

The New 2018 Housing Laws

Meeting of the Fairfax Town Council

June 6, 2018



Best Best & Krieger



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ATTORNEYS AT LAW

Big Picture

- Over 130 housing-related bills introduced; 15 ultimately signed as part of the 2017 ‘housing package,’ effective January 1, 2018
- Major themes
 - Erosion in Local Control Over Housing Applications
 - Housing Accountability Act
 - ‘No Net Loss’
 - SB 35
 - Housing Elements/Annual Reports/Enforcement
 - Return of Rental Inclusionary Requirements
 - Funding Mechanisms
 - Special Streamlining Districts



Erosion in Local Control Over Housing Applications

Housing Accountability Act – AB 1515, SB 167, AB 678

- Government Code § 65589.5
- Affects all residential projects

No Net Loss of Housing Element Sites - AB 1397 and SB 166

- Government Code §§ 65863; 65580, 65583, 65583.2
- Affects all sites designated for housing under Housing Element

SB 35

- Government Code § 65913.4
- “Streamlining” for some residential projects

Legislature’s focus is on “*objective standards*,” favoring *predictability* over *local discretionary review*.



Housing Accountability Act

New Intent Language

“The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval & construction of new housing for all economic segments of California’s communities by meaningfully and *effectively curbing the capability of local governments to deny, reduce the density of, or render infeasible housing development projects*. This intent has not been fulfilled.”



The Housing Accountability Act

- Restricts cities' ability to deny, reduce density of, or make infeasible housing developments and requires cities to justify these actions.
- Applies to *all* housing development projects (affordable *and* market-rate) and emergency shelters:
 - Residential only;
 - Transitional and Supportive housing; and
 - Mixed use projects with **at least 2/3 of the square footage designated for residential use**



The Housing Accountability Act

In a nutshell:

- If a housing development complies with “objective” general plan, zoning and subdivision standards, the Town can only reduce density or deny if can identify a “specific adverse impact” to public health & safety that cannot be mitigated.
- “Lower density” includes imposing conditions that “have the same effect or impact on the ability of the project to provide housing” (i.e., *de facto* density reduction).



Housing Accountability Act (65589.5)

Cut to the chase--If desire to deny or reduce density, must:

- Identify **objective** standards with which project does not comply.
- If project complies with all, must find “specific adverse effect” on public health & safety.



The Housing Accountability Act

What are “*objective*” standards?

- HAA does not define, but SB 35 defines as one that involves “no personal or subjective judgment by a public official and uniformly verifiable by reference to an external benchmark”
- Provisions such as permitted use, density, height, setbacks, FAR or design requirements regarding specific materials should be OK
- Receipt of density bonus is *not* basis for finding project inconsistent with development standards



The Housing Accountability Act

What is a “*specific adverse effect*?”

- If project complies with all “*objective standards*”, can only deny or reduce density if find “*specific adverse effect*” on public health.
- “*Specific adverse effect*” must be significant, quantifiable, direct, and unavoidable based on written health & safety standards on date project deemed complete, and no feasible way to mitigate.



The Housing Accountability Act

- Additional protections for affordable projects (Gov't Code § 65589.5(d)):
 - Emergency shelters;
 - 20% low income (up to 80% of median); or
 - 100% moderate (up to 120% of median) or middle income (up to 150% of median).
- Must make specific findings of specific, unmitigable adverse health or safety impact to deny or add condition making project **financially infeasible for affordable housing/emergency shelter—even if project does not comply with all “objective” standards.**



The Housing Accountability Act

Change in processing housing applications:

- If a project does not comply with “objective standards,” Town must provide list of any inconsistencies within 30 days of application being deemed complete for project of 150 or fewer units (60 days for projects of 150 or more units)
- Explain why the project inconsistent; or
- “Deemed consistent”



HAA Processing Requirements

- Also “*deemed consistent*” if “substantial evidence that would allow a reasonable person to conclude” project is consistent
- Developer may submit own evidence re: consistency



The Housing Accountability Act

Changes to Judicial Review:

- Requires the findings to be supported by a “preponderance of evidence.” If not supported by preponderance of evidence, court must issue order compelling compliance within 60 days. If project denied in “bad faith” court may order project approval.
- Imposes mandatory fines (\$10K/unit) on cities that fail to comply with court order within 60 days.
- Mandates enhanced fines (x5) court finds a city acts in “bad faith.”
- Attorney’s fees for both market rate and affordable.



The Housing Accountability Act

Compliance Strategies:

- Identify our “objective” criteria
- Identify any subjective criteria that might be better converted to objective criteria
- Review applications to ensure all relevant information is being sought from applicants



No Net Loss – Housing Element Sites (Government Code § 65863)

Background/History

- Must identify sites to accommodate their regional housing needs allocation (“RHNA”) for various income levels
- Identified sites and assigned densities that would accommodate those units
- Prohibited from approving development at lesser densities without making certain findings



No Net Loss (Government Code § 65863)

Now applies if:

- Downzone a site shown in the Housing Element to permit fewer units than shown in the site inventory;
- Approve a project on a site shown in the Housing Element with fewer units than shown in the site inventory; or
- A development is approved on a site with fewer units *at the income level shown in the Housing Element site inventory.*



No Net Loss Required Findings

Reduction in density/income level OK if:

- Reduction consistent with GP and Housing Element;

AND

- Remaining sites in Element are adequate to meet RHNA at all income levels. Must quantify unmet need and remaining capacity by income level;

OR



No Net Loss Findings, continued

- Must designate specific additional site(s) that can “accommodate” the RHNA at each income level during the planning period
- Time limit of 180 days to identify additional sites



No Net Loss

- Ways to “identify and make available” another site:
 - More units approved on another site than shown in inventory or has other units at that income category; or
 - Other sites NOT in Element can make up difference; or
 - Rezoning another site to maintain inventory.
- Cannot deny projects on grounds they result in need to identify or rezone additional sites.
- Confusing CEQA language – identifying and making site available does not “create CEQA review project” or review requirement.



Streamlining Local Approval (SB 35) (Gov't Code § 65913.4)

- Offers streamlined, ministerial approval to qualifying projects
 - Ministerial = no CEQA
- Imposes tight review timelines on cities
- Only allows for imposition of “objective” criteria in place when application submitted
- Many exclusions and requirements that may dampen enthusiasm



Streamlining Local Approval (SB 35)

SB 35 project requirements include:

- Jurisdiction must be ‘eligible’ – Fairfax is ‘eligible’
- Project must be eligible
 - Multi-family (2 or more units)
 - Site criteria
 - Affordability component
 - Meet “objective” land use requirements
 - Labor requirements



SB 35: Does the project qualify for streamlining?

- Multifamily housing development (at least 2 residential units);
- Located on a legal parcel or parcels, in city/town limits, and an urban area with at least of-site adjoining 75% parcels that are developed with urban uses;
- 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 project is submitted.



SB 35: Does the project qualify for streamlining? (continued)

- Inclusionary requirement:
 - 10% below 80% of AMI if annual report reflects fewer units of above-moderate **approved** than required (**Fairfax**); or
 - 50% below 80% of AMI if annual report reflects fewer units of lower income issued building permits than required.



SB 35: Does the project qualify for streamlining? (continued)

- Consistent with “**objective zoning standards and objective design review standards**” in place when application *submitted*
- “**Objective**” = Uniformly verifiable by reference to an external and uniform benchmark or criterion. **No personal or subjective judgment.**
- Can only apply objective standards that are both “**available and knowable**” by both the development applicant and the public official **prior to application submittal.** ”
- *Examples: Height, setbacks, lot coverage, % open space, density, FAR, etc.*



SB 35: Labor Requirements

- Development with more than 10 units is a “public work” or construction workers will be paid at least the general prevailing wage rate.
- Requirement for “skilled and trained workforce” in certain circumstances when projects located in coastal or bay counties of 75 units or more (50 units or more if approved between 1/1/22 and 12/31/2025).



SB 35 Site Exclusions

- FEMA floodplain or floodway;
- Very high fire hazard severity zone unless building standards met;
- Protected species habitat;
- Zoned for non-residential (unless GP allows residential);
- Site has been occupied by tenants within the last ten years (even if it has already been demolished);
- Site subject to affordability deed or other restrictions or rent control would be demolished;
- Site with historical structure required to be demolished for project;



Site Exclusions, continued:

- Project requires subdivision of land unless receives tax credit financing or pays prevailing wages (even if <10 units) (Gov't Code § 65913.4(a)(9)); or
- Site is subject to Mobilehome Residency Law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act or the Special Occupancy Act.



SB 35 applies to the project, now what?

- Review limited to compliance with objective standards published before submission of development application and broadly applicable.
 - If conflicts with “objective planning standards,” must provide written documentation within 60 days (if <150 units) or 90 days (if >150 units) of an **application’s submittal**, or the project is **deemed to satisfy** the standards.
- Town must complete “design review or public oversight” within 90 days (if <150 units) or 180 days (if >150 units) of an **application’s submittal**.
- Design review/oversight is “**ministerial**”: must be “objective,” strictly based on compliance with SB 35 criteria and reasonable, broadly applicable, objective standards in ordinance/resolution **before** submission of application.
- No Conditional Use Permit.
- No CEQA review.



SB 35 applies to the project, now what?

- Limited parking requirements no more than one space per unit or no parking required if:
 - Within ½ mile of public transit;
 - Within an architecturally and historically significant historic district;
 - In an area where on-street parking permits are required or not offered to occupants of the development; or
 - Within one block of a car share vehicle



Possible Next Steps

- Develop SB 35 eligibility checklist and process for reviewing applications where SB 35 is invoked.
- For projects utilizing SB 35, verify compliance with requirements for payment of prevailing wage or utilizing a “skilled and trained workforce.”



New Laws Add to Other Restrictions on Local Control

- **Density Bonus** (Gov't Code § 65915, *et seq.*)
 - Developer entitled to additional density in return for affordable housing
 - Developer can receive regulatory incentives and waivers unless Town makes findings
- **Accessory Dwelling Units** (Gov't Code §§ 65852.1, *et seq.*)
 - Limited Town discretion over use of “second units”



Accessory Dwelling Units

- 2017 Enacted bills (Gov't Code § 65852.2) continue to ease ADU restrictions
 - 'Interior ADUs' in all districts permitting single-family homes includes certain other structures
 - ADU may be rented, but not sold, separately
 - Limits parking to one space per ADU
 - Must allow tandem parking unless infeasible for specific topographical or fire/life safety reasons and parking in setbacks

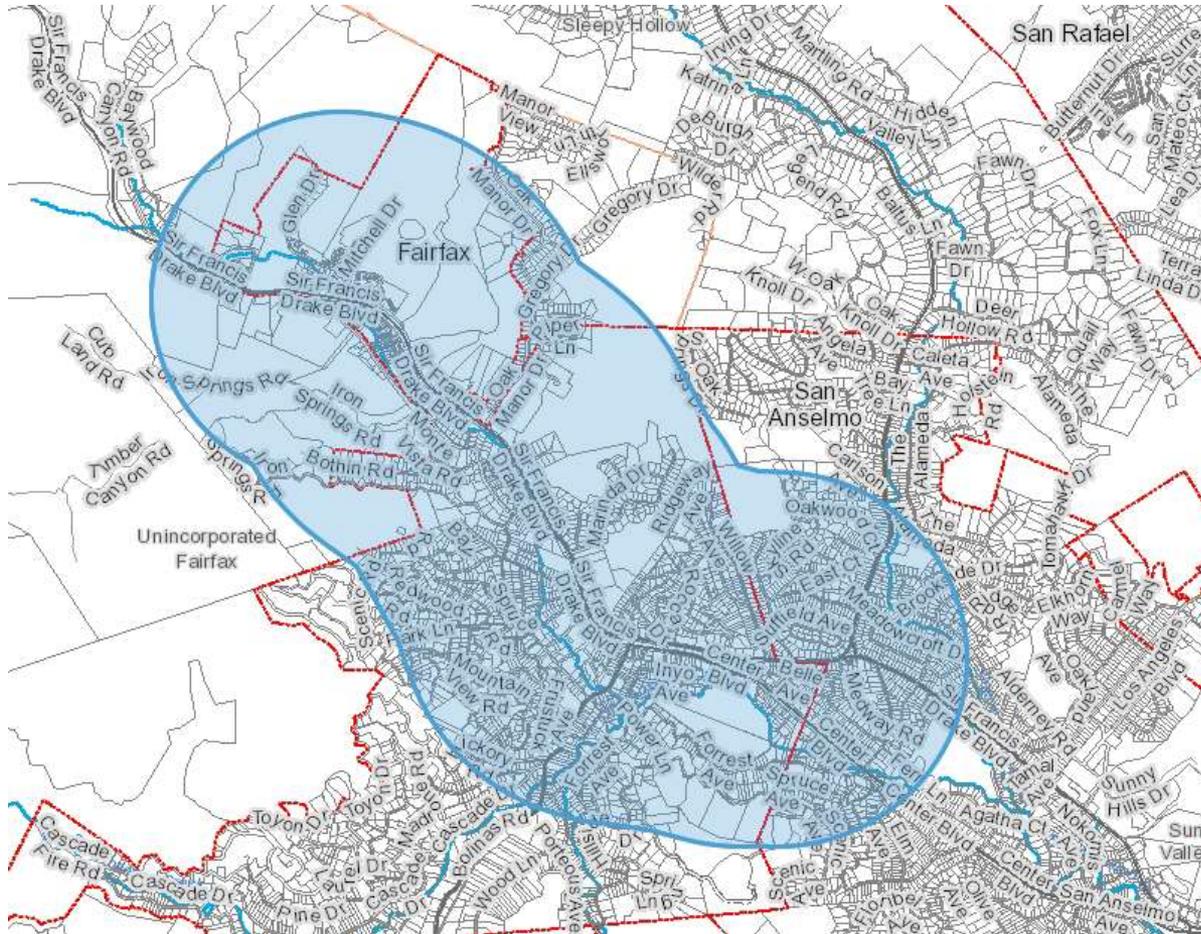


Fairfax ADU applicability

- Substantial increase in ADU applications/ approvals since most recent regulations relaxation
- ADU's exempted from parking in significant percentage of Town
- Increased public concern over parking, sewerage



ADU parking exempted area



Proposed Legislation: Accessory Dwelling Units

SB 831 (Wieckowski); AB 2890 (Ting)

- Aim to waive service fees
- Relaxed development standards (no FAR cap, no replacement parking required)
- Remove authorization for owner-occupancy requirements
- On May 30: SB 831 passed Senate; AB 2890 passed Assembly



Housing Element Overview

- State Planning and Zoning law requires each city/town to include in its General Plan a Housing Element for the preservation, improvement, and development of housing.
- Housing Element must show how to meet existing and projected housing needs for people at all income levels.
- HCD reviews all housing elements and determines whether each housing element and amendment substantially complies with State housing element law.
- Fairfax is the middle of its housing element cycle, with next update due in 2023.



Trend: Increasing housing data collection/ analysis

Previous requirements:

- Housing element subject to strict content requirements
 - Site inventory to identify sites that can be developed for housing sufficient to meet RHNA
 - Analysis of governmental and nongovernmental constraints



Housing Element

New requirements (Gov't Code § 65583.2) :

- Must designate specific sites that can “accommodate” the RHNA at each income level during the planning period.
- “Available” for residential development with “realistic and demonstrated” potential for development.
- Sufficient water, sewer, and dry utilities or be part of a mandatory program to provide such utilities.
- Lower income sites must be between ½ acre and 10 acres in size, others presumed inappropriate.



New HCD Enforcement

HCD's role previously:

- Reviewing and 'certifying' housing elements
- Receiving annual progress reports due by April 1
- Policing local land use actions



New HCD Enforcement



HCD's role now:

- Review and certify housing elements
- Review “any action or failure to act” that it determines is “inconsistent” with an adopted housing element or the Housing Element Law (Gov’t Code § 65585(i))
- Can revoke HE certification
- Notify the AG of violations



Reinstating Rental Inclusionary

AB 1505 (the “Palmer Fix”)

- Aim: reinstate ability of cities to adopt inclusionary housing requirements for rental projects
- Supersedes *Palmer/Sixth Street Properties v. City of Los Angeles*
- State Planning & Zoning Law (Gov’t Code §§ 65850-65850.1)



Photo credit: <https://www.thepiero.com/gallery/>



Inclusionary Zoning for Rental Projects (Under AB 1505)

- Can adopt ordinance that requires rental housing development to include certain percentage of units affordable to very low, low, or moderate income households.
- Must provide alternative means of compliance (*e.g.*, in lieu fees, land dedication, off-site development of units, etc.).



Providing funding assistance

- The “good old days”
 - Prop 46 (2002 \$2.1B bond measure)
 - Prop 1C (2006 \$2.85B bond measure)
 - **Redevelopment (\$1B annually)**
- Two major new funding sources
 - SB 2 (The Building Homes and Jobs Act of 2018)
 - SB 3 (Veterans and Affordable Housing Bond Act (\$1.5 billion for existing programs – Nov ‘18 Ballot)



Building Homes and Jobs Act (SB 2)

- Permanent source of funding.
- Imposes a \$75 recording fee on specified real estate documents (up to \$225 per transaction per parcel)
- Projected to generate hundreds of millions of dollars per year for the Building Homes and Jobs Trust Fund for:
 - Affordable housing;
 - Supportive housing;
 - Emergency shelters; and
 - Transitional housing.
- 2018 funds: 50% set aside for local housing streamlining plans; 50% homeless assistant programs
- All other years: 70% available to local affordable housing programs/projects



Streamlining local approval (WHOZ)

Workforce Housing Opportunity Zones

- Long-range planning tool for cities to offer streamlining
- Specific plan and EIR
 - Establish uniform development criteria and mitigation measures
- WHOZ must consist of parcels within city's housing element inventory
- Affordability component
- Labor requirements



Streamlining local approval (HSD)

Housing Sustainability Districts

- Second long-range planning tool for cities to offer streamlining
- Zoning overlays adopted by ordinance
 - Allow residential use ministerially
 - Uniform development standards
- Require initial and ongoing HCD review and oversight
- Labor requirements
- Affordability requirements



Preserving affordable units

- **Preservation Notice Law (AB 1521)**
 - Governs notice to tenants and sale of housing projects receiving certain types of affordability assistance
 - AB 1521 adds new requirements related to timing of notice to tenants and others, responses to offers to purchase, and monitoring/reporting



Proposed Legislation: Housing Production

- **SB 828 (Wiener) – Housing Element** (passed Senate)
 - Require local agency to plan and accommodate 125% of RHNA all income categories
- **AB 1771 (Bloom)-Revise RHNA process** (passed Assembly)
 - Allow neighboring jurisdictions to challenge another's RHNA



Questions?



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