

HOUSING HOUSING HOUSING: PITFALLS AND PROBLEMS IN REVIEWING HOUSING PROJECTS

LEAGUE OF CALIFORNIA CITIES
ANNUAL CONFERENCE
CITY ATTORNEYS DEPARTMENT
SEPTEMBER 14, 2017



IMPORTANT HOUSING STATUTES

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- 'No Net Loss': Gov't Code 65863
- 'By Right' Approval: G.C. 65583.2(i)
- Housing Accountability Act: G.C. 65589.5
 - ▣ Density bonus is so last year

WARNING!!!!

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**This presentation may be obsolete as of
January 1, 2018**



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RELATED PROVISIONS OF HOUSING ELEMENT LAW: *RHNA*

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- Regional Housing Need Allocation (RHNA)
 - ▣ Typically: 40% low and very low; 20% moderate; 40% above moderate

Model City

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

RELATED PROVISIONS OF HOUSING ELEMENT LAW: ADEQUATE SITES

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- Must designate specific sites that can “accommodate” the RHNA at each income level during the planning period (65583.2)
- Sites “accommodating” lower income housing must be at “default densities” of 10 – 30 du/A

APN	Zone	DU/A	Acres	Units	Use	Income Category
041-0042-002	R-3	20-30 du/ac	2.0	40	Vacant	Lower
037-0400-027	R-2	10-20 du/ac	0.75	7	Duplex	Moderate
038-0100-040	R-1	5-10 du/ac	4.5	22	Vacant	Above Moderate
039-1100-039	CMU	20 du/ac	1.5	25	Parking	Moderate

RELATED PROVISIONS OF HOUSING ELEMENT LAW: *ADEQUATE SITES*



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RELATED PROVISIONS OF HOUSING ELEMENT LAW: *REZONED SITES*

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- If not enough sites at appropriate densities, City must complete necessary rezoning within 3 years (4 years if findings). G.C. 65583(c), (f).
- Element must designate specific sites to be rezoned and units that can be built on each site after rezoning. G.C. 65583(c)(1)(B).
- Rezoning must allow housing 'by right' if rezoned to be suitable for lower income housing. G.C. 65583.2(h), (i).

‘NO NET LOSS’: SITES IN INVENTORY (65863)

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- Applies to *all* sites in inventory, not just affordable
- Applies when sites in inventory either downzoned to reduce **density**; or approved at lower **density** than shown
- If Housing Element not adopted on time, density less than 80% of maximum density
- Currently not applicable to charter cities (65803)

‘NO NET LOSS’: REQUIRED FINDINGS

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- OK if:
 - ▣ Reduction consistent with General Plan and Housing Element; and
 - ▣ Remaining sites in Element are adequate.
- If remaining sites are *not* adequate, can ID “additional, adequate, and available sites” so ‘no net loss.’
- Solely city’s responsibility unless developer’s application had lower density

‘NO NET LOSS’: OPTIONS

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- Remaining sites in Element adequate to meet the RHNA; or
- City approved more units on some site than shown in inventory; or
- Other sites NOT in Element can make up difference; or
- Another site upzoned.

‘NO NET LOSS’: *ISSUES*

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- Need to retain capacity by income category?
- Does the Housing Element need to be changed?
- When does any rezoning need to be accomplished?

Practice Tip: Keep a log of all HE sites; all approved housing; all “identified” sites.

‘NO NET LOSS’: SB 166

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- Compliance measured by *both* density *and* income category
- BUT: could not deny because market-rate
- Could only use sites in Housing Element
- All rezonings within 180 days
- Applies to charter cities

‘BY RIGHT’ APPROVAL: REZONED SITES (65863.2(h-i))

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Applies to:

- Sites in Housing Element program;
- Rezoned *after* Element adopted;
- To accommodate lower income housing.

Then: must allow multifamily residential use
‘by right’

‘BY RIGHT’ APPROVAL: *DEFINITION* **(65863.2(i))**

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- No discretionary approval that would be a “project” under CEQA; BUT:
 - ▣ If involves a subdivision, is “subject to all laws,” including local subdivision ordinance; and
 - ▣ May be subject to design review, but design review ‘shall not constitute a project’ under CEQA.

‘BY RIGHT’ APPROVAL: DESIGN REVIEW APPROVAL (65863.2(i))

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- Have 3-4 years to develop design guidelines
- Staff or public review for compliance?
- Does CEQA exemption require ministerial review; or does it mean it is exempt from CEQA even if discretionary?

BY RIGHT' APPROVAL: DESIGN REVIEW APPROVAL (65863.2(i))



Trellis feature over garage door and recessed door help articulate garage door.

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‘BY RIGHT’ APPROVAL: SUBDIVISION APPROVAL (65863.2(i))

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- “Subject to all laws.” Presumably includes:
 - ▣ Discretionary subdivision approvals.
 - ▣ CEQA.

- Any other discretionary approvals?

‘BY RIGHT’ APPROVAL: AB 1397

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‘By right’ only available for projects with 20% lower income housing

[Also makes it harder to qualify sites in housing element as suitable for lower income housing]

HOUSING ACCOUNTABILITY ACT

(65589.5)

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Applies to **ALL** “housing development projects” and emergency shelters:

- ▣ Residences only;
- ▣ Transitional & supportive housing;
- ▣ Mixed use projects when nonresidential uses are “neighborhood commercial” uses limited to the ground floor.

Affordable **AND** market-rate

HOUSING ACCOUNTABILITY ACT: ALL HOUSING PROJECTS (65589.5(j))

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- If complies with “objective” general plan and zoning standards, can only reduce density or deny if “specific adverse impact” to public health & safety that can’t be mitigated in any other way.”
- *Honchariw v. County of Stanislaus (2011)*

HOUSING ACCOUNTABILITY ACT: *ALL HOUSING PROJECTS (65589.5(j))*

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- If desire to deny or reduce density:
 - ▣ Identify objective standards project does not comply with.
 - ▣ If project complies with all, must make public health & safety finding.

- Not objective: “suitability”

HOUSING ACCOUNTABILITY ACT: *MARKET-RATE PROJECTS*



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HOUSING ACCOUNTABILITY ACT: MARKET-RATE PROJECTS



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HOUSING ACCOUNTABILITY ACT: *AFFORDABLE HOUSING (65589.5(d))*

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- Additional protections for projects:
 - ▣ Emergency shelters;
 - ▣ 20% low income; or
 - ▣ 100% moderate (120% of median) or middle income (150% of median).

HOUSING ACCOUNTABILITY ACT: *AFFORDABLE HOUSING (65589.5(d))*

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- Must make one of these findings to deny or add condition making project infeasible:
 - ▣ Have actually constructed RHNA at all income levels included in project; or
 - ▣ “Specific adverse impact”; or
 - ▣ Required to comply with state or federal law (see discussion of Coastal Act); or
 - ▣ Zoned for agriculture or open space or inadequate water or sewer; or

HOUSING ACCOUNTABILITY ACT: *AFFORDABLE HOUSING (65589.5(d))*

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- Inconsistent with both general plan & zoning on date application was deemed complete.

BUT: cannot use if:

- City has not adopted compliant Housing Element by due date; or
- Project is located on site shown for low & moderate income housing consistent with density; or
- Site inventory inadequate.

HOUSING ACCOUNTABILITY ACT: CEQA AND COASTAL ACT(65589.5(e))

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- *Kalnel Gardens LLC v. City of LA* (2016): in dicta Court said Coastal Act trumps HAA
- *Schellinger Bros. v. City of Sebastopol* (2009): must get out of CEQA before can invoke HAA
- *Sequoyah Hills HO Ass'n v. City of Oakland* (1993): upheld finding that legally infeasible to reduce density due to HAA

HOUSING ACCOUNTABILITY ACT:

SB 167 / AB 678; AB 1515

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- City findings based on preponderance of the evidence
- Evaluated based on plans & zoning at time of *submittal*
- Provide list of any inconsistencies within 30-60 days of completeness
- “Deemed consistent” if “substantial evidence that would allow a reasonable person to conclude” is consistent

PUTTING IT ALL TOGETHER

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- Is the project on a Housing Element site? If so:
 - ▣ Does it have at least the number of units listed in the Housing Element? If not, comply with 'no net loss' (Section 65863)
 - ▣ Was the site rezoned to be suitable for lower income housing AFTER the Housing Element was adopted? If so, must be approved 'by right.' (Section 65583.2(i))

PUTTING IT ALL TOGETHER

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- Is it a 'housing development project' under the HAA? If so:
 - ▣ Does City plan to reduce density or deny? Must either find non-compliance with objective standards or make "specific adverse impact" finding. (Section 65589.5(i).)

PUTTING IT ALL TOGETHER

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- Is it also an affordable project or emergency shelter under the HAA? If so:
 - ▣ Does City plan to deny or adopt condition making project infeasible? If so: must make one of 5 findings under Section 65589.5(d).

PUTTING IT ALL TOGETHER

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- Legislators blame local government while unwilling to modify obstacles to housing: CEQA; inadequate infrastructure funding
- Left to local officials to try to comply with State law while explaining to their constituents the increasing limits on local decision-making



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GOLDFARB & LIPMAN LLP
1300 CLAY STREET, 11TH FLOOR
OAKLAND, CALIFORNIA 94612
(510) 836-6336

BARBARA KAUTZ
BKAUTZ@GOLDFARBLIPMAN.COM

goldfarb lipman attorneys