Density Bonuses, Builder's Remedy, Housing Accountability: Oh My!
The New Role of Planning Commissioners In Navigating Housing Approvals

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Presentation Overview

- Introduction: State Housing Policy
- Housing Elements and “By Right” Approvals
- Ministerial v. Discretionary Approvals
- Not So Discretionary
  - Housing Accountability Act
  - Density Bonuses
- Major Ministerial Approvals
  - SB 35
  - AB 2011
- Housing Crisis Act
- HCD Authority, “Technical Assistance,” and Civil Fines
- Builder’s Remedy
- What’s Left for Planning Commissioners When They Review Housing Projects?

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."

Over 200, Often Poorly Drafted Laws

- Dense, prolix language
- Very difficult to understand
- Example:
  - Two meanings of “housing development project”: sometimes includes single-family homes and ADUs, sometimes not

Housing Elements and ‘By Right’ Approval

Sixth Cycle Regional Housing Needs Assessment

- RHNA MUCH higher this cycle (2021 in SANDAG, SCAG, SACOG regions; 2023 in ABAG region)
- Examples:
  - SCAG: +226%
  - SACOG: +46%
  - SANDAG: +6%
  - SLOCOG: + 164%
  - ABAG: +150%
- Communities required to upzone MANY more sites

Each Upzoned Site is Eligible for 'By Right' Approval

Eligibility:

- 20% affordable to lower income households
- No subdivision

Then:

- **NO CEQA**

- ONLY design review based on objective standards. (Plus CDP in coastal zone)

Discretionary v. Ministerial

Discretionary v. Ministerial Defined

Discretionary –

- Requires judgement, deliberation and decision making

Ministerial –

- Exercising no personal judgement
- Project review and approval limited to whether it meets agency's objective standards

Discretionary v. Ministerial Decisions

Prior to 2017 –

Planning Commission had greater role in reviewing & making decisions on housing projects. Much more discretion to modify projects. Almost all projects needed CEQA review.

Post 2017 –

Planning Commissioner's role becomes restrictive & even discretionary decisions aren't so discretionary

- Housing Accountability Act – Adopted in 1982; strengthened in 2017 and every year thereafter
  - Emphasis on "objective standards"

- SB 330 – Adopted in 2019:
  - Created Housing Crisis Act,
  - Preliminary Applications (early vesting)
  - 5 Hearing rule

Ministerial Decisions

- SB 35 – Adopted in 2017: streamlined approval
- ADUs – Starting in 2017 must be ministerial
- SB 9 – Adopted in 2021: 4 units on single-family lots
- AB 2011 – Adopted in 2022: housing in commercial areas
- SB 4 (YIGBY) – Adopted in 2023: housing on religious/university sites
- AB 684 – Adopted in 2023: approval of subdivision maps for 10 or fewer units on 5 acres or less, or 1.5 acres or less in single-family zones

Discretionary
But - No Longer Very Discretionary

Housing Accountability Act: Key Provisions

Denial or reduction in density only if:

- **Project doesn't comply with "objective standards" OR**
- **Results in "specific adverse impact" on public health & safety**
  - A "significant, quantifiable, direct, and unavoidable impact, based on **objective, identified, written public health or safety standards**" that can't be mitigated
- Usually still subject to review under CEQA

What Is an “Objective Standard”?

OBJECTIVE	SUBJECTIVE
DENSITY REQUIREMENTS	REFLECT THE LOOK AND FEEL OF THE COMMUNITY
HEIGHT LIMITS	SITE IS NOT PHYSICALLY SUITABLE FOR THE PROPOSED USE
LOT COVERAGE	MUST BE COMPATIBLE WITH ADJACENT USES
SETBACKS	
FAR REQUIREMENTS	

Question – What if objective standard above includes a range (i.e., density of 25 – 35 du/ac, height of 3 stories or 40 feet)?

What Is NOT an "Objective Standard"?

"If height varies by more than one story between buildings, a transition or step in height is necessary…If changes are greater, stepback upper floors."

Why Isn’t This Standard “Objective”?

- Could be a “transition” of trees and a trellis instead of a stepback
- Not clear how far upper floors must step back
- Not clear how far along building the step back must run
- Not clear how many floors must step back

“Deemed Consistent”

- Specific housing development application subject to Permit Streamlining Act
  - Must review for completeness within 30 days of each submittal, or “deemed complete”
- Once complete, staff must notify applicant in short time (30 or 60 days) if there are any “inconsistencies” – or “deemed consistent” with all applicable standards
  - If “deemed consistent,” can probably not be denied for inconsistency
  - If staff determines consistency, the project is deemed consistent even if Planning Commission/City Council disagrees

2025: Many More HAA “Disapprovals”

- More than 5 meetings
- Did not approve CEQA exemption when eligible
- Undertakes course of conduct for “improper purpose”
- Improperly deems application incomplete

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

- Entitled to consider the HIGHEST density as “base density”
  - 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.

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) Be 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

- Concessions allow applicant to deviate from design standards and/or development regulating when the concession reduces costs and such regulation make the project economically infeasible to build

Concessions (cont'd)

- Concessions and incentives must result in an identifiable and actual cost reduction to provide affordable housing costs and cannot result in a specific adverse impact on a written, objective health or safety standard

- 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

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

Local Agency's Discretion (cont'd)

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 satisfactorily mitigate the specific adverse impact without making the project unaffordable to the affordable households; or

3) Would be contrary to state or federal law

Density Bonus Law

- Inclusionary units can qualify project for density bonus (*Latino Unidos v. County of Napa*)

- Example:
  - City requires 10% to 20% lower or moderate income units in projects with 5 or more units

  - **All** of these projects are eligible for a density bonus (plus parking reductions, one or more concessions, and unlimited waivers)

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

AB 2011

- Allows multifamily residential development in infill areas zoned for office, retail and parking
- Streamlined, ministerial approvals even if inconsistent with general plan and zoning
- Must generally meet SB 35 environmental standards
- 100% BMR project; or must contain 13% BMR units
- Subject to prevailing wages
- AB 2243 (effective January 1, 2025) makes statute much easier to use; removes many obstacles

Streamlined Review Process

- Consistency review in 60 – 90 days after submittal
- Design review and decision in 90 – 180 Days
- Can only apply standard conditions
- Planning Director’s decision is determinative (SB 35)
- No CEQA

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

Housing Crisis Act
SB 330

Preliminary Applications

"Preliminary application" freezes development standards on date/ preliminary application submitted

- Agency not required to provide affirmative determination regarding completeness of preliminary application
- Project application must meet these timelines:
  - Housing development application must be filed within 180 days,
  - Applicant must complete project application within 90 days of receiving incomplete letter (interpretation disputed)
- Can change project by up to 20% of square footage or number of units or invoking density bonus and still rely on initial preliminary application. Special rules for builder's remedy projects

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
  - Builder's Remedy projects considered consistent
- 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

- Cannot take actions to reduce density or reduce a site's residential development capacity (example: reduce height)
- Exceptions:
  - At the same meeting, increase capacity on other sites
  - Housing development in a very high fire hazard zone
  - Not an "affected" city or county

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 large "housing accountability unit" 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"

Attorney General Involvement and Civil Fines

- AG may intervene in most housing cases; or may bring suit itself
- If fail to approve project after court order, penalty of up to $10,000/unit
- If HCD or the AG sue regarding housing element or ministerial approval, possible penalty of $10,000/month from date of violation if arbitrary or unlawful

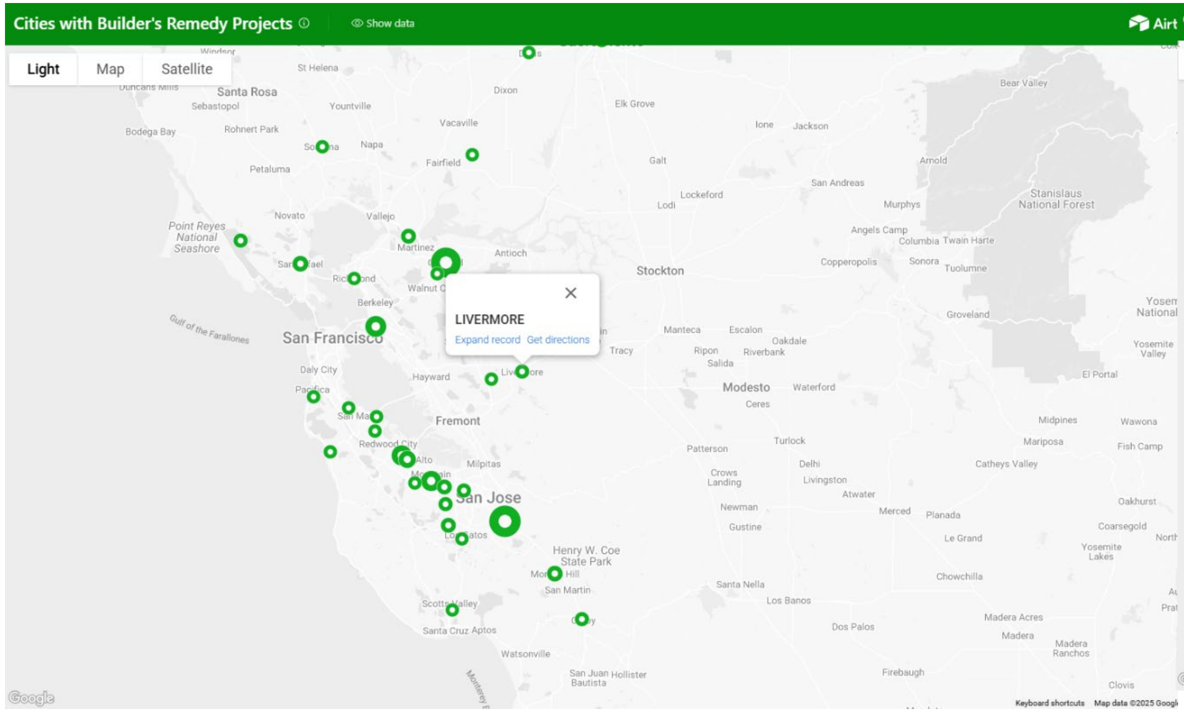
Builder’s Remedy

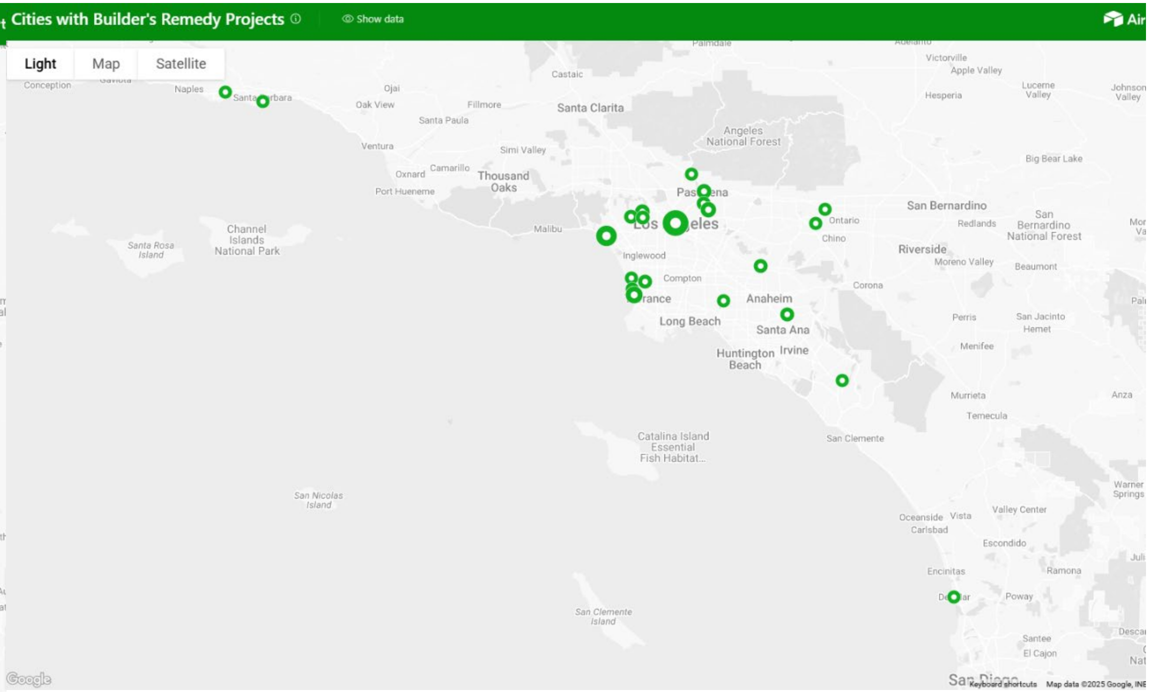
Builder's Remedy

Government Code 65589.5 (HAA)

- Local agency without Housing Element substantially compliant with state law cannot deny, or condition to infeasibility, qualifying "housing development projects" based on lack of conformance with local plans
- Proposed projects can be non-compliant with general plan and zoning
- Applicable to affordable residential, mixed use and supportive housing projects with 20% lower income housing

Builder’s Remedy





Builder's Remedy

Very limited grounds to deny project:

- Specific adverse impact on public health or safety that can't be mitigated without rendering project unaffordable
- Inconsistent with state or federal laws
- Project is on land zoned for agricultural or resource management & is surrounded by two sides with agricultural or resource management lands or does not have an adequate waste or wastewater capacity

New Definition of Builder's Remedy Project

- 13% low, 10% very low; or 7% extremely low; or 10 or fewer **base density** units, site less than 1 acre, at least 10 du/acre
- Doesn't exceed certain densities (**at least** 30 units/acre in metro areas in every zone); + 35 du/acre in high opportunity areas; plus density bonuses
- If minimum density, either 10 or 15 du/acre
- Housing element not compliant (i.e., HCD hasn't approved) when **or after** preliminary application filed

If Fits New Definition:

- Entitled to use city's zoning provisions allowing that density; or developer can pick applicable provisions
- May only apply objective standards
- Entitled to two additional concessions
- Cannot apply local affordability requirements unless can prove that development is still feasible
- Pre-2025 builder's remedy projects entitled to use new or old provisions
  - May modify project by more than 20%

What’s Left for Planning Commissioners Reviewing Housing Projects?

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)
- Also: often still subject to CEQA review

Thank You!

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