

New Housing Legislation: Lessons Learned from Recent Litigation

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Cal Cities City Attorneys' Conference – Spring 2021
Presented May 21, 2021

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Agenda

- Introduction
- HAA: Key Provisions and Cases
- SB 35: Key Provisions; First Published Case; Other Cases
- Practice Tips and Conclusion

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HOUSING LEGISLATION FRENZY



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Introduction

SB 35 & HAA upend local planning:

- *Deference to any evidence of consistency*
- *What is an "objective" standard?*
- *May be "deemed consistent" even if not*
- *General plan elevated over zoning*

First published case on SB 35

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HAA – Basic Provisions

Basic Provisions before January 1, 2018:

- “Housing development project” could only rarely be denied or reduced in density if conformed with objective standards
 - *Note effect of density bonus law*
- Very difficult to deny affordable project or impose condition making project infeasible

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HAA – Key Amendments

Intent to make it difficult to deny housing

- Inform of inconsistencies or “deemed consistent”
- Consistency with GP but not zoning is “consistent”
- Deference only to findings of consistency*
- Definition of “objective”
- Preliminary application & new claims
- Attorneys’ fees

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HAA – Successful Challenges to City Actions

First Cases: No Identified Inconsistency with Objective Standards

- *Honchariw v. Stanislaus County* (published) (2011)
- *SF BARF v. Berkeley* (2017)
- *Eden Housing, Inc. v. Los Gatos* (2017)

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Berkeley



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Los Gatos



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Los Gatos: Not an Objective Standard

- "Address unmet need for senior housing."
- "Special care shall be taken to avoid obstructing views to the surrounding hills."
- "Produce high quality authentic design."
- "Reflect look and feel of the community."

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District Square, Los Angeles



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HAA – Successful Challenges to City Actions

No Inconsistency Findings + “Deemed Consistent,” What Is “Objective,” and CEQA

- *District Square LLC v. City of Los Angeles* (2020)
 - Inconsistencies not identified by staff
 - Court found CEQA standards not “objective” and made CEQA findings itself
 - Court found “bad faith” and ordered approval

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HAA – Successful Challenges to City Actions

Condition Overturned

- *1444 Fifth Street LLC v. Berkeley* (2020)
 - City Council interpreted City’s inclusionary ordinance and determined developer had evaded ordinance
 - Court found City’s interpretation not consistent with plain language of ordinance & not identified by staff
 - Not clear what provisions of HAA were violated
 - Only protects denial or density reduction

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HAA – Prompt Cures and Settlements

- *SF BARF v. Sausalito* (2018)
 - Reheard and adopted with conditions
- *418 Holdings v. Monte Sereno* (2020)
 - Cured, without admission, asserted Brown Act violation & approved upon rehearing
- *Mwest Propco XXIII v. Morgan Hill* (2018)
 - Stipulated judgment regarding denial of enough allotments under growth control ordinance

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HAA – CEQA as a Defense

- Denied based on inadequate CEQA, use permit findings could not be made
- Demurrer sustained because:
 - *CEQA does not apply to disapproved projects*
 - *HAA claim not ripe because CEQA not completed; courts cannot direct cities to implement CEQA in any particular way*
 - Compare with *District Square*

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On Appeal: CaRLA v. City of San Mateo



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On Appeal: CaRLA v. City of San Mateo

- 10-unit market rate apartment denied
- Superior Court upheld denial & found (f)(4) unconstitutional
- Issues at Court of Appeal include:
 - *(f)(4): interpretation of law v. factual matters*
 - *Constitutional issues: due process, delegation, home rule*

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SB 35 – Overview

Gov. Code § 65913.4 (effective Jan. 1, 2018)

- Ministerial approval for qualified projects
- Policy that SB 35 be “interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply” (§ 65913.4(n))

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SB 35 – Overview

Project-specific criteria

- Multi-family housing of at least two units
- Affordable housing – percentages vary
- Objective zoning and design standards

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SB 35 – Overview

Site-specific criteria

- RHNA not satisfied
- Urbanized setting and adjacent uses
- Zoned residential or mixed use

Exemptions, e.g.,

- Wetlands
- Demolish historic structure on historic register

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SB 35 – Overview

Applicant-specific criteria

- Ten or more units: prevailing wages and worker qualification and training requirements

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SB 35 – Overview

AB 831 (effective Sept. 28, 2020)

- Scoping consultation with Native American Tribes Required
- Tribe may require discretionary and CEQA processes (§ 65913.4(b))

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SB 35 – Overview

Written response re satisfaction of objective planning standards

- 60 days of application for 150 or fewer units
- 90 days of application for more than 150 units
- Failure to respond = “deemed to satisfy”

Written response re satisfaction of objective design standards

- 90 days of application for 150 or fewer units
- 180 days of application for more than 150 units
- Failure to respond = “deemed to satisfy”

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SB 35 – Overview

Standard of Review

- “a development is consistent with the objective planning standards specified in subdivision (a) if there is substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards.” (§ 65913.4(c)(3) (effective Jan. 1, 2020))

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SB 35 in Court – Standard of Review

Deference to factual findings re objective planning standards?

- Effect of amendment imposing reasonable person standard?
- General rule for factual disputes in ministerial duty cases?
 - No deference under SB 35 (*Ruegg v. City of Berkeley* (Apr. 20, 2021) __ Cal.App.5th __, 2021 WL 1541065 (pet. for review?))
 - Rationale: legislative intent to eliminate discretion
 - Support: precedent did not concern factual dispute (*SF Fire Fighters*)
 - Dicta or holding?
 - Court ruled no evidence supported City
 - Dicta, since statement of law was not necessary (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006)

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SB 35 in Court – Ministerial Duty to Deny if Non-Compliant?

- Imagine that:
 - City approves SB 35 project
 - Opponents sue, alleging project does not satisfy objective planning standards
- Santa Clara Cnty. Supr. Ct.:
 - No duty to deny
 - Rationale: If inaction = deemed consistent, no duty to deny exists

(Friends of Better Cupertino v City of Cupertino)

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SB 35 in Court – Insufficient Notices

- Imagine that City denied application, but:
 - Unmet objective planning standards not identified with specificity
 - Lack of sufficient ingress and egress additional basis for denial
 - Santa Clara Cnty. Supr. Ct.:
 - Failure to sufficiently identify objective planning standards invalidates denial
 - Sufficient ingress and egress determination not objective
- (40 Main Street Offices v. City of Los Altos; CARLA v. City of Los Altos)*

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SB 35 in Court – Mixed-Use Projects

- Statutory Interpretation
 - SB 35 applies to mixed-use projects if sq. ft. thresholds met (*Ruegg v. City of Berkeley* (Apr. 20, 2021) __ Cal.App.5th __, 2021 WL 1541065 (pet. for review?))
- Charter Cities' Commercial Use Permitting Authority Protected by Home Rule Doctrine? Test:
 1. Municipal affair
 2. Conflict b/w state and local law
 3. Statewide interest
 4. Narrowly tailored

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SB 35 in Court – Mixed-Use Projects (cont.)

Application

- Statewide interest (third factor)?
 - Statute and legislative history silent as to interest in overriding commercial use permitting authority
- Narrowly tailored (fourth factor)?
 - State could advance interest in housing development without interference with commercial use permitting authority
- *Ruegg v. City of Berkeley*
 - No violation of home rule doctrine
 - Minimal and incidental interference
 - Cities retain zoning and authority of other permits and licenses

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Whether an SB 35 Denial Constitutes HAA Denial

- Ruegg Plaintiffs: Yes
- Ruegg Court: No reason to decide
- Answer? Should be no.
 - Applicant may still pursue discretionary approval
 - Would be premature and counterproductive to require HAA denial findings when making SB 35 decision
 - §65913.4(i)(2) statement re HAA merely says applicant may also qualify for protections under HAA

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Practice Tips

- Council and Commission education
 - *Risks of denials and density reductions*
- Staff burdens; many potholes for cities: completeness, consistency letter, strict timelines
 - *Comprehensive review of application forms*
 - *Emphasize importance of 30-60 day letter*
 - *Questions re: constitutionality of "deemed consistent"*

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Practice Tips

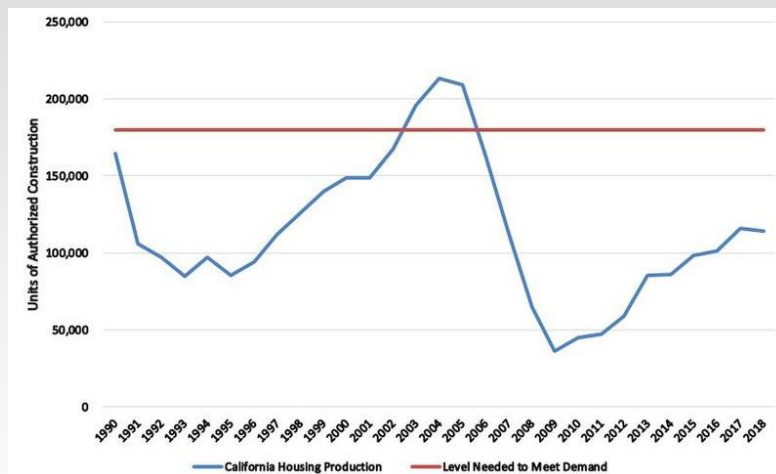
- HCD involvement & support for developers
- CEQA and the Coastal Act
- Include in record evidence of city support for housing
 - *Plaintiffs play dirty and will attempt to portray city as a racist bad actor*

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Is This the Fault of Cities?



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Conclusion

- Thoroughly analyze risks of potential denials or density reductions
- Narrative at the Legislature and in the media needs to change; housing production declining despite new laws – Why?
- An avalanche of housing laws in 2021

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