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A WHOLE NEW BALLGAME: WHAT THE HOUSING CRISIS ACT OF 2019 (SB 330) MEANS FOR HOUSING DEVELOPERS, LOCAL GOVERNMENTS, AND GO-SLOW OPPOSITION TO NEW RESIDENTIAL DEVELOPMENT PROJECTS IN CALIFORNIA

By Karl E. Geier[*]

A new set of ground rules for processing and approval of residential development projects has found its way into law and became effective January 1, 2020. The "Housing Crisis Act of 2019,"[1] sponsored by State Senator Skinner (D.-Berkeley), seeks to end foot-dragging by local governmental decisionmakers in the application process for new housing development projects by forcing the determination that project applications are complete, requiring such determinations to be based on objective, published standards and criteria, and imposing specific time-lines for processing, including limits on the number of public hearings a project applicant can be compelled to endure before a project is deemed approved. It also creates an early vested right to have the application for a housing development project considered under the rules and policies in effect at the time the application is submitted, rather than after some later date when the application is determined to be complete, and limits local governmental discretion to enact later changes in those rules and policies in the guise of addressing "public health and safety." While it does not directly compel actual approval of housing development projects, the Act sets up a series of procedural hurdles the local government needs to clear in order to deny approval. Importantly, it shifts the burden of proof to the local government to demonstrate that the housing development project does not conform with existing policies and rules in order to disapprove or conditionally approve a project that complies with applicable, objective general plan and zoning standards and criteria that were in effect at the time the initial project application was deemed to be complete.[2] To provide "teeth" to these provisions, all of which significantly change the dynamics of the land use application and approval process for housing developments, the law also creates penalties, including damages and attorney's fees, for a local government that skirts or evades the requirements of the

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law, and mandates court-directed remedies including forced approval of projects that meet these standards.[3]

All of these provisions run against the grain of existing statutory and case law in California that historically have given developers weak leverage against local agencies and their constituents who sought to delay and overburden housing development. Instead, SB 330 makes it difficult for local agencies to avoid approving new housing development projects, whether by endless delays for study sessions and hearings, by excessive conditions and exactions, or by indirection and changing the rules of the game for developers who submit applications based on existing laws and ordinances. Because it changes many assumptions under which local agencies and developers (as well as the public and the courts) have operated over many years of contentious opposition to new development, particularly at higher densities or at affordable rents or purchase prices, the law is certain to face scrutiny and resistance in some jurisdictions. Above all, the new law will need to be explained carefully to decisionmakers and stakeholders in the development process, in order to avoid unnecessary delay, expense, litigation, and liabilities for all parties.

This article summarizes the key elements of SB 330, which affects several scattered sections of the planning and zoning chapters of the Government Code. Currently, the law is set to expire January 1, 2025, when existing sections revert to their previous language without changes or additions made by SB 330, and the new sections added by SB 330 also lapse.[4] These "sunset" provisions may be extended or deleted by future legislation, but at least for the next four-plus years (what is left of 2020, plus 2021, 2022, 2023, and 2024), it can be expected that the operative rules for housing development projects will have shifted considerably as a result of the Act.

I. What is a Housing Development Project under SB 330? At the outset, it should be borne in mind that SB 330 only imposes the special procedures and standards outlined above when the applicant proposes a "housing development project."[5] The term "housing development project" is not narrowly defined; the statutory definition is actually very simple. A "housing development project" means any "use" consisting of any of the following: (a) "only residential units"; (b) mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; and (c) certain transitional or supportive housing.[6] These are stated in the alternative, and a project that is solely residential units or that has

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two-thirds of its square footage designated for residential use need not include transitional or supportive housing in order to qualify. It is not necessary that the project consist of multi-family or other high-density housing; although the term "residential unit" is not specifically defined, it would seem clear that single family residences are included within the meaning of "residential units." Further, a "housing development project" meeting these broad definitions will qualify for the special treatment afforded by SB 330 whether or not it includes an affordable housing component, whether very low-, low-, or moderate-income households. (By contrast, the so-called "ministerial, streamlined process" created by Gov. Code, § 65913.4, is applicable only to certain infill development projects that include a significant percentage of affordable housing and meet other labyrinthian requirements;[7] the provisions of The Housing Crisis Act of 2019 (SB 330) are not in any way restricted to such requirements, and the 2019 amendments to § 65913.4 make this abundantly clear by adding language specifically stating that the section "shall not prevent a development from also qualifying as a housing development project entitled to the protections of § 65589.5").[8]

II. Pre-application Process for "Freezing" Applicable Laws, Policies, and Ordinances under SB 330. Some local agencies have endeavored to delay consideration of projects that are theoretically subject to the Permit Streamlining Act[9] by delaying confirmation or repeatedly changing the requirements for an application to be deemed "complete," which triggers the timeframes imposed by the Streamlining Act,[10] while also rushing to change zoning or other existing rules, policies, and ordinances in an effort to thwart the project when the application ultimately is deemed complete. SB 330 creates a developer-initiated process for submitting a "pre-application" to establish the benchmark or record date of submission, after which changes in the rules and standards applicable both to the application and to the project itself cannot be made without the developer's consent. Specifically, a housing development project is subject only to the ordinances, policies, and standards adopted and in effect when a "preliminary application" meeting the requirements of the new Act is submitted.[11] Under SB 330, once a preliminary development application conforming to the statute is submitted, it is deemed complete as a matter of law,[12] and with limited exceptions, the local agency is prohibited from conditioning approval of the project on compliance or noncompliance with any subsequently enacted ordinance, policy, or standard that was not adopted and in effect prior to the date of submittal of the preliminary application.[13] This includes any general

plan, community plan, specific plan, zoning, design review standards, subdivision standards, and any other rules, regulations, requirements, or policies of the local agency, including impact fees, capacity or connection charges, permit or processing fees, or other exactions.[14]

III. Required Contents of the Preliminary Application to be Deemed Complete. The requirements for a "preliminary application" are spelled out in detail in new Gov. Code, § 65941.1, which details the contents and procedures to be followed in submitting and processing a "preliminary application."[15] Section 65941.1 includes a list of 17 items of information, some of which have additional sub-parts, that a developer must submit, with the applicable permit processing fee, in order to have completed a preliminary application for a housing development project.[16] Under subdivision (b) of § 65951.1, each local agency is required to compile a checklist and application form that complies with the statute for use by applicants in satisfying the requirements for a preliminary application, and the Department of Housing and Community Development also is directed to adopt a standardized form that developer applicants can use if the local agency has not developed its own form in compliance with the statute.[17] None of these checklists or forms may "require or request any information beyond that identified in subdivision (a)."[18] The list of items required for a preliminary application under subdivision (a) of § 65941.1, in summary, is as follows: (1) the specific location, including parcel numbers, a legal description, and site address, if applicable; (2) the existing uses on the project site and identification of major physical alterations to the property on which the project is to be located; (3) a site plan showing the location on the property, elevations showing design, color, and material, and the massing, height, and approximate square footage, of each building that is to be occupied; (4) the proposed land uses by number of units and square feet of residential and nonresidential development using the categories in the applicable zoning ordinance; (5) the proposed number of parking spaces; (6) any proposed point sources of air or water pollutants; (7) any species of special concern known to occur on the property; (8) whether a portion of the property is located within a very high fire hazard severity zone, in wetlands, in a hazardous waste site, in a special flood hazard area subject to inundation by a 100-year flood as in official maps published by FEMA, a delineated earthquake fault zone (unless the development complies with applicable seismic protection building code standards), or in a stream or other resource that may be subject to a streambed alteration agreement; (9) any historic or cultural resources known to exist on the property;

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(10) the number of proposed below market rate units and their affordability levels; (11) the number of bonus units and any incentives, concessions, waivers, or parking reductions requested pursuant to Gov. Code, § 65915; (12) whether any approvals under the Subdivision Map Act, including, but not limited to, a parcel map, a tentative map, or a condominium map, are being requested; (13) the applicant's contact information and, if the applicant does not own the property, consent from the property owner to submit the application; (14) for a housing development project proposed to be located within the coastal zone, additional information about whether any portion of the property contains wetlands, environmentally sensitive habitat areas, a tsunami run-up zone, or use of the site for public access to or along the coast; (15) the number of existing residential units on the project site that will be demolished and whether each existing unit is occupied or unoccupied; (16) a site map showing a stream or other resource that may be subject to a streambed alteration agreement and an aerial site photograph showing existing site conditions of environmental site features that would be subject to regulations by a public agency, including creeks and wetlands; and (17) the location of any recorded public easement, such as easements for storm drains, water lines, and other public rights of way.[19] If, subsequent to submittal of this information, the applicant revises the project such that the number of residential units or square footage of construction changes by 20 percent or more, the housing development project is not deemed to have submitted a preliminary application until the proponent resubmits all of the information required by subdivision (a) so that it reflects these revisions.[20] In determining whether the square footage of construction or number of dwelling units has changed by 20 percent or more, any increases resulting from a density bonus, incentive, concession, waiver, "or similar provision" is to be disregarded.[21]

IV. Timeframe and Process for Determination that a Preliminary Application has been Submitted and is Deemed Complete. Once the required information has been submitted or resubmitted, as noted, the rules, standards, and policies applicable to the project, and to the processing of the application, are all "frozen in time" or "vested," and only those rules, standards, and policies in effect on that date are applicable going forward through the application process and development, with only limited exceptions (discussed below in Part VII of this article).[22] Further, although the applicant still must file a "complete application" conforming with the "preliminary application" and with additional requirements of the Permit Streamlining Act within 180 days after submitting

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the preliminary application,[23] the requirements for a complete development application that triggers timeframes for approval, disapproval, or conditional approval of the application under that Act also are restricted.[24] Thus, establishing the "record date" of submission of the required information for a preliminary application is critical to the operation of the statute. In this regard, SB 330 removes the determination of "completeness" of a *preliminary application* from the local agency and leaves it to be objectively determined under the language and requirements of the statute; specifically, § 65941.1, subd. (d)(3) provides that "[t]his section shall not require an affirmative determination by a city, county, or city and county regarding the completeness of a preliminary application *or a development application* for purposes of compliance with this section."[25] (emphasis added). Once a preliminary application complying with the statute has been submitted, the application is also deemed complete for purposes of applying the provisions of Gov. Code, § 65589.5, which in turn requires only objective, not personal or subjective, standards to be applied by the local agency in considering compliance with the applicable general plan, zoning, and subdivision standards and criteria, including design review.[26] Failure by the local agency to comply with these requirements, in turn, subjects the local agency to penalties and liabilities in litigation; if the local agency attempts to require compliance with ordinances, policies, or standards not in effect when the preliminary application was submitted, a court can issue injunctions and impose fines and penalties against the local agency for even the attempt to impose improper requirements proscribed by the statute.[27] Thus, a developer/applicant's submission of a "preliminary application" in compliance with the statute triggers a series of compliance issues for the local agency, which can have serious consequences that are largely outside the control of the local agency if it fails to proceed in objective compliance with its existing rules, policies, and ordinances.

V. Subsequent Proceedings Following the Preliminary Application Process. Even though a full-fledged "development application" is still required after the preliminary application is deemed submitted, the allowable contents and submittals that can be required in connection with the full-fledged application are governed by the pre-existing standards and requirements in place when the preliminary application was submitted. The requirements of the Permit Streamlining Act for completeness review and timelines and hearings required for consideration of the "application," in turn, will be measured by these existing requirements in place when the preliminary application was submitted. The requirements for a complete application must be defined and described by local

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agencies in compliance with the Permit Streamlining Act.[28] While those requirements are not separately defined by SB 330 (unlike the requirements for a "preliminary application," which are specifically prescribed by SB 330), the requirements are limited by the "freeze" on changes in applicable rules, policies, and ordinances that is triggered by the preliminary application.[29] Thus, when the full-fledged development application is submitted, the local agency is required to provide "an exhaustive list of items that were not complete," which is "limited to those items actually required in the lead agency's submittal requirements," and the lead agency "cannot request the applicant to provide any new information that was not stated in the initial list of items that were not complete."[30] Every lead agency is required to have available on request a detailed list of requirements for a housing development application, and only those items called for in the published list can be demanded from the applicant.[31] Moreover, the lead agency must make the determination of completeness within 30 days of initial submittal, and then when the supplemental or amended materials necessary to satisfy the list of incomplete items are submitted, the local agency's 30-day period to review and deem the application complete is again limited by the specific list of deficient items it previously provided, and the agency's failure to respond within 30 days results in the application being deemed complete.[32]

Once the full application is deemed or determined to be complete under these provisions, the timeframes for action by the lead agency to approve or disapprove the housing development project also are limited by SB 330. Specifically, Gov. Code, § 65950 has been amended to provide that a housing development project under SB 330 is a "development project" to which the timeframes of § 65950, subds. (a)(2) and (a)(3) apply,[33] and the timeframes for approval or disapproval are limited to 90 days after certification of the environmental impact report under CEQA for most housing development projects, or 60 days after certification of the EIR if the project meets the affordability standards of subd. (a)(3).[34]

The local governmental agency is generally prohibited by Gov. Code, § 65859.5, subd. (o), from imposing later-enacted requirements on housing development projects, once a preliminary application has been filed, with limited exceptions discussed in Part VII, below.[35] With respect to historical or archaeological and cultural resources, however, SB 330 goes further—it provides that the local agency must make any determination of whether the project site is an historic site at the time the application is deemed complete, based on in-

formation contained in the application and required by its list of required information and submittals at that time. That determination remains valid throughout the pendency of the housing development project unless actual archaeological, paleontological, or tribal cultural resources are encountered during grading, construction, or building alteration activities.[36] While not a major component of SB 330, this provision may effectively preclude arguments that a site contains historical, archaeological or cultural values during the course of later public hearings on a project, which in some cases has led to lengthy delays while experts debated the need for a full site investigation before considering approval or disapproval.

VI. Limitations on Local Agency Proceedings to Consider Housing Development Projects Conforming to Existing General Plan and Zoning. SB 330 interposes several procedural and substantive restrictions on local agency processing to approval or disapproval of a housing development project that is in compliance with objective standards of its existing ordinances, policies, and standards. Some of these result from the application of the pre-existing restrictions of Gov. Code, § 65589.5 (before amendment) to all housing development projects, and some result from strengthened provisions of § 65589.5 and other provisions added by SB 330. The principal restrictions and limitations are as follows:

(a) Number of hearings for projects compliant with existing general plan. Consistent with the overall objective of minimizing delay and obstructionism by local agencies (whether imposed by the local governmental entity or demanded by their constituents opposed to project), SB 330 severely limits the potential that consideration of the project will be prolonged by repeated demands for "study sessions," public meetings, continued public hearings, and further opportunities for public testimony or opposition tactics when a project conforms with the existing zoning and general plan applicable to the site. This dovetails with the preliminary application "deemed complete" submittal date that freezes existing zoning and other policies, rules, and standards applicable to the project, and minimizes the potential for unreasonable delay. Specifically, new Gov. Code, § 65905.5 restricts the number of "hearings" before approval or disapproval to five hearings, for a housing development project that is consistent, compliant, and in conformity with applicable, objective *general plan and zoning* policies and criteria in effect at the time the application was deemed complete.[37] In making the determination of the applicability of these limitations, a project that is in compliance with the objective policies and standards of

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the general plan qualifies for the hearing limitations even if existing zoning is inconsistent with the general plan.[38] The local agency may apply the zoning ordinance to the extent consistent with the general plan, but may not require amendment of the zoning ordinance even where it is inconsistent, and must permit development at the density permitted for the site by the general plan and proposed by the proposed housing development project.[39] The term "hearing" is defined broadly to include "any public hearing, workshop, or similar meeting" conducted by the city or county at any level, including the legislative body, planning agency, "or any other agency, department, board, commission or any other designated hearing officer or body of the city or county, or any committee or subcommittee thereof."[40] "Hearing" does not include hearings to review a legislative action required for the proposed housing development, such as a general plan amendment, specific plan or zoning amendment, or any timely appeal of such a legislative action,[41] but this provision would not apply to expand the number of hearings for a project that is compliant with existing objective general plan and zoning policies and standards that does not require such amendments or changes.

(b) Limited discretion to find noncompliance with existing general plan and zoning for purposes of determining the number of hearings. The local agency also has limited discretion to find noncompliance or incompatibility with any existing objective general plan and zoning standards—§ 65905.5, subd. (c) expressly provides that "a housing development project shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project is consistent, compliant, or in conformity."[42] This, in effect, turns the usual deferential standard for validity of a local agency's decision on its head—the new standard applicable to housing development projects under SB 330 is "allow a reasonable person to conclude," not "require a reasonable person to conclude," which would be the standard required to overcome an agency decision under the usual substantial evidence test. There is no provision that would give the local agency the opportunity to decide otherwise, even if other substantial evidence may exist that would or could lead a reasonable person to conclude the project is not consistent, compliant, or in conformity. In other words, a city or county that attempts to require more than five hearings based on a less-than-100 percent certainty belief that the project somehow is out of conformity with the existing objective standards

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in effect when the preliminary application was submitted in accordance with § 65941.1, will run directly afoul of the five-hearing limit—and if it has attempted to impose requirements that were not in effect when the preliminary application was deemed complete, it will also run afoul of the provisions allowing for an award of injunctive relief, fines, and penalties of § 65859.5, subd. (k), as amended by SB 300.[43]

(c) Limited discretion, evidentiary requirements, and findings required to disapprove or reduce density of a project that is in compliance with general plan, zoning, and subdivision standards and criteria. The local agency also has limited discretion to disapprove a housing development project that is in compliance with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time the application was deemed complete.[44] Again, in this context, "deemed complete" refers to the standards and criteria in effect at the time the *preliminary application* was submitted, not the later submission of the full application, which is the date an application is "determined to be complete" under the terms of SB 330.[45] The local agency can only apply "objective" standards, which are further narrowly defined as those "involving no personal or subjective judgment by a public official and being 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."[46] If the housing development project complies with the applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards in effect when the application was deemed complete (i.e., at the time the preliminary application is submitted), the local agency is prohibited by § 65589.5, subd. (j) from disapproving the project or subjecting it to any conditions that would limit or reduce the density of the project unless it can make both of two specific findings specified in the statute. These required findings are (a) that the housing development project would have a specific adverse impact upon public health or safety, meaning "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete," and (b) that there is no feasible way to satisfactorily mitigate or avoid the project's significant adverse effect on public health or safety without requiring that the project be developed at a lower density.[47] These findings must be supported by *a preponderance of the evidence in the record,*[48] and thus would not be upheld under the more deferential "substantial evidence test" that

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ordinarily applies in administrative mandamus proceedings involving a land use approval or disapproval (where even a preponderance of evidence to the contrary will not overcome an agency's decision if based on other substantial evidence supporting its decision). If the project also includes an affordable component, and the affordability of the project for very low-, low-, or moderate-income households would be adversely affected, then the local agency actually bears the burden of proof to support its decision;[49] this burden of proof is not applicable to housing development projects lacking such an affordable component, but the findings of adverse health or safety effects and inability to mitigate without reducing density still must be supported by a preponderance of the evidence on the record.[50] Furthermore, a housing development project that is consistent with the objective general plan standards and criteria cannot be disapproved or conditioned for noncompliance with an existing zoning ordinance that is inconsistent with the general plan, although it can be required to comply with objective standards and criteria of the zoning that is consistent with the general plan so long as they are "applied to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project."[51]

(d) Duty to inform developer of noncompliance when application determined to be complete or else project is deemed in compliance with general plan, zoning, and subdivision standards and design review. The strength of the hearing limitations of Gov. Code, § 65905.5, and the significantly circumscribed ability of the local agency to disapprove or condition a housing development project that was in compliance with the objective, applicable general plan, zoning, and subdivision standards and criteria at the time the preliminary application was submitted under Gov. Code, § 65589.5, subd. (j), is enhanced by a further requirement that the local agency must inform the applicant/developer early in the process if it claims the project is not compliant with those requirements.[52] This notification to the applicant must be accompanied by written documentation identifying the specific provision of existing ordinances, policies, standards, or other requirements the local agency contends are applicable and not complied with, together with an explanation of the reasons the local agency considers the application not to be in compliance.[53] Otherwise, "the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."[54]

The timeline for the local agency to provide this notification and documenta-

tion to the developer is specific. The applicant must be informed by the local agency that it considers the project noncompliant with these standards and criteria, accompanied by the required documentation and explanation, within 30 days after the application was *determined to be complete*, if the project consists of 150 or fewer housing units, or within 60 days after such determination, if the project consists of more than 150 housing units.[55] For this purpose, the date the application is determined to be complete is the date the applicant has submitted a complete application under Gov. Code, § 65943, not the date of submission of the preliminary application under Gov. Code, § 65941.1.[56] However, the "applicable plan, program, policy, ordinance, standard, requirement, or other similar provision" with which such compliance is to be measured is determined by what was in effect on the date the application is *deemed complete*,[57] which is the preliminary application submittal date, not the date the full application is determined to be complete, which is the full application submittal date.[58]

VII. Circumstances in which local agency can impose new or additional requirements or changes in applicable ordinances, policies, and standards. Although SB 330 generally limits the applicable policies, ordinances, and standards that may be imposed on a housing development project to those actually adopted and in effect when the preliminary development application is first submitted,[59] it includes exceptions for changes in the project initiated by the applicant for projects that do not proceed after submission or approval of the application, and for certain other circumstances. Certain aspects of the exceptions may be problematic for the local agency to impose, due to potential penalties and liabilities to the developer if the local agency's determination to impose the subsequently-enacted requirements prove incorrect, as discussed below. However, where warranted and where proper findings can be made to support their imposition, these exceptions are as follows:

(a) Project changes: If there are project revisions that result in additional residential units or square footage changes of 20 percent or more (excluding increases resulting from density bonuses, incentives, waivers, or concessions), the local agency can apply new ordinances, policies and standards (which would include both exactions and regulatory standards) to the project as a whole;[60] whereas if those thresholds are not met, only the additional units or square footage may be subject to the policies, ordinances, and standards that were not in effect when the preliminary application was submitted.[61]

(b) Avoidance of significant effects of the project under CEQA: SB 330

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allows ordinances, standards, and policies that were not in effect when the preliminary application was submitted where necessary to avoid or substantially lessen a significant environmental effect under CEQA.[62]

(c) Avoidance of significant adverse public health or safety impacts: SB 330 allows ordinances, standards, and policies that were not in effect when the preliminary application was submitted where a preponderance of evidence establishes that subjecting the project to such a new ordinance, policy, or standard "is necessary to mitigate or avoid a significant adverse impact upon public health or safety," a standard that is not tied to CEQA but instead requires that a specific, quantifiable, direct, and unavoidable impact be found based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.[63]

(d) Projects that do not commence construction within two and a half years of final approval: SB 330 allows subsequently-enacted ordinances, policies, and standards to be imposed on a project if construction has not commenced within two and a half years after it receives final approval, with that date of "final approval" being extended by all appeal periods, statutes of limitations, reconsideration periods, and petition periods without a challenge or appeal being filed, as well as until the final resolution or favorable settlement of any challenge that is filed.[64]

(e) Cost index changes in fees, exactions, and charges previously enacted: If a fee, exaction, or other monetary exaction was established by an ordinance or resolution in effect when the preliminary application was submitted, the local agency can impose subsequent increases on the project where the increases are based on an automatic annual adjustment based on an independently published cost index referenced in the ordinance or resolution.[65]

(f) Post-construction matters: Once construction is completed and a certificate of occupancy is issued for a housing development project, the completed residential units may be subjected to existing or later-enacted ordinances, policies, or standards that regulate use and occupancy of those units, such as rent stabilization, rental housing inspection programs, short-term rental restrictions, and business licensing requirements.[66]

Despite these exceptions, SB 330 creates significant risks for a local agency that "guesses wrong" or submits to public pressure to impose later enacted ordinances, policies, and standards that are not authorized by the statute. Gov.

Code, § 65589.5, subd. (k) was amended by SB 330 to allow potential residents as well as the applicant for any housing development project to seek judicial relief whenever a local agency, in violation of subd. (o), "required or attempted to require a housing development project to comply with an ordinance, policy or standard not adopted and in effect when a preliminary application was submitted."[67] As a result, an applicant or potential resident or housing organization can bring an action under § 65589.5, subd. (k), for mandatory injunctive relief against the local agency's effort to impose the later-enacted requirements, as well as for fines and penalties and further orders of the court if the local agency fails to comply, which may include a judgment mandating approval of the project in accordance with standard conditions generally imposed on similar projects as determined by the court.[68] Among other things, the statute provides that the local agency that violates a court order to compel compliance, or fails to comply within 60 days, is subject to a fine of *not less than* $10,000 per unit in the project.[69] If the court finds the local agency acted in bad faith, the court is required to multiply the fine five-fold, in addition to other remedies.[70] (For a three hundred residential unit proposal, this would mean a minimum mandatory fine against the public entity of $3 million, or if the public entity has acted in bad faith, a minimum mandatory fine of $15 million).

Further, there is no provision for judicial deference to the local agency's determination of whether one of the exceptions applies; to the contrary, § 65589.5, subd. (o)(5) provides that subdivision (o), which imposes the limitation on application of later-enacted requirements as well as the exceptions to that limitation, "shall not be construed in a manner that would lessen the restrictions imposed on a local agency, or lessen the protections afforded to a housing development project, that are established by any other law, including any other part of this section,"[71] and § 65589.6 places the burden of proof on the local agency to demonstrate that its actions disapproving a project or conditioning it upon a requirement that the density be reduced are in conformity with "all of the conditions specified in § 65589.5,"[72] which would include those conditions newly added by SB 330. Moreover, if a court issues an injunction or other relief compelling the local agency to approve the project, the court may require the approval to impose only the standards applicable to other similar projects,[73] and if the local agency wishes to appeal from the court's remedial orders, it must post a bond in an amount determined by the court to the benefit of the plaintiff, if the plaintiff is the project applicant.[74]

VIII. Limitations on Downzoning or Reductions in Available Residen-

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tial Development Land Under Local Agency Planning, Zoning, Initiative, and Referendum Processes. The provisions of SB 330 discussed in earlier portions of this article apply to all local agencies (cities, counties, and cities and counties), regardless of size, location, or status, and including charter cities.[75] For cities and counties in defined "urban" or "urbanized" areas, however, SB 330 also removes the power of the local governmental authority as well as its voting electorate to reduce housing densities or intensities of use below levels in place under existing general plan, specific plan, or zoning ordinances in effect as of January 1, 2018. It does so through the enactment of Gov. Code, § 66300,[76] which is a broad prohibition on any general or specific plan amendment, zoning amendment, moratorium, subjective design standards, growth control measures (such as a cap on residential unit approvals on an annual or other periodic basis), or other measures that would have the effect of limiting housing development in the jurisdiction.[77] Among other things, this provision expressly limits the electorate's use of the initiative or referendum power in any affected county or affected city to enact any such limitation, as well as the local agency itself.[78]

Although the limitations of § 66300 would appear narrowly drawn, to apply only to "affected cities" and "affected counties" and their respective electorates, it actually will broadly affect most urban jurisdictions and not only those under scrutiny by the Department of Housing and Community Development (DHCD) for deficient land designated for housing under Gov. Code, §§ 65580 et seq. It defines "affected county" as any census designated place wholly located within the boundaries of an urbanized area as designated by the United States Census Bureau, and "affected city" as any city that DHCD determines is in an urbanized area or urban cluster designated by the United States Census Bureau.[79] The only exclusions from these broad designations are cities located outside an urbanized area and with a population of 5,000 or less,[80] and for purpose of "annual cap" type growth controls only, there is an exception for a predominantly agricultural county, meaning one that has more than 550,000 acres of agricultural land, with at least one-half of the county area comprising agricultural land.[81]

Section 66300 also imposes a general restriction upon the approval of any housing development project by an "affected city" or "affected county" that requires the destruction of existing residential dwelling units unless the approved project will replace all of the demolished units and additional criteria

and relocation requirements are satisfied for rent-controlled or occupied units.[82] This provision, which includes additional details and exceptions not summarized here, is in keeping with the overall purpose of SB 330, to maintain the existing residential housing stock while encouraging, if not compelling, the approval of housing development projects that will increase the available housing stock for all income levels.

The overall purpose of § 66300 is to maximize the development of housing and to ensure that any exception be construed narrowly, but not to prohibit the adoption or amendment of development policies, standards, or conditions that allow greater density, facilitate development of housing, or reduce the costs to housing development projects.[83] Like other provisions of SB 330, it expires and is repealed unless renewed by later legislation, as of January 1, 2025.[84]

Conclusion: A Whole New Ball Game for Housing Development Projects

With the enactment of SB 330, the California Legislature has sent a direct message to local governmental agencies and their constituents that housing development projects are a preferred activity that is entitled to prompt, objective consideration in light of existing, enacted policies in effect when the developer begins the application process. The mandatory requirements of the state's housing element laws requiring local agencies to plan and make available sufficient land for the regional fair share of housing needed, coupled with the restrictions that SB 330 imposes on efforts in urban or urbanizing areas to reduce densities or reduce land zoned and planned for housing, should provide developers with a basis for submitting housing development proposals in compliance with local planning and zoning at the time they initially apply. SB 330 then provides a baseline of existing ordinances, policies, and standards that must be applied in a good faith, objective manner by the local agency in reviewing and considering the project over a finite period of time with a finite number of meetings and hearings. The overall objective is to hold local agencies to account for their obligation to approve and actually allow development of needed housing in compliance with their ostensible planning for such housing, and to provide a substantial and meaningful bulwark against NIMBY'ism and other opposition forces that attempt to persuade local decisionmakers to disregard their statutory obligations and instead to reject or improperly condition or require reduced densities for housing projects that comply with the announced plans, policies, and standards of the local agency at the time the application is

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submitted. This is backed up with nondeferential legal standards for review of many aspects of the local agency's decisionmaking processes, and clear, forceful litigation remedies that favor the developer and proponents of housing in case of wrongful denial, delay, or conditioning of the project or challenges by project opponents to the project approvals, if granted. Although SB 330 does not eliminate one significant area of potential delay and burdensome conditions (the CEQA review process), in other respects it should make the housing development project application and approval process more predictable, and makes the process considerably more developer-friendly and local agency-restrictive than for most other types of development applications.

ENDNOTES:

[1]2019 Stats., ch. 564 (SB 330), amending various provisions of the Government Code, including Gov. Code, § 65589.5, and adding Gov. Code, §§ 66300 et seq.

[2]Gov. Code, § 65905.5, subds. (a), (c)(1), (c)(2).

[3]Gov. Code, § 65859.5, subds. (k),(l), as amended, 2019 Stats., ch. 654 (SB 330), § 3.

[4]See Gov. Code, §§ 65859.5, subd. (o)(8), 65905.5, subd. (e), 65913.10, subd. (d), 65941.5, subd. (e), 65943, subd. (g), 66301.

[5]See Gov. Code, § 65589.5, subd. (h) (defining "housing development project"), and Gov. Code, §§ 65905.5, 65913.10, 65940, 65941.1, 65943, 65950, 66300 (each of which references § 65589.5, subd. (h) for the definition of "housing development project" as used in those sections).

[6]Gov. Code, § 65589.5, subd. (h)(2).

[7]Gov. Code, § 65913.4. Note that § 65913.4 was not amended by SB 330, but rather by 2019 Stats., ch. 663 (AB 1485), § 1, and 2019 Stats, ch. 844 (SB 235), § 5.3.

[8]Gov. Code, § 65913.4, subd. (g)(2).

[9]Gov. Code, §§ 65920 to 65964 (the "Permit Streamlining Act"). See generally, 7 Miller & Starr, California Real Estate, Ch. 21, Land Use, § 21:13 (4th ed., 2019).

[10]Gov. Code, § 65950.

[11]Gov. Code, § 65589.5, subd. (o)(1).

[12]Gov. Code, § 65941.1.

[13]Gov. Code, § 65589.5, subd. (o).

[14]Gov. Code, § 65589.5, subd. (o)(4).

[15]Gov. Code, § 65941.1.

[16]Gov. Code, § 65941.1, subd. (a).

[17]Gov. Code, § 65941.1, subds. (b)(1), (b)(2).

[18]Gov. Code, § 65941.1, subd. (b)(3).

[19]Gov. Code, § 65941.1, subd. (a) lists these verbatim as follows: (1) The specific location, including parcel numbers, a legal description, and site address, if applicable. (2) The existing uses on the project site and identification of major physical alterations to the property on which the project is to be located (3) A site plan showing the location on the property, elevations showing design, color, and material, and the massing, height, and approximate square footage, of each building that is to be occupied. (4) The proposed land uses by number of units and square feet of residential and nonresidential development using the categories in the applicable zoning ordinance. (5) The proposed number of parking spaces. (6) Any proposed point sources of air or water pollutants. (7) Any species of special concern known to occur on the property. (8) Whether a portion of the property is located within any of the following: (A) A very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to § 51178. (B) Wetlands, as defined in the United States Fish and Wildlife Service Manual, Part 660 FW 2 (June 21, 1993). (C) A hazardous waste site that is listed pursuant to § 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to § 25356 of the Health and Safety Code. (D) A special flood hazard area subject to inundation by the 1 percent annual chance flood (100-year flood) as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency. (E) A delineated earthquake fault zone as determined by the State Geologist in any official maps published by the State Geologist, unless the development complies with applicable seismic protection building code standards adopted by the California Building Standards Commission under the California Building Standards Law (Part 2.5 (commencing with § 18901) of Division 13 of the Health and Safety Code), and by any local building department under Chapter 12.2 (commencing with § 8875) of Division 1 of Title 2. (F) A stream or other resource that may be subject to a streambed alteration agreement pursuant to Chapter 6 (commencing with § 1600) of Division 2 of the Fish and Game Code. (9) Any historic or cultural resources known to exist on the property. (10) The number of proposed below market rate units and their affordability levels. (11) The number of bonus units and any incentives, concessions, waivers, or parking reductions requested pursuant to § 65915. (12) Whether any approvals under the Subdivision Map Act, including, but not limited to, a parcel map, a tentative map, or a condominium map, are being requested. (13) The applicant's contact information and, if the applicant does not own the property, consent from the property owner to submit the application. (14) For a housing development project proposed to be located within the coastal zone, whether any portion of the property contains any of the following: (A) Wetlands, as defined in subdivision (b) of § 13577 of Title 14 of the California Code of Regulations. (B) Environmentally sensitive habitat areas, as defined in § 30240 of the Public Resources Code. (C) A tsunami run-up zone. (D) Use of the site for public access to or along the coast.

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(15) The number of existing residential units on the project site that will be demolished and whether each existing unit is occupied or unoccupied. (16) A site map showing a stream or other resource that may be subject to a streambed alteration agreement pursuant to Chapter 6 (commencing with § 1600) of Division 2 of the Fish and Game Code and an aerial site photograph showing existing site conditions of environmental site features that would be subject to regulations by a public agency, including creeks and wetlands. (17) The location of any recorded public easement, such as easements for storm drains, water lines, and other public rights of way.

[20]Gov. Code, § 65941.1, subd. (c).

[21]Gov. Code, § 65941.1, subd. (c).

[22]Gov. Code, § 65589.5, subd. (o)(1).

[23]Gov. Code, § 65941.1, subd. (d)(1).

[24]Gov. Code, § 65943, subds. (a), (b), (f).

[25]Gov. Code, § 65941.1, subd. (d)(3).

[26]Gov. Code, § 65589.5, subds. (f)(8), (j).

[27]Gov. Code, § 65589.5, subd. (k)(1).

[28]Gov. Code, §§ 65940, 65941, 65943.

[29]Gov. Code, § 65859.5, subd. (o)(1).

[30]Gov. Code, § 65943, subd. (a), as amended by 2019 Stats., ch. 654 (SB 330), § 9.

[31]Gov. Code, §§ 65940, 65943, subd. (a), as amended by 2019 Stats, ch. 654 (SB 330), § 9.

[32]Gov. Code, § 65943, subd. (b), as amended by 2019 Stats., ch. 654 (SB 330), § 9.

[33]Gov. Code, § 65950, subd. (c), as amended by 2019 Stats., ch. 654 (SB 330), § 11.

[34]Gov. Code, §§ 65950, subds. (a)(1), (a)(2), as amended by 2019 Stats., ch. 654 (SB 330), § 11. See also Gov. Code, § 65952, concerning timelines for approval or disapproval by a responsible agency, which also apply to housing development projects as defined by SB 330, pursuant to the definition of "development project" now contained in Gov. Code, § 65950, subd. (c), as amended by 2019 Stats., ch. 654 (SB 330), § 9.

[35]Gov. Code, § 65859.5, subd. (o). See Part VII of this article for further discussion.

[36]Gov. Code, § 65913.10, added by 2019 Stats., ch. 654 (S.B.330), § 5.

[37]Gov. Code, § 65905.5, subd. (a).

[38]Gov. Code, § 65905.5, subd. (c)(2).

[39]Gov. Code, § 65905.5, subd. (c)(2).

[40]Gov. Code, § 65905.5, subd. (b)(2).

[41]Gov. Code, § 65905.5, subd. (b)(2).

[42]Gov. Code, § 65905.5, subd. (c)(1).

[43]See Gov. Code, § 65589.5, subds. (k), (o), as amended by 2019 Stats., ch. 654 (SB 330), § 3.

[44]Gov. Code, § 65589.5, subd. (j).

[45]Gov. Code, § 65589.5, subd. (h)(5).

[46]Gov. Code, § 65589.5, subd. (h)(8).

[47]Gov. Code, § 65589.5, subd. (j)(1).

[48]Gov. Code, § 65589.5, subd. (j)(1).

[49]Gov. Code, § 65589.5, subd. (i).

[50]Gov. Code, § 65589.5, subd. (h)(1).

[51]Gov. Code, § 65589.5, subd. (j)(4).

[52]Gov. Code, § 65589.5, subd. (j)(2)(A).

[53]Gov. Code, § 65589.5, subd. (j)(2)(A)

[54]Gov. Code, § 65589.5, subd. (j)(2)(B).

[55]Gov. Code, § 65589.5, subd. (j)(2)(A).

[56]Gov. Code, § 65589.5, subd. (g)(9).

[57]Gov. Code, § 65589.5, subds. (j)(1), (j)(2).

[58]Gov. Code, § 65589.5, subd. (g)(5).

[59]Gov. Code, § 65589.5, subd. (o)(1).

[60]Gov. Code, § 65589.5, subd. (o)(2)(E).

[61]Gov. Code, § 65589.5, subd. (o)(3).

[62]Gov. Code, § 65589.5, subds. (o)(2)(C), (o)(6).

[63]Gov. Code, § 65589.5, subd. (o)(2)(B), referencing Gov. Code, § 65589.5, subd. (j)(1)(A).

[64]Gov. Code, § 65589.5, subd. (o)(2)(D).

[65]Gov. Code, § 65589.5, subd. (o)(2(A).

[66]Gov. Code, § 65589.5, subd. (o)(7).

[67]Gov. Code, § 65589.5, subd. (k)(1)(A)(III)(ia), (l).

[68]Gov. Code, § 65589.5, subd. (k)(1)(A)(ii).

[69]Gov. Code, § 65589.5, subd. (k)(1)(B).

[70]Gov. Code, § 65589.5, subd. (l). See also Gov. Code, § 65589.5, subd. (m), relative to statutes of limitation, preparation of the record, and appeal of decisions by the court in these matters.

[71]Gov. Code, § 65589.5, subd. (o)(5).

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[72]Gov. Code, § 65589.6.

[73]Gov. Code, § 65589.5, subd. (k)(1)(c).

[74]Gov. Code, § 65589.5, subd. (m).

[75]See Gov. Code, § 65589.5, subd. (g).

[76]Gov. Code, § 66300, enacted by 2019 Stats., ch. 654 (SB 330), § 13.

[77]Gov. Code, § 66300, subd. (b).

[78]See Gov. Code, § 66300, subd. (a)(3), defining "affected city" and "affected county" as including the electorate exercising its local initiative or referendum power, "whether that power is derived from the California constitution, statute, or the charter or ordinances of the affected county or city."

[79]Gov. Code, § 66300, subds. (a)(1), (a)(2).

[80]Gov. Code, § 66300, subd. (a)(1)(B).

[81]Gov. Codeh, § 66300, subd. (b)(1)(e).

[82]Gov. Code, § 66300, subd. (d).

[83]Gov. Code, § 66300, subds. (f), (j).

[84]Gov. Code, § 66301.

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