Housing Bills Avalanche: Local Control and Changing HCD Role

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SB 330

Land Use and CEQA Litigation Update
Housing Bills Avalanche: Local Control and Changing HCD Role
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I. SUMMARY

A. Senate Bill 330

Senate Bill 330 (Skinner) (SB 330),[1] entitled the Housing Crisis Act of 2019 ("Act"), took effect on January 1, 2020 and adopts new permitting regulations for housing that limit public agencies' ability to deny housing developments. The Act will sunset January 1, 2025 unless extended by the Legislature.

The primary purpose of the bill is to expedite construction of new housing. The Legislature has declared that California needs an estimated 180,000 additional homes annually to keep up with population growth and that the Governor has called for 3.5 million new homes to be built over the next seven years (500,000 new homes annually). This substantially exceeds recent housing development in California, which has averaged less than 80,000 homes annually over the last ten years.[2] The consequences of providing inadequate housing has resulted in a lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, air quality deterioration, and increasing greenhouse gas emissions from longer commutes to affordable homes far from growing job centers. (Gov. Code, § 65589.5; HCD Final Statewide Housing Assessment.) To accomplish the goal of expediting housing development, SB 330 creates a number of new procedures and legislative limitations on municipalities.

SB 330 precludes amending development regulations to a less intensive residential use in comparison to those in place on January 1, 2018. However, there are several exceptions to this limitation, including concurrently adopted changes that ensures there is no net loss in residential capacity.

SB 330 also prohibits enactment of a law "establishing or implementing any provision that: (i) limits the number of land use approvals or permits necessary for the approval and construction of housing that will be issued or allocated within all or a portion of the ... city," (ii) "acts as a cap on the number of housing units that can be approved or constructed either annually or for some other time period," or (iii) limits the population of the affected city. (Gov. Code, § 66300(b)(1)(D).)

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[1] Senate Bill 330 complete text: https://leginfo.Legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB330.

[2] HCD Final Statewide Housing Assessment 2025: https://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf.

Where housing is an allowable use, cities are prohibited from enacting a law[3] that would have the effect of "imposing a moratorium or similar restriction or limitation on housing development" except to protect against an imminent threat to the health and safety of persons in the area.

There are several administrative actions that cities will need to take in the short term to implement SB 330's new provisions. These include (1) preparation of a new preliminary application process (Section II.E), (2) an updated development application process (Section II.F and II.G), and (3) historic resource determinations (Section II.I).

II. SB 330 Requirements

A. Background of SB 330

SB 330 amends the State Housing Accountability Act (Gov. Code, § 65589.5) and adopts new Government Code sections to create new permitting regulations for housing that limit public agencies' ability to deny housing developments. SB 330 was approved by the Governor on October 9, 2019 and took effect on January 1, 2020, with most of the bill set to expire on January 1, 2025, unless extended by the Legislature.

In enacting SB 330, the Legislature formally declared there is a statewide housing emergency. The Legislature further declared that in light of the severe shortage of housing at all income levels in the state, providing adequate housing is a matter of statewide concern such that SB 330 applies to all cities, including charter cities and counties (collectively "cities"). SB 330 is intended to be broadly construed to maximize the production of housing with exceptions limiting housing construed narrowly. (Gov. Code, § 66300(f)(2).)[4]

SB 330's requirements generally apply to "housing development projects," which include residential projects, mixed use projects where at least two thirds of the square footage is designated for residential use, and transitional housing[5] and

[3] This includes general plan amendments, specific plan amendments, zoning amendments, or a subdivision standard or criterion. (Gov. Code, § 66300(a)(5).)
[4] In addition, none of the provisions in Government Code section 66300 are to be construed to limit or prohibit a development policy that allows greater density, facilitates housing development, reduces housing costs or imposes/implements mitigation measures pursuant to CEQA. (Gov. Code, § 66300 (f)(3).)
[5] "Transitional housing" means buildings configured as rental housing developments, but operated under program requirements that require the termination of assistance and recirculating of the assisted unit to another eligible program recipient at a predetermined future point in time that shall be no less than

supportive housing.[6] (Gov. Code, § 65589.5(h)(2).) Many of the new substantive limits also apply to voter sponsored initiatives. (Gov. Code, § 66300(a)(3).) The following sections summarize the key components of SB 330.

B. Moratorium Limits

SB 330 creates new procedures that are applicable to a "moratorium or similar restriction or limitation on housing development, including mixed-use development..." (Gov. Code, § 66300(b)(1)(B)(i).) Moratoria generally refers to a temporary ban on types of development or land uses. Specifically, where housing is an allowable use, a city is prohibited from enacting a "development policy, standard or condition"[7] that would have the effect of "imposing a moratorium or similar restriction or limitation on housing development ... other than to specifically protect against an imminent threat to the health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium ... " (*Id.*) While "imminent threat" is not defined in SB 330, imminent is generally defined as "likely to occur at any moment, impending," "ready to take place: happening soon; menacingly near," or "threatening to occur immediately; dangerously impending."[8] This provision is more stringent than the existing moratorium provision under Government Code section 65858(c),[9] which requires a finding that "there is a current and immediate threat to the public health, safety or welfare... . "

Such a moratorium or similar restriction on housing development is not enforceable until it has first been submitted and approved by the California Department of Housing and Community Development (HCD). If HCD does not approve the moratorium, the moratorium is deemed void. (Gov. Code, § 66300(b)(1)(B)(ii).)

C. Limitations on Regulations for Housing Permits

SB 330 prohibits enactment of "a development policy, standard or condition ... establishing *or implementing* any provision that: (i) limits the number of land use

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six months from the beginning of the assistance. (Gov. Code, §§ 65582(j), 62253; Health & Saf. Code, §§ 50675.2(h), 50801(i).)

[6] "Supportive housing" means housing with no limit on length of stay, that is occupied by the target population, and that is linked to onsite or offsite services that assist the supportive housing resident in retaining the housing, improving his or her health status, and maximizing his or her ability to live and, when possible, work in the community. (Gov. Code, § 65650; Health & Saf. Code, § 50675.14(b)(2).)

[7] "Development policy, standard or condition" includes general plan amendments, specific plan amendments, zoning amendments, or a subdivision standard or criterion. (Gov. Code, § 66300(a)(5).)

[8] https://www.dictionary.com/browse/imminent?s=t.

[9] See also Government Code, §§ 36934, 36937.

approvals or permits necessary for the approval and construction of housing that will be issued or allocated within all or a portion of the...city," (ii) "acts as a cap on the number of housing units that can be approved or constructed either annually or for some other time period," or (iii) limits the population of the affected city. (Gov. Code, § 66300(b)(1)(D).) There are certain limited exceptions to this new prohibition including regulations adopted before 2005 where the city is located in a "predominantly agricultural county" as defined in Government Code section 66300(b)(1)(E).[10]

D. Legislative Limits on Reducing Residential Density Below that Allowed on January 1, 2018

Where housing is an allowable use, SB 330 generally precludes cities from amending their general plan/specific plan land use designations or zoning to a *less intensive use* in comparison to those in place on January 1, 2018. "*[L]ess intensive use*" includes, but is not limited to, reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or anything that would lessen the intensity of housing." (Gov. Code, § 66300(b)(1)(A).)

There are exceptions to this limitation, including (1) concurrently adopted changes in other development standards, ensuring no net loss in residential capacity, and (2) amendments to mobilehome park standards. (See Gov. Code, § 66300(i).)

E. New Preliminary Application Process and Prohibition on Applying New Fees and Exactions after Submittal

Cities are required to create a preliminary application checklist or to utilize a standardized checklist prepared by HCD. (Gov. Code, § 65941.1(b)(2).) The checklist can only include the information provided in Government Code sections 65941.1(a) (1) – (17). Cities may not require any additional information in the

[10] Government Code section 66300(g) also states that this section "shall not be construed to void a height limit, urban growth boundary, or urban limit established by the electorate, provided [the regulations are not less intense than the development limits in place on January 1, 2019]." See also Government Code section 66300 (f)(4) excluding housing development projects in very high fire hazard severity zones.

preliminary application. (Gov. Code, § 65941.1(b)(3).) HCD has prepared standardized checklist that is now posted on its website.[11]

This preliminary application is a new first step in the planning process, to be followed by the development application process already required under Government Code §§ 65940, 65941, 65941.1(d)(1), 65941.5.) Cities are not required to provide an affirmative determination regarding completeness of a preliminary application. (Gov. Code, § 65941.1(d)(3).)

SB 330 precludes cities from applying any new "ordinances, policies or standards" adopted after submittal of the preliminary application for a housing development project. (Gov. Code, § 65589.5(o)(1).)[12] "[O]rdinances, policies, and standards" includes general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency, as defined in Government Code section 66000, including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions. (Gov. Code, § 65589.5(o)(2)(E)(4).)

These limitations under Government Code section 65589.5(o)(1) overlap in part with the new limitations under Government Code section 66300(b)(1)(A). As discussed in Subsection II.D, *supra*, cities may not implement regulations with less intense uses than those in place on January 1, 2018, including reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations ..." The primary distinction being that Government Code section 65589.5(o)(1) also applies to *fees and charges* including "development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions," which are not addressed by the January 1, 2018 development regulation freeze under Section 66300(b)(1)(A).

This project-specific freeze under Government Code section 65589.5(o)(1) is not applicable (1) to automatic annual adjustments in existing fees which are "based on an independently published cost index" (Gov. Code, § 65589.5(o)(2)(A)), (2) to measures which mitigate or avoid a specific, adverse impact upon the public health

[11] HCD checklist: https://hcd.ca.gov/community-development/accountability-enforcement/docs/sb%20330%20preliminary%20application%20%20form_final.pdf.

[12] If the applicant revises the project's residential density or square footage by 20% or more, the project will not have the benefits of the previously submitted preliminary application and will have the resubmit to reflect the revisions. (Gov. Code, § 65941.1(c).)

or safety (Gov. Code, § 65589.5(o)(2)(B)), (3) to measures to mitigate an impact under CEQA (Gov. Code, § 65589.5(o)(2)(C)), or (4) if more than two and a half years have passed since the final approval of the project (Gov. Code, § 65589.5(o)(2)(D)).

F. New Development Application Requirements

In addition to the creation of the preliminary application process discussed in the Subsection II.E, *supra*, cities are required to update their development application contents to include the information necessary to determine compliance with Government Code section 66300(d). (Gov. Code, § 65940(a)(2).)

This primarily affects projects involving the demolition or removal of existing housing, including, but not limited to, information on the number of dwelling units being removed, whether any dwelling units meet the definition of a "protected unit" (Gov. Code, § 66300(d)(2)(E)(ii)), whether any dwelling units were subject to rent or price control, and whether any dwelling units are for rent. SB 330 does not provide an explicit checklist; consequently, cities may wish to request information as follows:

> *Any information necessary to determine compliance with Government Code § 66300(d), including, but not limited to, information on the number dwelling units being removed if any, whether any dwelling units meet the definition of a "protected unit" (Gov. Code, § 66300(d)(2)(E)(ii)), whether any dwelling units were subject to rent or price control, and whether any dwelling units are for rent.*

The primary purpose of this question is to assess applicability of relocation benefits and right of first refusal outlined below in Subsection II.K.

Additionally, applicants are required to submit this development application within 180 calendar days from submittal of the preliminary application. (Gov. Code, § 65941.1(d)(1).)

G. SB 330 Requires Cities to Provide a List of Missing Information for All Development Applications Deemed Incomplete

SB 330 requires cities to determine the completeness of a development application within 30 days based upon the specific contents of the application, rather than information deemed relevant by the individual planner. (Gov. Code, § 65943(b).) If a city does not make this determination within 30 days, the application is automatically deemed complete.

If a project application submitted pursuant to Government Code section 65940 is determined to be incomplete, the city is required to provide the applicant with a list of items that were not complete. (Gov. Code, § 65943.)

The list must be limited to those items actually required on a city's submittal requirement checklist. (Gov. Code, §§ 65943(a) and (b).) Subsequent review of materials submitted by an applicant in response to an incomplete determination must be made within 30 days of submittal, or the application is deemed complete. Furthermore, the local agency shall not request that the applicant provide any new information that was not stated in the initial list of items that were listed as incomplete. SB 330 now also requires cities to make applications for housing developments available on their websites. (Gov. Code, § 65943(f).)

H. Prohibition on New Subjective Design Standards for Housing Development Projects

The 2018 State Housing Accountability Act limits the ability of a city to deny housing projects based upon subjective standards if a city has not yet met its regional housing needs allocation (RHNA). (Gov. Code, § 65589.5(d)(2).)[13]

However, SB 330 amends the Government Code to also state that a "city *shall not enact a* development policy, standard, or condition that would have any of the following effects ... imposing or enforcing design standards established on or after January 1, 2020, that are not objective design standards," regardless of whether the City has met its RHNA. (Gov. Code, § 66300(b)(1)(C), emphasis added.) Objective design standards are defined as "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code, §§ 66300(a)(7), 65589.5(h)(8).)

I. Historic Resource Determination

The new provisions under Government Code section 65913.10(a) require cities to "determine whether the site of a proposed housing development project is a historic

[13] Existing State Housing Accountability Act finding requirement: A local agency shall not disapprove a housing development project...unless it makes findings as to one of the following...(1) the jurisdiction has met or exceed its regional housing need allocation, or (2) ... the housing development project ... would have "specific, adverse impact" which "means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (Gov. Code, § 65589.5(d)(2).)

site...at the time the application...is deemed complete." This is *not* referring to the date of the "preliminary application," rather, this is referring to the traditional pre-existing development application process contemplated under Government Code section 65940. (Gov. Code, § 65913.10(b)(1).) This determination shall remain valid throughout the entitlement process unless new resources are encountered during grading, site disturbance, or building alteration activities. (Gov. Code, § 65913.10(a).)

To help expedite this determination, a city will receive some historic information early on in the process through the preliminary application materials, which are required to provide information on "Any historic or cultural resources known to exist on the property." (Gov. Code, § 65941.1(a)(9).)

Other subsections of SB 330 state that "nothing in this section supersedes, limits, or otherwise modifies the requirements of...[CEQA]." (Gov. Code, § 65913.10(c)(1).) It is unclear whether the historic resource finding under Government Code section 65913.10(a) is intended to preempt the historic resource findings under CEQA. This issue was also raised as a point of concern by numerous non-profit organizations.[14]

J. No More than Five (5) Hearings on a Housing Development Project

Significantly, Government Code section 65905.5(a) limits cities from conducting "more than five hearings" on a housing development project that complies with applicable objective standards after an application has been deemed complete under Government Code section 65940. A city is required to make a decision approving or disapproving a project by the end of the fifth hearing. (*Id.*)

"Hearing" includes any public hearing, workshop, or similar meeting, held by a city council, planning commission, or other departments. (Gov. Code, § 65905.5(b)(2).) If a city continues a hearing, the continued hearing counts as one of the five hearings. (Gov. Code, § 65905.5(a).) It is unclear whether an appeal hearing would

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[14] https://laconservancy.tumblr.com/post/187538638850/action-alert-senate-bill-330-threatens-historic ["With streamlining as its intent, SB 330 makes assumptions and imposes limitations that will put historic resources at risk. Because most historic resources are not formally designated or landmarked, potential resources could be missed or omitted during the accelerated approval process. Without a safeguard in place, historic places would be in jeopardy. [¶] SB 330 should clarify that streamlining the process does not eliminate the obligation of a local government to assess impacts on historic resources under their own ordinances or the California Environmental Quality Act (CEQA), even when a resource is not identified until later. Thank you and please do not support SB 330 unless there are adequate safeguards for California's historic resources."]

be counted as a hearing under this new provision. Consequently, a city may want to ensure that any approvals from non-elected bodies, such as planning commission are approved by the fourth hearing.

This five-hearing limit is not applicable to projects that are requesting legislative approvals, such as general plan, specific plan, or zoning amendments, or appeals of such amendments. (Gov. Code, § 65905.5(a) and (b)(2).)

K. Relocation Benefits and Right of First Refusal for "Protected Unit" Occupants

As discussed above in Subsection II.F, *supra,* development applications must now include information on whether existing development includes protected units.

Any project that includes the removal or demolition of a "protected unit" (Gov. Code, § 66300(d)(2)(E)(ii)) is required to provide the occupants with (1) relocation benefits (Gov. Code, § 7260 et seq.), and (2) right of first refusal for a comparable unit available in the new housing development. (Gov. Code, § 66300 (d)(2)(D).) "Protected units" are generally defined by Government Code section 66300(d)(2)(E)(ii) as including residential units subject to affordability restrictions, price controls, or occupied by low income households. Consequently, any projects meeting these requirements should be conditioned upon compliance with these provisions.

L. Changes to Permit Streamlining Act Deadlines

SB 330 reduces the time period in which a city is required to approve or disapprove a development project that is subject to the Permit Streamlining Act from 120 days to 90 days from certification of an environmental impact report (Gov. Code, § 65950(a)(2)) and from 90 days to 60 days, for a development project that is at least 49% affordable units (Gov. Code, § 65950(a)(3)(A)). These provisions of SB 330 do not preclude a project applicant and a city from mutually agreeing in writing to an extension of these time limits. (Gov. Code, § 65950(b).)

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Housing Bills Avalanche:
Local Control and Changing HCD Role

Recent Changes to ADU and Density Bonus Law

City Attorneys Department October 2020

Presented by: Jon E. Goetz
Meyers Nave

1. Summary of Recent Legislation Relating to Accessory Dwelling Units (ADUs)

The Legislature approved a number of bills in 2019 (SB 13, AB 68, AB 587, AB 670, AB 671 & AB 881) that are intended to facilitate the development of accessory dwelling units ("ADUs") by significantly limiting how ADUs may be reviewed and restricted. These laws are part of the Legislature's ongoing effort to address California's housing crisis and increase the supply of housing units.

These bills do three things:

(1) limit a city's review of ADUs by expanding ministerial approvals of building permits;

(2) limit the requirements a city may impose on ADUs; and

(3) create a greater role in oversight of local ordinances by the state Department of Housing and Community Development.

These provisions sunset in 2025.

Pre-2020 state law requires cities to approve ministerially, without discretionary review or hearing, a building permit application to create an ADU within an existing single-family home. The new state law expands the types of ADUs that must be ministerially approved through a building permit application (and, in some instances, requires approval of multiple ADUs), as follows:

AB 881: ADU Standards, Restrictions, Permitting.[1]

This is the main bill revising ADU requirements. It has three main components: (1) requirements for the City's ADU ordinance; (2) required ministerial approval of certain ADUs in residential and mixed use areas; and (3) a greater role in oversight of local ordinances by the state Department of Housing and Community Development.

1. Requirements for the ADU ordinance:

- *Designated areas* – A local ADU ordinance must designate which residential areas are zoned to allow ADUs. While local agencies have been allowed to designate these zones based on any criteria, now designation will be based only on adequacy of water and sewer services, and the impact of ADUs on traffic flow and public safety. (65852.2(a)(1)(A).)

[1] SB 13, AB 68 and AB 881 all amended the same code section related to ADUs (Government Code section 65852.2); two of the bills contain multiple versions of the same section. All three bills were enacted, but because AB 881 was chaptered last, its versions of section 65852.2 govern. Specifically, the operative versions of section 65852.2 are contained in AB 881 sections 1.5 (effective Jan. 1, 2020) and 2.5 (effective Jan. 1, 2025). This memo covers only the provisions that are effective as of Jan. 1, 2020 and not the provisions that go into effect in 2025.

- *Size limitations* – Cities will no longer be able to impose a restriction on minimum lot size for properties seeking an ADU. (6582.2(a)(1)(B)(i).) While before the total floor area of an ADU was limited to 50 percent of the existing *or* proposed primary residence, this restriction now will only apply to existing primary residences. (65852.2(a)(1)(D)(iv).) Otherwise, for attached and detached ADUs, cities may establish minimum and maximum unit size requirements, so long as the minimum square footage allows for efficiency units and the maximum is at least 850 square feet (or 1,000 square feet for more than one bedroom). (65852.2(c)(3)(C).) Any other size limitations on lot coverage, floor area ratios, or open space must allow, at minimum, for a 800 square foot ADU that is 16 feet in height. (*Id.*)

- *Owner-occupancy* – Cities may no longer require that an ADU permit applicant be an owner-occupant of the property. (65852.2(a)(6).)

- *Location* – ADUs can now be attached to new or existing multi-family dwellings, and are no longer limited to property with a single-family dwelling. (65852.2(a)(1)(D)(ii).) Also, before ADUs within a primary residence were limited to "living areas" in the residence; ADUs are now allowed anywhere in the primary residence, including in attached garages, storage areas, and accessory structures. (65852.2(a)(1)(D)(iii).)

- *Parking* – When a parking structure is converted to an ADU or demolished to build one, the City was previously allowed to require the parking to be replaced. It can no longer require this. (65852.2(a)(1)(D)(xi).)

- *Setbacks* – Setback requirements have been lowered from 5 feet to 4 feet for new ADU structures that are not built to replace an existing structure. (65852.2(a)(1)(D)(vii).) No setbacks are required for any existing living area, accessory structure, or new structure built in the same location and to the same dimensions as an existing structure converted to an ADU. (65852.2(a)(1)(D)(vii).) This no-setback rule was limited to converted garages before.

- *Fire sprinklers* – ADUs shall not be required to have fire sprinklers if the primary residence is not required to have them. (65852.2(a)(1)(D)(xii).)

- *Permitting Timeline* - The time for the City to approve an ADU or junior ADU permit application (without discretionary review or a hearing) has been cut from 120 days to 60 days for lots with existing dwellings. (65852.2(a)(3); (65852.2(b).) The statute now allows cities to delay review of an ADU or junior ADU permit application if it is submitted with a permit application for a new primary dwelling. (*Id.*) The ADU or junior ADU permit application is still reviewed ministerially, but can be delayed until the city acts on the primary residence application. (*Id.*) Also, no other ordinance, policy, or regulation can be the basis to deny or *delay* a permit application's approval. (65852.2(a)(5).)

2. Required Ministerial Approval

In addition, the City must now ministerally approve building permit applications to create ADUs in residential or mixed-use zones that meet certain requirements:

- One ADU or junior ADU that is within an existing or proposed single-family dwelling or accessory unit (and that would not require expanding the accessory unit by 150 feet), so long as it has exterior access and meets setback requirements. (65852.2(e)(1)(A).)

- One detached new construction ADU, along with a junior ADU, on a lot with a single-family property, so long as the ADU does not exceed a four-foot setback. (65852.2(e)(1)(B).) The City may require the ADU to be no more than 800 square feet in area and 16 feet in height. (65852.2(e)(1)(B).)

- Multiple ADUs within areas of existing multi-family dwellings that are not used as living space, so long as the ADUs comply with state building standards for dwellings. (65852.2(e)(1)(C).) The number of ADUs allowed will be at least one, but up to 25 percent of the number of existing multifamily units on the property. (*Id.*)

- Up to two detached ADUs on a property with an existing multifamily unit dwelling. (65852.2(e)(1)(D).)

As a condition of permit approval, the City cannot require that the property correct nonconforming zoning conditions. (65852.2(e)(2).) It must require that the ADU be rented out for at least 30 days. (65852.2(e)(4).) The fee provisions have also been tweaked slightly.

3. State Oversight

Cities must still submit their ADU ordinances to the Department of Housing and Community Development for review. However, now, the Department may issue findings regarding the ordinance's compliance with state law that the City must review and either adopt or explain why it is rejecting. (65852.2(h).) If it ignores the Department's findings, the Department may refer the matter to the Attorney General's office.

AB 68: Junior ADU Standards.

The Government Code currently allows, but does not require, a city to adopt an ordinance allowing for junior ADUs (dwellings of 500 feet and contained in a single-family home). Even if a city has not approved such an ordinance, it will still be required to approve ministerially any junior ADU permit application that meets the minimum requirements in the Government Code. Approval must take place within 60 days of the application being submitted, though the city may delay this review if the application is submitted along with an application for a new primary residence.

SB 13: Code Enforcement.

This bill adds a notice requirement for code enforcement on ADU units, allowing the owner to request a delay in enforcement based on changing ADU standards. The code enforcement agency has discretion to grant delays based on health and safety risks.

AB 587: Conveyance of ADUs.

Cities may now adopt an ordinance that allows, under certain conditions, the sale or conveyance of an ADU separate from the primary residence. The bill creates an exception to the current prohibition on this sale or conveyance found in Government Code section 65852.2(a)(1)(D)(i). To be separately conveyable, the ADUs must meet the following conditions:

(1) The property was built or developed by an nonprofit corporation for sale to low-income families (meeting the welfare exemption in the Revenue and Tax Code);

(2) The property is subject to an enforceable restriction, through a recorded contract between buyer and seller, that the land be used for affordable housing;

(3) The property is held pursuant to a recorded tenancy in common agreement;

(4) A grant deed be recorded and a Preliminary Change of Ownership Report be filed; and

(5) The ADU has a separate water, sewer, or electrical connection from the primary residence, if requested by a utility serving the primary residence.

AB 670: HOA Restrictions.

This bill makes void and unenforceable any covenants, restrictions, conditions, or HOA governing document provisions that prohibit or unreasonably restrict the construction or use of ADUs and junior ADUs in planned developments. Restrictions are allowed that do not unreasonably add to the cost of construction or effectively prohibit construction of ADUs and junior ADUs.

AB 671: General Plan Amendments.

This bill is a limited amendment to the general plan housing element requirements in Government Code section 65583 requiring housing elements to include a plan to incentivize and promote ADUs. The bill also requires the California Department of Housing and Community Development to post a list of state grants available to property owners to develop ADUs.

Comparison of Pre-2020 and Post-2020 ADU Requirements:

Pre-2020 State Law	State law as of Jan. 1, 2020	Gov. Code
Cities must ministerially approve a building permit application to create an ADU in a zone for single-family use: One ADU (per lot) if the ADU (1) is contained within the existing space of a single-family residence or accessory structure, (2) has an independent exterior access from the existing residence, and (3) the side and rear setbacks are sufficient for fire safety.	City must ministerially approve a building permit application to create, in residential and mixed-use zones, the following: (1) *Interior/Existing Structure, Single-Family*: One ADU or junior ADU (per lot) that is within a proposed single-family dwelling or within an existing single-family dwelling or accessory structure (the structure may be expanded by 150 feet to allow ingress and egress). Approval is required if the ADU has exterior access and has side and rear setbacks "sufficient for fire and safety." If the unit is a junior ADU, it must also meet the requirements of section 65852.22. (2) *Detached, Single-Family*: One detached, new construction ADU per lot with an existing or proposed single-family dwelling that has four-foot rear and side setbacks. The only conditions the city may impose on the detached ADU are a floor area limit of 800 square feet, and a height limit of 16 feet. ***Note***: The detached ADU may be combined with a ministerially approved junior ADU unit described above (within a proposed single-family home or an existing structure), creating a triplex. (3) *Interior, Multi-Family*: Multiple ADUs created within areas of existing multi-family dwellings that are not used as living space, if the ADUs comply with state building standards for dwellings. The number of ADUs allowed will be at least one and up to 25% of the number of existing multifamily units on the property. (4) *Detached, Multi-Family*: Up to two detached ADUs on a property with an existing multi-family unit dwelling, if the ADUs have a height limit of 16 feet and 4 foot rear and side setbacks.	65852.2(e)(1)(A)-(D)
Cities may adopt an ordinance allowing for junior ADUs, which are units of 500 square feet or less contained entirely within single-family residences.	Cities may adopt a junior ADU ordinance, but even if it has not adopted one, it must ministerially approve any permit application for a junior ADU that meets the standards in Government Code section 65852.22. The City may charge a fee for costs to issue junior ADU permits.	65852.22 (g); see also 65852.2(e)(1)(A)

The ordinance must include standards set out in the Government Code.		
Cities have 120 days to consider an ADU permit application and must do so ministerially (without discretionary review or hearing).	For any ADU or junior ADU permit application on a lot with an existing single- or multi-family dwelling, cities have 60 days to consider and approve the application and must do so ministerially, without discretionary review. The City must extend this timeline if an applicant requests a delay. For an application submitted with a permit application to create a new single-family residence, the City may delay review of ADU application until it has reviewed the primary residence application. The ADU application is still reviewed ministerially.	65852.2(a)(3)

Subject	Pre-2020 state law	State law as of Jan. 1, 2020	Reference (Gov. Code)
Location	Cities may adopt an ordinance that provides for the creation of ADUs and designates zones where ADUs are allowed. Designation may be based on any criteria, including adequacy of water and sewer services, and impact of ADUs on traffic flow and public safety.	In designating zones (and restricting where ADUs are allowed), the only factors a city may consider are adequacy of water and sewer services, and impact of ADUs on traffic flow and public safety. If a city does not provide water or sewer services, it must consult with local water or sewer services provider before designating.	65852.2(a)(1)(A)
SF vs. MF	Cities must require ADUs to be on a lot with an existing or proposed single-family dwelling	Cities must require ADUs to be on a lot with an existing or proposed single or multi-family dwelling	65852.2(a)(1)(D)(ii)
Standard Imposed	City may impose standards "that include but are not limited to parking, height, setback, lot coverage landscape, architectural review, maximum size of unit, and standards that prevent adverse impacts on real property that is listed in the California Register of Historic Places."	City ordinance may impose same categories of standards, except: - City may not require a minimum lot size - Lot coverage standards are not authorized. (Per Government Code § 65852.2(a)(6), these remain the "maximum standards," and a city may not impose any "additional standards.")	65852.2(a)(1)(B)(i)
Size of ADU vs. Main Unit	Total floor area of an attached ADU is limited to 50 percent of the primary residence.	This restriction applies only to attached ADUs created within existing primary residences.	65852.2(a)(1)(D)(iv)
Min. & Max. Size Limits	City may set minimum and maximum floor area, provided: - allows for at least an efficiency unit	City may set minimum and maximum floor area, provided: - minimum size cannot prohibit efficiency units (unchanged) - maximum of 1,200 SF for a detached ADU (unchanged)	65852.2(a)(1)(D)(v); 65852.2(c)(2)

	- maximum of 1,200 SF for a detached ADU.	- maximum area must be at least 850 SF for studio or one-bedroom. - maximum area allowed must be at least 1,000 SF for two or more bedrooms. - No other standards (e.g., lot coverage) shall have the effect of prohibiting any 800 SF ADU that is 16 feet in height and meets 4 foot setback.	
Setbacks for Conversions	City cannot require setback to convert garage into an ADU.	City cannot require a setback to convert into an ADU (1) an existing living area, (2) accessory structure, or (3) a structure constructed with same dimensions and location as an existing structure. ("Existing living area" and "accessory structure" are defined terms.)	65852.2(a)(1)(D)(vii)
Setbacks for New Construction	City cannot require more than 5-foot rear and side setbacks for ADU constructed above garage.	City cannot require more than 4 foot rear and side setbacks for any new ADU construction (not including an ADU constructed with the same dimensions and location as an existing structure, which has no setback requirement).	65852.2(a)(1)(D)(vii)
Parking	City may require owner to replace off-street parking demolished in ADU conversion or construction by moving it elsewhere on lot.	City may no longer require replacement of parking demolished in conversion or construction of an ADU.	65852.2(a)(1)(D)(xi)
Parking for Transit Adjacent Projects	City may not impose parking standards on ADUs meeting certain criteria, including ADUs located within one-half mile of public transit.	Same public transit exemption applies, except: - ADU is located within one-half mile walking distance of public transit - "Public transit" is defined to mean "a location . . . where the public may	65852.2(d) 65852.2(j)(10)

		access buses, trains, subways, and other forms of transportation that charge set fares, run on fixed routes, and are available to the public."	
Fees	None	City may charge a fee to reimburse it to review permit applications.	65852.2(a)(3)
	None	City may not impose any impact fee on the development of an ADU less than 750 SF. Fees for ADUs larger than 750 SF shall be proportional to square footage. "Impact fee" includes development application fees in Government Code §66000(b) and park dedication fees in §66477.	65852.2(f)(3)
Number of ADUs on a Lot	(New)	In some instances, City must ministerially approve two and more ADUs per lot	65852.2(e)(1)
Non Conformance with zoning	(New)	City cannot require, as a condition of ministerial approval of permits for an ADU or junior ADU, the correction of "nonconforming zoning conditions." This is defined to mean a "physical improvement on the property that does not conform with current zoning standards."	65852.2(e)(2) 65852.2(j)(7)
Rental Requirements	(New)	City must require that an ADU (falling within the ministerial building permit approval process) be rented out for at least 30 days.	65852.2(e)(4)
Cert of Occupancy	(New)	City may not issue a certificate of occupancy for an ADU before it issues a certificate of occupancy for the primary dwelling.	65852.2(k)

Location in Residence	ADUs created within a primary residence are limited to "living areas" in the residence.	ADUs are now allowed anywhere in the primary residence, including in attached garages, storage areas, and accessory structures.	65852.2(a)(1)(D)(iii)
Owner Occupancy	Cities may require that an ADU permit applicant be an owner-occupant of the property	City may no longer require this.	65852.2(a)(6)
Water Percolation Test	(New)	City may require, as part of a permit application for an ADU connected to an onsite water treatment system, a percolation test completed within the last five years, or, if the percolation test has been recertified, within the last 10 years.	65852.2(e)(5)
	City ordinance must prohibit the sale or conveyance of an ADU separate from the primary dwelling.	City may now create a limited exception, by ordinance, for property built or developed by an nonprofit corporation for sale to low-income families and that is subject to several enforceable restrictions.	65852.26. (a) see also 65852.2(a)(1)(D)(i)

2. Summary of Recent Legislation Relating to Density Bonus Law

AB 1763. This legislation from 2019 provides for an 80% density bonus to be granted to 100% affordable housing projects, the largest density bonus ever required under California law. The legislation also requires other benefits to be provided to 100% affordable projects, allowing them to be built denser and taller than allowed under prior law. The changes will be particularly helpful to affordable housing projects qualifying for federal and state low income housing tax credits, which are usually completely affordable. AB 1763 changes the state density bonus law in three ways:

a. Higher Density Bonus.

- For housing projects where all of the units are affordable to low, very low and moderate income residents (with up to 20% moderate), AB 1763 more than doubles the state-required density bonus to 80%.

- Before AB 1763, California's density bonus law (California Government Code Sections 65915 – 65918) focused primarily on projects with a mix of affordable and market rate housing, providing developers up to a 35% increase in project densities, set on a sliding scale based on the amount of affordable housing provided.

- The 80% density bonus represents the first time the Legislature has specifically tailored a density bonus to completely affordable housing projects, and the first time it has allowed owners to meet affordable rent requirements with the maximum rents allowed under the low income housing tax credit program.

- If the project is located within a half mile of a major transit stop, AB 1763 goes even further by eliminating all local government limits on density, and allowing a height increase of up to three stories or 33 feet.

b. Additional Incentives and Concessions.

- In addition to the density bonus itself, California's density bonus law provides developers with "incentives" and "concessions" to help make the development of affordable and senior housing more economically feasible, such as reduced setback and minimum square footage requirements as requested by the developer, and financial benefits at the option of the local government.

- Most projects qualifying for a density bonus are entitled to one to three incentives and concessions, depending on the amount of affordable units provided. AB 1763 provides a fourth incentive and concession to 100% affordable projects.

- The city is required to grant the applicant's proposed concession or incentive unless it would not reduce project costs, would cause public health or safety or environmental problems, would harm historical property, or would be otherwise contrary to law.

- Qualifying developers are entitled to incentives and concessions even without a request for density bonus units.

c. Parking Options.

- California's density bonus law also sets special parking ratio requirements for qualifying projects, ranging from one space for one bedroom units to two and one-half spaces for four bedroom units, which can be much lower than local parking standards require.

- Lower parking standards apply for density bonus projects adjacent to transit. For housing projects that qualify as a special needs or supportive housing development, AB 1763 completely eliminates all local parking requirements.

- Reductions in required parking can often be controversial for proposed housing projects, but they can lead to large savings in land costs for those projects.

AB 2345. This 2020 legislation continues the Legislative trend of expanding the benefits of the density bonus law. AB 2345 increases the maximum density bonus for mixed income housing projects from 35% to 50%, and reduces the parking requirements for two and three bedroom units in density bonus projects from 2 to 1 ½ spaces per unit.

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Housing Bills Avalanche:
Local Control and Changing HCD Role

Is There A Duty To Defend
A Local Initiative Growth Management Measure

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1. Introduction.

On October 9, 2019, Governor Newsom signed Senate Bill 330 ("SB 330") into law, effective as of January 1, 2020. Many City Attorneys have concluded that SB 330 likely preempts their cities' growth management ordinances and programs for the next five years while the bill is in effect, and in effect prohibits cities and counties from implementing certain limits on the number of residential permits issued through January 1, 2025.

Because many cities' growth management ordinances were adopted by voter initiative, cities will be required to consider whether and to what extent the law requires them to continue to enforce and even defend those initiative measures in the face of SB 330's apparently preemptive provisions, and whether those cities must initiate declaratory relief litigation to have a court resolve the conflict. This paper addresses those issues, and concludes that the law likely does not impose such a duty.

2. SB 330's limitations on local growth management.

Senator Nancy Skinner authored SB 330, the "Housing Crisis Act of 2019," to "suspend certain restrictions on the development of new housing during the period of the statewide emergency" through January 1, 2025 stemming from the lack of housing supply throughout the state. (SB 330, Section 2, subsection (c).) The legislation makes numerous changes to the requirements for how residential development projects are reviewed and processed. It also places specific limitations on housing permitting in "affected" cities and counties, where the housing shortages are most severe. (Gov. Code § 66300(a).)

An "affected city" means a city that "the Department of Housing and Community Development [("HCD")] determines . . . is in an urbanized area or urban cluster, as designated by the United States Census Bureau." (*Id.* at § 66300(a)(1)(A).) HCD was directed to prepare a list of affected cities no later than June 30, 2020. (*Id.* at § 66300(e).)[1] The new Government Code Section 66300(b)(1)(D) prohibits an affected city from implementing any provision that:[2]

[1] HCD published lists of affected cities and affected counties on December 27, 2019. HCD's determinations are available on the Department's website here: https://hcd.ca.gov/community-development/accountability-enforcement/statutory-determinations.shtml.

[2] SB 330 includes limited exceptions to the prohibition on enforcing limits on the number of approvals or permits or housing unit caps. (Gov. Code §§ 66300(b)(1)(E), 66300(f)(4).) An affected city may still enforce such limits if the "law imposing the limit was approved by voters prior to January 1, 2005, and the affected county or affected city is located in a predominantly agricultural county." (*Id.* at § 66300(b)(1)(E).) SB 330 defines "predominantly agricultural county" to mean "a county that meets both of the following, as determined by the most recent California Farmland Conversion Report produced by the Department of Conservation: (i) [h]as more than 550,000 acres of agricultural land; and (ii) [a]t least one-half of the county area is agricultural land." (*Id.*) In addition, none of the

(1) Limits the number of land use approvals or permits necessary for constructing housing;

(2) Caps the number of housing units that can be approved or constructed; or

(3) Limits the population.

3. Although California voters have the right to adopt legislation by initiative that is protected by the State Constitution and is "jealously guarded" by the courts, the state legislature has the authority to preempt local land use laws.

The California Constitution provides initiative and referendum powers to the voters of each city and county in California, which allows voters to propose and reject legislation. (See Cal. Const., art. II. § 11.) The California Supreme Court describes the people's initiative power as "one of the most precious rights of our democratic process."(*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591.) The initiative power is understood "not as a right granted the people, but as a power reserved by them." (Id.)

A long line of cases apply this precedent to "jealously guard and liberally construe the right so that it be not improperly annulled." (*California Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 934, citing *Associated Home Builders*, 18 Cal.3d at 591.) Courts "resolve doubts about the scope of the initiative power in its favor whenever possible," and they will "narrowly construe provisions that would burden or limit the exercise of that power." (*Id.* at 936.) For example, in California Cannabis Coalition, the Court interpreted the term "local government" to exclude voters acting by initiative in Constitutional provisions restricting local governments' ability to impose taxes, because a broader definition would limit voters' ability to exercise their initiative power. (*Id.* at 931.) Similarly, in *City of Morgan Hill v. Bushey* (2018), the Court permitted voters to repeal a zoning code amendment adopted to comply with the legal mandate to maintain a code that is consistent with the general plan because it concluded that there were other options the City could implement to achieve general plan compliance. (5 Cal.5th 1068.)

Despite these principles, the voters' initiative power is not unlimited. A "definite indication that the Legislature, as part of the exercise of its power to preempt all local legislation in matters of statewide concern, has intended to restrict that right" can preclude the voters' ability to use their initiative power. (*DeVita v. Cty. of Napa* (1995) 9 Cal.4th 763, 776.) In other

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provisions of Government Code Section 66300 apply to housing development projects proposed within a Very High Fire Hazard Severity Zone ("VHFHSZ") as designated by the Director of Forestry and Fire Protection that is not a state responsibility area. (*Id.* at § 66300(f)(4).)

words, "the initiative and referendum power could not be used in areas in which the local legislative body's discretion was largely preempted by statutory mandate." (*Id.*; see, e.g., *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 779 ("the Legislature may restrict the right of referendum if this is done as part of the exercise of its plenary power to legislate in matters of statewide concern").) Such preemption is effective where "there is a definite indication or a clear showing" that the Legislature's purpose was to restrict those rights. (*City of Morgan Hill*, 5 Cal.5th at 1078, quoting *DeVita*, 9 Cal.4th at 775-776.)[3]

4. Cases suggesting a "duty" to defend: *BIA* and *Perry*

When an initiative or referendum is proposed, courts have limited cities' ability to unilaterally keep such measures off the ballot. For example, in *Save Lafayette v. City of Lafayette* (2018), voters obtained sufficient signatures to force a referendum on a zoning ordinance the City had adopted to conform to its General Plan. (20 Cal.App.5th 657, 662.) The City concluded the referendum would violate state law by making its zoning ordinance inconsistent with its General Plan and refused to place the referendum on the ballot. (Id.) The court held that "local governments are not empowered to exercise discretion in determining whether a duly certified referendum is placed on the ballot." (*Id.* at 663; see also *California Cannabis Coalition*, 3 Cal.5th at 948 (City erred by making a "unilateral determination" to withhold a proposed initiative from the ballot).)

In addition, where initiatives have been challenged after they became effective, and initiative proponents asserted standing to defend measures, the California Supreme Court has twice stated, without actually either deciding or requiring, that a city or county has a "duty to defend" ordinances enacted by the voters. (*Bldg. Indus. Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 822 ("*BIA*"); see also *Perry v. Brown* (2011) 52 Cal.4th 1116, 1149.)

In that context, the Supreme Court recognized that when confronted with a challenge to an ordinance that it does not support, a city or county "might not [defend the measure] with vigor." (*BIA*, 41 Cal.3d at 822.) Consistent with the principle that the initiative power is to be "jealously defended by the courts," the California Supreme Court has held that the proper

[3] In addition to SB 330, the state has other tools for coercing cities and counties to amend or invalidate growth control measures. Local programs that constrain housing supply may cause HCD to de-certify a jurisdiction's housing element, and a court can invalidate local restrictions that prevent housing element compliance. (See, e.g., *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561.) With the sixth cycle of housing elements coming due, voter-adopted measures that limit housing may face further scrutiny, even if they would ve permitted under SB 330.

remedy if a city or county chooses not to defend an ordinance is to permit "intervention by the initiative proponents" in a legal action regarding the ordinance. (*Id.*) "[I]n a postelection challenge to voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgement invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgement decline to do so." (*Perry*, 52 Cal.4th 1116, 1127.)

Arguably, the language in *BIA* and *Perry* suggesting that government has a duty to defend an initiative is dictum, in the sense that both courts simply assumed the duty's existence without addressing either its existence or scope.

5. **California Constitution art. III, § 3.5 prohibits administrative agencies from declaring or refusing to enforce statutes as unconstitutional:**

California Constitution art. III, § 3.5 states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

- **Is art. III, § 3.5 applicable to cities? By its terms, art. III, § 3.5 applies to "administrative agencies." Does that include cities?**

Citing *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086, the court in *Boyer v. County of Ventura* (2019) 33 Cal.App.5th 49 said "yes" with respect to a County Clerk in her capacity as an election official, and the court in *Billig v. Voges* (1990) 223 Cal.App.3d 962, 969.

Is an ordinance or charter provision a "statute" for purposes of art. III, § 3.5? In *City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 488 the court said "yes" in the context of Code of Civil Procedure section 1033.5(a)(10), which allows for the recovery of attorney's fees when authorized by "statute."

6. Do cities face two competing, inconsistent duties?

The authorities above suggest that cities may have competing duties toward both state and local law. Specifically, to assert the primacy of a local growth management initiative relative to SB 330, a city would likely be required to assert SB 330's unconstitutionality or invalidity. Conversely, to assert SB 330's primacy would require a city to assert the local measure's invalidity. Assuming art. III, § 3.5 applies to cities and local measures in these contexts, cannot simultaneously satisfy the rule.

7. If there is a duty to defend, is it enforceable? What is its limit?

Generally, a writ of mandate proceeding under Code of Civil Procedure section 1085 is the exclusive means of compelling a public agency to discharge a duty. To qualify for such mandate relief, a party must generally establish that the so-called duty is "ministerial," meaning that it must be carried out without the exercise of judgment or discretion.

With respect to the assumed duty to defend an initiative, that is clearly not the case. Rather, public agencies must exercise discretion and judgment in how to defend and litigate legal challenges. City Councils may and must use discretion in determining the strengths and weaknesses of their cities' legal arguments and positions in litigation, and whether and to what extent to commit the General Fund and scarce city resources to defending a case. Similarly, cities faced with lawsuits may and must exercise discretion and subjective judgment with respect to whether to take every imaginable step and use every procedural tool at every opportunity in litigation, including whether to exhaust every appeal, irrespective of cost or prospect for success.

Given that, we believe cities have a solid argument that there is no "duty" to defend that is judicially enforceable.

8. Alternatives

Cities faced with the decision whether or how to enforce a local growth management initiative measure in the face of SB 330 have several alternatives they may evaluate. These include:

- **File a Declaratory Relief Action Asking The Court To Decide**

To minimize the City's liability to local growth management proponents or SB 330 proponents, a City could file a "preemptive" action in court seeking direction on the enforceability of SB 330 before deciding how to proceed. A city of course would be the plaintiff in such a lawsuit, and it would likely be required to name the State of California as a defendant. Acting as the plaintiff in its own lawsuit would require the city to argue against SB 330's implementation, likely arguing that the court should defer to the voter's expression of their preference for growth control by interpreting SB 330 to only restrict the enactment of new growth control measures. However, as the plaintiff the city would bear the burden of proof that SB 330 is not enforceable, which could be a difficult standard. In addition, there are procedural barriers to seeking declaratory relief. For example, the city would need to demonstrate that there is a live controversy so that the court would not be giving a mere advisory opinion. For those cities that have already publicly stated their position that SB 330 preempts a local growth management measure likely creates such a cognizable controversy. In the absence of a specific project or other tangible action, it is not clear however, that the city would have standing to be heard before the court. Finally, bringing a lawsuit against the State, which has essentially unlimited legal resources, could require the city to incur large legal fees.

- **Refrain from Enforcing SB 330**

If a city wishes to challenge SB 330 but either does not want to be the plaintiff in a lawsuit or is denied standing, the city could simply ignore SB 330 and continue enforcing the local growth management measure. This could prompt a legal challenge from a residential developer, housing advocates, the Attorney General, or all three. The city would then attempt to defend its actions in that lawsuit, again likely by arguing that SB 330 the court should defer to the voter's expression of their preference for growth control by interpreting SB 330 to only restrict the enactment of new growth control measures. Under this scenario, there would be no question regarding standing, and, as the defendant, the city may benefit from a more favorable standard of review. However, the city would again be at risk for large legal fees as it tries to defend itself from multiple plaintiffs.

In addition, a challenge to a local growth management measure under SB 330 would potentially be accompanied by other claims against the city for housing element compliance,

violations of the least cost zoning law, or other claims; even if these are less likely to succeed, they would make the city's defense more complicated.

- **Refrain from Enforcing the Local Growth Management Initiative Measure**

The city could abide by the prohibition on residential growth control in SB 330 and refrain from enforcing local laws until January 1, 2025 without filing a court action or taking any other affirmative steps; it would simply stop enforcing the provisions of the local growth management measure that the city views as preempted by SB 330. This would be consistent with SB 330's intent, but it could potentially be interpreted as the city making a "unilateral determination" that the local initiative measure is preempted, contrary to the voters' will as expressed through the exercise of their initiative power. This would also be consistent with the position some cities have already taken publicly in public meetings, staff reports, press releases and on city websites. Although additional robust outreach might reduce the risk that local initiative proponents sue the city to enforce the measure, if voters did file suit a court would likely grant them standing to challenge any project approvals the city issued to ensure that the initiative is protected "with "vigor." Under this scenario, the city would again be a defendant, but it would be required to defend is actions based on the argument that SB 330 properly preempts the local initiative power. The city could potentially benefit from assistance in its defense from the Attorney General or other interveners who support housing production.

- **Adopt An Ordinance Amending The Zoning Code That States The City's Determination To Suspend Enforcement of the Local Initiative Growth Management Measure Due To SB 330**

As a more aggressive variation on the previous alternative, if a city believes the risk of a lawsuit from local growth management initiative measure proponents is high if it simply stops enforcing the local measure, it could consider taking an additional step by enacting an ordinance in its zoning code stating that it will not implement the measure while SB 330's provisions are in effect.[4] This would give such a city the opportunity to conduct additional inclusive, transparent outreach, and thereby develop a full record in support of its conclusions, and if it were

[4] For example, the City of Morgan Hill introduced an ordinance to temporarily suspend enforcement of its growth management program while SB 330 is in effect. The City had vigorously opposed SB 330's provisions regarding growth control, because the city uses its program to incentivize affordable housing development (the city has produced 4 times its RHNA for above-moderate income households, but continues to lag behind in housing for lower income households). However once SB 330 was passed, arguably it better served the public interest to clarify in advance how the city would approach land use applications, rather than face case-by-case decisions (and potential public opposition) every time a new application was submitted.

challenged, the city would likely be able to argue the applicability of a favorable, deferential standard of review from a reviewing court. In addition, by enacting a formal policy by ordinance, the city would also be able to argue that the statute of limitations in Government Code Section 65009 apply; this would likely reduce the amount of time potential litigants would have to file suit to 90 days after enactment of the ordinance and could reduce the risk that the City would be sued.

However, the City would need to make CEQA findings (which could be challenged in court), and the ordinance itself could be the subject of a referendum. A city could consider taking the position, and finding, that such an approach would be exempt under CEQA as a ministerial compliance with state law.

9. Conclusion.

Cities are likely not legally required to defend local initiative measures in the face of SB 330's apparently preemptive provisions. Nor are they required to initiate declaratory relief litigation to have a court resolve the conflict.

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October 2020

Housing Roundup: New Housing Bills Signed By Governor Newsom

Governor Newsom recently signed several new housing related laws. The bills include:

- AB 1561 | Extensions of Time for Housing Entitlements
- AB 168 & 831 | Changes to Streamlined Ministerial Multifamily Housing Approvals
- AB 725 | Regional Housing Needs & Multifamily Housing
- AB 2553 | Homeless Shelter Crisis Declarations
- AB 2345 | Density Bonuses
- AB 1851 | Parking for Religious Institution Affiliated Housing

AB 1561 –Extensions of Time for Housing Entitlements, Tribal Consultation

AB 1561 extends by 18 months the life of "housing entitlements" issued before and in effect on March 4, 2020, and that will expire before December 31, 2021. Qualifying housing entitlements that received an extension of time of at least 18 months from a local agency between March 4, 2020, and the effective date of AB 1561 (January 1, 2021), will not be eligible to receive an additional 18-month extension of time on top of what the local agency approved. A "housing entitlement" includes most approvals, permits or other entitlements issued by a local agency for housing development projects, including tentative tract maps and any approval subject to the Permit Streamlining Act, and ministerial approvals that are prerequisites for a building permit, except as otherwise stated in AB 1561. Exceptions include development agreements and preliminary applications.

AB 1561 also amends the Housing Element Law to authorize (but not require) the Housing Element's analysis of actual and potential constraints on the maintenance, improvement, or development of housing to also address constraints on housing for persons due to their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status.

This new law also extends the time in the California Environmental Quality Act (CEQA) for California Native American Tribes to respond in writing to a lead agency's consultation request by an additional 30 days (for a total of 60 days). This extension of time is only for housing development projects with a project application completed between March 4, 2020, and December 31, 2021.

October 2020

AB 168 & 831 – Changes to Streamlined Ministerial Multifamily Housing Approvals

AB 168 and AB 831 make changes to the law that allows developers of multi-family housing in urban areas to pursue a streamlined, ministerial process to obtain entitlements under certain circumstances.

AB 168 requires that a development proponent submit a notice of intent to apply to a local government agency before pursuing a streamlined development. The parties are then required to engage in a consultation with any Native American tribe that is "traditionally and culturally affiliated with the geographic area [of the proposed development]." If no agreement is reached, then the development proponent cannot obtain streamlined approval. This new provision does not apply to projects that were previously approved before the bill was enacted.

AB 831 adds a mechanism for a development proponent to request a modification to a development that has been previously approved under the streamlined, ministerial process, but where a final building permit has not yet issued. Subject to certain limited exceptions, local governments must evaluate such requested modifications "for consistency with the objective planning standards using the same assumptions and analytical methodology that the local government originally used to assess consistency for the development that was approved from streamlined, ministerial approval" of the project to begin with. Local governments will have 60 days to make this determination, or 90 days if design review is required.

The new law further provides that local governments "may apply objective planning standards adopted after the development application was first submitted" under certain circumstances when considering a request for modification. These include instances where:

> (A) "a development is revised such that the total number of residential units or total square footage of construction changes by 15% or more";
>
> (B) "The development is revised such that the total number of residential units or total square footage of construction changes by 5% or more and it is necessary to subject the development to an objective standard beyond those ineffective when the development application was submitted in order to mitigate or avoid a specific, adverse impact . . . upon the public health and safety and there is no feasible alternative to satisfactorily mitigate or avoid the adverse impact"; and
>
> (C) necessary to apply objective building standards in the California building code.

AB 725 – Regional Housing Needs & Multifamily Housing

Planning and Zoning laws require that cities and counties adopt a general plan that includes a housing element, including an inventory of land suitable for residential development, to be used to identify sites that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing needs. The rules concerning the housing element vary depending on whether the city or county at issue is located in a metropolitan, nonmetropolitan, or suburban area.

In an effort to encourage multifamily and infill development, AB 725 requires would require that, in metropolitan areas, at least 25% of a metropolitan jurisdiction's share of the regional housing need for moderate residential development to be zoned such that parties are permitted to build more than four units of housing per acre on those sites but no more than 100 units per acre of housing and at least 25% of the jurisdiction's share of the regional housing need for above moderate-income housing. These requirements would not apply to an unincorporated area.

AB 725 also clarifies certain defined terms and makes changes to the jurisdictions that may qualify as a "suburban" jurisdiction.

AB 2553 – Homeless Shelter Crisis Declarations

Under existing law, all cities within Alameda, Orange, and Santa Clara counties, as well as the cities of Los Angeles and San Francisco and some other local jurisdictions were given authority, upon declaring a shelter crisis, to adopt by ordinance "reasonable local standards and procedures for the design, site development, and operation of homeless shelters and the structures and facilities therein." These local standards and procedures apply in lieu of state and local health, habitability, planning and zoning, or safety procedures and laws to the extent the public agency determined that strict compliance with these would hinder or delay attempts to mitigate the effects of the shelter crisis. AB 2553 expands this program to all cities and counties statewide.

AB 2553 also requires local agencies that declare a shelter crisis to create a public plan to address it, including the development of homeless shelters and permanent supportive housing, as well as onsite supportive services, and a plan to transition residents from homeless shelters to permanent housing. It provides a timeframe under which these plans need to be adopted. If the shelter crisis is declared within a jurisdiction before January 1, 2021, the public plan is due on or before July 1, 2021. If the shelter crisis is declared after January 1, 2021, the public plan is due on or before July 1 of the year after the shelter crisis is declared.

AB 2553 makes other changes to the shelter crisis declaration law, including expanding the definition of "homeless shelter" to include parking lots "owned or leased by a city, county, or city and county specifically identified as one allowed for safe parking by homeless and unstably housed individuals."

AB 2345 – Density Bonuses

AB 2345 makes several changes to the Density Bonus Law. This bill decreases the percentage of total units that must be for lower-income households to qualify for two or three incentives or concessions, and increases the density bonuses awarded to certain projects.

However, AB 2345 provides that any city or county that has adopted an ordinance or housing program that allows for density bonuses that exceed what is required by AB 2345 are not required to amend its ordinances or programs to comply with the changes to the density bonus law made by AB 2345 and are exempt from complying with the incentive and concession calculation amendments made by AB 2345.

October 2020

AB 1851 – Parking for Religious Institution Affiliated Housing

AB 1851 prohibits local agencies from requiring the replacement of required parking spaces for a place of worship when those parking spaces are being eliminated as a part of a religious institution affiliated housing development project, provided that no more than 50% of the required parking spaces are proposed for elimination. A local agency must allow the remaining parking spaces for the place of worship to be counted toward the number of parking spaces required for the housing development project. A local agency may require up to one parking space per unit in the housing development project notwithstanding any other provision of AB 1851 unless the project is within one-half mile of public transit or there is a car share vehicle within one block.

The law prohibits a local agency from requiring that an existing parking deficiency be cured as a condition of approval of a religious institution affiliated housing development. AB 1851 also specifies that the parking reduction provided therein is not a "concession" for the purposes of the Density Bonus Law.

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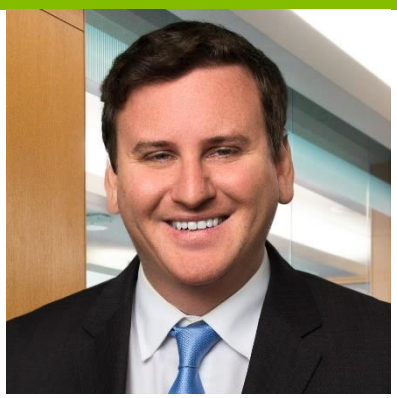

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