



Housing Everywhere All At Once: Navigating Complex Land Use Laws

March 16, 2023

Presented by: Diana Varat - Richards, Watson & Gershon

Outline of Presentation

- **The 6th Housing Element Update Cycle**
 - New Substantive Requirements
 - HCD Certification Process
 - Implementation Phase
- **Rezoning Actions and “Use by Right” Process**
- **Density Bonus Law**
 - Trends / Recent Applications
- **Housing in Commercial Zones**
- **Housing and Property Owned by “Education Agencies”**

The 6th Housing Element Update

Sixth Cycle Challenges

- Detailed, Evolving Statutory Requirements
- Staff and Consultant Changes / Shortages
- Community Involvement / Expectations
- Timelines / New Procedural Requirements
- HCD Interpretations / Review / Demands
- CEQA Compliance
- Threats of Litigation

Connecting Needs to Programs



Adoption Timeline

- **Public Comment Period (30 days)**
- **Incorporate Comments (10 Business Days)**
 - Online Posting? (7 Days)
- **Send Initial Draft to HCD**
 - 90-day review period
 - HCD Determination - does HE “substantially comply” with law?
- **City Revises Draft HE or Adopts “as is”**
 - Send revised draft to HCD for another 60-day review?
- **Submit Adopted HE to HCD**
 - Review period – 60 days or 90 days?
 - Gov. Code § 65585, subd. (b) and (h)



Breaking News

Still Seeking Certification?

- **New Emergency Shelter Requirements (AB 2339)**
 - Requires by-right approval *in a zone that allows other residential uses*
 - *Requires sufficient capacity analysis*
- **Timing Issues – AB 2339 applies if:**
 - First draft submitted to HCD after deadline for adoption
 - (Arguably any) *draft* submitted to HCD after April 1, 2023
- **HCD Guidance Memos**

Basic Components of Housing Elements

- **Housing Needs Assessment**
 - Analyze Demographics, Household Characteristics, and Existing Housing Stock
- **Constraints Analysis**
 - Governmental / Nongovernmental
- **Affirmatively Furthering Fair Housing**
- **Site Inventory**
 - Identify Capacity for Residential Development to Meet RHNA at All Income Levels
- **Programs**

Most Challenging Requirements

- **Analysis of Potential Governmental Constraints**
 - Permitting, Special Needs Housing (Group Homes)
- **Affirmatively Furthering Fair Housing (AFFH)**
- **Identifying Adequate Sites (Site Inventory)**
- **Housing Programs**
 - Again, analysis must inform Policies / Programs

Fair Housing – Analysis & Program

- **Analyze Fair Housing Concerns**
- **Assess Enforcement & Outreach Capacity**
- **Site Inventory:**
 - Disperse Sites for Lower Income Housing throughout Community – identify sites for Lower Income HHs in **Higher** Resource Areas
 - If identifying sites for Lower Income HHs in **Lower** Resource Areas, add programs that create opportunity and encourage investment

Sites Inventory & AFFH

- Sites identified **throughout the community**
 - Gov. Code §§ 65583.2(a); 65583(c)(10)
- Sites for Lower Income RHNA should not be concentrated in low resource areas
 - But, also make sure your sites are realistic for development

Site Inventory Challenges

- **Strategies to Meet RHNA**
 - ADUs, Pipeline Projects, Vacant Sites, Underutilized Sites
- **Complicated Requirements**
 - Capacity Analysis
 - Income Level Analysis
- **Accessory Dwelling Units**
 - Assumptions and Assignment of Affordability

A Quick Note on ADUs

- **Modified Height Limits – City Must Allow:**
 - Up to 16 feet for **detached** ADU
 - Up to 18 feet for **detached** ADU: (1) within ½ mile walking distance of major transit stop / high quality transit corridor and (2) on a site with a multistory, multifamily building
 - Up to 25 feet **or** height limit allowed for primary dwelling, whichever is **lower**, for **attached** ADU
- **Explicitly identifies ability to apply front yard setbacks (but not if it prevents “default” ADU)**

Site Inventory Challenges

- **Suitability of Nonvacant Sites**

- **Methodology** to Determine Development Potential
 - Existing Uses an Impediment
 - Past Experience
 - Market Demand for Existing Use
 - Existing Leases / Contracts that Prevent Redevelopment
 - Development Trends
 - Market Conditions
 - Incentives / Standards to Encourage Redevelopment
- **Existing Use Analysis / Findings**
 - If using > 50 % nonvacant sites for Lower Income RHNA

- **Gov. Code § 65583.2(g)(1) – (2)**

Housing Element Implementation

Housing Programs

- **Provide Adequate Sites**
 - Rezoning Programs
- **Remove Governmental Constraints**
- **Conserve / Improve Existing Stock**
- **Preserve At-Risk Units**
- **Definitive Commitments / Implementation Timelines**

When is “Rezoning” Required?

- **Sites Used in Prior Cycles**

- Gov. Code § 65583.2(c)

- **Shortfall to Meet Lower Income RHNA**

- Gov. Code § 65583(c)(1)(A)
- Gov. Code § 65583.2(h)

Sites Used in Prior Cycles

- To use them again to meet **Lower Income RHNA capacity**, the City must include a “program” to create a “by-right” process for proposed projects with 20 percent of units for lower income HHs
- **Applies to:**
 - Vacant Sites – Used in Prior TWO cycles
 - Nonvacant Sites – Used in Prior Cycle

Shortfall for Lower Income RHNA

- “Adequate Sites Program” must accommodate the **shortfall** for Lower Income RHNA with:
 - **By-Right Process** for developments with at least 20 percent of units for Lower Income HHs
 - Each **site** must permit at least 16 units
 - Minimum Density (Default Density, e.g., 20 du/acre)
 - At least 50 percent of shortfall must be on sites that **only allow** residential uses, unless...
 - If mixed use, then sites must **allow 100 percent residential** and **require** that **residential use occupy 50 percent** of the total floor area of mixed use project

“Use By Right”

- Local review of the residential use may not require a CUP, PUD permit, or other **discretionary** approval that would constitute a “project” under CEQA
 - BUT if a **subdivision** is required, subdivision of the site is subject to all laws, including a local subdivision ordinance and CEQA
- Design review not a “project” under CEQA

Implementing a “Rezoning”

- Create an **overlay district** establishing a by-right process for projects with 20 percent of the units affordable for Lower Income Households
- Incorporate the by-right process for qualifying projects into **underlying zoning district(s)**
- **CEQA Considerations**
- **Objective development standards**
 - Consider density bonus law...

By-Right Rezoning & the HAA

- Because the rezoning requires 20 percent for Lower Income, subdivision (d) of the HAA (Gov. Code § 65589.5) applies...
 - Limits ability to disapprove or impose conditions on the project



Density Bonus Law

Managing Expectations

- Prepare your Staff
 - Prepare your Planning Commission
 - Prepare your City Council
 - Prepare your Community
- You can have the best objective standards in the world, but many projects will not comply!

Qualifying Projects – GC 65915(b)

- **10 percent Lower Income HHs**
- 5 percent Very Low Income HHs
- Senior Citizen Housing Development
- 10 percent Moderate Income Persons / Families
- 10 percent Transitional Foster Youth, Disabled Veterans, or Homeless Persons
- 20 Percent Lower Income Students
- 100 Percent “Affordable” Projects (80 / 20 Split)

Benefits for the Applicant

- **Qualifying projects entitled to receive:**
 - A **density bonus** [sliding scale in subd. (f)];
 - Specific number of “**incentives / concessions**” [based on affordability, subd. (d)];
 - **Waivers** / reductions of development standards (where standards would “physically preclude” the development) [subd. (e)]; and
 - Reductions in **parking** requirements [subd. (p)]

Density Bonus Calculations

| Level of Affordability | Percentage Affordable | Density Bonus |
|------------------------|-----------------------|---------------|
| Lower | 10 % | 20 % |
| Lower | 20 % | 35 % |
| Lower | 24 % | 50 % |
| Very Low | 5 % | 20 % |
| Very Low | 15 % | 50 % |

Calculating the Density Bonus

- **Recent Changes to “Maximum Allowable Residential Density” (AB 682 and AB 2334)**
 - The **greater** shall prevail ... between GP, SP, and Zoning
 - No Density Standard? Prepare “**Base Density Study**”
- **Other Changes**
 - Shared Housing Buildings
 - Unlimited Density / Benefits for 100 Percent Affordable Projects in “Very Low Vehicle Travel Areas”

Reductions in Parking Requirements

- **Density bonus eligible applicants can request the following parking ratios:**
 - 0-1 Bedroom: 1 onsite parking space
 - 2-3 Bedrooms: 1.5 onsite parking spaces
 - 4+ Bedrooms: 2.5 parking spaces
- **Additional parking space reductions for transit-oriented, senior, and special needs projects**

AB 2097

- **Prohibits minimum parking requirements for projects within ½ mile of a “major transit stop”**
 - **Exception:** If city **finds** that not imposing parking would have a “substantially negative impact” on:
 - City’s ability to meet Lower Income RHNA
 - City’s ability to meet Special Needs Housing Need
 - Existing residential / commercial parking within ½ mile of the housing development project
 - BUT no using the exception if project contains 20 percent for Lower Income Households
- **Gov. Code § 65863.2**

Concessions / Incentives

| Number of Concessions | Very Low | Lower | Moderate |
|-----------------------|----------|-------|----------|
| 1 | 5 % | 10 % | 10 % |
| 2 | 10 % | 17 % | 20 % |
| 3 | 15 % | 24 % | 30 % |

- Four concessions and additional benefits for 100 Percent Affordable Projects
- See, Gov. Code § 65915, subd. (d) and (k)

Approval of Waivers

- Applicant may request reduction or waiver of any **development standard** that has the effect of **physically precluding** a **development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section**
 - See, Gov. Code § 65915(e)

Waivers - “Development Standard”

- **A site or construction condition**

- A height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development
- pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.
 - See, Gov. Code § 65915(o)(2)

Waivers – Physically Precludes?

- **Recent Case Law**

- *Schreiber v. LA; Bankers Hill v. San Diego*

- What does it mean to physically preclude the construction of “a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section”?

- Project “as proposed”?
 - Alternative site plans?

Denial of Waivers

- **City Bears the Burden of Proof**
- **Substantial Evidence to Support Denial**
 - Engage Architect / Engineer?
- **Potential Consequences**
 - Attorneys' Fees and Costs of Lawsuit

Density Bonus Law – Trends

- **Requests for Concessions / Incentives and Waivers from Development Standards**

- **Examples:**

- For mixed-use zones, reduce minimum commercial requirements (by a LOT)
- For mixed-use zones, waive ground floor retail
- Waive street network requirements
- Reduce Setbacks
- Waive Step-backs (even if objective)
- Others (CEQA-related issues)

Procedural Issues & Deadlines

- Requirements on Website
- Completeness Checklists and Application Forms
- What Objective Standards Apply to Which Projects?
 - How aggressive on concessions / waivers?
- Meet your timelines
 - Completeness / Incompleteness
 - Consistency / Inconsistency
 - New timelines for post-entitlement permits (AB 2234)

What Next?



Housing in Commercial Zones

AB 2011

■ Affordable Housing and High Roads Jobs Act

- Streamlined, ministerial approval process for two types of housing projects
 - Wholly affordable projects on some commercially zoned lots
 - Mixed-income housing projects along commercial corridors
- No CEQA
- Short Timelines for Review / Approval
- Labor Requirements
 - Prevailing Wage, Apprenticeship, Health Care Requirements

AB 2011 – Applicable to Both

- Site zoned to allow office, retail, or parking as “**principally permitted use**” – no CUP!
- Not a site or adjoining a site with $> 1/3$ square footage “**dedicated to industrial use**”
- Vacant sites – no tribal resources and no VHFHSZs
- **Limits application to some Specific Plan sites**
 - See “neighborhood plan” provisions
- **Environmental Restrictions**
 - Phase I ESA, Proximity to Freeways and Oil / Gas Facilities

AB 2011 – The Basics

Lower Income Projects

- **100 % Affordable Rental Units for Lower Income**
 - Restricted for 55 years
- **Project must meet or exceed Default Density**

Mixed Income Projects

- **Mixed Income Requirements for Rental – must meet either:**
 - 8 % VL and 5 % EL
 - 15 % Low
- **Mixed Income Requirements for For-Sale**
 - 30 % Mod or 15 % Low
- **Along “commercial corridor”**
 - “Right of Way” 70 – 150 ft
- **Density, Height, Setback, Step-back Standards**

AB 2011 – What Standards Apply?

Lower Income Projects

- Standards from the zone with greatest density between:
 - Existing zoning designation
 - Closest parcel that allows multifamily at default density
- **Density Bonus**
 - Eligible for density bonus, concessions, waivers, etc.

Mixed Income Projects

- Standards from the **closest** zone that allows multifamily at applicable / highest density
 - May require up to 1/2 of the ground floor be dedicated to retail use
- **Density Bonus**
 - Eligible for density bonus, concessions, waivers, etc.
 - **Except:** Cannot use concession to reduce a local government ground floor retail req't

SB 6 – Housing as an Allowable Use

- Housing is an “allowable use” on parcels zoned for office or retail uses
- No **new** ministerial approval process, BUT...
 - May use the existing SB 35 process!
 - Inclusionary affordable percentage per SB 35
 - Prevailing Wage (projects of 10 or more units)
 - Skilled and Trained Workforce Requirements
 - Limits on location

Again, Managing Expectations

- Prepare your Staff
 - Prepare your Planning Commission
 - Prepare your City Council
 - Prepare your Community
-
- You can have the best objective standards in the world, but many projects will not comply!

Education Agencies (AB 2295)

- **Effective January 1, 2024...**
 - On property owned by “local education agencies,” housing is an allowable use if:
 - At least 30 percent of the units are lower income and
 - Majority of the units are either lower / moderate income
 - Applicable density for the site OR default density
 - Applicable height limit for the site OR 35 feet
 - Tenant Requirements
 - Determine / establish applicable standards?
 - Density Bonus Law?



Thank you!

Diana Varat
dvarat@rwglaw.com

