

# What is the New Role of Planning Commissioners In Light of Recent Streamlining Housing Laws?



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# Presentation Overview

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- Introduction: State Housing Policy
- The RHNA Process and Housing Elements
- Ministerial v. Discretionary Approvals
- Not So Discretionary
  - Housing Accountability Act
  - Density Bonus
- Ministerial Approvals
  - SB 35
  - YIGBY (SB 4)
  - SB 9
  - AB 2011
  - AB 684
- SB 330
- Builder's Remedy
- What's Left for Planning Commissioners When They Review Housing Projects?

# State Housing Policy

# Making It Hard to Deny Housing Projects

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“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 100, Often Poorly Drafted Laws

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

# RHNA and Housing Elements

# Sixth Cycle Regional Housing Needs Assessment

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- 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

# Sixth Cycle Housing Elements

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- Much more difficult to receive approval from HCD.
- Emphasis on fair housing and equity.
- Much more scrutiny of site analysis,
  - Third party advocates.
- More scrutiny in general.

# Ministerial v. Discretionary

# Discretionary v. Ministerial Decisions

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## **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,
  - Emphasis on “objective standards”
- SB 330 – Adopted in 2019:
  - Created Housing Crisis Act,
  - Preliminary Applications,
  - 5 Hearing rule.



# Discretionary v. Ministerial Decisions

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## Post 2017 –

More decisions are ministerial (not subject to CEQA or public hearings).

- SB 35 – Adopted in 2017: streamlined approval.
- SB 9 – Adopted in 2021: lot splits in single-family zones.
- 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.



Discretionary

But - No Longer Very Discretionary

# Housing Accountability Act: Key Provisions

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## Denial 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.

# What Is an “Objective Standard”?

Involves **no personal or subjective judgment** by a public official and verifiable by referring to an **external benchmark**.

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

# What Is NOT an “Objective Standard”?

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“If height varies by more than one story between buildings, a transition or step in height is necessary.”



## Why Isn't This Standard "Objective"?

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- Could be a “transition” of trees and a trellis instead of a setback.
- 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”

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- Formal 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 Town standards.
  - If “deemed consistent,” can probably not be denied for inconsistency.

# Alleged Inconsistencies

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- No rezoning required if general plan is “inconsistent” with zoning.
  - Once project shown as suitable for lower or moderate income housing in housing element, housing element densities probably apply even if zoning has not been adopted.
  - Example: Zoning has minimum density, GP does not.

# Density Bonus Law

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- Eligible project: 5% to 100% affordable housing
- Eligible projects entitled to receive:
  - A **density bonus** [20 – 100%, or unlimited];
  - 1 – 5 “**incentives / concessions**” [reduce costs],
  - **Unlimited waivers** of development standards,
  - Reduced **parking** requirements.
- Density Bonus project = consistent with city standards.

# Density Bonus Law

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- Entitled to consider the HIGHEST density as “base density”;
  - Example: General Plan allows 20 to 60 units per acre. Zoning allows 20 to 40 units per acre. “Base density” is 60 units per acre. Could receive 100% density bonus and achieve 120 units per acre.

# Density Bonus Law

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- 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).

# Ministerial Approvals

# SB 35 Projects (“Streamlined Review Process”)

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## Qualifying Projects:

- Multifamily housing development with either 10% or 50% Lower/Moderate income,
- 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,
- Consistent with objective standards; but can request density bonus waivers if not.

## SB 35 Projects (“Streamlined Review Process”)

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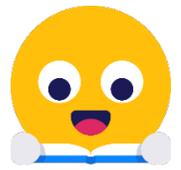
- Consistency review in 60 – 90 days after submittal.
- Design review and decision in 90 – 180 Days.
- Can only apply standard conditions.
- Planning Director’s decision is determinative.
- No CEQA.

# 'By Right' Approvals

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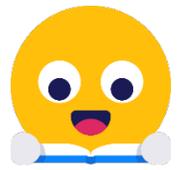
- Applies to:
  - Certain housing element sites designated for lower income housing if project has 20% lower income units.
  - Certain supportive housing developments.
  - Low barrier navigation centers.
- No CEQA review.
- Only objective design review; may impose conditions.
- No accelerated timelines.

# YIGBY (SB 4)

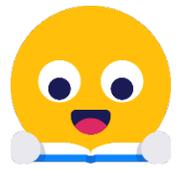


- YIGBY (“Yes in God’s Backyard”)
- Land owned by religious organizations and nonprofit colleges to provide affordable housing.
- Streamlined, ministerial approvals even if inconsistencies with General Plan and zoning.
- 100% of units must be affordable:
  - 80% Low Income,
  - 20% moderate.
- Density Guidance: 40 du/ac for commercially zoned property. Housing element “default density” (usually 20 – 30 units/acre) on residentially zoned sites.
- Must pay prevailing wages.

# 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 and if located in “commercial corridor” must contain 15% BMR units.
- Subject to prevailing wages.

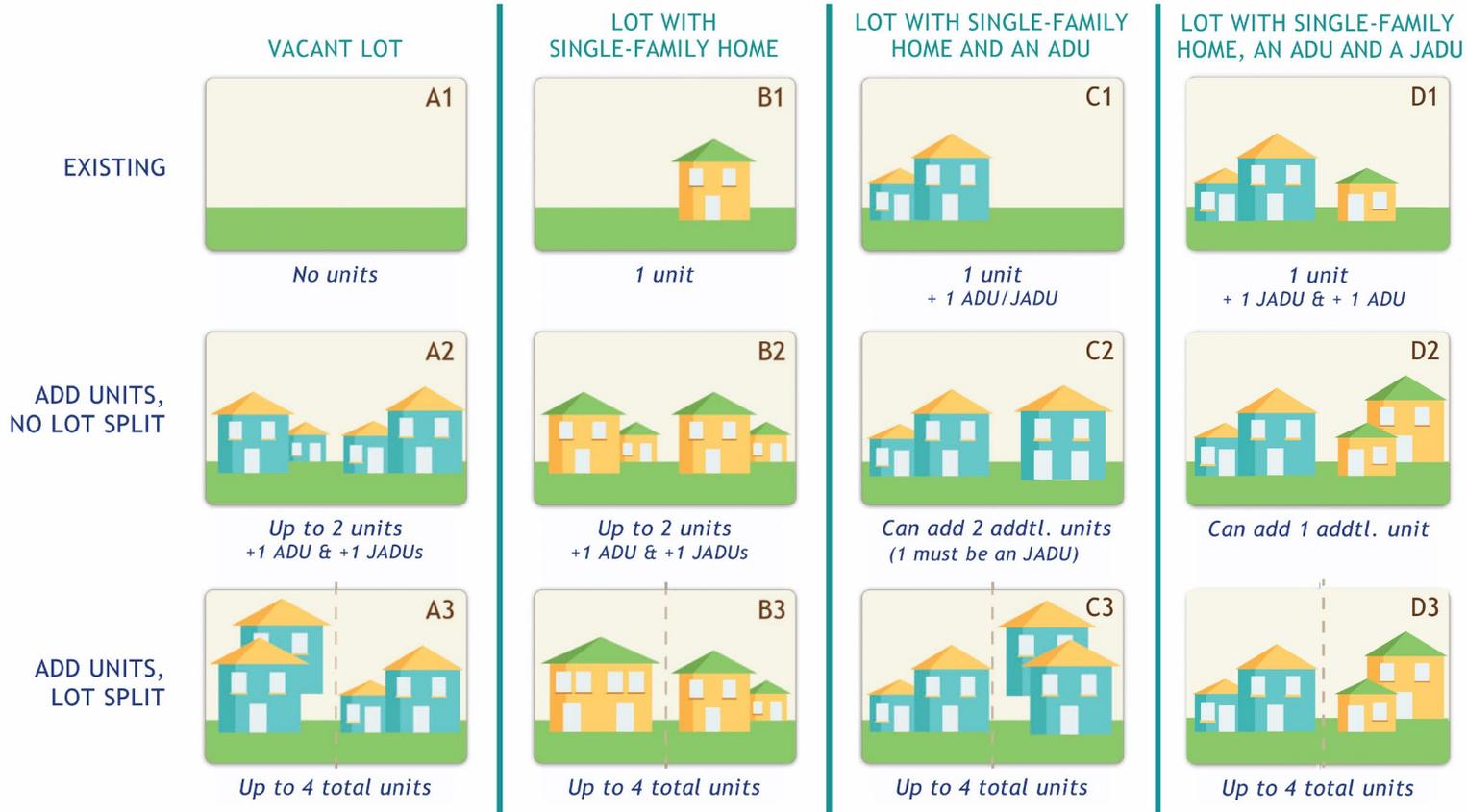


- Allows additional units with and without a lot split on a single family parcel.
- Without lot split on vacant lot,
  - Add 2 primary units and 2 ADUs.
- With lot split on vacant lot,
  - Add 4 total units.
- Must adhere to objective zoning and design standards.



## WHAT IT CAN MEAN FOR DEVELOPMENT OF NEW DWELLING UNITS

*Illustrations are based on a preliminary analysis of the law. Details are subject to change and are for informational purposes only.*



*For parcels with non-conforming buildings please check with Department of Planning & Development on the requirements for SB 9 to be utilized for building new units.*

### USING SB 9 WITHOUT A LOT SPLIT:

- Without a lot split, two primary units and up to 2 new ADUs/JADUs can be built.

### USING SB 9 WITH A LOT SPLIT:

- SB 9 does not require jurisdictions to approve more than 4 units total, including any ADUs/JADUs.
- Future subdivision prohibited.

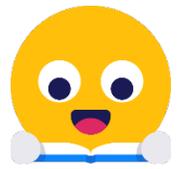


### SINGLE-UNIT DEVELOPMENTS

SB 9 can be used to develop single units - but projects must comply with all SB 9 requirements.

# More Ministerial Approval Legislation

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## AB 684:

- Allows for ministerial approval of up to 10 unit housing project on small sites (>5 ac).
- Local agencies precluded from applying certain setback, parking, floor area requirements.

# Implications for Planning Commissioners

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- Planning Commissioners may never review certain 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.

SB 330

# Preliminary Applications (“SB 330 Applications”)

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“Preliminary application” freezes development standards on date required info submitted.

- Agency not required to provide affirmative determination regarding completeness of PA.
- But project must meet these timelines:
  - Project application must be filed within 180 days,
  - Applicant must complete application within 90 days of receiving incomplete letter.
- 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.

# Five-Meeting Limit

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Project limited to 5 public meetings organized by local agency

## Exceptions:

- Meetings held before application is complete.
- Project not consistent with objective standards.
  - **Builder's Remedy projects?**
- Projects that require legislative approvals.
- Additional meetings required by CEQA (such as a scoping hearing).
- Meetings not conducted by the local agency.

# 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

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## Grounds to deny project:

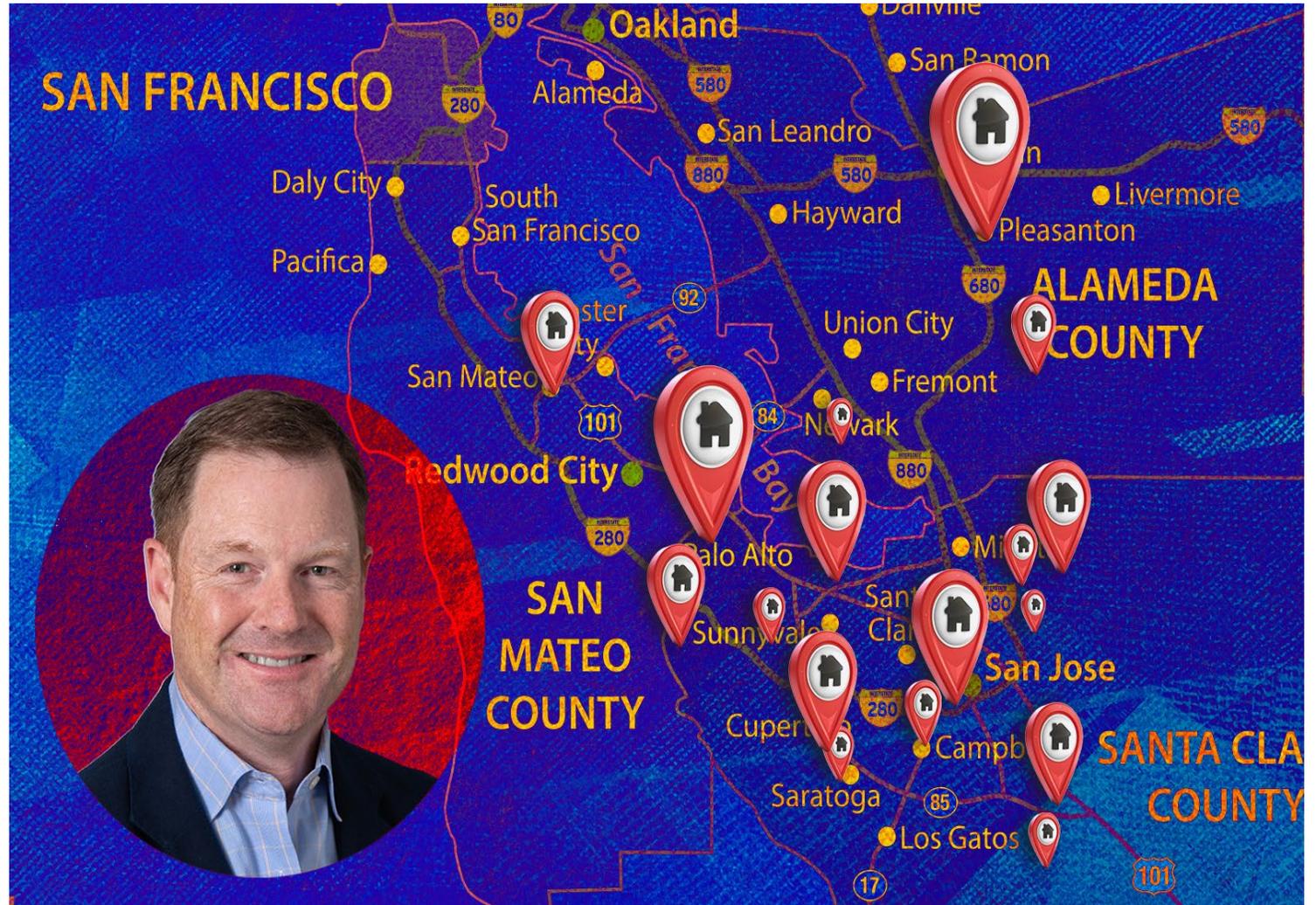
- Specific adverse impact on public health or safety that can't be mitigated without rendering project unaffordable.
- Inconsistent with state or federal laws.  
- Project is on land zoned for agricultural or resource management & is surrounded by two sides with agricultural or resource management lands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

# Builder's Remedy (cont.)

## Application Statistics:

34 applications in 11 Bay Area cities and counties = 6,400 [potential] units:

- 15 in San Jose
- 5 in Mountain View
- 3 in Palo Alto
- 3 in Los Altos Hills
- 2 in Brentwood
- 1 each in Menlo Park/San Mateo/Pleasanton/Sonoma/Fairfax/Marin County



# Preliminary Applications & Builder's Remedy

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Issue: Does the preliminary application freeze the adequacy of the housing element at the time the application was submitted?

- Not clear if housing element was inadequate when preliminary application submitted, but adequate when project reviewed.
- Is element adequate when adopted or when HCD certifies?
  - HCD has opined that adequacy is frozen and HCD certification required.
  - But HCD's determinations are only its opinions, not law.

What's Left for Planning Commissioners?

Thank You!

## For Further Information or Questions Contact:

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