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REPORT TO HONORABLE MAYOR AND COUNCILMEMBERS

REQUIREMENTS UNDER SENATE BILL 330

INTRODUCTION

This Report is to advise the San Diego City Council (City Council) about the legal requirements imposed by Senate Bill 330 (2019-2020 Reg. Sess.). The California Legislature approved Senate Bill 330 (also known as the Housing Crisis Act of 2019 or S.B. 330) in October 2019 in response to a statewide housing emergency. It is intended to eliminate certain restrictions on housing development and to expedite housing permits. As explained in this Report, S.B. 330 requires the City Council to make specific written findings when denying affordable housing development projects or housing development projects.¹

QUESTIONS PRESENTED

1. When and under which circumstances may the City Council deny an affordable housing development project?
2. When and under which circumstances may the City Council deny a housing development project?

SHORT ANSWERS

1. The City Council may deny an affordable housing development project, or condition the approval, after making in writing at least one of the five findings described in S.B. 330 based on a preponderance of the evidence in the administrative record. Cal. Gov't Code § 65589.5(d).
2. The City Council may deny a housing development project, or impose a condition that the project be developed at a lower density, after making written findings, based on a preponderance of the evidence in the administrative record, that the project would have a specific, adverse impact on the public health or safety, and there is no other feasible method to satisfactorily mitigate or avoid the adverse impact. Cal. Gov't Code § 65589.5(j)(1)(A)-(B).

¹Although S.B. 330's protections also apply to the development of emergency shelters, this Report only addresses affordable housing development and housing development projects. However, the findings for denial of an emergency shelter are the same as those required for affordable housing development projects.

ANALYSIS

I. S.B. 330 PROVIDES FIVE POSSIBLE FINDINGS TO SUPPORT DENIAL OF AN AFFORDABLE HOUSING PROJECT THAT MUST BE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD.

For purposes of S.B. 330, an affordable housing development project is a housing project designed for housing very low-, low-, or moderate-income households.² Cal. Gov't Code § 65589.5(h)(3). To qualify for S.B. 330's protections, an affordable housing development project must designate at least 20 percent of the total units sold or rented to lower income (meaning very low- or low-income) households, or 100 percent of the project units sold or rented to moderate-income households (including middle-income households). *Id.*

To encourage the development of affordable housing projects, S.B. 330 prohibits a local government from denying an affordable housing development project, or conditioning the approval to the point of making the project infeasible, unless the legislative body of the local government agency makes at least one of five written findings based upon a preponderance of the evidence in the record. To achieve the preponderance of evidence standard, the local government agency must establish by clear and convincing proof of the existence (or nonexistence) of a fact used to make the written findings. This clear and convincing proof of the fact must be made beyond a reasonable doubt. Cal. Evid. Code § 502.

S.B. 330 facilitates affordable housing projects throughout the state by streamlining the initial application process, limiting the number of public hearings, curbing over-prescriptive design guidelines, and requiring a specific finding to deny a project. The five possible findings for denial of an affordable housing development project which must be supported by the administrative record are described in California Government Code section 65589.5(d) and briefly explained below.

1. The City has achieved its regional housing needs allocation (RHNA) and additional affordable housing development projects are not needed.

The City must have an adopted housing element that is not only in substantial compliance with California Government Code section 65589.5 but has also met or exceeded its share of RHNA for the planning period for the income category proposed for the housing development project. If the project includes a mix of income categories, the City must have met or exceeded the RHNA allocation for one or more of those categories.³ The City may not base a disapproval

² Lower income household is defined in California Health and Safety Code section 50079.5, moderate income is defined in section 50093 of the statute, and middle income is defined in section 65008 of the statute. The California Department of Housing and Community Development identifies local area median income (AMI) for these households: very low 30%-50% of AMI; low 50%-80% of AMI; moderate 80%-120% of AMI. *California Department of Housing and Community Development. Income Limits.* <https://www.hcd.ca.gov/grants-funding/income-limits/index.shtml> (last visited Dec. 22, 2020).

³ In the case of an emergency shelter, the City shall have met or exceeded the need for emergency shelters identified in paragraph 7 of California Government Code section 65583.

or conditional approval under this finding on any of the reasons prohibited by California Government Code section 65008.⁴ Further, while the City's housing element currently complies with California Government Code section 65589.5, satisfaction of any specific RHNA allocation must be evaluated at the time the project is being considered. Cal. Gov't Code § 65589.5(d)(1).

2. The project would have a significant and unavoidable impact to public health and safety that cannot be feasibly mitigated.

A specific adverse impact is defined as "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." Cal. Gov't Code § 65589.5(d)(2). A finding of adverse impact can only be made if the City has these types of standards adopted at the time the project's application is deemed complete. *Id.*

3. The project would violate state or federal law.

Denial or imposition of conditions for the project is required "to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development or the emergency shelter financially infeasible." Cal. Gov't Code § 65589.5(d)(3).

4. The project is located in an area zoned for agriculture or resource preservation or the land does not have an adequate water supply to support the project.

Specifically, the project "is proposed on land zoned for agriculture or resource preservation" that is surrounded on at least two sides by land uses for similar purposes, or the land "does not have adequate water or wastewater facilities to serve the project." Cal. Gov't Code § 65589.5(d)(4).

5. The project is inconsistent with the City's zoning ordinances and general plan.

The project is inconsistent with both the City's zoning ordinances and general plan land use designation "as it existed on the date the application was deemed complete."⁵ Cal. Gov't Code § 65589.5(d)(5).

⁴Prohibited actions by a government agency include denying a residential/dwelling unit based on the lawful occupation, age, or any characteristic of the individual or group of individuals listed in subdivision (a) or (d) of California Government Code section 12955, as those bases are defined in sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of section 12955 and section 12955.2. It also includes family status, housing for elderly, and methods of financing. Cal. Gov't Code § 65008.

⁵This finding for denial cannot be made if the project or emergency shelter was proposed on a site that is identified as suitable for affordable housing in the City's housing element and is consistent with the density specified in the housing element. This finding of denial also cannot be made if the City has failed to identify zones for affordable housing or shelter needs or the zoning ordinance and general plan land use designation changed after the permit application was deemed complete. Cal. Gov't Code § 65589.5(d)(5).

Each affordable housing development project must be analyzed on a case-by-case basis based on the project's individual facts and circumstances in existence at the time the matter is before the City Council for review. Findings that the City has achieved its RHNA numbers, that a project is located in an area zoned for agriculture or resource preservation or lacks adequate water or wastewater services, and that a project is consistent with zoning and the general plan land use designation are fact-based analyses. The finding for denial based on a project's impact to public health and safety requires an analysis of the project with objective standards that have already been written based on statutory public health and safety standards. Cal. Gov't Code § 65589.5(d)(2). The remaining finding for denial based on non-compliance with state or federal law also requires a specific analysis based on the details of the project.

When considering an affordable housing development project, the City Council cannot deny or condition approval of the project in a manner that renders it infeasible, unless at least one of the five findings is made in writing and is supported by a preponderance of evidence in the record. Denying the project (or conditioning to infeasibility) includes using design review standards to make the project infeasible. Cal. Gov't Code § 65589.5(d).

II. S.B. 330 REQUIRES TWO FINDINGS FOR DENIAL OF A HOUSING PROJECT THAT MUST BE SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD.

A housing development project is defined in S.B. 330 as a use that consists of “[r]esidential units only”; “[m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use”; or “[t]ransitional housing or supportive housing.” Cal. Gov't Code § 65589.5(h)(2)(A)-(C). Findings for denial are still required even if the housing development project does not include any affordable housing units. Findings must also be made if the decision-makers impose a condition to lower the project's density. Cal. Gov't Code § 65589.5(j).

To deny a housing development project, the written findings supported by a preponderance of the evidence in the record must demonstrate that the project would have an adverse impact on public health and safety and that no other feasible alternative or mitigation exists. Cal. Gov't Code § 65589.5(j)(1). A specific adverse impact means “a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies or conditions as they existed on the date the application was deemed complete.” *Id.* The same standard applies to a housing development project as an affordable housing development project. The City Council may deny a housing development project, or condition approval on a reduction in a project's density, after it makes the written findings that the project will have a specific adverse impact based on policy that was adopted prior to the date the application was deemed complete and a feasible modification to the project (other than lowering the density) does not exist. *Id.*

If any type of housing development project (including affordable) is denied without the required written findings, the applicant, a housing organization, or any person who would be

eligible to apply for residency in the development may bring an action against the City to enforce the protections in S.B. 330, thus increasing the City's potential liability with regard to such projects.^{6, 7}

CONCLUSION

S.B. 330 limits when local government agencies may deny affordable housing development projects and housing developments, and broadens the scope of liability should a government agency fail to abide by S.B. 330's directives. When denying an affordable housing development project, the decision-maker must support the denial in writing with at least one of the five specific findings identified in S.B. 330. When denying a housing development project, the decision-maker must make both of the required written findings identified in S.B. 330 demonstrating an adverse impact and no other feasible alternative. Findings for denials must be supported by a preponderance of the evidence in the administrative record.

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⁶Housing organization means a trade or industry group whose local members are primarily engaged in the construction or management of housing units or a nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households that have filed written or oral comments with the local agency prior to action on the housing development project. Cal. Gov't Code § 65589.5(k)(2).

⁷S.B. 330 also provides that a project is automatically approved after five public hearings. When City staff supports a project that is presented to the decision-makers, it is likely that the record and report will not contain the necessary written findings to deny the project. If the City Council proposes a continuance or a new hearing for a project and requests staff to come back with written denial findings, the project could be automatically approved if it has been subjected to more than the five allowed public hearings. Cal. Gov't Code § 65905.5.