# Navigating Housing Development in the New Era

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**Barbara Kautz, Partner, Goldfarb & Lipman**
**Diana Varat, Of Counsel, Richards, Watson & Gershon**

**Notes:**

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Presented by:

**Barbara Kautz**
Partner
Goldfarb & Lipman LLP
1300 Clay Street, 11th Floor
Oakland, CA 94612
510-836-6336
bkautz@goldfarblipman.com

and

**Diana Varat**
Of Counsel
Richards, Watson & Gershon, APC
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071
213-626-8484
dvarat@rwglaw.com

## I. Introduction

To address the State's housing crisis, the California Legislature substantially amended housing and planning laws in 2017 and 2018. These changes to State law shape the way cities plan for housing development and determine the processes that cities use to review and approve housing projects. Both planners and city attorneys need to understand the challenges in implementing these laws, especially given the State's expanded enforcement role.

On the planning side, cities now face significant challenges in complying with Housing Element Law. In the next Housing Element cycle - which begins in 2019 - new site requirements will make it more difficult for cities to identify appropriate parcels to accommodate their local share of the regional housing need. Furthermore, changes to the "No Net Loss" provisions require staff to continually monitor housing production and ensure adequate site capacity at all times for all income levels. As of January 1, 2019, these obligations apply to all California cities, including charter cities.

On the project approval side, cities have less discretion to deny, or reduce the density of, proposed housing projects that meet the city's objective standards, under the revised Housing Accountability Act. This loss of discretion is both politically and practically challenging. Already, YIMBY groups have started filing litigation based on recent changes to the statute. Even more than before, city attorneys must be aware of the requirements of the Housing Element Law, No Net Loss provisions, and Housing Accountability Act.

This paper summarizes the most recent changes to these laws. In addition, we will identify practical challenges to complying with these laws and provide tips for city attorneys to minimize legal exposure, reduce the potential for State enforcement actions, respond to public concerns, and defend litigation. In this paper, we will provide examples of how to collaborate with staff to plan proactively to promote housing development, retain some local control, and implement these laws effectively. Finally, we will briefly discuss the possibility of citizen initiatives and referenda in response to these changes in State law.

We recognize that this is not the end of the story. In the current 2019 legislative session, over 200 bills have been introduced dealing, in various ways, with the State's critical housing shortage. While many of these bills will limit local discretion further and impose onerous mandates on cities, our goal in this paper is to explain the current state of the law.

## II. Housing Element Site Identification and Upzoning Requirements[1]

"Housing elements" are parts of cities' general plans intended to identify local housing needs, adopt programs to meet housing needs, and identify adequate sites for all types of housing. (§ 65583; *see generally* §§ 65580 *et seq.*) In recent years the focus of housing element

[1] All references in this paper are to the California Government Code, unless otherwise specified.

preparation and review has been the adequate identification and (up)zoning of sites suitable for development of lower income housing.

Amendments to housing element law adopted in the 2017 and 2018 legislative sessions will substantially affect the "sixth cycle" housing elements. City and county housing elements for the sixth cycle will begin to be due in 2019 (41 jurisdictions), with San Diego County (the SANDAG region) and likely Southern California (the SCAG region) and Sacramento region (SACOG) due in 2021, the Bay Area (ABAG) in 2023, and other jurisdictions between 2020 and 2023.[2] In many cities, these amendments will require that more and more sites be upzoned to meet housing demand, significantly increasing the potential for local opposition and litigation.

### A. Basic Housing Element Concepts

The key requirement for housing elements is to show that a city has enough land zoned for housing at appropriate densities to accommodate its Regional Housing Need Allocation (RHNA). (§ 65583(c)(1).) The RHNA represents the expected need for housing in the city, usually over the next eight years (although there may be a five-year RHNA in smaller regions) and is usually calculated by the local council of governments (COG). (*See generally* §§ 65584 – 65584.09.) The RHNA is further divided by income category. Typically about 40 percent of the assigned need is for lower income housing (affordable to households with incomes less than 80 percent of the area median), 20 percent for moderate income housing (for households with incomes between 80 percent and 120 percent of the area median), and 40 percent for above moderate income housing.

To show that there is enough land zoned for housing to “accommodate” the RHNA, a city must do an inventory of land zoned for housing that identifies specific sites, describes existing uses and the density permitted, and states specifically how many units can be accommodated on each site. (§§ 65583(a)(3); 65583.2.)

Additionally, the city must identify whether the site is suitable for lower, moderate, or above moderate income housing. (§ 65583.2(c).) Certain densities are ‘deemed appropriate’ for lower income housing (often called the "default density"). In metropolitan areas, these densities are 20 to 30 units per acre. (§ 65583.2(c)(3)(B).)[3]

If the inventory does not identify enough sites at appropriate density to meet the RHNA, the city must identify specific sites and rezone them in the next three years (four years if certain findings can be made).[4] (§§ 65583(c)(1)(A), (f).) The rezoning must allow a housing development containing 20 percent lower income housing to be developed ‘by right.’

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[2] The schedule for the sixth cycle housing element update can be viewed on HCD’s website: http://www.hcd.ca.gov/community-development/housing-element/docs/6th_web_he_duedate.pdf.

[3] Theoretically, cities may present evidence to the Department of Housing and Community Development (HCD) that a lower density will accommodate the need for lower income housing. (§65583.2(c)(3)(A).) However, HCD rarely approves these requests.

[4] As discussed below, amendments to the Housing Accountability Act may allow development at the density shown in the housing element even if the rezoning has not yet taken place. (*See* § 65589.5(j)(4).)

(§ 65583.2(h).) 'By right' means that no review is required under the California Environmental Quality Act (CEQA), unless a subdivision is required, and the project can only be reviewed using 'objective' design standards. (§ 65583.2(i).)[5] Practically this means that the 'by right' provision is limited to rental housing with no condominium map.

The Department of Housing and Community Development (HCD) reviews each city's housing element (in draft and final form) and opines on whether the element is in substantial compliance with state law. (§ 65585.) HCD may revoke a finding of compliance if a city does not implement its housing element and may refer transgressors to the Attorney General. (§§ 65585(i), (j).)

**B. A Perfect Storm: Recent Amendments**

The amendments adopted in 2017 and 2018 are likely to make it much more difficult for many cities, especially those without substantial vacant land, to find enough sites that HCD agrees can 'accommodate' lower income housing to satisfy the city's RHNA. In particular:

- The RHNA is likely to be higher;
- The obligation to "affirmatively further fair housing" will create pressure to place more housing in higher income cities and neighborhoods;
- Limitations on the use of non-vacant land, HCD's strict definition of 'vacant,' and other requirements will make it difficult to find enough sites that are suitable for lower income housing;
- 'No net loss' requirements, explained in the next section, effectively require cities to upzone substantially more sites than are required to satisfy the city's RHNA; and
- A newly emboldened HCD intends to undertake much more rigorous scrutiny of housing elements.

1. *Revised RHNA Allocation Process*

The total housing needs assigned to each region are likely to be substantially higher because the amount of housing required to correct overcrowding and overpayment of *existing* households will be added to projected household growth. (§§ 65584.01(b)(1)(C), (H).) HCD makes the final determination of total regional need [§ 65584,01(c)(3)]; and HCD staff members have indicated that the total need for some regions could be as much as 50 percent higher as in the last housing element planning period.[6]

In distributing the regional need to individual cities, new factors required to be considered by the COGs include low-wage jobs in the community, overcrowding and overpayment, and the need to 'affirmatively further fair housing' (discussed below). Existing zoning and growth limits (except for agricultural preservation), past failure to meet the RHNA,

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[5] Despite this provision, the Coastal Commission requires that any necessary Coastal Development Permit be obtained within the coastal zone.

[6] Total need in the San Diego County (SANDAG) region is 18 percent higher for the sixth cycle than it was in the fifth cycle, even though it did not include the adjustment for overpayment.

and a stable population cannot be considered. These changes were clearly intended to assign more units to low-growth cities. While HCD may review and comment on the methodology for allocating the need among cities in a region (a new provision), the COG makes the ultimate decision. (§ 65584.04.)

After the methodology is adopted, the COG submits draft allocations to each city or county. Any city can appeal its own allocation or the allocation of any other city, and HCD can also appeal any allocation. Again, the final decision is made by the COG. (§ 65584.05.) The increased involvement of HCD, and the ability of agencies to challenge each others' allocations, could make the next round of RHNA allocations highly contentious. However, despite the potential for significant political battles, the Court of Appeal decided in *City of Irvine v. Southern California Ass'n of Governments*[7] that RHNA allocations to individual cities are not justiciable.

2. *Obligation to Affirmatively Further Fair Housing*

The RHNA plan and each local housing element must 'affirmatively further fair housing.' (§§ 65584(d)(5), 65583(c)(9).)[8] 'Affirmatively furthering fair housing' means "taking meaningful actions…that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunities." (§§ 8899.50(a)(1); 65584(e).)

There are no guidelines regarding how this will be implemented in the housing element context. However, the Tax Credit Allocation Committee (TCAC) has prepared opportunity maps for the entire state assigning census tracts into categories ranging from those with the highest resources (education, proximity to jobs, high environmental quality etc.) to those with the least opportunities and characterized by high segregation and poverty.[9] It can be expected that COGs and cities will be expected to place more lower income sites in high opportunity cities and neighborhoods, which tend to be higher income and wealthier (and in many cases more opposed to multifamily housing).

3. *New Site Inventory Requirements*

In many communities, the most controversial task is to identify sites suitable for lower income housing that are zoned (or intended to be zoned) to allow development at the 'default density' of 20 to 30 units per acre. New amendments will make it more difficult to find enough sites in many cities, particularly those with few vacant sites.

- *More Evidence to Justify All Non-Vacant Sites.* Previously, in order to include non-vacant sites in the site inventory, cities had to discuss local development trends, regulatory incentives to encourage housing development, and the extent to which existing uses are an impediment to housing development. Now, for each

[7] (2009) 175 Cal. App. 4th 506.

[8] The provision applicable to the RHNA applies only if HCD has not yet made a final determination of regional need and so is not applicable to the San Diego County (SANDAG) region. The provision applicable to housing elements applies to housing elements due after January 1, 2021 and so does apply to the SANDAG region.

[9] *Available at: https://haasinstitute.berkeley.edu/sites/default/files/mappings/TCAC/opportunity_map_2019.html.*

non-vacant site, cities also must identify any applicable leases and existing contracts for current uses, market demand for the existing use, and prior experience converting non-vacant sites to higher density residential. (§ 65583.2(g)(1).)

- *Emphasis on Vacant Sites for Lower Income Housing.* If more than 50 percent of the lower income housing need is shown to be met on non-vacant sites, then:

  > The "*existing use shall be presumed to impede additional residential development*, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period." (§ 65583.2(g)(2).)

  It is not clear what evidence will satisfy HCD. For housing elements completed late in the fifth cycle planning period, HCD required letters of interest from each property owner. Without such an expression of interest, this requirement assumes that cities can find substantial evidence that a particular use is likely to be discontinued in the next 8 years – something cities cannot do realistically. There is no exception for cities that simply do not have enough vacant sites to accommodate 50 percent of their lower income housing need.

- *Strict Interpretation of 'Vacant.'* In a recent review of a housing element, HCD indicated that the following sites were not 'vacant':

  - A large vacant site that had not yet been subdivided from the non-vacant part of the site.
  - A large vacant site containing a high-voltage power line.
  - Sites used for agriculture.
  - A large vacant site containing one vacant, abandoned single-family home.

  These strict interpretations will make it even more difficult to meet the 50 percent vacant site threshold.

- *Limits on Site Size.* Sites smaller than 0.5 acre or larger than 10 acres are not considered to be suitable for lower income housing without evidence that the site can be developed for lower income housing. (§ 65583.2(c)(2).)

- *Limits on Reuse of Sites.* If a vacant site was identified in the site inventory in two previous housing elements, or a non-vacant site was identified in one previous housing element, it will not be considered suitable for lower income housing unless it is zoned to permit 'by right' development at the default density for a project with 20 percent lower income housing. (§ 65583.2(c).)[10]

[10] In addition, if development is proposed on any site listed in the housing element, at all income levels, the city must require that any rental housing that existed on the site in the past five years and was occupied by

- *More Scrutiny of Site Capacity.* Each site must individually have access to water, sewer, and dry utilities (or a plan must have been adopted to provide those services). More detail is required regarding site constraints, and cities need to provide information regarding the density of projects on similar sites in the jurisdiction. (§§ 65583.2(b)(5), (c)(2).)

4. *An Emboldened HCD*

HCD's new authority to 'decertify' housing elements and refer cases to the Attorney General (§§ 65585(i), (j)), as well as Governor Gavin Newsom's emphasis on housing production, has resulted in an HCD team determined to look closely at local housing elements. There will be no 'streamlined review' as was possible in the last housing element cycle. In particular, HCD at conferences has indicated its intent to scrutinize local development standards (such as height, parking, setbacks, and lot coverage) to determine if they actually allow development at the asserted densities and to determine if the standards are "objective." In one recent review letter, HCD specified necessary changes (such as an increased height limit) in those standards to achieve HCD approval. If faced with similar demands from HCD, cities may be faced with making unpopular changes to achieve an HCD finding of substantial compliance or risk housing element litigation. While cities are not required to accept HCD's recommendations and may make their own findings explaining why their element is consistent with state law (§ 65585(f)), a housing element found not in compliance by HCD is vulnerable to a legal challenge for over three years. (§ 65009(d).)

### C. Practice Tips

In many communities, adoption of the sixth cycle housing element is likely to be controversial, with city councils and staff buffeted by the need to comply with state law and possible community opposition to what is required. The city attorney will likely be called upon to support the city council regarding unpopular actions it may be required to take (or, alternatively, to develop strategies for opposing HCD requests). Some specific suggestions are:

- To avoid an excessive allocation of units, ensure that the city is involved early in the COG's RHNA allocation process and encourage staff to closely monitor and participate in meetings regarding the allocation.
- To defend against housing element litigation, ensure that the housing element contains *every* provision required by state law and that there is substantial evidence in the record to support each of the conclusions reached.
- If significant upzoning is required, CEQA review may add substantial time to housing element preparation time. If the element is not adopted within 120 days of the due date, the element will be due every four years instead of every eight years. (§ 65588(e)(4).) Work on the housing element should be started well before the due date, in particular regarding the site inventory. Professional

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lower income households be 'replaced' as defined in density bonus law. (§§ 65583.2(g)(3); 65915(c)(3).) This in effect is an important exception to the Ellis Act, which normally does not allow a city to require the replacement of existing rental housing on a site.

services agreements with technical consultants may be entered into early in the RHNA planning process, if necessary. Since many parts of the housing element can be prepared even before the RHNA allocation is finalized, staff may want to begin the process of identifying sites and updating the housing element even before the COG has finalized the RHNA allocation.

- Consider joint efforts among cities to prepare portions of the housing element that are not city-specific. For instance, in San Mateo County the '21 Elements' group has prepared joint analyses of existing emergency shelters, issues involving the developmentally disabled, and other issues.
- HCD's level of scrutiny tends to relate to correspondence received and to the community's reputation. Ensure that any consultant hired is familiar with the changes to housing element law and has a good working relationship with HCD. It is worthwhile for planning staff and consultants to meet with HCD regarding strategies proposed by the city. Be sure to respond to all letters sent to HCD commenting on the city's housing element.
- If it does not appear that HCD will certify the housing element, closely examine the evidence supporting the city's position and make the written findings contained in Section 65585(f) explaining why the element substantially conforms with State law despite HCD's findings.

## III. Maintaining Adequate Capacity for New Housing Units - The "No Net Loss" Principle

As described in the previous section, cities must begin each housing element cycle by demonstrating that they can accommodate the projected housing need for the jurisdiction during the coming planning period. A separate section of State law, known as the "No Net Loss" provision, ensures that each city maintains adequate capacity to accommodate its allocated regional housing need during the entire eight-year planning period. (§ 65863.)

With the 2017 Housing Package, the State expressed a clear intent to ensure that planning efforts result in the actual production of housing units, not simply planning for housing on paper. The changes made to the No Net Loss requirements in 2017 are no exception. As amended in 2017, Government Code Section 65863 now requires that cities monitor housing production as the planning period progresses, and ensure no net loss in capacity by income level, as described in the following sections.

### A. General Requirements under Government Code Section 65863

In 2017, the State expanded the scope of the No Net Loss requirements. Previously, Government Code Section 65863 required that jurisdictions maintain adequate capacity with respect to the *total number* of dwelling units. In accordance with the State's current focus on producing more dwelling units, and specifically, producing more *affordable* units, the No Net Loss provisions now require that each city maintain unit capacity for specific income levels. While adequate capacity in connection to the *total* number of units remains important, Section 65863 now also requires that each city maintain unit capacity to meet each income level required by the city's RHNA allocation.

In addition, the State's focus on production of units has resulted in an increased focus on how planning does (or does not) result in the production of the number and affordability category of units that were imagined by the city's planning efforts. The city's obligation to maintain unit capacity arises in two contexts: (1) when the City reduces the allowable density on a site identified in the city's Housing Element site inventory to a "lower residential density," and (2) when an applicant obtains an entitlement to develop a site identified in the Housing Element site inventory, but where the entitlement authorizes fewer units by income level than were identified as possible on that site in the Housing Element site inventory, or at a "lower residential density," as defined by statute. Each of these contexts is described below.

1. *Down-Zoning - Reducing the Allowable Density on a Site Inventory Site*

If a city plans to reduce the allowable density on a site that is identified in the Housing Element site inventory as available for housing development, the city must comply with the No Net Loss requirements. As an over-arching rule, each city must ensure that there is always adequate capacity during the entire planning period for the number of units required to meet the City's remaining unmet share of the RHNA numbers for all income levels. (§ 65863(a).)

In addition, a city may only reduce the maximum allowable density for a specific site inventory site to a "lower residential density" if it finds that doing so would be consistent with the city's adopted General Plan, including the housing element, and more importantly, only if the city can demonstrate that the remaining sites in the site inventory provide adequate capacity to meet the city's RHNA needs for each income level. (§ 65863(b)(1).) If the remaining sites are not adequate to meet the RHNA need at each income level, the city must *simultaneously* identify "sufficient additional, adequate, and available sites with an equal or greater residential density in the jurisdiction so that there is no net loss of residential unit capacity." (§ 65863(c)(1).)

These obligations will play out differently in different jurisdictions because of the definition of the term "lower residential density," provided in Section 65863(g), which depends on whether the city has a timely-adopted and compliant housing element.[11]

For ***compliant*** jurisdictions, "lower residential density" simply means fewer units than the housing element's projections for the specific site. For these cities, therefore, staff should compare the number of units that would be allowed under the proposed maximum allowable density to the number of units that were identified for that site in the Housing Element site inventory. If the number of units that would be allowed on the site under the proposed (reduced) maximum density is ***less than*** the number identified as possible in the site inventory, the city must make the finding that there is adequate remaining capacity on the remaining site inventory sites, or find other sites to upzone simultaneously to meet the RHNA for each income

[11] For these purposes, "timely-adopted and compliant" means that the housing element was adopted within 90 days of the original deadline and the housing element was in "substantial compliance" with Housing Element Law within 180 days of the deadline.

level. For jurisdictions that do ***not*** have a timely-adopted and compliant housing element, however, the definition of "lower residential density" is more complicated.[12]

In order to ensure that a city maintains adequate capacity consistently during the planning period, and that there is never a "net loss" in capacity, city planning department staff should analyze the remaining capacity of site inventory sites *before* proposing any down-zoning in the city.

2. *Approving a Project on a Site Identified in the Site Inventory*

In the wake of the 2017 changes, the No Net Loss requirements also may be triggered when a city approves a project on a site that was identified in the site inventory as available for housing development. The statute establishes two distinct, but overlapping obligations.

First, Section 65863 states that a city may not "allow development of any parcel at a, lower residential density," unless the city makes the necessary finding that there is adequate capacity to meet the RHNA at each income level. (§ 65863(b)(1).)[13] Second, if a city allows development of a site inventory site with "fewer units by income category than identified in the jurisdiction's housing element for that parcel," then the city must make the necessary finding. (§ 65863(b)(2).) For either scenario, if the remaining sites in the site inventory are ***not*** adequate to meet the remaining unmet need of the city's RHNA allocation, ***at each income level***, then the city has 180 days in which to upzone other sites to ensure adequate capacity remains.

In light of this requirement, the approval of a project with fewer units by income category than were identified in the site inventory triggers the obligation to make a finding of adequate remaining capacity, or if that finding cannot be made, to upzone other sites within 180 days.

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[12] Non-compliant jurisdictions should be mindful of the complications created by the definition of "lower residential density" in Section 65863(g)(2). As described previously, Section 65583.2(c)(3) establishes density levels that are ***deemed sufficient*** to meet a jurisdiction's RHNA share, known as "default density" levels. The "default density" for a particular jurisdiction depends on whether it is incorporated or unincorporated, and whether it is located within a metropolitan or nonmetropolitan county. Under housing element law, a city may zone sites to allow for density levels *greater than* the default density, but it also may adopt lower maximum density levels if lower densities are justified by an analysis showing that the densities adopted allow the city to meet its RHNA share. For non-compliant jurisdictions, if a city allows for a density level higher than the default density, a "lower residential density" for the purpose of the no net loss provisions would be anything less than 80 percent of the maximum allowed density. If the city allows for a density lower than the default density (as justified by an analysis), or allows for the applicable default level, a "lower residential density" would be anything less than 80 percent of the default level applicable under 65583.2(c)(3).

[13] Approving a project at a "lower residential density" in a ***compliant*** jurisdiction does not create any additional obligation. In a ***non-compliant*** jurisdiction, however, even if the project that is approved contains more than the number of units indicated in the site inventory as available for housing development, staff should still compare the number of units approved with the number of units that would meet 80 percent of the default density. In the latter instance, the city will need to make the necessary findings under No Net Loss and may need to upzone other sites.

### B. Application of the No Net Loss Provision to Charter Cities (SB 1333)

Prior to January 1, 2019, the No Net Loss provisions did not apply to charter cities. With the adoption of Senate Bill 1333, however, the No Net Loss requirements - as well as a number of other provisions in the Planning & Zoning Law - now expressly apply to charter cities. (§ 65863(i).) As of January 1, 2019, even charter cities must maintain adequate capacity for site inventory sites and make the appropriate findings each time the city approves a project on a site that is identified in the city's Housing Element or down-zones a site inventory site.

For many cities, especially larger charter cities, maintaining adequate capacity to comply with the No Net Loss provisions may require a greater level of coordination within the planning department. As described above, each city must ***quantify*** the remaining unmet need for each RHNA income level when it makes findings under the No Net Loss provision. For many cities, especially larger charter cities with diverse and separate planning areas, quantifying the unmet housing need may require a shift in internal recordkeeping. We recommend that city attorneys of cities of all sizes proactively coordinate with planning department staff to ensure that resolutions approving developments on site inventory sites include the appropriate quantification of unmet RHNA needs and the required findings.

### C. Additional Practice Tips for Compliance with the No Net Loss Provisions

The easiest way to ensure that a city complies with the basic requirement of the No Net Loss provision - i.e., to maintain adequate housing capacity during the planning period - is to begin the housing element cycle with a ***surplus*** of adequate sites in the Housing Element site inventory. The larger the surplus, the more likely the city will be able to make the required No Net Loss finding that there is adequate remaining capacity, and the less likely the city will have to scramble to upzone other sites in a 180-day period. Without a surplus, cities may be faced with constant upzonings, which may be practically and politically challenging.

In light of the specific requirements of the No Net Loss provisions, we recommend that every local planning department maintain a spreadsheet identifying the Housing Element site inventory sites. For each site inventory site, the spreadsheet should identify the number of units – and the appropriate income level – of the units identified in the Housing Element as possible for each site. Planning department staff should monitor re-zonings, for both site inventory sites and non-site inventory sites, in order to continue to quantify the city's remaining unmet housing need by income level at any moment.

In addition, if a city receives a development application for a site identified in the site inventory, planning staff should immediately begin considering how to comply with the No Net Loss provisions. First, staff should compare the number and income level of the units proposed by the applicant with the number of units and income level identified as possible for the site in the site inventory. If the proposed project would develop the site at a "lower residential density," the city must make the necessary finding that the city has adequate capacity elsewhere to accommodate the differential in capacity. If the city will not have adequate remaining capacity, staff should identify replacement sites that may need to be upzoned as soon as possible, especially in light of the 180-day window in which to complete any necessary

CEQA analysis and planning or zoning amendments. (§ 65863(c)(2).) To that end, staff may wish to maintain a list of potential alternative sites that are not listed in the site inventory, which could be used as replacement sites.

Consistently maintaining a tally of the city's remaining unmet need should now be a regular task for planning department staff. Maintaining adequate data regarding the city's unit capacity and unit production also will allow staff to more easily prepare the housing element annual progress report, which must be provided to the city council and submitted to the State by April 1 each year, pursuant to Government Code Section 65400. While all of these new requirements may create additional burdens on staff, monitoring the city's progress as the housing element cycle proceeds, both with respect to zoning capacity and unit production, may allow staff to plan more strategically for future housing element cycles.

## IV. The Housing Accountability Act ("HAA")

### A. Basic HAA Provisions

The Housing Accountability Act (HAA; § 65589.5) applies to **all** "housing development projects," whether or not affordable, and to emergency shelters. It is applicable to charter cities. (§ 65589.5(g).) A "housing development project" includes:

- Residences only;
- Transitional and supportive housing;
- Mixed use projects with at least two-thirds the square footage designated for residential use. (§ 65589.5(h)(2).)

The HAA applies only when a local agency is considering a "specific construction proposal" and does not include the approval or disapproval of a specific plan or other legislative action. (*Chandis Sec. Co. v. City of Dana Point*.[14]) But the definition of a "housing development project" does not require that the project contain any affordable housing, and the courts have rejected contentions to the contrary.[15] In fact, all of the published cases except one interpreting the HAA have involved market-rate, not affordable, projects.

Prior to January 1, 2018, the key provisions of the HAA were as follows:

1. *A Housing Project May Usually Not be Denied or Reduced in Density if It Conforms with All "Objective" Standards*. This key provision requires that *if* a housing project complies with all "objective" general plan, zoning, and subdivision standards, it may only be denied or have its density reduced if a city or county can find that the project would have a "specific adverse impact" on public health and safety.

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[14] (1996) 52 Cal. App. 4th 475, 486.

[15] *See Honchariw v. County of Stanislaus* (2011) 200 Cal. App. 4th 1066, 1077; *North Pacifica, LLC v. City of Pacifica* (N.D. Cal. 2002) 234 F. Supp. 2d 1053, 1058.

A "specific adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards" in effect when the application was deemed complete; and there is no feasible method to mitigate the impact. (§ 65589.5(j)(1).)

2. *Additional Findings Must be Made to Deny an Affordable Project*. If a project is also "housing for very low-, low- or moderate-income households," additional findings need to be made to deny the project, reduce the density, or add a condition making the project infeasible—even if the project does not comply with all "objective" standards. (§ 65589.5(d).)

   Affordable developments include projects where at least 20 percent of the units are affordable to lower income households (incomes up to 80% of median) or 100% are affordable to either moderate-income households (120% of median) or middle-income households (150% of median). (§ 65589.5(h)(3).)

**B. Key Amendments to the HAA**

Amendments adopted in 2017 and 2018 were intended to make it more difficult for cities to deny or reduce the density of all housing developments. The Legislature stated explicitly:

> "The Legislature's intent in enacting this section in 1982 …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." (§ 65589.5(a)(2)(K).)

The major changes were these:

1. *Applicants Must be Informed of Any Inconsistencies within 30-60 Days after the Application is Complete*. Cities and counties must identify any inconsistencies with any applicable "plan, program, policy, ordinance, standard, requirement, or similar provision" within 30 days after an application for 150 units or less has been deemed complete, or within 60 days for projects with more than 150 units. If the local agency does not identify an inconsistency within the required period, the project will be "deemed consistent." (§§ 65589.5(j)(2).)

2. *Projects Receiving Density Bonuses Are Consistent with Objective Standards*. Receipt of a density bonus is not a basis to find a housing project inconsistent with applicable development standards. (§ 65589.5(j)(3).)

3. *Projects Consistent with the General Plan, But Not Inconsistent Zoning, Are Consistent.* If the zoning for the site is inconsistent with the general plan, but the housing project is consistent with 'objective' general plan standards and criteria, the project is considered consistent, and no rezoning is required.

(§ 65589.5(j)(4).) This may mean that a project could be built at the density shown in the housing element even before consistent zoning is completed.

4. *Less Deference to Local Government Findings of Inconsistency*. A housing project "shall" be deemed consistent with applicable standards if there is substantial evidence that would allow a reasonable person to conclude that the project is consistent. (§ 65589.5(f)(4).)

   This standard allows applicants to submit their own evidence of consistency, and, if a court finds that evidence of project consistency submitted by an applicant is reasonable, the project may be found consistent even if the local government has better evidence that the project is inconsistent. Further, if staff or a planning commission has recommended approval and made findings of consistency, the agency would need to find that those findings were unreasonable or not supported by substantial evidence, making it difficult for city councils to overturn staff or planning commission recommendations for approval. On the plus side, the standard will make it more difficult for project opponents to challenge a project as inconsistent when the local government has found it to be consistent.

   Any findings made to deny or reduce the density of a housing project conforming with objective standards or to deny or reduce the density of an affordable housing project must be supported by a 'preponderance of the evidence,' which is a far less deferential standard of review than the former 'substantial evidence' standard. (§ 65589.5(d), (j).)

5. *Increased Penalties for Failure to Comply with the HAA*. The city has the burden of proof in defending against any HAA claim. (§ 65589.6.) If a city improperly denies any housing project, whether market rate or affordable, the prevailing party in a lawsuit brought under the HAA is entitled to attorneys' fees. (§ 65589.5(k)(1)(A).) In addition, if a local agency fails to comply with a court order to approve a project pursuant to the HAA, it shall be fined a minimum of $10,000 per unit. (§ 65589.5(k)(1)(B).) Penalties can increase to five times this amount if the local agency fails to comply with a court order, and the court finds bad faith. (§ 65589.5(*l*).)

### C. Relationship to the Coastal Act and CEQA

The HAA provides that "[n]othing in this section shall be construed to relieve the local agency from complying with … the California Coastal Act of 1976…Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required by [CEQA]." (§ 65589.5(e).) This provision retains significant authority for cities.

*Coastal Act issues:* While there is no case that decides whether the Coastal Act trumps the HAA, in *Kalnel Gardens, LLC v. City of Los Angeles,*[16] the Court of Appeal in dicta concluded that, based on the language of the HAA and the Court's reasoning regarding the relationship of state density bonus law to the Coastal Act, the HAA is likely subordinate to the Coastal Act. That is, regardless of the HAA, no housing development project may be approved if it violates the Coastal Act.[17] Assuming that this conclusion is correct, projects within the coastal zone may be denied if they are inconsistent with relatively subjective provisions of the Coastal Act, such as the requirement that they be "visually compatible with the character of the surrounding area."

*CEQA Issues:* An HAA claim may not even be ripe until CEQA review is completed. In *Schellinger Brothers v. City of Sebastopol*,[18] the developer spent six years trying to get a development plan approved, modifying the plan by repeatedly reducing the density and paying for various versions of an EIR that was never certified. He finally sought to have a court order the City to certify the EIR, citing, in part, the HAA. The Court of Appeal held that it could not order the City to certify the EIR; that the City had not unreasonably delayed the project because Schellinger kept modifying it; that the City had always continued to process the EIR; and that the HAA would have no applicability until the EIR was certified.

Since environmental review may well substantially exceed 30 to 60 days, applicants will often receive a list of plan inconsistencies long before CEQA review is completed. That review could require the incorporation of various mitigation measures into the project, potentially resulting in major project changes. The HAA contains no provisions for submittal of revised plans, and re-review, once a project is deemed complete.

It is not entirely clear how cities should reconcile the HAA and CEQA if a required mitigation measure would make a project infeasible. In *Sequoyah Hills Homeowners Assn. v. City of Oakland,*[19] the Court of Appeal upheld the City of Oakland's determination that it was legally infeasible to approve a reduced density alternative because the City could not make the findings required by the HAA to reduce the density: none of the impacts that would be mitigated by the reduced density alternative rose to the level of "specific, adverse impacts on public health or safety." But a city in this situation might be required to adopt a statement of overriding considerations under CEQA Guidelines Section 15093. Would its refusal to do so justify denial of the project? To be determined.

### D. Many Unanswered Questions

There are few published cases interpreting the HAA and none interpreting the recent amendments. Here are some of the issues we have encountered in advising cities and defending in litigation based on the HAA, which may well be resolved in future litigation:

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[16] (2016) 3 Cal. App. 5th 927.

[17] *See id.* at 944 fn.9.

[18] (2009) 179 Cal. App. 4th 1245.

[19] (1993) 23 Cal. App. 4th 704, 715-716.

1. *What Is an 'Objective' Standard?* The HAA does not define 'objective' (although SB 35 does, as discussed in the next section), nor do any of the published cases. The Court of Appeal in *Honchariw v. County of Stanislaus*[20] noted that the term "objective" was added in 1999 amendments and was intended to "strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')" to deny or reduce the density of a housing development project. But the Court never defined the term.

2. *Conflict with Other State Laws.* The HAA's demand that a project denial or reduction in density be based on 'objective' standards conflicts with subjective standards contained throughout state Planning and Zoning Law, such as the list of findings in the Subdivision Map Act requiring denial of a project. (§ 66474.)

3. *Use of Subjective Findings.* The findings contained in local zoning ordinances that must be made to approve projects through discretionary processes are almost all subjective (e.g., "furthers the public safety and welfare"; "is consistent with the character of the neighborhood"). It is our view that conditions of approval can be imposed (so long as they do not have the effect of reducing project density) to ensure that a city can make the required findings, but this view is challenged by advocates.

4. *May a Project be "Deemed Consistent" When It Isn't Consistent?* The HAA states that failure of staff to point out an inconsistency results in a project being "deemed consistent" even when it clearly does not meet general plan or zoning standards. This provision in effect allows amendments to general plans and zoning ordinances due to a staff member's failure to comply with a ministerial duty and without notice or due process. Consequently, it appears that challenges are available to the 'deemed consistent' provision.

5. *What Does 'Reduced Density' Mean?* Cities view the definition of density as units per acre, and the housing element statute also refers to density as units per acre. (*See, e.g.,* § 65583.2(c)(3)(B).) The HAA contains no definition of density. Plaintiffs argue that even the loss of a bedroom is a loss of density, based on this language: " 'Lower density' includes any conditions that have the same effect or impact on the ability of the project to provide housing." (§ 65589.5(j)(5).)

6. *Does the HAA Apply to One Single-Family Home on an Individual Lot?* Because a "housing development project" is defined as including "residential unit**s**" (plural), many cities have concluded that the HAA does not apply to an application for one single-family home on an individual lot. This conclusion is also consistent

[20] (2011) 200 Cal. App. 4th 1066, 1076-77.

with the purposes of the HAA; that is, issues involving the design and construction of one home on an existing lot do not relate to the creation of additional housing, only to how big or tall the house can be.

7. *Are Design Guidelines 'Design Review Standards'?* The HAA requires project compliance with "objective general plan, zoning, and subdivision standards, including design review standards." (§ 65589.5(j)(1).) Plaintiffs have argued that even objective design guidelines are not 'design review standards,' and so compliance is not required, although we do not agree with this interpretation. As a best practice, it is better to reference these 'guidelines' as 'standards' in the zoning ordinance or general plan and to make clear that they are mandatory.

**E. Practice Tips**

In our experience, many planners are still not aware of the requirements and implications of the HAA, in particular the need to send a letter within 30 – 60 days of the completeness determination detailing all of the inconsistencies between the project and applicable city regulations. Additionally, city councils need to be aware that, once the staff or planning commission has found that a project complies with all objective standards, the council's ability to conclude otherwise may not be upheld by the courts unless the previous conclusion is not supported by substantial evidence that would allow a reasonable person to conclude that the project is consistent. The city attorney may find him- or herself in the difficult position of explaining why the council has no choice but to approve a project.

City attorneys will need to work closely with their planning staff to ensure that they are complying with the HAA. Below are some practices adopted by cities:

1. *Determining Consistency.* Prepare a packet containing all “plans, programs, policies, ordinances, standards, requirements” to ensure that no standards are left out. Require applicants to demonstrate consistency as part of application submittal.

2. *Base Project Denials or Density Reductions on Inconsistency with 'Objective' Standards.* Review the standards to ensure that they are 'objective.' Review the record to ensure that there are not contrary findings in the record that may be considered to be reasonable. Consider adding conditions of approval (even 'redesigning from the dais') rather than denying the project, even if the conditions are not acceptable to the applicant, to address any inconsistencies with either objective or subjective standards.

3. *Attempt to Convert as Many Standards as Possible to 'Objective' Standards.* This strategy is discussed in more detail in the next section.

4. *If Litigation is Brought by a 'Housing Organization,' Understand that the Interests of the Organization and the Real Party May Not Align.* The statute allows a 'housing organization' to bring litigation on behalf of the developer

[§ 65589.5(k)(1)(A)], so long as the organization has first provided written or oral comments to the city. (§ 65589.5(k)(2).) The HAA cases we are now defending were all brought by YIMBY organizations committed to the construction of housing of all types, affordable or market-rate. However, in the context of litigation, the interests of the developer and the 'housing organization' do not necessarily coincide: the developer wants a project and a settlement in a timely fashion; the housing organization wants to make new law, get attorneys' fees, and issue a press release. This can make settlement difficult.

## V. State-Mandated Ministerial Approval Processes

### A. Legislative Trend - Establishing Ministerial Approval Processes for Housing

From the State's perspective, local discretionary approval processes potentially create barriers to the production of housing.[21] To reduce such barriers, the Legislature has established ministerial approval processes for various housing types. In some instances, the State has established the criteria that make a housing project application eligible for streamlined approvals. In other instances, the State has authorized cities to establish the development standards to qualify for streamlined ministerial approval.

State-mandated ministerial approval processes often require that proposed housing projects comply with a city's existing objective development standards. This section briefly describes two of the most important State-mandated approval processes. We anticipate that the Legislature will continue to encourage – and mandate – more streamlined housing approval processes.

As described below, we recommend that cities – and city attorneys – become familiar with the new State-mandated ministerial approval processes. In addition, we recommend that city planning departments reevaluate their existing (and potentially applicable) objective development standards. As the State focuses more on ministerial approval processes, locally established objective development standards may be the only way to ensure that new developments comply with local preferences for future development. Since the distinction between objective and subjective standards is not always clear, city attorneys will need to work closely with planning staff to develop and refine development standards to ensure that objective standards do not confer discretionary authority on local decision-makers unintentionally.

#### 1. *Senate Bill 35 - Government Code Section 65913.4*

In 2017, the State enacted Senate Bill 35, establishing a streamlined ministerial approval process for qualifying multifamily housing projects. SB 35 authorizes proponents of residential developments that meet specified statutory criteria to apply for approval under a streamlined, ministerial approval process. (§ 65913.4(a).) This means that a city cannot require a conditional use permit or other discretionary approval for projects meeting these criteria. Moreover, as ministerial actions, these approvals are statutorily exempt from CEQA. (Pub. Res. Code

[21] *See, e.g.*, Gov. Code 65589.5(a)(1)(K).

§ 21080(b)(1); CEQA Guidelines § 15268.) In November 2018, HCD released guidelines intended to clarify this process.[22]

As part of the approval process, a city must determine whether the proposed project is consistent with "objective zoning standards and objective design review standards" established before the application for approval is submitted. (§ 65913.4(a)(5).) As defined in the statute, "objective standards" are those that "involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both" the applicant and the public official prior to the time the application is submitted. (*Id*.)

In light of this requirement, cities may want to evaluate their zoning regulations and design review guidelines to determine which local standards are truly "objective" and could be applied to SB 35 projects. Objective zoning standards might include setbacks, floor area ratio standards, lot coverage limitations, and maximum height. In general, most cities do not yet have adequate objective standards in place to address concerns that previously may have been addressed through the CEQA process, including concerns regarding historic, tribal cultural, and biological resources. As such, cities should consider adopting additional, broadly applicable, objective standards to ensure that typically imposed conditions of approval or mitigation measures will apply to projects approved through the ministerial process. Of course, any newly adopted standards would need to be tailored to ensure that they are clear and objective.

2. *Assembly Bill 2162 - Government Code Sections 65650 et seq.*

In 2018, the Legislature responded to the State's homelessness crisis, in part, by establishing another ministerial approval process specifically for qualifying supportive housing developments. As defined by State law, "supportive housing" means housing with no limit on length of stay, that is occupied by a defined target population—including persons with disabilities, families who are homeless, and homeless youth—and where the housing is linked to onsite or offsite services that assist residents in retaining housing, improving health, and maximizing the ability to live and, when possible, work in the community. (Health & Safety Code § 50675.14.)

AB 2162 requires supportive housing to be a "use by right" in zones where either multifamily or mixed uses are permitted, so long as the proposed housing development meets the criteria outlined below. (§ 65651(a).) A "use by right" means that the local government's review may not require a conditional use permit, planned unit development permit, or other discretionary local government review and the approval would not constitute a "project" for purposes of CEQA. (§ 65583.2(i).)

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[22] These guidelines can be found at http://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf. Although the guidelines state that they are 'quasi-legislative,' they were prepared without public hearings, without submittal to the Office of Administrative Law, and through an informal process that did not create a record and where there is no explanation of interpretations that seem to go beyond the provisions of the statute. If there is litigation regarding these guidelines, cities should submit a Public Records Act request to determine as much as possible who influenced the guidelines and why certain decisions were made.

To qualify as a "use by right" under AB 2162, a supportive housing development application must satisfy all of the following requirements:

- Units in the development are subject to a 55-year recorded affordability restriction;
- Every unit, except the managers' unit, must be dedicated to lower income households, and the development must receive public funding to ensure affordability;
- The greater of 12 units or 25% of all units in the development, or all units if the development is under 12 units, are restricted to residents in supportive housing;
- The development must contain a specific amount of nonresidential floor area dedicated to supportive services, the amount of which depends on the number of units, as specifically stated in Government Code Section 65651(a)(5);
- Units must include a bathroom and a kitchen or other cooking facilities, including, at a minimum, a stovetop, sink, and refrigerator; and
- The developer must submit a plan for providing supportive services, identifying the entity that will provide services, specific services that will be available, proposed funding for the services, and proposed staffing levels. (§ 65651.)

Local agencies must approve supportive housing developments that comply with these requirements through a ministerial, non-discretionary review process. Local agencies must make a decision on a proposed supportive housing project within 60 days after the application is deemed complete, if the development contains 50 or fewer units, or within 120 days after the application is deemed complete, if the development contains more than 50 units. (§ 65653(b).)

For many jurisdictions, the streamlined approval process will be available only for developments of 50 units or less. For cities with a population of less than 200,000 people and where the population of persons experiencing homelessness is 1,500 or fewer (according to the most recently published point-in-time count), a supportive housing development only qualifies for the "by right" procedures if the development contains no more than 50 units. (§ 65651(d).) Cities should verify overall population - and the population of persons experiencing homelessness - before relying on the 50-unit maximum. For larger cities and for any city with a homeless population of at least 1,500 people, all qualifying supportive housing developments shall be considered a "use by right," regardless of whether the proposed development contains more than 50 units.

As with SB 35, local governments may require supportive housing developments to comply with the same objective, written development standards that apply to other multifamily developments in the zone. We recommend that local planning staff review local standards to ensure that the regularly applicable development standards for multifamily uses remain appropriate.

While this paper does not seek to explain all of the requirements for a streamlined supportive housing development, we recommend that city attorneys and local planning staff

become familiar with the application and approval requirements for supportive housing developments that qualify for the "use by right" procedures, as required by Section 65651.

### B. Streamlined Ministerial Approval Processes - Challenges for Local Agencies

The Legislature continues to consider additional State-mandated ministerial approval processes for housing developments.[23] These new bills could alter the way cities plan for development in drastic ways. City attorneys and staff need to prepare for significant shifts in local control and planning frameworks.

#### 1. *Reduced Reliance on the CEQA Process*

As the Legislature relies increasingly on ministerial project approvals, the practical impact of CEQA will be reduced. When a city relies on a discretionary decision to approve a project, they have the opportunity to revise a proposed project by imposing feasible mitigation measures to reduce significant environmental impacts through the CEQA process and impose conditions of approval through the discretionary planning process to address neighborhood compatibility, aesthetic concerns, and impacts to the City's infrastructure and public services.

If the Legislature continues to adopt State-mandated ministerial approval processes, cities will lose the ability to use the CEQA process to analyze impacts to public infrastructure and the environment. Local planning agencies should analyze their discretionary review processes and recent project approvals to determine whether there are concerns that only come to light through the environmental review process. If cities wish to continue addressing those concerns, even after the State's imposition of ministerial approval processes, they should convert standard conditions of approval into objective standards that would apply to all proposed projects. City attorneys will need to assist staff in converting potentially subjective conditions of approval and standard mitigation measures into 'objective' standards, where possible.

#### 2. *Proactively Reviewing and Revising Objective Standards*

In addition to analyzing conditions of approval and mitigation measures that normally would be imposed through the CEQA process, city planning departments should review and potentially revise generally applicable objective zoning and design review standards. Most of the adopted and pending State-mandated approval processes rely on consistency with such standards. To the extent that cities want to maintain some control over the local development process, therefore, city planning staff should review generally applicable objective standards and update them as needed. City attorneys should be prepared to review draft amendments and ensure that the standards do not unintentionally confer discretionary authority on the reviewer, thereby converting objective standards into subjective standards.

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[23] See, e.g., Senate Bill 827, 2017-2018 Reg. Session (Wiener 2018) and Senate Bill 50, 2019-2020 Reg. Session (Wiener 2019).

## VI. Potential Citizen Responses: Initiatives and Referenda

In a recent USC Dornsife/Los Angeles Times survey, only 13 percent of eligible voters believed that too little homebuilding was responsible for high housing costs, and only nine percent of voters believed that restrictive zoning rules were at fault. At the same time, 69 percent wanted to retain local control rather than provide more state control over housing production.[24] This sets up the potential for a citizens' revolt, through local initiatives or referenda, or even through statewide action, against the state's insistence that cities zone for higher densities.

Some cities already have citizen-adopted growth caps or requirements that any upzoning receive voter approval. More of these types of growth control measures could be proposed and adopted if there is sufficient opposition to the upzoning needed to meet housing element law. Alternatively, citizens may obtain signatures for a referendum to overturn an adopted housing element or rezoning.

The California Supreme Court has called the initiative and referendum power "one of the most precious rights of our democratic process," which the courts "should protect and liberally construe."[25] Historically, the Court has consistently upheld the initiative and referendum power in the land use context.[26] As relevant here, the Supreme Court has upheld a voter-adopted initiative requiring voter approval of zoning changes,[27] and the Court of Appeal upheld a similar initiative requiring voter approval of amendments to the local coastal plan, even though the Coastal Act involves statewide interests, like housing element law.[28] In the most recent case, *City of Morgan Hill v. Bushey,*[29] the Court upheld a referendum even though it resulted in an inconsistency between the general plan and zoning.

Therefore, cities should not expect the courts to intervene to stop the adoption of initiatives requiring voter approval of upzoning or referenda on housing elements, unless, in the end, these result in a fatal conflict with state law. In at least two instances, superior courts have removed these citizen-adopted requirements when they have conflicted with state law. In 2010, the Alameda County Superior Court found that the voter-adopted growth limit in the City of Pleasanton could no longer accommodate the City's RHNA and found it preempted by state law.[30] In 2019, after voters failed to approve a housing element due in 2013 in elections held in 2016 and 2018, the San Diego Superior Court ordered the City of Encinitas to adopt a housing

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[24] *See* Liam Dillon, "Experts say California needs to build a lot more housing. But the public disagrees," *Los Angeles Times* (October 21, 2018).

[25] *California Cannabis Coalition v. City of Upland* (2017) 3 Cal. 5th 924, 928.

[26] *See Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal. 3d 582, 596.

[27] *See DeVita v. County of Napa* (1995) 9 Cal. 4th 763, 783.

[28] *See San Mateo County Coastal Landowners' Ass'n. v. County of San Mateo* (1995) 38 Cal. App. 4th 523, 536 fn.4, 538.

[29] 5 Cal. 5th 1068 (2018).

[30] *Urban Habitat Program v. City of Pleasanton,* Alameda County Superior Court Case No. RG06-293831, order filed March 12, 2010.

element without a vote.[31] However, plaintiffs in the suit initially attempted to stop the 2018 vote, and the court refused even though the element was five years late. Where voters make it impossible for cities to comply with state law, city attorneys can expect protracted litigation.

However, the Legislature may act to address these issues. Pending Senate Bill 330 (Skinner) would declare any requirement that voter approval be obtained to "increase the allowable intensity of housing, to establish housing as an allowable use, or to provide services and infrastructure necessary to develop housing" to be against public policy and void. Whether this provision, if adopted, would be consistent with the State Constitution's protection of the initiative power is an issue almost certain to be decided by the courts.

## VII. Conclusion

City attorneys should be prepared to assist local planning staff and decision-makers as they adjust to the new planning framework in California. Decision-makers and planners alike will be frustrated with the loss of local control and the strain on local resources required to comply with new laws.

City attorneys can assist local planning staff and decision-makers by encouraging them to strategically and proactively plan for targeted density - through strategic planning and the potential adoption of objective standards for multifamily housing. Establishing additional objective standards can lead to multifamily housing development that better meets the community's vision for future growth, at least from an aesthetic perspective, than simply relying on pre-existing objective standards, which likely were intended to establish minimum requirements as a prerequisite for a discretionary review process.

In addition, city attorneys likely will need to be more engaged in the housing element review process - and interactions with HCD - as staff struggles to find adequate sites that meet statutory requirements and comply with the new fair housing requirements for the sixth cycle. When preparing the site inventory, city attorneys and staff should be thinking ahead to ensure compliance with the No Net Loss requirements.

City attorneys can minimize legal exposure by educating staff and decision-makers about the limited scope of their authority with respect to discretionary approvals for housing development projects under the HAA. In addition, city attorneys should be prepared to proactively collaborate with planning staff to ensure that the city complies with the procedural requirements of the HAA and the No Net Loss provisions, especially the need to provide applicants with letters of inconsistency, monitor the city's remaining unmet RHNA need by income level, and prepare necessary findings for project approvals.

Despite all of this advice, the best advice we can provide to city attorneys and local planning staff alike is to stay informed about *further* changes in State law. There have already

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[31] *San Diego Tenants United v. City of Encinitas,* San Diego County Superior Court Case No. 37-2017-00013257-CU-WM-NC, order filed January 31, 2019.

been a myriad of bills introduced this year that would: create new streamlined approval processes for multifamily housing in transit-oriented and jobs-rich areas; potentially freeze development standards and development impact fees; and reduce local discretion further with respect to accessory dwelling units. Encouraging the development of housing remains a policy priority in Sacramento, and we anticipate that these laws will continue to change on an annual basis for some years to come.