California Housing Law Updates: Practical Guidance for Planning Commissioners

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Presentation Overview

- Introduction: State Housing Policy.
- The Legislature as Planners
    - SB 79: dense housing near transit
    - AB 2011 – housing in commercial zones.
    - SB 4: YIGBY – housing on religious property.
- Housing Accountability Act.
- Housing Crisis Act of 2019
- Density Bonus Law.
- Builder’s Remedy

Presentation Overview – part 2

- Major CEQA Changes (AB 130 and SB 131).
- Major Ministerial Approvals and Streamlining
  - v SB 35.
  - v ADUs, SB 9, 10-Unit Subdivisions.
  - v 60-days to decide after complete application submitted.
- Tribal Consultation Process.
- HCD Authority, “Technical Assistance,” and Civil Fines.
- What’s Left for Planning Commissioners When They Review Housing Projects?
- Discuss a Housing Project and take it through the Planning Process.

State Housing Policy

Making It Hard to Deny Housing Projects

"The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then 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."

Major Themes in Legislation Since 2017

- Very difficult to deny or reduce density of housing
- **Applicants may use density bonus law to ignore almost all standards (height, floor area, etc.); and use builder’s remedy to ignore density in addition**
- State standards imposed in place of local ones (ADUs, SB 9, SB 79, parking, housing in commercial zones, code limits)
- Greatly reduced timelines for many approvals
- More ministerial approvals (no public input, no CEQA)
- Increased authority to HCD
- Increased penalties for noncompliance

The Legislature as Planners: SB 79, AB 2011, and SB 4

SB 79

- Effective in 8 counties on July 1, 2026
- **Sets density standards for projects within ½ mile of major public transit, primarily rail service**
- Reflects Legislature's view that low densities around transit stations do not support transit investments
- Densities allowed 80 – 120 units/acre; may be doubled
- Heights of 55 – 75 feet but no requirement to increase
- Subject to CEQA unless eligible for SB 35 ministerial approval

AB 2011: Affordable Housing & High Roads Act

- Sets development standards for housing along commercial corridors & within ½ mile of UC, CSU, and community college campuses
- **Sets density, height, and setback standards for eligible projects, which may be modified under density bonus law**
- Reflects Legislature's view that dense housing should be allowed along significant commercial corridors
- Densities allowed 30 – 80 units/acre; may be doubled
- Heights of 35 – 65 feet; may be increased
- Ministerial approval; no CEQA

SB4 Overview

Streamlines process for religious orgs & nonprofit colleges to provide affordable housing

- Ministerial approval (no CEQA) of 100% affordable housing regardless of zoning on faith-based properties.
- Ancillary uses also permitted (childcare centers + facilities that provide recreational, social or education service) + some commercial uses.
- Projects are eligible for density bonus.
- Must be a “Qualified Developer”.

Housing Accountability Act (HAA)
(Government Code § 65589.5)

Limits local government discretion over housing approvals to promote housing development

Purpose and Core Policy

- Oldest/most important pro-housing law (enacted in 1982) addressing housing shortage and limiting local actions that impede housing development.
- Discourages rejecting, reducing the density of, or rendering infeasible housing projects, farmworker housing, or emergency shelters.
- Applies to both affordable and market rate housing projects.

Basic Applicability

- Applies to housing development projects that are consistent with objective local development standards (general plan, zoning, subdivision, and design standards).
- Includes mixed-use projects if a defined portion is residential.
- Local rules adopted after a project is “deemed complete” cannot be applied to that project.

Objective Standards

- A written rule that involves no personal or subjective judgement by a public official and the applicant must be able to know in advance and with certainty whether their application satisfies the rule or standard.

  Examples:

  - Objective: A height limit of 30 feet; there is no room for personal judgement in deciding whether an application meets this height limit, and the applicant will know with certainty when they submit their application whether it meets the height limit.
  - Non-objective: If a project is two or more floors higher than adjacent buildings, the project must include "a transition or step in height" and "step back upper floors to ease the transition." (*California Renters Legal Advocacy & Education Fund v. City of San Mateo (2021) 68 Cal.App.5th 820)*

Limited Exceptions for Denial or Reduced Density

A local agency can only disapprove or condition a project that is consistent with objective standards to a lower density if it makes written findings (based on a preponderance of evidence) showing:

- The project would have a specific, adverse impact on public health or safety;
- No feasible mitigation exists other than denial or conditions that reduce density.

(This is a narrow, high threshold.)

Specific, adverse impact on public health or safety?

- Must be quantifiable and direct and based on objective written public health or safety standard.
- Must have existed when the application was deemed complete.
- No definition of “adverse impact on public health or safety” (maybe very high fire zones, flood zones, no water/sewer capacity; connect condition to a specific code/standard and an unmitigable impact).
- HCD cites “neighborhood character” as an example that is not quantifiable and thus not a specific adverse impact; HAA specifically states inconsistency with the GP or zoning is not a specific adverse impact by itself.

Key Takeaways

- Local governments must approve code-compliant housing and cannot arbitrarily deny or downsize such projects.
- Objective standards apply, and exceptions for denial are narrow and evidence-based.
- The HAA dovetails with other state laws like the Density Bonus Law and housing element requirements, reinforcing pro-housing accountability.
- The HAA does not change CEQA; CEQA still applies to HAA projects.

Housing Crisis Act of 2019 (HCA) commonly known as SB 330

Amended HCA

Amended Permit Streamlining Act

Enacted New Streamlining Provisions

What It Is?

- Makes sweeping reforms to state housing law to respond to housing production crisis by limiting local restrictions and providing new streamlining approvals.
- Extended beyond its original sunset (January 1, 2025) out to January 1, 2030 by Senate Bill 8 (SB 8) and later statutory updates.
- Does not apply to projects located in “very high fire hazard severity zones”.

Five-Meeting Limit

Project limited to 5 public meetings organized by local agency

Exceptions:

- Meetings held before project application is deemed complete
- Project not consistent with objective standards
- Projects that require legislative approvals
- Additional meetings required by CEQA (such as a scoping hearing)
- Meetings not conducted by the local agency

Limitations on Reductions in Density and Downzoning

- Agency cannot reduce density or development capacity from what was in place on 1/1/2018 (i.e., change general plan designation to lower density).
- Exceptions - at the same meeting, increase density or capacity on other sites.
- Agency may not impose new housing moratoria unless an imminent threat to public health/safety exists.

Interaction With Other Laws

- Works in tandem with existing laws like the HAA, PSA, Builders Remsdy and Density Bonus.
- Has no impact on CEQA; CEQA still applies to the HCA projects.

Density Bonus Laws

Promote development of affordable housing
(sometimes referred to as below market rate “BMR” units)

Density Bonus Law – Inconsistent Projects ARE Consistent!

- Eligible project: 5% to 100% affordable housing.
- Eligible projects entitled to receive:
  - A density bonus [5 – 100% (if stacking) or unlimited if 100% affordable]
  - 1 – 5 "incentives / concessions" (7 if using builder's remedy)
  - Unlimited waivers of development standards
  - Reduced parking requirements
- **Density Bonus project = consistent with set standards**
  - Granting of concession/waiver does not make project inconsistent with agency's land use regulations

Density Bonus Law

- Example: General Plan and zoning allows 20 to 60 units per acre. “Base density” is 60 units per acre. Could receive 100% density bonus and achieve 120 units per acre.
- Example: Project proposes base density and includes 15% of the units as low-income units to comply with agency’s inclusionary housing requirements. Entitled to 27.5% bonus.

Density Bonus Law -- Waivers

- Entitled to UNLIMITED waivers of development standards.
- Waiver needed to PHYSICALLY allow the housing project as proposed.
- Burden of proof on city if denies waivers.
- Can only deny waiver if it would:
    1) Have a “specific adverse impact” on health or safety
    2) Have an adverse impact on property listed in the California Historical Register
    3) Contrary to state or federal law

Density Bonus Law – Concessions

Concessions are:

- A reduction in site development standards or modification to zoning standards or design requirements.
- Allows applicant to deviate from design standards and/or development regulations when the concession reduces costs and such regulation makes the project economically infeasible to build.
- Intention is to facilitate the construction of the density bonus or “extra” units.
- Number of concessions is related to the percentage and category of affordability (maximum of 7).

Examples of Concessions

Examples:

a) Timing of payment of development fees*

b) Length of project approval

c) Ground floor commercial requirement

*An agency is NOT required to waive development fees or dedication requirements.

Local Agency's Discretion is considering Concession

Local agency has the burden of proof when denying a concession/incentive

Local agency can only deny concessions/incentives if based upon substantial evidence and include findings that the requested concession/incentive will:

1) Not result in identifiable and actual cost savings to the project to provide for the affordable housing costs; or

2) Have a specific adverse impact on public health, safety or on property which is listed on the state Register of Historical Resources and there is no feasible method to mitigate the impact without making the project unaffordable to the affordable households; or

3) Would be contrary to state or federal law.

Builder’s Remedy

Builder's Remedy

- Applies if Housing Element has not been approved by HCD
- Pre-2025: could not deny project because inconsistent with general plan and zoning for project with 20% low income units
- Major changes effective 1/1/25: set maximum densities (very high); reduced affordability requirements; determined standards applicable to project (which may be waived); made project eligible for many CEQA exemptions; stated project must be approved as proposed by applicant

What It Means for Planning Commission

- Policy preferences carry little weight
- Very difficult to require any changes
- Some projects may be exempt from CEQA
- Density may be substantially higher than zoning permits (in high opportunity areas, minimum density of 65 or 80 units per acre; may be doubled)

Major CEQA Changes
(AB 130 & SB 131)

California Environmental Quality Act

If project requires discretionary approval, CEQA **may** apply

- Mitigation measures can be imposed if project not exempt
- But more exemptions and more ministerial approvals exempt from CEQA

AB 130 Broad New Infill Exemption

Housing Projects in City Are Exempt from CEQA If:

- Site not more than 20 acres
- Previously developed with an urban use or 75% surrounded by urban uses or near urban uses
- Consistent with general plan and zoning
- At least 10 or 15 du/acre
- Meets certain environmental standards (no habitat for protected species, no wetlands, meets flood & fire stds.)
- Doesn’t demolish listed historic resource

Major Ministerial Approvals

Streamlined Review Process - SB 35 Projects

Qualifying Projects:

- Multifamily housing development (2 or more units)
- 2/3 residential square footage
- General plan or zoning allows residential or mixed use
- No housing occupied by tenants within last 10 years
- More than 10 units = prevailing wages, either 10%, 20% or 50% Lower/Moderate income
- Consistent with objective standards; but can request density bonus waivers if not

ADUs, SB 9, 10-unit Subdivisions

ADUs

- Government Code Section 65852.2, ADUs must be approved ministerially (by-right) if they meet objective local standards
- Local agency review limited to objective zoning, building, and health/safety standards
- Strict statutory timelines for approval

SB 9

- Ministerial approval of: (1) urban lot splits and/or (2) up to two primary dwelling units
- Objective zoning, subdivision, and design standards
- Projects cannot be denied / reduced in density if statutory criteria are met

<u>SB 684 (10-unit subdivisions)</u>

- Subdivisions creating up to 10 units on qualifying multifamily-zoned parcels (≤5 acres in urbanized areas)
- No discretionary review or CEQA, if objective standards are met.

Implications for Planning Commissioners

- Planning Commissioners may never review certain major housing projects; may be approved wholly at staff level

- Local agencies may be required to accept and approve plans that conform with state law:

    - Even if inconsistent with community's adopted policies,

    - Regardless of community concerns.

Tribal Consultation process

AB 130

When Consultation Is Required

- Applies to projects subject to CEQA, SB 35 projects, and projects using AB 130 infill exemption
  - Triggered when California Native American tribe has requested notification
  - Project may impact tribal cultural resources

Key Process Requirements (AB 130)

- Lead agency must provide formal written notice to requesting tribes
- Tribes have 30 days to request consultation
- Consultation must begin within 30 days of request
- Good faith consultation
- Completed before CEQA document certification

HCD Authority, “Technical Assistance,” and Civil Fines

HCD Authority

- HCD has broad authority to enforce most housing laws and refer cities to the Attorney General
- **In particular, HCD may "de-certify" a housing element if an "action or inaction" is inconsistent with housing element**
- Effective January 1, 2025: housing elements are only consistent with state law if a court or HCD says so

Housing Accountability Unit and "Letters of Technical Advice"

- HCD has "housing accountability unit" with 50 employees to investigate asserted violations
- Usually the first step is a "Letter of Technical Advice;" means "do what we say or else;" then "Notice of Violation"
- If city does not follow HCD's direction, **may** risk HCD decertification of housing element and "builder's remedy"

Housing Cases in General

Courts:

- Generally very pro-housing
- Uphold housing approvals
- Overturn denials

City risks:

- Significant attorneys fees exposure
- High defense costs
- AB 712: fine of $10,000/unit if take action contrary to letter received from HCD or AG

What’s Left for Planning Commissioners Reviewing Housing Projects?

Proactive Steps

- **Adopt objective health & safety standards**

  Examples: sidewalk & bikeway standards, street design, “safe routes to school,” fire evacuation standards, adequate sewer & water capacity, etc.
- Designate historic sites and buildings
- Adopt standards requiring studies of environmental issues apart from CEQA
- Adopt environmental standards & mitigation measures
- Contact your legislators

Project Review

- Review Under CEQA, If Not Exempt
- Analysis of environmental issues required
- City may impose feasible mitigation measures
- Enforce Health & Safety Standards
- Enforce State & Federal Law
- Protect Historic Sites If Possible

Remaining Discretion on **Some** Housing Projects

- May use subjective standards to apply conditions of approval if standards adopted before January 1, 2020 and don’t effectively reduce the density or deny the project (and if no specific restriction on use of these standards)

Discussion on Housing Project

PROJECT DESCRIPTION

- Site: 13.5 acres; previously used for farming and storing farm equipment;
- General Plan – Residential Low (1 du/ac); Zoning – Agriculture (1 du/5ac)

Project Proposes:

- Grading portions of artificial slopes at 17% -20%
- 7 homes (5,000 sq. ft; 5 bedrooms; 4 bathrooms
- 1 BMR (3,000 sq. ft.; 4 bedrooms, 2.5 bathrooms
- seeks density bonus – requests 1 concession to inclusionary housing standards B(b)(1) and (3) to provide “smaller” unit and 1 waiver for General Plan Policy 1.

DEVELOPMENT STANDARDS

A. General Plan Policies

- Policy 1: Discourage grading on slopes exceeding 15% to avoid slope instability, unnecessary grading and extensive land disturbance.
- Policy 2: Discourage projects in High Fire Hazard Zones unless adequate fire protector services are provided

B. Inclusionary Housing Ordinance Standards:

a) Inclusionary units must be dispersed throughout the development.
b) The quality and exterior design of inclusionary units must be comparable to the market rate units. However, an inclusionary unit may:

1) Be smaller in size by up to ten percent when compared to the average size of market rate units that have the same number of bedrooms as the inclusionary unit.
2) Be developed on smaller lots of up to ten percent when compared to the average lot size of market rate units that have the same number of bedrooms as the inclusionary unit.

c) The average number of bedrooms for all inclusionary units must be equivalent to the average number of bedrooms for market rate units

Discussion

1) Can applicant use a Preliminary Application under HCA and can it be processed as an SB 330 project (must be consistent with objective standards)?
2) Can agency require applicant to rezone to make zoning consistent with General Plan?
3) Are General Plan policies and inclusionary housing standards objective?
4) Is the project consistent with GP standards?
5) Can agency restrict the concession to apply to subparts of standard in inclusionary housing ordinance?
6) Can a waiver be used for General Plan Policy 1?
7) Does AB130 and/or SB131 apply?

Thank You!

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