

# **SB 35**

# **Streamlined Ministerial Affordable Housing Projects**



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# SB 35



- California Senate Bill 35 (“SB 35”) codified Government Code Section 65913.4 and became effective January 1, 2018.
  - Since passage, section 65913.4 has been amended by 6 different bills.
  - There are currently 18 bills in the Legislature that propose to amend Section 65913.4.
- Currently will sunset on January 1, 2026.
- In adopting SB 35, the Legislature found that providing affordable housing opportunities is a matter of statewide concern.

# 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 determination list of cities and counties subject to SB 35.
- Latest published list was released July 17, 2020.
  - 29 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 proposed developments with at least 10% affordability.
  - 221 jurisdictions have insufficient progress toward their Lower income RHNA (Very Low and Low income) and are subject to SB 35 proposed developments with at least 50% affordability.

# HCD Guidelines



- Legislature provided HCD with authority to prepare and adopt guidelines to implement SB 35 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.
  - Does not 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 at least 50% of 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 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.”

# 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.

# Determine of Ineligibility



- Determination that project is not eligible must be in writing, identify the specific objective standards with which the project does not comply, and be based on substantial evidence.
  - Current Guidelines require County to show that a reasonable person would not conclude the development is consistent with the objective standards.
  - Proposed amendments to Guidelines makes standard more difficult, requiring County to show that no reasonable person could conclude that the development is consistent with the 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.

# 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.
- 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.
- Statute does not define what “public oversight” includes, but it may not “inhibit, chill, or preclude the ministerial approval.”
- Statute is not clear whether public oversight may be utilized to make consistency determination if the inconsistency was not raised within the 60-day deadline.

# 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 require a traffic study, but cannot perform independent review that is subjective or requires the exercise of discretion.
- Can apply objective traffic standards and objective transportation policies in General Plan.

# 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.



# General questions?