HOW CALIFORNIA'S SB 35 CAN BE USED TO STREAMLINE REAL ESTATE DEVELOPMENT PROJECTS

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U.S. Real Estate Alert

Real estate developers in "infill" locations are wise to consider the streamlined, ministerial review process offered by California Senate Bill SB 35 ("SB 35") for qualifying infill housing projects in cities that do not meet the Regional Housing Needs Assessment. Currently, there are only 28 cities and counties that are not subject to the streamlining provisions of SB 35. Bypassing discretionary review allows a project to move forward without requiring a discretionary approval that would trigger the California Environmental Quality Act ("CEQA").

HOW DOES A DEVELOPER TAKE ADVANTAGE OF SB 35?

SB 35 requires approval of qualified housing projects based on objective, regulatory standards.

If a housing project meets certain requirements, then, depending on the size of the project, within 60 or 90 days the local government must identify any objective planning standards the project is not compliant with. In addition, the local government must identify the basis for which the project is not compliant with the objective planning standards. If the local government fails to identify any non-compliant standard within the requisite 60 or 90 days, then the project is automatically determined to qualify with the local, objective planning standards.

Likewise, any design review or public oversight must be objective and focused only on reasonable design standards previously adopted and broadly applied by the local agency. The design review or public oversight must be completed within 90 or 180 days, depending on the size of the housing project. Notably, local agencies are not permitted to utilize public hearings.

In order to qualify for this streamlined approval, the project must be:

- A multifamily housing development (at least two residential units) in an urbanized area;
- Located where 75% of the perimeter of the site is developed;
- Zoned or designated by the general plan for residential or mixed use residential;
- In a location where the locality's share of regional housing needs have not be satisfied by building permits previously issued;
- One that includes affordable housing in accordance with SB 35 requirements;
- Consistent with the local government's objective zoning and design review standards; and
- Willing to pay construction workers the state-determined "prevailing wage."

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WHERE SB 35 DOES NOT WORK?

In several locations, a housing project will not qualify for streamlined approval under SB 35. A project will not qualify under SB 35 if it is located in:

- A coastal zone, conservation lands, or habitat for protected species;
- Prime farmland or farmland of statewide importance;
- Wetlands or lands under conservation easement;
- A very high fire hazard severity zone;
- Hazardous waste site;
- Earthquake fault zone;
- Flood plain or floodway;
- A site with existing multi-family housing that has been occupied by tenants in the last ten years or is subject to rent control; or
- A site with existing affordable housing.

WHAT IS THE BEST APPROACH WHEN CONSIDERING SB 35?

There are some practical considerations to take into account when determining whether to take advantage of SB 35. First, the cities and counties where a project is being proposed ultimately have the authority to determine whether a project qualifies under SB35 for streamlined review. Second, if a project has opponents, they may still be able to bring a lawsuit alleging that SB 35 does not meet the long list of qualifying criteria. Finally, developers need to consider a very important economic trade-off if they choose to use SB 35: the project must pay the prevailing wages for on-site construction. This latter point alone may prevent a project from "penciling" and discourage reliance on SB 35.

Regardless, before pursuing a project with SB 35, it is important to do full land use due diligence. This includes taking the following steps: (1) check that the project meets all the requirements and is not in an exempt location, (2) check that the project does not trigger discretionary approvals from other agencies that could potentially trigger a CEQA review, (3) check that the project is in a city that has failed to meet the Regional Housing Needs Assessment, and (4) make sure that the project includes the requisite affordable housing. This investigation should be conducted by knowledgeable land use counsel who can help evaluate whether SB 35 is right for a project.

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