THE REGISTRY
BAY AREA REAL ESTATE

Despite Disappointing Legislative Session, Existing State Laws Can Change the Game for Housing Developers

By Alan Murphy, Perkins Coie LLP
October 15, 2020

This year's legislative session was disappointing for all those who understand that California's dire shortage of housing is largely due to cumbersome entitlement processes and long-standing local constraints on production. Several bills failed that would have forced cities to allow more housing. While we can hope that next year's legislative session will bring greater success, focusing too narrowly on what the Legislature failed to accomplish this year risks missing how significant the changes of the last few years have been. The work of reform is far from over—and the causes of the housing crisis are far from adequately addressed—but the law governing housing development has changed in fundamental ways. State law now offers a roadmap to increasing housing production with fewer local constraints.

In assessing a new project, a developer and its counsel once may have focused primarily on reviewing relevant provisions in the local general plan and zoning code. Yet several state laws, some older and some newer, can change the game for a project by overriding these local density restrictions, development standards, and entitlement processes. This makes it critical to consider state law alongside local regulations from a project's earliest stages.

Here are some key questions developers should ask for every potential housing project, to help ensure they take full advantage of existing state law:

- *Can the Density Bonus Law help?* Most housing developers are aware that the Density Bonus Law offers additional density above local limits in exchange for providing on-site affordable housing. But few realize just how extensively various provisions of the law can be combined to reduce or eliminate development standards and other local requirements. Additionally, just last month, Governor Newsom signed legislation that will increase the maximum density bonus available to predominantly market-rate developments from 35 to 50 percent, presenting a significant opportunity for many projects.

- *Should a "preliminary application" be filed?* Filing a "preliminary application" requires providing detailed information identified by SB 330 (see Government Code section 65941.1), so not every housing applicant will choose to submit one. Yet doing so protects a project, at an early stage, against new or changed ordinances, policies, development standards, and fees (except for automatic adjustments) that a city otherwise might seek to apply.

- *Are streamlined, ministerial approvals available under SB 35?* Under legislation enacted in 2017 (Government Code section 65913.4), cities must approve eligible multifamily infill projects on an expedited timeline, any design review or public oversight of these projects must be "objective," and no conditional use permit or other discretionary local approvals can be required. To become eligible, a project must satisfy site-specific and project-specific criteria, among them meeting certain affordable housing requirements and (for most projects) paying prevailing wage.

- *Is CEQA streamlining available?* Many housing projects qualify for streamlining under one or more of the numerous provisions that can limit the scope of environmental review. While each provision differs, developers should bear in mind that CEQA streamlining is more likely to be available to projects that are located on infill sites within a half mile of major transit facilities.

- *Does the entitlement process laid out in the city's code need to be shortened?* SB 330 (see Government Code section 65905.5) also prohibits cities from holding more than five hearings on any proposed housing project that complies with applicable, objective general plan and zoning standards.

- *Would the Housing Accountability Act prevent the city from denying the project?* In addition to its other restrictions, the Housing Accountability Act generally forbids cities from disapproving, or reducing densities in, housing projects that comply with objective development standards. While the statute has been on the books for decades, recent amendments and enhanced enforcement provisions have caught the attention of many cities. Attorneys' fees now typically must be awarded to a party that prevails in litigation to enforce the law, and the courts must impose hefty fines on a city found in violation if it fails to comply quickly.

There's no harm in hoping for legislative progress in Sacramento next year. In the meantime, though, proponents of any new housing project should consider carefully whether any of these existing state law tools may prove beneficial in the coming year.

Article Link: https://news.theregistrysf.com/despite-disappointing-legislative-session-existing-state-laws-can-change-the-game-for-housing-developers/