

**AFFORDABLE HOUSING LAWS  
AND LOCAL LAND USE PROCEEDINGS IN CALIFORNIA  
2004 UPDATE**

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This paper was initially prepared for the Urban Land Institute's January 17, 2003, program on affordable housing held in Sacramento, California and has been updated to reflect legislation and court decisions through December 1, 2003. It is based upon a book chapter prepared by the same authors in the forthcoming [Affordable Housing Deskbook](#). More information regarding the publication will be available at [www.solano.com](http://www.solano.com). Part I provides introductory background materials, while Part II provides an in-depth discussion of important code sections.

## **Part I**

### **A. Introduction**

This paper discusses in detail the various provisions of state law regarding affordable housing and local land use regulations including legislation enacted during the 2003 legislative session. It does not address the intersection of local land use decisions and federal law such as the federal Fair Housing Act.<sup>1</sup> California has enacted many statutes which purposely foster as well as inadvertently discourage affordable housing as cities and counties consider and act upon general and specific plans, zoning ordinances, subdivision approvals and in administering the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 *et seq.*). California land use law is partly analogous to multi-strand electrical wire. That is, various regulatory strands, each reflecting a different legal concept (e.g., zoning, subdivisions, building regulations), are wound together. A development project, whether affordable or market rate, must pass through most, and in some cases all, of the strands in order to succeed. The analogy to a tightly wound wire is most apt as the wire can unravel, break or otherwise be disconnected. Given the number of ways in which things can go wrong, successful results are never guaranteed.

Local barriers to affordable housing, be they intentional or otherwise, have resulted in the California Legislature's enactment of specific limitations on the exercise of land use powers. In many cases, these limitations are targeted to, and specifically benefit advocates for affordable housing projects. In other circumstances, these remedial statutes impact all economic levels of housing generally, and affordable projects can benefit as well, based upon the theory that a rising tide lifts all boats.

In order to maximize opportunities, project advocates and community activists need to have a firm grasp on the specific land use procedures triggered by a development proposal. The reason for understanding this process is that the statutes discussed in this paper are in some cases specific to a particular type of land use decision. For example, provisions contained in the Subdivision Map Act pertaining to affordable housing projects lack legal relevance to the construction of a rental project on an existing parcel because no subdivision decision is called into play. Therefore, to effectively use this

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article in conjunction with a development application, the reader must have a solid understanding of the required entitlements, as well as how the project fits within the overall structure of land use laws. Persons interested in increasing the supply of affordable housing are best served by focusing on Sections II B (General Plans) and II D (inclusionary housing, density bonuses and secondary units). In addition to these sections, developers and applicants will benefit from reviewing Sections II A (general limitations on discrimination), II D (general provisions under the zoning law) and II E (Subdivision Map Act).

In terms of organization, this paper first reviews the history of California land use law in order to provide a background to the discussion of specific legal requirements. In part II, the statutes of general application are reviewed, followed by a discussion of specific statutory provisions organized around the type of land use approval under consideration. These include general plans, zoning, subdivision, redevelopment, the Coastal Act and CEQA.

For the purposes of this paper, the references to “general plans” encompass other local planning type documents such as area plans, community plans, master plans and specific plans. “Zoning” or “zoning ordinances” includes zoning ordinances, including a site-specific rezoning, development agreements, conditional use permits, special permits, PD or PUD type approvals and variances. References to “subdivisions” include subdivision ordinances, as well as decisions regarding applications for major and minor (parcel map) subdivision approvals.

All statutory references are to the California Government Code unless otherwise noted. The term “city” includes “counties,” and the terms “municipalities” and “municipal” include both cities and counties.

Generally, state land use laws do not apply to charter cities except as expressly noted in this paper.

## **B. Historical Background**

California’s land use law has evolved over a 100 year period, with the greatest movement taking place between 1970 and 1980. Post 1980, the policy shifts have been less dramatic, and have operated by and large as a refinement of the legislation enacted in the early 1970s. The first state statute addressing the development of land was the precursor to the Subdivision Map Act enacted in 1895. This legislation focused on the centralized recording of subdivision maps and was not intended as a substantive land use regulatory tool. This was followed in 1915, when cities were authorized to create planning commissions. In 1917, the first statute on zoning was enacted, followed by the authorization to adopt master plans (general plans) in 1927. Master and general plans were initially relegated to an advisory status, and later made mandatory, but without any serious consequences in circumstances in which a city or county was non-compliant.<sup>2</sup> From 1900 until the 1960’s, there was no interconnection between the separate statutory procedures, local planning and development. In other words, decisions regarding local plans, zoning, subdivision approvals and building permits could be made without consideration of the other.

As an outgrowth of the national environmental movement in the late 1960s, three very significant legislative changes took place in California. First, the Legislature enacted CEQA, requiring public agencies to account for environmental impacts associated with public projects and approvals. Second, the Legislature made the general plan the “constitution for all development,” and required consistency of zoning, subdivision approvals and selected building permit decisions.<sup>3</sup> Third, as an outgrowth of the consistency doctrine and the widening area of inquiry of subdivision decisions, the Legislature relocated the Subdivision Map Act from the Business and Professions Code to the Government Code, reflecting the view that subdivision decisions now needed to reflect the broader policy considerations found in the general plan, and not be limited exclusively to engineering concerns. Subsequently over time the scope of public review of a subdivision approval expanded beyond parcel sizes, land dedication and street improvements, to include factors which could directly impact housing affordability such as open space protection, impact fees and affordable housing inclusionary requirements. As the barriers to new development began to solidify, the Legislature acted to balance these considerations strengthening the housing component of the general plan, along with various housing development related statutes. Coupled with greater public interest and participation in land use decisions, the terrain on which development projects must now navigate has become significantly more difficult compared to the 1960s and 1970s.

### **C. The Police Power**

It is common during the debate over a development application to hear the agency staff refer to the “police power” as a basis for a particular development requirement or restriction. This phrase is a short hand reference to an uncodified legal doctrine which serves as the inherent authority of states, cities and counties to enact legislation. In California, this doctrine is reflected in Art. XI, section 7 of the California Constitution. Section 7 serves as the basic authority for cities and counties to enact regulations and ordinances as long as they do not conflict with state laws. In many cases, the Legislature has created only minimum frameworks for the exercise of regulatory powers. The real substance of the regulations is thus left to the cities and counties, which in turn can base a specific enactment on section 7. Over time, as local governments encounter new community concerns, the exercise of the police power manifests itself in new ways, reflective of these new concerns. Thus, while at one time there was a serious debate over whether or not a city or county could zone property, that dialogue is well behind us, and the focal point has shifted to such topics as inclusionary housing, continued affordability and restrictions of building intensity (minimum and maximum). The validity of the breadth, flexibility and strength of the police power has long been recognized by the courts. Associated Home Builders, Inc. v. City of Livermore (1976) 18 Cal.3d 582; Berman v. Parker (1954) 348 U.S. 26.

### **D. Land Use Initiatives - A Wild Card in California Land Use Regulations**

Initiatives and referenda play a special role in the exercise of land use powers in California. The term *initiative* describes the process by which voters enact legislation on their own. In the field of land use, these are common and are used frequently by controlled-growth or no-growth advocates. The exercise of these powers can dramatically reshape the planing terrain in any given community by making it extremely difficult to proceed with approvals allowing for new growth opportunities. A *referendum* involves citizen review of a legislative measure passed by the city council or board of

supervisors. The exercise of these powers is expressly protected by the California Constitution, found at Article II, and has been upheld in a variety of general government and land use regulatory contexts. Broadly speaking, the power of the voters is equal to those of the legislative body as it relates to *legislative* acts. In the land use context, this means that voters jointly share the right to act upon general plan and specific plan amendments and zoning changes. However, land use approvals such as a tentative subdivision map or conditional use permits are not legislative acts, and the approval/review of this class of entitlements through an initiative or referendum lays outside the voters' authority.

Two limitations on the exercise of the rights of initiative are: (1) the single subject rule; and (2) the enactment cannot violate state statute. In a recent case, a developer sought to challenge a voter enacted measure which posed limitations on residential development and land fills in eastern Alameda County. Shea Homes Limited Partnership v. County of Alameda (2003) 110 Cal.App.4th 1246. As the regulations of landfills and new residential development were joined under the umbrella of protection of open space, this measure did not violate the single subject rule, and was not in direct conflict with selected land use statutes designed to promote affordable housing (Gov. Code §§ 65008, 65584.5, 65915).

Notable tension exists between initiative/referendum rights and statutory duties under the planning and zoning law. While the Legislature may impose limitations on the exercise of voter rights, such limitations cannot frustrate these constitutionally-based rights. As a result, some statutory requirements only apply to city councils and board of supervisors (e.g., adoption of determinations and findings on growth control measures; Building Industry Association v. City of Camarillo (1986) 41 Cal.3d 810). However, many of California's important provisions regarding adequate general plans, housing elements and zoning consistency would apply with equal force. See Leshar Communications, Inc. v. City of Walnut Creek (1991) 52 Cal.3d 531; DeVita v. County of Napa (1995) 9 Cal.4th 763; deBottari v. City Council (1985) 171 Cal.App.3d 1204.

It is beyond the scope of this paper to explore all of the potential relationships between initiatives, referenda and affordable housing, other than to note to the readers that even when matters appear smooth and harmonious at city hall, the voters may be at work in the background taking land use planning into their own hands.

## Part II

Part II reviews the individual statutes governing land use decisions which impact affordable housing. For a more indepth discussion of California land use law, see Curtin's California Land Use and Planning Law (2004) published by Solano Press.<sup>4</sup> The following topical areas are examined in detail in the order listed below:

- A. General Limitations on the Exercise of Land Use Powers
- B. The General Plan and the Housing Element
- C. The California Coastal Act
- D. Zoning Law
  - General Provisions and Limitations
  - Zoning Consistency

- Inclusionary Zoning
- Density Bonuses
- Condominium Conversion Incentives
- Secondary Units

- E. Subdivision Map Act
  - F. Mobilehome Parks
  - G. CEQA
  - H. Permit Streamlining Act
  - I. Local Agency Formation Commissions
- Table 1 includes a summary of the key statutes.

**TABLE 1**  
**SUMMARY OF KEY LAND USE STATUTES IMPACTING AFFORDABLE HOUSING**

**General Limitations on the Exercise of Local Land Use Powers**

- Prohibitions on discriminatory actions (Gov. Code, § 65008)
- Findings required for project denials or excessive conditions (Gov. Code, § 65589.5)

**General Plans and Housing Elements**

- General Plans (Gov. Code, § 65302 *et. seq.*)
- Housing Elements (Gov. Code, § 65580 *et. seq.*)
- Housing in the Coastal Zone (Gov. Code, § 65590)

**Limitations on the Exercise of the Planning and Zoning Powers**

- Growth limitation ordinances (Gov. Code, § 65863.6)
- General statement of policy regarding the exercise of land use powers (Gov. Code, § 65913)
- Duty to zone sufficient land, and appropriate densities and standards to meet housing needs (Gov. Code, § 65913.1)
- Zoning consistent with the general plan (Gov. Code, § 65860)
- Inclusionary zoning (Gov. Code, § 65589.8)
- Multifamily conditional use permit exemption requirements (Gov. Code, § 65589.4)
- Limitations on reducing project density for certain parcels (Gov. Code, § 65863) (“No-Net-Loss”)
- Density bonuses (Gov. Code, §§ 65915-65917)
- Condominium conversion incentives (Gov. Code, § 65915.5)
- Second units, including senior-only second units (Gov. Code, § 65852.1; § 65852.2)
- Zoning for manufactured housing (Gov. Code, §§ 65852.3-65852.5)
- Mobilehome parks allowed in residentially zoned property (Gov. Code, § 65852.7)

**Subdivision Standards and Requirements**

- Subdivision standards not to preclude housing for all economic segments of the community (Gov. Code, § 65913.2)
- Consideration of regional housing needs (Gov. Code, § 66412.3)
- Mobilehome park conversions (Gov. Code, §§ 66427.1-66427.4)

**CEQA**

- General criteria for CEQA exemption (Pub. Resources Code, § 21159.21); Specific exemptions for agricultural housing (Pub. Resources Code, § 21159.22); low income housing (Pub. Resources Code, 21159.23); infill housing (Pub. Resources Code, § 21159.24)
- Exemption for projects consistent with redevelopment plan with prior EIR (Pub. Resources Code, § 21090)
- CEQA streamlining for projects consistent with specific plan (Gov. Code, § 65453)
- Limitation on reducing residential density as a mitigation measure (Pub. Resources Code, § 21159.26)
- Categorical exemption for infill projects meeting specified conditions (Cal. Code Regs., tit. 14, § 15332)

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- Consideration of the ability of the local agency to meet housing needs (Gov. Code, § 56001)
- Assessment of annexation effect on jurisdiction losing land area (Gov. Code, § 56132; § 56668)

## A. General Limitations on the Exercise of Land Use Powers

The bulk of relevant state statutes governing land use decisions are found at Divisions 1 and 2 of Title 7 of the Government Code. Title 1 includes the planning and zoning law (§ 65000 *et. seq.*), while Title 2 deals with the Subdivision Map Act (§ 66410 *et. seq.*). The prefatory provisions to Division 1 provide general limitations on discriminatory actions by local agencies.

Section 65008 generally prohibits and declares as null and void various forms of discrimination against housing by cities, counties and local agencies, including discrimination based upon the method of financing of any residential development, or the intended occupancy of any residential development of persons or families of low, moderate or middle income. This prohibition applies to any power exercised under the authority of Title 7. §§ 65008(a)(1) and (2). Title 7 includes land use decisions, including general plans, zoning and subdivisions. Section 65008 also bars a county from enacting age based ordinances restricting development to certain age groups. (Senior housing) Gibson by Gibson v. County of Riverside (1997) 132 F.3d 1311. Section 65008 can be asserted to defeat residential growth initiative limiting the construction of new dwelling units (Building Industry Associates of San Diego, Inc. v. City of Oceanside (1994) 27 Cal.App.4th 744), or which prohibited for a five year period, the construction of subsidized housing units. Bruce v. City of Alameda (1985) 166 Cal.App.3d 18. Residents dislocated by public construction may have a cause of action, based upon economic discrimination, against a city which denies a development request to build replacement housing. Keith v. Volpe (1988) 858 F.2d 467.

Limitations on denials and conditions that applied to affordable projects of multifamily housing projects and projects funded through some type of public assistance have also been extended by the CRLA Foundation Omnibus Land Use bill. Essentially, this bill prohibits discrimination against multifamily housing in areas awaiting a rezoning designation as multifamily to conform to a more recently adopted general plan. Stats. 2003, ch., § 65008(b)(1)(D).793

Additionally, local agencies are prohibited from enacting or administering ordinances which discriminate against residential developments or emergency shelters because the units are to be occupied by persons or families of low, moderate or middle income. § 65008(c). In a related limitation, local agencies cannot impose different requirements on publically assisted residential developments serving low, moderate or middle income residents than on non-assisted projects. §65008(d)(1).

Conditions of approval different than those imposed on market rate housing cannot be imposed on a project simply because the future occupants are low, moderate or middle income. § 65008(d)(2).

Notwithstanding the foregoing provisions prohibiting express and implied discrimination, cities and counties are expressly authorized to enact and apply more favorable land use requirements for projects serving low, moderate and middle income, emergency shelters and agricultural employee housing. Examples of relaxed standards include, but are not limited to, architectural requirements, site development and property line requirements, building setbacks and parking requirements. §

65008(e).

The foregoing provisions apply to charter cities. § 65008(g).

## **B. The General Plan and the Housing Element**

Each city and county in California, including a charter city, is required to prepare and adopt a comprehensive long-term, general plan for the physical development of the community and any land outside the community's boundaries that may have an impact on the community's ability to plan for its future growth. § 65300. A general plan is the essential planning document: the "charter" or "constitution" for all future development within a community. Leshar Communications, Inc. v. City of Walnut Creek (1990) 52 Cal.3d 531; Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553. The general plan is the starting point for evaluating the role of affordable housing in a given community. In the absence of a legally adequate general plan, new development may be halted. Camp v. Board of Supervisors (1981) 123 Cal.App.3d 334; § 65755.

Creating a general plan for a community requires the planning agency and the respective governing legislative body to undertake a comprehensive analysis of the community's physical, economic, and environmental resources and balance these resources against the community's objectives, principles, standards and present plan proposals. § 65302. A general plan is to be designed as a fully integrated document, with consistency of goals and policies among all elements. § 65300.5. The Governor's Office of Planning and Research (OPR) is required to provide guidance to cities and counties for integrating environmental justice into their general plans (§65040.12(e)), guidance that OPR provides in their 2003 General Plan Guidelines.

A general plan must contain seven mandatory elements with discrete elements addressing land use, circulation, conservation, open space, noise, safety and housing. § 65302. In addition to the mandatory elements, communities may adopt other elements as part of their plan. These discretionary or permissive elements of a general plan are intended to capture other subjects that are important to the community or need to be considered when planning for future growth within the community. § 65303. These permissive elements need not be included; however, once a permissive element is made part of the general plan, that element is given equal dignity to the mandatory elements and must be consistent with the remaining elements of the general plan.<sup>5</sup>

A city or county may amend its general plan only four times a year. However, this numeric limitation does not apply to general plan amendments necessary to: (1) accommodate the development of residential units affordable to low or moderate income persons or families (§ 65868(c)); or (2) implement court orders to bring general plans into statutory compliance (§ 65358(c)(1)).

In the event that a city or county adopts a general plan or plan amendment which limits the number of housing units which may be constructed on an annual basis, the Legislature must adopt certain findings. These findings must address regional fair share housing obligations, a description of specific housing programs being undertaken to meet the housing element requirements, a description

of how the public health, safety and welfare will be promoted by the enactment, and the fiscal and environmental resources available to the enacting local jurisdiction. §65302.8. These findings are not required for measures adopted by initiative. Building Industry Association v. City of Camarillo (1986) 41 Cal.3d 810.

Each of the seven mandatory elements must be addressed as prescribed under section 65302. Section 65302 sets forth factors which must be addressed in the creation and adoption of each general plan element. For the mandatory elements other than the housing element, municipalities are pretty much left to themselves as to the policy direction to be pursued. Because the availability of decent and affordable housing, is recognized by the Legislature as vital in each community in California, the creation of the housing element of the general plan is closely monitored and regimented by a complex legislative scheme giving the housing element generally less flexibility than is given to other mandatory elements. § 65580 et seq. As to housing generally, and affordable housing specifically, the state has undertaken a more proactive role. This role is discharged by the Department of Housing and Community Development (“HCD”) which reviews local housing elements for legal adequacy, although its determinations are advisory.<sup>6</sup>

The housing element of a general plan must consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, public financial resources, and scheduled programs for the preservation, improvement, and development of housing within a community. § 65583. The housing element must identify adequate sites of housing of all types and make adequate provisions for the existing and projected needs of all economic segments of the community. Buena Vista Gardens Apartment Assoc. v. City of San Diego (1985) 175 Cal.App.3d 285.

The housing element must contain an assessment of housing needs of the community and an inventory of the resources and constraints relevant to the meeting of those needs.<sup>7</sup> The assessment and inventory must include an analysis of population and employment trends and documentation of projections and a quantification of the community’s existing and projected housing needs for all income levels.<sup>8</sup> 70 Ops. Cal. Atty Gen. 231 (1987). The existing and projected needs must encompass the community’s fair share of the regional housing need as determined by local government agencies, the local council of governments and the California Department of Housing and Community Development (“HCD”). §§ 65584(a), (b); § 65580(e).

Assembly Bill (AB) 668, passed this year by the legislature, provides a procedure for determining regional housing needs for newly incorporating cities, whereby the new city and county can reach an agreement on the new distribution of regional needs and report to the regional COG or HCD. Stats. 2003, ch. 760, § 65584. In addition, AB 518 requires local agency formation commissions (“LAFCO”) to assess the effect of annexation on the jurisdiction losing land area regarding its ability to meet its regional housing needs assessment (assessment of effect on the agency gaining land area is already required). Section 56668 of this bill provides a list of factors to be considered in the assessment. Stats. 2003, ch. 518, § 56132; § 56668.

An examination of the affordability of housing in a community is an essential ingredient of the housing element. An adequate housing affordability analysis for the housing element must take into consideration the characteristics of existing and potential housing stock in the community,<sup>9</sup> including

an inventory of land suitable for residential development, vacant sites and sites having potential for redevelopment, an analysis of the relationship of zoning and public facilities and public services to those sites, and costs of developing housing resources compared to the ability of community households to pay for such housing. Hernandez v. City of Encinitas (1994) 28 Cal.App.4<sup>th</sup> 1048.

The housing element is the foundation for securing affordable housing. As a result, housing advocates frequently monitor the preparation of these elements, including the written comments made by the State Department of Housing and Community Development as to the legal adequacy of the element. Cities and counties which fail their statutory responsibilities can find themselves in court. If a court determines that a municipality is noncompliant, the court can select from a broad number of remedies, including an injunction against market rate housing development projects from moving forward. §§ 65755, 65760.

When a court reviews a general plan, the court looks only for substantial compliance. §65301.5. However, judicial review of a housing element requires actual compliance. Buena Vista Gardens Apartment Assoc. v. City of San Diego (1985) 175 Cal.App.3d 285.

If a local jurisdiction, through its general plan imposes a moratorium on the development of housing, or in any other way limits the number of housing units to a discrete number or percentage of new units, the local jurisdiction must make findings under section 65302.8. The local jurisdiction must justify its action by making findings concerning how the reduction relates to the jurisdiction's fair share number of housing units, what specific programs the jurisdiction employs to achieve the requirements of the housing element, what financial or environmental resources are available or unavailable to the jurisdiction and how the reduction in new housing units relates to the promotion of the public health safety and welfare.

These requirements apply to charter cities.

### **C. Denial and Conditioning of Affordable Projects. (§ 65589.5)**

Embodied within the Housing Element law (Art. 10.6) are very significant limitations on how local agencies deny or condition projects affordable to very low, low and moderate income residents. Notwithstanding their location within the housing element law, these limitations appear to impact all types of city and county land use decisions. In brief, project denials, or conditions of approval which adversely impact affordability, must be supported by detailed findings and substantial evidence. § 65589.5(d). These findings require the city or county to address the denial/conditions of approval in the context of the housing element, overcrowding, lack of need, impacts to agricultural lands, inadequate water or sewer facilities and inconsistency with the general plan. Section 65589.5 clearly evidences the Legislature's desire to create a more disciplined decision-making process for affordable projects and to limit arbitrary and/or discriminatory actions by cities and counties.

Section 65589.4 has been added to the Government Code exempting multifamily residential housing projects, as a permitted use, from a conditional use permit on parcels zoned for multifamily housing provided certain requirements are satisfied. Stats. 2003, ch. 793, § 65589.4.

These limitations do not act as an override and must be read and applied consistent with other statutory requirements such as CEQA.

Section 65589.5 applies to charter cities.

## **D. The California Coastal Act and Affordable Housing**

### **1. Introduction**

Special rules for planning and affordable housing exist for the coastal areas in California. The California Coastal Act (“CCA”) (Pub. Resources Code § 30000 et seq.) was enacted in 1976 to provide long-term protection of California’s 1,100 mile coastline. The 1976 Act permanently adopted the coastal protection program launched by a citizens’ initiative, Proposition 20 the “Coastal Conservation Initiative,” which the voters approved in 1972. The CCA created a partnership between the State, acting through the California Coastal Commission, and local governments to manage the conservation and development of coastal resources through a comprehensive planning and regulatory program. CCA’s policies constitute the standards used by the California Coastal Commission in its coastal development permit decisions and for the review of local coastal programs prepared by local governments. Coastal cities and counties must incorporate these policies into their individual local coastal programs. The policies which address public access, recreation, marine environment, land resources, development and industrial development are detailed in Public Resources Code sections 30200-30265.5.

The CCA specifically addresses the need for affordable housing stating that nothing in the CCA “shall exempt local governments from meeting the requirements of state and federal law with respect to providing low- and moderate- income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by existing law or any law hereafter enacted.” Pub. Resources Code § 30007. The California Legislature acknowledged in its findings and declarations under the CCA that “existing developed uses, and future developments that are carefully planned and developed consistent with the policies of [the CCA], are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.” Pub. Resources Code § 30001(d).

The special rules, including items 2-5 which follow, for affordable housing in the coastal zone apply to charter cities.

### **2. Local Coastal Programs and Coastal Development Permits. (§§ 30500 & 30600)**

Under Public Resources Code section 30500 each local government whose boundaries include property within the coastal zone must prepare and submit a “local coastal program” to the California Coastal Commission for approval. Local coastal programs (“LCPs”) identify the location, type, densities and other ground rules for future development in the coastal zone. Each LCP includes a land use plan and its implementing measures (e.g., zoning ordinances). An LCP is not required to include housing policies and programs pursuant to Public Resources Code section 30500.1. However, the zoning must be consistent with the general plan and housing element when required by law or local ordinance.

Under the CCA, “any person, as defined in section 21066, wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit.” Pub. Resources Code § 30600. “Development” includes virtually all forms of construction and is defined expansively. Pub. Resources Code § 30106.

However, certain types of development are exempt from coastal permitting requirements. Public Resources Code section 30610 provides exemptions for the following: emergency work necessary to protect life or property; most repairs and improvements to single-family homes; maintenance dredging of existing channels pursuant to a permit from the U.S. Army Corps of Engineers; other repair or maintenance activities; development in areas subject to categorical exclusions; installation or replacement of utility connections; replacement of any structure destroyed by natural disaster; conversion of existing multiple unit residential to time-share; and certain temporary events. Pub. Resources Code § 30610(a)-(h).

**3. Requirements for Affordable Housing Within the Coastal Zone. (§§ 65590 & 65590.1)**

In 1981, the California Legislature enacted section 65590. This provision is also known as the Mello Act and its purpose is to preserve residential housing units occupied by low or moderate- income persons or families within the coastal zone. In addition to incorporating the housing element requirements with housing development within the coastal zone the Mello Act applies several requirements to condominium conversions<sup>10</sup>, demolitions<sup>11</sup>, new construction, conversions from residential to nonresidential uses and new residential developments within the coastal zone. Section 65590(a) requires each respective local government to comply with the Mello Act in that portion of its jurisdiction which is located within the coastal zone. § 65590(a).

**4. Conversion or Demolition of Existing Residential Structures. (§§ 65590(b) & 65590(c))**

Section 65590(b) imposes a mandatory duty on local governments to require replacement housing as a condition of granting a permit to convert or demolish existing residential dwelling units which are occupied<sup>12</sup> by persons or families of low or moderate income. Replacement dwelling units shall be located on the site of the converted or demolished structure or elsewhere within the coastal zone if feasible, or, if not feasible, they shall be located within three miles of the coastal zone, and within the same city or county as the converted or demolished structure. §65590(b).

Certain narrow circumstances arise where the mandatory requirement for replacement of converted or demolished affordable housing units is subject to a determination that replacement of all or any portion of the affordable housing is “feasible,”<sup>13</sup> otherwise the replacement requirements shall not apply. The following types of conversion or demolition are subject to a feasibility determination:

(1) The conversion or demolition of a residential structure which contains less than three dwelling units, more than one residential structure, or 10 or fewer dwelling units.

(2) The conversion or demolition of a residential structure for purposes of a nonresidential use which is either “coastal dependent,” or “coastal related. The coastal dependant or coastal

related use shall be consistent with the provisions of the land use plan of the local coastal program. Examples of coastal dependent or coastal related uses include, but are not limited to, visitor-serving commercial or recreational facilities, coastal dependent industry, or boating or harbor facilities.

(3) The conversion or demolition of a residential structure located within the jurisdiction of a local government which has within the area encompassing the coastal zone, and three miles inland therefrom, less than 50 acres, in aggregate, of land which is vacant, privately owned and available for residential use.

(4) The conversion or demolition of a residential structure located within the jurisdiction of a local government which has established a procedure under which an applicant for conversion or demolition will pay an in-lieu fee into a program, the various provisions of which, in aggregate, will result in the replacement of the number of dwelling units which would otherwise have been required by this subdivision. As otherwise required by this subdivision, the replacement units shall, (i) be located within the coastal zone if feasible, or, if location within the coastal zone is not feasible, shall be located within three miles of the coastal zone, and (ii) shall be provided and available for use within three years from the date upon which work commenced on the conversion or demolition.

The requirements for replacement dwelling units shall not apply to the demolition of any residential structure which has been declared to be a public nuisance.<sup>14</sup>

§ 65590(b)(1-4).

Section 65590(c) prohibits the conversion or demolition of any residential structure for purposes of a nonresidential use which is not coastal dependent, unless the local government first determines that a residential use is no longer feasible at that location and requires replacement affordable housing. Section 65590(c) states:

The conversion or demolition of any residential structure for purposes of a nonresidential use which is not 'coastal dependent', as defined in section 30101 of the Public Resources Code, shall not be authorized unless the local government has first determined that a residential use is no longer feasible in that location. If a local government makes this determination and authorizes the conversion or demolition of the residential structure, it shall require replacement of any dwelling units occupied by persons and families of low or moderate income pursuant to the applicable provisions of subdivision (b).

§ 65590(c).

## **5. New Housing Developments. (§ 65590(d))**

Section 65590(d) requires new housing developments constructed within the coastal zone to

provide affordable housing where feasible. Density bonuses and other incentives shall be used to encourage affordable housing within new developments. Section 65590(d) provides:

New housing developments constructed within the coastal zone shall, where feasible, provide housing units for persons and families of low or moderate income, as defined in section 50093 of the Health and Safety Code. Where it is not feasible to provide these housing units in a proposed new housing development, the local government shall require the developer to provide such housing, if feasible to do so, at another location within the same city or county, either within the coastal zone or within three miles thereof. In order to assist in providing new housing units, each local government shall offer density bonuses or other incentives, including, but not limited to, modification of zoning and subdivision requirements, accelerated processing of required applications, and the waiver of appropriate fees.

Section 65590(e) requires that any determination of the “feasibility” of an action required to be taken shall be reviewable pursuant to the provisions of section 1094.5 of the Code of Civil Procedure. Section 1094.5 provides for administrative mandamus which is used to obtain judicial review of adjudicatory decisions (i.e., decisions that determine what the facts are in relation to specific private rights or interests) of state level or local government bodies. California Administrative Mandamus (Cont. Ed. Bar 2d ed. 1982 § 1.1).

Venice Town Council v. City of Los Angeles (1996) 47 Cal.App.4th 1547, provides a summary of the Mello Act (§ 65590) and its application to a specific land use decision. In February 1993, the City of Los Angeles approved an application by the owners of an apartment building located on Ocean Front Walk in Venice to convert three ground floor residential units to commercial uses. The City granted the application based on its finding that residential use of the units abutting the Venice board walk was no longer feasible at that location and that the new retail stores were “coastal dependent.” Venice Town Council at 1556. The town council brought an action against the City of Los Angeles, alleging that the Mello Act imposed a mandatory duty on the City in certain circumstances to require replacement housing for low or moderate income people or families where the units occupied by qualifying people were converted or destroyed. The trial court found in favor of the City and the town council appealed.

The appellants’ alleged that the City had a clear duty imposed by section 65590. The court agreed that section 65590(b) “mandates that the City require replacement of low or moderate- income housing as a condition of approval of their conversion or demolition. This provision creates a mandatory duty to require replacement housing, or an in-lieu fee, unless the City makes express factual determinations that the project falls within specific statutory categories which in turn still mandate replacement unless the City makes an express factual determination replacement housing is not feasible.” Venice Town Council at 1558. The appellants’ alleged that the City had failed to make the necessary factual determinations and to require replacement housing in cases which do not implicate any of the special factual circumstances. The complaint went on allege that the City had authorized the demolition of at least 271 affordable housing units and only required five to be replaced.

The court noted that section 65590(c) mandates the City to require replacement housing any time existing residential units occupied by low or moderate-income persons are replaced by noncoastal dependent commercial uses. The court rejected the City's argument that section 65590(c) permits the City the discretion to determine whether replacement units are feasible in this circumstance. "[C]ontrary to the City's apparent policies, argument in the trial court and in this court, when dwelling units occupied by low or moderate-income persons or families are replaced by noncoastal dependent commercial uses, replacement of these units or payment of an in-lieu fee is mandatory and is not dependent on a finding replacement is feasible." Venice Town Council at 1559-60. The court summarized that the only types of conversion or demolitions which may be reviewed for feasibility of replacement with affordable housing or payment of an in-lieu fee under 65590 are explicitly stated in subsection 65590(b)(1-4).

The appellants also alleged that the City failed to comply with section 65590(d) which requires new housing developments in the coastal zone to include affordable housing where feasible. In addition, the complaint alleged that the City had a policy of automatically exempting any developer who challenged the condition when the City did require affordable housing to be included in a new housing development.

In sum the appellate court held that:

a liberal construction of the complaint adequately alleges the Mello act [sic] imposes on the City the mandatory, ministerial duties to, at a minimum, (1) make the threshold factual determination whether proposed residential units slated for demolition or conversion in the coastal zone are, or in the past year have been, occupied by low or moderate-income persons or families; (2) and, if so, to require an in lieu fee, or replacement of affordable housing units at that location, within the coastal zone or within three miles of the coastal zone; or (3) to make the requisite factual findings a proposed commercial use is coastal related or dependent; or (4) if not coastal dependent, to require replacement housing for low or moderate income persons and families in, or within three miles of, the coastal zone; and, (5) to make the additional factual determinations whether a residential unit slated for demolition is still feasible at the location, whether affordable housing units are feasible for a given new housing development, and the other express determinations required by statute prior to the issuance of conversion, demolition or construction permits within the coastal zone.

Venice Town Council at 1561.

## **D. Zoning Actions**

### **1. General Discussion**

This section focuses on the interplay of zoning law and affordable housing issues, including policies adopted by the state to facilitate the development of affordable housing. Housing development approvals and enforcement of compliance with local zoning ordinances tailored toward

meeting housing needs are addressed. Also discussed in this section, are particular zoning provisions and incentives such as inclusionary zoning, density bonuses and secondary units. Finally, the application of the state zoning law to charter cities is summarized.

On the next regulatory tier, following the general plan and specific plan in the land use approval hierarchy are zoning ordinances. Zoning is defined in Curtin's Land Use and Planning Law as the division of a city into districts and the application of different regulations in each district. Zoning ordinances must be consistent with the general plan and any applicable specific plan of the relevant city or county.<sup>15</sup> § 65860(a). The consistency requirement is the legal tool by which local agencies can implement affordable housing strategies such as inclusionary units and minimum densities. The state zoning law (§ 65800 et seq.) provides the tools to regulate the structural and architectural design of buildings and the nature and extent of their use. Zoning ordinances are used by municipalities to regulate a wide variety of land use issues, for example, an ordinance may regulate: (1) the location, height, size of buildings and structures; (2) the size and use of lots, yards and other open spaces; (3) the use of buildings, structures and land; (4) the percentage of a lot which may be occupied by a building or structure; (5) the intensity of a land use; (6) parking; and (7) setbacks.

## **2. Interim Ordinances. (§ 65858)**

When faced with an unusual or unpopular land use entitlement request, some cities and counties respond by adopting emergency ordinances under the authority of section 65858. This statute allows the city council or board of supervisors, without going through the normal procedures including public notice, adopt a freeze on types of development projects and/or projects in certain geographic areas of the community. As a result of legislative amendments adopted in 2001, ordinances which impact multi-family housing projects may not be extended unless additional findings supported by substantial evidence are adopted. § 65858(c).

Charter cities must follow these requirements.

## **3. Growth Limitation Ordinances. (§ 65863.6)**

The California Legislature has identified the development of a sufficient supply of housing to meet the needs of all Californians as a matter of statewide concern. This concern is reflected in the state zoning law, which provides that when imposing zoning regulations a city or county shall consider the effect of an ordinance on the housing needs of the region and balance those needs against the public service needs of its residents and available fiscal and environmental resources. § 65863.6. In addition, any ordinance which by its terms, limits the number of housing units which may be constructed on an annual basis shall contain findings as to the public health, safety, and welfare of the city or county to be promoted by the adoption of the ordinance which justifies reducing the housing opportunities of the region. Id.

In Building Industry Assn. v. City of Camarillo (1986) 41 Cal.3d 810, the California Supreme Court addressed the issue of whether section 65863.6 is applicable to a growth control ordinance enacted by means of the initiative process. The court found that the requirements of section 65863.6

do not apply to the initiative ordinances. In its ruling the Supreme Court cited a previous decision Associated Homebuilders, etc. Inc. v. City of Livermore (1976) 18 Cal.3d 582, where it concluded that the statutory notice and hearing provisions of sections 65853 through 65857 govern only ordinances enacted by city council action and do not limit the power of municipal electors to enact legislation by initiative. Associated Homebuilders at 596.

A statutory analysis of section 65863.6 supported a similar conclusion. The court found that when the Legislature wrote section 65863.6 it could not have intended the electorate to undertake the balancing process when enacting legislation by initiative. “How can one prove that the voters weighed and balanced the regional housing needs against the public service, fiscal, and environmental needs? We agree with [citation omitted] that ‘what is in the minds of the electorate in adopting the initiative is . . . immaterial.’” Building Industry Assn. at 823-824.

“Section 65863.6 establishes guidelines that can be carried out by a city or county government, but which reasonably cannot be satisfied by the initiative process . . . . To hold otherwise would place an insurmountable obstacle in the path of the initiative process and effectively give legislative bodies the only authority to enact this sort of zoning ordinance.” Id. at 824. Nevertheless, growth control ordinances must meet certain other requirements. For example, an initiative ordinance must still comply with the requirement that it be substantially and reasonably related to the welfare of the region affected. (Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal.3d 511, 524.) It cannot unfairly discriminate against a particular parcel and it cannot be arbitrary or capricious. [citations omitted]. Building Industry Assn. at 824.

**4. Sale of Subsidized Units.** (§§ 65863.10, 65863.11, 65863.13)

Special pre-sale (or payoff of a subsidized mortgage) notification steps are codified in the zoning law. However these code sections do not directly impact the exercise of zoning powers by cities and counties.

**5. Housing Development Approvals.** (§ 65913); **Zoning Sufficient Residential Land to Meet Housing Needs.** (§ 65913.1)

The Legislature has declared that “there exists a severe shortage of affordable housing, especially for persons and families of low and moderate income, and that there is an immediate need to encourage the development of new housing, not only through the provision of financial assistance, but also through changes in law.” These laws are designed to: (1) expedite the local and state residential development process; (2) assure that local governments zone sufficient land at densities high enough for production of affordable housing; (3) assure that local governments make a diligent effort through the administration of land use and development controls and the provision of regulatory concessions and incentives to significantly reduce housing development costs and thereby facilitate the development of affordable housing. § 65913(a).

The Legislature has further found that the costs of new housing developments have increased, in part because of the existing permit process and existing land use regulations and that vitally needed housing developments have been halted or rendered infeasible despite the benefits to the public

health, safety, and welfare of those developments and the absence of adverse environmental impacts. To address these problems the Legislature has enacted and amended existing statutes which govern housing development to provide greater encouragement for local and state governments to approve needed and sound housing developments. § 65913(b).

In some cases the Legislature has responded by imposing requirements and limitations on the ability of a city or county to exercise its zoning authority. For example, the state zoning law requires that in exercising its authority to zone for land uses and in revising its housing element a city or county must “designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan to meet housing needs for all income categories as identified in the housing element of the general plan.” § 65913.1(a).

“Appropriate standards” means densities and requirements with respect to minimum floor areas, building setbacks, yards, parking, lot coverage percentages, and other requirements which contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors, the public health and safety, and the need to facilitate the development affordable housing to low or moderate income persons or families. §65913.1(a)(1).

In Hernandez v. City of Encinitas (1994) 28 Cal.App.4th 1048, the appellants, six low-income residents of the City of Encinitas alleged that the City’s general plan unreasonably restricted affordable housing for low income people. In addition to challenging the adequacy of the general plan’s housing element and its internal consistency, the appellants contended that various provisions of the City’s zoning ordinance and its land use element violated the least cost zoning provisions of sections 65913 and 65913.1.

The court held that the City did not violate the “least cost zoning law” provisions of section 65913 and 65913.1. The court found that the housing element of the ordinance incorporated a regional housing need allocation totaling 1,406 units over a five year time frame, 857 of which were allocated to very low, lower and moderate income categories. The court pointed out that the City had demonstrated that it had adequately zoned land sufficient to accommodate an additional 1,410 units. Hernandez at 1073-1074. The court also held that there was substantial evidence supporting the conclusion that the City adopted density and other land use standards with respect to vacant land for residential use that was sufficient to meet housing needs as identified in the general plan as required by 65913.1. Hernandez at 1074. Furthermore, there was no contravention of the “appropriate standards” definition of section 65913.1, as the general plan and its adoption process reflected consideration by the City of not only the need for housing at the lowest possible cost in the context of the five year regional plan, but also consideration of the environmental, safety and infrastructural constraints identified in the environmental reports, traffic analysis and technical analysis of the general plan elements.

Although codified in the state zoning law, the companion section to section 65913.1 addresses local subdivision standards. When regulating subdivisions under the Subdivision Map Act (§ 66412 et seq.) which is discussed in more detail in Section II E, a city or county shall: (1) refrain from imposing

criteria for design or improvements for the purpose of rendering infeasible the development of housing for any and all economic segments of the community; (2) consider the effect of ordinances with respect to the housing needs of the region; (3) refrain from imposing standards and criteria for public improvements, including, but not limited to, streets, sewers, fire stations, schools, or parks, which exceed the standards and criteria being applied by the city or county at that time to its publicly finance improvements located in similarly zoned districts within that city or county. § 65913.2.

Sections 65913.1 and 65913.2 can be enforced through judicial action and if a court finds that a city or county acted in violation of either of these sections, the city or county must bring its action into compliance within 60 days. § 65913.7. This means that cities and counties are open to lawsuits brought by citizens who have been adversely impacted by actions restricting the development of affordable housing where the municipality fails to comply with the provisions of 65913.1 and 65913.2. However, the court retains jurisdiction to enforce its decision. The court may extend the time period for compliance an additional 60 days if it determines that the original 60 day time period would place an undue hardship on the city or county.

Charter cities are subject to these statutory obligations.

## **6. Zoning and General Plan Consistency**

Section 65860 requires that county or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. Zoning consistency does not apply to a charter city unless the city elects by charter or ordinance to bind itself to this requirement. §65803.

The appellate courts have affirmed the general exception to zoning consistency for charter cities. In Garat v. City of Riverside (1991) 2 Cal.App.4th 259 the appellants, the City of Riverside, appealed a decision holding that the city's general plan was deficient and that two land use initiative ordinances adopted by the city were invalid and unenforceable. The respondents opposed the city's enactment and enforcement of a controlled growth land use planning measures. The appellate court concluded that zoning enactments by a charter city do not need to be consistent with the provisions of its general plan. In reaching its conclusion the court cited Verdugo Woodlands Homeowners etc. Assn. v. City of Glendale (1986) 179 Cal.App.3d 696, which noted the fact that the "Legislature has imposed the provisions of the state planning law on charter cities in numerous instances (e.g., § 65300) and has steadfastly refused to do the same with respect to the consistency requirement." Garat at 283-284 citing Verdugo. In agreeing with past precedent the court stated "Verdugo reluctantly concluded, as do we, that the legislative directive of section 65803 is unmistakable and unavoidable and that the consistency requirement of section 65860 simply does not apply to charter cities which have not adopted the same for themselves by either charter or ordinance." Garat at 284.

Both the Verdugo and Garat courts acknowledged the fact that the exemption in section 65803 of charter cities from the consistency requirement arguably leaves charter cities virtually free to ignore the overall benefits of integrated planning. The Garat court reiterated the "strong suggestion made by our sister court in Verdugo that the Legislature examine the wisdom of permitting charter cities (or their voters, through the initiative process) to ignore such a fundamental principle of sound land use planning as consistency between a city's zoning enactments and that city's general plan for

land use and development.” Grant at 284.

The zoning consistency requirement is very important in terms of translating affordable housing opportunities recognized in a general plan into real units. Zoning is not required to be a mirror image of the land use map. The map is only a two dimensional depiction of the allocation of land uses, and as a general plan consists of much more than just a map, the actual regulations which are adopted and applied to parcels of land represent opportunities to gain and lose ground on affordable units. Housing advocates cannot rest following the adoption of a general plan and favorable housing element. Rather, affordable housing concerns must be carried through to the adoption of necessary regulations as well as application of regulations to individual development projects in order for affordable housing strategies to have a positive impact. San Franciscans Upholding Downtown Plan v. City and County of San Francisco (2002) 102 Cal.App.4th 656; Sequoyah Hills Homeowners Association v. City of Oakland (1994) 23 Cal.App.4th 704.

## **7. Inclusionary Zoning**

Inclusionary zoning provisions are a core strategy in an overall system designed to meet affordable housing goals in many communities. An inclusionary zoning system is designed to allow the community to lay out with specificity the number of lower and moderate income housing units that will be provided for in new developments within the community. §65589.8. The use of inclusionary housing ordinances by local governments provides a useful tool in land use decision making and meeting the goals within the housing element of the jurisdiction’s general plan. Inclusionary zoning, as mandated by local enactment, is not expressly authorized within the organization of the state zoning law. Developer sponsored affordable projects are addressed in the following section. Most land use attorneys believe however, that such requirements can be readily defended on the basis of the police power (see I C above), the housing element requirements as part of the general plan (see II B above) and/or the zoning consistency requirements. (See II D 3.)

The use of the inclusionary zoning ordinance to meet a community’s affordable housing goal through a set percentage of affordable units can be a significant burden upon new development within a community and can pose significant planning and land use issues for the local government. However, when coupled with incentives, in the form of density bonuses, in-lieu fees, or other negotiated concessions, the developer’s profit pro forma and the community’s affordable housing and planning goals can jointly be achieved.

Inclusionary zoning ordinances have withstood legal challenge. In the recent case regarding inclusionary zoning ordinances of Home Builders Association of Northern California v. City of Napa (2001) 90 Cal.App.4th 188, the City of Napa’s inclusionary zoning ordinance requiring 10 percent of all newly constructed units to be affordable to low or moderate income households was upheld in a challenge of the ordinance as a taking of private property for a public purpose without just compensation. The court in Napa held that the application of Napa’s inclusionary zoning ordinance substantially advanced a legitimate government interest of creating affordable housing for low and moderate income families and did not deny the owners of property of economically viable use of the

their land.<sup>16</sup>

Inclusionary housing requirements are not expressly authorized in the zoning law. However, to the extent that inclusionary requirement is applied, the Legislature has provided that a developer has the right to construct rental housing to meet the needs, including projects located in charter cities. § 65589.8.

#### **8. Density Bonuses. (§§ 65915-65917)**

Through density bonus regulations, local governments including charter cities, may provide developers with density allowances above what is otherwise allowed for at a particular location. As authorized by sections 65915-65917, when a developer of affordable housing proposes a housing development within a local jurisdiction, the local government is required to provide the developer with certain incentives for their development of lower income housing units. In granting the various incentives, the jurisdiction must ensure the continued affordability of the housing units for up to 30 years or longer. § 65915(c).

Local governments are required to codify the various methods of providing incentives to the developers of these lower income housing units. Unless the local government makes a specific finding that such incentives are not required in order to provide for affordable housing costs or rents for a proposed housing development, or the developer waives its right to the increased density, local governments are required to grant increased density for qualifying affordable housing developments. § 65915(b).

The term “density bonus” as used in section 65915 means a density increase of at least 25 percent, unless a lesser percentage is elected by the developer, over the otherwise maximum allowable residential density under the applicable zoning ordinance and land use element of the general plan. § 65915(g). However, an increase in density is not the only allowable “bonus” or incentive that a local government can provide for the developer’s commitment to produce affordable housing.

In addition to an increase in otherwise allowable density for an affordable housing project of five or more units, section 65915 provides for additional concessions or incentives as a means to encourage and reward affordable housing development. For example, a local government may allow for a reduction in site development standards or a modification of zoning code or architectural requirements that exceed minimum specifications. § 65915(j).

The granting of the density bonus to a developer for a particular project that otherwise meets the requirements of section 65915 does not, in and of itself, require that the developer seek a general plan amendment, zoning change, or other discretionary approval.

The reduction in site development standards, when used as an ad hoc tool to provide an incentive to affordable housing development, may not be able to enjoy the full benefit of ministerial review that the density bonus alone enjoys. § 65915(g). Unless the general plan, land use table,

zoning code, site development or architectural standards are modified to accept the more dense development prior to the development application, discretionary governmental approvals may often be required which can add less certainty and added costs to an affordable housing development.<sup>17</sup>

The Legislature is cognizant of the fact that utilization of the density bonus is not always as beneficial as possible on specific sites. § 65915(d). In order to accommodate specific sites that are not able to effectively utilize the density bonus due to zoning and development restrictions placed upon a specific property, the Legislature provides that the local jurisdiction shall establish procedures for waiving or modifying development and zoning standards. § 65915(d).

In reality, however, the narrow exception allowing a waiver of zoning and development restrictions afforded by the Legislature provides a very limited route around potentially expensive site development requirements. For if it is determined that the density bonus cannot be effectively utilized for the specific site, and waivers of zoning and development regulations may be required, it is incumbent upon the developer and not the local government to show that such waivers are necessary in order to make the proposed affordable housing units “economically feasible.” §65915(f). Simply stating in the local ordinances that a developer may ask for waivers of zoning regulations and site development restrictions does not in and of itself protect the developer against discretionary governmental approval or necessarily add to the economical feasibility of a given project.

In 2002, the Legislature amended section 65915 which provides density bonuses to developers to encourage the inclusion of affordable housing units within new housing construction. According to the bill’s sponsors, California’s density bonus law has not lived up to its potential for helping meet the state’s housing needs because too many local governments have undercut these laws by layering density bonus projects with unnecessary conditions and procedural obstacles. The amendments are intended to simplify the process for obtaining density bonuses.

Amended section 65915(e) generally prohibits local governments from applying any development standard that would have the effect of precluding an affordable housing development from receiving a density bonus. Specifically, section 65915(d) now allows an applicant to request a particular incentive specified in the statute and then requires the local government entity to grant that incentive or concession (rather than allowing the local government to specify the concession or incentive), unless the local government makes a written finding that the concession or incentive is not required in order to provide for affordable housing or for rents of targeted units; or that the concession or incentive would have a specific adverse impact upon public health and safety or the physical environment or real property listing in the historical register and for which there is no feasible method to mitigate or avoid the impact without rendering the development unaffordable.

The amendment also expands the requirement on local governments to ensure continued affordability of specified units to include condominiums. In addition, section 65915(d) specifically states that an applicant may initiate judicial proceedings if the city, county or city and county refuses to grant a requested density bonus, incentive or concession. If a court finds that the refusal to grant the requested density bonus, incentive or concession was in violation of section 65915, the court shall

award the plaintiff reasonable attorney's fees and costs of the suit. §65915(d).

## 9. Condominium Conversion Incentives

The conversion of existing rental housing to condominiums can have a substantial negative impact upon the community's available affordable housing units. A phenomenon of the late 1970's and early 1980's, this development trend has largely disappeared. However, the conversions represent an alternative avenue to increase the affordable housing stock within the community by allowing an applicant a density bonus or other equal financial incentive when converting these existing for-rent apartments to condominium projects.

Section 65915.5 provides that when an applicant for such a conversion agrees to provide a certain percentage of the total units of the proposed condominium to qualifying lower, moderate and low income persons and families,<sup>18</sup> the developer may be entitled to economic or density increase incentives. § 65915(a). There are similarities to the bonus structure for these types of conversions with those available for new-construction affordable housing projects addressed above. However, there are many distinct differences and perhaps a practical disincentive to utilize the incentives and provide affordable housing.

In the situation of a condominium conversion, if assurances are made to meet the respective affordability levels, the developer is entitled to an increased density of 25 percent over the number of apartments to be provided within the existing structure or structures proposed for conversion. This is similar to the situation for new construction where the density increase is calculated by first determining the maximum allowable density given the current zoning and development restrictions for the property. Here, the existing number of units at the time of the proposed conversion forms the basis for 25 percent increase.

The differences however are that in the case of a condominium conversion the project developer is entitled to only one incentive for the assurance to maintain affordability. The local government may choose to either grant the 25 percent density increase or provide other incentives of equivalent financial value. § 65915.5(a). While in the case of the new construction of affordable units, provided that the development otherwise meets the affordability requirements, is entitled to both a 25 percent density bonus and at least one other concession. §§ 65915(b) and 65915(H)(1)-(3). Further, the 25 percent bonus allowable for the condominium conversion may be in reality significantly less than the 25 percent stated in section 69515.5(a). The 25 percent increase may amount to much less than 25 percent of the units existing at the time of the proposed conversion due to the definition of a density bonus in the context of condominium conversion. Density bonus in this context is granted based upon the otherwise maximum allowable density permitted under the *then current* applicable zoning ordinance and land use elements of the general plan of the community. It is not unreasonable or even unlikely to imagine the scenario wherein a condominium conversion is proposed for a project that is several years or decades old. In the intervening years between the original construction of the structures to be converted and the date of the proposed conversion, land use, planning and zoning requirements more often than not have changed, become more

comprehensive and more restrictive with respect to use and density. Thus, with a trend toward greater site constraints under the local ordinances the density in place at the time of original construction may be equal to or greater than the density that would be allowable under the zoning and land use requirements in effect at the time of proposed conversion; thus negating the possibility of the density bonus.

## 10. “Granny” Housing and Secondary Housing Units

“Granny unit” regulations are designed to address a more specific situation than the more general second unit legislation and one that is increasingly important as older citizens become a greater percentage of the population. § 65852.1. As a result of this narrower focus, many of the general requirements applicable to secondary units under section 65852.2 do not apply. First, these units may be permitted by a local government in a zoning district that may not otherwise allow for secondary units. Second, and what makes these units unique is that the Legislature grants to local governments the authority to issue a zoning variance, special use permit, or conditional use permit for such a dwelling unit if such unit is intended for the sole occupancy of one or two adults over the age of 62 and the area of floor space does not exceed thirty percent of the existing living area or the area of the floor space of the detached dwelling unit does not exceed 1,200 square feet. § 65852.1. Section 65852.2 and its more specific requirements must be consulted in implementing the section 65852.1 “Granny unit” statute because the provisions concerning secondary units generally found in section 65852.2 are expressly not limited by the broader defining terms contained in section 65852.2. § 65852.1. What does exist in the provisions of section 65852.1 is the ability of the local government to grant a variance in certain circumstances where the requirements of section 65852.2 cannot be otherwise met. Thus, the age of the intended occupant of the dwelling unit may become a reason for granting a variance from the section 65852.2 zoning requirements . § 65852.1.

Second units are recognized as a valuable form of housing in California. § 65852.150. Second units provide housing for family members, students, the elderly and others, at below market pricing within existing neighborhoods. To encourage this relatively affordable housing, a local government may provide for second units or “Granny” housing in single family residential or multifamily residential districts.

The broader section 65852.2 provisions for non-age restricted secondary unit ordinances contains specific pronouncements that form the minimum basic requirements for local governments when considering an application for a second unit on a residential parcel. The purpose of this 1994 legislation was to provide guidance to local governments so that secondary units can become a viable housing alternative and that pre section 65852.2 requirements be refined so that arbitrary local governmental regulations concerning secondary units are discouraged.<sup>19</sup>

The general provisions of section 65852.2 governing second units are directives to local governments that provide for second units by ordinance or upon an application for a conditional use permit for a second dwelling unit. When a local government adopts a second unit ordinance or an application for a second unit is made, section 65852.2 provides the local government direction. The

local government must grant a special use or conditional use permit for the creation of a second unit if the application meets the section 65852.2 requirements. The requirements of this second unit statute require approval if the unit is not intended for sale, is within a single or multifamily zone with an existing single family dwelling, the increased floor area of an attached second unit does not exceed thirty percent of the existing living area, or if detached 1,200 square feet and otherwise meets the local requirements for height, setback, architectural review and local health and building code requirements. § 65852.2(b)(1)(A)-(I).

In 2002 the Legislature amended section 65852.2 which sets forth procedures whereby second units in single-family and multifamily residential zones may be established. According to the sponsors, of AB 1866, California's second unit law has not lived up to its potential for helping meet the state's housing needs because too many local governments have undercut these laws by layering second unit projects with conditions and procedural obstacles. For example, even when second units complied with all the necessary standards of section 65852.2, public hearings have drawn the process out for as much as a year and in some cases where neighbors had complied, the permits were denied. The amendments are intended to simplify the process for obtaining a permit for a second unit.

Specifically, section 65852.2 now requires local governments with second unit ordinances, after July 1, 2003, to consider *ministerially* without discretionary review or a hearing, application for second units that meet the requirements of the ordinances. § 65852.2(a)(3). For local governments who have not adopted an ordinance governing second units and receive its first application on or after July 1, 1983, the city or county shall accept the application and approve or disapprove the application *ministerially* without discretionary review second units that meet all the requirements of the current statute. § 65852.2(b)(1).

Charter cities must follow the density bonus statutes.

## **E. Regulation of Subdivisions**

As part of a local government's set of development regulations, a city or county must adopt a subdivision ordinance. § 66411. In California, this body of law is commonly referred to as the Subdivision Map Act. §§ 66410-66499.37. A subdivision is defined as the division of land into separate parcels for purpose of sale, lease or financing. § 66411. The most common form of subdivision is the conventional single family detached homes. Other residential housing types regulated as subdivisions include condominiums and townhomes. Rental developments such as apartments are not regulated as subdivision, although a larger parcel may need to be divided in order to create the building site for the apartment complex, in which case the division is regulated pursuant to the Subdivision Map Act. These state statutes apply equally to charter cities.

Subdivision ordinances are important in that these regulations set forth the development standards for the creation of new parcels. These standards typically include grading, utility, street

work as well as land dedication for streets, parks and other public improvements. In addition, development impacts are collected as part of the subdivision process, and the combined cost of development standards along with impact fees can be significant. A recent study by the Department of Housing and Community Development for the State of California bears this out.<sup>20</sup> Based upon a stated legislative desire that cities and counties not unnecessarily drive up the cost of new housing, the Legislature has adopted limits on local subdivision ordinances as well as limitations on decisions impacting specific subdivision decisions. In addition, there are provisions designed to facilitate affordable ownership opportunities. These legislative inroads as discussed below. For a more detailed discussion of the Subdivision Map Act, consult Subdivision Map Act Manual (1999) by Curtin and Merritt, published by Solano Press. For a more detailed examination of impact fees and other forms of exactions, see Exactions and Impact Fees in California (2001) by Abbott, Detwiler et al., also published by Solano Press.

The Subdivision Map Act, including the special rules for affordable housing, applies with equal force in charter cities.

**1. Consideration of Regional Housing Needs. (§ 66412.3)**

The Legislature has enacted a general proviso that cities and counties are to “consider the effect of ordinances and actions adopted pursuant (the Subdivision Map Act) on the housing needs of the region,” and to balance those needs “against the public service needs of its residents and available fiscal and environmental resources.” This general limitation sounds good, but lacks sufficient definition to be converted into an effective argument for reducing development standards or impact fees.

**2. Subdivision Design Standards May Not to Preclude Housing for All Economic Segments. (§ 65913.2)**

This code section provides that subdivision regulations are not to be set at a level which precludes the housing needs of all economic segments of the community. While this limitation is specific as to subdivision regulations, it is hidden in the zoning law for no apparent reason other than poor drafting. This fact, along with the recognition that the mandate lacks sufficient teeth to act as an effective barrier or cap to excessive development standards, may explain why this section has received little judicial scrutiny.

**3. Mobilehome Park Conversions**

The statutory protections designed to slow the pace of conversions remain, and are found at section 66427.1. This section requires pre-conversion notice to tenants, along with purchase rights by the existing tenants. Other notice requirements applicable to conversions can be found at sections 66452.8 and 66452.9.

Anytime a subdivider proposes to convert an existing mobile home park to another use

involving a subdivision, the applicant must file a report addressing the impact of the conversion on the tenants. This report must examine the availability of alternative spaces for relocating tenants. A local agency is authorized, but not mandated, to require mitigation steps to be taken by the subdivider to reduce the impacts. This particular requirement does not apply to the conversion of a tenant occupied park to a tenant owned park. § 66427.4. El Dorado Springs, Ltd. v. City of Palm Springs (2002) 96 Cal.App.4th 1153.

Mobilehome parks which convert to resident owned parks, as compared to conversion to other uses, are governed by a separate section. In this case, the subdivider must offer the existing tenant the right to either purchase or remain as a tenant in an effort to avoid displacement. El Dorado. If the existing tenant elects to not purchase, then the maximum allowable rent is determined in accordance with a statutory formula. § 66427.5. This section applies only after a rental park is converted to tenant ownership. Donohue v. Santa Paula West Mobile Home Park (1996) 47 Cal.App.4th 1168; El Dorado.

In circumstances in which two-thirds of existing tenants are willing to purchase their underlying parcels, then the conversion of the parks to an ownership park may be exempt from the mapping requirements. If the city or county can make the required determination, then a map may be required although there are detailed limits on the kinds of conditions which may be imposed. This is in marked contrast to other traditional forms of subdivisions. § 66428.1.

#### **4. Offsite Improvements - Recording of Final Map. (§ 66462.5)**

Often, a city or county imposes a condition on a tentative map which requires a subdivider to construct offsite improvements on land not owned by the subdivider. When this occurs, the local agency must cooperate with the subdivider in the event the subdivider is unable to secure the property by allowing the subdivider to record a final map subject to the agency exercising the power of eminent domain or by waiving the condition.

This “condemn or waive” provision does not apply to offsite improvements consisting of replacement or construction of affordable housing. § 66462.5.

#### **5. Water Supply Planning - Major Subdivisions. (§ 66473.7)**

The growing tension between water supply planning and new development resulted in water supply considerations being formally incorporated into the approval considerations of larger subdivisions (500 or more units). Several classes of projects are exempt from these requirements including housing projects exclusively for very low and low income households.

## **F. Manufactured Homes and Mobilehome Parks**

The Legislature has also recognized that mobile homes and mobile home parks operate as an effective tool for providing lower cost housing. Although these statutory provisions do not explicitly target low, moderate or middle income owners and renters, this housing type is generally recognized as falling in the “affordable” category.

**1. Manufactured Home Zoning. (§§ 65852.3-65852.5)**

In 1980, the Legislature directly addressed the practices by some cities and counties whose zoning regulations effectively barred the placement of mobile homes on single family residential lots. With the enactment of section 65852.3, the Legislature generally placed mobile homes certified under the 1974 federal standards on parity with conventionally constructed homes. Thus, these certified homes are subject to the same development standards such as setbacks, lot size and parking as would a stick-built home. A limitation exists however, that these standards cannot have the effect of precluding the use of manufactured housing. Cities and counties can enact limited architectural requirements such as standards for roof overhang, roofing and siding materials, as long as those standards are similar to those imposed upon conventional single family homes built on the same lot. In the absence of overhang requirements adopted for conventional homes, the maximum overhang requirement for a manufactured home is 16 inches. § 65852.5.

Local ordinances can preclude the placement of manufactured homes which are more than ten years old from the date of manufacture. § 65852.3.

A companion code section precludes cities and counties from adopting additional review procedures different from those applicable to conventional homes except as necessary to deal with architectural review. § 65852.4.

These provisions, including the following provision applicable to mobilehome parks, apply to charter cities.

**2. Mobilehome Parks. (§ 65852.7)**

Mobilehome parks are deemed to be a permitted use on any land zoned for residential use. A city or county can require that a park developer obtain a conditional use permit as a prerequisite to park development. § 65852.7.

**G. CEQA**

**1. Introduction**

The California Environmental Quality Act (“CEQA”) (Pub. Resources Code § 21000 et seq.) generally requires that local agencies engage in the preparation of formal environmental documents prior to approving public and private projects. Most frequently, these environmental documents are either negative declarations or environmental impact reports (“EIR”). This statutory scheme applies

to land use decisions such as tentative maps, parcel maps, rezonings and conditional use permits. CEQA's specific requirements are explored in depth in the Guide to the California Environmental Quality Act (2003) Remy, Thomas, Moose & Manley, published by Solano Press.

CEQA is important to affordable housing advocates and developers because it can be used to block project approvals, as well as to promote affordable housing.

As a possible barrier or impediment to development projects, it is important for housing advocates to understand that even after 30 years of interpretive case law, it is difficult to predict in advance what the required scope will be for an environmental document. The statute requires formal public review and comment on most projects, and CEQA cases can be litigated by opponents relatively easily. CEQA is typically the first line of attack by existing residents and neighbors opposed to new homes higher densities and affordable projects. California's development landscape is littered with the remains of affordable projects brought to a halt as a result of CEQA requirements. It is critical for project proponents to master the CEQA process, and fully understand the potential for delay and expense before undertaking site acquisition and development.

The same forces which work against housing advocates can be used for them as a means of encouraging the development of affordable housing. As part of the CEQA process, the lead agency must identify probable environmental impacts along with mitigation strategies and alternatives to the project. This required analysis provides the opportunity to introduce housing affordability as a means for reducing impacts associated with new development. As an example, a development project which generates significant numbers of low paying jobs in a community in which there is little affordable housing will force the future workers to commute from other communities, thereby creating traffic and related air quality impacts. CEQA requires that feasible mitigation measures be made part of the project approval. Thus, for some projects, a condition of approval could be fashioned which requires the developer to construct a certain number of affordable housing units onsite or in a nearby location.

CEQA practice is defined by state statutes, administrative guidelines ("Guidelines")<sup>21</sup> and case law, which are too extensive to consider here in detail. This section summarizes the key provisions of CEQA which specifically relate to housing development, as well as an identification of key streamlining provisions which can be used by housing advocates and developers to streamline and focus the environmental review process required for a housing project.

CEQA applies with full force in charter cities.

## 2. **SB 1925** (Stats. 2002, ch. 1039)

CEQA currently provides various exemptions from the requirements of the act relating to housing, including exemptions for agricultural housing and affordable housing projects in urbanized areas. The CEQA provisions addressing these exemptions have recently been recast, recodified and consolidated by SB 1925.

The Legislative intent of SB 1925 is to assure protection of the environment and of the residents of agricultural employee housing, affordable housing, and urban infill housing while creating

opportunities for the development of these types of housing and providing greater regulatory certainty to the developers by taking all of the following actions:

- (1) Placing statutes that provide for a special review of housing projects under CEQA in a single part of the act.
- (2) Providing specific standards for certain agricultural employee housing, affordable housing and urban infill housing projects and by eliminating any general standard that applies to housing exemptions that is inconsistent with those provisions.
- (3) Creating a streamlined procedure for agricultural employee housing, affordable housing, and urban infill housing projects that do not have an adverse effect on the environment.

In addition to making the above legislative findings and declarations regarding the need to promote housing in California, SB 1925:

- (1) Defines the terms infill site, major transit stop, project-specific effect, urbanized area, qualified urban use, low-income households, low and moderate income households, agricultural employee, residential, wetlands, census defined place, wildlife habitat, and developed open space.
- (2) Repeals sections 21080.7, 21080.14, 21085 and 21158.6 of the Public Resources Code. Amends section 21080.10 and adds sections 21061.0.5, 21064.3, 21065.3, 21071, 21072 and creates Article 6 (sections 21159.20- 21159.27) as Special Review of Housing Projects in order to recast and consolidate previously enacted housing provision with consistent terminology.
- (3) Authorizes low and moderate income housing to qualify for an exemption if it meets certain conditions.
- (4) Recasts and revises the agricultural employee exemption and affordable housing exemptions.
- (5) Authorizes an exemption to any development project that consists of the construction, conversion , or use of residential housing consisting of 100 or fewer that is affordable to low income households if it meets certain conditions.
- (6) Recasts certain provisions which authorizes a focused environmental impact report for certain Oakland projects.
- (7) Prohibits a public agency from reducing the proposed number of housing units with respect to a project that includes a housing development as a mitigation measure or project alternative if it determines that another feasible specific mitigation measure or project alternative exists that would provide a comparable level of mitigation.
- (8) Prohibits a project from division into smaller projects to qualify for one or more exemptions.

**3. General Criteria for CEQA Exemption for Housing Projects. (§ 21159.21)**

Public Resources Code section 21159.21 provides that a housing project qualifies for an exemption from CEQA pursuant to Public Resources Code section 21159.22 (agricultural housing), Public Resources Code section 21159.23 (low income housing) or Public Resources Code section 21159.24 (infill housing) if it meets the criteria in the applicable section and all the criteria provided in section 21159.21. Among the criteria which the project must meet are: (a) the project is consistent with any applicable general plan, specific plan and local coastal program, including any mitigation measures, and any applicable zoning ordinance, on the date the application was deemed complete; (b) community level environmental review has been adopted or certified; (c) the project and other projects can be adequately served by existing utilities and the applicant has paid all applicable in-lieu or development fees. Pub. Resources Code § 21159.21(a)-(c). In addition, certain project site requirements must be met, including for example that it have no value as wildlife habitat or historical significance, among others. See Pub. Resources Code § 21159.21(d)-(j).

**4. Agricultural Housing. (§ 21159.22)**

Public Resources Code section 21080.10 was amended and recast as section 21159.22. In limited circumstances, agricultural housing can be exempt from CEQA. Depending upon whether or not the residential units rely upon a public subsidy, there are different standards which define the scope of the projects which qualify for an exemption. The two types of projects are: (1) non-assisted projects affordable to lower income households which are restricted as to their affordability for at least 15 years; and (2) publically assisted projects which are affordable to very low, low or moderate income households and which also have a 15 year restriction. In addition, the project must meet the requirements of section 21159.21 mentioned above and certain location and acreage requirements.

This exemption is qualified by the limitation that if the lead agency determines that there is a reasonable possibility that the project, if completed would have a significant effect on the environment due to unusual circumstances or cumulative impacts of successive projects of the same type in the same area would be significant, then CEQA would apply without regard to the exemption. Pub. Resources Code § 21159.22(d).

Former provision 21080.10 was implemented through CEQA Guidelines section 15279. As of the time of this publication the Guidelines have not been amended to reflect the change, as such the reader should be aware that Guidelines section 15279 is based on the former section 21080.10.

**5. Lower Income Housing Projects. (§ 21159.23)**

Public Resources Code section 21080.14 was repealed by SB 1925 and recast in section 21159.23. This is still the broadest statutory exemption applicable to affordable housing. The exemption provides that CEQA does not apply to any development project that consists of the

construction, conversion, or use of residential housing consisting of 100 or fewer units that is affordable to low income households if: (1) the developer provides sufficient legal commitments to ensure the continued availability and use of the units to lower income households for a period of at least 30 years, at monthly housing costs; (2) the projects meets the requirements of section 21159.21; (3) the project site or adjacent parcels meets certain urban use requirements; (4) the project site is not more than five acres in area; (5) the project site is located within an urbanized area or within a census-defined place with a population density of at least 5,000 persons per square mile or, if the project consists of 50 or fewer units, within an incorporated city with a population density of at least 2,500 persons per square mile and a total population of at least 25,000 persons.

Again, this exemption is qualified by the limitation that if there is a reasonable possibility that the project would have a significant effect on the environment or the residents of the project due to unusual circumstances or due to the related or cumulative impacts of reasonably foreseeable projects in the vicinity of the project, CEQA would apply notwithstanding the exemption.

The provisions of section 21080.14 were previously implemented through CEQA Guidelines section 15280. As of the time of this publication the Guidelines have not been amended to reflect the repeal of section 21080.14, as such the reader should be aware that Guidelines section 15280 is based on the former section 21080.14.

#### **6. Infill Housing. (§ 21159.24)**

SB 1925 added an exemption for infill housing that meets certain requirements. The project must meet the following criteria: (1) is a residential project on an infill site; (2) is located within an urbanized area; (3) satisfies the criteria of Public Resources code section 21159.21; (4) community-level environmental review is certified or adopted within five years of the date the application of the project is deemed complete; (5) the site is not more than four acres in total area; (6) the project does not contain more than 100 residential units; (7) at least 10 percent of the housing is sold to families of moderate income, or not less than 10 percent is rented to families of low income, or not less 5 percent of the housing is rented to families of very low income, or the developer provides sufficient commitments to ensure continued availability and use of housing units for very low, low and moderate income households at monthly housing costs; (8) the project is within one-half mile of a major transit stop; (9) the project does not include any single level building that exceeds 100,000 square feet; and (10) the project promotes higher density infill housing.

This exemption is qualified by the limitation that CEQA shall apply if: (1) there is a reasonable possibility that the project will have a project-specific, significant effect on the environment due to unusual circumstances; (2) substantial changes to the circumstances under which the project is being undertaken that are related to the project have occurred since community-level environmental review was certified and adopted; (3) new information becomes available that was not known, and could not have been known at the time the environmental review was certified or adopted.

#### **7. Projects consistent with a redevelopment plan. (CEQA Guidelines § 15180)**

Perhaps the oldest of all the significant streamlining provisions, section 15180 provides that projects undertaken pursuant to or in furtherance of a redevelopment plan are deemed approved at

the time of original adoption of a redevelopment plan. If there has been a material change in circumstances resulting in new impacts, feasible mitigation measures or project alternatives, then a new, albeit more focused level of environmental review must take place. This qualification is often referred to in short hand as the “changed circumstances doctrine.” The limitation also applies to the following streamlining provision.

Section 15180 is based upon Public Resources Code section 21090.

**8. Projects Consistent with Specific Plans. (CEQA Guidelines § 15182)**

Another broad exemption applies to residential projects consistent with specific plans. This is an incentive to cities and counties to adopt, and for land owners to support, specific plans. This strategy comes with a hidden price in that the level of detail for an EIR on a specific plan may be held to a higher standard since it carries with it an exemption from later environmental review. Like the redevelopment exemption, in circumstances involving “changed circumstances,” a new EIR or ND can be required.

Section 15182 is based upon Government Code section 65453.

**9. Projects Consistent with a Community Plan, General Plan or Zoning. (CEQA Guidelines § 15183)**

While not an exemption, this provision narrows the scope of environmental review to issues particular to the project site. This section allows later projects to piggyback off of an early broad-based policy document like a general plan or specific plan. If the lead agency has taken the extra step of adopting implementing regulations which mitigate previously identified impacts, then the CEQA burdens for later projects are materially diminished. As long as cumulative impacts were adequately addressed, then the applicants for a specific project have a compelling argument for a narrowed review. If however, the prior EIR was poorly done, or the city or county has failed to adopt required mitigation measures (which is frequently the case,) the scope of relief otherwise available will be narrowed. Nevertheless, in the opinion of the authors, this Guideline provision is frequently the starting point for looking for effective CEQA relief.

Section 15183 is based upon Public Resources Code section 21083.3.

**11. Second Unit Exemptions. (§ 15282 (i))**

Under section 15282, CEQA provides a list and summary of various statutory exemptions found in the California Code, intended to be used by lead agencies as a reference tool. Section 15282(i) exempts the adoption of an ordinance pertaining to second units in a single-family or multifamily residential zone by a city or county to implement provisions of Government Code section 65852.1 and 65862.2 as set forth in section 21080.17 of the Public Resources Code.

**12. Limitation on Residential Density Reduction as a Mitigation Strategy. (§ 21159.26)**

In an effort to limit density reduction (applicable to both market rate and affordable projects), the Legislature amended CEQA in 1982 with Public Resources Code section 21085. SB 1925 (Stats. 2002) repeals and recodifies Public Resources Code section 21085 in Public Resources Code section 21159.26 without any substantive changes. Public Resources Code section 21159.26 precludes the use of density reduction as a mitigation measure or as an alternative, if the lead agency determines that another feasible mitigation measure or project alternative provides equivalent mitigation.

While most municipalities are slow to aggressively pursue this line of analysis, this provision provides a motive for the applicant to become proactive in the search for alternative mitigation approaches. For example, when faced with a demand to reduce residential unit counts in order to mitigate visual impacts, an applicant can offer up substitute mitigation such as landscaping and staggered building heights and setbacks as a means to achieve equivalent mitigation.

Note that CEQA is not the only legal source for density reduction. A city could require density reduction in order to fulfill the general plan consistency requirement. This method of density reduction would not be limited by Public Resources Code section 21159.26.

#### **H. The Permit Streamlining Act. (§§ 65920-65957.5)**

In an effort to curtail the excessive delays caused by CEQA, the Legislature enacted the Permit Streamlining Act (“PSA”). The PSA is intended to set overall time limits within which local agencies must act on development projects. A development project does not include legislative acts, and as a result, the PSA does not apply to entitlements which include general plan amendments or rezonings.

Generally, the PSA requires local agencies, including charter cities, to act on an entitlement request as follows: within 180 days following certification of the EIR, or 60 days after acceptance of a negative declaration. If an EIR is prepared and the development project is affordable to very low or low income households and public financing is involved (e.g., tax credits), then the applicable time period is reduced from 180 to 90 days.

More information regarding the PSA may be found in the Guide to the California Environmental Quality Act (2003) by Remy, Thomas, Moose & Manky, published by Solano Press.

#### **I. Local Agency Formation Commissions**

Each of California’s counties has a Local Agency Formation Commission (“LAFCOs”). LAFCOs are independent agencies that are not part of county government and are not under the authority of the county board of supervisors. LAFCOs have been described as watchdogs, guarding “against the wasteful duplication of services that results from indiscriminate formation of new local agencies or haphazard annexation of territory to existing local agencies.” Curtin’s Land Use and Planning Law p. 337 quoting City of Ceres v. City of Modesto (1969) 274 Cal.App.2d 545, 553. The primary objectives of LAFCOs are to encourage the orderly formation of local governmental agencies, preserve agricultural land resources, and discourage urban sprawl.

LAFCOs regulate, through approval or denial, proposed jurisdictional boundary changes, including the annexation and detachment of territory to and/or from cities, including charter cities

and most special districts, incorporations of new cities, formations of new special districts, and consolidations, mergers, and dissolutions of existing districts. The Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (§ 56000 et seq.) is the primary law that governs LAFCOs. While promoting orderly development has always been a fundamental purpose of LAFCOs, the 2000 amendments recognized “that providing housing for persons and families of all incomes is an important factor in promoting orderly development.” The amendments also included provisions that stated that a “preference granted to accommodating additional growth, within, or through the expansion of, the boundaries of those local agencies which can best accommodate and provide necessary governmental services and housing for persons and families of all incomes in the most efficient manner feasible.” § 56001.

For example, historically, the impact of a proposed incorporation on the future development of affordable housing to lower income household did not necessarily come into question when a LAFCO was considering an application for incorporation. Under the 2000 amendments the extent to which a proposal will assist the receiving entity in achieving its fair share of the regional housing needs is now one of the many factors to be considered in the review of a proposed change of organization or reorganization. Thus, the extent to which a jurisdiction is vesting its fair share of housing needs may be a relevant determination as to whether or not a request for annexation should be approved.

1. The Fair Housing Act U.S.C. Title 42, § 3601, et seq. acts as a limitation on private and public forms of discriminatory behavior. Starting points for additional inquiry are [www.hud.gov](http://www.hud.gov) and [www.fairhousing.com](http://www.fairhousing.com).
2. A more detailed history can be found in the [General Plan Guidelines](#) distributed by the State Office of Planning and Research. The Guidelines can be downloaded for free at [www.opr.ca.gov](http://www.opr.ca.gov).
3. The legal concept of consistency of government decision with general plans has expanded to include numerous other local and state government decisions. OPR [General Plan Guidelines](#), pp. 128-135.
4. Related publications on California land use law and practice, can be found at the publisher's website, [www.solano.com](http://www.solano.com).
5. Consistency among various elements of a general plan is known as "internal consistency." Internal consistency is a legal requirement providing that the data, policies, projections, and assumptions upon which individual elements of the plan are based must be consistent across all elements. For example, the housing element cannot be based upon an assumption of rapid growth while the circulation element is based upon an assumption of limited projected growth. The result being programs that meet the projections of the individual elements yet create discord in implementation. Having elements based upon differing assumptions can render the general plan itself internally inconsistent. *Sierra Club v. Board of Supervisors*, (1981) 126 Cal.App.3d 698; *Concerned Citizens of Calaveras County v. Board of Supervisors*, (1985) 166 Cal.App.3d 90.
6. Useful information on housing elements and related statutes can be found at the Department's website: [www.hcd.ca.gov](http://www.hcd.ca.gov).
7. For a comprehensive look into the process of creating housing elements, see Bay Area Housing Council's *Blueprint 2001*, Housing Element Ideas and Solutions: [www.bayareacouncil.org](http://www.bayareacouncil.org).
8. Housing for persons with disabilities and farmworker housing must also be addressed within the housing element. § 65583 (a)(4); (a)(6).
9. A proper analysis of affordable housing stock must take into account current low income housing which has the potential of changing to market-rate housing during the succeeding 10 years as a result of the lapse or expiration of governmental regulations concerning affordability. § 65583(a)(8); (a)(8)(A)
10. "Conversion" means a change of a residential dwelling, including a mobilehome, as defined in section 18008 of the Health and Safety Code, or a mobilehome lot in a mobilehome park, as defined in section 18214 of the Health and Safety Code, or a residential hotel as defined in paragraph (1) of subdivision (b) of section 50519 of the Health and Safety Code, to a condominium, cooperative, or similar form of ownership; or a change of a residential dwelling, including a mobilehome, or a mobilehome lot in a mobilehome park, or a residential hotel to a nonresidential use.
11. "Demolition" means the demolition of a residential dwelling, including a mobilehome, as defined in section 18008 of the Health and Safety Code, or a mobilehome lot in a mobilehome park, as defined in section 18214 of the Health and Safety Code, or a residential hotel, as defined in paragraph (1) of subdivision (b) of section 50519 of the Health and Safety Code, which has not been declared to be a public nuisance under Division 13 (commencing with section 17000) of the Health and Safety Code or any local ordinance enacted pursuant to those provisions.
12. A residential dwelling unit shall be deemed occupied by a person or family of low or moderate income if the person or family was evicted from that dwelling unit within one year prior to filing of an application to convert or demolish the unit and if the eviction was for the purpose of avoiding the requirements of this subdivision. If a substantial number of persons or families of low or moderate income were evicted from a single residential development within one year prior to the filing of an application to convert or demolish that structure, the evictions shall be presumed to have been for the purpose of avoiding the requirements of this subdivision and the applicant for the conversion or demolition shall bear the burden of proving that the evictions were not for the purpose of avoiding the requirements of this subdivision.
13. "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technical factors.

14. No building, which conforms to the standards which were applicable at the time the building was constructed and which does not constitute a substandard building, as provided in Section 17920.3 of the Health and Safety Code, shall be deemed to be a public nuisance solely because the building does not conform to one or more of the current

15. The general plan consistency requirement only applies to general law cities and all counties. With the exception of Los Angeles the general plan consistency requirement does not automatically apply to charter cities, instead a charter city must specifically adopt the state zoning law by charter or ordinance. § 65803. Zoning law and charter cities is discussed in more detail later in this section. To determine whether a particular city is a charter city consult the latest issue of the *California Planner's Book of Lists* published by the Office of Planning and Research or call the appropriate city clerk's office.

16. Home Builders at p. 197.

17. Ministerial acts require the administrative official to apply the rule or regulation then in effect to the facts at hand. "A ministerial decision involves only the use of fixed standards or objective measures, and the public official cannot use personal subjective judgment in deciding whether or how the project should be carried out." Mountain Lion Foundation v. Fish & Game Comm'n (1997) 16 Cal.4<sup>th</sup> 105, 117.

18. In order to qualify for the incentives enumerated in §69515.5(a), at least 33 percent of the total proposed project in the case of low or moderate income persons or families and 15 percent of housing units in the case of lower income persons or families must be made available. The respective income classifications are set forth in California Health and Safety Code Sections 50093 and 50079.5.

19. AB 3198 Hauser, 1994; Assembly Floor Bill Analysis, August 1994.

20. Pay to Play: Residential Development Fees in California Cities and Counties (1999): [www.hcd.ca.gov](http://www.hcd.ca.gov).

21. CEQA's statutory and regulatory provisions can be found at <http://ceres.ca.gov/CEQA>.