



(Not) Burning Down the House

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I. Introduction

In the dynamic landscape of urban planning and sustainability, local governments face a delicate balancing act. On one front, there is a pressing need to address housing shortages through state-mandated policies aimed at increasing available housing. Simultaneously, local governments contend with conflicting policies aimed at both mitigating fire risks for housing and preserving environmental integrity. We will delve into the interplay between these seemingly conflicting objectives, exploring laws designed to boost housing availability, policies aimed at mitigating fire risks, and the complex task of resolving the tensions between the two. Through an analysis of the applicable laws and the proposal of practical tools, we aim to unravel these tensions and shed light on navigating the nuanced complexities of these competing policies.

II. Topics

- (A) Laws Increasing Available Housing
- (B) Policies to Reduce Fire Risk
- (C) Resolution of the Two

III. Laws Increasing Housing

(A) Builder's Remedy Housing Accountability Act

Government Code § 65589.5

- To Deny an Eligible Housing Development Project or Emergency Shelter, the City must make one of five findings:
 - 1. Met or Exceeded regional housing need allocation (RHNA)
 - 2. Specific Adverse Impact on Public Health and Safety based on Objective, Written Public Health, or Safety Standards
 - 3. Required to Meet State or Federal Law
 - 4. On Land Zoned for Agriculture or Resource Prevention or There are Not Adequate Water or Sewage Facilities
 - 5. Inconsistent with Both the Zoning and the General Plan
 - **But, a City cannot make this finding if it has not adopted a Housing Element in Substantial Compliance with State Law**
- If a City has not adopted a housing element in substantial compliance with state law, developers may propose eligible housing development projects that do not

comply with either the zoning or the general plan. The term “Builder’s Remedy” is used to describe the situation where a local agency may be required to approve an eligible housing development project because it cannot make one of the other four findings.

- However, CEQA is still required unless the project is otherwise exempt.
- Note – Separately, Government Code § 65589.5 (j) is more broadly applicable and prevents agencies from denying most housing projects that comply with objective standards, with few exceptions.

(B) Accessory Dwelling Units (ADU)

Government Code §§ 66310 *et seq.*

- A City may, by Ordinance, provide for the creation of ADU’s in Areas Zoned for Single Family or Multifamily dwelling residential use. Among other things:
 - Designate the Areas Where ADU’s are Permitted based on adequacy of water and sewer service and the impact of accessory dwelling units on traffic flow and public safety.
 - Impose objective standards on ADU’s that include, but are not limited to, parking, height, setback, landscape, architectural review, maximum size of a unit, and prevent adverse impacts on property listed in the California Register of Historical Resources. This shall not include requirements on minimum lot size.
 - New Law (AB 976) prohibits the imposition of an owner-occupant requirement, but the City may require that the property be used for rentals of terms 30 days or longer.
- Permits for ADU’s are subject to ministerial approval, without discretionary review.
- Streamlined Approval Process
- If the City has not adopted such an Ordinance, then applications for permits for ADU’s will still be subject to a ministerial approval process.
- Without an ordinance, it is not clear what objective standards would be used to evaluate the application on a ministerial basis.

(C) Accessory Dwelling Units

AB 1332 – Government Code § 65852.27

- By Jan. 1, 2025, local agencies must develop a program for the preapproval of ADU plans whereby the local agency accepts ADU plan submissions for preapproval.
- Once an ADU plan is approved, local agencies are required to either approve or deny an ADU application utilizing a preapproved ADU plan within 30 days.
- Local agencies must maintain a website page with preapproved ADU plans and the contact information of companies offering preapproved ADU plans.
- AB 1332 specifies that ADU plans approved by the local agency or "other agencies within the state" (i.e., HCD) can be admitted into the local preapproval program.
- The local agency shall approve or deny the application for preapproval pursuant to the standards established in Government Code §§ 66310 et seq.

(D) SB 9 (Duplexes & Urban Lot Splits)

- Overrides Existing Density Limits in Single-Family Zones
- Waives any Discretionary Review & Public Hearings for:
 - Building two homes on a parcel in a single-family zone (“Single Lot Duplex”) (Government Code § 65852.21);
 - Subdividing a lot into two that can be smaller than required minimum size (“Urban Lot Split”) (Government Code § 66411.7)
- Impose Objective Standards
 - May impose objective zoning standards, objective subdivision standards, and objective design review standards, within certain limits.
- Findings of Denial
 - The proposed housing development would have a specific, adverse impact, as defined, upon public health and safety or the physical environment and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.
 - “Specific, adverse impact” means 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.

(E) SB 35 & SB 423

Government Code § 65913.4

- SB 35 provides for a streamlined ministerial approval process for qualifying housing development projects in local jurisdictions that have not made sufficient progress towards their Regional Housing Needs Allocation.
- SB 423 (New Law) subjects local governments to this streamlined, ministerial approval process if they fail to adopt a compliant housing element as determined by the Department of Housing & Community Development, as specified.
- To qualify for this ministerial process, projects must comply with a locality's "objective" standards, meet a long list of qualifying criteria designed to capture "infill" sites, commit to paying "prevailing wage" rates for construction labor, and meet significant affordability requirements.
- Authorizes Development in the Coastal Zone
- Revises the standard that prohibits a multifamily housing development from being subject to the streamlined, ministerial approval process if the development is located in a coastal zone to apply only if the development that is located in the coastal zone meets any one of specified conditions.
- Requires a development that is located in a coastal zone that satisfies the specified conditions to obtain a coastal development permit. Requires a public agency with coastal development permitting authority to approve a coastal development permit if it determines that the development is consistent with all objective standards of the local government's certified local coastal program, as specified. Provides that the changes made apply in a coastal zone on or after January 1, 2025.
- Clarifies Development in Very High Fire Hazard Zones and the State Responsibility Area. At minimum:
 - Development Must Meet Defensible Space Requirements (Public Resources Code § 4291 or Government Code § 51182, as applicable)
 - Development Must Meet Minimum Fire Safe Regulations (Public Resources Code § 4290)

- Development Must Meet Home Hardening Requirements (Chapter 7A of the California Building Code)
- Local government may establish objective zoning standards, objective subdivision standards, and objective design review standards applicable to such applications, as specified.
- Limits review conducted by a local elected body.
- Requires approval if a local government’s planning director or equivalent position determines the development is consistent with the objective planning standards.
- SB 35 previously authorized the local government’s planning commission or any equivalent board or commission responsible for review and approval of development projects, or the City Council or Board of Supervisors, as appropriate, to conduct any design review or public oversight of the development.
 - SB 423 removed the above-described authorization to conduct public oversight of the development and would only authorize design review to be conducted by the local government’s planning commission or any equivalent board or commission responsible for design review.
- Limits review conducted by a local elected body.
- Cannot require any of the following prior to approving the development:
 - (1) Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development.
 - (2)(A) Compliance with any standards necessary to receive a postentitlement permit.
 - (2)(B) This paragraph does not prohibit a local agency from requiring compliance with any standards necessary to receive a postentitlement permit after a permit has been issued pursuant to SB 423.

(F) AB 2011

Affordable Housing & High Road Jobs Act

Government Code §§ 65912.100 et seq.

- Creates ministerial approval process for multifamily housing developments on sites within a zone where office, retail or parking are the principally permitted use.
- The law provides for slightly different qualifying criteria depending upon whether the project is (1) for 100-percent affordable projects or (2) for mixed-income projects located in "commercial corridors."
- Projects must pay prevailing wages to construction workers, among other labor standards.
- Authorizes the creation of objective zoning standards, objective subdivision standards, and objective design review standards, as specified.
- Local Agency may exempt parcels as specified.

(G) SB 6

Middle Class Housing Act of 2022

Government Code § 65852.24

- Also permits residential development on sites currently zoned and designated for commercial or retail use.
- Normal approval process but does not require a rezoning.
- Projects meeting SB 6 criteria may invoke the Housing Accountability Act if they meet all other criteria.
- A project proposed under SB 6 may be either a 100-percent residential project or a mixed-use project where at least 50 percent of the square footage is dedicated to residential uses.
- SB 6 projects are not exempt from CEQA but need not provide any affordable housing.
- SB 6 projects are required to pay prevailing wages and utilize a "skilled and trained workforce."
- Local Agency may exempt parcels from this statute if it makes certain findings, as specified.

- The development shall be subject to local zoning, parking, design, and other ordinances, local code requirements and applicable procedures applicable to the processing and permitting of a housing development in a zone that allows for the housing with the density allowed by SB 6.

(H) SB 684

Government Code § 66499.41

- Requires a local agency to ministerially consider, without discretionary review or a hearing, a parcel map or a tentative and final map for a housing development project that meets specified requirements.
- Requires the proposed subdivision to result in 10 or fewer parcels and the housing development project to, among other things, consist of 10 or fewer residential units, meet certain minimum parcel size and density requirements, and be located on a lot zoned for multifamily residential development that is no larger than 5 acres and is substantially surrounded by qualified urban uses.

(I) SB 684

Government Code § 65852.28

- Requires a local agency to ministerially consider, without discretionary review or a hearing, an application for a housing development project on a lot that is subdivided pursuant to the provisions of SB 684.
- Authorizes a local agency to impose on the housing development objective zoning standards, objective subdivision standards, or objective design standards that are related to a housing development or to the design or improvement of a parcel, as specified.
- Prohibits a local agency from imposing on the housing development certain standards, including those that physically preclude the development of a project built to specified densities, impose a requirement that applies to a project solely or partially on the basis that the subdivision or housing development receives approval pursuant to the bill's provisions, or impose certain requirements related to parking, setbacks, or floor area ratios, as specified.

(J) SB 4

Government Code § 65913.16

- Creates a "by right," CEQA-exempt, time-limited (90-180 day) approval process closely modeled on SB 35 of 2017 and AB 2011 of 2022 for affordable housing projects (including qualifying ground-floor commercial, childcare center and community center uses) on land owned by religious organizations and higher education institutions.
- Such a project can be entitled to approval even if the project is inconsistent with applicable local general plan and zoning requirements.
- A project is entitled to a height of one story above applicable local requirements and to specified minimum residential densities of between 10-40 dwelling units per acre, depending upon the project's location.
- Local agencies may establish objective development standards consistent with this statute.
- Design review may be conducted by the Planning Commission or the Board of Supervisors. That design review shall be objective and be strictly focused on assessing compliance with criteria required for streamlined, ministerial review of projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submittal of the development to the local government and shall be broadly applicable to developments within the jurisdiction.

IV. Policies to Reduce Fire Risk

(A) General Authority

- Public Resources Code § 4117:
 - Any county, city, or district may adopt ordinances, rules, or regulations to provide fire prevention restrictions or regulations that are necessary to meet local conditions of weather, vegetation, or other fire hazards. Such ordinances, rules, or regulations may be more restrictive than state statutes in order to meet local fire hazard conditions.

(B) Fire Hazard Severity Zone Maps

- Government Code §§ 51175 et seq.
- A local agency shall designate, by ordinance, moderate, high, and very high fire hazard severity zones in its jurisdiction within 120 days of receiving recommendations from the State Fire Marshal.
- A local agency can include areas not identified by the State Fire Marshal following findings supported by substantial evidence that such designations are necessary.
- A local agency shall not decrease the level of fire hazard severity zones identified by the State Fire Marshal.

(C) Significance for Development: Defensible Space

- In areas within a Very High Fire Hazard Severity Zone:
 - 1. Maintain Defensible Space of 100 feet from each side and from the front and rear of the structure, but not beyond the property line. Government Code § 51182.
 - 2. Local Ordinance may require greater distances.
 - 3. Local Ordinance may also require fuel modification beyond the property line in order to maintain 100 feet of defensible space from a structure.

(D) Significance for Development: State Minimum Fire Safe Regulations

- In areas within a Very High Fire Hazard Severity Zone:
 - 1. New Development Must Comply with the State's Minimum Fire Safe Regulations. Public Resources Code § 4290; 14 CCR §§ 1270 *et seq.*
 - 2. State's Minimum Fire Safe Regulations provide for emergency access; signing and building numbering; private water supply reserves for emergency fire use; vegetation modification, fuel breaks, greenbelts, and measures to preserve undeveloped ridgelines.
- Building Setback Requirements (14 CCR § 1276.01)
 - All parcels shall provide a minimum 30-foot setback for all buildings from all property lines and/or the center of a road, except as follows:

- A reduction in the minimum setback requirement shall be based upon practical reasons, which may include, but are not limited to, parcel dimensions or size, topographic limitations, development density requirements or other development patterns that promote low-carbon emission outcomes, sensitive habitat, or other site constraints, and shall provide for an alternative method to reduce Structure-to-Structure ignition.
- What types of alternative methods?
 - (1) non-combustible block walls or fences; or
 - (2) non-combustible material extending five (5) feet horizontally from the furthest extent of the Building; or
 - (3) hardscape landscaping; or
 - (4) a reduction of exposed windows on the side of the Structure with a less than thirty (30) foot setback; or
 - (5) the most protective requirements in the California Building Code, California Code of Regulations Title 24, Part 2, Chapter 7A, as required by the Local Jurisdiction.
- Fuel Break Requirements for New Development (14 CCR § 1276.03)
 - When Building construction meets the following criteria, the Local Jurisdiction shall determine the need and location for fuel breaks in consultation with the local Fire Authority:
 - a. Approval of three or more new parcels, excluding lot line adjustments.
 - b. Zoning Application to increase zoning intensity or density; or
 - c. Use Permit Application increasing use intensity or density.
- Strategic Ridgelines (14 CCR § 1276.02)
 - The Local Jurisdiction shall identify Strategic Ridgelines, if any, to reduce fire risk and improve fire protection through an assessment of certain enumerated factors.
 - Preservation of Undeveloped Strategic Ridgelines shall be required.
 - New Development On Strategic Ridgelines is Restricted.

- 1. New Residential Units are prohibited within or at the top of drainages or other topographic features common to Ridgelines that act as chimneys to funnel convective heat from Wildfires.
- 2. Nothing in this regulation shall be construed to alter the extent to which utility infrastructure, including but not limited to wireless telecommunications facilities, or Storage Group S or Utility and Miscellaneous Group U Structures, may be constructed on Undeveloped Ridgelines.
- 3. Local Jurisdictions may approve Buildings on Strategic Ridgelines where Development activities such as mass grading will significantly alter the topography that results in the elimination of Ridgeline fire risks.

(E) Significance for Development: Enhanced Building Standards

Chapter 7A of the State Building Code

- Health & Safety Code § 13108.5
- Fire Protection building standards for roofs, exterior walls, structure projections (porches, decks, balconies, and eaves) and structure openings (attic and eave vents and windows)
 - 1. Applicable in Very High Fire Hazard Zones and Other areas Designated by the Local Agency Based on Findings Supported by Substantial Evidence that the Requirements are Necessary for Effective Fire Protection.
 - 2. Also applicable to Buildings Located in Urban Wildland Interface Communities, as defined, unless a local jurisdiction finds they are not necessary for effective fire protection in that area.
 - 3. “Urban wildland interface community” means a community listed in “Communities at Risk from Wild Fires,” produced by the California Department of Forestry and Fire Protection, Fire and Resource Assessment Program, pursuant to the National Fire Plan, federal Fiscal Year 2001 Department of the Interior and Related Agencies Appropriations Act (Public Law 106-291).

(F) California Attorney General’s guidance for evaluating wildfire impacts under CEQA:

- <https://oag.ca.gov/system/files/attachments/press-docs/Wildfire%20guidance%20final%20%283%29.pdf>. - among other things, suggests that project-level CEQA documents should include evacuation and wildfire modeling studies to quantify the project’s impacts, but offers no specific guidance on how to do this – it’s often not practical.

V. Resolution of the Competing Policies - Can We Sue Them?

(A) State Preemption Over Local Land Use

- *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139 (2006)
 - Land Use Regulation is a function of a local government under the police power contained in California Constitution, Article XI, section 7.
 - When enacting state zoning laws, the State has declared its intention to provide only a minimum of limitation so counties and cities may exercise the maximum degree of control over local zoning matters. Government Code 65800.
 - Absent a clear indication of preemptive intent from the Legislature, California courts will presume that local land use regulation is not preempted by state statute.
- *Chevron U.S.A. Inc. v. County of Monterey*, 15 Cal. 5th 135 (2023)
 - Local ordinance banning land uses in support of new oil and gas wells conflicted with state statute granting state oil and gas supervisor authority to supervise drilling operations.
 - Local Ordinance was preempted.

VI. Resolution of the Competing Policies – Use Tools Provided

(A) Objective Criteria in Implementing Ordinances

- **Establish Objective Standards Where Authorized, Focusing on Fire Protection**
 - **Housing Accountability Act**
 - Specific Adverse Impact on Public Health and Safety based on Objective, Written Public Health or Safety Standards, which can include fire protection (Government Code § 65589.5(d)(2)).

- Establish objective development standards appropriate to, and consistent with, meeting the regional housing need and/or the need for emergency shelter. (Government Code § 65589.5(f)).
- **Accessory Dwelling Units Ordinance**
 - Designate Areas Where ADU's may be permitted based on the adequacy of water and sewer service, traffic flow, and public safety, including fire concerns. (Government Code § 66314(a)).
 - Impose objective standards on ADU's to address fire concerns (Government Code § 66314(b)).
 - In residential or mixed use zones, the side and rear setbacks must be sufficient for fire and safety (Government Code § 66323(a)1(C)).
 - Consider adopting a fire or life protection ordinance relating to fire and life protection requirements within a single family residence that contains a junior accessory dwelling unit so long as the ordinance applies uniformly to all single-family residences within the zone regardless of whether the single-family residence includes a junior accessory dwelling or not (Government Code § 66337).
- **SB 9**
 - Establish Objective Standards to address fire concerns that do not conflict with the statute (Government Code § 65852.21(b)(1); Government Code § 66411.7(c)(1))
 - Include policies and standards relating to public health and safety impacts.
 - Implementing Ordinance Not Subject to CEQA (Government Code § 65852.21(j); Government Code § 66411.7(n))
- **SB 35 & 423**
 - Establish objective zoning, subdivision, and design review standards that address fire concerns (Government Code § 65913.4(a)(5))

- May be embodied in alternative objective land use specifications, and may include housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances.
- **AB 2011**
 - Establish objective zoning, subdivision, and design review standards that address fire concerns, consistent with the statutes (Government Code § 65912.113(f); Government Code § 65912.123(j))
 - Determine if parcels should be exempt (Government Code § 65912.114(i); Government Code § 65912.124(i)).
- **SB 684**
 - Establish objective zoning, subdivision, and design standards that address fire concerns, consistent with the statutes. (Government Code § 65852.28(b); Government Code § 66499.41(d))
 - Implementing Ordinance Not Subject to CEQA (Government Code § 65852.28(e); Government Code 66499.41(i))
- **SB 4**
 - Establish objective development standards that address fire concerns consistent with the statute (Government Code § 65913.16(c)(10))

(B) Types of Objective Criteria Focusing on Fire Protection

- Establish Very High Fire Hazard Zones Supported by Substantial Evidence
- Defensible Space
- Setbacks
- Fuel Breaks
- Limit New Development on Strategic Ridgelines
- Enhanced Building Standards