New Housing Legislation: Lessons Learned from Recent Litigation

Friday, May 21, 2021

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

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I. Introduction

To address the State's housing crisis, the California Legislature, beginning in 2017, has passed myriad bills substantially amending housing and planning laws. Initially, these bills were intended to make it more difficult for cities to deny or reduce the density of housing projects and to require that cities apply only "objective" standards to housing development projects otherwise complying with general and specific plans and ordinances. As the legislation has evolved, however, it further strengthens developers' efforts to constrain cities' land use authority by giving deference to developers' arguments of plan consistency, regardless of the views of staff, commissioners, or the elected City Council; creating a standard for "objective" that in practice allows applicants to argue that standards viewed as "objective" requirements are not, in fact, objective; allowing developers to ignore local standards if inconsistencies are not demonstrated within short time periods; elevating maximum general plan densities over those in the zoning ordinance; and expanding the rights of developers under density bonus law, so that a project with as little as 15 percent affordable housing is now entitled to a 50 percent density bonus and waiver of any development standards that prevent the project from achieving that density. As a whole the legislation has upended the implementation of general plans and zoning ordinances.

On April 20, 2021, the First District Court of Appeal issued the first published decision that addresses changes made to state law since 2017—*Ruegg & Ellsworth v. City of Berkeley* (Apr. 20, 2021) __ Cal.App.5th __, 2021 WL 1541065—which concerns SB 35 (petition for review may have been filed after submission of this paper). Another case is pending in the First District—*CaRLA v. City of San Mateo*—which concerns the Housing Accountability Act and will be fully briefed prior to this presentation. Meanwhile, the California Department of Housing and Community Development (HCD) has published guidelines heavily weighted toward the positions of the development community. Those guidelines have not been challenged in any case that we are aware of.

This paper reviews the issues raised in litigation known to us, including the pending and recently decided appellate decisions and available Superior Court decisions, regarding the Housing Accountability Act and SB 35.[1] Our goal is to provide tips for city attorneys to minimize legal exposure and avoid litigation, develop a record to support a city's actions, and to defend litigation.

We recognize that this is not the end of the story. In the current 2021 legislative session, over 200 bills have been introduced dealing, in various ways, with the State's 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.

[1] Because of space limitations, we are not reviewing Superior Court cases involving density bonus law. We are not aware of pending appellate cases involving the statute. The Superior Court cases we have found are primarily challenges by third parties to density bonuses, incentives, and waivers granted by cities; the courts have generally upheld the decisions of the cities.

II. Litigation under the Housing Accountability Act ("HAA")

A. Basic HAA Provisions

The Housing Accountability Act (HAA; Gov. Code § 65589.5[2]) 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 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.[3] 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.

   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).)

Under the former statute, a cause of action for a market-rate project was available for denying or reducing the density of a project, and, in the case of an affordable project, for a condition that made the project infeasible.

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[2] All further references are to the Government Code unless otherwise stated.

[3] *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.

B. Key Amendments to the HAA

Amendments adopted since 2017 are 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 listed below create a series of potholes for unwary cities:

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) (effective January 1, 2018).)

2. *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) (effective January 1, 2019).) For instance, if the general plan states that housing is permitted on a site, but the zoning permits only commercial development, housing may be permitted without a rezoning.

3. *Deference Only to Findings of Consistency*. 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) (effective January 1, 2018).)

4. *Strict Definition of "Objective."* The definition of "objective" initially included in SB 35 was added to the HAA, defining "objective" 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." (§ 65589.5(h)(8) (effective January 1, 2020; sunsets January 1, 2025).)

5. *Preliminary Application and New Claims*. Developers have the right to file an abbreviated application called a "preliminary application," which largely vests their rights to rely on existing zoning, plans, and fees (subject to certain exceptions) if they are able to complete their "regular" planning application subject to the Permit Streamlining Act within an approximate 270-day time period. (§§ 65589.5(o), 65941.1.) A new cause of action was added allowing a claim if a city "required or *attempted to require*" a housing project to comply with a policy not adopted when the preliminary application was

filed, or after the "regular" application was found to be complete. (§65589.5(k)(1)(A)(i)(III) (effective January 1, 2020; sunsets January 1, 2025).)[4]

6. *Attorneys' Fees*. Successful plaintiffs under the HAA are entitled to attorneys' fees. (§ 65589.5(k)(1)(A)(ii) (effective January 1, 2018).)

C. The New HAA in the Courts

1. Successful Claims Challenging City Actions

In three cases, trial courts have determined that city decisions denying a project or reducing its density violated the HAA; in a fourth, the Court ruled that the imposition of a condition of approval violated the HAA (in a case that did not seem to actually implicate the HAA at the time it was decided). Note that, despite the publicity given to YIMBY groups, only one case, challenging the City of Berkeley, was filed by such groups (San Francisco Bay Area Renters Foundation (SF BARF) and California Renters Legal Advocacy and Education Fund (CaRLA)); the others were filed by the applicant.

No Identified Inconsistency with Objective Standards. In three of the Superior Court cases we have located, city denials of housing developments were overturned as violating the HAA. In all of them, the Court held that the city involved denied the project *without finding an inconsistency with objective standards and without making the required health and safety findings to support denial of a compliant project*. But the analysis varied, as discussed below. None of the cities appealed.

Two cases,[5] against Berkeley and Los Gatos, were filed to challenge denials made in 2016, before adoption of recent amendments. In both of those cases, the courts found that the city identified no objective standards that the projects failed to meet, but, on administrative appeal, were nonetheless denied by the cities' respective councils. In both cases, the Court held that because the cities had not identified any objective standards not complied with, they were required to make the "specific health and safety" finding required by the HAA, and remanded the cases for rehearing. The Los Gatos court made a specific finding that none of the policies cited by the Town as grounds for denial were objective, concluding that all used "subjective criteria."[6] In neither case were appeals filed.

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[4] Although beyond the scope of this paper, note that some applicants are attempting to submit preliminary applications for projects that require legislative approvals (seeking to vest fees and other provisions not at issue). However, 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*. (1996) 52 Cal.App.4th 475.)

[5] *San Francisco Bay Area Rents Federation v. City of Berkeley,* Alameda County Superior Court Case No. RG16834448 (July 21, 2017); *Eden Housing, Inc. v. Town of Los Gatos*, Santa Clara County Superior Court Case No. 16CV300733 (June 9, 2017).

[6] The decision includes a list of criteria not considered to be "objective." There is also an interesting discussion in the Los Gatos decision regarding the relation between the HAA and the Subdivision Map Act. Los Gatos did adopt findings under the Map Act denying the project because it did not comply with various policies in the City's general plan and specific plan. Even though the Court found that all of those findings were supported by substantial evidence, it also held that all of the policies in question were not objective and hence the City needed to make additional findings under the HAA. Theoretically, the City could find itself unable to approve the project under the Map Act but unable to deny the project under the HAA. The issue was also reviewed in *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, where the Court held that the Map Act finding regarding whether the site is "physically suitable" for the project is a subjective standard and cannot be used to deny a project. Nonetheless, a conflict remains in the statutes which the Legislature has not resolved.

"Bad Faith," "Deemed Consistent," and CEQA. The most troubling of the three cases, and one utilizing the post-2017 amendments to reach its conclusions, is a 2020 case challenging the denial of a project by the City of Los Angeles. In *District Square, LLC v. City of Los Angeles,*[7] the City's Director of Planning approved a permit for a 577-unit project, finding it conformed to all objective standards and was exempt from review under the California Environmental Quality Act (CEQA). The project was appealed to the South Los Angeles Area Planning Commission, which, despite the advice of both the Director and a Deputy City Attorney, denied the project because of its impact on gentrification and displacement of existing residents. The Commission did not accept the Deputy's advice to adjourn so that all the appropriate findings could be developed. Six months later the City – three months after the developer had filed suit challenging the denial -- issued a Letter of Determination containing various findings.

The facts (as summarized by the Court) would seem to result in the same remedy as in the previous two cases: remand to the City with an order to reconsider and make proper findings under the HAA. Instead, the Court found that the Commission had acted in bad faith "on its own frolic and detour," acting "knowingly and deliberately to violate the law."

Under the HAA, a court may order a city to approve a project if it finds the City acted in bad faith. (§ 65589.5(k)(1)(A)(ii).) However, to be able to order project approval, the Court here acted as decision-maker, making both findings of consistency and finding the project exempt from CEQA. In particular:

- The "Deemed Consistent" Provision. The Court held that since the applicant had received no notice within the required 60-day period that the application was inconsistent with any City policy, the project was "deemed consistent" under the HAA. (§ 65589.5(j)(2)(B).)

  Note that, as interpreted by the Court, if staff does not find inconsistencies within 30 to 60 days of completeness, projects may be found consistent, regardless of any errors made and regardless of the views of the decision-makers. The effect will be that, except for the rare instance when a "specific health or safety finding" can be made, or CEQA or the Coastal Act compel a different result, the project – with its inconsistencies – must be approved, despite its failure to actually comply with the objective standards. This result seems to have constitutional infirmities similar to those that the courts have found with the "deemed approved" provisions in the Permit Streamlining Act, where the courts have determined that notice and the ability to be heard must be provided before a project can be approved.[8] Further, the provision effectively delegates all code interpretation to planning staff and provides no opportunity for a challenge to a failure by a public official to perform a mandatory duty, i.e., to provide the required findings of inconsistency. However, we are not aware of any challenges to date to these provisions. (A similar provision is included in SB 35, discussed below.)

- CEQA and the HAA. The Court found that no CEQA finding had been made by the Commission. The Court further found there was no substantial evidence that the project did *not* qualify for the statutory exemption found by the Planning Director, and so there was no need to remand the project to the City for a CEQA determination. The particular

[7] Los Angeles County Superior Court Case No. 20STCP00654 (Oct. 20, 2020).

[8] *Selinger v. City Council* (1989) 216 Cal.App.3d 259, 274.

exemption used required conformance with the Regional Transportation Plan and Sustainable Communities Strategy (RTP/SCS) prepared by the Southern California Association of Governments (SCAG). Included in the Court's decision was the somewhat head-spinning determination that, because the policies in the RTP/SCS were not all objective, lack of conformance with any subjective policies could not be used to find that the project did not conform with the RTP/SCS – although lack of conformance would simply mean that environmental review would be needed, not that the project would be denied, and the HAA states specifically that it is not to be construed "to relieve the local agency from making one or more of the findings required by [CEQA]." (§ 65589.5(e).)

While the results here may have been colored by the Court's clear unhappiness with the Commission's actions, they demonstrate the danger of the "deemed consistent" provision (discussed further in the SB 35 section below) and the lengths a court may go to when it is determined to see a project approved. Los Angeles has not appealed the decision.

Condition Overturned. In *1444 Fifth Street LLC v. City of Berkeley*,[9] a developer applied separately for two four-unit projects on adjacent lots to avoid the imposition of the City's inclusionary ordinance, which did not require affordable units in a four-unit project but did require affordable units in an eight-unit project. The staff stated that the project complied with the inclusionary ordinance, but the City Council determined that the ordinance was intended to apply to contiguous properties and required the provision of affordable units.

In a judgment drafted by the plaintiffs over Berkeley's objections, the Court held, first, that the plain language of the City's inclusionary ordinance did not justify a condition of approval requiring the provision of inclusionary units on contiguous lots and found the condition to violate the HAA. While a court may certainly exercise its independent judgment to interpret Berkeley's ordinance, nowhere in the judgment does it explain what provision of the HAA was violated by the City's decision, because in 2019, when the City made this determination, there was no cause of action related to imposition of a condition on a market-rate project.

The Court also held that the City had not identified the project's asserted noncompliance with the inclusionary ordinance within the required 30-day period after the project was deemed complete but, again, did not explain precisely how the imposition of the condition violated the HAA. Even if an inconsistency is not identified, a city should be able to impose a condition of approval so long as it does not deny the project or reduce its density.

However, when a city fails to identify an inconsistency within the 30-day period, it is easiest for the lower courts to determine that the problem is mooted by the "deemed consistent" provision. The constitutionality of this provision, which in many cases may effectively delegate to staff ordinance interpretations without opportunity for Council review or notice or hearing to the public, has not yet been challenged in any case that we have reviewed.

Berkeley has not appealed the decision.

[9] Alameda County Superior Court Case No. RG19032434 (September 23, 2020).

2. Defense of a Project Denial: CEQA and the HAA

In another trial court decision,[10] a city successfully demurred to CEQA and HAA claims regarding the denial of use permits for a project that included several homes. After lengthy hearings and significant opposition, the city's denial was based on detailed findings determining that the proposed negative declarations were not adequate and that the findings required to approve the use permits could not be made. The developer challenged the denial, asserting: (1) the Court should order the city to approve the negative declarations; and (2) none of the city's use permit findings were based on violations of objective standards, there was no evidence of a "specific health and safety impact," and therefore the HAA compelled project approval.

The Court sustained the city's demurrer without leave to amend, holding that:

- CEQA does not apply to projects that have been disapproved, relying on the statute, the CEQA Guidelines, and *Sunset Sky Ranch Pilots Ass'n v. County of Sacramento*[11]; and

- Relying on *Schellinger Brothers v. City of Sebastopol*[12] and citing the legislative history demonstrating that CEQA was not intended to be subject to the HAA, the Court rejected the HAA claim, holding that:

  "Petitioners can obtain no relief under [the HAA] cause of action and statute. This is because given the CEQA decision, even if the court finds that the rejection failed to comply with the HAA in other ways, the court still will not be able to overturn the decision due to the CEQA determination and thus the court may not afford Petitioners any relief, rendering any further determination regarding the HAA at best both an advisory opinion and an idle act."

In *District Square* cited above, the Court found that the Commission made no CEQA findings when it denied the project. Despite this, the Court made its own CEQA determination so that it could order the City to approve the project, effectively directing the City to find the project exempt, contrary to the provisions of Public Resources Code § 21168.9(c) ("Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way"). In distinguishing *Schellinger,* the Court stated that if CEQA review is not adequate, the appropriate action of the agency is to complete an adequate review, but the city "may not deny entitlements, when the environmental review is not complete." This statement is simply contrary to the CEQA statute and guidelines and to CEQA case law.

3. Avoiding Expensive Litigation: Early Case Resolution

At least three cases have been resolved at an early stage, after filing of a complaint but prior to briefing. If the case was filed by one of the YIMBY groups, however, the price of settlement may be a press release identifying the city as a violator of the HAA, now brought to justice by the valiant efforts of the plaintiffs.

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[10] Because the parties in the case are attempting to achieve a settlement, we were asked not to provide the name of the city or case name.

[11] (2009) 47 Cal.4th 902.

[12] (2009) 179 Cal.App.4th 1245.

- *SF BARF v. City of Sausalito*[13] involved plans for a luxury home (and two rental properties) on an exceptionally steep hillside lot. The case was filed in 2017, before the attorneys' fee provision became effective, and the City Council reheard and reconsidered the matter before the end of the year, approving the home at a lower height, which mooted the HAA claim. Following settlement discussions, a compromise design was approved, with minimal payment of attorneys' fees.

- *Four Eighteen Holdings v. City of Monte Sereno.*[14] In the *Four Eighteen Holdings* matter, the City Council denied an application for a single family home. The developer sent the City a Brown Act cure and correct demand, but then filed suit before the 30-day response period had run. The developer stipulated to stay the litigation while the City considered taking further action. Without admitting liability, the City Council timely cured and corrected per the Brown Act demand letter, rescinded the denial, reconsidered the application (with revisions submitted by the applicant), and approved the project. Although the case is moot, the developer has yet to dismiss and might file a motion for an award of attorneys' fees.

- *MWest Propco XXIII LLC v. City of Morgan Hill*[15]*:* Morgan Hill entered into a stipulated judgment regarding the denial of sufficient allotments under its growth control program for an affordable housing project. In denying the allotments, the City did not make the findings required to deny or reduce the density of an affordable housing project under Section 65589.5(d), and the City agreed to comply with the HAA within 60 days.

4. On Appeal: *CaRLA v. City of San Mateo*

CaRLA v. City of San Mateo,[16] now on appeal in the First District Court of Appeal, implicates many of the issues raised regarding the HAA, including the constitutionality of the "reasonable person" standard included in Section 65589.5(f)(4).

An application was submitted to the City of San Mateo for a 10-unit market-rate apartment in 2016. At the first public hearing held in 2017 (before the "deemed consistent" provisions were in effect), the staff report stated that the project conformed to the general plan and zoning ordinance. However, ultimately both the Planning Commission and the San Mateo City Council, by a 4-1 vote, found that the project did not conform to an objective design standard. Suit was filed by CaRLA and SF BARF.

In the initial briefing, the plaintiffs argued that the staff's early determination of compliance, a consultant's view on how the design provision could be interpreted, and the Mayor's vote in favor of the application provided "substantial evidence that would allow a reasonable person to conclude" that the project was compliant. The Court, however, requested supplemental briefing on the "enforceability" of Section 65589.5(f)(4), which reads in full as follows:

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[13] Marin County Superior Court Case No. CIV 1704052 (2017).

[14] Santa Clara County Superior Court Case No. 20CV370686 (filed Sept. 14, 2020).

[15] Santa Clara County Superior Court Case No. 18CV333676 (Sept. 20, 2018).

[16] San Mateo County Superior Court Case No. 18-CIV-02105, First District Court of Appeal Case No. A159320.

> For purposes of this section, a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision *if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity*. (emphasis added)

The City argued that subsection (f)(4), *as interpreted by the plaintiffs,* was inconsistent with procedural due process ((U.S. Const., 14th Amend; Cal. Const., art. I § 7, subd. (a)); delegated City decision-making to non-public officials, in violation of the state constitution (Cal. Const., art. XI § 11, subd. (a)), and violated the City's home rule authority (Cal. Const., art. XI § 5, subd. (a)).However, if subsection (f)(4) is interpreted correctly to apply to factual matters only, with the interpretation of ordinances subject to the independent review of the courts, with appropriate deference given to the City's interpretation, there is no constitutional violation.

The Superior Court determined that: (1) the City's design guidelines qualified as "design review standards" under the HAA; (2) the project did not comply with the design guidelines; and (3) subsection (f)(4) does not apply to issues of pure law, such as the interpretation of the design guidelines. The Court held further that (f)(4), as interpreted by the plaintiffs, would violate both the City's home rule authority, because it is not narrowly tailored to an identified issue, and the non-delegation provisions of the California Constitution.

The plaintiffs have appealed. Because the Superior Court found a statute to be unconstitutional, the Attorney General has exercised its right to intervene in the case on behalf of the plaintiffs. Holland & Knight was substituted in to represent the plaintiffs. Briefing will be completed by the date of the conference. The issues which are being argued include these:

- The interpretation of subsection (f)(4). The City argues that review of the City's interpretations of its own enactments is made according to an independent judgment standard; consequently (f)(4)'s "substantial evidence" standard does not come into play except for review of factual determinations. This interpretation resolves any constitutional violations.

- Whether subsection (f)(4) *as interpreted by plaintiffs,* violates the state and federal constitutions. The City argues that, *as interpreted by plaintiffs*::

  - Section 65589.5(f)(4) violates the non-delegation provisions of the California Constitution by potentially delegating to private persons the ability to determine project consistency..

  - Section 65589.5(f)(4) violates procedural due process by depriving those potentially affected by a project of a *meaningful* hearing.

  - Subsection (f)(4)'s sweeping negation of local agency authority interferes with core municipal decision-making ability and violates the home rule doctrine.

Depending on which issues the Court chooses to decide, there may be more clarity regarding the meaning of the new HAA following the resolution of this case.

III. Litigation Under SB 35 (Gov. Code § 65913.4)

A. Overview of SB 35

The Legislature enacted SB 35 in 2017, effective January 1, 2018. (§ 65913.4, added by Stats. 2017, ch. 366, § 3.)[17] SB 35 provides a streamlined, ministerial approval for qualified residential projects in urbanized settings where local governments have not issued enough building permits to meet their Regional Housing Needs Assessment (RHNA) numbers in all income categories.

If the project meets multiple criteria—including project-specific, site-specific, and applicant-specific criteria—it shall be ministerially approved and is not subject to otherwise-applicable conditional use permit requirements. (§ 65913.4(a)-(b).) Some of the criteria are described below.

Among project-specific criteria, the project must (i) be a multifamily housing development that contains at least two residential units; (ii) include a certain percentage of affordable units (the number varies based on certain factors); and (iii) comply with any applicable "objective zoning standards and objective design review standards." (§ 65913.4, subdivs. (a)(1), (a)(3), (a)(2)(B), and (a)(5).

As to site-specific requirements, the project must be in a local jurisdiction that has not issued enough building permits to meet its RHNA allocation, (ii) be located in an urbanized area; (iii) adjoin parcels that are developed with urban uses; and (iv) be zoned for residential use or residential mixed-use development, or have such a general plan designation. (§ 65913.4, subdivs. (a)(2), (a)(4)(A) and (a)(4)(B).) Certain site characteristics, if present, disqualify the project from approval under SB 35. (§ 65913.4, subdivs (a)(6) and (a)(7).) For example, if the site is located in an area of environmental concern, e.g., wetlands, or would demolish "a historic structure that was placed on a national, state, or local historic register," SB 35 does not apply. (§ 65913.4, subdivs. (a)(6)(C) and (a)(7)(C).)

As to applicant-specific criteria, for a project of more than 10 units, the applicant must agree to pay prevailing wages and satisfy certain worker qualification and training requirements. (§ 65913.4, subdiv. (a)(8).)

Upon receipt of an SB 35 application, the local agency must determine whether the criteria are met, within certain timeframes. As to objective planning standards: "If the local government determines that a development submitted pursuant to this section is in conflict with any of the objective planning standards," the agency must provide a written explanation of the conflict within 60 days of application submittal for projects of 150 or fewer units, or 90 days of application submittal for projects of more than 150 units. (§ 65913.4, subdiv. (c)(1)(A)-(B).) If the public agency does not issue a written determination within the applicable deadline, the development is "deemed to satisfy the objective planning standards" (§ 65913.4, subdiv. (c)(2)), with similar effect to the "deemed consistent" provision in the HAA. (§ 65589.5, subdiv. (j)(2).)

As to objective design criteria: the local government must make a determination regarding a project's compliance with objective design criteria within 90 days of the submission of an application proposing 150 or fewer housing units, or 180 days with respect to an application for development involving more than 150 housing units. (§ 65913.4, subdiv. (d).) This deadline applies irrespective of

[17] Government Code section 65913.4 is often referred to as SB 35, even though section 65913.4 has been amended since the adoption of SB 35, including in 2019 by AB 101 (effective July 31, 2019), and AB 1485 (effective January 1, 2020), which added new subdivisions, revised preexisting subdivisions, and renumbered preexisting subdivisions. The subdivisions referenced herein are to Section 65913.4 as presently in effect.

whether staff, a commission, or the city council or board of supervisors is the local government's decision maker with respect to design criteria compliance. (§ 65913.4, subdiv. (d).)

As originally adopted, section 65913.4 did not describe any evidentiary standards by which either the local government or the courts shall review applications. By AB 1485, the Legislature added the same provision as that at issue and now on appeal in the San Mateo case: "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, subdiv. (c)(3) (effective Jan. 1, 2020).)

AB 1485 also added references to the HAA, which had not been referenced in SB 35 as originally adopted. Section 65913.4 now provides: "This section shall not prevent a development from also qualifying as a housing development project entitled to the protections of Section 65589.5. This paragraph does not constitute a change in, but is declaratory of, existing law." (§ 65913.4, subdiv. (i)(2).)

AB 831, effective September 28, 2020, added provisions requiring "scoping consultation" with California Native American tribes "traditionally and culturally affiliated with the geographic area," if the tribe requested upon notice of proposed application (§ 65913.4, subdiv. (b).) These amendments effectively permit a tribe to insist on standard discretionary review processes, requiring compliance with CEQA and its tribal consultation provisions.

B. SB 35 in the Courts

SB 35 creates innumerable opportunities for disputes about whether an applicant has met, and the local government properly applied, its myriad provisions, as to both factual and legal determinations. Below we discuss certain provisions which have been subject to judicial review, to help provide insight on how the courts have begun to review local government action under SB 35 and to help city attorneys counsel their clients during the administrative processes.

1. Standard of Review with Respect to Objective Planning Standard Determinations

Section 65913.4, as originally enacted by SB 35, did not provide any standard for judicial review of the local government's factual determinations as to whether the applicant satisfied the statute's multiple criteria, including whether the application met objective planning standards. As discussed above, since January 1, 2020, the statute has added the same reasonable person standard at issue in the San Mateo case. To date we are aware of no cases involving determinations made after the effective date of this amendment.

A city's factual determination on an SB 35 application that pre-dated this amendment was at issue in the recently published *Ruegg & Ellsworth v. City of Berkeley* case (petition for review may have been filed after submission of this paper).[18] Before describing the factual dispute, we summarize the Court's discussion regarding the standard of review of factual disputes.

The City maintained that where underlying facts are in dispute, the resolution of which will determine whether an objective planning standard is satisfied, a court must defer to the local government's factual findings. The Court of Appeal disagreed. It reasoned that the legislative intent of SB 35 is to constrain local governments' discretion, and that it would thus be inconsistent with SB

[18] *Ruegg*, __ Cal.App.5th __, 2021 WL 1541065.

35 to defer to local governments' factual determinations.[19] However, the Court declined to opine as to the proper standard of review because, the Court found, the record lacked evidence that the project would demolish a historic structure placed on a historic register.[20] Thus, the *Ruegg* discussion of the standard of review as to factual determinations should be considered dicta, rather than binding precedent, as its statement that deference did not apply was not "necessary to the decision."[21]

Below, we explain how this issue came to the Court of Appeal and discuss how the Court left unanswered the broader question of the proper standard of review to apply to factual disputes in ministerial duty cases.

At issue in *Ruegg* was an application for ministerial approval under SB 35 of a mixed use project including 260 residential units, 130 of which would be available at less than 80% of the area median income ("AMI"), with 27,891 square feet of commercial uses, among other components. The site is the parking lot of the former Spenger's restaurant. It is also the historic location of a Native American shellmound, which has been designated as a historic site by the City and State (the "West Berkeley Shellmound"), remnants of which remain below grade.

The City evaluated whether the application satisfied SB 35's objective planning standards, including the project's impacts on the below-grade remainder of the West Berkeley Shellmound. In September 2018, the City determined that the project was ineligible for ministerial approval under SB 35, including because the City found the project would demolish the remainder of the West Berkeley Shellmound, and thus did not qualify pursuant to subdivision (a)(7)(C) of section 65913.4 (exempting projects that would demolish a historic structure on a site listed in a historic register). The developers assigned their rights to the owners, who then filed a petition for writ of mandate (traditional mandate).[22] The Confederated Villages of Lisjan, a Native American tribe represented by Thomas Lippe, intervened in the case as a defendant.

The Superior Court applied traditional review standards under Code of Civil Procedure section 1085.[23] Thus, it considered whether the City violated a ministerial duty or abused its discretion because the City's decision was arbitrary, capricious or entirely lacking in evidentiary support. As to the City's determination that the project would demolish a historic structure on a designated landmark, the Superior Court determined that the City's decision was not entirely without evidentiary support, and thus must be upheld despite evidence that contradicted the City's conclusion.

On appeal, the Plaintiffs asserted that the "arbitrary, capricious or entirely lacking in evidentiary support" standard was inapplicable, for three principal reasons. First, they asserted that, as a matter of generally-applicable law in traditional mandate cases involving ministerial duties, no

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[19] *Ruegg,* __ Cal.App.5th __, 2021 WL 1541065, at *10.

[20] *Ibid.*

[21] *Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006.

[22] Administrative mandate standards did not apply, as no hearing is required by law pursuant to SB 35, and thus the elements for administrative mandate review under Code of Civil Procedure section 1094.5(a) do not apply. (*Ruegg*, __ Cal.App.5th __ fn. 11, 2021 WL 1541065, at *8; see also *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785-86; *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547-48.)

[23] Several courts have ruled that the "entirely lacking in evidentiary support" standard is more deferential to public agency's factual determinations than the substantial evidence standard. (See, e.g., *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1466-67, 1470-71; *American Coatings Ass'n., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 461; *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 586.)

deference is ever due to a public agency's determinations, including factual prerequisites to triggering a duty. Second, they asserted that the "reasonable person" standard now included at subdivision (c)(3) of section 65913.4 is declarative of existing law (SB 35, as originally enacted), and thus applied. Third, the Plaintiffs asserted that the Legislature intended SB 35 to preclude local governments from exercising discretion, including as to the determination of underlying facts. Thus, they asserted, no deference could be due to a public agency's factual determinations, including as to whether the subject project would demolish the remainder of the West Berkeley Shellmound.

The First District Court of Appeal largely accepted the third argument, at least with respect to the question of whether there was evidence of a structure on the site. But the foundation for this holding is questionable. First, the Court ultimately found there was no evidence in the record that the any remaining portion of the Shellmound would be destroyed.[24] Thus, assuming arguendo the Court's factual conclusion was correct, there was no reason for the Court to rule on the standard of review applicable to factual determinations under SB 35. Second, the authority upon which the Court relied is distinguishable. In *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 661, 669-70, the Supreme Court held that San Francisco lacked discretion under its charter to invoke an exemption from labor arbitration in order to comply with anti-discrimination laws. The Court did not address the degree of deference due to public agency factfinders with respect to factual prerequisites that trigger ministerial duties.

In sum, *Ruegg* declares that discretion is not due to local governments' factual determinations as to whether objective planning standards are met, but does not provide any further guidance on this issue.

2. Whether a City Has a Ministerial Duty to Find a Noncompliant Project Inconsistent with Objective Planning Standards, or Whether Inaction that Results in a "Deemed to Satisfy" Presumption Overrides any Such Duty

One might presume that where a project does not satisfy objective planning standards pursuant to SB 35, a local government has a ministerial duty to deny the application. But in *Friends of Better Cupertino v City of Cupertino*, Santa Clara County Superior Court Case No. 18CV330190, the Superior Court has ruled it does not.

In March 2018, a developer applied under SB 35 to redevelop 51 acres, the site of the Vallco Fashion Mall, with a mixed use project, including with 2,402 residential units, 400,000 square feet of retail and entertainment uses, 1.8 million square feet of office space, and a park. In June 2018, the developer supplemented the application, providing, inter alia, information regarding how the project satisfied eligibility criteria. Later that month, the City informed the developer that the project qualified for ministerial approval under SB 35. The developer submitted additional application material thereafter, and in September 2018, the City again determined that the project qualified for ministerial approval under SB 35. Project opponents filed a writ petition challenging both the June and September 2018 determinations that the project qualified for ministerial approval under SB 35, contending that the City had a ministerial duty to deny the project under SB 35 on the ground that it did not satisfy objective planning standards. In May 2020, Santa Clara Superior Court denied the petition, and its judgment became final without an appeal.

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[24] *Ruegg*, __ Cal.App.5th __, 2021 WL 1541065, at *10.

While of course the decision is not precedential, the Superior Court's analysis provides interesting perspectives regarding judicial review under Government Code section 65913.4. The Court ruled that section 65913.4 creates a duty to approve qualifying projects, but no duty to deny projects that do not meet the statute's eligibility criteria. First, the Court observed that Government Code section 65913.4 includes no provision mandating denial of a project that does not meet the eligibility criteria. Second, the statute's streamlined review process provides that if the local government fails to reach eligibility determinations by certain deadlines, the project will be deemed to meet the criteria irrespective of whether they actually do. Thus, the Court reasoned, since a developer may secure an approval under section 65913.4 if the local government does not act regardless of whether the project actually qualifies, the local government must not have a ministerial duty to deny an unqualified project. In other words, to infer a ministerial duty to deny a project would be in conflict with the rule that a project can be deemed approved upon inaction.

3. Whether a City that Insufficiently or Improperly Informs an Applicant of Unmet Objective Planning Standards May Deny SB 35 Approval

A similar issue arises with respect to arguably insufficient notices of inconsistencies.

In November 2018, a developer applied for approval of a mixed use project, using the City of Los Altos' General Application form (the City did not have an SB 35 application form), stating it sought SB 35 approval as well as use permit approval (which would not be required if the project qualified for SB 35 approval). The City responded that it could not simultaneously process a ministerial SB 35 application and a standard use permit application. The City also determined that the project did not qualify for ministerial approval under SB 35 on the ground that it did not satisfy the affordable housing criteria or objective planning standards regarding parking and design review. But the City did not identify the objective parking standards with which the project did not comply, among other Court-identified shortcomings in the City's response.

The developer and a renters advocacy group each filed suits, alleging violations of SB 35 and the HAA, among other claims—40 *Main Street Offices, LLC v. City of Los Altos* and *California Renters Legal Advocacy & Education Fund v. City of Los Altos*, Santa Clara County Superior Court Case Nos. 19CV349845 and 19CV350422. The Court consolidated the lawsuits.

The Superior Court ruled against the City. Among the reasons was that the City's determination that the application did not qualify for ministerial approval under SB 35 was insufficient. First, as to the City's determination that the developer did not satisfy objective planning standards with respect to parking, the Court held that the City's determination did not inform the developer of the objective planning standards that were purportedly not satisfied. Second, the Court ruled that the standard upon which the City appeared to rely, regarding "adequate" ingress and egress, was not an objective planning standard. Accordingly, the denial letter was insufficient.

4. Whether Mixed-Use Projects Qualify for Ministerial Approval Under SB 35

Of course, SB 35 provides for streamlined approval of *housing* projects. But what about mixed-use projects? An issue considered in *Ruegg & Ellsworth v. City of Berkeley* is whether Government Code section 65913.4 applies to mixed-use projects, and if it does as a matter of statutory interpretation, whether application to mixed-use projects in charter cities violates the Home Rule/Municipal Affairs Doctrine.

The only discussion regarding commercial uses in Government Code section 65913.4, as originally adopted by SB 35 and subsequently amended, arises in the context of the underlying zoning and square footage requirements. (§ 65913.4, subdiv. (a)(2)(C

As a matter of statutory interpretation, the Court of Appeal held that SB 35 applies to mixed-use projects, provided that the site is zoned for residential or mixed uses, the development will devote at least two-thirds of the square footage to housing, and associated criteria are satisfied.[25]

As to charter cities' home rule authority, the Court held that application of SB 35 to mixed-use projects does not unconstitutionally override charter cities' discretionary commercial use permitting authority.[26] Below, we unpack this issue and explain the Court's reasoning.

Charter cities are authorized to "make and enforce all ordinances and regulations in respect to municipal affairs." (Cal. Const., art. XI, § 5(a); see also *Northgate Partnership v. City of Sacramento* (1984) 155 Cal.App.3d 65, 73 [Constitution provides charter cities with broad authority over municipal affairs, subject to their city charters which act as instruments of limitation].) Local enactments "relating to matters which are purely municipal affairs prevail over state laws covering the same subject." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.) "Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." (*Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552, 562.) "[T]his constitutional 'home rule' doctrine reserves to charter cities the right to adopt and enforce ordinances that conflict with general state laws, provided the subject of the regulation is a 'municipal affair' rather than one of statewide concern."' (*Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 45.)

A four-part test applies to resolve whether a matter is a municipal affair for which the State may not interfere with charter city authority. First, the court "determine[s] whether the [matter] at issue regulates an activity that can be characterized as a 'municipal affair.'" (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 556.)

Second, the court determines whether the case "presents an actual conflict between [local and state law]." (*State Building & Construction Trades Council,* 54 Cal.4th at 556.) The courts should seek to preserve charter cities' home rule authority and construe statutes to avoid conflict findings, whenever possible. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16.)

Third, in the event of a conflict, the court decides whether the statute addresses a statewide concern. (*State Building & Construction Trades Council,* 54 Cal.4th at 556.)

Fourth, the court determines whether the statute is reasonably related to the statewide concern and is narrowly tailored to avoid interference in local governance. (*Id.* at 556.)

As to the first factor, the Court accepted that zoning authority with respect to commercial uses is a municipal affair.[27]

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[25] *Ruegg*, __ Cal.App.5th __, 2021 WL 1541065, at *22-24.

[26] *Ruegg*, __ Cal.App.5th __, 2021 WL 1541065, at *25.

[27] *Ruegg*, __ Cal.App.5th __, 2021 WL 1541065, at *25. Indeed, the conditional use permitting process is a principal means by which cities exercise their land use authority. Decisions regarding a use permit are of "vital public interest" to the local agency, applicant, and neighbors. (*Penn-Co v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, 1084.) The local agency notifies neighbors and others about the proposed use and provides an opportunity to be heard at quasi-

As to the second factor, a conflict necessarily exists between state and local law as the Court held SB 35 provides that a use permit shall not be required for project that meet its criteria.

As to the third and fourth factors, the City asserted that neither the statute nor the legislative history justified preclusion of commercial use permitting authority, and that any attempt to do so was not narrowly tailored.

"[T]he sweep of the state's protective measures may be no broader than its interest." (*Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137, 146.) Indeed, even a legislative declaration of a statewide interest does not "*ipse dixit* make it so." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 24, fn. 21.) Here, the Legislature has not even declared a statewide interest on overriding local government's *commercial* use permitting authority in order to advance housing development. Indeed, SB 35's 1257-page legislative history neither identifies any purpose to override commercial use permitting authority nor implies that the passing statutory reference to mixed-used zoning would surreptitiously capture for ministerial review commercial aspects of a mixed-use project. Thus, given that the courts do not blindly accept legislative declarations of statewide interest when the Legislature has asserted one, the absence of any such declaration, finding, or discussion supports the conclusion of no statewide interest in overriding charter city authority regarding commercial use permits.

Further, the City asserted, SB 35 is not narrowly tailored because the State could advance its interest in promoting housing without interfering with charter cities' separate, well-accepted interest in regulating commercial uses, e.g., by limiting SB 35 to housing projects or to projects with limited, resident-serving commercial uses.[28]

The Court of Appeal did not directly address these contentions as to the third and fourth factors. Rather, it provided only a cursory rejection of the City's home rule argument:

> The extent to which section 65913.4 interferes with local regulation of commercial uses appears to be fairly minimal, and incidental to the statute's purpose of facilitating development of affordable housing. While the overall "multifamily housing development" eligible for ministerial approval is not subject to a conditional use permit, nothing in section 65913.4 requires or allows ministerial approval of a development that includes commercial uses conflicting with local zoning. To the contrary, to be eligible for ministerial approval, the proposed development must be "consistent with objective zoning standards, objective subdivision standards, and objective design review standards" established by the locality. (§ 65913.4, subd. (a)(5).) Nothing in section 65913.4 exempts the businesses that would occupy the commercial portion of appellants' project from permit and licensing requirements for their particular operations. In light of the limited extent of any intrusion into municipal authority over commercial uses, and narrowly delineated circumstances in which section 65913.4 applies, we conclude the statute—which, as we have said, is reasonably related to resolving the statewide interest in alleviating delays and obstacles to development of affordable housing

adjudicatory hearings during which the applicant and interested parties may offer evidence and arguments regarding the propriety of the proposed use and offer solutions to prevent and/or mitigate potential impacts. (*Id.* at 1079.)

[28] Moreover, neighbors have due process rights to notice and opportunity to be heard regarding commercial uses that affect their interests. (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 615-16.) Thus, the courts should not infer legislative intent to deny due third parties' due process rights with respect to commercial uses.

projects—does not unduly interfere with the City's land use authority. (*State Building & Construction, supra,* 54 Cal.4th at p. 556.)[29]

5. Whether an SB 35 Denial Constitutes HAA Denial

In *Ruegg & Ellsworth v. City of Berkeley*, the Plaintiffs also alleged a cause of action contending that denial of ministerial approval under SB 35 constituted an unlawful "disapproval" of the project under the HAA. The City responded that its determination that the application did not qualify for ministerial approval pursuant to SB 35 did not constitute disapproval under the HAA, and that Plaintiffs could still pursue standard use permit processes, as the SB 35 denial had explained.

Neither the Superior Court nor the Court of Appeal ruled as to whether the City's SB 35 decision constituted a denial under the HAA. The Court of Appeal explained that it was unnecessary to reach this issue given its holding that a writ must issue to command the City to approve the SB 35 application.[30]

Nonetheless, we discuss positions taken by the parties' on this issue, for the good of the order.

The Plaintiffs claimed that the City had unlawfully disapproved the project under the HAA. The City responded by explaining, inter alia, that the HAA's deadlines had not yet been triggered, and that the City had not reached any determinations regarding (i) any use permit application, which is required for the project in the absence of ministerial approval under SB 35, nor (ii) whether the project satisfies the specific criteria set forth in subdivisions (d) and (j) of section 65589.5 and, if so, whether disapproval is nonetheless warranted based on a preponderance of the evidence, e.g., existence of a "specific, adverse impact." Moreover, it would be contrary to state housing policy (as articulated in the HAA, SB 35, and other housing laws) to require or incentivize local governments—as a matter of avoiding potential HAA liability—to make denial findings under the HAA when determining that a project does not qualify for SB 35 processing approval, as they might actually be prepared to approve the project under the HAA upon further review through standard application procedures.

This position is consistent with the Legislature's amendment of Government Code section 65913.4, at subdivision (i)(2), to state: "This Section shall not prevent a development from also qualifying as a housing development project entitled to the protections of Section 65589.5. This paragraph does not constitute a change in, but is declaratory of, existing law." An applicant may seek a project approval pursuant to either SB 35 or the HAA, or both.

Thus, while the Court of Appeal declined to reach the issue, we believe local governments have a strong basis to assert a denial of an SB 35 application is not a denial under the HAA.

IV. Practice Tips

In our experience, some developers' attorneys are becoming increasingly aggressive regarding the use of the HAA and SB 35, including by seeking approval of nonconforming projects through use of density bonus law, challenging standards as not "objective," or arguing that the general plan and zoning are inconsistent and so no rezoning is needed. In addition, YIMBY groups are also filing suit against local governments that deny projects. In reviewing controversial projects, or those with difficult applicants, cities must be scrupulous in conforming to the new HAA and SB 35. Some particular strategies that may be developed by city attorneys may include these:

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[29] *Ruegg*, __ Cal.App.5th __, 2021 WL 1541065, at *25.

[30] *Ruegg*, __ Cal.App.5th __ fn. 40 2021 WL 1541065, at *29.

- *Council and Commission Education.* City Councils and Planning Commissions must understand that denial of housing applications, reduction of density, or application of standards not in effect when a preliminary application was filed, or a project was deemed complete, can embroil the city in expensive litigation. Decision-makers should be counseled to confine their review to the appropriate standards. Consider adding conditions of approval (even 'redesigning from the dais') rather than denying the project or reducing its density, even if the conditions may not be acceptable to the applicant, to address any inconsistencies with either objective or subjective standards.

- *Findings Regarding Consistency.* 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. While this will prevent major gaffes, it does not resolve the effect of the "deemed consistent" provision essentially delegating ordinance interpretation to City staff. Modifications to that provision will require either legislation or a case finding the provision to be unconstitutional as violating procedural due process (or for other reasons), as occurred with the "deemed approved" provisions in the Permit Streamlining Act.

  One workaround may involve requiring additional information from applicants before applications may be determined to be complete, by providing copies of relevant plans and policies and requiring applicants to demonstrate consistency. As the statute is drafted, a decision-maker that desires to retain its authority to interpret its ordinances would need to hold a public hearing regarding consistency within 30 to 60 days after an application is found to be complete.

  Many planners are still unfamiliar with SB 35 applications. The Legislature's new requirement for tribal consultation, however, has essentially provided a 60-day period for cities to develop appropriate application forms and train staff when faced with an unexpected SB 35 application (30 days to request consultation, 30 days for a response). Because the process is so new and the deadlines so strict, in our experience agency staff is likely to complete the required consistency review within the applicable deadlines.

- *Attempt to Convert as Many Standards as Possible to 'Objective' Standards.* No design standards adopted after January 1, 2020 may be enforced unless they are "objective." The state has made funds available through SB 2, LEAP, and REAP grants. Recognize, however, that applicants will still seek to demonstrate that adopted standards are not objective or to request waivers under density bonus law.

- *CEQA and the Coastal Act.* 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]."

While there is no case that decides whether the Coastal Act trumps the HAA, in *Kalnel Gardens, LLC v. City of Los Angeles,*[31] the Court of Appeal in dicta concluded that, based on the language of the HAA and the Court's reasoning in the case 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.[32]

As discussed above, an HAA claim may not even be ripe until CEQA review is completed; *Schellinger Brothers v. City of Sebastopol*[33] is the lead case. Almost every provision of the HAA contains an exemption for mitigation measures required by CEQA, and cities must make all of the required CEQA findings to approve a project. *District Square,* however, is a disturbing example of a court becoming the CEQA decision-maker.

- *An Emboldened HCD*. HCD's new authority to de-certify housing elements, to interpret the HAA, density bonus law, and Section 65008 (fair housing provisions) (§ 65585(j)), and to refer wrongdoers to the Attorney General has resulted in an HCD team very responsive to developer complaints. In our experience, HCD has never failed to support the developer's position, often making decisions with significant implications for housing with no opportunity for local input. Most recently HCD has threatened not to certify, or to decertify, housing elements if cities do not repeal ordinances that HCD asserts violate state law, whether or not there is any court ruling upholding HCD's position and sometimes in contradiction to the actual language of a statute. Hence cities may find themselves in opposition not only to a developer, but to HCD.

V. 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.

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 been multiple bills introduced this year that would, for instance, end single-family zoning, allow residences in every commercial zone, and limit the imposition of impact fees. Unfortunately, cities are continually excoriated for failing to "build" housing to meet their RHNA requirements, even though cities do not "build" housing, there is only a small fraction of the funds needed to build all the lower income housing assigned to cities, the state has removed $1 billion per year formerly available to cities to subsidize lower income housing, and the Attorney General has intervened in three CEQA lawsuits opposing large housing projects in fire-prone areas.

Nonetheless, cities should not contribute to this narrative by denying housing under questionable circumstances. The courts cannot help but be influenced by the drumbeat of criticism

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[31] (2016) 3 Cal.App.5th 927.

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

[33] (2009) 179 Cal.App.4th 1245.

heaped on cities for failing to "build" enough housing; the Superior Court's decision in the San Mateo case resulted in a scathing editorial in the San Francisco *Chronicle*. Contacts with lawmakers are critical. 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.