American Planning Association
California Chapter

Making Great Communities Happen

September 26, 2017

The Honorable Jerry Brown
Governor of California
State Capitol
State Capitol
Sacramento, California 95814

SUBJECT: SB 35 (WIENER) – STREAMLINED APPROVAL FOR SOME HOUSING PROJECTS – REQUEST FOR CLEAN UP AMENDMENTS AFTER BILL IS SIGNED

Dear Governor Brown:

The American Planning Association, California Chapter (APA California) supports the ministerial review process that is the cornerstone of SB 35, and understands that the bill is in the Housing Package that you have endorsed and plan to sign. Unfortunately, several amendments that were added to the bill at the very end of session appear to override local zoning. We respectfully request that you support a clean-up measure in early January, 2018, as well as a letter to the Journal that we have requested Senator Wiener submit in January as well, clarifying that it is not his intent that SB 35 override local zoning. A full explanation and suggested amendments are below.

Generally we understand that the language in S. 65913.4 (5)(A), (B) and (C) was meant to restate existing law, but instead appears to allow either the General Plan or zoning to apply to sites, mixes in design standards, and uses terms and concepts that are vague, undefined, and inconsistent with existing Housing Element and Density Bonus law, and the Housing Accountability Act. The language appears to prioritize densities within the land use element, where in many cases the housing element may allow higher densities. Under current law, a development must meet the density standards of the general plan, but that does not abrogate the obligation to meet all other reasonable zoning standards that do not directly conflict with the general plan's prescribed densities, or other major policy provisions. I think the fear here is that this reopens the door way too far by appearing to prohibit any zoning standards from applying to development, leaves way too much confusion, and will result in further litigation that yet again delays the construction of needed housing.

C/O STEFAN/GEORGE ASSOCIATES
1333 36TH STREET
SACRAMENTO CA 95816-5401

P: 916.736.2434
F: 916.456.1283
www.calapa.org

As some specific examples:

In (5)(A,) the amended language specifies that the density must comply with the density "within the land use designation, notwithstanding any specified maximum unit allocation that may result in fewer units of housing being permitted." The land use designation is always contained within the land use element. The amendments we are recommending would allow the ***higher*** *of the density between the land use and the housing elements. They would also use terms very similar to that in density bonus law so that there is some consistency between the statutes. Additionally, we do not know what is meant by a "specified maximum unit allocation." It is undefined and unused elsewhere in the housing statutes.*

Amend S. 65913.4 (5)(A) to be consistent with the definition of "maximum allowable residential density" in S. 65915 (o)(2) in the Density Bonus Law.

(A) A development shall be deemed consistent with the objective zoning standards related to housing density, as applicable, if the density proposed ~~is compliant with the maximum density allowed within that land use designation, notwithstanding any specified maximum unit allocation that may result in fewer units of housing being permitted.~~ *does not exceed the maximum allowable residential density. "Maximum allowable residential density" means the density allowed under the zoning ordinance, or, if the density allowed under the zoning ordinance is inconsistent with the general plan, the general plan density applicable to the project. For the purpose of this subsection, the "general plan density applicable to the project" means the greater of the density allowed in the land use element or specified in the housing element of the general plan.*

In (5)(B): We are unsure what is intended by this provision but it could have the effect of eliminating all zoning and design review standards that are not included in the general plan. It applies when zoning, general plan, or design review standards are "mutually inconsistent" and states that, in that case, only the general plan standards apply. For instance, general plans do not usually specify lot coverage, setbacks, required open space, design, and many other provisions included in zoning ordinances and design review guidelines. This section could be interpreted to mean that none of these standards apply. We have instead suggested language to ensure that developers may always obtain the density prescribed in the housing element, regardless of inconsistencies with the general plan and zoning.

Amend S. 65913.4 (5)(B) to be consistent with the Housing Accountability Act S. 65589.5 (d)(5)(A) and Housing Element law.

~~*(B) In the event that objective zoning, general plan, or design review standards are mutually inconsistent, a development shall be deemed consistent with the objective zoning standards pursuant to this subdivision if the development is consistent with the standards set forth in the general plan.*~~

(B) In the event that zoning for a proposed development site is not consistent with the general plan, a development shall be deemed consistent with the objective zoning standards related to housing density pursuant to this subdivision if the density of the proposed development is consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation.

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SACRAMENTO CA 95816-5401

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And in (5)(C), *the amendment again talks about 'general plan designation' without any specificity. Our language specifies either the zoning or the housing element. This language is also based on a recent City of Carlsbad case*, where the Housing Element was attacked as being inconsistent with the Land Use Element. The Court said that that was apparently contemplated by certain language in the Housing Accountability Act, and it was OK so long as the Housing Element contained a timeline for the Land Use Element to be made consistent.*

Delete the addition to S. 65913.4 (C) that would allow zoning OR the General Plan designation and make language consistent with above:

(C) A site that is zoned for residential use or residential mixed-use ~~development~~ *development, or designated for residential use or residential mixed-use development in the housing element*, ~~*or has a general plan designation that allows residential use or a mix of residential and nonresidential uses,*~~ with at least two-thirds of the square footage *of the development* designated for residential use.

APA believes that our suggested amendments achieve your goals, as well as the Senator's goals, but without all of these major side effects and elimination of zoning standards. APA looks forward to working with you and your staff, along with Senator Wiener, to clean up this language as early as possible next year.

If you have any questions, please contact APA California's lobbyists, Sande George or Lauren De Valencia with Stefan/George Associates, 916-443-5301 or sgeorge@stefangeorge.com and lauren@stefangeorge.com.

Sincerely,

John Terell

John Terell, AICP
Vice President Policy and Legislation
APA California]
jcterell@aol.com

cc: Governor's Office
OPR
Senator Scott Wiener

*Friends of Aviara vs. CITY OF CARLSBAD – San Diego Superior Court – (2012) 210 Cal.App. 4th 1103.

THE CITY ALLEGING THAT THE REZONING PROGRAM IN THE HOUSING ELEMENT WAS INCONSISTENT WITH THE CITY'S GENERAL PLAN. THE COURT HELD THAT THE HOUSING ELEMENT STATUTE ANTICIPATED THAT THERE COULD BE INCONSISTENCIES BETWEEN THE HOUSING ELEMENT AND GENERAL PLAN, SO LONG AS THE HOUSING ELEMENT CONTAINED A TIMELINE FOR RESOLVING THE INCONSISTENCIES.

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