

SB 35

Streamlined Ministerial

Affordable Housing Projects



February 9, 2021

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El Dorado County Counsel's Office

SB 35



- California Senate Bill 35 (“SB 35”)
 - Enacted Government Code section 65913.4.
 - Effective January 1, 2018 and currently will sunset on January 1, 2026.
 - Since passage, section 65913.4 has been amended 8 times.
 - Currently, there are 11 pending bills seeking to amend section 65913.4.
- In adopting SB 35, the Legislature found that providing affordable housing opportunities is a matter of statewide concern, which preempts local control.

Applicability of SB 35



- SB 35 applies to localities that have not made sufficient progress toward their Regional Housing Need Allocation (“RHNA”).
- Department of Housing and Community Development (“HCD”) publishes list of cities and counties subject to SB 35.
- Latest published list was updated October 1, 2020.
 - 30 cities and counties are not subject to SB 35.
 - 289 cities and counties have insufficient progress toward their Above Moderate income RHNA and/or have not submitted the latest Housing Element Annual Progress Report and are subject to SB 35 for projects with at least 10% affordability.
 - 220 jurisdictions have insufficient progress toward their Lower income RHNA (Very Low and Low income) and are subject to SB 35 for projects with at least 50% affordability.
 - El Dorado County is on this list, now requiring 50% affordability to utilize SB 35.

HCD Guidelines



- Legislature provided HCD with authority to adopt SB 35 guidelines and take enforcement actions.
 - Guidelines adopted November 29, 2018.
 - HCD circulated proposed amendments in April 2020 and then a second set of proposed amendments. Comment deadline was August 5, 2020.
 - Presentation today is based on the 2018 Guidelines until any amendments are adopted.
- Guidelines “shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of increasing housing supply.”

HCD Guidelines



- Current HCD Guidelines:
 - <https://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf>
- Proposed amended HCD Guidelines:
 - <https://www.hcd.ca.gov/policy-research/lhp.shtml>

Does SB 35 Apply?



- Multifamily housing development with two or more attached residential units.
 - Project cannot involve demolition of housing that is already restricted by covenant for affordable housing or subject to rent control.
 - Project cannot demolish historic structure that is on the national, state, or local historic registry.
 - Project site cannot have a tribal cultural resource on a national, state, tribal, or local historic register.
 - Project cannot include accessory dwelling units (ADUs) unless the project is new construction of a single-family home with attached ADU in a zone that allows for multifamily.
- Prior to first building permit, recorded restriction dedicating units for affordable households making below 80% of area median income (Low or Very Low income).
 - Duration of restriction is 55 years if rented or 45 years if owned.

Does SB 35 Apply?



- Project is on legal parcel that is:
 - Within an “urbanized area” or “urban cluster” as determined by the U.S. Census Bureau.
 - “Urbanized area” is 50,000 or more people
 - “Urban cluster” is at least 2,500 and less than 50,000 people
 - Infill: At least 75% of perimeter adjoins parcels developed with “urban uses.”
 - “Urban uses” are “any current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses.”
 - Separation by a highway or street is considered adjoined.
 - Zoned for residential use or residential mixed-use or has General Plan designation allowing for residential or mixed use.

Does SB 35 Apply?



- Site cannot be within a very high fire hazard severity zone, unless local agency has excluded site from specified hazard zones or site has an adopted fire hazard mitigation measures.
- Development site does not have:
 - Coastal zone
 - Prime farmland or farmland of statewide importance
 - Wetlands
 - Hazardous waste site
 - Delineated earthquake fault zone
 - Special flood hazard area or within regulatory floodway
 - Conservation plan or easement for natural community or habitat or natural resources
 - Habitat for protected species

Does SB 35 Apply?



- Generally, project required to pay prevailing wages and comply with certain requirements for skilled and trained workforces,
 - Statute and Guidelines are more detailed and complicated regarding these requirements.
- Project site does not have:
 - Tenant-occupied housing that was demolished within 10 years of application; or
 - Tenant-occupied housing or units that were offered for sale.
- Development is not on a parcel that is governed by the state laws for mobilomes, recreational vehicles, or special occupancy parks.

Does SB 35 Apply?



- Development is consistent with objective zoning standards, objective subdivision standards, and objective design review standards.
 - Objective standards must be in place at the time the application is submitted and must be “available and knowable by both the development applicant or proponent and the public official before submittal.”
 - Objective standards are “standards that involve **no personal or subjective judgment by a public official** and are uniformly verifiable by reference to an external and uniform benchmark or criterion.”

Policy Decision Points Today



1. Who does the Board want to decide SB 35 applications?
 2. Does the Board want to provide for the right to appeal decisions on SB 35 projects?
 3. If an appeal is allowed, who does the Board want to decide the appeal?
 4. Who does the Board want to decide whether to approve project modifications after approval of an SB 35 project?
- Options for decisions on SB 35 projects:
 - Planning Director (no public hearing or oversight)
 - Zoning Administrator
 - Planning Commission
 - Board of Supervisors
 - Key considerations in making this decision:
 - State-imposed deadlines to make decisions on SB 35 projects.
 - Approval is ministerial and does not allow the exercise of discretion.

Expedited Time Limits



- County must provide readily accessible information about ministerial approval requirements and information required.
 - Application cannot be used to “inhibit, chill, or preclude” SB 35 projects.
- From submission of application, County staff must determine SB 35 eligibility within:
 - 60 days if 150 or fewer housing units; or
 - 90 days if more than 150 housing units.
- Request for modification to SB 35 project made after approval but before building permit issuance also subject to the 60 and 90 day deadlines.

Determine of Ineligibility



- Determination that project is not eligible must be in writing, identify specific objective standards with which the project does not comply, and be based on substantial evidence.
 - Assessed under a reasonableness standard. County would have to show that a reasonable person would not conclude the project is consistent with objective standards.
- If County does not provide this written determination within the required time (60 or 90 days), the project is “deemed to satisfy” all required objective standards, including the County’s objective zoning, General Plan, and other standards.
 - Even if Board elects for public oversight, staff must perform detailed review in advance that should identify any potential ground upon which a project could be denied. If the inconsistencies are not identified, decision-making body could be precluded from denying the application.

AB 168 – Tribal Scoping Consultation



- Effective September 25, 2020 as an urgency bill, SB 35 requires tribal consultation (similar to tribal consultation under AB 52 for CEQA).
- Project applicant must file a notice of intent to submit an application, which is a preliminary application. From date of notice of intent:
 - 30 days for County to notify recognized tribes affiliated with area
 - 30 days for tribes to respond
 - 30 days to commence confidential consultation, if requested
- Tribal consultation concludes if 1) agreement of no potential impact to tribal resources; 2) if there is a potential impact, an enforceable agreement regarding the treatment of the tribal resources; or 3) one or more parties, acting in good faith and after a reasonable effort, conclude that mutual agreement cannot be reached.
- If parties cannot reach an enforceable agreement regarding tribal cultural resources, the project is ineligible for SB 35.
- County cannot accept application until consultation concludes.

Limits of Public Oversight Process



- Public oversight or a public hearing is not required.
- Design review or “public oversight” *may* be conducted by the Planning Commission or Board of Supervisors.
 - SB 35 allows for, but does not require, a decision by the Planning Commission or Board of Supervisors.
- Any design review or public oversight “shall be objective and be **strictly focused on assessing compliance with criteria required for streamlined projects**, as well as any reasonable objective design standards.”
- Design review or public oversight “**shall not in any way inhibit, chill, or preclude the ministerial approval.**”

Limited Time for Public Oversight



- Design review or “public oversight” shall be completed within:
 - 90 days of submission if 150 or fewer housing units; or
 - 180 days of submission if more than 150 housing units.
- Unclear whether public oversight may be utilized to make consistency determination if the inconsistency was not raised within the 60-day deadline.
 - Thus, staff review of all objective standards should occur within 60 days.
- SB 35 does not require the ability to appeal a decision approving an SB 35 project.
 - If Board allows for an appeal, the appeal must be heard and decided within the 90 or 180 days.

Decision is Ministerial



- “Ministerial processing approval” means a “process for development approval involving **little or no personal judgment by the public official as to the wisdom or manner of carrying out the project.**”
 - Public official “merely ensures” that the proposed development meets all the objective zoning, subdivision, and design review standards.
 - County cannot require conditional use permit.
- Determination of consistency with objective standards “shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply.”

Limits of Design Review



- May only apply objective design review standards.
 - Consistency with “neighborhood character” is not objective unless it is defined so that it can be applied without the exercise of discretion.
 - Acceptable standards include use of specific materials, such as Spanish-style tile roofs or roof pitches with a slope of 1:5.
 - Architectural design requirements such as “craftsman style architecture” could be used so long as the elements of “craftsman style architecture” are clearly defined (e.g., “porches with thick round or square columns and low-pitched roofs with wide eaves”).
 - Illustrations are preferred.

Limits of Analysis of Traffic



- Can apply objective traffic standards and policies, including payment of existing traffic impact fees.
- Cannot require a traditional traffic study that requires the exercise of discretion and project-specific conditions.
- General Plan TC-X Policies / “Measure E”
 - Can apply Policy TC-Xa to SB 35 projects that have 5 or more residential units or parcels. Policy TC-Xa allows for limited traffic study to determine that the project does not result in or “worsen” LOS F during weekday, peak-hour periods on any highway, road, interchange, or intersection.
 - Policy TC-Xe provides objective definition of “worsen.”
 - None of the other TC-X policies apply to ministerial approvals, thus cannot be applied to SB 35 projects.
 - Policy TC-Xd, which requires LOS E in Community Regions or LOS D in the Rural Centers, does not apply to SB 35 projects.

Limits on Parking Requirements



- No parking requirements can be imposed if:
 - Located within 1/2 mile of public transit;
 - Located within historic district;
 - On-street parking permits are required, but not offered to occupants of development; or
 - Car share vehicle is within one block.
- If does not come within above restriction, can impose only one parking space per unit.

Mixed Use Projects



- Under HCD Guidelines, SB 35 project may include commercial so long as:
 - At least 2/3rds square footage is designated for residential use; and
 - Concurrency of construction, which can either be:
 - Commercial is part of vertical mixed-use structure; or
 - For horizontal mixed-use, residential component is completed prior to or concurrent with commercial component.
- If comply with these requirements, commercial component is able to proceed under the streamlined ministerial process.

Legal Challenges



- Government Code Section 65914 provides that, if an SB 35 project is challenged under the California Environmental Quality Act (“CEQA”) and the plaintiff loses, the court may require the plaintiff to pay the County’s and developers’ attorneys’ fees.
 - This is a significant fee shifting statute for CEQA cases, which generally allows the plaintiff to recover fees against the County and developer, but makes it difficult for the County or developer to recover attorneys’ fees against the plaintiff.
- There are no published (binding) appellate decisions that interpret or apply SB 35 yet, but given the statutory language, decisions will likely lean in favor of SB 35 projects.

Legal Challenges



- City of Cupertino (May 2020 trial court decision)
 - Public challenged City's approval under SB 35 and argued that the project did not meet objective planning standards. Trial court upheld approval and concluded that the City was not required to disapprove SB 35 project even though it did not meet objective planning standards.
 - Trial court concluded that SB 35 "contemplates that a project may proceed through streamlined review and ultimately be approved even if it is, in fact, in conflict with one or more of the objective planning standards."
- City of Los Altos (April 2020 trial court decision)
 - City had timely sent letter stating that the SB 35 project was inconsistent with parking standards.
 - Court held the project was deemed approved because City failed to adequately identify the applicable parking standards and explain how the project conflicted with them.

Review – Policy Decisions Today



1. Who does the Board want to decide SB 35 applications?
 - *Planning Director, Zoning Administrator, Planning Commission, or Board of Supervisors*
2. Does the Board want to provide for the right to appeal decisions on SB 35 projects?
 - *Staff recommend against providing for an appeal given the expedited SB 35 deadlines.*
 - *If the Board provides for appeals, staff proposes an expedited schedule with 3 days to file an appeal instead of the 10 days in the Zoning Ordinance.*
3. If an appeal is allowed, who does the Board want to decide the appeal?
4. Who does the Board want to decide whether to approve project modifications after approval of an SB 35 project?
 - *Staff recommend staff-level review of modifications with Planning Director approval.*

SB 35 Project Processing and Approval Authority



February 9, 2021

Rob Peters, Deputy Director of Planning

El Dorado County

Planning and Building Department

Existing Design Review Approval



- Design Review Combining Zones
 - Pre-Application Optional
 - Project Parcel **is not** Adjacent to or visible from a State Scenic Highway Corridor
 - Planning Director Level Approval
 - 10-Day Appeal Period
 - Appeal Heard by Planning Commission (PC)
 - 10-Day Appeal Period
 - Appeal Heard by Board of Supervisors (BOS)
 - Project Parcel **is** Adjacent or visible from a State Scenic Highway Corridor
 - PC Level Approval
 - 10-Day Appeal Period
 - Appeal Heard by BOS

Existing Planned Development Approval



- Planned Development Combining Zones
 - Pre-Application Optional
 - Design Review processed through Planned Development Application
 - PC Level Approval
 - 10-Day Appeal Period
 - Appeal Heard by BOS

SB 35 Approval



- Mandatory Notice of Intent/Pre-Application
 - 30-Day Notice to Tribes
 - 30-Day For Tribal Response
 - 30-Consultation if Requested
- Projects <150 Units
 - 90-Days for Approval
 - 60-Day Eligibility Determination
 - Includes Any Appeals

SB 35 Approval



- Projects >150 Units
 - 150-Days for Approval
 - 90-Days for Eligibility Determination
 - Includes Any Appeals
- Modification of an Approved SB 35 Project
 - 90 Days if it requires Design Review
 - 60 Days otherwise

Typical Project Processing Chart



Total Processing Time (Days)

90 60 30 0 30 60 90 120 150 180

Design Review Project



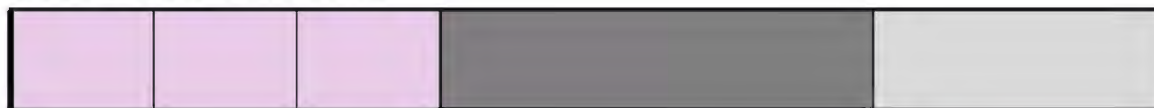
Planned Development Project



SB 35 Project <150 Units

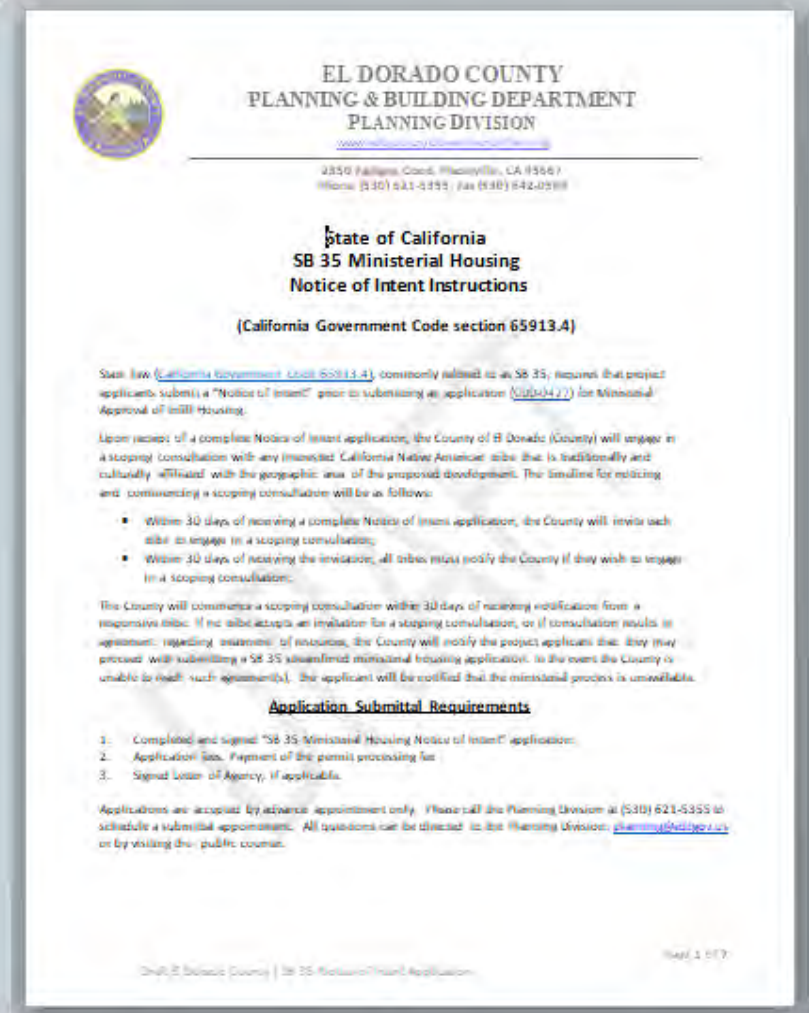


SB 35 Project >150 Units



Application/Checklists

- Notice of Intent/
Pre-Application
 - Consistent with OPR
Guidelines
 - Incorporates Tribal
Consultation



Application/Checklists

- Design Review Application
 - Consistent with HCD Guidelines
 - Requires NOI/Pre-Application Completion
 - Submittal Materials Demonstrate Compliance with Objective Standards



EL DORADO COUNTY PLANNING & BUILDING DEPARTMENT PLANNING DIVISION

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RE DESIGN REVIEW PROCESS INSTRUCTIONS

PURPOSE:

California Senate Bill 35 (SB 35), enacted in 2013, was signed into law to address California's regional housing strategies. The law requires cities and counties to streamline review and approval of eligible affordable housing projects through a streamlined approval process and also exempt eligible projects from environmental review under the California Environmental Quality Act ("CEQA"). This process does not allow public hearings to consider the merits of the project; rather, only design review or public oversight of the development is allowed, which must be objective and strictly focused on assessing compliance with criteria required for streamlined projects as well as objective design review of the project (Government Code Section 65913.4(c)(1)).

Depending on the number of housing units proposed in the project, the jurisdiction has only a short timeframe within which to review the application to determine if it is eligible for processing under SB 35 (within 60 days for projects with 150 or fewer units or within 30 days for larger projects). If it is determined that the project is eligible, the Planning Division will make a final decision on the project within 30 days for projects with 150 or fewer units or within 150 days for larger projects.

PROCEDURE:

1. Applicant/agent prepares all state and County required submittal information and makes an appointment to submit the application to the Planning Division. Note: As of September 26, 2023, State SB 35 processing requirements include submittal of a preliminary [Native Application Notice of Review](#) and documentation of substantial completion of Native American tribal consultation with any tribes regarding SB 35 consultation with the County.
2. A process is adopted and makes a determination that the application is complete and for eligibility under the SB 35 streamlined approval process. An eligibility determination will be made within 60 days for projects with 150 or fewer units or within 30 days for large projects. Staff will notify the applicant/agent during this timeframe if a project is **ineligible** for SB 35 streamlined processing and notification will include the reason(s) for ineligibility. A project deemed ineligible for SB 35 streamlining may continue to be processed under standard requirements and processing timelines. Alternatively, the applicant/agent may revise the project to meet SB 35 streamlining requirements and submit a new SB 35 streamlining request. If a new SB 35 streamlining request is submitted for a project, a new 60 or 30 day review timeline shall begin.
3. A Planning Commission public hearing may be held, as determined by the Director, to provide appropriate public oversight under the provisions of SB 35 and further evaluate the project's consistency with locally-adopted "objective design standards" as defined under SB 35. Such review may include but not be limited to consistency with objective design standards found in the County Zoning Ordinance, the County General Plan (e.g. traffic level 60-Service), the

SB 35 Projects In Process



- El Dorado Haven Apartments
 - El Dorado Area
 - 62 New Units
 - Multifamily General Plan Designation
 - Multi-unit Residential/Design Historic Zoning
- Courtside Apartments
 - Diamond Springs Area
 - 36 Unit Addition to 12-Unit Apartment Complex
 - Multifamily General Plan Designation
 - Multi-unit Residential/Design Control Zoning

Policy Decisions Today



1. SB 35 Project , who Decides?
2. Appeal or no Appeal? How long for Appeal?
3. If Appeal allowed, who Decides on the Appeal?
3. SB 35 Project Modification, who Decides?

Proposed Resolutions



1. SB 35 Project No Appeal
 - a) Who Decides Project
 - b) Who Decides Modification

2. SB 35 Project with Appeal
 - a) Who Decides Project
 - b) Who Decides Appeal
 - c) Who Decides Modification



Questions?