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MEMORANDUM

TO: Town Council
Planning Commission
Sean Rabé, Town Manager

FROM: Town Attorney

DATE: April 2, 2021

RE: Housing Crisis Act of 2019 (Senate Bill 330)

In the 2019-2020 Legislative Session, the California Legislature adopted Senate Bill 330 enacting the Housing Crisis Act of 2019 (the "Act"). This memorandum explains the legislative intent behind the Act, describes provisions in the Act impacting local control over residential development, identifies the types of projects that qualify for preferential treatment under the Act ("Qualifying Projects"), discusses special administrative procedures applicable to Qualifying Projects, and describes certain enforcement mechanisms included in the Act.

A. California's Housing Crisis

SB 330 was intended to address California's long-standing and severe housing shortage. The author of the bill included language in its adopted findings that "California housing has become the most expensive in the nation" and the state has suffered from a housing crisis of "historic proportions" despite many years of efforts by the Legislature to expedite housing production.[1] In the bill, the Legislature declared a "statewide housing emergency" and enacted temporary measures to address that emergency. SB 330 went into effect on January 1, 2020 and most of its provisions will remain in effect through January 1, 2025.

Declaring the production of housing to be a matter of statewide concern, the Act added new procedural requirements that modify laws governing how local governments process applications for Qualifying Projects. By implementing these emergency measures, the Act took unprecedented steps overriding local land use decision-making by suspending certain restrictions on housing projects and imposing new procedural limitations on the review and consideration of housing development applications by local government agencies. In enacting these measures curtailing local control over the planning process, the Legislature found the measures were needed because past efforts at "curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects" had not been strong enough to sufficiently eliminate barriers to the production of new housing

[1] Gov. Code § 65589.5(a)(1)-(2). All statutory references are to the Government Code.

in the state.[2] "California has accumulated an unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units annually to keep pace with growth through 2025."[3] In a departure from past laws drafted to kick start housing development, which were primarily focused on housing for lower income households, several of the Act's emergency measures apply more broadly and provide benefits to market-rate housing projects, as well as affordable housing.

B. The Act Prohibits Local Agencies from Taking Certain Actions to Limit Housing Production

The Act prohibits local agencies from making changes to the land use designations in a general plan or zoning code that would reduce the amount of land available for residential development, or otherwise reduce the allowed intensity of residential development, to a level below that which was in effect on January 1, 2018.[4] The only exception to this prohibition on "downzoning" is a provision allowing an agency to reduce the number of units allowed on a specific property if the agency increases the number of units allowed on one or more other properties to ensure no net loss in residential development capacity overall.[5] The Act also prohibits a local agency from declaring a moratorium on the construction of new residential units (except to protect against an imminent threat to the health and safety of existing residents), enacting a numerical limitation on the number of permits that will be issued for new housing, or limiting the population within its jurisdiction.[6]

In addition to preserving the amount of land available for residential development, the Act also prohibits a local agency from "[i]mposing or enforcing design standards on or after January 1, 2020, which are not objective design standards."[7] The term "objective design standard" is defined as a standard involving "no personal or subjective judgment by a public official" and which "is 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 before submittal of an application."[8] The parts of the Act governing downzoning and design standards remain in effect until January 1, 2025.[9]

C. Projects Must Meet Objective Criteria to Qualify Under the Act

The Act limits the discretion of local government agencies to disapprove Qualifying Projects, and also expedites the review and processing of applications for those projects.[10] The Act defines "housing

[2] § 65589.5(a)(2)(K).

[3] § 65589.5(a)(2)(D).

[4] § 66300(b)(1)(A).

[5] § 66300(i)(1).

[6] § 66300(b)(1)(B) and (D).

[7] § 66300(b)(1)(C).

[8] § 66300(a)(7).

[9] § 66301.

[10] While the Act contains certain provisions applicable to affordable housing projects, affording developers of such projects additional benefits, this memorandum does not discuss those benefits available only to affordable housing projects and is instead focused on the provisions in the Act that apply to all Qualifying Projects, both affordable and market rate.

development project" as a project consisting of: residential units only, mixed-use developments consisting of residential and nonresidential uses (with at least two-thirds of the square footage designated for residential use) or transitional housing or supportive housing.[11]

For a housing development project to be a Qualifying Project, it must satisfy certain objective standards and criteria. Such a project must comply with "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards," as determined once the applicant has submitted a complete application.[12]

Determining that a housing development project complies with objective general plan, zoning, subdivision and design standards and criteria remains a function of local government. However, one of the temporary emergency measures in the Act is a new definition of the term "objective" to mean "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."[13] This definition remains in effect until January 1, 2025. Along with the temporary prohibition on subjective design standards (discussed above), this measure is intended to limit the discretion of local governments to disapprove or condition a Qualifying Project in a manner that requires a reduction of housing units.[14]

If a local government finds that a housing development project is inconsistent with one or more applicable, objective general plan, zoning, subdivision or design standards, the agency must provide a detailed notice of the inconsistency to the applicant within 60 days of the date that the agency determines that the Development Application is complete (or within 30 days of that date if the project contains 150 or fewer units).[15] If the agency fails to provide notice of the inconsistency within that timeframe, the Development Application is deemed to be consistent with the standard.

Even though existing law requires zoning to be consistent with the general plan,[16] it is not uncommon for zoning standards to occasionally vary from standards in the general plan. The Act accounts for this practice in a manner that encourages housing production by allowing the applicant to demonstrate conformity with the general plan instead of the zoning, in the event that the two are not consistent.

> [A] proposed housing development project with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent

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[11] § 65589.5(h)(2).

[12] § 65589.5(j)(1).

[13] § 65589.5(h)(8).

[14] § 65589.5(a)(2)(K). Section H of this memo discusses the limited standards for decisions to disapprove or require a reduction in units or density for a Qualified Project.

[15] § 65589.5(j)(2)(A). As used in this memo, the term “Development Application” refers to the completed application under Section 65943. Section E of this memo discusses the new “Preliminary Application” process created by SB 330, the effect of filing a pre-application, and the process for determining when a project application is complete.

[16] § 65860.

with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan.[17]

Rather than being compelled to seek a rezoning, or being limited by zoning standards that are not consistent with the general plan, the project is treated as "not inconsistent" with the zoning, as long as the project complies with applicable, objective general plan standards and criteria. However, if the agency has provided the required notice of inconsistency within the applicable (60 or 30 day) time period, the agency may continue to apply zoning standards and criteria which are consistent with the general plan, provided that these standards are "applied to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project."[18] In addition to addressing the issue of inconsistency between the general plan and zoning, the Act also addresses the issue of fees and standards that are enacted in response to a housing development proposal, as discussed in the next section.

E. Filing a Preliminary Application Freezes the Applicable Standards and Fees for a 180-day Period

Another manner in which the Act encourages housing production is through the new Preliminary Application procedures the Act added to Government Code section 65941.1. Through those procedures, local agencies are prevented from imposing new fees and standards adopted after a complete Preliminary Application has been submitted. A complete Preliminary Application requires information regarding 17 specific items, as well as payment of permit application fees.[19]

Included among the 17 items are various data points about the proposed project and the project site, some of which make an SB 330 Preliminary Application more burdensome for the applicant than other permit applications. For example, to complete the Preliminary Application, the applicant must provide extensive details about the project such as architectural elevations showing design, color, and material, and the massing, height, and approximate square footage of each building that is to be occupied. Also required are details about the project site such as the locations of environmental constraints and utility easements.

F. Development Application Completeness

The Permit Streamlining Act[20] previously required local agencies to compile a list of the information needed beyond the requirements of a Preliminary Application, which must be satisfied before the agency is required to make a determination that the application is complete for processing.[21] The Act expands this list requirement to include information about existing residential units that would be demolished on the project site, some of which may have affordability restrictions (so-called "protected

[17] § 65589.5(j)(4).

[18] § 65589.5(j)(4).

[19] A full list of all 17 required items is included as Attachment A.

[20] §§ 65920 *et seq.*

[21] The information required for a complete development application is set out in §§ 65940, 65941, and 65941.5.

units").[22] The Act provides a period of 180 days after submittal of the Preliminary Application in which the applicant must submit all materials needed for the agency to determine whether the package of information ("Development Application") is complete as submitted.[23]

In determining whether the Development Application is complete, the agency may only apply the "ordinances, policies, and standards adopted and in effect" when the complete Preliminary Application was filed, with certain limited exceptions.[24] The statute defines "ordinances, policies, and standards" to include "general plan, community plan, specific plan, zoning, design review standards and criteria," as well as "subdivision standards and criteria, and any other rules, regulations, requirements, and policies of a local agency, … including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions."[25]

As noted above, the Act puts a freeze on the application of new "ordinances, policies and standards" during the period after a complete Preliminary Application has been filed and the applicant has paid the applicable permit processing fees.[26] However, even after the Preliminary Application is submitted, the agency is allowed to adopt and apply the following new ordinances, policies, standards and measures: (1) increases to fees, charges and monetary exactions "resulting from an automatic annual adjustment based on an independently published cost index"; (2) a new ordinance, policy or standard which is needed to "mitigate or avoid a specific, adverse impact upon the public health or safety, … [where] there is no feasible alternative method to satisfactorily mitigate or avoid the adverse impact";[27] and (3) mitigation measures and other standards imposed during the CEQA process.[28] The agency may also apply new standards in the following two circumstances: (A) if the Qualifying Project has not commenced construction within 2½ years from the date of final approval, or (B) if the Qualifying Project is changed to increase or decrease the number of units or square footage of construction by twenty percent (20%) or more.[29]

G. Procedural Streamlining Available to Qualifying Projects

In addition to limiting the scope of new regulations that can be applied to Qualifying Projects, the Act also provides procedural streamlining to prevent the local agency from subjecting Qualifying Projects to undue delay or unfair treatment. The Act amends the Permit Streamlining Act to shorten the length of

[22] § 65941.1(a)(15).

[23] § 65941.1(d)(1).

[24] § 65589.5(o)(1).

[25] § 65589.5(o)(4).

[26] § 65941.1(a).

[27] A "specific, adverse impact" is defined as "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." §§ 65589.5(d)(2), (j)(1)(A). And, note that "[i]nconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety." § 65589.5(j)1)(A).

[28] § 65589.5(o)(2).

[29] *Ibid*.

time that the agency has to approve or disapprove Development Applications for Qualifying Projects following compliance with CEQA. If an Environmental Impact Report ("EIR") is required, the agency must approve or disapprove the Qualifying Project within 90 days of certification of the EIR.[30] If a Negative Declaration, Mitigated Negative Declaration or exemption is prepared for a Qualifying Project, the agency must approve or disapprove the Qualifying Project within 60 days of that determination.[31]

In addition to limiting the time for reaching a decision on the Development Application, the Act also limits the number of public hearings that may be held to consider a Qualifying Project. Once the agency has determined that a complete Development Application has been submitted, the agency may only hold a maximum of five hearings on Qualifying Projects.[32] This includes all administrative hearings and workshops, including those before advisory bodies as well as the legislative body (i.e., the Town Council), but does not include hearings on legislative matters (e.g., general plan or zoning amendment) or appeals of legislative matters.[33] A hearing which is continued to a different day counts as one of the five hearings.[34]

At these hearings, the project is "deemed consistent, compliant and in conformity with" applicable standards "if there is substantial evidence that would allow a reasonable person to conclude that the housing development project is consistent, compliant, or in conformity."[35] Until it is repealed on January 1, 2025, this prevents the hearing body from arbitrarily finding that a Qualifying Project does not meet applicable standards found in the agency's own plans, programs, policies, ordinances and requirements. However, the Act does not modify the agency's application of standards under the CEQA process, and Qualifying Projects are not afforded any deferential treatment with respect to CEQA.[36]

While the Act does not expressly limit the application of CEQA, it does expedite the agency's determination of whether the site of the Qualifying Project is a historic site. That determination must be made at the time that the application is deemed complete and remains valid during the entire processing of the application, "unless any archaeological, paleontological, or tribal cultural resources are encountered during any grading, site disturbance, or building alteration activities."[37] This prevents the agency from taking additional time to determine whether or not the site of the Qualifying Project is a historic site, but does not limit the time necessary to analyze the project's potential impacts on historic resources under CEQA.[38] This portion of the Act also only remains in effect until January 1, 2025.[39]

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[30] § 65950(a)(2).

[31] § 65950(a)(4), (5).

[32] § 65905.5(a).

[33] § 65905.5(b)(2).

[34] § 65905.5(a).

[35] § 65905.5(c)(1).

[36] § 65905.5(d).

[37] § 65913.10(a).

[38] § 65913.10(c)(1).

[39] § 65913.10(d).

H. Standards for Denial of a Qualifying Project

In considering the merits of a housing development project which is a Qualifying Project, local agencies are not entirely without options, although the authority to disapprove a Qualifying Project is severely scaled back. Where a local agency wishes to deny a Qualifying Project, it must find, by a preponderance of the evidence, that the project would have "a specific, adverse impact upon the public health or safety unless the project is disapproved or approved … at a lower density."[40] And, the agency must find that "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact" other than disapproval of the project or requiring a reduction in density.[41]

The Act advises that finding that a Qualifying Project will have a "specific, adverse impact" should be exceptional. ("It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety, … arise infrequently.")[42]

I. Enforcement

Enforcement of the Act is available in the event that the agency disapproves a Qualifying Project, or requires a reduction in units or density, without making the necessary finding of a specific, adverse impact on public health or safety which cannot be avoided without disapproving the project or reducing units or density (or without substantial evidence to support such a finding.) If that occurs, the applicant, any person who would be eligible to apply for residency in the project, or a housing organization may bring an action to enforce the Act.[43] If the court finds that the project qualifies as consistent with the applicable, objective general plan and zoning standards, and the agency failed to make the necessary finding (or to support the finding with substantial evidence) to support disapproving the project or requiring a reduction in units or density, then the court must issue a judgment compelling compliance with the Act within 60 days, including an order that the agency take action on the project.[44] If the court also finds that the agency acted in bad faith, then the court may direct the agency to approve the Qualifying Project.[45]

In addition to the procedure for enforcement by court action, the Act also provides for the levy of fines by the court if the agency does not comply with the court order by reconsidering the project within the 60-day time period.[46] The amount of the fine is set at a minimum of $10,000 per dwelling unit.[47] Where the agency fails to reconsider the project within the 60-day time period, the court may enter an order vacating the action of the local agency and deeming the project to be approved in accordance with the application as considered at the time the agency took its action determined to be in violation of the Act,

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[40] § 65589.5(j)(1)(A). See footnote 25 for the definition of “specific, adverse impact.”

[41] § 65589.5(j)(1)(B).

[42] § 65589.5(a)(3).

[43] § 65589.5(k)(1)(A)(i).

[44] § 65589.5(k)(1)(A)(ii).

[45] *Ibid*.

[46] § 65589.5(k)(1)(B)(i).

[47] *Ibid*.

"along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects."[48]

I. Conclusion

Recognizing the dire state of California's housing affordability and severely constrained housing supply, the Act imposes unprecedented measures upon local governments to not reject or make infeasible housing development projects that comply with applicable, objective standards, and to shorten and streamline the approval process. Most of these are temporary emergency measures, including the suspension of subjective design standards, which remain in effect until January 1, 2025.

[48] *Ibid*.

ATTACHMENT A

Preliminary Application Requirements

1. The specific location, including parcel numbers, a legal description, and site address, if applicable.

2. The existing uses on the project site and identification of major physical alterations to the property on which the project is to be located.

3. A site plan showing the location on the property, elevations showing design, color, and material, and the massing, height, and approximate square footage, of each building that is to be occupied.

4. The proposed land uses by number of units and square feet of residential and nonresidential development using the categories in the applicable zoning ordinance.

5. The proposed number of parking spaces.

6. Any proposed point sources of air or water pollutants.

7. Any species of special concern known to occur on the property.

8. Whether a portion of the property is located within any of the following:

(a) A very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178.

(b) Wetlands, as defined in the United States Fish and Wildlife Service Manual, Part 660 FW 2 (June 21, 1993).

(c) A hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code.

(d) A special flood hazard area subject to inundation by the 1 percent annual chance flood (100-year flood) as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency.

(e) A delineated earthquake fault zone as determined by the State Geologist in any official maps published by the State Geologist, unless the development complies with applicable seismic protection building code standards adopted by the California Building Standards Commission under the California Building Standards Law Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code), and by any local building department under Chapter 12.2 (commencing with Section 8875) of Division 1 of Title 2.

(f) A stream or other resource that may be subject to a streambed alteration agreement pursuant to Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code.

9. Any historic or cultural resources known to exist on the property.

10. The number of proposed below market rate units and their affordability levels.

11. The number of bonus units and any incentives, concessions, waivers, or parking reductions requested pursuant to Section 65915.

12. Whether any approvals under the Subdivision Map Act, including, but not limited to, a parcel map, a tentative map, or a condominium map, are being requested.

13. The applicant's contact information and, if the applicant does not own the property, consent from the property owner to submit the application.

14. For a housing development project proposed to be located within the coastal zone, whether any portion of the property contains any of the following:

(a) Wetlands, as defined in subdivision (b) of Section 13577 of Title 14 of the California Code of Regulations.

(b) Environmentally sensitive habitat areas, as defined in Section 30240 of the Public Resources Code.

(c) A tsunami run-up zone.

(d) Use of the site for public access to or along the coast.

15. The number of existing residential units on the project site that will be demolished and whether each existing unit is occupied or unoccupied.

16. A site map showing a stream or other resource that may be subject to a streambed alteration agreement pursuant to Chapter 6 (commencing with Section 1600) of Division 2 of the Fish and Game Code and an aerial site photograph showing existing site conditions of environmental site features that would be subject to regulations by a public agency, including creeks and wetlands.

17. The location of any recorded public easement, such as easements for storm drains, water lines, and other public rights of way.