be available for initial planning.

# Development within WHOZ

City “shall approve” development:

- Consistent with adopted SCS/APS;
- Incorporated Plan’s mitigation measures;
- Incorporated Plan’s uniform standards;
- Affordability requirements (within Zone):
  - ✓ 30% affordable to moderate or middle income
  - ✓ 15% affordable to lower income
  - ✓ 5% affordable to very low income
  - ✓ Not more than 50% for above moderate; above moderate must include 10% affordable to lower income unless local ordinance requires higher percentage; and
- Either “public work” or payment of prevailing wages.

# Housing Sustainability District

## AB 73

- Housing sustainability district is a type of housing overlay zone which allows for the ministerial approval of housing that includes 20% affordable to very low, low, and moderate income families.
- Ordinance establishing the District requires HCD approval and must remain in effect for 10 years.
- Zoning Incentive Payment (unfunded) available if HCD determines that approval of housing is consistent with ordinance.
- EIR prepared for establishment of district; development approval is not subject to CEQA.

# Inclusionary Housing

## “Palmer Fix”

- Costa-Hawkins Act pre-empted the application of inclusionary housing ordinance to rental housing. (*Palmer/Sixth Street Properties L.P. v. City of Los Angeles* (2009) 175 Cal.App.4<sup>th</sup> 1396.)
- AB 1505: A city may adopt an ordinance that requires rental housing development to include a certain percentage of units be affordable and occupied by households with incomes that do not exceed very low, low, or moderate income households.



# Inclusionary Housing

## HCD Review

- HCD may review ordinance adopted after September 15, 2017 if:
  - ✓ Requires more than 15% be occupied by 80% of AMI or lower; and
  - ✓ City failed to either (1) meet at least 75% of its share of above moderate income RHNA; or (2) submit annual report.

HCD may request economic feasibility study with evidence that ordinance does not constrain production of housing. 90 days to review study.

# Housing Element Changes

## [Schedule: Gov't 65588]

- Housing Element Content:

**Governmental constraints analysis** must include local ordinances that “directly impact the cost and supply of residential development.

**Nongovernmental constraints analysis** must include requests to develop housing at densities below those anticipated in site inventory; length of time between receiving approval and submittal of building permit application.

# Housing Element Changes

- Site Inventory:

Sufficient water, sewer, and dry utilities or be part of a mandatory program to provide such utilities. (65583.2(b)(5)(B).)

“Available” for residential development with “realistic and demonstrated” potential for redevelopment. (65583(a)(3).)

Lower income sites must be between  $\frac{1}{2}$  acre and 10 acres in size. (65583.2(c)(2).)

Continuing identification of nonvacant sites and certain vacant sites that have not been approved limited. (65583.2(c).)

Restrictions on using nonvacant sites. (65593.2(c),(g).)

# Housing Element Changes

## HCD Review

- Requires HCD to review “any action or failure to act” that it determines is “inconsistent” with an adopted housing element or Section 65583, including any failure to implement any program included in housing element.
- Requires HCD to issue written findings regarding failure to comply. City response within 30 days.
- HCD’s determination of failure to comply allows HCD to revoke original housing element compliance finding.
- HCD may notify AG that city is in violation of HAA, no net loss, density bonus law, or anti-discrimination provisions.

# Building Homes and Jobs Act

- New recording fee on every real estate transaction (\$75-\$225). Money deposited into Building Homes and Jobs Trust Fund.
- Calendar year 2018: 50% of funds to local governments to update planning documents and zoning ordinances; 50% to assist persons experiencing or at risk of homelessness.
- Thereafter: 70% to local governments (90% based on CDBG formula; 10% equitably to nonentitlement areas); 30% to HCD for state incentive programs. 20% of total for affordable owner-occupied workforce housing.

# Possible Next Steps

- Review housing element inventory to become familiar with distribution of RHNA by income category. Review housing development approvals since the beginning of the planning period to analyze status of “unmet” need by income category on remaining parcels. Review inclusionary requirements to maximize actual production of affordable housing.
- Develop new information required for Annual General Plan Report (possibly due on April 1, 2018).
- Prepare lists of “objective planning standards” to be applied to projects under SB 35 and the HAA. Determine whether new standards should be added.
- Develop SB 35 eligibility checklist and process for reviewing applications where SB 35 is invoked.
- Analyze relationship between Permit Streamlining Act and new provisions of HAA to determine appropriate process for notifying applicant of inconsistencies between housing development project and city planning documents.
- For projects utilizing SB 35 or AB 540, verify compliance with requirements for payment of prevailing wage or utilizing a “skilled and trained workforce.”

# Questions?



**Please enter all questions in the Q&A field at the bottom right of your screen.**

# Contact Information

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