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## SENATE COMMITTEE ON GOVERNANCE AND FINANCE

Senator Mike McGuire, Chair  
2021 - 2022 Regular

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**Bill No:** AB 1174  
**Author:** Grayson  
**Version:** 6/23/21  
**Consultant:** Favorini-Csorba

**Hearing Date:** 7/8/21  
**Tax Levy:** No  
**Fiscal:** Yes

### ***PLANNING AND ZONING: HOUSING: DEVELOPMENT APPLICATION MODIFICATIONS, APPROVALS, AND SUBSEQUENT PERMITS***

*Makes numerous changes to the streamlined housing development approval process established by SB 35 (Wiener, 2017).*

#### **Background**

Planning and approving new housing is mainly a local responsibility. The California Constitution allows a city or county to “make and enforce within its limits, all local, police, sanitary and other ordinances and regulations not in conflict with general laws.” It is from this fundamental power (commonly called the police power) that cities and counties derive their authority to regulate behavior to preserve the health, safety, and welfare of the public—including land use authority.

**Planning and Zoning Law.** State law provides additional powers and duties for cities and counties regarding land use. The Planning and Zoning Law requires every county and city to adopt a general plan that sets out planned uses for all of the area covered by the plan. A general plan must include specified mandatory “elements,” including a housing element that establishes the locations and densities of housing, among other requirements. Cities’ and counties’ major land use decisions—including most zoning ordinances and other aspects of development permitting—must be consistent with their general plans. The Planning and Zoning Law also establishes a planning agency in each city and county, which may be a separate planning commission, administrative body, or the legislative body of the city or county itself. Cities and counties must provide a path to appeal a decision to the planning commission and/or the city council or county board of supervisors.

**Zoning and approval processes.** Local governments use their police power to enact zoning ordinances that shape development, such as setting maximum heights and densities for housing units, minimum numbers of required parking spaces, setbacks to preserve privacy, lot coverage ratios to increase open space, and others. These ordinances can also include conditions on development to address aesthetics, community impacts, or other particular site-specific considerations.

Local governments have broad authority to define the specific approval processes needed to satisfy these considerations. Some housing projects can be permitted by city or county planning staff “ministerially” or without further approval from elected officials, but most large housing projects require “discretionary” approvals from local governments, such as a conditional use

permit or a change in zoning laws. This process requires hearings by the local planning commission and public notice and may require additional approvals.

**SB 35 (Wiener, 2017).** In 2017, the Legislature enacted a substantial package of legislation aimed at addressing the state's housing crisis. Among other legislation, the Legislature enacted SB 35 (Wiener) to provide for a streamlined, ministerial process for approving housing developments that are in compliance with the applicable objective local planning standards—including the general plan, zoning ordinances, and objective design review standards. SB 35 was intended to enable developments that face local opposition, but are consistent with local objective development standards, to be constructed. To be eligible for streamlining under SB 35, a specified percentage of the total housing units in the development must be affordable to lower-income households (those under 80 percent of area median income), as follows:

- 10 percent, if the locality has not issued building permits for enough above moderate-income—greater than 120 percent of area median income (AMI)—units to meet their RHNA requirement. If a project is located within the nine-county Bay Area, the project may instead include 20 percent of the units affordable to moderate income households (up to 120 percent AMI).
- 50 percent, if the locality has not issued building permits for enough lower-income units to meet their RHNA requirement; or
- The percentage in a local inclusionary zoning ordinance if it is higher than the requirements above.

All but 30 cities and counties in California are subject to some streamlining under SB 35 because they have not issued building permits to housing units sufficient to meet their RHNA at one or more income levels.

SB 35 also included certain requirements for labor standards, such as the use of a skilled and trained workforce on an eligible project. However, SB 35 exempts projects of 10 housing units or less from the affordability requirements and labor standards.

Last year, the Legislature added a process to SB 35 for determining if a project would affect tribal cultural resources (AB 168, Aguiar-Curry). This process includes a consultation between the California Native American Tribes traditionally affiliated with the project area and the relevant local government to identify tribal cultural resources and agree upon mitigation measures needed to preserve them.

SB 35 sunsets on January 1, 2026.

**Vallco Town Center.** The Vallco Town Center development (Vallco) will involve the demolition of a defunct mall in Cupertino and the construction of: 2,402 residential units, half of which will be affordable to low and very low-income levels as required by SB 35; 400,000 square feet of retail and entertainment uses; and 1.8 million square feet of office space.

Vallco received approval from the City of Cupertino under SB 35 in October 2018, and demolition has begun. As one of the first, and the largest, development to go through the SB 35 process, Vallco has attracted significant attention. The project has faced opposition from local groups as well as some members of the Cupertino City Council. As a result, Vallco's experience

may illuminate challenges that future developments seeking to employ SB 35's process may also encounter.

The Legislature has enacted numerous measures in recent years to address challenges that Vallco has encountered following receipt of its SB 35 approval, including:

- AB 831 (Grayson, 2020), which was referred to the Senate Governance and Finance Committee, but that referral was rescinded due to the COVID-19 pandemic. AB 831 prohibited unreasonable delay by local governments in issuing subsequent permits for SB 35 projects, among other changes.
- AB 1485 (Wicks, 2019), which the Senate Governance and Finance Committee approved at its July 10<sup>th</sup>, 2019, hearing on a vote of 7-0. AB 1485 allowed housing projects in the Bay Area to qualify for SB 35 by including 20% moderate-income units, among other changes.
- SB 765 (Wiener, 2018), which was not referred to the Senate Governance and Finance Committee. SB 765 changed the treatment of proposed subdivisions under SB 35, among other changes.

Nearly three years after the initial approval by the City of Cupertino, Vallco has not yet commenced building structures on the site, although significant demolition and grading work has been completed.

The Bay Area Council and the San Francisco Bay Area Planning and Research Association (SPUR) want the Legislature to enact further changes to SB 35 to assist the Vallco project.

### **Proposed Law**

Assembly Bill 1174 makes numerous changes to specific provisions of SB 35, as outlined below.

Current law provides that an SB 35 approval remains valid for three years following approval of the project, and allows a city or county to extend that approval for an additional year, at its discretion. Approvals never expire for projects that include public investment in housing affordability outside of tax credits and that designate at least 50 percent of the units for affordable housing. SB 35 also extends the approval for other projects indefinitely until after litigation is resolved or if vertical construction on the site has begun and is in progress, meaning that the applicant has begun construction and has not ceased for more than 180 days, or specified actions on building permits have been taken. **AB 1174** changes “vertical construction” to “construction activity” and makes clarifying changes to the tolling of the approval for litigation.

Current law allows a developer to request a modification to an approved SB 35 project prior to the issuance of the final building permit. The local government must approve the modification if it determines that the modification is consistent with the objective planning standards that were in place when the original development application was first submitted, unless the modification would increase the square footage or number of residential units by 15 percent or more, or 5 percent if new standards are needed to mitigate a specific, adverse impact from the modification. **AB 1174** extends the validity of an SB 35 approval for the time from submittal of a modification request to the date of the request's final approval, plus an additional 180 days.

Current law allows building standards code changes to be applied to all modifications. **AB 1174** allows building code standards to only be applied to modification applications that are submitted prior to the first building permit application, unless agreed to by the developer.

Current law requires local governments to issue subsequent permits needed for an approved SB 35 project if the application substantially complies with the development as it was approved, and requires the local government to process the permit without unreasonable delay. **AB 1174** requires a local government to consider applications for such permits based on the objective standards that were in effect when the original development application was submitted, unless the development proponent agrees to a change in objective standards.

AB 1174 applies these changes retroactively to developments approved prior to January 1, 2022, and makes other clarifying and technical changes and includes findings and declarations to support its purposes.

### **State Revenue Impact**

No estimate.

### **Comments**

1. Purpose of the bill. According to the author, “The Legislature has made enormous efforts to dramatically increase our housing supply. However, ambiguities in the law have been exploited by anti-growth community groups to delay and derail desperately needed housing projects. For example, SB 35 streamlining approvals are currently valid three years after the project is approved. Some jurisdictions have used lawsuits to extend the project timeline beyond this window, and then revoke the streamlining provisions. Another issue arises when jurisdictions require a project to comply with objective standards that were not in place at the time of project approval. This can compel a project proponent to seek a modification, which can further delay or derail the project. To address these challenges, AB 1174 specifies that the “shot clock” for a development or modifications is paused when a project is sued, and clarifies that subsequent permit applications must only meet the objective standards that were in place when the project was initially approved. This measure will also clarify that construction activity must have begun on the site to maintain its permit, and that underground space does not count towards square footage when calculating development changes. These fixes are essential to ensure to facilitate the timely construction of housing at all income levels to meet California’s critical housing needs.”

2. Just sue already. The City of Cupertino has consistently identified what it considers to be loopholes in SB 35 to slow down or attempt to halt the project. For example, they have imposed new conditions, balked at minor modifications, and attempted to withhold permits for excavation and encroachment after the project’s approval. So far, they have been successful in delaying the project for almost three years, to the point where Vallco’s SB 35 approval is about to expire prior to the commencement of construction. The Vallco developer, Sand Hill Properties, and other advocates have returned to the Legislature in every year following the passage of SB 35 to revise its provisions in an attempt to head off the City’s efforts, spending significant time and resources. Sand Hill explains that their intent with AB 1174 is to avoid litigation. But local governments are a crafty bunch, and Cupertino will likely find additional ways to hold up Vallco even with the changes in AB 1174. Furthermore, SB 35 already prohibits a local government’s review and issuance of subsequent permits from “inhibiting, chilling, or in any way precluding

the development.” Cupertino’s actions seem clearly intended to delay this project. Litigation may be the only way to ensure that Vallco is successfully constructed.

3. The exception that swallows the rule. SB 35 intentionally limited the length of time that approvals would remain valid for most projects to three years, so that the legislation would result in the rapid construction of much needed new housing units. Existing law allows developers to submit modifications to the project, but currently the clock ticks down on their approval while they are working on those modifications, consistent with that intent. AB 1174 tolls the clock on the approval while a local government is reviewing the modifications, but also goes further to automatically grant an additional 180 days with each modification request. Since local governments are limited in their ability to deny modifications or impose new conditions on them, this provision would potentially allow a project developer to extend approvals indefinitely. The Committee may wish to consider limiting the number of modifications a developer can submit.

4. Let’s be clear. SB 35 currently requires “vertical” construction to have commenced for a project to qualify for the extension of an SB 35 approval. The City of Cupertino argues that because no structures have been erected on the site, vertical construction has not commenced and Vallco’s SB 35 approval will expire at the end of September. AB 1174 changes “vertical construction” to “construction activity,” but leaves it up to the Department of Housing and Community Development to define what construction activity means in its guidelines for SB 35 projects. Absent some clarification, relatively minor activity such as erecting a fence around a site might qualify as construction. The Committee may wish to consider amending AB 1174 to include a definition of construction activity.

5. Charter city. The California Constitution allows cities that adopt charters to control their own “municipal affairs.” In all other matters, charter cities must follow the general, statewide laws. Because the Constitution doesn't define "municipal affairs," the courts determine whether a topic is a municipal affair or whether it's an issue of statewide concern. AB 1174 says that its statutory provisions apply to charter cities but does not include the Legislature’s reasoning supporting that conclusion. The Committee may wish to consider amending AB 1174 to include findings explaining that the production of affordable housing is a matter of statewide concern.

6. Mandate. The California Constitution requires the state to reimburse local governments for the costs of new or expanded state mandated local programs. Because AB 1174 adds to the duties of local officials, Legislative Counsel says that the bill imposes a new state mandate. AB 1174 disclaims the state's responsibility for providing reimbursement by citing local governments’ authority to charge for the costs of implementing the bill's provisions.

7. Incoming! The Senate Housing Committee approved AB 1174 at its July 1<sup>st</sup> hearing on a vote of 8-0. The Senate Governance and Finance Committee is hearing it as the committee of second reference.

### **Assembly Actions**

Assembly Housing and Community Development Committee:	8-0
Assembly Local Government Committee:	7-0
Assembly Appropriations Committee:	16-0
Assembly Floor:	71-0

### **Support and Opposition** (7/5/21)

Support: Bay Area Council (co-sponsor); SPUR (co-sponsor); California Apartment Association; California Association of Realtors; California Building Industry Association; California YIMBY; Casita Coalition; Council of Infill Builders; Fieldstead and Company, INC.; Greenbelt Alliance; Habitat for Humanity California; Hello Housing; Housing Action Coalition; Lisc San Diego; Midpen Housing; Sand Hill Property Company; Silicon Valley @ Home; The Two Hundred; TMG Partners

Opposition: None submitted.

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