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**“By Right” Housing Approvals
Proposed Trailer Bill¹
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The Department of Finance released an updated version of the Governor’s “by right” housing proposal.

http://www.dof.ca.gov/budgeting/trailer_bill_language/local_government/documents/707StreamliningAffordableHousingApprovalswithTechnicalModifications.pdf

While some minor issues have been clarified, other **new** issues of concern have been added.

Basic Framework: The Governor’s proposal for streamlining affordable housing approvals requires cities and counties to approve:

- A certain type of housing project with modest levels of affordable units
- As a permitted “use by right”
- With no public input;
- With limited ministerial review; and
- No CEQA compliance

Major Changes:

- HCD has been given broad and unprecedented authority authorized to determine where “affordable housing” should not be located. This provision authorizes (but does not require) HCD to adopt regulations pursuant to the Administrative Procedures Act that would determine what areas are “inappropriate for affordable housing development” according to “objective criteria,” including areas severely lacking in access to public transit, accessibility to employment or educational opportunities, and residentially supportive retail and service amenities. Unless and until HCD adopts regulations, this section of the proposal doesn’t prohibit housing on any particular site. Housing qualifies as a “permitted use” in an HCD-identified area if the project incorporates “approved remediation measures.” CEQA does not apply to the adoption of the regulations.
- States legislative intent that the provisions “advance,” laws prohibiting discrimination, implementing state planning priorities, attaining the state housing goal, fair housing choice, AB 32 climate change, and compliance with “non-discretionary” local inclusionary zoning ordinances.
- Instead of requiring developments to comply with “objective general plan and zoning standards,” as in the prior draft, this version seems to narrow the language by defining “objective planning standards” to be land use and building intensity designation applicable to the site under the general plan and zoning code, land use and density and other objective zoning standards, and any setback or objective design review standards.”
- Adds a definition of “approved remediation measures” but only applies it to developments on prime farmland, flood plains, wetlands, hazardous waste sites,

¹ Based on most recent Department of Finance draft.

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earthquake faults, and areas identified by HCD as inappropriate for affordable housing.

- Responding to concerns expressed with the prior draft, developers are required to replace any existing affordable housing on a site at equal or greater levels and must pay relocation assistance to those displaced.
- Clarifies the Subdivision Map Act must be complied with.
- Deletes language from prior version that implied zoning amendments and conditional use permits could be made by staffers as ministerial decisions.

What types of housing projects are included?

Newly constructed structure containing two or more dwelling units in a project that is entirely residential or part of a mixed-use development that comply with the criteria summarized in the next question. The proposal does not apply to the construction of a second unit or the conversion of an existing structure to condominiums. [NOTE: The proposal is not clear. A cross reference to another definition in the law, raises concerns that the law could also apply to a single-family housing development, mixed use or transitional or supportive housing.]

What restrictions are placed on the location of these housing projects?

1. Urban site: Located on a site that is either immediately adjacent to parcels that are developed with urban uses or for which at least 75% of the perimeter of the site adjoins parcels that are developed with urban uses. The revised version adds “or is bounded by a natural body of water,” which presumably is intended to pick up sites bordering the ocean, lakes and rivers.
2. Prohibited sites: A Project cannot be located on the following sites unless the development incorporates “**approved remediation measures**”: (A) Prime farmland or farmland of statewide importance; (B) Wetlands; (C) Within a very high fire hazard severity zone; (D) Hazardous Waste site; (E) Within a delineated earthquake fault zone; (F) Flood plain; (G) Floodway; (H) Within an area “determined to be inappropriate for affordable housing development” by the Department of Housing and Community Development based upon “objective criteria” such as lacking in access to public transit, accessibility to employment or educational opportunities, and residentially supportive retail and service amenities.
3. Replacing existing affordable housing: Unless development replaces units at a level of affordability equal to or greater than the level of a previous affordability restriction, the development may not be on any property that is (A) a parcel on which rental dwelling units are, or have been within past 5 years, subject to a recorded covenant that restricts rents to levels affordable to persons and families of lower or very low income; (B) subject to any other form of rent or price control; or (C) occupied by lower or very low income households.

What is a permitted “use by right?”

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This means that a city may not require a conditional use permit, planned unit development permit, or other discretionary review or approval that would constitute a “project” for purposes of CEQA. [NOTE: This means that approval of a housing project covered by the proposal is not subject to any environmental evaluation under CEQA.]

What is the approval process for a housing project that qualifies for permitted “use by right” review?

Within 30 days of receiving an application, the public official must either approve the development or explain why it is inconsistent with objective planning standards. If the public official fails to respond within 30 days or fails to provide an explanation, project is deemed to be consistent with general plan and zoning standards.

What else is included in the proposal?

- Declaration that the proposal applies to charter cities
- Declaration that it overrides anything to the contrary in the existing law.
- CEQA does not apply to a local government’s award of financial assistance to any development that qualifies as a permitted use by right under the proposal.

What criteria must a housing project comply with to qualify for permitted “use by right” review?

A housing project must comply each of the following requirements:

- **Objective planning standards:** Consistent with the following objective planning standards: land use and building intensity designation applicable to the site under the general plan and zoning, or other objective zoning standards, and any setback or objective design review standards in effect at the time the application is submitted
- **Affordability (TPA):** For developments within a *transit priority area*², subject to a restriction lasting 30 years requiring at least 10% of the units be affordable to lower income households or at least 5% of the units to be affordable to very low income households.
- **Affordability (non-TPA):** For developments outside a transit priority area, subject to a restriction lasting 30 years requiring at least 20% of the units to be affordable to households whose income is 80% or less of area median gross income.
- **Approved remediation measures:** A project is not entitled to use by right if it is located on certain sites (e.g. prime farmland, hazardous waste site, etc.) unless the developer complies with “approved remediation measures.” These are measures included in a certified environmental impact report to mitigate the impact of

² A transit priority area is an area within ½ mile of a major transit stop that is existing or planned provided the planned stop is scheduled to be completed within the planning horizon included in the Transportation Improvement Program adopted pursuant to Section 450.216 or 450.322 of Title 23 of the Code of Federal Regulations. This is the same definition as is found in PRC 21099..

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residential development in the location proposed by the project; or uniformly applied development policies or standards that have been adopted to mitigate the impact of residential development in that location.

Comments and Concerns

Unprecedented role for HCD in local land use planning

The proposal authorizes HCD to inject itself directly into local land use authority by adopt regulations that determine areas that are inappropriate for affordable housing development because they lack access to public transit, accessibility to employment or educational opportunities, and residentially supportive retail and service amenities. The term “affordable housing development” is not defined in this measure potentially empowering HCD with even broader authority. A development proposed in an area identified as “inappropriate” will not qualify for “permitted use by right” unless the development incorporates “approved remediation measures.”

No public review

The hallmark of local government land use decisions has been the public hearing. A public hearing (1) allows interested members of the community to inform the decision-makers of their support or opposition to the project; and (2) guarantees that property rights will not be impacted without the “due process of law.”

Excluding the elected decision makers

The proposal excludes the elected city council and board of supervisors from land use decisions. These public officials are elected to represent their constituents and to be available and responsive. The proposal asks appointed staff, who are not directly accountable to local voters, to make the policy decisions: this is the arena reserved for elected officials.

Local governments are already required to approve housing but with public hearings and CEQA review

- Housing Accountability Act (20% lower income; 100% moderate income or middle income; emergency shelter) (Gov. 65589.5)

Must approve a housing project that is consistent with general plan and zoning ordinance unless (1) specific adverse impact on public health or safety; (2) housing is not needed; (3) denial required to comply with state or federal law; (4) project is on land zoned for agriculture or resource preservation.

- “No net loss” (Gov. 65863)

May not reduce the residential density for any parcel unless remaining sites identified in housing element are adequate to accommodate RHNA

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- Density bonus (Gov. 65915)

Must award density bonus and other concessions and incentives when development includes 10% lower income, 5% very low income, senior citizen, or 10% for moderate income in common interest development

- Least cost zoning (Gov. 65913.1)

Must zone sufficient land for residential use with appropriate standards to meet housing needs for all income categories identified in housing element. When land is zoned, then Housing Accountability Act requires approval.

- Second units (Gov. 65852.2)

Must approve second unit with ministerial review. City may not adopt ordinance that totally precludes second units in residential zones unless specific adverse impacts on public health, safety, and welfare.

- Ministerial approval of multifamily housing (Gov. 65589.4)

Must approve as a permitted use multifamily housing structure located on an infill site that is consistent with general plan and zoning ordinance in which at least 10% of the units are affordable to very low income households; or at least 20% available to lower incomes; or 50% affordable to moderate income households.

No project specific CEQA review

The proposal requires ministerial review of a housing project if it is consistent with “objective general plan and zoning standards.” CEQA review that is required for both the general plan and zoning ordinance does not extend to the project level. CEQA review that is required for both the general plan and zoning ordinance may have occurred many years before the development application is submitted. Cities and counties will not be able to determine whether site-specific conditions or changed circumstances and new information require environmental mitigation. If for some reason a previous environmental document was helpful in evaluating the project, the bill does not allow a city to impose conditions to require compliance with previously-adopted mitigation measures.

What are “objective zoning standards”?

To be a “permitted use by right,” a development must comply with the location requirements, the affordability requirements, and must be consistent with the following objective planning standards: land use and building intensity, land use and density or other objective zoning standards, and any setback or objective design review standards. Although the second draft of the proposal includes building intensity and density as examples of “objective zoning standards,” it does not otherwise shed light on the meaning of “objective zoning standards.” With the repeated use of the term “objective,” litigation is likely to occur over its purported meaning.

Affordable housing will not remain affordable

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A housing development must be “required by law to record” a land-use restriction based on (1) a condition of award of funds or financing from a public agency; (2) as a condition of the award of tax credits; (3) as might be required by contract entered into with a public agency. In other words, if a developer does not receive funding for the affordable housing, the housing will not remain affordable.

Breadth of the proposal

The proposal states that it applies “notwithstanding anything to the contrary contained in the law.” It is not possible to accurately evaluate the impact of this statement because of its breadth.