A Closer Look at California's New Housing Production Laws

By Chelsea Maclean

With the statewide housing crisis at the forefront of the California Legislature's 2017 agenda, legislators unleashed an avalanche of more than 130 bills this year. Housing advocates have argued, backed by staggering statistics, that California's local land use approval process has slowed housing production and made it more expensive.[1] After vetoing housing bills in the past, Gov. Jerry Brown approved 15 housing bills for the first time in his tenure on Sept. 29, 2017. Some of these laws streamline entitlement processing and attempt to reduce local agencies' discretionary approval rights in order to remove local hurdles to housing. These laws provide political "coverage" to decision-makers in development-friendly jurisdictions looking to approve projects in the face of vocal community opposition and also increase the ability to enforce development rights in less friendly jurisdictions where decision-makers oppose new development. More generally, other laws evidence the statewide goal to encourage housing production now that the lack of housing supply is reaching emergency levels.

The following analysis summarizes each new law, grouped into the following categories: (I) Enforceability, (II) Streamlining and Other Incentives, (III) Housing Element Law Amendments, (IV) Funding and (V) Other.

I. Enforceability

1. **SB 167 (Skinner)/AB 678 (Bocanegra) and AB 1515 (Daly) Housing Accountability Act amendments.** These laws strengthen the Housing Accountability Act (HAA), also known also known as the "Anti-NIMBY (Not In My Backyard) Act." As background, the purpose of the HAA is to limit the ability of local agencies to deny or make infeasible qualifying housing developments without making specified findings that require the analysis of the environmental, economic and social effects of the action. In short, SB 167/AB 678 strengthens the HAA by increasing the standard of proof required for a local government to justify a denial of low- and moderate-income housing development projects. AB 1515 provides for a broader range of housing projects to be afforded the protections of the HAA if the project is consistent with local planning rules. Taken together, and as reported previously (see Holland & Knight's alert, "California Governor Signs into Law Major Reforms to Housing Accountability Act," Sept. 29, 2017), amendments to the HAA include the following:

    a) Increased Eligibility for Mixed-Use Projects. The HAA previously permitted a limited set of mixed-use projects to qualify for the Act's protections. Under the revised HAA, a mixed-use project qualifies as long as at least two-thirds of its square footage is designated for residential use.

[1] See, e.g., White House, *Housing Development Toolkit*, September 2016, available here: https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf; Bay Area Council Economic Institute, *Solving the Affordability Crisis*, October 2016, available here: http://www.bayareaeconomy.org/report/solving-the-housing-affordability-crisis/

b) Tightening the Definition of "Objective Standards." Some anti-housing jurisdictions have attempted to avoid the HAA by making claims that a project does not comply with the jurisdiction's "objective" standards and criteria. The reformed HAA establishes a standard that is very favorable to housing developers and advocates: A project must be considered consistent with objective standards as long as "there is substantial evidence that would allow a reasonable person to conclude" that a project complies. If a local government determines that a project does not comply with the jurisdiction's objective standards, it must inform applicants of the basis for this conclusion on a specific timeline, and if the local government fails to do so, the project is legally deemed to be consistent. The new law also clarifies that a project's eligibility for a bonus under California's Density Bonus Law does not render it inconsistent with the local jurisdiction's objective standards.

c) Jurisdictions Can Apply Only Those Standards in Effect at the Time the Application Is Complete. Some jurisdictions have attempted to adopt new objective standards for the purpose of avoiding the HAA. The revised act clarifies that, for affordable housing projects as well as market-rate projects, changes to the change to the zoning ordinance or general plan made subsequent to the date the application was deemed complete are not a valid basis to disapprove a project.

d) Increasing the Burden on Jurisdictions that Reject Housing. Any local government that disapproves or reduces the size of a housing development project must now meet the more demanding "preponderance of the evidence" standard – rather than the more deferential "substantial evidence" standard – in proving that it had a permissible basis under the HAA to reject the project or reduce its density.

e) Increased Availability of Attorney's Fees. California's Fifth District Court of Appeal had previously interpreted the Act to authorize an award of plaintiff's attorney's fees only when a local government rejects an affordable housing project. The revised HAA overrules this interpretation, making attorney's fees available – and presumptively required – regardless of whether the project contains affordable housing.

f) Increased Fines and Increased Authority for Court to Order Projects to Be Approved. The Act previously limited the circumstances under which a court could issue fines or directly order a local government to approve a project. Under the revised HAA, after a successful court challenge, a court must issue an order compelling compliance with the HAA, and any local government that fails to comply with such order within 60 days must be fined a minimum of $10,000 per housing unit and also may be ordered directly to approve the project. If an agency does not carry out a court order within 60 days, a court may also directly order the jurisdiction to approve the project rather than merely order it to comply with the Act. If a local jurisdiction acted in bad faith when rejecting the housing development, the applicable fines must be multiplied by five.

2. **AB 72 (Santiago/Chiu) HCD oversight.** This law strengthens the ability of the California Department of Housing and Community Development (HCD) to enforce housing laws that require local governments to achieve housing goals.

a) Increased HCD Oversight of Local Agency Compliance with Housing Element Law. Specifically, it requires HCD to review any action or failure to act by a local agency that it determines is inconsistent with an adopted housing element and to issue findings whether the action or failure to act substantially complies with the housing element. If HCD finds that the action or failure to act by the agency does not substantially comply with the housing element, HCD may, after allowing no more than 30 days for a local agency response, revoke its findings until it determines that the city, county, or city and county has come into compliance with the housing element.

b) HCD Obligation to Report Violation to Attorney General's Office. The law also requires HCD to notify the city, county, or city and county as well as authorizes HCD to notify the Office of the Attorney General that the city, county, or city and county is in violation of state law (including the HAA, state density bonus law and "no net loss" in zoning density law) if HCD makes certain findings of noncompliance or a violation.

II. Streamlining and Other Incentives

3. **SB 35 (Weiner) "By Right" Approval Processing.** This law streamlines the approval process for infill developments in local communities that have failed to meet their regional housing needs.

a) Ministerial Approval Processing. The law authorizes a development proponent to submit an application for ministerial processing where a multifamily housing development satisfies specified planning objective standards and specified criteria. The law includes a long list of qualifying criteria, including payment of prevailing wages, use of a "skilled and trained workforce, and consistency with objective development standards. The law will apply only if it is shown in a housing production report (the first reports are due April 1, 2018) that a city is not achieving affordable housing targets. The law requires a local government to notify the development proponent in writing within 90 days of submittal (for projects of more than 150 units) if the local government determines that the development conflicts with any of those objective standards; otherwise, the development is deemed to comply with those standards. Design review or other public oversight of the development may still be conducted but is directed to the "objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as reasonable objectives design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within that jurisdiction." The design review or public oversight process must be completed within 180 days (for projects of more than 150 units) of submittal of the development.

b) Limitations on Local Government Imposition of Parking or Other Requirements for Qualifying Projects. The law limits the authority of a local government to impose parking standards on a streamlined development approved. The law also prohibits a local government from adopting any requirement that applies to a project solely or partially on the basis that the project receives ministerial or streamlined approval pursuant to SB 35.

c) Limitations on Approval Expiration. The law provides that if a local government approves a project pursuant to that process, that approval will not expire if that project includes investment in housing affordability where more than 50 percent of units are affordable. The approval of a project that contains less than 50 percent affordable units expires automatically after three years, unless that project qualifies for a one-time, one-year extension of that approval. Separately, the law provides that an approval shall remain valid for three years from the date of the final action establishing that approval and shall remain valid thereafter so long as vertical construction of the development has begun and is in progress; it also authorizes a discretionary one-year extension.

d) Local Government Housing Production Reporting. The law also requires local governments to include in the annual general plan report specified information regarding units of net new housing, including rental housing and for-sale housing that have been issued a completed entitlement, building permit or certificate of occupancy. The law also requires local governments to report on the housing produced pursuant to SB 35's requirements.

4. **SB 540 (Roth) Workforce Housing Opportunity Zones.** This law streamlines the environmental review and planning process for certain housing projects located within to-be-established "Workforce Housing Opportunity Zones" and meeting affordable housing, prevailing wage and other specified criteria.

a) Workforce Housing Opportunity Zone Planning and Environmental Review. The law encourages local agencies to prepare an environmental impact report (EIR) under the California Environmental Quality Act (CEQA) and adopt a specific plan. A local government may submit an application to HCD for funding to support the local government's efforts to develop a specific plan and EIR within a Workforce Housing Opportunity Zone.

b) Streamlining for Compliant Housing Project Processing. Housing projects meeting certain criteria (including providing affordable housing and paying prevailing wages), would not require a separate CEQA review, and the local jurisdiction would be required to take action on such projects within 60 days after an application is deemed complete.

5. **AB 73 (Chiu) Housing Sustainability Districts.** This law gives local governments incentives to create housing in "Housing Sustainability Districts" on infill sites near public transportation.

a) Creation of Housing Sustainability Districts. The law prescribes the contents of the ordinance that must be established to create a Housing Sustainability District, including the obligation to require that at least 20 percent of the residential units constructed within the district are affordable. The law requires the agency to prepare an EIR when designating a Housing Sustainability District. However an EIR is not required if, when reviewing a housing project, the agency has certified an EIR within 10 years of the lead agency's review of a housing project.

b) Zoning Incentive Payment for Compliant Housing Sustainability Districts. The law requires HCD to approve a zoning incentive payment for those agencies that apply for such payment if its housing sustainability ordinance meets the specified requirements and the city's housing element is in compliance with specified law. The law requires HCD to issue a certificate of compliance if the agency meets specified criteria pertaining to the continued compliance.

c) Streamlining Compliant Housing Project Processing. The law authorizes a developer to develop a project in a Housing Sustainability District in accordance with the housing sustainability ordinance or the agency's otherwise applicable general plan and zoning ordinances. The law imposes deadlines for an agency's processing of a project within a Housing Sustainability District and limits the instances in which an approving authority may deny a qualifying project.

   Notably, the law requires that prevailing wages be paid and a skilled workforce be employed in connection with all projects within the Housing Sustainability District. The law establishes procedures for review of an application by an approving authority, including requiring the approving authority to conduct a public hearing on an application and issue a written decision within 120 days of receipt of the application. The law also prescribes procedures for review of a decision of the approving authority to deny or approve with conditions an application for a permit within a Housing Sustainability District in the appropriate superior court.

d) HCD Obligation to Prepare Housing Sustainability District Program Report. The law requires HCD to publish a report containing specified information about the Housing Sustainability District program on its website no later than Nov. 1, 2018, and each Nov. 1 thereafter.

III. Housing Element Law Amendments

6. **SB 166 (Skinner) Residential Density.** Existing "no net loss" in zoning density law requires that local governments identify adequate sites to meet regional housing needs when a housing element is adopted. This new law bolsters existing law to ensure that agencies maintain an ongoing supply of housing construction sites for residents of various income levels, throughout the entirety of a housing element planning period.

   a) Prohibitions on Reducing Density. Specifically, the law prohibits an agency from reducing residential density to a density that is below the density utilized by HCD in determining compliance with housing element law unless the agency makes findings that the reduction is consistent with the general plan and that the remaining sites identified in the housing element are adequate to meet the jurisdiction's share of the regional housing need. It also prohibits local agencies from causing their inventories of housing sites to be insufficient to meet their required housing needs for lower-income and moderate-income households. The law also requires agencies to make specified written findings if the agency allows development of any parcel with fewer units by income category than identified in the housing element for that parcel. If the approval of a development project results in fewer units by income category than identified in the housing element for that

parcel and the remaining sites in the housing elements are not adequate to accommodate the jurisdiction's share of the regional housing need by income level, the agency must then identify additional adequate sites within 180 days.

7. **AB 1397 (Low) Residential Development Inventory.** Existing law requires an agency's housing element to contain an inventory of land suitable for residential development, including vacant sites and sites having the potential for redevelopment. The new law strengthens housing element law by limiting the reliance of local governments on sites that do not have a realistic capacity for development of housing.

    a) Modified Analysis of Land for Residential Development. Specifically, the new law makes changes to the definition of land suitable for residential development to increase the number of sites where new multifamily housing can be built. Specifically, the law requires the inventory of land to be *available* for residential development in addition to being *suitable* for residential development and to include vacant sites and sites that have "realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level."

    b) Local Agency Obligation to Consider Infrastructure and Resource Availability. The law also includes new requirements for requiring parcels included in the inventory to have sufficient water, sewer and dry utilities supply available, or be included in an existing general plan program or other mandatory program or plan to secure sufficient water, sewer and dry utilities supply to support housing development and to be accessible to support housing development. This law requires the agency to specify for each site the number of units that can *realistically* be accommodated on that site and whether the site is adequate to accommodate lower-income housing, moderate-income housing or above-moderate-income housing.

    c) Local Agency Obligation to Consider Local Experience in Housing Production. The new law requires the agency's discussion of the methodology used to determine development potential to consider, among other things, the city's or county's past experience with converting existing uses to higher-density residential development, the current demand for the existing use, and an analysis of existing leases or other contracts that would perpetuate the existing use or prevent redevelopment.

8. **AB 879 (Grayson) Housing Production Reporting, Development Constraints Analysis and Local Fees Study.** This law requires additional analysis of housing production and housing constraints in an agency's annual general plan report as well as an HCD-prepared study of local fees charged to new residential developments that will also include a proposal to substantially reduce such fees.

    a) Local Agency Obligation to Report on Housing Production. Specifically, the law now requires an agency, as part of its annual general plan report, to report on the number of housing development applications received in the prior year, units approved and disapproved in the prior year, and a listing of sites rezoned to accommodate that portion of the city's or county's share of the regional housing need for each income level that

could not be accommodated on specified sites. The law also extends the obligation to prepare the general plan report to charter cities.

b) Local Agency Obligation to Analyze Housing Constraints. The law also now requires an analysis of governmental constraints upon the maintenance or development of housing to also include any locally adopted ordinances that directly impact the cost and supply of residential development. The law requires the analysis of nongovernmental constraints to also include the requests to develop housing at densities below those anticipated in a specified analysis as well as the length of time between receiving approval for a housing development and submittal of an application for building permits for that housing development. The law requires the analysis of nongovernmental constraints to demonstrate local efforts to remove nongovernmental constraints that create a gap between the locality's planning for the development of housing for all income levels and the construction of that housing.

c) HCD Obligation to Prepare Local Fees Study and Recommend Means to Reduce Fees. This law also requires HCD, by June 30, 2019, to complete a study to evaluate the reasonableness of local fees charged to new developments. The law requires the study to include findings and recommendations regarding potential amendments to the California Mitigation Fee Act to substantially reduce fees for residential development.

IV. Funding

9. **SB 2 (Atkins) Building Homes and Jobs Act.** This law establishes a permanent funding source for affordable housing to fill the gap in funding lost from the loss of redevelopment agencies and the exhaustion of prior bond funds. Specifically, the law establishes funding through a $75 fee on real estate transaction documents. The fee is capped at $225 per transaction and exempts real estate sales. The fees would generate roughly $225 million per year, which would be split among state and local housing programs.

10. **SB 3 (Beall) Veterans and Affordable Housing Bond Act of 2018.** This law authorizes $4 billion in general obligation bonds for affordable housing programs and a veteran's home ownership program. SB 3 must be approved by voters in November 2018.

V. Other

11. **AB 1505 (Bloom/Bradford/Chiu/Gloria) "*Palmer* Fix."** The law declares the legislative intent to supersede the holding and dicta in *Palmer/Sixth Street Properties L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 (*Palmer*) to the extent that the decision conflicts with a local jurisdiction's authority to impose inclusionary housing requirements on rental housing.

a) Authorization of Inclusionary Housing Ordinances for Residential Rental Units. Specifically, this law authorizes cities and counties to adopt an inclusionary ordinance for residential rental units in order to create affordable housing.

b) HCD Review of Inclusionary Housing Ordinances. This law also authorizes HCD – within 10 years of the adoption or amendment of an inclusionary ordinance by a county or city after Sept. 15, 2017, requiring more than 15 percent of the total number of units

rented in the development be affordable to, and occupied by, households at 80 percent or less of the area median income – to review that ordinance if the county or city fails to meet specified conditions (i.e., that the county or city has failed to meet at least 75 percent of its share of the regional housing need allocated or that the agency has failed to submit its annual general plan report). The law authorizes HCD to request – and require that the county or city provide – evidence that the ordinance does not unduly constrain the production of housing by submitting an economic feasibility study that meets specified standards.

c) Limitation on Inclusionary Housing Obligations if Not Economically Feasible. If HCD finds that the economic feasibility study does not meet specified standards, or if the county or city fails to submit the study within 180 days, the law would require the county or city to limit any requirement to provide rental units in a development affordable to households at 80 percent or less of the area median income to no more than 15 percent of the total number of units in the development.

12. **AB 1521 (Bloom/Chiu) Preservation Notice Law Amendments.** This law strengthens the Preservation Notice Law by requiring additional notice of a scheduled expiration of rental restrictions and by requiring owners of expiring affordable rental properties to accept any market-rate purchase offer from a qualified preservation entity that intends to maintain the property's affordability restrictions. The law requires HCD to monitor compliance and allows tenants the right to enforce the law. The law applies to an "assisted housing development," defined as a multifamily rental housing development that receives governmental assistance pursuant to specified federal or local programs. The granting of density bonuses, concessions or incentives is included as a type of local assistance that renders a project subject to the law. However, assisted housing developments in which 25 percent or less of the units are subject to affordability restrictions are exempt from the requirement to accept any market-rate purchase offer from a qualified preservation entity that intends to maintain the property's affordability restrictions.

13. **AB 571 (E. Garcia) Farmworker Housing Tax Credits.** This law makes it easier to develop farmworker housing by easing qualifications for the Farmworker Housing Tax Credit.