Planning Commission

STAFF REPORT

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TO: Planning Commission

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SUBJECT: ANALYSIS OF RECENTLY SIGNED AFFORDABLE HOUSING BILLS

SUMMARY

On September 29, 2017, Governor Jerry Brown signed six Senate bills and nine Assembly bills intended to promote the development of affordable housing. The fifteen bills makes significant changes to state housing law.

The 15 bills include:

SB 2 (Atkins)
SB 3 (Beall)
SB 35 (Wiener)
SB 166 (Skinner)
SB 167 (Skinner)
SB 540 (Roth)
AB 72 (Santiago/Chiu)
AB 73 (Chiu)
AB 571 (E. Garcia)
AB 678 (Bocanegra)
AB 879 (Grayson)
AB 1397 (Low)
AB 1505 (Bloom/Bradford/Chiu/Gloria)
AB 1515 (Daly)
AB 1521 (Bloom/Chiu)

BACKGROUND

Many of the bills increase the regulatory burden on cities by expanding the contents of the Housing Element and increasing and adding teeth to the annual reporting requirements. AB 1397 requires greater specificity in describing the methodology used to list sites in a city's housing inventory. AB 879 requires the Housing Element to analyze additional governmental and nongovernmental constraints on housing

developments. AB 879, SB 40, and SB 35 require a host of new information to be reported with each annual report, and AB 879 extends the annual reporting requirement to charter cities.

The bills significantly constrain a city's discretion in drafting its Housing Element or approving or rejecting certain development projects. AB 1397 limits the types of sites that may be listed in a city's housing inventory. SB 166 limits a city's ability to approve projects with units fewer than the listed zoning density. SB 35 requires ministerial approval of housing projects under certain conditions. SB 167 limits a city's discretion to reject an affordable residential development application by increasing the evidentiary burden on a city and reducing the traditional judicial deference afforded to its findings.

The bills expand the authority of the Department of Housing and Community Development ("HCD") to review the Housing Element and correct noncompliant ordinances. AB 72 authorizes HCD to review a Housing Element and revoke any former findings of compliance when HCD finds an inconsistency with state law. AB 1505 allows HCD to review an inclusionary housing ordinance and requires a city to prove the ordinance does not unduly constrain the production of housing or else HCD will limit its application.

Lastly, the bills provide cities with some regulatory tools and financial incentives to increase affordable housing. AB 1505 allows cities to condition the development of residential rental units on the inclusion of a specified percentage of affordable units. Both SB 540 and AB 73 streamline the development of affordable housing by eliminating project-specific environmental review and providing loans and grants within locally-created zones or districts.

This report analyzes 11 of the 15 bills, excluding SB 2,[1] SB 3,[2] AB 571,[3] and AB 1521.[4] SB 167 and AB 678 are identical, and any discussion of SB 167 applies equally to AB 678.

ANALYSIS

I. Background

The Housing Element of the City's General Plan outlines a long-term strategy for meeting the community's existing and projected housing needs. HCD determines the

1 SB 2 establishes a permanent funding source for affordable housing through a $75 fee on real estate transaction documents (except for home sales). The recording fee is expected to generate approximately $200-$300 million per year for affordable housing.
2 SB 3 authorizes $4 billion in general obligation bonds for affordable housing programs and a veteran's home ownership program, which must be approved by voters next November.
3 AB 571 makes it easier to develop farmworker housing by easing qualifications for Farmworker Housing Tax Credit.
4 AB 1521 gives experienced housing organizations a first right of refusal to purchase affordable housing developments in order to keep the units affordable.

number of new housing units a region is projected to need at all income levels over the course of the next Housing Element planning period (eight years) to accommodate population growth and overcome existing deficiencies in the housing supply. Each regional council of governments, i.e. SCAG or SACOG, assigns individual cities their share of the regional housing needs assessment ("RHNA"). Cities must then (1) create an inventory of sites suitable and zoned for new residential development sufficient to accommodate its share of the RHNA, at each level of affordability, (2) draft a Housing Element, incorporating the inventory into a general analysis of governmental and nongovernmental constraints on residential development, and (3) submit a draft of the proposed Housing Element to HCD for review and approval. As necessary, cities then need to rezone sufficient sites to accommodate their RHNA as part of their Housing Element implementation.

II. Listing of Inventory in Housing Element

Land suitable for residential development includes: (1) vacant sites zoned for residential use, (2) vacant sites zoned for nonresidential use that allows residential development, (3) residentially zoned sites that are capable of being developed at a higher density, and (4) sites zoned for nonresidential use that can be redeveloped for residential use. The inventory must describe the listed sites. The description of the listed sites needs to include a general description of existing or planned water, sewer, and other dry utility.

AB 1397 makes it more difficult for cities to list sites that do not have a realistic capacity for development. Specifically, AB 1397 (1) establishes higher standards and requires a robust analysis before allowing sites with existing uses to be considered suitable for residential development; (2) limits reliance on sites that are too large (over ten acres) or too small (under one acre); (3) limits reliance on sites that have been recycled across multiple Housing Elements without developing as housing; and (4) requires that the inventory of land be available, in addition to being suitable, for residential development. A site is both suitable and available if it is vacant and has a demonstrated potential for redevelopment during the planning period to meet the City's housing need for a designated income level. AB 1397 also requires that the parcels included in the inventory have sufficient water, sewer, and dry utilities available and accessible to support housing development or be included in an existing plan that will provide sufficient utilities.

AB 1397 requires the description of listed sites to specify the number of units that can be accommodated on each site and whether the site is adequate to accommodate affordable housing for each income level. AB 1397 also requires the methodology used to explain the development potential of sites to consider a city's (1) past experience with converting existing uses to higher density residential development, (2) the current demand for the existing use, and (3) an analysis of existing leases or other contracts that would perpetuate the existing use or otherwise prevent redevelopment.

III. Analysis of Constraints

The Housing Element must identify and analyze governmental constraints (building codes, permits, etc.) and nongovernmental constraints (private financing, price of land, etc.) on residential development projects. AB 879 requires this analysis to address (1) any ordinances that directly impact the cost and supply of residential development (2) requests to develop housing at lower densities, (3) the length of time between applying for building permits and receiving approval, and (4) local efforts to remove nongovernmental constraints to development projects.

IV. Review and Approval

If a city does not have enough sites within its existing inventory of residentially zoned land to accommodate its entire regional housing need, then the community must adopt a program to rezone land within the first three years of the planning period. The rezoning must accommodate 100% of the need for housing for very low and low-income households for which site capacity has not been identified in the inventory. HCD reviews a city's draft Housing Element before adoption. Formerly, cities faced limited consequences for failing to adopt compliant Housing Elements or to submit their Housing Element for HCD review.

AB 72 requires the HCD to review any city action or inaction determined to be inconsistent with the following: (1) an adopted Housing Element; (2) its inventory of sites suitable to accommodate the locality's regional housing needs assessment; and (3) a program to rezone sites to meet the locality's RHNA. The HCD will report its findings to the city, and the city has 30 days to respond. The HCD may revoke any former finding that the city was in compliance with the state law if an inconsistency is discovered. Under AB 1397, during the rezoning, the requirement under existing law that the sites shall be zoned to permit owner-occupied and rental multifamily residential use by right is limited to developments that are 20% affordable to lower-income households.

V. Annual Report and HCD Review

Under existing law, a general law city[5] must submit an annual report to the city council, the Governor's Office of Planning and Research, and HCD that includes information on (1) the progress and implementation of the general plan and (2) progress in meeting its share of regional housing needs and local efforts to remove governmental constraints on development projects. AB 879 now requires charter cities to comply with the reporting requirements, and expands the scope of reporting requirements by requiring the following:

(1) the number of housing development applications received in the prior year,
(2) the number of units in all development applications in the prior year,

5 Existing law does not require charter cities to submit an annual general plan report.

(3) the number of units approved and disapproved in the prior year, and
(4) a listing of the sizes rezoned to accommodate that portion of the city's share of the regional Housing Element's site inventory.

SB 540 requires the report to state the number of housing units approved within a Workforce Housing Opportunity Zone. SB 35 requires listing the number of units of net new housing, including rental housing and for-sale housing, issued a completed entitlement, building permit, or certificate of occupancy.

VI. No Net Loss Zoning

Under the No Net Loss Zoning Law (Gov. Code, sec. 65863), a city is prohibited from reducing residential density to a point below the density that was utilized by HCD in reviewing the City's Housing Element, unless the City makes written findings supported by substantial evidence that the reduction is consistent with the adopted general plan and the remaining sites identified in the Housing Element are adequate to accommodate the jurisdiction's share of the regional housing need. The law seeks to prevent a net loss of residential unit capacity. But the law does not address the effect of a city's development approvals on the RHNA. For example, a site identified to accommodate a portion of a city's need for lower-income households might later be developed with high-end market-rate housing or commercial use, eliminating a potential site for new housing development.

SB 166 now requires that if a city permits a development with fewer units by income category than identified in the city's Housing Element, the city must make written findings supported by substantial evidence as to whether the remaining sites identified in the Housing Element are adequate to meet the RHNA requirements. If approvals result in fewer units, the City has 180 days to identify and rezone sufficient land to make available additional adequate sites, which does not trigger CEQA review.

VII. Ministerial Review

Ministerial permit review only assesses whether the project is consistent with existing general plan and zoning rules, as well as meet standards for building quality, health, and safety. Most large housing projects are not subject to ministerial review. Instead, these projects are vetted through both public hearings and administrative review, and generally require discretionary approval in the form of a conditional use permit, tract map, design review or site plan review permit, or similar Planning Commission level permit.

SB 35 creates a streamlined, ministerial approval process for any large housing project, under the following circumstances:

(1) the proposed development is (i) a multifamily housing development (ii) affordable, and (iii) meets objective zoning and design review standards;

(2) the proposed site is (i) zoned for residential uses and (ii) within or adjacent to an urban area; and
(3) the city (i) failed to issues building permits for its share of the regional housing needs assessment, pro-rated to that point in the reporting period, or (ii) failed to submit its annual Housing Element report.

The following development sites are exempt from SB 35: (1) coastal zones, (2) farmland, (3) wetlands, (4) specific mapped very high and high fire hazard severity zones, (5) hazardous waste sites, (6) earthquake fault zones, (7) flood plains, (8) floodways, (9) habitat for protected species, or (10) lands under a conservation easement or part of a natural community conservation plan, among others.

If the developer's application fails to meet the specifications for streamlined approval, the City must provide written documentation to the developer regarding which standards the proposed development conflicts with, within the specified periods of time. If the City does not meet those deadlines, the development shall be deemed approved. Unlike the other bills, SB 35 is automatically repealed on January 1, 2026.

VIII. Strengthening the Anti-NIMBY Law

The Housing Accountability Act ("Act"), also known as the "Anti-NIMBY Law," prohibits a city from disapproving, or conditioning approval in a manner that renders infeasible, an application for an affordable housing development project or an emergency shelter. An exception exists where a city makes specified written findings based on substantial evidence in the record that a housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan. A consistency determination is generally upheld unless the court determines the local government has acted arbitrarily, capriciously, or without evidentiary basis, a very deferential standard.[6]

SB 167 limits a city's discretion to deny an application or condition a project to reduce its density by increasing the cities' burden of proof for denial of certain projects compliant with applicable objective General Plan and zoning standards. In order to disapprove a project or shelter, a city's findings must be based on a preponderance of the evidence, instead of substantial evidence, a higher evidentiary burden. A city is prohibited from disapproving an application based on inconsistency with a zoning ordinance or general plan, if either was amended after the application was deemed complete. SB 167 also creates a number of judicial remedies encouraging private citizens to enforce the Act's requirements.

AB 1515 further limits a city's discretion by requiring a city to find a project or shelter is consistent with the zoning ordinance and general plan when "there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent." The effect is to create an

6 A Local & Regional Monitor v. City of Los Angeles (1993) 16 Cal.App.4th 630, 648.

objective evidentiary standard and to reduce the traditional judicial deference afforded to cities in making consistency findings. Additionally, AB 1515 could extend the consistency analysis beyond the question of zoning ordinances and general plan elements to include local plans, programs, policies, ordinances, standards, requirements, or other similar provisions.

IX. Inclusionary Housing

In 2009, the court of appeal in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, held the Costa Hawkins Rental Housing Act ("Costa Hawkins") limits a city's ability to establish rent control by preventing cities from requiring private developers to restrict rent levels. AB 1505 overturns the 2009 appellate court ruling by expressly allowing cities to condition the development of residential rental units on the inclusion of a specified percentage of affordable units. If a City chooses to adopt such an ordinance, it must provide an alternative method of compliance, such as in-lieu fees, land dedication, offsite construction, and/or acquisition and rehabilitation of existing housing units.

AB 1505 gives the HCD the authority to review inclusionary housing ordinances that (1) were adopted or amended after September 15, 2017, (2) require more than 15% affordable housing, and (3) for which the City has met less than 75% of its RHNA, measured over at least a five year period or has failed to submit the annual Housing Element Report for two consecutive years. Upon review, HCD may require a city to undertake an economic feasibility study to prove the ordinance does not unduly constrain the production of housing. If the economic feasibility study does not support the required findings or if the city does not submit an economic feasibility study, HCD may require the city to limit the applicability of its inclusionary housing ordinance and may cap the ordinance's required affordability percentage. Given that this provision elevates HCD to the position of reviewing and approving or rejecting local ordinances, this may be subject to judicial challenge.

X. Workforce Housing Opportunity Zones & Housing Sustainability Districts

Both SB 540 and AB 73 streamline the development of affordable housing by creating a process for cities to dedicate specific areas where they will (1) eliminate project-specific environmental review, (2) provide economic incentives to spur development, and (3) have reduced discretion to deny projects. SB 540 authorizes cities to establish a Workforce Housing Opportunity Zone ("WHOZ") within an area of contiguous or non-contiguous parcels identified on a city's inventory of land as suitable for residential development. Once a city establishes a WHOZ, it must ministerially approve a complete development application within 60 days, over the course of the next five years.

AB 73 authorizes cities to adopt a Housing Sustainability District ("HSD") within an "eligible location," defined as an area within one-half mile of public transit and served by existing infrastructure and utilities. A complete development application for a project within an HSD must be ministerially approved within 120 days, during the 10-year term

of an HSD. In both cases, a City may deny a project where there is substantial evidence in the record that a physical condition on the site of the development that was not known and could not have been discovered with reasonable investigation at the time the application was submitted would have a specific, adverse impact upon health or safety and that there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact.

Workforce Housing Opportunity Zones v. Housing Sustainability Districts

	SB 540: WHOZ	AB 73: HSD
Method of Adoption	Specific Plan	Ordinance
Requires HCD Approval	No	Yes & Requires an Annual Certificate of Compliance
Ministerial Issuance of Permit	Yes	Yes
Financial Incentives Provided by HCD	Grant or No-Interest Loan	Zoning Incentive Payment
Application Approval Deadline	60 Days	120 Days
EIR Required to Approve Zone/District	Yes	Yes
EIR Required to Approve Housing Development in Zone/District	No	No
Development Project Within Zone/District Requires Prevailing Wages	Yes	Yes
Percentage of Development Dedicated to Affordable Housing	At Least 50% of Units (30% for Moderate-Income; 15% for Low; 5% for Very Low)	At Least 20% of Units
Percentage of City's RHNA That May be Included in Zone/District	50%	100%
Limitation on Development	100–1,500 units	15% of City's total land area for a single district; 30% of City's total land area for all districts

RECOMMENDATION

Receive and file.