**Answers - HAA and SB 35**

**NOTE:** *There are many unanswered questions about the housing bills adopted in the 2017 legislative session. The bills themselves contain ambiguities and unclear provisions. These answers represent one interpretation of the legislation, but public agencies are encouraged to consult with their own city attorney or county counsel for legal advice.*

Relevant Government Code provisions in brackets are shown for reference. Provisions applicable to cities also include counties.

**Question 1**

A developer proposes to knock down an older single family home and build a mcmansion. The building meets all objective design criteria. The developer claims he is exempt from design review because of the Housing Accountability Act.

1. *Does the HAA apply?* Many city attorneys would say 'no' because the HAA applies to "residential units," plural. [65589.5(h)(2)(A)]
2. *Would the answer have been different if the proposal had an ADU?* Yes, it would apply.
3. *Could the city deny the project? Could it require the ADU be removed?*

The city cannot deny the application nor require the removal of an ADU, unless the city can make a public health and safety finding. [65589.5(j)].

1. *Can the city apply subjective design guidelines?* Probably. Nothing in the HAA says that the developer can avoid design review. The city could add conditions of approval like going through a design review committee, so long as those conditions don't have the effect of denying the project or reducing the density or have the same effect as reducing the density. The same goes for reducing massing. [65588.5(i) & (j)(4)]
2. *Could the city deny the right to knockdown the building because demolition is different than construction*? No. The statute was amended to state that denial includes denial of any land use approvals necessary for the issuance of a building permit. [65589.5(h)(5)(A)]
3. *Could the developer utilize SB 35?* No, because SB 35 applies to a "multifamily" housing development with two or more units. [65913.4(a)(1)] ADUs are accessory to single-family homes. [65852.2(a)(1)(D)(ii)]
4. *What could the city have done to avoid this problem?* Adopt objective design guidelines.

**Question 2**

A developer proposes a 10 unit development that does not meet the rules for setbacks or heights. The city does not ask if the developer is using the HAA nor does the developer mention it in her proposal. After 45 days, the city asks for modifications to the development because it does not meet the zoning rules. The developer claims that the city missed their 30 day window and must now approve the project.

1. *Who is right?* The project is now 'deemed consistent' [65589.5(j)(2)(B)], and, under the HAA, the City cannot deny it or reduce the density for being inconsistent unless the inconsistency creates a public health or safety impact that cannot be mitigated and otherwise meets the definition of 'health & safety impact' in the statute. [65589.5(j)(1)]

However, the City could attempt to require that the project meet the required setbacks and heights through conditions of approval, so long as so long as those conditions don't have the effect of denying the project or reducing the density or have the same effect as reducing the density. [65588.5(i) & (j)(4)]

HAA does not exempt projects from CEQA. Because the proposed heights and setbacks were not reviewed in any environmental document, the proposal may trigger an EIR.

*NOTE:* The 'deemed consistent' provision seems to conflict with many provisions of State planning and zoning law and so is particularly difficult to interpret.

1. *Could the city add conditions of approval like adding sidewalks and a stoplight?*

Under the HAA, the city can add conditions. (Assuming they do not reduce the density.)

1. *What if these conditions of approval requirements made the project infeasible?*

This should be avoided.

1. *How could the city avoid this problem*? City needs to inform the applicant within 30 days (60 days for projects with more than 75 units) of any inconsistencies with any adopted "plan, program, policy, ordinance, standard, requirement, or other similar provision" and explain why the project is inconsistent [65589.5(j)(2)(A)] and set up procedures to accomplish this. Some cities are requiring developer to demonstrate consistency as part of a complete application.

Note that normally this level of inconsistency would be caught as part of a completeness letter, and the applicant would be told to apply for a variance and warned of the possible need for an EIR.

**Question 3**

A developer proposes a 40-unit development on a slope with a compound roof. The city determines that the building exceeds the height limit established in the zoning for the property, but meets all other objective criteria. The developer argues that the zoning code does not specify how to measure the height of the buildings clearly and the height should have been measured differently. The developer is making a reasonable argument, but the city has never measured height that way, even though city staff admit the code is a little ambiguous.

1. *Can the city deny the project under HAA?* A housing development project is "deemed consistent" with a city's objective standards if there is "substantial evidence that would allow a reasonable person to conclude that the [project] is consistent" with the applicable standard. [65589.5(f)(4)] Assuming the developer's interpretation is reasonable and that she provides substantial evidence, a court could favor the developer's interpretation of the height limit over the city's interpretation.
2. *Could they deny it per SB 35*? Maybe. SB 35 does not change the standard of review a court would use, so the City should be able to apply its interpretation of the objective height limit instead of the applicant's, although the applicant may then argue that the standard is not 'objective.' However, SB 35 provides that if development standards are mutually inconsistent, the standards in the general plan shall prevail. [65913.4(a)(5)(B)] Therefore, if the project qualifies for SB 35 and the height standard in the zoning precluded the project from developing at the maximum density allowed under the general plan, the applicant would have an argument that the city could not apply the height limitation.
3. *Could they require it to be lower if the project remains feasible*? Under the HAA, the city is only expressly precluded from denying a project or reducing its density. If it is possible to reduce the height of the project without reducing its density, the city may be able to require reduced height as a condition of project approval. However, if the project qualifies for processing under SB 35 instead of the HAA, the project must be approved ministerially based only on objective standards, and the city could only reduce the height to the extent that the proposed height was not consistent with the city's height limit.

**Question 4**

A city rezones downtown to allow buildings up to 60 feet in height, unless extraordinary community benefits are provided, in which case the buildings may be up to 150 feet in height. A developer proposes a 150 foot building that meets all objective criteria. The developer invokes the HAA and claims the community benefits clause is not objective and therefore does not apply [or claims that, in the absence of clear objective standards, the benefits he is offering are adequate, and that anything more than was he is offering will kill the project].

1. *Does the HAA apply*? The answer is not clear. Many city attorneys interpret 'objective' measures to mean that if a use permit or other permit is required for additional height, etc., only the 'base density' is covered by the HAA.
2. *What could the city do to avoid this problem?* Adopt objective criteria for the increased height and density. For instance, one community requires additional affordable housing and higher traffic impact fees.
3. *How would SB 35 apply?* SB 35 states that a development is considered compliant if it is consistent with the maximum density in the land use element. [65913.4(a)(5)] It is possible that a project could be eligible for public benefit density under SB 35.

**Question 5**

A city rezones the area around a transit station. It allows 60 feet buildings at 80 units per acre. At the edge of the zone, where the property abuts a single family neighborhood, it call for the new buildings to be of similar in size and scope to the existing buildings. The proposed housing development does not reduce its height or massing near the existing neighborhood, but meets the height and density rules. Neighbors are up in arms about the overall density and the interface with their properties. The developer argues that they have met all objective criteria.

1. *Can the city deny the project under the HAA?* City may attempt to argue that 'similar in size and scope' is objective and the major difference in scale may make it obvious it doesn't conform; however, if standard is not objective, City may not be able to make the public safety findings to deny. However, the unforeseen height and density may again trigger the need for an EIR. Here it would be difficult to substantially reduce the heights as a condition of approval because that would almost certainly reduce the density.
2. *Per the HAA, could the city require 1-bedroom units instead of 2 bedroom units as a condition of approval to reduce the project’s intensity?* – The law does not define density so there would be risks associated with this. Someone could argue that reducing bedrooms is reducing density. It would be helpful to have a clear definition of density in the city’s zoning ordinance.
3. *Would it be different if the project qualified for SB 35?* 'Similar in size and scope' is probably not objective under the definition in SB 35. [65913.4(a)(5)] If the project otherwise met SB 35's eligibility criteria, it could be entitled to the full height and density.
4. *What would have been a way to avoid the problem*? Specify precisely maximum heights and type of buildings near a single-family neighborhood. Is anyone noticing a pattern here?

**Question 6**A developer proposes a hideously ugly 150-unit development on 1 acre in an R4 zone. The development is made up of 120 units (110 market rate and 15 affordable units) and 25 units per California’s density bonus law. The developer states an intention to use SB 35 and the city is subject to the 10% affordable housing rule for Streamlined Approvals. The development meets all the rules for SB 35 (e.g. not in a coastal zone, wage rules, etc.).

1. *How long does the city have to provide a list of all inconsistencies with current ‘objective’ zoning and design review standards?* Under SB 35, the city has 60 days after the date of submittal to notify the applicant of inconsistencies with objective standards (for projects with more than 150 units, the city has 90 days). [65913.4(b)(1)(A)-(B)]
2. *How long does it have to complete all review of the proposal?* All "public oversight" must be completed within 90 days after submittal (180 days for projects with more than 150 units). [65913.4(c)(1)-(2)]
3. *While reviewing the application, the city realizes that their newly adopted zoning code forgot to define FAR for the R4 zone. They rush to fix the problem and complete the edit 60 days after the application is received, but before they deem it complete. Can the city apply the newly adopted FAR rules? What if the city fixes the zoning code and, in the interim, determines the application does not comply with SB 35. Can the new FAR rules apply to the project?* The city may only apply objective standards in effect at the time the development is submitted. [65913.4(a)(5)] If the application does not meet the eligibility standards to qualify to use SB 35, the city may deny the application, and then it could apply its new FAR rules if and when the project is modified and re-submitted.
4. *Can the city approve the project on the condition that it work with the Design Review Board to improve the design?* No, because all approvals under SB 35 are ministerial, and design review must be completed within 90 days after project submittal. [65913.4(c)(1)]
5. *The R4 zone allows 100 units per acre and the corresponding general plan category (medium density residential) specifies 80-120 units per acre. Does the development meet the density rules per SB 35?* Yes, because the project is being developed at a base density of 120 units/acre. SB 35 provides that if development standards are mutually inconsistent, the standards in the general plan shall prevail, and increases due to a density bonus are consistent for SB 35 purposes. [65913.4(a)(5)]
6. *Can the city require a stoplight be added as a condition of approval? What if this (and other similar conditions make the project infeasible)?* No, because all approvals under SB 35 are ministerial, so no conditions of approval may be added. If the City wants to require stoplights or other mitigating measures for SB 35 projects, it must adopt objective standards that determine when a stoplight will be required. (Note that CEQA does not apply to SB 35 projects but does apply to HAA projects.)
7. *The developer is proposing one car share and no other parking for the entire project even though it is miles from transit. Can the city require parking or more car share spots? Can the city require bike parking?* A city cannot require parking for an SB 35 project within one block of a "car share vehicle." [65913.4(d)(1)(D)] It is unclear whether the city can require more than 1 vehicle be available near the project. SB 35 prohibits the application of "parking standards" (not just automobile parking], so arguably the city cannot require bicycle parking be added to the project either.