

Summary of 2021 Legislative Session Housing Bills

Below is a summary of significant housing legislation that was passed in the 2021 legislative session and subsequently signed into law by Governor Gavin Newsom.

GENERAL PLAN AND HOUSING ELEMENT

Housing Element Timing. **AB 215** makes important changes to Housing Element deadlines. Specifically, AB 215 provides that the first draft of a housing element must be made available for public review and comment for at least 30 days. If any public comments are received, the local government must take at least 10 *business* days after the 30-day public comment period to consider and incorporate the comments. This must be done before submitting the draft housing element to HCD for review, otherwise HCD will not review the draft. Subsequent drafts must be posted electronically and those interested must be provided notice at least 7 days before submitting to HCD. Additionally, AB 215 extends the time that HCD has to review the first draft of the housing element to 90 days and reiterates that it has 60 days to review any subsequent drafts.

AB 215 also provides HCD with authority to contract with an independent attorney to sue jurisdictions over housing law violations where the Attorney General has declined to bring suit or represent HCD. Lastly, it extends the statute of limitations to three years for actions brought by the Attorney General or HCD or pursuant to a notice of violation issued by HCD regarding housing laws.

Affirmatively Furthering Fair Housing. The AFFH legislation primarily codifies requirements already imposed by HCD's AFFH Guidelines. **AB 1304** requires local governments to administer their programs and activities relating to housing in a manner to affirmatively further fair housing. Similarly, **AB 1398** provides that the site inventory and analysis contained in housing elements must include discussion of the relationship

between the identified site and the jurisdiction's duty to affirmatively further fair housing. AB 1398 also requires that any AFFH analysis identify and examine patterns, trends, areas, disparities, and needs both within the jurisdiction and regionally. Any assessments should include local and regional historical origins and current policies and practices for identified fair housing issues.

Rezoning. In addition to the AFFH changes, **AB 1398** imposes new rezoning requirements on jurisdictions. If a jurisdiction does not adopt a housing element that HCD has found in substantial compliance within 120 days of the housing element due date, the agency now has one year from the housing element due date to complete rezoning of sites. Previously, the agency had three years and 120 days regardless of the date the element was found in compliance. If the housing element requires rezoning and it is not completed within one year of the housing element due date, HCD may revoke any findings of compliance it has previously made. Prior to revoking its findings, HCD must issue inconsistency findings and give the local agency an opportunity to respond. Finally, if a housing element is adopted more than one year after the due date, it cannot be found to be in compliance until the agency has completed any required rezoning.

AB 1398 also eliminates 4-year housing element cycles for local governments that fail to adopt a housing element within 120 days of the due date. Starting with the 6th cycle, adoption of a housing element that HCD finds to be in substantial compliance with state law will be deemed to satisfy the 4-year housing element requirement.

Annual Progress Reports. **SB 290** requires jurisdictions to include in their annual reports the number of units in a student housing development for lower-income students for which a developer was granted a density bonus. **SB 9** requires

jurisdictions to report the number of units constructed pursuant to its provisions as well as the number of applications for parcel maps for urban lot splits.

SB 787 provides that a local agency may include in the annual report the number of units in an existing multifamily building that were deed-restricted rental for moderate-income households by imposition of affordability covenants/restrictions for up to 25 percent of moderate-income RHNA. The jurisdiction must clearly indicate that these are not newly constructed units and must meet specific requirements to be able to count these units in the annual report. While implementation of this new provision begins January 1, 2023, the agency may report any conversion that occurred after January 1, 2022. SB 787 does *not* provide that jurisdictions may use these units in their housing elements to satisfy their RHNA.

HOUSING DEVELOPMENT APPROVALS

SB 330 Update. SB 8 extends the key provisions of the Housing Crisis Act of 2019 until January 1, 2030. If a qualifying preliminary application for a housing development is submitted prior to January 1, 2030, the rights to complete the project can vest until January 1, 2034. SB 8 extends the protections provided by a preliminary application to three and a half years from "final approval" if the project is an "affordable housing project" as statutorily defined.

Perhaps most significantly, SB 8 modifies the definition of "housing development project" to include (1) projects that involve no discretionary approvals, and (2) projects to build a single dwelling unit. While this definition does not impact the scope of "housing development project" under the Housing

Accountability Act, it does impact the Permit Streamlining Act (PSA) and the Housing Crisis Act. As a result, the 30-day deadline in the PSA to notify applicants if their project is complete will apply to SB 35 projects, ADUs, SB 9 projects, and single-family homes.

Other clarifications made by SB 8 include:

- Expanding the definition of "hearing" to include "any appeal" conducted by the jurisdiction with respect to the housing development project
- Providing that receipt of a density bonus, including any incentives, concessions, or waivers, does not constitute a valid basis on which to find a proposed housing development inconsistent, noncompliant, or nonconforming with an applicable plan, program, policy, ordinance, standard, requirement or similar provision

SB 8 also amends the replacement housing and relocation requirements in the Housing Crisis Act of 2019. Existing law requires one-for-one replacement of statutorily defined "protected units" that are demolished. Moreover, existing law provides that all residents of protected units, regardless of income, are entitled to state relocation benefits and a right of first refusal to a comparable unit. SB 8 changes these requirements by:

- Extending the requirement to replace "protected units" to a project that proposes to demolish a single-family home. If a "protected" single-family home is being replaced in a development that consists of two or more units, "comparable units" means:
 - A unit that contains the same number of bedrooms, if the single-family home had three or fewer bedrooms; or

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- A unit that contains three bedrooms, if the single-family home had four or more bedrooms.
- Clarifying that existing occupants that are displaced for the housing development project can return to their units at their prior rental rate if the demolition does not proceed and the property is returned to the rental market.
- Limiting relocation benefits, including rental assistance payments and right of first refusal, to lower-income households.
- Providing that the existing occupants' right of first refusal to a comparable unit in the new housing development does not apply to:
 - A development project that consists of a single residential unit located on a site where a single protected unit is being demolished;
 - Units in a housing development in which 100 percent of the units, except the manager's unit(s), are reserved for lower-income households;
 - Occupants of a short-term rental that is rented for fewer than 30 days;
 - Any unlawful occupant of a protected unit.

Floor Area Ratio. SB 478 sets minimum floor area ratios (FAR) in multifamily residential zones and mixed-use zones. For projects with 3-7 units, there is a minimum FAR of 1.0; the minimum FAR is 1.25 for projects with 8-10 units. A local agency cannot impose a lot coverage requirement that would physically preclude a housing development from achieving these FARs. However, it may impose other zoning design standards. A local agency also cannot deny a housing development project located on an existing legal parcel, and

meeting specified requirements, solely because the lot area of the proposed lot does not meet requirements for minimum size.

Two-Unit Developments & Urban Lot Splits. For a comprehensive overview of SB 9, see our Law Alert [HERE](#).

Upzoning. For a comprehensive overview of SB 10, see our Law Alert [HERE](#).

DENSITY BONUS

Changes to Density Bonus Law. SB 290 makes several small changes to state density bonus law. First, it redefines "total units" to (1) include inclusionary housing units, and (2) exclude the units added by state or local density bonus in calculating the density bonus and incentives/concessions. Additionally, SB 290 removes "specific adverse impact on the *physical environment*" as a basis for denying a concession, incentive, waiver, or deduction of development standard; denials may only be based on health or safety impacts.

Next, SB 290 requires a jurisdiction to grant one incentive/concession for student housing with a 20 percent set-aside for low-income students. The jurisdiction's housing element annual report must include the number of housing units for lower-income students for which the student housing development was granted a density bonus.

SB 290 also eliminates the requirement that moderate-income units be in a "common interest" development to qualify for a density bonus, instead providing for a density bonus so long as 10 percent of the total units in any for-sale housing development are sold to moderate-income families. Lastly,

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SB 290 extends the parking ratio exception to cover development with at least 40 percent moderate-income units and located within one-half mile of a major transit stop. Where the housing development project meets these requirements, jurisdictions cannot impose a parking requirement that exceeds 0.5 spaces per bedroom.

Purchase of Density Bonus Units. SB 728 broadens the requirements for a for-sale unit that qualifies an applicant for a density bonus. Whereas previously the applicant and the city or county had to ensure that the initial occupant of the for-sale affordable unit was a person or family of very low, low, or moderate income, now the for-sale unit may be purchased by a "qualified nonprofit housing corporation." The nonprofit must have 501(c)(3) tax exempt status and a state welfare exemption and must sell to low-income families pursuant to a no-interest loan program. To satisfy the requirements in density bonus law, it must be purchased under a recorded contract that includes:

- A repurchase option that requires a subsequent purchaser of the property that desires to sell or convey the property to first offer the qualified nonprofit corporation a right to repurchase;
- An equity sharing agreement, as statutorily defined; and
- Affordability restrictions on the sale and conveyance of the property that ensure the property will be preserved for lower-income housing for at least 45 years.

Local Affordability Restrictions. AB 634 clarifies that state density bonus law does not prohibit a jurisdiction from requiring an affordability period that is longer than 55 years for any units that qualify a housing development project for a

density bonus, if required to meet the terms of a local inclusionary ordinance, so long as the project is not financed with low-income housing tax credits.

IMPACT FEES

Development Fee: Impact Fee Nexus Study. AB 602 outlines the following new requirements for local impact fee nexus studies:

1. The study must be adopted prior to adoption of the associated development fee;
2. The study must identify the existing and proposed level of service for each public facility and explain why the proposed service level is necessary;
3. The study must include supporting information as required by the Mitigation Fee Act;
4. If the study supports a fee increase, it must also support the original fee;
5. The study must employ one of the following calculation methods after July 1, 2022:
 - a. **The fee is levied proportionately to the square footage of the proposed units.** This method is automatically deemed a valid method by which to establish a reasonable relationship between the fee charged and the burden imposed by the development; or
 - b. **The fee is levied on some alternative basis of calculation**, if the local agency makes the following specified findings: (1) an explanation of why square footage is not an appropriate metric; (2) an explanation that the alternative basis bears a reasonable relationship between the fee charged and the burden imposed by the development;

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and (3) other policies in the fee structure ensure that smaller developments are not charged disproportionate fees.

6. If the jurisdiction is a "large jurisdiction," meaning a county with a population of at least 250,000 people or any city within such a county, the city or county must adopt a capital improvement plan;
7. The study must be adopted at a public hearing with at least 20-days' notice, and the local agency must notify any member of the public who requested notice of the date of the hearing; and
8. The study must be updated at least every eight (8) years, beginning January 1, 2022.

Any member of the public, including an applicant for a housing development project, may submit evidence that the city, county, or local agency has failed to comply with the requirements of the Mitigation Fee Act. Upon receipt of such information, the jurisdiction must consider the timely submitted evidence and authorize the legislative body to adjust the proposal if deemed necessary in light of evidence considered.

Additionally, a city, county, or special district must (1) request the developer to provide total amount of fees and exactions associated with a project upon the issuance of a certificate of occupancy or the final inspection, whichever occurs last, and (2) if the developer provides this information, post this information on its website. The information posted on the jurisdiction's website must be updated at least twice a year, but the jurisdiction may include a disclaimer that it is not responsible for the accuracy of the information received and posted. Developers are not required to provide the information.

AB 602 is not intended to prevent a local agency from establishing and adopting different fees for different types of developments. Additionally, these new study requirements do not apply to any fees or charges for water and sewer services and facilities.

Lastly, AB 602 directs HCD to create a template, by January 1, 2023, that may be used by local jurisdictions to design their impact fee nexus studies. The template must include a method for calculating the feasibility of housing being built within a given fee level.

Impact Fees & Affordable Housing. AB 571 prohibits the imposition of affordable housing impact fees, including inclusionary zoning fees and in-lieu fees, on a housing development's affordable units.

OTHER SIGNIFICANT HOUSING LEGISLATION

Mixed-Income Structures. AB 491 addresses fair housing issues in mixed-income structures. Specifically, AB 491 provides that in a mixed-income multifamily structure, the residents of the affordable housing units must have the same access as the residents of the market-rate units to (1) the common entrances of the structure, and (2) the common areas and amenities of the structure. Perhaps more significantly, AB 491 also states that the affordable housing units in a multifamily structure cannot be isolated on a specific floor or area of a floor; rather, they must be integrated throughout the structure.

For the purposes of this legislation, a "mixed-income multifamily structure" means any residential structure with five or more dwelling units that includes both affordable housing units and market-rate housing units. "Affordable housing unit"

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is defined to include both low- and moderate-income units. Nothing in AB 491 prohibits the development of a separate structure with all affordable housing units.

Restrictive Covenants. During this session, the Legislature addressed restrictive covenants as barriers to the development of housing. First, **AB 721** allows the owner of a statutorily defined affordable housing development to record a restrictive covenant modification to make inoperable a recorded covenant, condition, or restriction that restricts the number, size, or location of the residences that may be built on a property, or that restricts the number of people or families who may reside on the property. To qualify, the owner of the affordable housing development must submit the modification document, along with supporting documentation, to the county recorder. The county recorder must forward the documentation to the county counsel who must make a determination whether, among other things, the original restrictive covenant contains an unlawful restriction in violation of AB 721 and the property qualifies as an affordable housing development. The intended impact of AB 721 is to ensure that restrictive covenants do not curtail the type and density of development otherwise permitted on a site by the local zoning.

Similarly, **AB 1584** makes void and unenforceable any covenant, restriction, or condition that "effectively prohibits or unreasonably restricts" construction or use of qualifying accessory dwelling units or junior accessory dwelling units on single-family residential lots. For the purposes of the law, reasonable restrictions are those that do not unreasonably increase construction costs, effectively prohibit construction, or extinguish the ability to otherwise construct. Unlike AB 721, AB 1584's provisions automatically void the effect of any

CC&Rs that conflict with its provisions; the owner of the property need not take any additional action.

While similar provisions were passed in 2019 and 2020 that amended Civil Code §§ 4740, 4741 & 4751 to prohibit these types of CC&Rs from being imposed by homeowners' associations and common interest developments, AB 1584 amends Civil Code § 714.3 to void any of these CC&Rs, regardless of their origin. AB 1584 serves to reinforce previously adopted legislation.

Conveyance of ADUs. Previously, the law permitted jurisdictions to choose to allow separate conveyance of certain accessory dwelling units (ADUs) by adoption of a local ordinance. **SB 345** requires local agencies to allow for separate conveyance or sale of these ADUs.

To separately convey an ADU, it must meet the following requirements:

- The ADU was built or developed by a statutorily defined qualified nonprofit corporation;
- The ADU is being sold to a statutorily defined qualified buyer;
- There is a recorded restriction on the use of the land between the buyer and the nonprofit;
- The property is held pursuant to a tenancy in common agreement that, among other requirements, provides for affordability restrictions on the future sale or conveyance of both the ADU and the primary dwelling on the property;
- The recording of a grant deed with the county naming the grantor and grantee, and describing the property interests being transferred; and

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- If requested by a utility providing service to the primary dwelling unit, separate water, sewer, or electrical connection to that utility for the ADU.

AB 345 also requires that any tenancy in common agreement, as outlined above, that is recorded after December 31, 2021, include the following:

- Delineation of all areas of the property that are for the exclusive use of a cotenant;
- Delineation of each cotenant's responsibility for the costs of taxes, insurance, utilities, general maintenance and repair, improvements, and any other costs, obligations, or liabilities associated with the property; and
- Procedures for the resolution of disputes among the cotenants before legal action.

To the extent that jurisdictions have adopted local policies regarding the separate conveyance or sale of these types of ADUs, AB 345 would override any conflicting provisions.

Starter Home Development. AB 803, or Starter Home Revitalization Act, seeks to make it easier to develop smaller, more affordable homes to increase homeownership. AB 803 eliminates minimum lot sizes to encourage zero lot line detached homes and requires approval of projects that propose these types of homes and meet certain other criteria.

The proposed development must, among other requirements, meet the following requirements:

- The site to be developed must be in a multifamily residential zone, substantially surrounded by qualified urban uses, and at least five acres in size;

- The project must propose to develop single-family homes on fee simple ownership lots;
- The project must comply with existing density, height requirements and setbacks in relation to other sites;
- The proposed development must be within the boundaries of a jurisdiction that has adopted a compliant housing element.

A local agency need not ministerially approve projects that meet all the criteria in AB 803, but it must approve the application so long as the development complies with non-conflicting local standards and would not have a specific, adverse impact on public health and safety that cannot be satisfactorily mitigated. A local agency may impose conditions not in conflict with the law, except that it:

- May not impose setback requirements between buildings, except as required by the state Building Code;
- May not impose a minimum lot size;
- May not require covered or enclosed parking; and
- May not require the formation of a homeowner's association.

The utility of AB 803 is likely to be limited given its narrow application and strict criteria.

Enforcement Response to Complaints. With the goal of ensuring safe and habitable housing for tenants, AB 838 imposes on cities and counties new rules for the enforcement of complaints of substandard building conditions or lead hazard violations. First, AB 838 requires that local agencies inspect the property in question as promptly after receipt of a complaint as they would a request for final inspection.

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Moreover, agencies cannot impose unreasonable conditions, such as that the tenant be current on rent or in compliance with their rental agreement, on responding to substandard building complaints.

Upon inspection, the agency must document any violations and substandard conditions. Thereafter, the agency must inform the owner of the property of any violations and required corrective actions and schedule a time for reinspection to ensure compliance with the corrective actions. Finally, the city or county may not collect a fee from the property owner for the inspection or the report and must provide free, certified copies of inspection reports and citations to any who requests such copies.

A local agency is not required to conduct an inspection where (1) the complaint does not allege one or more substandard conditions, or (2) a previous complaint, submitted by a tenant, resident, or occupant about the same property, was determined to be frivolous or unfounded by an inspector in the last 180 days.

Intergenerational Housing. SB 591 seeks to facilitate the establishment of intergenerational housing to benefit senior citizens who need special living environments and services. The new law provides that an intergenerational housing development may be established to provide housing units for senior citizens, caregivers, or transition age youth if, among others, the following requirements are met:

- At least 80 percent of the occupied units are occupied by at least one senior citizen, which is defined as a person 55 years of age or older;
- Up to 20 percent of the occupied units are occupied by at least one statutorily defined caregiver or

transition age youth, defined as a person who is 18 to 24 years of age and is either a current or former foster youth or a current or former homeless youth;

- The development is affordable to statutorily defined lower-income households; and
- The CC&Rs or written policy for the development set forth the limitations on occupancy, residency, or use.

SB 591 is particularly important because it allows developers that have certain funds or tax credits designated for affordable rental housing to expand occupancy to include not only senior citizens, but also caregivers and transitional youth.

Surplus Land Unit. SB 791 creates the California Surplus Land Unit within the Department of Housing and Community Development. The purpose of the Unit is to facilitate development and construction of residential housing on local surplus land, which is defined as land declared surplus by a local agency, pursuant to Gov. Code §§ 54220, *et seq.*, or by a school district, pursuant to Educ. Code §§ 17455, *et seq.* The Unit may engage in the following activities in the furtherance of its purpose:

- Facilitate agreements between housing developers and local agencies seeking to dispose of surplus land;
- Provide advice or technical assistance and services to local agencies with surplus land or developers seeking to develop housing on the surplus land;
- Collaborate with other relevant state agencies, such as the California Housing Finance Agency or the California Tax Credit Allocation Committee, to assist housing developers and local agencies with obtaining grants, loans, tax credits, and other types of financing;
- Collect and compile data on housing production on local surplus land.

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For more information about this new housing legislation summary or any specific bills, please contact Barbara Kautz (bkautz@goldfarblipman.com), Nazanin Salehi (nsalehi@goldfarblipman.com), or any other attorney at Goldfarb Lipman LLP.

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