Housing Housing Housing: Pitfalls and Problems in Reviewing Housing Projects

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Housing, Housing, Housing: Pitfalls and Problems in Reviewing Housing Projects

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I. Introduction

This paper was – and is – intended to bring city attorneys' attention to several lesser-known provisions of California Planning and Zoning Law that may require cities to make certain findings when approving, disapproving, reducing the density of, or attaching conditions to housing projects. The statutes reviewed here include:

- The so-called 'no net loss' provision (Gov't Code § 65863[1]), which requires that certain findings be made if a housing development is approved at a density lower than that shown in the city's housing element.

- 'By right' approval provisions for sites rezoned to achieve consistency with the housing element. (§ 65583.2(i).)

- The Housing Accountability Act (§ 65589.5), which requires that certain findings be made when housing projects are denied, reduced in density, or have conditions attached that make the project infeasible.

However, in the current session of the California Legislature, over 130 bills related to housing have been introduced. As has been extensively reported, part of the deal struck by Governor Jerry Brown to ensure the passage of his cap-and-trade bill was his agreement to work with the Legislature to adopt a package of bills intended to provide more funding of housing and require 'streamlining' of housing approvals by cities.[2]

The bills selected as part of the Governor's housing package would collectively amend **all** of the statutes reviewed below. (Note that there are no significant changes proposed in either CEQA or density bonus law.) As a consequence, while this paper reviews the current provisions and case law surrounding each of these statutes, below each section is a list of the key bills and the changes that are proposed in current versions of the bills. The Governor, Senate President Pro Tem Kevin de Leon, and Assembly Speaker Anthony Reardon have jointly issued a statement that an approved housing package will be presented when the Legislature reconvenes on August 21.[3] We hope to be able to explain the final version of these statutes when the League meets in September.

[1] Unless otherwise specified, all future references are to the Government Code.

[2] *See, e.g.*, Angela Hart, *"Climate change talks provide 'tension' for housing deal, California lawmaker says,"* Sacramento Bee (July 13, 2017); Josie Huang, *"CA affordable housing bills benefiting in political dealing over cap and trade,"* KPCC (July 13, 2017).

[3] Liam Dillon, *"Gov. Jerry Brown, California legislative leaders commit to push an affordable housing plan next month*, Los Angeles Times (July 17, 2017).

II. Related Provisions of Housing Element Law.

The statutory provisions reviewed in this paper apply to the review of applications for housing projects. However, each of the statutes relates back to the contents of each city's housing element. The key housing element provisions are these:

The City's Regional Housing Need Allocation. Before a housing element is drafted, the region's council of governments, or, for areas without a council of governments, the California Department of Housing and Community Development ("HCD"), assigns each city its share of the projected regional housing need for the next five or eight years (the regional housing need allocation, or "RHNA"). (Housing elements in the larger urban areas must be revised every eight years; those in other areas may elect a five- or eight-year period. § 65588(e)(2).)

The RHNA is assigned by income category. (§§ 65584 – 65584.09.) Typically approximately 40 percent of the need is for very low income and low income housing (collectively "lower income housing," for households generally earning 80 percent or less of median income); approximately 20 percent of the need is for moderate income housing, for households earning between 80 and 120 percent of median income; and the remaining 40 percent is for above-moderate income housing.[4] If a city's RHNA totaled 1000 units, the breakdown might be as follows:

Lower Income (Very Low and Low)	**Moderate Income**	**Above Moderate Income**	**TOTAL RHNA**
400 units	200 units	400 units	**1,000 units**

Providing Adequate Sites to Meet the RHNA. Each community must demonstrate in its housing element that it has enough sites properly zoned for housing to allow its total RHNA to be built in the next five to eight years. The housing element must contain an inventory of sites that permit housing development. For *each* site, the inventory must list the number of housing units that can be accommodated on the site, given the zoning and other constraints, and indicate whether the site is suitable for lower income, moderate income, or above moderate income housing. (§ 65583.2.)

The statute has specific requirements regarding which sites can "accommodate" the lower income housing need. In particular, certain densities (often called "default densities") are "deemed appropriate" to accommodate lower income housing. The default densities range from 10 units per acre in rural areas to 20 or 30 units per acre in urban areas. (§ 65583.2(c)(3)(B).) In

[4] *See, e.g.,* Association of Bay Area Governments, *Final Regional Housing Need Allocation (2014-2022).* "Lower income" is defined by Health & Safety Code § 50079.5; "moderate income" is defined by Health & Safety Code § 50093.

the above example, if the city's default density were 20 units per acre, at least 20 developable acres would need to be zoned at that density to accommodate the required 400 lower income units. A city may seek to demonstrate to HCD that a density below the default density could accommodate lower income housing (§ 65583.2(c)(3)(A)), and in a few instances HCD has approved lower default densities.[5] However, regardless of the required density, sites must be identified to accommodate the community's entire RHNA at all income levels.

Sites that Must be Rezoned to Provide Adequate Sites. If a city's inventory of sites shows it does not have enough areas zoned for housing at appropriate densities to meet its RHNA, its housing element must contain a rezoning program to be accomplished in three years (or a maximum of four years if certain findings can be made). (§§ 65583(c), (f).) In the above example, if the city had only 10 developable acres zoned at 20 units per acre or more, it would need to identify at least another 10 acres which it would promise to rezone within three years. Housing developments proposed on the rezoned sites must be approved 'by right,' as explained below. (§ 65583.2(h), (i).)

III. 'No Net Loss' Provisions.

The so-called 'no net loss' provisions apply when: (1) a site included in the housing element's inventory of sites; is (2) either rezoned to a *lower residential density*; or a project is approved at a *lower residential density* than shown in the housing element. (§ 65863(b).) At present the provision is inapplicable to charter cities (§ 65803), although this is likely to change (see discussion of SB 166 below). There are no published cases interpreting this provision.

"Lower residential density" usually means fewer units than were projected for the site in the city's housing element. (§ 65863(g)(1).) The provision applies to housing located on *any* site listed in the city's housing element, not only to sites designated as suitable for affordable housing. However, if either the city has not adopted a housing element within 90 days of the due date, or the housing element is not in substantial compliance with housing element law within 180 days of the due date, then "lower residential density" is defined as a density less than 80 percent of the maximum residential density permitted on the site. (§ 65863(g)(2).)

If the city downzones the site or approves a project at "lower residential density," it must make two findings:

1. "The reduction is consistent with the adopted general plan, including the housing element; and

[5] Personal communication.

2. "The remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584." (§ 65863(b).)

Even if the remaining sites are not adequate to accommodate the regional need, the city may reduce the density if it identifies "additional, adequate, and available sites" so that there is no net loss of "residential unit capacity." (§ 65863(c).) Finding the additional sites is solely the city's responsibility unless an applicant requests "in his or her initial application" a lower density that would result in the remaining housing sites being inadequate. (§ 65863(e).)

If a city then downzones a site identified in the housing element, or approves a project at a lower density than shown in the housing element, it would comply with this provision if one of the following is true:

- Other sites identified in the housing element show that the city's zoning remains adequate to meet its RHNA; or, the city has approved more units than shown in the housing element on some sites to make up the difference. For instance, if the city described above had identified sites that could accommodate 450 lower income units, but the density of one site was reduced by 20 units, the city would still be able to accommodate 430 lower income units, more than its RHNA of 400 units. Similarly, if the city had approved on another site 20 *more* units than shown in its housing element – say, through approval of a density bonus – there would be no net loss of capacity. In general, projects receiving density bonuses under Section 65915 are likely to provide extra capacity to make up for projects approved below the housing element density.

- Other sites zoned for housing, even if not identified in the housing element, show that the city's zoning remains adequate to meet its RHNA.

- The city upzones another site to meet its RHNA.

As currently in effect, Section 65863 has several ambiguities:

- Does the city's zoning need to accommodate the required number of units by income category (400 lower, 200 moderate, 400 above moderate), or only the total RHNA (1000 units)? When density is reduced, the city is required to find that sites are adequate to accommodate the regional need "pursuant to Section 65584." (§ 65863(b)(2).) Because Section 65584(a)(1) requires that each city's share be determined for "persons at all income levels" and defines those income

levels (§ 65583(e)), the better interpretation is that the required number of units must be maintained *by income level*.

- Are any changes to the housing element needed if the city identifies a site not shown in the housing element as an "additional, adequate and available site"? Nothing in Section 65863 discusses the need to modify the housing element when a new site is identified. It therefore appears to allow cities to substitute sites for those identified in the housing element without review by HCD. However, one finding required to be made is that the reduction in density is consistent with the housing element. (§ 65864(b)(1).) Projects that substantially reduce density are probably not consistent with the housing element. Cities therefore may wish to have language in their housing elements allowing this type of substitution.

- If a site needs to be rezoned to maintain adequate site capacity, when does this need to be accomplished? The city may approve the reduction in density if it identifies "adequate and available" sites so that there is no loss of capacity. (§ 65863(c).) This would seem to require that the new sites with the appropriate zoning be identified at the time of project approval; or the replacement site will not be "available" for housing. However, there is no definition regarding what is required for a site to be "adequate and available;" and the language is not consistent with that in the site identification statute (§ 65583.2), which requires a determination of whether a site can "accommodate" housing "during the planning period"[6] (§ 65583.2(c).)

Practice Tip: Cities should keep a log showing: (1) project approvals and rezonings applicable to all housing element sites; and (2) all residential approvals located on other sites, so that, if approving a project with lower density than shown in the housing element, the city will be able to demonstrate that it can still accommodate its RHNA; or will be aware that it must find another site, either by rezoning or by identifying an alternate, properly zoned site to make up the deficiency. If a site is rezoned or identified, but not in the housing element, it needs to be added to the log of housing element sites and monitored in the same way as housing element sites.

SB 166 (Skinner) (Included in Governor's housing package). As currently drafted, SB 166 would require not only that densities be maintained within each income category, but also that *sites be maintained for the actual production of units within that income category.* Under SB 166, of a market-rate project is built on a site designated for lower income or moderate income

[6] The "planning period" is the time period between the due date for one housing element and the due date of the next housing element. (§ 65888(f)(1)).

housing, the city must demonstrate that remaining sites could accommodate the unmet need for lower income or moderate income housing; or zone another site within 180 days. However, the bill provides that the city cannot deny a market-rate project because it does not contain lower income or moderate income units.

For example, under SB 166, if the city described above were to review an application for 100 market-rate units on a site designated for lower income housing, it would need to find that adequate sites zoned at 20 units per acre remain for all 400 lower income units (assuming no lower income units had been constructed). Unless the city had designated sites capable of accommodating 500 lower income units in its housing element, it would need to either identify a site not included in the housing element zoned to accommodate 100 units at 20 units per acre; or rezone another site within 180 days to accommodate 100 units at 20 units per acre.

Many cities have already approved market-rate projects on sites designated as suitable for lower income housing. If SB 166 as currently drafted becomes law, as soon as another market-rate project is proposed on a lower income site, some of these cities are likely to find that they have a significant rezoning obligation. The bill includes no exemptions for growth management provisions, agricultural preservation, or open space protection policies; and requires rezoning within 180 days regardless of CEQA requirements.

As noted above, lower income and moderate income housing account for 60 percent of a community's total RHNA. In two Bay Area affordable housing studies completed in 2015, the 'affordability gap' – the required subsidy per unit to construct lower income and moderate income units – ranged from $213,000 to $281,000 per unit for lower income units and from $123,000 to $187,000 for moderate income units.[7] Given that there are insufficient funds to subsidize 60 percent of the state's total housing need, if passed in its present form, SB 166 could force cities into large-scale rezonings in the face of tremendous public opposition.

SB 166 would apply to charter cities.

IV. <u>'By Right' Approval for Rezoned Sites</u>.

'By right' approval of a housing project is required when a housing development is proposed on: (1) a site included in the housing element's inventory of sites suitable for lower income housing; that was (2) rezoned *after* adoption of the housing element under a housing element program to accommodate lower income housing. (§ 65863.2(h).) The provision applies

[7] *See, e.g.*, Strategic Economics, *City of Belmont: Final Report, Residential Impact Fee Nexus Study* (November 2015), p. 48; Keyser Marston Associates, *City of Cupertino, Residential Below Market Rate (BMR) Housing Nexus Study* (March 2015), p. 35.

to charter cities (§ 65300). There are no published cases interpreting the 'by right' provisions as applied to the review of a housing development project.[8]

If a site must be rezoned to be suitable for lower income housing, the zoning must allow "owner-occupied and rental multifamily residential use by right." (§ 65863.2(h).) "Use by right" means that the city's review of a housing project on the site must not include any discretionary approval, such as a use permit, that would constitute a 'project' for purposes of the California Environmental Quality Act ("CEQA") – effectively requiring that any review of the project must be ministerial and based on fixed standards. *However:*

- If the project includes a subdivision, the subdivision is "subject to all laws," including the city's subdivision ordinance; and
- The project may be subject to design review, but that design review "shall not constitute a 'project' " under CEQA. (§65583.2(i).)

These provisions raise two issues. First, how should design review be structured to meet the 'by right' requirements? And second, if the project includes a subdivision, does project approval again become discretionary and subject to CEQA?

Design Review Approval. If a housing project consists only of rental housing with no subdivision, the project is exempt from any CEQA review as 'not a project,' and only design review approval can be required. In general, communities which have rezoned sites subject to the 'by right' provisions have developed detailed design guidelines for review of proposed projects.[9] Since the rezoning of the site to make it suitable for lower income housing does not need to be accomplished for three to four years (§ 65583(c)(1)(A), (f)), communities should theoretically have ample time to develop these guidelines; however, as described in the next section, the Housing Accountability Act does not allow an affordable project consistent with the housing element to be denied even if the rezoning has not yet been accomplished.

A further issue is what type of public review may be required for compliance with the design guidelines. Some communities are uncomfortable with staff review of compliance and provide for public hearings before the Planning Commission or City Council The statutory language that the design review approval "shall not constitute a project" under CEQA could be interpreted to mean that the design review approval must be ministerial; or could mean that even if the design review approval is discretionary, the legislature has exempted the approval from CEQA. In either case nothing prevents a city from allowing public comment on compliance or

[8] In *Fonseca v. City of Gilroy* (2007) 148 Cal. App. 4th 1174, 1180, the Court of Appeal held that the 'by right' provision, effective January 1 2005, did not apply to Gilroy's 2002 housing element.
[9] *See, e.g.,* Town of Los Gatos, *North 40 Specific Plan* (June 17, 2015), pp. 3-19 to 3-30.

having the decision made by the Commission or Council. The risk to the city is that conducting a public hearing can set up a false expectation among decisionmakers and members of the public who may demand the denial of a project that conforms with the design guidelines, setting up a challenge under the Housing Accountability Act (see below).

Subdivision Approval. If the project includes a subdivision, it is "subject to all laws." Presumably this phrase is intended at least to: 1) allow discretionary approval of the subdivision under the terms of the community's subdivision ordinance; and 2) subject the subdivision approval to CEQA. It is not clear what other "laws" are being referenced. Given the specific language limiting discretionary planning approvals, it should be assumed that the only permissible planning approval is design review and that that approval is exempt from CEQA; but it is unclear whether the project is now subject to other discretionary permits, such as tree permits or grading permits.

CEQA review should have been completed on the site rezoning required by the housing element but could have been completed in a limited, generalized fashion; as a program environmental impact report; or on a site-specific basis. Any additional CEQA review would be limited to a determination under Public Resources Code Section 21166 about whether a supplemental environmental document should be required. Nonetheless, a 'by right' project that includes a subdivision is clearly subject to discretionary review of the subdivision and potentially the need for additional CEQA analysis.

AB 1397 (Low) (Included in Governor's housing package). AB 1397 would limit the 'by right' provisions to projects containing 20 percent lower income housing.

V. The Housing Accountability Act.

The Housing Accountability Act (§ 65589.5; the "HAA") was originally adopted in 1982 and has been amended 16 times since. Formerly called the Anti-NIMBY Law, it is in part based on the Legislature's perception that local government bears major responsibility for the state's high housing costs, finding as follows:

> "The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.
>
> …

"Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for housing projects." (§ 65589.5(a)(2), (4))

The HAA restricts cities' ability to deny, reduce the density of, or make infeasible *all* housing developments, whether affordable or market rate, and places the burden of proof on the city to justify one of these actions. (§ 65589.6.) It is applicable to charter cities. (§ 65589.5(g).) While different provisions apply to affordable and market-rate projects, cities should consider the possible applicability of the HAA whenever *any* housing project is proposed. Nonetheless, cities retain substantial leverage in reviewing these projects: the city must make all findings required by CEQA; and, regardless of the HAA, projects within the coastal zone must comply with the Coastal Act.

This section first reviews the provisions applicable to all housing projects and then the additional provisions applicable to affordable housing projects.

Provisions Applicable to All Housing Development Projects.

A proposed use qualifies as a "housing development project" under the HAA if it consists of:

- Residences only;
- Transitional or supportive housing;[10] or
- Mixed-use projects where the only nonresidential uses are "neighborhood commercial" uses limited to the first floor of buildings that have two or more stories. (§ 65589.5(h)(2).)

The HAA applies only when a local agency is considering a "specific construction proposal" and does not include the approval or disapproval of a specific plan or other legislative action. (*Chandis Sec. Co. v. City of Dana Point* (1996) 52 Cal. App. 4th 475, 486.) But the definition of a "housing development project" does not require that the project contain any affordable housing, and the courts have rejected contentions to the contrary.[11] In fact, all of the published cases except one interpreting the HAA have involved market-rate, not affordable, projects.

[10] Defined in Section 65582.

[11] *See Honchariw v. County of Stanislaus* (2011) 200 Cal. App. 4th 1066, 1077; *North Pacifica, LLC v. City of Pacifica* (N.D. Cal. 2002) 234 F.Supp.2d 1053, 1058.

Findings Required to Deny or Reduce the Density of a Housing Development Project. Under the HAA, if *any* housing development project – whether market-rate or affordable – complies with all "applicable, *objective* general plan and zoning standards and criteria, including design review standards," in effect when the project is deemed complete, but the city disapproves the project or reduces the density, the city must make written findings supported by substantial evidence that both of the following exist:

> "(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means 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.
>
> "(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (§ 65589.5(j).)

In evaluating project compliance with the general plan and zoning, cities must apply their development standards and policies "to facilitate and accommodate development at the density permitted on the site and proposed by the development." (§ 65589.5(f)(1).) Although there is no definition of what constitutes an "objective" general plan or zoning standard, the Court of Appeal in *Honchariw v. County of Stanislaus* (2011) 200 Cal. App. 4th 1066 (*"Honchariw"),* noted that the term "objective" was added in 1999 amendments and was intended to "strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability')" to deny or reduce the density of a housing development project. (*Id.* at 1076-77.)[12]

In *Honchariw*, the Court of Appeal prescribed how findings should be made when a residential project is to be denied or to have its density reduced. The Court ordered the Stanislaus County Board of Supervisors to vacate its denial of Honchariw's vesting tentative map because nothing in the record supported the County's contention that the project did not comply with

[12] The 1999 amendments also added the requirement that a 'significant adverse impact' means "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards." (Stats. 1999 ch. 968 §6.) Two earlier cases decided before the adoption of those amendments provide more deference to local agency determinations. *See Toigo v. Town of Ross* (1998) 70 Cal. App. 4th 309, 319; *Mira Development Corp. v. City of San Diego* (1988) 205 Cal. App. 3d 1201, 1222-23.

A recent Superior Court decision (not appealed) found that findings made to deny a housing development were not based on "objective" criteria. *See Eden Housing, Inc. v. Town of Los Gatos,* County of Santa Clara Superior Court, Case No. 16CV300733, Decision and Judgment Granting Writ of Mandamus (June 14, 2017).

"applicable, objective" standards; in fact, the proposed conditions of approval required compliance with the standards at issue, and the applicant stated he would comply with the conditions. (*Id.* at 1080-81.) Although the County made findings denying the subdivision under Section 66474 of the Subdivision Map Act, finding that the site was "not physically suitable" for the proposed subdivision, the Court held that this did not relieve the County of making the findings required by the HAA. (*Id.* at 1079.)

The Court ordered the County to reconsider the application, and, if it determined again to deny the project [or reduce its density], to:

- Determine whether the project complied with "applicable, objective general plan and zoning standards and criteria" in effect when the application was deemed complete;
- Identify the specific standards with which the project failed to comply; or
- If the project did comply with all objective standards, to make the written findings of a "specific, adverse impact upon the public health and safety" required by Section 65589.5(j), supported by substantial evidence in the record. (*Id.* at1081-82.)

The lesson is that, if a city intends to deny or reduce the density of any "housing development project," it must first identify any specific "applicable, objective" standards with which the project does not comply. If none can be found, the city may deny or reduce the density of the project *only* if it can find a "specific, adverse impact upon the public health and safety," as specified in Section 65589.5(j). Otherwise, it cannot deny or reduce the density of the project. The only exception relates to projects in the coastal zone, as discussed below.

Affordable Housing Development Projects.

In addition to the findings required by Section 65589.5(j) to deny or reduce the density of a project, whenever a city reviews a housing development project for "very low, low-, or moderate-income households" or an emergency shelter, it must make one of five findings contained in Section 65589.5(d) to disapprove the project or "condition approval in a manner that renders the project infeasible." "Housing for very low, low-, or moderate-income households" includes:

- 20 percent of the units available for sale or rent to lower income households at a monthly housing cost that does not exceed 30 percent of 60 percent of median income;

- 100 percent of the units available for sale or rent to moderate income households at a monthly housing cost that does not exceed 30 percent of 100 percent of median income; or

- 100 percent of the units available for sale or rent to middle income households earning up to 150 percent of median income. No standards are included for monthly housing cost for middle income households. (§§ 65589.5(h)(3); 65008(c).)

Units affordable to lower income households must be deed-restricted for at least 30 years. (§ 65589.5(h)(4).) If the project is instead affordable to moderate- or middle-income households, the statute prescribes no period of affordability; the first buyer may sell at any price.

Findings Required to Deny Affordable Projects and Emergency Shelters. One of five findings must be made to deny an affordable project or emergency shelter or to adopt a condition rendering the project infeasible. Each of these findings in the statute is lengthy and should be read in its entirety; below is a summary.

1. The city has "met or exceeded its share of the regional housing need allocation" for all of the income categories included in the proposed project, as shown in its housing element annual report required by Section 65400. (§ 65589.5(d)(1).) In the housing element annual report, progress in meeting the regional need is based on building permit issuance. 25 CCR §§ 6200-6203. Therefore, to use this finding to deny a project that includes 20 percent lower income housing and 80 percent above moderate-income housing, the city would need to demonstrate that it had issued building permits at least equal to *both* the community's entire above moderate income RHNA *and* its entire lower income RHNA.

2. The project would have a "specific, adverse impact upon the public health and safety," and there is no way to mitigate the impact without rendering the project infeasible. A "specific, adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health and safety policies" as they existed when the application was deemed complete. Inconsistency with the general plan or zoning is not a "specific adverse impact." (§ 65589.5(d)(2).) (This is essentially the same finding required by Section 65589.5(j) described above.)

3. The denial or the conditions are required to comply with state or federal law, and there is no feasible way to comply without rendering the project infeasible. (§

65589.5(d)(3).) This finding should be used if the project does not comply with the local coastal plan; see discussion below.

4. Either: the site is zoned for agriculture or natural resource use *and* is surrounded on at least two sides by land actually used for agriculture or natural resource purposes; or water or sewer are inadequate to serve the project. (§ 65589.5(d)(4).)

5. The project is inconsistent with *both* the general plan and zoning as they existed on the date the application was deemed complete. However, this provision cannot be used to deny a project, or adopt a condition making the project infeasible, if any one of the following is true:

    a. The city has not adopted a housing element in substantial conformance with state law by the due date prescribed in Section 65888. This provision could theoretically require a city to approve an affordable project inconsistent with both the general plan and zoning if its housing element does not conform with state law, or if it has not adopted a housing element when due; or

    b. The project is located on a site designated for lower or moderate income housing in the housing element and is consistent with the density shown in the housing element; or

    c. The site inventory contained in the city's housing element does not provide adequate sites at all income levels. The burden of proof is on the city to demonstrate that the housing element provides adequate sites. Effectively, this provision allows an attack on the adequacy of the sites designated in the community's housing element long after it was adopted. (§ 65589.5(d)(5).)

All of these findings are difficult to make, and no published cases explore the adequacy of a local agency's findings denying an affordable project.

Compliance with CEQA and the Coastal Act. Despite these strict requirements, the HAA provides that "[n]othing in this section shall be construed to relieve the local agency from complying with … the California Coastal Act of 1976…Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required by [CEQA]." (§ 65589.5(e).)

While there is no case that decides whether the Coastal Act trumps the HAA, in *Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal. App. 5th 927, the Court of Appeal in dicta concluded that, based on the language of the HAA and the Court's reasoning regarding the relationship of state density bonus law to the Coastal Act, the HAA is likely subordinate to the Coastal Act: regardless of the HAA, no housing development project may be approved if it violates the Coastal Act. (*See id.* at 944 n.9.)

The requirement for compliance with CEQA allows thorough and extensive review of any housing development project. In *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal. App. 4th 1245, the developer spent six years trying to get a development plan approved, modifying the plan by repeatedly reducing the density and paying for various versions of an EIR that was never certified. He finally sought to have a court order the City to certify the EIR, citing, in part, the HAA. The Court of Appeal held that it could not order the City to certify the EIR; that the City had not unreasonably delayed the project because Schellinger kept modifying it; that the City had always continued to process the EIR; and that the HAA would have no applicability until the EIR was certified.

It is not entirely clear how cities should reconcile the HAA and CEQA if a required mitigation measure would make a project infeasible. In *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal. App. 4th 704, the Court of Appeal upheld the City of Oakland's determination that it was legally infeasible to approve a reduced density alternative because the City could not make the findings required by the HAA to reduce the density: none of the impacts that would be mitigated by the reduced density alternative rose to the level of "specific, adverse impacts on public health or safety." (*See id.* at 715-16.) But a city in this situation might be required to adopt a statement of overriding considerations under CEQA Guidelines Section 15093. Would its refusal to do so justify denial of the project? To be determined.

SB 167/AB 678 (Included in Governor's housing package). These two bills would:

- Require that all city findings under the HAA be based on a preponderance of the evidence, rather than on the usual substantial evidence test;
- Prohibit cities from evaluating a project based on zoning or general plan changes made after a project is submitted but before it is deemed complete;
- Expand the definition of a "housing development project" to include any mixed-use development in which at least two-thirds of the square footage is designated for residential use;

- Clarify that projects are considered to be denied when any entitlement is denied that is necessary to obtain a building permit;

- Require cities to provide a list to developers of any inconsistencies with development standards within 30 to 60 days after the project is deemed complete;

- Allow market-rate developers, as well as affordable developers, to receive attorneys' fees for a violation of the section;

- Require fines of at least $10,000 per unit if a city ignores a court order to comply with the HAA.

AB 1515 (Included in Governor's housing package). This bill would provide that a housing development project or emergency shelter is "deemed consistent" with community plans "if there is substantial evidence that would allow a reasonable person to conclude" that the project is consistent. This would allow a project proponent to submit evidence into the record of consistency even when a city determines that a project is inconsistent. If a court found the developer's evidence to be "reasonable," the project would be found to be consistent, regardless of the city's determination.

VII. Putting It All Together: When Your City May Need to Make Additional Findings.

Here are the questions to ask to determine if any housing project may be subject to these statutes:

- **Does the project include housing or involve downzoning or other zoning changes that include residentially zoned sites?**

- **If so: is the project or city action located on a site designated for housing in the City's housing element?**

    - If on a housing element site: was the site rezoned as required by a housing element program *after* the housing element was adopted?

        - Then a housing development project must be approved 'by right' as described in Section 65583.2(i).

    - If on a housing element site: are the proposed units shown in the project application or possible after rezoning at least equal to the number of units shown in the housing element?

        - If not: the findings required by Section 65863 need to be made. If the proposal is inconsistent with the housing element, the project cannot be approved without an amendment to the housing element. If the project is consistent with the housing element, but the remaining sites identified in the housing element are *not* adequate to accommodate the city's RHNA, then:

            - If a developer's initial application showed the reduced density, the developer must find the alternate site.

            - If the developer reduced the density below the housing element projection *after* submitting the application, or the city requires that the density be reduced, or the city is taking other action to reduce density, the city must find the alternate site.

- **If the project includes housing: Does the project meet the definition of a "housing development project" under the HAA?**

    - If a housing development project: does the city plan to deny or reduce the density of the project?

        - If city plans to deny or reduce density: does the project comply with "applicable, objective" general plan and zoning standards?

            - If does not comply: the city may specify the deficiencies and deny the project or reduce the density.

            - If does comply: the project may only be denied, or have its density reduced, if the city can find a "specific adverse impact upon the public health or safety;" *unless* the project is in the coastal zone, in which case it likely may be denied if it does not comply with the local coastal plan. (Section 65589.5(f).)

    - If a housing development project: does the project qualify as an affordable project or as an emergency shelter?

        - If affordable or a shelter: does the city plan to disapprove the project or impose a condition that will make the project infeasible

for development of affordable housing [probably as asserted by the applicant]:

- If so: in addition to the analysis and findings required by Section 65589.5(f), the city must make one of the findings required by Section 65589.5(d).

VII. Conclusion.

Housing advocates are convinced that local planning and zoning regulations and local opposition to housing account for the high cost, slow production, and lack of affordability of housing in much of California. Since projects have not been approved despite the designation of sites in housing elements, advocates are now looking to strengthen developers' hand when their projects are reviewed by local governments and to enhance enforcement of state law. Bills likely to pass the Legislature will make existing requirements even more onerous.

In attempting to comply, cities are buffeted by state demands on one hand and, on the other, by growing community opposition to the more intense infill housing required by housing element law, exacerbated by lack of funding to improve school overcrowding and traffic congestion. Nonetheless, cities need to ensure that the housing called for in their plans and policies can actually be built. City attorneys and managers will need to educate their decision-makers and the public on the demands posed by state law and the increasing limitations on local decision-making in reviewing housing projects.