

# **SB 35**

# **Streamlined Ministerial Affordable Housing Projects**



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# 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 12 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.
  - Latest Guidelines adopted March 30, 2021.
  - Available at:
    - <https://www.hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf>
- Guidelines “shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of increasing housing supply.”

# 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.
  - Demolish historic structure that is on the national, state, or local historic registry.
  - Have a tribal cultural resource on a national, state, tribal, or local historic register.
  - 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, must record 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 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 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.”

# 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.

# Expedited Time Limits



- County must provide readily accessible information about ministerial approval requirements and required application information.
  - 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.
  - County can find inconsistency with an objective standard only if “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 a decision-making body.
- 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.**”

# Board Direction on SB 35 Projects



- Planning & Building Department sought direction from the Board of Supervisors on February 9, 2021 regarding processing of SB 35 applications.
- Board of Supervisors adopted Resolution 211-2021, which provides:
  - Planning Commission shall provide public oversight and be the final approving authority for SB 35 projects that would otherwise require discretionary approval.
  - Decision by the Planning Commission is final and there is no right to appeal.
  - Planning Director is the final approving authority for any modifications to an approved SB 35 project.

# Limited Time and Scope of 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.
- Planning Commission cannot disapprove a project based on an inconsistency with an objective standard *unless* County staff had identified the specific inconsistency within the 60 or 90 days deadline during initial review.

# 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: “Traffic from **residential development projects of five or more units** or parcels of land shall not result in, or *worsen*, Level of Service F (gridlock, stop-and-go) traffic congestion during weekday, peak-hour periods on any highway, road, interchange or intersection in the unincorporated areas of the county.”
    - 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-Xf



“At the time of approval of a tentative map **for a single family residential subdivision** of five or more parcels that worsens (defined as a project that triggers Policy TC-Xe [A] or [B] or [C]) traffic on the County road system, the County shall do *one of the following*: (1) condition the project to construct all road improvements necessary to maintain or attain Level of Service standards detailed in this Transportation and Circulation Element based on existing traffic plus traffic generated from the development plus forecasted traffic growth at 10-years from project submittal; **or** (2) ensure the commencement of construction of the necessary road improvements are included in the County’s 10-year CIP.

**For all other discretionary projects** that worsen (defined as a project that triggers Policy TC-Xe [A] or [B] or [C]) traffic on the County road system, the County shall do one of the following: (1) condition the project to construct all road improvements necessary to maintain or attain Level of Service standards detailed in this Transportation and Circulation Element; or (2) ensure the construction of the necessary road improvements are included in the County’s 20-year CIP.”

# Policy TC-Xd



**“Level of Service (LOS) for County-maintained roads and state highways within the unincorporated areas of the county shall not be worse than LOS E in the Community Regions or LOS D in the Rural Centers and Rural Regions except as specified in Table TC-2.** The volume to capacity ratio of the roadway segments listed in Table TC-2 shall not exceed the ratio specified in that table. Level of Service will be as defined in the latest edition of the Highway Capacity Manual (Transportation Research Board, National Research Council) and calculated using the methodologies contained in that manual. Analysis periods shall be based on the professional judgment of the Department of Transportation which shall consider periods including, but not limited to, Weekday Average Daily Traffic (ADT), AM Peak Hour, and PM Peak hour traffic volumes.”

# Policy TC-Xg



“Each development project shall dedicate right-of-way, design and construct or fund any improvements necessary **to mitigate the effects of traffic** from the project. The County shall require an **analysis of impacts of traffic** from the development project, including impacts from truck traffic, and require dedication of needed right-of-way and construction of road facilities as a condition of the development. This policy shall remain in effect indefinitely unless amended by voters.”

# 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.



# Legal Challenges: *Ruegg & Ellsworth v. City of Berkeley* 63 Cal.App.5th 277 (April 20, 2021)



- First published appellate decision interpreting SB 35.
- Upheld state’s preemption of local authority for SB 35 projects.
  - SB 35 was “intended to decrease delays and local resistance to such developments, and does so by removing local governments’ discretion to deny applications for affordable housing developments meeting specified *objective* criteria.”
- Narrowly interpreted “historic structure” to find that SB 35 applied to the project even though the City considered a potential shellmound to be a “historic structure.”
  - Showed little deference to the City’s factual determinations.
- Strictly applied the deadlines to the initial determination letter and faulted the City for the lack of specificity about any alleged inconsistencies.
- Found Level of Service standard was not objective and could not be applied.
  - “*In general*, mitigations are required if a movement is at LOS F, the peak hour signal warrant is met, and a minimum of 10 vehicles is added to the critical movement. . . . [C]onsideration should be given to the number of new trips added by a project and other factors, such as the feasibility of alternative routes . . . .”

# Legal Challenges: Trial Court Decisions



- 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.

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# Questions?