The New SB330 – The Legislature Ratchets Up the Pressure On Cities to Approve Housing Developments

Analysis and Commentary by Andrew L. Faber, Esq.

Rev. 10/17/19

This article summarizes the salient provisions of SB330 (the "Bill"), which was signed into law by Governor Newsom on October 9, 2019. This is a much-publicized and debated bill that enacts the most sweeping legislation affecting housing projects since the spate of such actions in 2017. The Bill is long and complex, and reference to the text should be made before taking any action based on its contents (and a source of confusion is that there are several sections that appear to be duplicated, but one of each pair is effective until January 1, 2025, and the other thereafter).

In general, SB330 continues the recent Legislative trend of reducing a city's discretion in dealing with housing development applications, all with the goal of increasing the supply of housing. In fact, the Bill is entitled the "Housing Crisis Act of 2019," and starts off with 14 numbered paragraphs containing legislative findings in support of the need for the Bill.

The major provisions of the Bill are summarized in the following sections of this article. All Section references are to the Government Code.

Preliminary Application Completeness and Vested Rights. The Bill adds new sections to the Government Code and amends others to create a new "completeness" concept based on a preliminary application that complies with a checklist. The City must prepare a preliminary checklist, and after submittal of a compliant application, the application is deemed complete at this stage, so that the existing ordinances, policies and standards must be applied. The information required in the preliminary application is specified in the Bill and must be objective, including location, uses, environmental and cultural sensitivities and hazards. More particularly:

1) Under Section 65940, each public agency must maintain a list of the information required from any applicant for a development project. This is an existing code section.

2) New Section 65941.1 lists the items that may be required in such a list for a housing development project (which is defined as in the Housing Accountability Act ("HAA"), Section 65589.5(h)(2), as meaning either all residential use or a mixed-use project that is two-thirds residential by square footage).

    a. The list includes location, existing uses, detailed site plan, parking, and various environmental factors. Sec. 65941.1(a).

b. The city may not add other items to the checklist that are not specified in the State Law. Sec. 65941.1(b)(3). If the applicant complies with the checklist, then the application is deemed complete, without any affirmative action by the city being required. Sec. 65941.1(d)(3); 65913.10(b)(1). If the city has no list, the applicant may use one that shall be prepared by HCD. Sec. 65941.1(b)(2).

c. Nonetheless, the city shall determine completeness within 30 calendar days, and must allow resubmittal and provide provisions for appeal of its determination. Sec. 65943(a)-(c).

3) The Housing Accountability Act is amended by adding a new subsection that spells out in more detail the rights vested by submitting a complete preliminary application.

a. Generally, the city can only apply the ordinances, policies, and standards in effect at the time the application was submitted. Sec. 65589.5(o).

b. There are various exceptions, including: indexed fees, CEQA mitigations, or if the development is substantially revised or delayed.

Comment: These provisions are obviously designed to prevent city staffers from requesting repeated revisions to the plans, not because they are truly incomplete, but rather because the staff feels they can be improved, all the while refusing to find the application to be complete until the staff is satisfied.

New Limitations on Planning Actions by Cities. A new section is added to the Government Code, section 66300, which contains a long list of restrictions on City planning actions, including:

1) The restrictions apply to "affected cities." For the purposes of this section, an affected city is any city (including a charter city) determined by HCD no later than June 30, 2020, to be "in an urbanized area or urban cluster," as designated by the U.S. Census Bureau. This includes the electorate of an affected city as well. Sec. 66300(a), (e).

Comment: This probably means all Bay Area cities. It's not clear if a city could be deemed subject to these restrictions before HCD makes its official determination. Earlier drafts of the bill had a complex definition for affected cities, involving rental and vacancy rates; fortunately, these have been eliminated. Including the "electorate" means that these rules are not supposed to be altered by initiative or referendum.

2) Restrictions on downzoning. A city may not redesignate land where housing is an allowable use by changing or applying general plan, specific plan, or zoning criteria that would reduce the intensity of land use below that which was allowable on January 1, 2018.

a. There is a list of such measures, including "reductions to height, density, or floor area ratio, new or increased open space or lot size requirement," etc. Sec. 66300(b)(1)(A).

b. Certain specifically listed voter-imposed limits are still allowed, if they comply with the requirement stated above: "a height limit, urban growth boundary, or urban limit." Sec. 66300(g).

c. A reduction in housing intensity is allowed if the reduced density is concurrently made up elsewhere, i.e., there is "no net loss" of residential capacity. Sec. 66300(i)(1). However, planned housing intensity may be reduced for an existing mobilehome park without complying with the no net loss requirement. Sec. 66300(i)(2).

Comment: The January 1, 2018 date is not a misprint; this section reaches back a long way. Presumably this restriction does not apply to a whole new general plan or specific plan, provided that the reductions in intensity are made up elsewhere, because of the no net loss provision.

3) Design Review Standards. A city may not impose or enforce design standards "established on or after January 1, 2020 that are not objective design standards." Sec. 66300(b)(1)(C). An objective design standard is defined to mean a standard "that involves no personal or subjective judgment by a public official and is uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal of an application." Sec. 66300(a)(7).

Comment: Does this mean that a city can still apply its existing pre-2020, non-objective design standards? Presumably, yes, but since the HAA doesn't allow a project to be turned down or reduced in density for non-objective reasons (Sec. 65589.5(j)(1)), a city intending to regulate design will have to develop objective design standards.

4) Restrictions on Moratoria. A city may not impose a moratorium on development of land where housing is an allowable use except to protect against an imminent threat to the "health and safety of persons residing in, or within the immediate vicinity of, the area subject to the moratorium," Sec. 66300(b)(1)(B)(i). Any such proposed moratorium must be submitted to HCD for prior approval. Sec. 66300(b)(1)(B)(ii).

Comment: This substantially stiffens the normal moratorium standard of Govt. Code Sec. 65858, which allows a moratorium to prevent development that "may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time."

5) Numerical Growth Controls Prohibited. A city may not establish or implement any provision that limits the number of approvals or permits, puts a cap on the number of housing units that can be "approved or constructed whether annually or for some other time period" or limits population. Sec. 66300(b)(1)(D).

Comment: This will affect several Bay Area cities, preventing existing growth control measures from being implemented. The only exception for voter-initiated growth control

measures is a limited one for pre-2005 enactments in a "predominantly agricultural county."

6) CEQA Review not Affected. "Nothing in this section supersedes, limits, or otherwise modifies the requirements of, or the standards of review pursuant to… [the California Environmental Quality Act]." Sec. 66300(h)(1).

   Comment: Wouldn't you know it: The Legislature once again backs away from any modifications to CEQA. In the author's experience, few CEQA challenges these days are made on true environmental grounds, with most plaintiffs now being neighbors, competitors, or unions, but the Legislature steadfastly refuses to curb such suits.

New Limit on Number of Hearings. New Section 65905.5 is added to the Government Code. It imposes a limit on the number of hearings that can be conducted on a housing development project. A City cannot conduct more than five hearings for a project that complies with objective general plan and zoning standards in effect at the time the application is deemed complete. Sec. 65905.5(a). A determination that the proposed housing development is on a historic site must also be made at the time the application is deemed complete. Sec. 65913.10(a).

1) Hearings include "any public hearing, workshop or similar meeting," but not legislative hearings (e.g. general or specific plan amendment, or rezoning). Sec. 65905.5(b)(2).

2) This section carries over some language from the Housing Accountability Act. In particular, if a project is consistent with objective general plan standards and criteria, but the zoning is inconsistent with the general plan, the project shall not require a rezoning. Sec. 65905.5(c)(2). [The same provision appears in the HAA, Sec. 65589.5(j)(4).]

   Comment: This seems designed to cut down on the endless hearing cycle that some cities like to indulge in. Note that a continued hearing counts as a new one. Sec. 65905.5(a).

Shorter Time Limits for Approvals. Existing Section 65950 is revised to shorten some approval time limits and focus on housing projects.

1) A housing development project must be approved or disapproved within 90 days of certification of an EIR (old provision: 120 days). That period is now 60 days for certain affordable projects (old provision: 90 days). Sec. 65950 (a)(2), (3).

2) This section now uses the Housing Accountability Act (Gov. Code Sec. 65589.5(h)(2)) definition of a housing development project: all residential use or a mixed-use project that is two-thirds residential by square footage.

   Comment: This is part of the Permit Streamlining Act. One extension of up to 90 days by agreement is still permissible. Sec. 65950(b).

****

Andrew Faber practices in the areas of Land Use and Municipal Law. He has over forty years of experience in representing private and public clients in a wide range of land use,

environmental and public law matters, and in real estate, environmental and eminent domain litigation. If you have any questions, please contact Andrew Faber at andrew.faber@berliner.com or (408) 286-5800.

Berliner Cohen is one of the largest and oldest law firms in San Jose serving the business and regulatory needs of private business and public agencies. Berliner Cohen also meets the growing demands of the Northern San Joaquin Valley with its expanding offices in Modesto and Merced. For more information, visit www.berliner.com.

This article is for informational purposes only and not for the purpose of providing legal advice. Please contact your attorney to obtain advice with respect to any particular legal issue. The opinions expressed are the opinions of the authors.