

What is the New Role of Planning Commissioners In Light of Recent Streamlining Housing Laws?



League of California Cities
Planning Commissioners Academy
March 7, 2024

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Presentation Overview

- Introduction: State Housing Policy
- The RHNA Process and Housing Elements
- Ministerial v. Discretionary Approvals
- Not So Discretionary
 - Housing Accountability Act
 - Density Bonus
- Ministerial Approvals
 - SB 35
 - YIGBY (SB 4)
 - SB 9
 - AB 2011
 - AB 684
- SB 330
- Builder's Remedy
- What's Left for Planning Commissioners When They Review Housing Projects?

State Housing Policy

Making It Hard to Deny Housing Projects

“The Legislature’s intent in enacting this section in 1982 and in expanding its provisions since then was to significantly increase the approval & construction of new housing for all economic segments of California’s communities by meaningfully and effectively **curbing the capability of local governments to deny, reduce the density of, or render infeasible housing development projects.** This intent has not been fulfilled.”

Over 100, Often Poorly Drafted Laws

- Dense, prolix language
- Very difficult to understand
- Example:
 - Two meanings of “housing development project”: sometimes includes single-family homes and ADUs, sometimes not

RHNA and Housing Elements

Sixth Cycle Regional Housing Needs Assessment

- RHNA MUCH higher this cycle (2021 in SANDAG, SCAG, SACOG regions; 2023 in ABAG region)
- Examples:
 - SCAG: +226%
 - SACOG: +46%
 - SANDAG: +6%
 - SLOCOG: + 164%
 - ABAG: +150%
- Communities required to upzone MANY more sites

Sixth Cycle Housing Elements

- Much more difficult to receive approval from HCD.
- Emphasis on fair housing and equity.
- Much more scrutiny of site analysis,
 - Third party advocates.
- More scrutiny in general.

Ministerial v. Discretionary

Discretionary v. Ministerial Decisions

Prior to 2017 –

Planning Commission had greater role in reviewing & making decisions on housing projects. Much more discretion to modify projects. Almost all projects needed CEQA review.

Post 2017 –

Planning Commissioner's role becomes restrictive & even discretionary decisions aren't so discretionary.

- Housing Accountability Act – Adopted in 1982; strengthened in 2017,
 - Emphasis on “objective standards”
- SB 330 – Adopted in 2019:
 - Created Housing Crisis Act,
 - Preliminary Applications,
 - 5 Hearing rule.



Discretionary v. Ministerial Decisions

Post 2017 –

More decisions are ministerial (not subject to CEQA or public hearings).

- SB 35 – Adopted in 2017: streamlined approval.
- SB 9 – Adopted in 2021: lot splits in single-family zones.
- AB 2011 – Adopted in 2022: housing in commercial areas.
- SB 4 (YIGBY) – Adopted in 2023: housing on religious/university sites.
- AB 684 – Adopted in 2023: approval of subdivision maps for 10 or fewer units on 5 acres or less.



Discretionary

But - No Longer Very Discretionary

Housing Accountability Act: Key Provisions

Denial only if:

- **Project doesn't comply with "objective standards" OR**
- **Results in "specific adverse impact" on public health & safety.**
 - A "significant, quantifiable, direct, and unavoidable impact, based on **objective, identified, written public health or safety standards**" that can't be mitigated.

What Is an “Objective Standard”?

Involves **no personal or subjective judgment** by a public official and verifiable by referring to an **external benchmark**.

OBJECTIVE	SUBJECTIVE
DENSITY REQUIREMENTS	REFLECT THE LOOK AND FEEL OF THE COMMUNITY
HEIGHT LIMITS	SITE IS NOT PHYSICALLY SUITABLE FOR THE PROPOSED USE
LOT COVERAGE	MUST BE COMPATIBLE WITH ADJACENT USES
SETBACKS	
FAR REQUIREMENTS	

What Is NOT an “Objective Standard”?

“If height varies by more than one story between buildings, a transition or step in height is necessary.”



Why Isn't This Standard "Objective"?

- Could be a “transition” of trees and a trellis instead of a setback.
- Not clear how far upper floors must step back.
- Not clear how far along building the step back must run.
- Not clear how many floors must step back.

“Deemed Consistent”

- Formal application subject to Permit Streamlining Act,
 - Must review for completeness within 30 days of **each** submittal, or “deemed complete”.
- Once complete, staff must notify applicant in short time (30 or 60 days) if there are any “inconsistencies” – or “deemed consistent” with all Town standards.
 - If “deemed consistent,” can probably not be denied for inconsistency.

Alleged Inconsistencies

- No rezoning required if general plan is “inconsistent” with zoning.
 - Once project shown as suitable for lower or moderate income housing in housing element, housing element densities probably apply even if zoning has not been adopted.
 - Example: Zoning has minimum density, GP does not.

Density Bonus Law

- Eligible project: 5% to 100% affordable housing
- Eligible projects entitled to receive:
 - A **density bonus** [20 – 100%, or unlimited];
 - 1 – 5 “**incentives / concessions**” [reduce costs],
 - **Unlimited waivers** of development standards,
 - Reduced **parking** requirements.
- Density Bonus project = consistent with city standards.

Density Bonus Law

- Entitled to consider the HIGHEST density as “base density”;
 - Example: General Plan allows 20 to 60 units per acre. Zoning allows 20 to 40 units per acre. “Base density” is 60 units per acre. Could receive 100% density bonus and achieve 120 units per acre.

Density Bonus Law

- Inclusionary units can qualify project for density bonus (*Latino Unidos v. County of Napa*)
- Example:
 - City requires 10% to 20% lower or moderate income units in projects with 5 or more units.
 - **All** of these projects are eligible for a density bonus (plus parking reductions, one or more concessions, and unlimited waivers).

Ministerial Approvals

SB 35 Projects (“Streamlined Review Process”)

Qualifying Projects:

- Multifamily housing development with either 10% or 50% Lower/Moderate income,
- 2/3 residential square footage,
- General plan or zoning allows residential or mixed use,
- No housing occupied by tenants within last 10 years,
- More than 10 units = prevailing wages,
- Consistent with objective standards; but can request density bonus waivers if not.

SB 35 Projects (“Streamlined Review Process”)

- Consistency review in 60 – 90 days after submittal.
- Design review and decision in 90 – 180 Days.
- Can only apply standard conditions.
- Planning Director’s decision is determinative.
- No CEQA.

'By Right' Approvals

- Applies to:
 - Certain housing element sites designated for lower income housing if project has 20% lower income units.
 - Certain supportive housing developments.
 - Low barrier navigation centers.
- No CEQA review.
- Only objective design review; may impose conditions.
- No accelerated timelines.

YIGBY (SB 4)



- YIGBY (“Yes in God’s Backyard”)
- Land owned by religious organizations and nonprofit colleges to provide affordable housing.
- Streamlined, ministerial approvals even if inconsistencies with General Plan and zoning.
- 100% of units must be affordable:
 - 80% Low Income,
 - 20% moderate.
- Density Guidance: 40 du/ac for commercially zoned property. Housing element “default density” (usually 20 – 30 units/acre) on residentially zoned sites.
- Must pay prevailing wages.

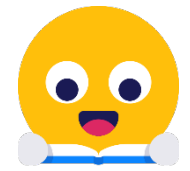
AB 2011



- Allows multifamily residential development in infill areas zoned for office, retail and parking.
- Streamlined, ministerial approvals even if inconsistent with general plan and zoning.
- Must generally meet SB 35 environmental standards.
- 100% BMR project and if located in “commercial corridor” must contain 15% BMR units.
- Subject to prevailing wages.

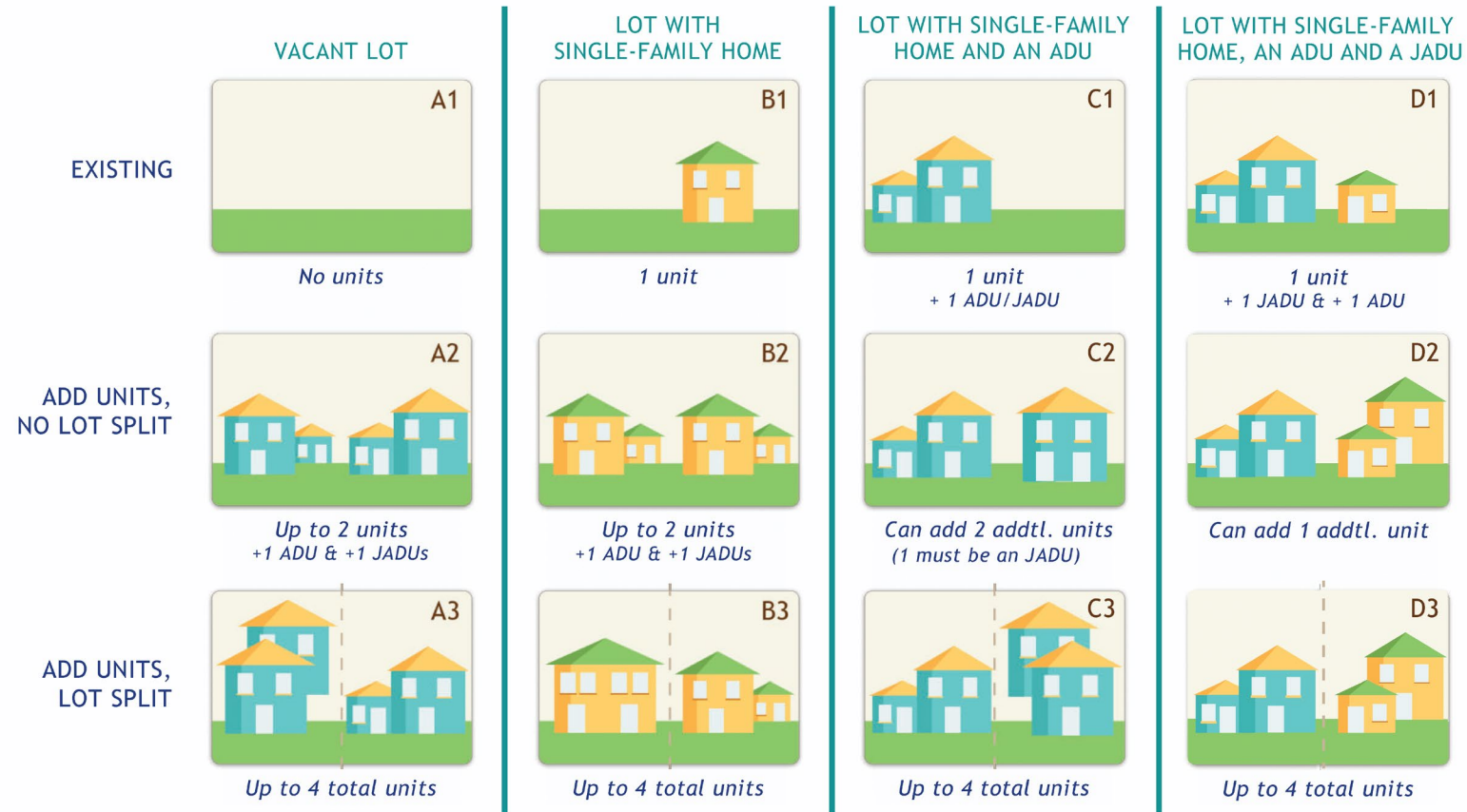


- Allows additional units with and without a lot split on a single family parcel.
- Without lot split on vacant lot,
 - Add 2 primary units and 2 ADUs.
- With lot split on vacant lot,
 - Add 4 total units.
- Must adhere to objective zoning and design standards.



WHAT IT CAN MEAN FOR DEVELOPMENT OF NEW DWELLING UNITS

Illustrations are based on a preliminary analysis of the law. Details are subject to change and are for informational purposes only.



For parcels with non-conforming buildings please check with Department of Planning & Development on the requirements for SB 9 to be utilized for building new units.

USING SB 9 WITHOUT A LOT SPLIT:

- Without a lot split, two primary units and up to 2 new ADUs/JADUs can be built.

USING SB 9 WITH A LOT SPLIT:

- SB 9 does not require jurisdictions to approve more than 4 units total, including any ADUs/JADUs.
- Future subdivision prohibited.



SINGLE-UNIT DEVELOPMENTS

SB 9 can be used to develop single units - but projects must comply with all SB 9 requirements.

More Ministerial Approval Legislation



AB 684:

- Allows for ministerial approval of up to 10 unit housing project on small sites (>5 ac).
- Local agencies precluded from applying certain setback, parking, floor area requirements.

Implications for Planning Commissioners

- Planning Commissioners may never review certain housing projects; may be approved wholly at staff level.
- Local agencies may be required to accept and approve plans that conform with state law:
 - Even if inconsistent with community's adopted policies,
 - Regardless of community concerns.

SB 330

Preliminary Applications (“SB 330 Applications”)

“**Preliminary application**” freezes development standards on date required info submitted.

- Agency not required to provide affirmative determination regarding completeness of PA.
- But project must meet these timelines:
 - Project application must be filed within 180 days,
 - Applicant must complete application within 90 days of receiving incomplete letter.
- Can change project by up to 20% of square footage or number of units or invoking density bonus and still rely on initial preliminary application.

Five-Meeting Limit

Project limited to 5 public meetings organized by local agency

Exceptions:

- Meetings held before application is complete.
- Project not consistent with objective standards.
 - **Builder's Remedy projects?**
- Projects that require legislative approvals.
- Additional meetings required by CEQA (such as a scoping hearing).
- Meetings not conducted by the local agency.

Builder's Remedy

Builder's Remedy



Government Code 65589.5 (HAA)

- Local agency without Housing Element substantially compliant with state law cannot deny, or condition to infeasibility, qualifying “housing development projects” based on lack of conformance with local plans.
- Proposed projects can be non-compliant with general plan and zoning.
- Applicable to affordable residential, mixed use and supportive housing projects with 20% lower income housing.



Builder's Remedy

Grounds to deny project:

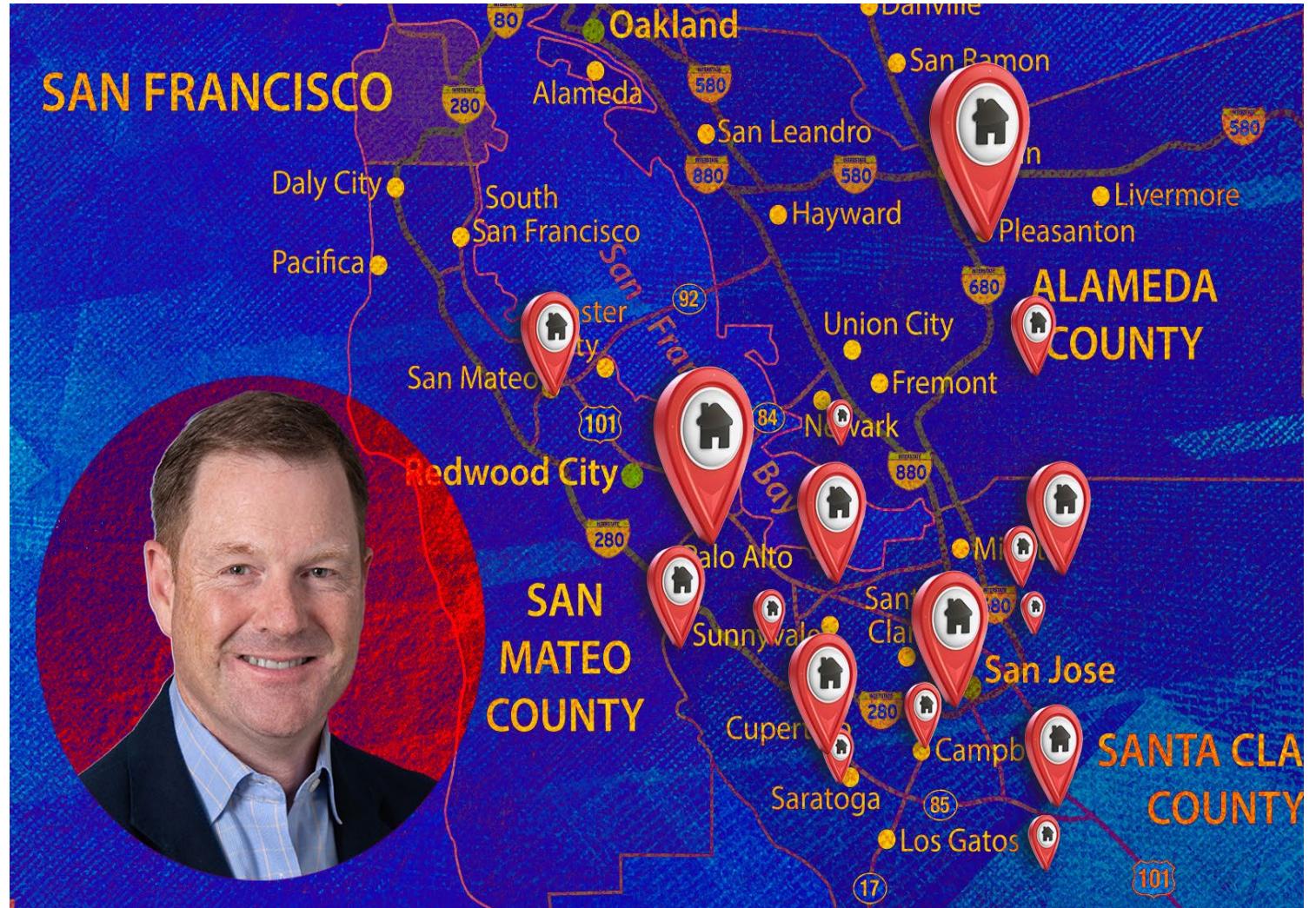
- Specific adverse impact on public health or safety that can't be mitigated without rendering project unaffordable.
- Inconsistent with state or federal laws.  
- Project is on land zoned for agricultural or resource management & is surrounded by two sides with agricultural or resource management lands or does not have an adequate waste or wastewater capacity to serve project.

Builder's Remedy (cont.)

Application Statistics:

34 applications in 11 Bay Area cities and counties = 6,400 [potential] units:

- 15 in San Jose
- 5 in Mountain View
- 3 in Palo Alto
- 3 in Los Altos Hills
- 2 in Brentwood
- 1 each in Menlo Park/San Mateo/Pleasanton/Sonoma/Fairfax/Marin County



Preliminary Applications & Builder's Remedy

Issue: Does the preliminary application freeze the adequacy of the housing element at the time the application was submitted?

- Not clear if housing element was inadequate when preliminary application submitted, but adequate when project reviewed.
- Is element adequate when adopted or when HCD certifies?
 - HCD has opined that adequacy is frozen and HCD certification required.
 - But HCD's determinations are only its opinions, not law.

What's Left for Planning Commissioners?

Thank You!

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