New California Law Restricts Cities' Ability to Limit Housing

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California Governor Gavin Newsom signed into law yesterday a major set of restrictions on the actions California cities and counties may take to impede housing development. Senate Bill 330 broadly aims to prevent local agencies from putting up new barriers to housing production. The legislation declares a statewide housing emergency and, on that basis, amends state law with a scheduled sunset date of January 1, 2025.

One key reform under SB 330 is its amendment of the Housing Accountability Act. The legislation establishes a new rule that housing projects statewide generally are subject only to the ordinances, policies, development standards and fees (except automatic annual adjustments) that are in effect when the developer submits a "preliminary application." This newly-defined submission must contain certain information about the project as specified by statute. The legislation's new protection applies to projects where at least two-thirds of square footage is designated for residential use.

SB 330 also prohibits nearly all cities in urban areas, as well as counties with respect to certain urbanized places, from taking the following actions:

- Parcels of land where housing is an allowable use may not be downzoned, and general or specific plan land use designations may not be changed to a less intensive use as compared to what was allowed as of January 1, 2018. This provision includes reductions in height, density or floor area ratio, or other types of increased requirements. (However, cities and counties may limit a property to less intensive uses if changes in land use designations or zoning elsewhere ensure no net loss in residential capacity.)
- Moratoriums or similar restrictions may not be imposed, with certain exceptions, on housing or mixed-use development.
- Design standards established on or after January 1, 2020 that do not qualify as "objective" standards may not be imposed or enforced.
- The number of housing units may not be capped, and limitations may not be set on population or how many approvals or permits will be issued for housing, except in predominantly agricultural counties.
- Housing projects may not be approved that either fail to replace any dwelling units lost to demolition or that will require demolishing units recently occupied by low-income households or other "protected" units, unless specified criteria are met.

Finally, among several additional provisions, SB 330 prohibits cities and counties from holding more than five hearings on a proposed housing project, including any continuances, if the project complies with the applicable, objective general plan and zoning standards in effect when an application is deemed complete.

While SB 330 will limit the ability of cities and counties to restrict housing projects by deviating from established zoning and development standards, many legislators also have expressed interest in more far-reaching reform that would force local agencies to accept housing at higher densities. Any such reform will have to wait until the legislature returns next year.

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California's "Housing Crisis Act of 2019" May Boost Housing Production or Just Boost Housing-Related Litigation

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On October 9, 2019, Governor Newsom signed into law Senate Bill (SB) 330, or the "Housing Crisis Act of 2019" in an effort to combat California's current housing shortage, which has resulted in the highest rents and lowest homeownership rates in the nation. In a nutshell, the Housing Crisis Act of 2019 seeks to boost homebuilding throughout the State for at least the next 5 years, particularly in urbanized zones, by expediting the approval process for housing development. To accomplish this, the Housing Crisis Act of 2019 removes some local discretionary land use controls currently in place and requires municipalities to approve all developments that comply with current zoning codes and general plans. If not extended, SB 330 will only be effective from January 1, 2020 through January 1, 2025.

Governor Newsom signed SB 330 over the objections of local governments to help meet his ambitious goal of 3.5 million new housing units by 2025. One study by UCLA found that localities have already approved zoning for 2.8 million new housing units – 80% of Governor Newsom's goal. However, if zoning alone was enough to increase housing production, California's rate of housing production would be increasing. Instead, in the first half of 2019, there was a 20% reduction in the issuance of residential building permits compared to the same time period in 2018. California believes the reduction was due, in part, to excessive hearings and local approval procedures, mid-application spikes in development impact fees, and mid-application

changes to development regulations, all of which can render a residential development project infeasible.

Only time will tell if SB 330 will actually increase the rate of housing production or merely fill the courts with more housing-related litigation prior to SB 330's sunset in 5 years. However, one thing is for sure – local governments must tread carefully before denying the next housing project.

Major Provisions:

The Housing Crisis Act of 2019 applies to all housing developments consistent with objective general plan, zoning and subdivision standards in affect at the time an application is deemed complete, and affects all cities and counties in California – including charter cities. A "housing development" is defined as a project that is (1) all residential; (2) a mixed use project with at least two-thirds of the square-footage residential; or (3) for transitional or supportive housing.

SB 330 also places extra restrictions on certain "affected" cities and counties with housing statistics below national averages. As defined by the legislation, today there are nearly 450 cities and unincorporated parts of counties that qualify as "affected."

For all cities and counties, the Housing Crisis Act of 2019's major impacts include:

- Retroactive prevention of zoning codes or design standards alterations that reduce residential density or intensity of use from that which was in place on January 1, 2018;
- Authorization of proposed housing developments to override the local zoning codes that are inconsistent with the general plan, if the project is consistent with the general plan or land-use element of a specific plan;
- Prevention of non-scheduled impact fees increases after a project applicant has submitted all preliminary required information;
- Limitation of the number of public hearings on a development to 5; and
- Specification that applications must be reviewed for completeness within 30 days of submission, provision of a written notice to the applicant if the agency believes the project is inconsistent with objective local development plans, policies and standards within 30 days if a housing project is under 150 units (and 60 days if the housing project is over 150 units).

Additional controls on "affected"[1] cities include:

- Prevention of municipalities from enacting moratoriums on residential and mixed use projects;
- Prevention of municipalities from establishing caps on the number of people who can live in the municipality, the number of housing units allowed, or the number of housing units to be constructed; and

- Prevention of any density reductions or changes to design standards that downzone or limit housing development.

In addition to the above-mentioned controls on a local government's ability to restrict development, there are also special limitations on reductions to affordable housing in a community. As to cities and counties, a local agency may not disapprove, or condition approval in a manner that renders infeasible a housing project for very low, low-, or moderate-income households or emergency shelters without specific written findings based on a preponderance of evidence in the record. This only applies to projects with 20% of the total units set-aside for affordable housing at 60% area median income (AMI) or 100% of the total units set-aside for affordable housing at 100% AMI.

As for developers, the Housing Crisis Act of 2019 bans any demolition of affordable or rent-controlled units unless the developer replaces all such units, allows tenants to stay in their homes until 6 months before construction begins, provides relocation assistance to tenants, and offers tenants a first right of return at an affordable rent.

SB 330 also implements penalties for violation of Housing Accountability Act (Govt. Code § 65589.5) (HAA) rules. Specifically, a court may require an agency make appropriate findings of denial or pay a $10,000 per unit fine into affordable housing funds. In the case of a local agency's bad faith and failure to comply with a court order within 60 days, fines can increase to $50,000 per unit and the court can overturn a project denial and approve the project itself. Bad faith includes decisions that are frivolous or entirely without merit.

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[1] SB 330 sets out criteria for identifying "affected" cities based on incorporation, size, and the average rent and vacancy rate compared to the national average.

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Walking the Tightrope of SB 35

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Developers in California know that getting approval to build new housing projects can be extremely difficult, time-consuming, and expensive. But a new policy is finally coming into full effect which could help developers cut through those barriers. SB 35, enacted in 2017, streamlines the approval process for housing developments in areas with inadequate housing supply, so long as the developments meet certain criteria.

We have written elsewhere about the initial impacts of SB 35. SB 35 has successfully allowed some developers to obtain their entitlements quickly and easily through a streamlined process, but some local governments have resisted the use of SB 35. For example, the City of Los Altos denied an application that attempted to obtain streamlining through SB 35, prompting a nonprofit housing organization to sue. In Cupertino, the Planning Commission Chairman advocated in April 2019 for rescinding the SB 35 approval of the redevelopment of the Vallco Mall, which would include over 2,400 units of housing, while some residents have sued to block the development. As a result, it is crucial for developers to understand the details of SB 35 and make sure to meet all of its requirements. Any misstep may allow a recalcitrant local government to deny that a development project qualifies for SB 35 treatment and attempt to block it.

In November 2018, the state Department of Housing and Community Development (HCD) released Guidelines to clarify the criteria for SB 35 and assist cities in determining whether projects qualify for streamlining.

SB 35 Applies to Most California Cities and Counties

Any California city or county can be subject to SB 35 streamlining for either failing to permit

sufficient housing units to meet its share of regional housing needs, as determined by the Regional Housing Need Allocation (RHNA), or failing to submit annual housing reports to HCD. SB 35 currently applies to nearly all California cities and counties. As of December 2018, only 24 cities and counties are meeting their RHNA goals, and are thus entirely exempt from SB 35 streamlining. These jurisdictions combined represent less than 4% of California's population.

Where it applies, SB 35 streamlining can take two different forms. First, a city or county that has not met its RHNA goal for "lower income" housing must provide a streamlined process when any proposed development includes at least 50% affordability. "Lower income" housing means housing affordable to people making up to 80% of area median income. Most of California's largest cities—including San Francisco, Los Angeles, San Jose, San Diego, Oakland, Fresno, Anaheim, and Irvine—are not meeting their goals for lower income housing, and are subject to the SB 35 streamlining requirement for 50% affordable developments.

Second, a city or county that has not met its RHNA goal for "above-moderate income" housing—housing affordable to people making above 120% of area median income—must provide a streamlined process when any proposed development includes at least 10% affordability. This 10% streamlining process is available in several cities on the San Francisco peninsula, including Los Gatos, Millbrae, San Bruno, and Pacifica, where much new development is occurring. SB 35 could be a useful tool for developers hoping to advance projects quickly in these active markets.

HCD provides a complete list of cities and counties that currently qualify for either type of streamlining. For a map of the cities in the San Francisco Bay Area affected by SB 35, click here.

A Project Must Check All the SB 35 Boxes

SB 35 specifically exempts certain projects from the conditional use permit process and instead requires cities to provide an expedited, non-discretionary (i.e., "ministerial") approval process. To be eligible for SB 35 streamlining, the project must satisfy the following requirements:

- Be a multifamily development. "Multifamily" means the project will build at least two attached residential units. ADUs count if they are attached to a new single-family home, and in a zone allowing for multifamily developments.

- Be consistent with the city's objective zoning, subdivision and design review requirements, effective at the time the application is submitted. The guidelines define "objective" standards as "standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external source available and knowable by both the development applicant or proponent and the public official prior to submittal" (HCD Guidelines at Art. III (b) (8)). The Guidelines also suggest that this requirement should be interpreted to maximize the housing supply; provisions in local codes which

- "inhibit, chill, or preclude the development of housing" under SB 35 are "inconsistent with the application of state law."

- Be in an area that is zoned for residential use or residential mixed-use (or has a general plan designation that allows for such uses).

- Designate at least 2/3 of the overall square footage for residential use. The 2/3 calculation is based on gross square footage ratio, which includes density bonus units and related facilities (e.g., building manager's units and residential common areas). The non-residential component of a mixed-use project also qualifies for SB 35—in other words, the entire project is streamlined.

- Qualify as "urban infill." "Urban" areas are designated by the U.S. Census Bureau, and "infill" requires that at least 75% of the project site's perimeter adjoin (including across a street) parcels that are developed with urban uses. Such uses include current or former residential, commercial, retail, public institutional, or transit uses.

- Certify that all workers will be paid the local Prevailing Wage (i.e., union level wages), as determined by the California Director of Industrial Relations.

- Certify that the all workers on larger projects (75 units or more until the end of 2019, then stepping down to 26 or more units by 2022) are Skilled and Trained (i.e., graduates of an approved apprenticeship program or have commensurate experience). Smaller projects may still need to meet this Skilled and Trained requirement, depending on the location and population of the area they're located in. See Guidelines Section 403(b) for more detail.

- **Not** result in removal of current rental housing (i.e., the project cannot displace existing tenants through demolition, evictions or sale of rented units), nor require demolition of an historic structure that is listed on a national, state, or local historic register.

- **Not** be located in certain sensitive or hazardous areas, such as wetland areas, hazardous waste sites, or flood zones (see Guidelines 401(b) for the complete list).

In addition to these project and site-specific requirements, SB 35 projects must meet the minimum affordability requirements spelled out in the statute, depending on how well its locality is meeting its RHNA goals:

- For developments in areas without enough "lower income" housing, **50% of the units must be affordable** for households making below 80% of the area median income.

- For developments in areas without enough "above-moderate income" housing, **10% of the units must be affordable** for households making below 80% of the area median income.

But if a development in one of these areas is for ten or fewer units, it is exempt from the requirement to create affordable units.

- The number of affordable units required must be counted before any density bonus units are added in; density bonus units do not count towards the affordability percentage.
- Affordable units must be built on-site.
- If both SB 35 and a local inclusionary zoning ordinance apply, whichever requirement results in more affordable units governs.

Projects that elect to take advantage of streamlining must submit a site or building permit application and an SB 35 streamlined development application demonstrating the project's eligibility to the local planning department. Each locality can decide on the specific form of its SB 35 streamlined development application.

SB 35 Expedites Review for Qualified Projects

Once a developer applies, a city or county has either 60 or 90 days (depending on whether the project will create more than 150 residential units) to determine whether the developer has complied with all SB 35 requirements. If the local government fails to either certify or reject the application in this timeframe, the project is automatically deemed approved.

For SB 35-compliant projects, final approval (including any design review or public oversight) must be completed within either 90 or 180 days (again depending on if the project will produce over 150 units) from when the initial application was submitted. A city's failure to obtain design review approval cannot prevent overall approval of the project.

Perhaps most importantly for developers, the California Environmental Quality Act (CEQA) does not apply to projects qualifying for SB 35. CEQA only applies when a project needs discretionary approval from a local government, and under SB 35, cities and counties have no discretion to approve or reject qualifying projects. Avoiding CEQA review can dramatically reduce the cost and shorten the time to completion of a project.

Moving Forward

SB 35 sets out a number of hoops for developers to jump through, but once those requirements are met, it offers a powerful way to cut through the red tape which often dooms projects. Whether this tradeoff is workable for enough developers to meaningfully increase housing production remains to be seen. Every local government sends a yearly progress report to the state, detailing the number of SB 35 streamlining applications they received, whether those applications were approved, and how much progress the locality has made in reaching its RHNA goals. As these data come in, we will learn just how powerful a tool SB 35 can be.

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NEWS

Los Altos council holds special meeting, braces for housing-related litigation (/news/sections/news/199-city-affairs/60778-los-altos-council-holds-special-meeting-braces-for-housing-related-litigation)

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(/images/web/09_11_19_NEWS_40MainStreet_4437.jpeg)

Megan V. Winslow/Town Crier

Updated plans for a five-story, mixed-use building are posted outside 40 Main St., despite the Los Altos City Council's rejection of an appeal in April. Owners Ted and Jerry Sorensen are among the plaintiffs suing the city over the decision.

The Los Altos City Council was slated to convene two hours prior to Tuesday's meeting – held after the Town Crier's press deadline– to discuss a pair of lawsuits filed against the city and its entities. Both lawsuits stem from housing-related applications rejected earlier this year.

GoldSilverIsland Homes LLC is suing the city over the council's failure to allow developer Ying-Min Li to subdivide his property at 831 Arroyo Road after major public pushback.

The other case involves 40 Main Street Offices LLC and tenant protection groups the California Renters Legal Advocacy and Education Fund (CaRLA) and the San Francisco Bay Area Renters Federation (SFBARF), which consolidated two suits to become a petitioning powerhouse against a Senate Bill 35 application the council denied for a downtown property.

DEFINING 'CONSISTENCY'

In a 3-2 vote May 28, council members rejected the proposed subdivision of Li's Arroyo Road plot, which would have split the property into a 10,029-square-foot interior lot and a 13,404-square-foot corner lot. Councilwomen Jeannie Bruins and Neysa Fligor dissented. In the resolution certifying the denial of the application, city staff said it was rejected on the grounds of lack of compliance with the Los Altos General Plan and its Housing Element.

The day of the subdivision discussion, Li's legal team sent the city a 42-page document detailing the merits of his request, as well as the efforts he had made to work with the city. His attorneys aimed to address all of the major concerns raised by neighbors opposed to the subdivision, who showed up at both Planning Commission and council meetings.

"On May 23, 2019, (Li) emailed the mayor to communicate that on the condition the city council reconsiders and approves the application, (he would be) willing to voluntarily agree to ... limit building height to one story for both (parcels), comply with neighborhood CC&R 40-foot setbacks from the street line for both (parcels) and the new home at parcel 2 will face Arroyo Road," wrote Monchamp Meldrum LLP partner Paula Kirlin in the letter. "(Li) also stated he further agrees to a recorded deed restriction documenting the above requirements."

Kirlin cited case law to allege that the city's basis for the denial was "inconsistent and factually inaccurate." The complaint, filed in Santa Clara County Aug. 13, called the city's suggested changes to 831 Arroyo Road "minor" and acknowledged that city leaders were "faced with neighborhood opposition" from a "small but vocal" group of project opponents when they made the decision to reject the application.

Matthew Francois, lead attorney for GoldSilverIsland Homes, stated in the complaint that the council's decision "must be set aside" and the city should be ordered to issue Li a certification of approval due to the council's failure to act on the project within 30 days from the Planning Commission's report, as required by law. According to city documents and the lawsuit, the commission unanimously recommended approval to the council Feb. 7, and the council considered that recommendation March 26. No formal action was taken until 76 days after the commission report was provided to the council via the city clerk, on or before Feb. 11.

After "exhausting all non-judicial remedies available," the complaint states, the petitioners are demanding approval of the project, compensatory damages and litigation expenses.

No court dates have been set, according to the county's public portal.

ON THE GROUNDS OF AFFORDABLE HOUSING

After nine years of fighting for approval to turn their office at 40 Main St. into a three-story complex, Ted and Jerry Sorensen in November 2018 changed course and submitted a new application for a five-story, mixed-use building under SB 35. Signed into law last year, the legislation aims to streamline standards in cities that have not met their affordable housing requirements.

Tasked with reviewing the Sorensens' application through SB 35, city planners deemed the project noncompliant due to its failure to meet the city's "objective" standards. The Sorensens and their attorney Daniel Golub appealed the decision April 6.

At the time, Golub alleged that city officials did not alert the Sorensens that their application was incomplete and did not specify the violations in their Dec. 7 letter, sent within SB 35's required 60-day window. He also contended that the city's standards used to evaluate the project were not in fact "objective."

Despite Golub's argument and a California Department of Housing and Community Development's letter supporting the project's approval, both the council and the Planning Commission stood with staff and denied the appeal.

Golub reached out to two of the plaintiffs involved in the consolidated case: CaRLA and SFBARF. Both organizations advocate for the construction of more homes in the Bay Area and monitor local governments closely to ensure they are adhering to state housing laws. The co-executive directors of CaRLA, Victoria Fierce and Sonja Trauss, are also named as petitioners.

The plaintiffs seek damages including a statement declaring what is appropriate under SB 35 and the related state density bonus law, an injunction urging the city against denial of the application and the cost of the suit and attorneys fees. A hearing for the petition is scheduled 9 a.m. Nov. 1; the location is pending.

The city has declined to comment on both cases in the past due to its long-standing policy of refusing to discuss pending litigation.