GOLDFARB & LIPMAN LLP

RECENT DEVELOPMENTS IN CALIFORNIA HOUSING LAW
SUMMARY OF 2017 HOUSING LEGISLATION

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This summary has been published by Goldfarb & Lipman LLP to alert clients and others of recent changes in California law related to the state's housing package. This summary does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation be required, please contact any Goldfarb & Lipman attorney.

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INTRODUCTION

On September 15, 2017, the last day of the 2017 legislative session, the California Legislature responded to the state's housing crisis by passing fifteen bills in a landmark housing package developed together with Governor Jerry Brown's office. The Governor signed all fifteen bills on September 29, 2017. The package raises more money for affordable housing—much designated for local government—in exchange for requirements to "streamline" housing development approvals. Although most of the attention has been focused on only three of the bills, SB 2, SB 3, and SB 35, many significant changes are contained in more obscure bills which received little publicity. Together, the bills will require each city and county to change the way it processes housing applications.

This summary discusses the key provisions of all fifteen bills, as well as several other laws related to housing, such as the legislation covering accessory dwelling units. Each bill has numerous complex provisions, and this review only provides highlights. Please contact any attorney at Goldfarb & Lipman for more information regarding the effects of these new laws and their applicability to your organization or projects.

I. CHANGES REQUIRED IN PROCESSING OF ALL HOUSING PROJECTS

The 2017 legislative session included the enactment of fifteen significant bills, many of which were intended to "streamline" local government approvals of housing projects. This reflects the Legislature's view that local government approval processes significantly delay housing construction and increase costs. While SB 35 was the most publicized statute related to streamlining, its effects on local government will be relatively minor compared with those required by amendments to the Housing Accountability Act and the so-called "No Net Loss" statute. The changes to the Housing Accountability Act and the No Net Loss statute will require changes on how housing applications are processed after January 1, 2018.

A. Housing Accountability Act (HAA): Applicable to *All* Housing Development Projects (AB 678, SB 167, and AB 1515; Government Code § 65589.5)

1. ***Key HAA Provisions.*** The HAA currently applies to **all** "housing development projects," whether or not affordable. Its key provisions are:

a. A Housing Project May Usually Not be Denied or Reduced in Density if It Conforms with All "Objective" Standards. For all housing projects, whether affordable or not, the key provision requires that *if* a housing project complies with all "objective" general plan, zoning, and subdivision standards, it may only be denied or have its density reduced if a city or county can find that the project would have a "specific adverse impact" on public health and safety.

A "specific adverse impact" is a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards" in effect when the application was deemed complete; and there is no feasible method to mitigate the impact.

b. Additional Findings Must be Made to Deny an Affordable Project. If a project is also "housing for very low-, low- or moderate-income households," additional findings need to be made to deny the project, reduce the density, or add a condition making the project infeasible—even if the project does not comply with all "objective" standards.

Affordable developments include projects where at least 20 percent of the units are affordable to low-income households (incomes up to 80% of median) or 100% are affordable to either moderate-income households (120% of median) or middle-income households (150% of median).

2. *Major Changes to the HAA.*

As of January 1, 2018:

a. Applicants Must be Informed of Any Inconsistencies within 30-60 Days after the Application is Complete. Cities and counties must identify any inconsistencies with any applicable "plan, program, policy, ordinance, standard, requirement, or similar provision" within 30 days after an application for 150 units or less has been deemed complete, or within 60 days for projects with more than 150 units. If the local agency does not identify an inconsistency within the required period, the project will be "deemed consistent."

It is not clear how this provision applies to "pipeline" projects: projects that are deemed complete before January 1, 2018. Clearly when a project is found to be complete before January 1, 2018, the provision is not yet in effect. The most reasonable approach is that the requirement applies only to projects deemed complete after January 1, 2018. However, this issue was not resolved in the legislation.

b. Definition of a "Housing Development Project" Expanded. A "housing development project" will include any mixed-use project where at least two-thirds of the square footage in the project is designated for residences, as well as projects that include residences only and transitional and supportive housing.

c. Definition of "Objective" Standard. The HAA does not define "objective." However, SB 35 defines an "objective" standard as one that involves "no personal or subjective judgment by a public official and uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant… and the public official prior to submittal." Although SB 35 states that this definition is confined to that statute, courts may reference this definition in interpreting the HAA.

Provisions such as permitted uses, density, height, setbacks, floor area ratio, even specific design guidelines such as required materials should all be considered to be "objective" standards under this definition. On the other hand, subjective criteria such as "consistent with the character of the city" are not likely to be considered "objective" and, if not objective, cannot be the basis for denying a housing project or reducing the density.

d. Projects Receiving Density Bonuses Are Consistent. Receipt of a density bonus is not a basis to find a housing project inconsistent with applicable development standards.

e. Less Deference to Local Government Findings of Inconsistency. A housing project "shall" be deemed consistent with applicable standards if there is substantial evidence that would allow a reasonable person to conclude that the project is consistent. Currently a local government's finding of either consistency or inconsistency is upheld unless no reasonable person could agree.

This new standard may make it more difficult for local governments to deny projects, because if a court finds that evidence of project consistency submitted by an applicant is reasonable, the project may be found consistent even if the local government has better evidence that the project is inconsistent. The standard will also make it more difficult for project opponents to challenge a project as inconsistent when the local government has found it to be consistent.

Additionally, any findings made to deny a housing project must be supported by a preponderance of the evidence, which is a less deferential standard of review than the current substantial evidence standard. Rather than only looking at the city's or county's evidence to see if it is "substantial," a court will compare the agency's evidence with the applicant's evidence and determine which is more convincing.

f. Increased Penalties for Failure to Comply with the HAA. If a local government improperly denies any housing project, whether market rate or affordable, the prevailing party in a lawsuit brought under the Housing Accountability Act is entitled to attorneys' fees. In addition, if a local agency fails to comply with a court order to approve a project pursuant to the Housing Accountability Act, it shall be fined a minimum of $10,000 per unit. Penalties can increase to five times this amount if the local agency fails to comply with a court order, and the court finds bad faith.

3. ***Coastal Act.*** The HAA provides specifically that nothing in the Act relieves a local agency from compliance with the Coastal Act. In *Kalnel Gardens LLC v. City of Los Angeles* (2016), the Court of Appeal stated in dicta that the HAA is likely to be subordinate to the Coastal Act as a consequence of this provision. Assuming that this conclusion is correct, projects within the coastal zone may be denied if they are inconsistent with relatively subjective provisions of the Coastal Act, such as the requirement that they be "visually compatible with the character of the surrounding area."

However, an applicant may submit evidence of consistency into the record. It is not clear if a court would evaluate a local decision regarding the Coastal Act under the HAA standard of review rather than under the usual 'substantial evidence' standard for administrative mandate. Under the HAA, if a court were to find that a developer's evidence is substantial and would allow a reasonable person to conclude that the project is consistent, a finding of inconsistency by the local agency may not be upheld.

4. ***CEQA.*** In reviewing the project, the agency must also comply with CEQA and, if approving a project, must make all findings required by CEQA. (See *Schellinger Bros. v. City of Sebastopol* (2009).) Since environmental review may well substantially exceed 30 to 60 days, applicants will often receive a list of plan inconsistencies long before CEQA review is completed. That review could require the incorporation of various mitigation measures into the project, potentially resulting in major project changes. The HAA contains no provisions for submittal of revised plans, and re-review, once a project is deemed complete.

5. ***Implications for Processing of Housing Development Applications.*** Thirty to sixty days is a very short time to review developments for consistency with every local standard. In the short term, local governments may want to develop checklists of all of the objective requirements placed on housing development and require applicants to demonstrate how they comply with those requirements. Because agencies must review compliance with all "standards and requirements," as well as the general plan, zoning, and subdivision ordinance, applications may need to show a higher level of detail to demonstrate this consistency.

In the longer term, local governments may wish to review their standards to ensure that they are "objective," especially design review standards and findings for approval of projects. Under SB 2, significant planning funds will be available in 2018 that may be used for the purpose of streamlining housing approvals. Developing "objective" standards may both enable local government to achieve quality development and provide more certainty to housing developers.

B. "No Net Loss": Applicable to *All* Development on Sites Listed in the Housing Element[1] (SB 166; Government Code § 65863)

1. ***Key "No Net Loss" Provisions.*** Each city and county in its housing element must list specific sites that can accommodate its Regional Housing Need Allocation (RHNA) for three income levels: lower (very low and low); moderate; and above moderate. For each site listed, the housing element must show the number of units that can be constructed on the site, and whether the site is intended to meet the need for lower-, moderate-, or above-moderate-income housing. Sites designated for lower-income housing need to be zoned at certain densities, usually 20 or 30 units per acre in urban areas.

The current "no net loss" provisions apply only when a city or county subject to the provision approves a project on a site shown in the housing element with *fewer units* than shown in the housing element. If that is the case, the government must either:

[1] The provision also applies to sites zoned for residential development in communities that have not adopted housing elements. However, because this affects fewer than 5% of communities, these provisions are not described here.

- Find that other sites shown in the housing element are adequate to meet the RHNA at all income levels; or

- Identify other sites so there is 'no net loss' in capacity.

Under current law, if a site designated as suitable for lower-income housing is developed with the *number of units* shown in the housing element, there is "no net loss," even if the units are not affordable.

The statute applies only to general law cities and counties, and SB 166 did not apply the provision to charter cities.

2. ***Major Change to "No Net Loss": Maintaining Capacity by Income Category.*** As of January 1, 2018, cities and counties subject to the provision will need to make "no net loss" findings if projects are approved on housing element sites with *either fewer units* OR *a different income category* than shown in the housing element. If a site shown as suitable for lower- or moderate-income housing is developed with market-rate units—even with the same number of units as shown in the housing element—the local government must either:

- Make a written finding (including unmet need and remaining capacity of sites) that other sites shown in the housing element are adequate to meet the RHNA for lower- or moderate-income housing, as applicable; or

- "Identify and make available" within 180 days other sites zoned at a density suitable for lower- or moderate-income housing, either by identifying existing properly zoned sites or by making such sites available through rezoning. It is not entirely clear when the 180-day period starts; the most likely interpretation is that it begins on the date that a project is approved that results in sites being inadequate.

Other important provisions include:

a. Denial Because of Need to Rezone. Cities and counties are not authorized to disapprove a housing development because additional sites would need to be identified for a specific income category. This appears to be intended to disallow project denials when a market-rate housing project is proposed on a site shown as suitable for affordable housing, and a replacement site must be found. Note that this provision does not apply to non-residential development proposed on a housing element site, apparently allowing non-residential development to be disapproved for this reason.

b. CEQA Review of Any Required Rezoning. If an approval results in the need to find a replacement housing site, the agency is not "obligated" to complete CEQA

review of any rezoning or other action needed to create a replacement site. While this language appears to be intended to separate any CEQA review of the project from CEQA review of any needed rezoning, it does not clearly prevent agencies from reviewing both actions together, if they choose to do so.

The obligation to identify another site within 180 days of project approval does not allow any extension due to the need to complete CEQA review.

3. ***Implications for Processing of Applications on Housing Element Sites.*** Any development application on a site shown in the housing element, including commercial development on mixed-use sites, should be reviewed for compliance with this section.

Before January 1, 2018, agencies should review all applications approved on housing element sites since adoption; list the number of units approved and their income category; list all housing approved on sites *not* listed in the housing element and their income category; and determine if there is a current shortage of sites in any income category. If so, when another application is reviewed for a site listed in that income category, the agency will need to "identify and make available" a replacement site within 180 days if the project does not include the density and income category shown in the housing element. The replacement site could be one that is properly zoned but not shown in the housing element; or a site not included in the housing element that is rezoned to a higher density.

SB 166 does not appear to require that the housing element be amended if a site not shown in the housing element is "identified and made available" to account for any shortfall. However, AB 879 requires that housing element annual reports list any sites rezoned or identified to comply with this provision.

C. Streamlined Approval for Housing Projects Meeting Specific Criteria (SB 35; Government Code § 65913.4)

1. ***Jurisdictions Subject to SB 35.*** Government Code section 65913.4 applies to general law and charter cities and counties; however, jurisdictions are only subject to its provisions if:

- HCD has determined that the jurisdiction has not issued enough building permits to satisfy its regional housing need allocation (RHNA) by income category; or
- A jurisdiction has not submitted its required annual report to HCD for at least two consecutive years.

HCD will make its determination for each "reporting period," and once HCD has determined that a jurisdiction is subject to streamlining requirements, housing projects remain eligible through the end of that reporting period. A "reporting period" is either the first half or second half of the either five- or eight-year-long housing element planning

period. Accordingly, HCD determinations will last for a maximum of either two and a half or four years, depending on the length of each jurisdiction's housing element planning period.

2. ***Projects Eligible for Streamlining.*** To be eligible for streamlined approval, the project must:

- Propose at least two residential units;
- Be located in an urban area, with 75% of the site's perimeter already developed;
- Have a general plan or zoning designation that allows residential or mixed-use development; and
- Meet all "objective" zoning and design review standards in effect when the project is submitted.
    - A project that receives a density bonus and other regulatory incentives under density bonus law is considered consistent, and any "maximum unit allocation" (presumably under a growth control measure) must be ignored.
    - Maximum density is the maximum shown in the general plan. Under SB 35, general plan standards trump other standards if documents are inconsistent.

In addition, projects must meet affordable housing and labor requirements. Specifically:

- If the jurisdiction has not approved enough units to meet its RHNA for above-moderate-income housing, a project with more than 10 units of housing qualifies if it dedicates at least 10% of the total unit count for low-income households;
- If the jurisdiction has not issued enough building permits to meet its RHNA for low-income housing, a project qualifies if it dedicates 50% of the total unit count for low-income households;
- If the jurisdiction has not issued enough building permits to meet its RHNA for low-income housing and above-moderate-income housing, the applicant can choose between dedicating 10% or 50% of the total unit count for low-income households;
- Projects with more than 10 units must commit to paying prevailing wages; and
- Projects must be completed using a "skilled and trained workforce" if they:

- Are located in a coastal or bay county with a population of 225,000 or more and propose 75 or more units (January 1, 2018, until December 31, 2021) or 50 or more units (January 1, 2022, until December 31, 2025) that are not 100 percent subsidized affordable housing; or

- Are located in a county with a population of 550,000 or more that is not a coastal or bay county and propose 75 or more units (January 1, 2018, until December 31, 2019), 50 or more units (January 1, 2020, until December 31, 2021), or 25 or more units (January 1, 2022, until December 31, 2025) that are not 100 percent subsidized affordable housing.

3. ***Exclusions.*** If a project meets the above qualifications, it may be eligible for streamlining if no exclusions apply. Specifically, the project site must not be in the following areas:

- The coastal zone;
- Prime farmland or farmland of statewide importance;
- Wetlands;
- Specified hazardous areas (e.g., severe fire hazard areas, hazardous waste sites, fault zones, floodways, etc.);
- Sites subject to a conservation easement or designated for conservation in a habitat conservation plan;
- Sites subject to the Mobilehome Residency Law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act, or the Special Occupancy Parks Act;
- Sites that require the demolition of housing restricted to households with moderate income or lower or housing subject to rent control or an historic structure; or
- Sites that have contained housing occupied by tenants within last 10 years, even if such housing has subsequently been demolished.

Finally, the project must not involve the subdivision of a parcel unless it satisfies the prevailing wage and skilled and trained workforce requirements (summarized above) or it is financed with low-income housing tax credits and commits to paying prevailing wages.

4. ***Limitations on Parking for Eligible Projects.*** No more than one parking space per unit may be required for eligible projects. Moreover, no parking may be required if the project is located:

- Within one-half mile of public transit;
- Within an architecturally and historically significant historic district;
- In an area where on-street parking permits are required but not offered to the occupants of the development; or
- Within one block of a car share vehicle.

5. ***Streamlining Benefits to Applicant.*** Most importantly, qualifying projects are eligible for streamlined approvals under a ministerial process, which excludes qualified projects from environmental review under the California Environmental Quality Act.

An applicant must request review under the streamlining provisions. A jurisdiction then has 60 days from *submittal* (90 days for projects with more than 150 units) to provide the applicant with written notice of any objective development standards that the project does not satisfy and an explanation for the conflict; failure to meet this timeframe results in a project being deemed consistent with such standards. The jurisdiction must complete any "design review or public oversight" for the project within 90 days of an application's submittal (180 days for projects with more than 150 units).

Because of the numerous qualification criteria and exclusions, it is not clear how many projects will be in a position to take advantage of the new streamlining provisions. However, note that the timeframes for processing applications are triggered from the date of *submittal*, not from the date an application is accepted as complete, which increases the pressure on local agency staff to review and process applications quickly. Regardless, agencies may want to develop a checklist to evaluate eligibility for streamlining and submittal requirements needed to determine if a project is consistent with all objective standards. As with the Housing Accountability Act, cities and counties will need to compile a list of applicable objective development standards that can be used to evaluate housing applications going forward.

II. ANNUAL REPORTING AND HOUSING ELEMENT ENFORCEMENT

SB 35, AB 72, AB 879, and AB 1397 have created significant changes to housing element requirements and annual reporting of housing development.

A. Increased Annual Reporting Obligations, Now Applicable to Charter Cities (AB 879 and SB 35; Government Code § 65400)

General law cities have been obliged to draft an annual report on implementation of their general plans that includes a description of housing development activity in the jurisdiction. The annual report requires a discussion of the jurisdiction's progress towards implementing its housing element programs to meet its share of the regional housing needs allocation (RHNA). Local governments are required to hold a hearing and accept public comment regarding the report, as well as to submit the report to the state Department of Housing and Community Development (HCD) and state Office of Planning and Research (OPR) by April 1 each year. HCD has adopted forms for the annual reports.

SB 35 and AB 879 impose additional substantive requirements for the preparation and contents of annual reports on implementation of the general plan and extend the requirements to charter cities. The bills require that the following additional information be included in the report:

- The number of housing development applications received in the prior year;
- The number of units included in all development applications in the prior year;
- The number of units approved and disapproved in the prior year;
- A listing of sites that were rezoned to accommodate any portion of the local government's share of the RHNA for each income level that could not be accommodated on sites identified in the site inventory of the housing element;
- A listing of sites that were identified or rezoned if housing was developed at a lesser density or for a different income level than anticipated for that site in the housing element site inventory, in accordance with the new "No Net Loss" requirements in AB 166;
- A production report that identifies:
    - The number of net new units of housing (both rental and for-sale) that have been issued a "completed entitlement," a building permit, or a certificate of occupancy, thus far in the housing element cycle. The term "completed entitlement" is defined in the streamlining provisions of SB 35 as "all required land use approvals or entitlements necessary for issuance of [a] building permit" (Government Code section 65913.4). It appears likely this definition will be used for the annual reports; and

- The income category that each new housing unit satisfies, based on the anticipated area median income of the future occupants, presumably in accordance with the RHNA categories (e.g. very low-, lower-, moderate-, and above-moderate-income categories); and

- A unique site identifier for each entitlement, building permit, or certificate of occupancy, including the assessor parcel number.

- A report on the impact of SB 35's streamlining provisions (Government Code section 65913.4), including the number of applications for streamlining, the location and number of each development approved and building permit issued via SB 35 streamlining, and the total number of units constructed via streamlining by income category and noting whether the unit is for rent or sale.

HCD has been given authority to revise the housing element annual report forms it previously adopted via notice and comment, but the new revisions are not subject to the California Administrative Procedures Act. Presumably the new annual report forms will incorporate all of the new requirements. HCD has stated that the additional information must be submitted in the annual reports due on April 1, 2019, but that the reports due on April 1, 2018 need only conform with the regulations adopted in 2010.

Each city, county, or city and county that fails to submit an annual report in substantial compliance with the new requirements by May 31 of each year may be subject to a court order requiring completion of the report. After HCD revises the forms to incorporate the above requirements, agencies may be ordered by a court to prepare a report consistent with the new forms by October 1 following the adoption of the forms, but no sooner than six months following their adoption, and after that must submit consistent annual reports by April 1. Separately, failure to submit the annual report for two or more consecutive years triggers SB 35 streamlining provisions for housing development applications.

AB 879 also directs HCD to evaluate the reasonableness of local government fees charged under the Mitigation Fee Act by June 30, 2019, with direction to identify fee reduction opportunities to promote housing development.

B. Increased Enforcement of Housing Law (AB 72; Government Code § 65585)

Currently, HCD reviews all housing elements and determines whether each housing element or amendment substantially complies with state housing element law. In the past HCD has revoked its finding of compliance when communities have failed to implement their housing elements but has not had statutory authority to do so.

AB 72 provides explicit authority for HCD to revoke its compliance finding, allowing the department to review any action or failure to act that is inconsistent with either an adopted

housing element or state housing element law, such as a failure to complete required rezonings. HCD must provide the city or county with a "reasonable" time to respond that cannot exceed 30 days and then may revoke its finding of substantial compliance and may refer the violation for potential action by the California Attorney General. HCD may additionally report to the Attorney General any violations of the Housing Accountability Act, the "No Net Loss" statute, density bonus law, or fair housing law. However, no funds were appropriated for the Attorney General to act on these referrals.

C. Future Housing Element Sites Restricted (AB 879 and AB 1397; Government Code §§ 65583 and 65583.2)

AB 1379 and AB 879 require cities and counties to provide additional analysis when adopting a housing element and seek to limit the designation of certain sites as suitable for lower-income housing, especially non-vacant sites. Although most housing elements in the state will not be required to be revised until 2021 to 2023, cities and counties should be aware of the substantial changes regarding adequate sites.

1. ***Site Inventory Requirements.*** Housing elements previously required land inventories that identify sites that could accommodate housing development. Now, the site inventory must include the "realistic and demonstrated potential" for identified sites to accommodate housing development. While the realistic and demonstrated potential is not clearly defined, new requirements for the site inventory may shed light. The site inventory must now identify each property by its assessor parcel number (rather than allowing other identifiers) and then describe whether the property either currently has access to sufficient water, sewer, and dry utilities, or is scheduled to have such access according to an adopted plan. As currently required, the site inventory must identify the number of units that can "realistically be accommodated" on site, but AB 1397 requires more justification of the number of units identified for each site, including a review of the density of projects on similar sites in the jurisdiction and at similar affordability levels.

2. ***Restrictions on Site Designations.*** AB 1397 revises Government Code section 65583.2 to impose new restrictions on which sites may be included in the site inventory based on the size and current use of the site. Sites smaller than one-half acre and those larger than ten acres are presumed to be inappropriate for development of housing affordable to lower-income households, unless the jurisdiction can provide evidence why the site would be appropriate. Acceptable evidence includes either a proposal for or an approved development project affordable to lower-income households for the site.

3. ***Use of Vacant Sites in the Site Inventory.*** Vacant sites that were previously included in prior housing element site inventories are subject to additional scrutiny. If a vacant site was identified in two or more consecutive planning periods to accommodate lower-income households but was not a site of an approved housing development, or if a non-vacant site was identified in a prior housing element, the site cannot be used to fulfill the

jurisdiction's obligation to accommodate development for lower-income households unless:

- the site is or will be rezoned to the minimum lower-income household density for the jurisdiction within three years; and

- the zoning allows for residential development by right if at least twenty percent (20%) of the units are affordable to lower-income households.

4. ***Use of Non-vacant Sites in the Site Inventory.*** For each non-vacant site identified in the housing element site inventory, the development potential for the site must additionally consider the jurisdiction's past experience converting existing uses to higher density residential development, the current market demand for the existing use, and an analysis of any existing leases or contracts that could prevent redevelopment of the site.

Additionally, if a jurisdiction relies on non-vacant sites to accommodate fifty percent (50%) or more of its housing need for lower-income households, the "*existing use shall be presumed to impede additional residential development*, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period." Sites identified for housing development that currently or within the last five years contained residential units occupied by lower-income households, or were subject to an affordability requirement or local rent control policy, must be replaced one-for-one with units affordable to the same or lower income levels. This replacement requirement must be a condition to any development of the site.

5. ***Additional Analysis Required.*** The analysis of governmental constraints on the production of housing must specifically address "any locally adopted ordinances that directly impact the cost and supply of residential development." Such ordinances likely include mitigation fees related to traffic, parks, and utilities, but could potentially be interpreted to include typical zoning constraints like height limits or mandatory setbacks from streets and lot lines.

Finally, the housing element must expand the analysis of nongovernmental constraints on the production of housing. AB 1397 requires that this analysis discuss any requests to develop housing at densities below the density identified for the site in the land inventory, describe the length of time between project approval and a request for building permits, and identify local efforts to address nongovernmental constraints.

III. SUPPORT FOR AFFORDABLE HOUSING

A. New Permanent Funding Sources for Housing (SB 2 and SB 3)

For over a decade, and more urgently since the demise of redevelopment in 2012, which provided over $1 billion each year for affordable housing, local governments and affordable housing developers have been struggling to find an alternative source of funding to help address the state's severe housing shortage. The California Legislature passed two funding bills this year as part of the fifteen-bill housing package in an effort to replace some of the lost redevelopment funds and provide a permanent source of funding.

1. ***Permanent Source for Housing—Recording Fee.*** SB 2, the Building Homes and Jobs Act, provides a "permanent source" of funding for affordable housing by imposing a $75 fee on each recorded document up to a maximum of $225 per transaction per parcel, estimated to generate $200 to $300 million annually. Documents exempted from the fee include documents transferring a residential dwelling to an owner-occupant and documents recorded in connection with transfers that are subject to the transfer tax, such as grant deeds not involving related parties.

As of January 1, 2018, SB 2 requires county recorders to send fee revenues quarterly, after deduction of administrative costs, to the State Controller for deposit in the Building Homes and Jobs Fund. The funds to be generated by the fees will be provided to local governments and the California Department of Housing and Community Development (HCD) in two phases, with the majority of the funding designated for use by local governments.

a. **Year 1: January 2018—December 2018**

- ***50% for local governments to streamline housing production.*** During the first year, 50% of the funds will be available for local governments to update planning documents and zoning ordinances to streamline housing production, including but not limited to general plans, community plans, specific plans, sustainable communities strategies, and local coastal programs. The funds can also be used for analyses under the California Environmental Quality Act (CEQA) to eliminate the need for project-specific review and for process improvements to expedite local permits.

  To obtain funding, local governments must submit requests to HCD with a description of the proposed use of the funds in the interest of accelerating housing production. HCD is required to ensure geographic equity in the allocation of the funds.

- ***50% for HCD to combat homelessness.*** The remaining 50% of the funds will be available to HCD to assist individuals experiencing or at risk of

homelessness including, but not limited to, providing rapid rehousing, rental assistance, navigation centers, and the new construction, rehabilitation, and preservation of permanent and transitional rental housing.

b. **Year 2 and Beyond: January 2019—Beyond**

Beginning January 1, 2019, the funding will shift toward the creation of affordable housing with 70% of funds designated for local government use and 30% for HCD use. Additionally, SB 2 requires that 20% of all funds be used for affordable owner-occupied workforce housing, but does not define "workforce housing."

- ***70% for local governments to support affordable housing, homeownership opportunities, and other housing-related programs.*** Of the 70% for local governments, 90% of the funds will be allocated based on the same formula as used for Community Development Block Grants (CDBG) funds, except that the funds allocated to non-entitlement areas pursuant to the CDBG formula will be distributed by HCD through a competitive grant program. As under the CDBG program, cities with populations of at least 50,000 and urban counties with a population of at least 200,000 (excluding entitlement cities) will be designated as entitlement jurisdictions and receive grants by formula, provided they comply with certain minimum requirements.

  For non-entitlement areas, HCD is required to prioritize counties that have populations of 200,000 or less in unincorporated areas, local governments that did not receive awards based on the CDBG formula in 2016, and local governments that pledge to use the funds towards assisting persons experiencing or at risk of homelessness.

  The remaining 10% of the funds for local governments will be allocated equitably among non-entitlement areas using the CDBG formula.

  Minimum Requirements. To receive the funds, cities and counties must comply with the following minimum requirements: (1) submit a plan to HCD describing how the funds will be used consistent with the eligible uses and to meet the local government's unmet share of the regional housing needs allocation (RHNA); (2) have a "compliant" housing element and submit a current housing element annual report (Government Code section 65400); (3) submit an annual report to HCD tracking the uses and expenditures of any allocated funds; (4) expend funds for the eligible purposes; and (5) prioritize investments that increase the housing supply to households that are at or below 60% Area Median Income

(AMI). If there is no "documented plan" to spend the funds within five years, the funds revert to HCD for use in its Multifamily Housing Program.

Uses of Funds. Local governments may use the funds for a wide variety of purposes that include: (1) predevelopment, development, acquisition, rehabilitation, and preservation of multifamily, residential live-work, rental housing that is affordable to extremely low-, very low-, low- and moderate-income households; (2) affordable rental and ownership housing that meets the needs of a growing workforce earning up to 120% of AMI (or 150% AMI in high-cost areas, which are not defined); (3) capitalized reserves for services connected to the creation of new permanent supportive housing; (4) assisting persons who are experiencing or at risk of homelessness; (5) accessibility modifications; (6) acquisition and rehabilitation of foreclosed or vacant homes; (7) homeownership opportunities; or (8) fiscal incentives or matching funds to local agencies that approve new affordable housing.

Two or more cities may spend their allocation on a joint project. Only five percent of the funds may be spent on administration.

HCD is authorized to adopt guidelines in consultation with "stakeholders" to implement this section and determine allocation methodologies.

- ***30% for HCD for specified purposes.*** The remaining 30% of the funds will be made available to HCD for the following purposes: 5% for state incentive programs including loan and grant programs administered by HCD, 10% to address affordable homeownership and rental housing opportunities for agricultural workers and their families, and 15% will be appropriated to the California Housing Finance Agency to create mixed-income multifamily residential housing for lower- or moderate-income households.

2. ***Veterans and Affordable Housing Bonds.*** SB 3 places on the November 6, 2018 ballot a bond measure to raise $3 billion for existing state affordable housing programs and $1 billion for the veterans' home purchase program. For the most part, funds raised under SB 3 (if approved by voters) are not directed to local governments. Like SB 2, SB 3 is also an urgency measure that became effective on September 29, 2017. Supporters intend to develop get-out-the-vote efforts and other campaign efforts to ensure that this will be a successful initiative.

3. ***Summary.*** Both SB 2 and SB 3 are long-awaited sources of funding for affordable housing. Local governments will need to pay special attention to eligibility requirements

to receive funding under SB 2, and developers and other entities should be aware of new recording fees as a result of SB 2.

B. <u>Support for Farmworker Housing and Migrant Farm Labor Centers</u> (AB 571)

AB 571 makes several changes to the state low-income housing tax credit program to promote the development of additional farmworker housing, and also provides additional support and flexibility for the operation of migrant farm labor centers. AB 571 is an urgency measure, so it is effective as of September 29, 2017, except as otherwise provided in the legislation.

1. ***<u>Changes to the State Low-Income Housing Tax Credit for Farmworker Housing</u>.*** California's state low-income housing tax credit program provides a set-aside of $500,000 annually for farmworker housing, which accrues if unused. As of June 7, 2017, there was approximately $4.8 million of unused state farmworker tax credits available. AB 571 alters the state low-income housing tax credit program to make the farmworker set-aside more effective. These changes are:

a. As of January 1, 2018, the definition of "farmworker housing" is modified so that only 50 percent (rather than 100 percent) of the residential units in the development must be occupied by farmworker households.

b. As of January 1, 2018, the California Tax Credit Allocation Committee ("TCAC") can now allocate farmworker state low-income housing tax credits to housing developments located in difficult to develop areas (DDAs) and Qualified Census Tracts (QCTs) (which are the two areas where developments qualify for a 30% basis boost for federal tax credits). Previously, TCAC could only allocate state credit for developments in DDAs and QCTs where at least 50% of the units served special needs populations.

c. As of January 1, 2018, for developments that also receive 4% federal low-income housing tax credits, the state low-income housing tax credit for farmworker housing will be increased to 75% of the development's basis over four years. For all other situations, the state low-income housing tax credit equals only 13% of the development's basis over four years.

These changes will work together to make the farmworker set-aside of the state low-income housing tax credit more flexible and enable owners of farmworker housing to raise more equity than was previously possible. The goal is to encourage more farmworker housing to be constructed.

2. ***Changes to the State Migrant Farm Labor Centers Programs.*** AB 571 also provides more support and flexibility to the state's migrant farm labor centers in the following ways:

a. Allows HCD to make advance payment of up to 20% of annual operating costs for migrant farm labor centers, provided the contractors do not have outstanding advance balances from previous periods.

b. Clarifies that the maximum occupancy period, consisting of the standard 180-day occupancy period plus any HCD-approved extended occupancy period, cannot exceed a total of 275 days in a calendar year.

c. Deletes a condition for approval of an extended occupancy period that no additional subsidies from HCD are to be used for the extended occupancy period beyond the first 14 days of the extended period.

These changes will provide more flexibility in extending the occupancy period, which will presumably make housing available to migrant farm labor households for longer periods of time.

C. Preservation of Units with Expiring Use Restrictions (AB 1521)

AB 1521 provides additional measures to retain the affordability of developments with expiring use restrictions, a proposed termination of a subsidy contract, or a proposed prepayment in an effort to preserve more affordable housing developments (collectively, "expiring use restrictions").

1. ***Changes to the Required Notices for Assisted Affordable Housing Developments with Expiring Use Restrictions.***

- *Assisted Housing Developments.* The notice requirement applies to multifamily affordable housing developments with federal, state, or local governmental assistance, with the exception of Housing Choice Vouchers, and does not apply to units under rent control/rent stabilization ordinances.

- *Notice Period.* Under current law, notice of "expiring use restrictions" must be given for all assisted affordable housing developments within one year of the expiration of those restrictions. The legislation now provides that notice must also be given at least **three years** prior to the expiration date of restrictions to prospective tenants, current tenants, and "affected local entities" if the rental restrictions are set to expire after January 1, 2021. This change will allow potential purchasers more time to obtain financing to maintain the affordability of the units. "Affected local entities" are the local city or county, any local housing

authority, and the California Department of Housing and Community Development.

- *Injunctive Relief.* Injunctive relief was always a remedy for violation of the notice requirements. Now, the legislation provides that the re-imposition of the prior restrictions and restitution of increased rents are remedies that a court can impose for violations of this notice requirement, along with attorneys' fees and costs to a prevailing plaintiff.

2. ***Changes to the Mandatory Offer to Purchase Process for Assisted Affordable Housing Developments with Expiring Use Restrictions.*** Under current law, the owners of assisted affordable housing developments are required to provide a notice of the opportunity to offer to purchase the development within five years of termination of a subsidy contract, prepayment of a mortgage, or expiration of rental restrictions. AB 1521 makes the following changes to the offer to purchase requirements:

- *HCD Certification.* Any eligible purchase offers made during the first 180 days after the owner's notice of the opportunity to offer to purchase must be from qualified purchasers, which have been certified by HCD and which own and operate at least three comparable developments subject to regulatory agreements with a California or federal department or agency. HCD is now required to maintain a list of certified entities that is to be updated annually.

- *Maintain Affordability.* Under existing law, the offeror must also agree to maintain the affordability of the development for the longer of 30 years after the purchase of the development or the remaining term of any existing federal restrictions.

- *Initial 180-Day Period.* The offer to purchase must be made by a certified, qualified entity and submitted within 180 days of the owner's notice of opportunity to submit an offer. If the owner wishes to sell, it must accept the offer and sign a purchase and sale agreement within 90 days of receipt of the offer.

- *Limits on Owner.* If the owner receives an offer to purchase from a qualified entity within 180 days of the owner's notice of opportunity to submit an offer, then the owner cannot accept offers from other entities and shall either accept that offer or decide not to sell by making a declaration that it will not sell the property for at least five years. That declaration must be made under penalty of perjury and recorded against the property.

- *Fair Market Value Determination.* The owner and buyer can establish fair market value by negotiation or by the appraisal process set forth in the legislation (Government Code section 65863.11(k)).

- *After the Initial 180-Day Period*. Under existing law, the owner may accept an offer in the 180-day period following the initial 180-day period from any purchaser which is not qualified. However, the owner must first notify any qualified offeror who made an offer during the initial 180-day period of the opportunity to purchase on the same terms and conditions as the pending offer unless the new offeror agrees to maintain the affordability of the development for the longer of 30 years after the purchase of the development or the remaining term of any existing federal restrictions. The legislation is not clear on how this provision works given the new requirement to record a declaration not to sell within five years if the owner does not accept an offer from a certified, qualified purchaser within the first 180-day period.

- *Exemptions.* Under AB 1521, the provisions related to the offers to purchase and HCD reporting (as set forth below) do not apply to affordable housing developments where 25% or fewer of the units are subject to affordability restrictions due to density bonus or inclusionary zoning requirements. Under existing law, the requirements to send notices to tenants and local jurisdictions and to potential purchasers for developments with expiring use restrictions do not apply if a regulatory agreement is recorded on the property to maintain affordability that contains all the conditions set forth in Government Code section 65863.13 for the longer of an additional 30 years or the remaining term of any existing regulatory agreement.

- *Enforcement.* Judicial action to enforce these provisions can now be brought by tenant associations and affected public entities that have been adversely affected by failure to follow the statute. The court can waive bonding requirements and award attorneys' fees and costs to a prevailing plaintiff.

3. ***New HCD Monitoring and Annual Report Requirements.*** Under AB 1521, HCD now is required to monitor and issue annual reports, starting no later than March 31, 2019, on compliance with these procedures for all assisted affordable housing developments.

- *Annual Reporting by Owners*. Owners of assisted affordable housing developments where 25% or more of the units are subject to affordability restrictions will now need to report annually to HCD on forms to be provided by HCD.

- *HCD Annual Report.* HCD is required to compile specified data and provide a report annually to the Legislature. HCD's annual report will also be available on its website.

- *Violations.* If HCD discovers violations, it can refer those to the Attorney General for enforcement.

D. Welfare Exemption for Over-Income Tenants (AB 1193)

AB 1193 expands the welfare property tax exemption for developments receiving federal low-income housing tax credits for residential units where tenant incomes increase above lower income (defined as income at or below 80% of the Area Median Income (AMI)). In the past, increases in tenant incomes above 80% of AMI created fiscal problems for tax credit developments because those units were not eligible for the welfare exemption, the tax credit projects were underwritten assuming a property tax exemption for all units affordable to "lower-income" residents, and, under tax credit rules, the owners are unable to raise rents on those units unless incomes are increased above a specified level.

- *Expansion of Exemption.* For fiscal years 2018–19 through 2027–28 only, the welfare exemption for affordable housing developments that receive federal low-income housing tax credits will be expanded to include residential units where the tenant occupant income was at or below 80% of AMI at the time of initial occupancy, even if that tenant occupant's income has increased up to 140% of AMI. For units where the tenant occupant's income has increased above 140% of the AMI, those units will not be eligible for the welfare property tax exemption.

- *Claim for Welfare Exemption.* For fiscal years 2018–19 through 2027–28 only, the claim for the welfare *exemption* for units with tenant incomes that have increased over "lower income" must include an affidavit with specified information about the increased income and rent paid by that tenant household. The affidavit form is not available yet, but is likely to be published before the January 1, 2018 lien date for the 2018–19 fiscal year. The legislation also provides that the information provided in such affidavits is not subject to the Public Records Act to protect the privacy of the individual households.

IV. NEW DISTRICTS AND ZONES TO STREAMLINE DEVELOPMENT AND FINANCE HOUSING

A. Workforce Housing Opportunity Zones (SB 540)

1. ***What is a Workforce Housing Opportunity Zone (WHOZ) and How is One Created?***

SB 540 permits local jurisdictions to create a Workforce Housing Opportunity Zone (WHOZ) to streamline housing approvals. A city or county can establish a WHOZ through the preparation of an EIR and adoption of a specific plan creating the zone. The WHOZ can include in its boundaries contiguous or non-contiguous parcels which *must* be identified in the community's housing element land inventory.

Prior to adoption of the specific plan, a community must meet detailed statutory requirements, including holding two noticed public hearings that are at least 30 days apart and providing written notice to local agencies, property owners within the proposed zone, and property owners within 300 feet of the proposed zone.

The specific plan must include text and diagrams that:

- Specifies the distribution and location of 100 to 1,500 residential dwelling units within the zone, but the community may not include more than 50% of the community's regional housing needs allocation (RHNA) within the zone. However, if the community's RHNA is less than 100 dwelling units, the zone must include the entire allocation;

- Specifies the distribution, location and extent and intensity of major components of public and private infrastructure and essential facilities (including schools) that will be required to support the construction of the residential dwelling units within the zone;

- Identifies traffic, water quality, public utility, and natural resource protection mitigation measures that will apply to all developments within the zone (in addition to mitigation measures identified in the EIR);

- Specifies density ranges for housing in an amount not lower than is deemed appropriate to accommodate the lower-income housing, and a density range for single-family attached or detached housing not less than 10 units per acre;

- Identifies the uniformly applied development policies or standards that will apply to all development constructed within the zone;

- Identifies the manner in which funding will be provided for infrastructure and services necessary for development within the zone; and

- Includes design review standards.

Within five years of adoption of the specific plan for the zone, the community must complete an analysis of the EIR under Public Resource Code section 21166 to determine if a supplemental or subsequent EIR must be prepared, and consider whether any amendments are required to the specific plan for the zone. The community must then hold a noticed public hearing to consider amendments and re-adoption of the specific plan (for a new five-year period).

2. ***What are the benefits of adopting a WHOZ?*** For a period of five years after the specific plan is adopted (or re-adopted), a housing development that is consistent with the specific plan, and satisfies the criteria listed below, must be approved within 60 days after the application is deemed complete:

- The development is located on land within the boundaries of the zone;
- The development is consistent with the specific plan for the zone, including applicable density ranges;
- The development implements the low- and moderate-income housing targeting within the zone, as follows:
    - At least 30% of the total units constructed or substantially rehabilitated in the zone will be sold or rented to moderate-income households;
    - At least 15% of the total units constructed or substantially rehabilitated in the zone will be sold or rented to lower-income households; and
    - At least 5% of the total units constructed or substantially rehabilitated in the zone will be sold or rented to very low-income households.
    - Not more than 50% of the total units constructed or substantially rehabilitated in the zone will be sold or rented to above-moderate-income households. If the total number of units in a development will be sold or rented to above-moderate-income households exceeds 50%, then not less than 10% of the units in the development must be sold or rented to lower-income households.
- The developer must provide sufficient legal commitments to ensure continued availability of units for very low-, low-, moderate-, or middle-income households for 55 years for rental units and 45 years for owner-occupied units;
- The development incorporates all applicable mitigation measures from the specific plan and those identified in the EIR;

- The development incorporates each of the applicable uniformly applied development standards;

- The development complies with the applicable adopted design review standards; and

- The developer agrees to pay all construction works employed in execution of the work at least the general prevailing rate of per diem wages.

When the community receives an application for a housing development within the zone, the community must post a notice on its website and mail or deliver notice to interested parties within 10 days of receiving the completed application. In addition, the community must include the number of residential dwelling units approved within the zone during the past fiscal year that comply with the income targeting requirements for the zone.

After the adoption of a WHOZ, no additional environmental review is required for housing within the zone if the development is consistent with the specific plan, specified affordability goals are achieved, mitigation measures and the uniformly applied development standards are incorporated in the development, the development complies with the applicable design review standards, and the project proponent certifies the payment of prevailing wages and related requirements under the Labor Code. The community may not deny approvals for a development unless the community makes a finding, based on substantial evidence in the record of a public hearing for the project, regarding changes in the physical condition of the site that would result in a specific, adverse impact upon public health or safety.

Under SB 540, HCD may provide grants or no-interest loans to cities and counties to develop the specific plan and related EIR required for the adoption of a zone.

B. Housing Sustainability Districts (AB 73)

1. ***What is a Housing Sustainability District and how is one created?*** AB 73 permits communities, with HCD's approval, to create housing sustainability districts meeting designated conditions, including a specified amount of low- and moderate-income housing and zoning to permit residences through a ministerial permit.

A community may establish a housing sustainability district through adoption of a zoning ordinance under Government Code section 65800, and subject to the following criteria:

- The district must be located in an eligible location and the district may include an area adjacent to an eligible location if the adjacent area is served by existing infrastructure, defined to include an area within 1/2 mile of public transit; or an area that, by virtue of existing infrastructure, transportation access, existing

underutilized facilities, or location, is highly suitable for a residential or mixed-use housing sustainability district.

- The area must be zoned to permit residential uses through the ministerial issuance of a permit. Other uses may be permitted by conditional use or other discretionary permit, provided that uses are consistent with residential use.

- The area must be subject to density ranges for multifamily housing in an amount not less than is deemed appropriate to accommodate the lower-income housing, and a density range for single-family attached or detached housing not less than 10 units per acre, and the density range must specify a minimum and maximum of dwelling units per acre.

- The development of housing is permitted, consistent with neighborhood building and use patterns and applicable building codes.

- No limitations or moratoriums on residential use, other than those imposed by a court, apply to any of the area within the district.

- The area within the district is not subject to any general age or occupancy restrictions, except that the community may allow for the development of specific projects within the district, exclusively for the elderly or the disabled or for assisted living.

- Housing units must comply with all applicable federal, state, and local fair housing laws.

- The area included within a housing sustainability district may not exceed 15% of the total land area under the jurisdiction of the community, unless approved by HCD. A community may not include more than 30% of the total land area under its jurisdiction in housing sustainability districts.

- Development projects within the district must comply with the replacement housing obligations applicable to the district.

The ordinance proposing to establish a housing sustainability district must:

- Provide for an "approving authority" to review permit applications for development within the district consistent with requirements of the bill.

- Provide a manner of review by an approving authority, consistent with HCD regulations.

- Require that at least 20% of the residential units constructed within the district be affordable to very low-, low-, and moderate-income households and subject to recorded affordability restrictions for at least 55 years. A development that is affordable to above-moderate-income households must include not less than 10% of the units for lower-income households, subject to additional requirements imposed by local ordinance. For communities that include their entire RHNA within the district, then the percentages of the total units constructed or substantially rehabilitated within the housing sustainability district shall match the percentages in each income category of the community's RHNA.

- Specify that a project is not deemed to be for residential use if it is infeasible for actual use as a single or multifamily residence.

- Require the applicant for a development within the district to pay prevailing wages or use skilled and trained workforce to construct the development based on the location of the project, population of the county the project is located in, and the size of the project.

- Provide that a project is not eligible for approval if the project involved or involves a subdivision, with limited exceptions for projects receiving assistance under the low-income housing tax credit program or if the project is subject to the requirement that prevailing wages be paid, and a skilled and trained workforce be used.

- Provide relocation assistance for persons and families displaced from their residences due to development within the housing sustainability district.

2. ***How Is HCD Involved in Review of a Housing Sustainability District?*** A community that desires to create a housing sustainability district must first submit a preliminary application to HCD along with the following information:

- The proposed boundaries of the district;

- A description of the developable land within the proposed district;

- A description of other residential development opportunities within the city, county, or city and county, including infill development and reuse of existing buildings within already developed areas;

- A copy of the community's housing element;

- A copy of the adopted housing sustainability ordinance (made subject to HCD approval);

- A copy of the environmental impact report;
- Design review standards applicable to developments within the district, adopted pursuant to Government Code section 66206;
- Other materials establishing the community's compliance with the requirements for a sustainability district.

HCD must give the community a preliminary determination as to the eligibility of the proposed housing sustainability district within 45 days of receipt of the application. Following preliminary approval of an application, and following receipt of a notice provided by the community that the ordinance establishing the housing sustainability district has taken effect, HCD must confirm approval of the district.

The ordinance establishing the housing sustainability district will remain in effect for 10 years, subject to one 10-year extension. But on or before October 1 of each year following the approval of the ordinance establishing the housing sustainability district, HCD must issue a certificate of compliance if the community has satisfied all of the following:

- The ordinance establishing the housing sustainability district is in effect;
- The housing sustainability district complies with the minimum requirements to adopt the district;
- The community has only denied a permit for a residential development consistent with its housing sustainability district ordinance, the provisions of its housing element, or for failure to comply with the housing sustainability district ordinance, failure to pay any applicable district application fees, or a change in the physical condition on the site of the development that would have a specific adverse impact on the public health or safety;
- The design review standards, if any, adopted by the community ensure that the physical character of development within the district is complementary to adjacent buildings and structures and is consistent with the community's general plan, including the housing element. "Design review standards" is defined as reasonable application of qualitative design requirements that are clear and concise and consistently applied to all types of development applications, with specific terms defined or generally accepted word definitions.

HCD may deny the certification of the housing sustainability district if HCD finds that the conditions are not satisfied.

3. ***What are the benefits of adopting a housing sustainability district?*** A community with an HCD-approved housing sustainability district is entitled to receive a zoning incentive payment. The amount of the zoning incentive payment will be based on the number of new residential units constructed within the district, subject to specified exclusions. If a community reduces the density of sites within the district from the required levels, the community will be required to return the full amount of the zoning incentive payment it received.

The EIR included as part of the application to HCD will serve as the EIR for all housing projects developed in the district for the next 10 years, thereby reducing development costs for projects within the district that are consistent with the requirements of the district.

Grounds to deny a housing project are very specific and limited. AB 73 also gives developers the ability to opt-out of the requirements of the district and standing to sue if a project is denied or has been approved subject to conditions rendering the project infeasible for residential uses.

Similar to SB 35, the bill requires payment of prevailing wages and use of a "skilled and trained workforce" for projects with more than 10 units.

C. Neighborhood Infill Finance and Transit Improvements (NIFTI) Districts (AB 1568)

1. ***What is a NIFTI and how is one created?*** Existing law allows for the creation of enhanced infrastructure financing districts (EIFDs), a tax increment tool available for community economic development activities. Under AB 1568, a city or county may now designate one or more EIFD overlay districts identified as Neighborhood Infill Finance and Transit Improvements (NIFTI) Districts, by adopting a resolution at a noticed public hearing.

2. ***How is a NIFTI funded?*** Prior to or after the adoption of the EIFD's infrastructure financing plan, a community, through adoption of an ordinance at a noticed public hearing, may pledge sales and use taxes and transaction and use taxes to the EIFD. In the ordinance, the community must establish procedures to calculate amounts derived from sales and use taxes and transaction and use taxes and amounts of each to be allocated to the EIFD.

3. ***What are eligible activities?*** NIFTI funds may be used by the district to fund affordable housing and infrastructure upgrades to meet current and future capacity demands in infill areas. Any housing units assisted by the district must be subject to recorded covenants or restrictions ensuring the units remain affordable to, and are occupied by, very low-, low- and moderate-income households (as applicable) for the longest time feasible, but for not less than 55 years for rental units and 45 years for owner-occupied units.

NIFTI-generated funds are limited for use on "infill sites" and must be used for activities that are consistent with the purposes for which the tax was imposed. NIFTI funds may not be used for highway or highway interchange improvements.

4. ***What are the affordable housing requirements?*** A community that desires to establish a NIFTI must ensure that the infrastructure financing plan applicable to the district requires that:

- At least 20% of all funds allocated to the EFID are set aside for the acquisition, construction, or rehabilitation of very low- and low-income housing; and
- That at least 20% percent of any new housing units constructed within the district be affordable to low- or moderate-income households with:
  - At least 6% of new units affordable to very low-income households;
  - At least 9% of new units affordable to low-income households; and
  - Up to 5% of new units affordable to moderate-income households.

The District must ensure that the production requirements are satisfied every 10 years, and for the 45-year life of the plan. A local community may not adopt an ordinance to terminate the district, if the district has not complied with the affordable housing obligations.

V. ACCESSORY DWELLING UNIT LEGISLATION

In 2016, the Legislature adopted two bills that significantly limited the restrictions jurisdictions could place on the construction of second units, formally called "accessory dwelling units" or "ADUs." This year, two more pieces of legislation were adopted, and additional changes will become effective on January 1, 2018.

1. ***Non-Complying Ordinances Are Void.*** Even public agencies that adopted or amended ADU ordinances within the past year may want to review their ADU ordinances to confirm if further amendments are required to comply with the latest state requirements. This review is especially important because Government Code section 65852.2 still includes language that all non-complying ordinances are void, and non-complying local governments must approve or disapprove an ADU application ministerially, applying only the standards specified in Government Code section 65852.2.

2. ***Existing ADU Processing Requirements.*** Government Code section 65852.2 requires local jurisdictions to approve ADU applications through a ministerial process.

    - If a property owner applies to create a new accessory structure or expand an existing structure to create an ADU (an "**exterior ADU**"), the jurisdiction may restrict which areas of the jurisdiction allow ADUs and impose certain physical standards.

    - By contrast, if a property owner applies to create an ADU entirely within an existing structure (an "**interior ADU**"), the jurisdiction may impose fewer restrictions.

3. ***Exterior ADUs.*** Jurisdictions continue to have the ability to designate where ADUs are permitted. AB 494 and SB 229 clarify that an applicant may propose an ADU on any lot that is zoned to permit a single-family dwelling and includes an existing or proposed single-family dwelling, provided that the site is included within the area designated.

4. ***Interior ADUs.*** Under the current law, jurisdictions must permit interior ADUs on sites with an existing single-family home in all single-family zoning districts. The new legislation requires the approval of interior ADUs on sites with existing or proposed single-family homes in *any* district where single-family dwellings are permitted (e.g., multifamily zones that permit single-family dwellings). This should not require local agencies to approve ADUs in zones where there are non-conforming single-family dwellings, because such uses are not permitted in the zoning district.

5. ***Parking Requirements.*** The new legislation further reduces parking requirements that may be imposed in connection with ADU development.

- Parking for exterior ADUs is limited to no more than 1 space per unit or per bedroom, whichever is less.

    - The "whichever is less" language may imply that no parking is required for ADUs that are studio units (because they do not have bedrooms), but the language is unclear, so the actual effect of this new provision is uncertain.

- Jurisdictions may only prohibit ADU parking in setbacks or in tandem spaces by making specific findings that such parking is not feasible due to site specific, topographical, or fire and life safety issues. Finding that parking in setbacks or in tandem spaces is not permitted elsewhere in the jurisdiction is no longer sufficient.

6. ***Utility Fees.*** The new legislation clarifies that Government Code section 65852.2 applies to local agencies along with special districts and water corporations. Accordingly, such entities:

- May not consider an ADU to be a new residential use for the purpose of calculating connection fees or capacity charges;

- May not require the applicant to install a new or separate utility connection directly between an interior ADU and the utility or impose a related connection fee or capacity charge; and

- May require a new or separate utility connection for exterior ADUs, subject to a connection fee or charge that is based on the ADU's size or the number of its plumbing fixtures.

VI. RETURN OF RENTAL INCLUSIONARY HOUSING

AB 1505 restores the ability of cities and counties to adopt inclusionary housing policies for rental projects. It explicitly allows local ordinances to require the provision of affordable rental housing, if so desired, superseding the California Court of Appeal's 2009 decision in *Palmer/Sixth Street Properties LP v. City of Los Angeles* (*Palmer*). However, the ordinances must meet certain standards, and the Department of Housing and Community Development (HCD) may review inclusionary requirements for rental projects under certain circumstances.

A. The *Palmer* Decision

In 2009, the Court of Appeal held in *Palmer* that the Costa-Hawkins Rental Housing Act (Costa Hawkins) prevented local governments from imposing inclusionary requirements on rental units that did not receive government assistance. In relevant part, Costa Hawkins gives rental housing owners the right to set the initial rent level at the start of any tenancy. In *Palmer*, Los Angeles adopted a policy requiring certain residential housing projects to construct affordable housing units subject to rent restrictions for at least 30 years or pay an in lieu fee that the city would use to build affordable housing units elsewhere. A rental housing developer challenged the application of the policy to rental housing projects as invalid under Costa Hawkins. The court ruled in favor of the developer, stating that requiring a rental housing project to provide affordable housing units at regulated rents is "clearly hostile" to the right afforded under Costa Hawkins for a rental housing owner to establish the rental rate at the start of a tenancy; and that in-lieu fees were "inextricably intertwined" with the affordable housing requirement and also invalid.

Local Responses to *Palmer*. Since the Court's decision in *Palmer*, local governments have been prohibited from implementing policies requiring rental housing developers to provide affordable housing units unless the government provided financial assistance or a regulatory incentive such as a density bonus. Instead, some communities adopted rental housing impact fees to mitigate the impact of market-rate rental housing on the need for affordable housing; while others simply stopped applying their inclusionary ordinances to rental housing development.

B. AB 1505 Authorizes Inclusionary Housing Requirements in Rental Projects

AB 1505 expressly supersedes the *Palmer* decision by authorizing the legislative body of any city or county to adopt ordinances requiring that, as a condition of developing rental housing units, the development include a certain percentage of rental units affordable to moderate-income, lower-income, very low-income, or extremely low-income households.

1. ***Alternative Means of Compliance Required.*** Any inclusionary housing ordinance requiring affordable rental housing must provide alternative means of compliance, which *may* include, but are not limited to, in-lieu fees, land dedication, off-site development of units, or acquisition and rehabilitation of existing units. Cities and counties have broad

discretion to provide any of these alternatives, or additional alternatives not listed, so long as alternative means of compliance are available.

2. ***Possible HCD Review.*** HCD may review an inclusionary housing ordinance that: 1) was adopted after September 15, 2017; *and* 2) requires more than 15 percent of the rental units to be affordable to households with incomes of 80 percent or less of the area median income (low-income households) if either of two conditions is met:

- The city or county has failed to meet at least 75 percent of its share of the regional housing need for the above-moderate-income category for five years or more; or

- The city or county has not submitted its annual housing element report (required by Government Code section 65400) for at least two consecutive years.

If either of these conditions is met, HCD may request, and the locality must provide, an economic feasibility study meeting specified standards that demonstrates that the ordinance does not unduly constrain the production of housing.

If HCD finds that the economic feasibility study does not meet these specified standards, or if the local government fails to submit the study within 180 days, the city or county cannot require that more than 15 percent of rental units be affordable to low-income households until the city or county submits an economic feasibility study that HCD finds to support the ordinance.

HCD cannot ask to review an economic feasibility study for an ordinance more than 10 years after it was adopted or amended.

C. Implications for Local Ordinances

1. ***Ordinances that Require Rental Inclusionary Housing.*** Local inclusionary ordinances that were not amended after *Palmer* and continued to require affordable rental housing, or which provide that inclusionary rental housing will be required if state law so allows, may be implemented after January 1, 2018 so long as they provide alternative means of compliance. If the ordinance was adopted by September 15, 2017, HCD has no authority to request review of an economic feasibility study, regardless of the required percentage of affordable units.

2. ***New and Amended Inclusionary Ordinances.*** Inclusionary ordinances adopted after September 15, 2017 or amended to require affordable rental housing after September 15, 2017 may require 15 percent of rental units to be affordable to low-income households without being subject to a future HCD request for an economic feasibility study. If the ordinance proposes a higher inclusionary requirement, or affordability for extremely low-income or very low-income households, it would be good practice to prepare an economic feasibility study meeting the standards in the statute prior to adoption.

3. ***Need for Ordinance.*** AB 1505 authorizes communities to adopt rental inclusionary requirements by *ordinance.* An ordinance should be adopted to implement inclusionary requirements contained in general plans, housing elements, or other policy documents.

4. ***Need for a Nexus Study.*** No nexus study is required to justify a rental inclusionary requirement. In its 2015 decision *California Building Industry Ass'n v. City of San Jose (CBIA),* the California Supreme Court determined that inclusionary requirements were land use provisions similar to rent and price controls and met constitutional requirements so long as not "confiscatory" and designed to further the public health, safety, and welfare. After *Palmer,* the Costa Hawkins Act prevented communities from adopting rental inclusionary requirements, and many instead completed nexus studies to support the adoption of rental housing impact fees. However, a requirement to limit rents in a certain number of units is a form of rent control that does not need to be supported by a nexus study.