Housing Law and Recent Legislation

Presented by

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COLANTUONO HIGHSMITH WHATLEY, PC

Introduction

- Overview
- What we'll cover
  - Housing Accountability Act (HAA)
  - SB 330/35
  - Recent Legislation

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Housing Accountability Act (HAA)

- Adopted in 1982 and significantly amended in the last few years
- According to HCD, the HAA:
  - "[E]stablishes the state's overarching policy that a local government may not deny, reduce the density of, or make infeasible housing development projects, emergency shelters, or farmworker housing that are consistent with objective local development standards."
- Prohibits City from disapproving/conditioning approval in a manner that renders qualifying housing project infeasible

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Housing Accountability Act (HAA) (Con't)

- HAA applies to a "housing development project":
  - "[A] use consisting of residential **units** only, mixed use developments consisting of residential and non-residential uses with at least two-thirds of the square footage designated for residential use, or transitional or supportive housing."
  - "Units" means more than one unit, including attached and detached units and on one or more parcels, provided they are included in one application

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Standard of Review for Projects with Affordable Units

HAA's standard for affordable units applies to "very low, low, and moderate income households," which means:

1. At least 20% of the total units shall be sold or rented to lower income households (monthly cost not to exceed 30% of 60% of AMI); or

2. 100% of the units shall be sold or rented to persons and families of moderate income, or persons and families of middle income (monthly cost not to exceed 30% of 100% of AMI).

Novato's inclusionary housing ordinance requires 20% of the dwelling units in a project of 20 units or more to be reserved as affordable units. The City will be considering whether to reduce this percentage later this year.

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Standard of Review for Projects with Affordable Units

- City cannot disapprove affordable projects unless one of the following findings are made:
  1. Compliant housing element **and** met the RHNA allocation for all income categories proposed for the project
  2. Project has a specific, adverse impact upon the public health or safety, and there is no feasible method to mitigate or avoid impact
  3. Denial is required to comply with specific state or federal law, and there is no feasible method to comply
  4. On land zoned for agricultural or there is inadequate water or sewer to serve the project
  5. Project is inconsistent with both zoning and general plan land use designation, the site is not listed in the Housing Element, and there are adequate alternative sites to accommodate the RHNA allocation.

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Default Standard of Review
No Affordable Units

- Project is consistent with **objective** general plan, zoning, subdivision, and design standards & criteria
    - City cannot disapprove the project or impose conditions that reduce its density unless it makes both of the following findings (preponderance of the evidence):
        - ❑There is a specific, adverse impact upon the public health or safety; and
        - ❑There is no feasible method to satisfactorily mitigate or avoid the adverse impact
- "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.
- CEQA still applies.

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Housing Accountability Act (HAA) (Con't)

- "Objective" means "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official."

- Examples:
  - Minimum setback of 5 ft from street
  - Maximum building height of 16 ft

- Rethink performance and context-based criteria and standards (e.g., "should", "compatible", "within") and be specific

- City Staff is currently reviewing objective standards with a subcommittee of the Design Review Commission

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Housing Accountability Act (HAA) (Con't)

- Timelines:
  - Application "deemed complete" if preliminary application submitted under Permit Streamlining Act, freezing applicable standards/fees while the proponent assembles the remaining information within 180 days.
  - If no preliminary application, application is "determined to be complete" when it's found complete under Permit Streamlining Act (30 days to inform applicant application is incomplete otherwise application "deemed complete")

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Housing Accountability Act (HAA) (Con't)

- Timelines:
  - If local agency determines project is inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision, must provide written documentation:
    - Within 30 days of project "determined to be complete" if 150 or fewer housing units
    - Within 60 days of project "determined to be complete" if more than 150 units
  - Otherwise deemed consistent

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HAA Enforcement & Penalty

- HCD has authority to find the City's actions do not substantially comply with the HAA → HCD may notify the California State Attorney General's Office → AG can seek enforcement of state law through suit.
- HAA enforcement actions may also be brought by (1) applicant, (2) anyone who would be eligible to apply for residency, or (3) a housing organization.
- Court may issue an order requiring compliance with HAA
  - Failing to comply with court order within 60 days is punishable by a minimum fine of $10,000 per housing unit
    - Fine may be increased by a factor of 5 if City acted in bad faith
  - Court may vacate City decisions or deem projects approved
- 1094.5 writ applies to HAA: Did not proceed in manner required by law, decision not supported by findings, findings not supported by evidence

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Housing Crisis Act of 2019 (SB 330)

- Filing a "preliminary application" locks in the development requirements, standards, and fees at time of submission.
- No more than five hearings if housing development project complies with applicable, objective general plan and zoning standards in effect when application is "deemed complete" under Permit Streamlining Act
- No housing moratoria
- No net loss housing unit/density intensity
- Prohibited from imposing or enforcing design standards established on or after January 1, 2020 that are not "objective design standards"

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SB 35 Streamlining

- Applies to the City
- Provides a "streamlined, ministerial approval process" with no CUP
- Multifamily housing with two or more residential units on parcel, 75% of which adjoins parcels developed with urban uses, zoned for residential or residential mixed-use, or has general plan designation that allows these, and at least 2/3 of square footage is designated for residential use (including density bonus units)
- Developer commits to record deed restriction, prior to issuance of first building permit: 55 years for rented, 45 years for owned

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SB 35 Streamlining (Con't)

- At least 50% of the proposed residential units must be affordable to households at 80% annual median income.
- AB 168 (2020) amended SB 35 to require Tribal consultation as a prerequisite to filing a SB 35 application
- Time frames to determine SB 35 eligibility:
  - Up to 150 units: 60 calendar days
  - Over 150 units: 90 calendar days
- Time frames to review application:
  - Up to 150 units: 90 calendar days
  - Over 150 units: 180 calendar days
- Ministerial review – not subject to CEQA.

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HAA Cases

- *Honchariw v. Stanislaus County* (2011) (Published)
- *SFBARF v. Berkeley* (2017)
- *District Square, LLC v. City of Los Angeles* (2020)
- *Ruegg & Ellsworth v. City of Berkeley* (2023)

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Honchariw

- Overview
  - Long history of litigation (10 + years)
  - Proposal to subdivide 33.7 acre parcel into eight parcels ranging in size from .5 to 5 acres including 12 acre "remainder" to remain undeveloped
  - Some zoned "general agriculture" and some zoned "historical site district". Historical district properties served by CSD that issued "will not serve" letter
  - Concerns over traffic, water availability, contamination from septic, and maintaining historical character
  - Planning Commission denied on 6-2 vote
  - Appeal to BOS which unanimously disapproved (project site not physically suitable for proposed development)

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Honchariw (Con't)

- HAA not limited to affordable housing
- Housing "units" proposed because single family dwelling proposed on each of eight lots
- If housing development project (including "units") complies with objective standards, may only deny based on findings: (1) project would have specific, adverse impact on public health or safety unless disapproved, and (2) no feasible method to satisfactorily mitigate adverse impact
- PC/BOS did not make findings

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SFBARF v. Berkeley

- Overview
  - Proposal to demolish single residential unit and construct three residential units in its place
  - Zoning Adjustment Board approved, finding project complied with all objective general plan and zoning standards and criteria, including design review standards, in effect at the time the application deemed complete. Use permit issued
  - Public opposition
  - Appealed to City Council which overturned ZAB's decision, citing concerns over parking, privacy, light and view access, and crowding

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SFBARF v. Berkeley

- When project complies with applicable, objective general plan and zoning standards, but agency wishes to deny project or reduce density, agency must make findings based on substantial evidence: (1) specific adverse impact on public health or safety, and (2) no feasible method to mitigate impact,
- City Council did not make findings when overturning ZAB
- Trial court decision and settlement for City Council to rehear appeal. On rehearing, City Council vacated resolution and denied demolition permit, taking position this was not subject to HAA. Back to court. Court orders HAA analysis per settlement
- Settlement to construct the project
- Takeaway: Consider whole application?

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District Square, LLC v. City of Los Angeles

- Overview:
  - Case under post-2017 amendments to HAA
  - Director of Planning approved permit for 577-unit project in mixed use building, finding it met all objective standards and was exempt from CEQA
  - Project within allowable density
  - Project appealed to PC which denied project because of impact on gentrification and displacement of existing residents. Issued "Letter of Determination" six months later

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District Square, LLC v. City of Los Angeles

- Remand to make proper findings under HAA?
- Court:
  - Project "deemed consistent" with City policies, ordinances, standards (notice within 60 days).
    - Effect: Even if inconsistent, must approve unless findings made
  - Court ordered City to approve project under HAA provision (PC went "on its own frolic and detour," acting "knowingly and deliberately to violate the law")

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Ruegg & Ellsworth v. City of Berkeley

- Overview
  - Ruegg & Ellsworth & Frank Spenger Co. applied for approval of a mixed-use development under SB 35
    - 260 dwelling units, 50% affordable to low-income households
    - Over 27,500 square feet of retail space and parking.
  - Project site contained part of the "Shellmound"
    - A sacred burial site designated a City Landmark in 2000
  - City responded to applicant within 90 days documenting project's inconsistencies with objective standards.
  - City then denied the revised application.

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Ruegg & Ellsworth v. City of Berkeley

- City argued:
  - SB 35 does not apply to Berkeley (a Charter City)
    - It impinges upon municipal affairs, which includes protecting local landmarks ("Home Rule").
  - Project does not qualify for SB 35
    - Gov. Code § 65913.4(a)(7)(C) excludes projects that would demolish a "historic structure" on a national, state, or local historic register.
    - Mixed-use development projects don't qualify.

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Ruegg & Ellsworth v. City of Berkeley

- Court rejected all of City's arguments:
  - SB 35 applies to Charter Cities because affordable housing is a matter of statewide concern.
    - SB 35 is reasonably related to resolving the statewide interest and does not unduly interfere with the City's land use and historical preservation authority.
  - Shellmound artifacts are underground. Not a "structure."
  - SB 35 *does* apply to mixed-use development.
- On remand, trial court found City violated SB 35 *and* HAA.
  - Required City to grant developer's permit application.

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SB 9 (Atkins)

- Requires **ministerial review** of eligible urban lot splits
- Eligibility:
  - Proposals to build 2 principal dwelling units on 1 parcel in a single-family residential zone;
  - Would not require demolition or alteration of housing that is subject to a covenant, ordinance, or law restricting rent;
  - Would not allow for the demolition of more than 25% of the existing exterior structural walls (with exceptions);
  - Not located within a historic district or landmark or on a site listed on the State Historic Resources Inventory.

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SB 9 (Atkins) (Con't)

- City must require rental of any unit created by lot split be for longer than 30 days.
- May deny an urban lot split project that would have a specific, adverse impact on public health and safety or the physical environment if there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.

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SB 9 (Atkins) (Con't)

- In Feb. 2022, City adopted Urgency Ordinance No. 1678 to implement SB 9.
- Applies to parcels zoned:
  - Rural Residential (RR),
  - Very Low Density Residential (RVL),
  - Low Density Residential (RI), and
  - Planned District (PD) zones assigned:
    - Rural Residential (RR),
    - Very Low Density Residential (RVL), and
    - Low Density Residential (RL) in the General Plan.

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AB 571 (Mayes) (2022)

- Prohibits City from imposing affordable housing impact fees, inclusionary zoning fees, or in-lieu fees on a housing development's affordable units under the Density Bonus Law.
  - Inclusionary housing ordinance requires affordable units
  - Density bonus law grants density bonus and incentives/concessions based on percentage of affordable units and level of affordability

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AB 721 (Bloom) (2022)

- Any recorded covenants restricting
    - the number, size, or location of residences that may be built on a property, or
    - the number of persons or families who may reside on a property
- Are unenforceable against the owner of an "affordable housing development," defined as development on a property: (1) with a restriction requiring 100% of units be rented or occupied by lower income households for 55 years or longer for rental housing, or (2) owned or controlled by entity proposing to develop such a project.
- With exceptions for certain conservation easements and covenants required to comply with state or federal law

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SB 478 (Wiener) (2022)

- Prohibits imposing a floor area ratio (FAR) less than:
  - 1.0 for 3-7 unit housing development projects;
  - 1.25 for 8-10 unit housing development projects.
- Does not apply to projects of 11 units or more
- Prohibits imposing a lot coverage requirement that would preclude a project from achieving FARs described above.
- Prohibits denying a housing project on an existing parcel solely on the basis that the lot area does not meet the City's requirements for minimum lot size.
- Voids any CC&R that effectively prohibits or unreasonably restricts a housing project from using these FAR standards.

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AB 1551 (Santiago) (2022)

- Reinstates density bonuses for commercial developers who fund, donate land, or partner with a housing developer to provide affordable housing onsite or in the City
  - At least 30% total units must be affordable to low-income tenants, or
  - 15% of total units must be affordable to very low-income tenants
- City must annually submit info to HCD describing any approved bonuses.

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AB 1551 (Santiago) (Con't)

- Possible density bonuses include:
    1. Up to a 20% increase in maximum allowable intensity in General Plan.
    2. Up to a 20% increase in maximum allowable floor area ratio.
    3. Up to a 20% increase in maximum height requirements.
    4. Up to a 20% reduction in minimum parking requirements.
    5. Use of a limited-use/application elevator for upper floor accessibility.
    6. An exception to a zoning ordinance or other land use regulation.
- Developers are not entitled to the bonus of their choice.

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SB 6 (Caballero) (2022)

- "Housing development project" consisting of residential units only or mixed use development with at least 50% of square footage for residential use
- Shall be deemed an allowable use on a parcel within a zone where office, retail, or parking are a principally permitted use
- If requirements are met relating to affordability, density, public notice, hearings, prevailing wages, etc.
- Subject to all other local zoning, parking, design, and other ordinances, and procedures for processing application
- Commercial tenants may be eligible for relocation assistance.

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SB 6 (Caballero) (2022)

- City may **exempt** parcels with written findings that:
  - City concurrently reallocated the lost residential density to other residential site(s) subject to development by right so there is no net loss in residential density in the jurisdiction; or
  - The lost residential density from exempted parcel can be accommodated on other site(s) permitting same or greater residential densities and in excess of the acreage to accommodate the City's share of housing for lower income households.

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AB 2011 (Wicks) (2022)

- Requires ministerial approval of certain housing projects in zones where **office, retail, or parking** are a principally permitted use.
- Qualifying projects:
  - (1) Fully affordable housing development projects in commercial zones not next to a commercial corridor; and
  - (2) Mixed-income housing development projects in commercial zones along commercial corridors.
- Project must meet the objective zoning standards of a zone which allows residential use at the contemplated density.
- Design review is limited to **objective** criteria.
- Exempt from CEQA.

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AB 2097 (Friedman) (2023)

- Generally prohibits imposing minimum parking requirements on HAA projects within ½ mile of public transit
- May impose parking requirements if City finds (within 30 days of application) *not* imposing requirements would have a substantially negative impact on:
  - Ability to meet its RHNA for low- and very low income households;
  - Ability to meet any special housing needs for the elderly or disabled;
  - Existing parking within ½ mile of the project.

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AB 2097 (Friedman) (Con't)

- **BUT** City **<u>can't</u>** use those findings to impose minimum requirements on projects that:
  - Dedicate 20% or more of units to very low, low-, or moderate-income households, students, the elderly, or persons with disabilities;
  - Contain fewer than 20 housing units;
  - Are already subject to parking reductions based on other applicable law.

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AB 2339 (Bloom) (2023)

- Emergency/homeless shelters may only be subject to the following written, objective standards:
  - Max number of beds or persons permitted nightly;
  - Sufficient parking to accommodate all staff;
  - The size and location of exterior and interior onsite waiting and client intake areas;
  - The provision of onsite management;
  - The proximity to other emergency shelters, provided shelters are not required to be more than 300 feet apart;
  - The length of stay;
  - Lighting;
  - Security during operating hours.

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AB 2234 (R. Rivas) (2023)

- By Jan. 1, 2024, the City must:
  - Compile a list of info needed to approve or deny a post-entitlement phase permit,
  - Post on its website an example of an approved application, and
  - Post an example of a complete set of post-entitlement phase permits for at least 5 types of housing development projects.

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AB 2234 (R. Rivas) (2023)

- Applicable permits include building permits, permits for minor or standard off-site improvements, permits for demolition, & permits for minor or standard excavation and grading, after entitlement process has concluded for construction of development with at least two-thirds residential

- City has **15 days** to determine application is complete

- City has **30 days** to review/approve projects with 25 units or fewer; **60 days** to review/approve larger projects

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Required ADUs

City **must** permit the following in residential and mixed-use zones:

1. JADU/ADU within existing/proposed single-family home or accessory structure if:
   - the proposed unit has independent exterior access from existing residence, and
   - side and rear setbacks are sufficient for fire safety.
2. Detached ADU up to 800 sq. ft. with max height 16 ft. and 4 ft. side and rear setbacks, which may be combined with a JADU in the primary residence;
3. ADUs (equivalent to 25% of the existing units or 1, whichever is greater) within portions of existing multifamily dwellings not used as livable space;
4. ADUs detached from an existing multifamily dwelling, with a maximum height of 16 ft. and 4 ft. side and rear setbacks.

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ADU Standards

- City **cannot**:
  - Set a min. ADU size limit <150 sq. ft
  - Set a max. ADU size limit <850 sq. ft. for 1 bedroom
  - Set a max. ADU size limit <1,000 sq. ft. for 2+ bedrooms
  - Require rear and side yard setbacks >4 ft for new ADUs
  - Deny ADU based on encroachment into front setback if there is not enough space on property to build an 800 sq ft ADU.

- Effectively allows second story and two level ADUs without design review

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ADU Height Limits

City must allow the following heights:

- 16 ft for detached ADU on a lot with single family or multifamily dwelling unit;
- 18 ft for a detached ADU on a lot with single family or multifamily dwelling unit that is within ½ mile walking distance of a major transit stop or a high-quality transit corridor;
  - (Must also allow an additional 2 ft to align ADU roof pitch with the roof pitch of the primary dwelling unit)
- 18 ft for a detached ADU on a lot with multifamily, multistory dwelling;
- 25 ft or the height limit in local zoning that applies to the primary dwelling (whichever is lower) for an ADU attached to a primary dwelling.
  - City is not required to allow an ADU to exceed two stories.

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New ADU Requirements

SB 897 (Wieckowski) (2023)

- Increases height maximums
- Requires objective standards for historic properties
- Accommodates pre-existing, non-conforming ADUs
- Regulates demolition permits
- Prohibits fire sprinklers where not required for primary dwelling unit

AB 2221 (Quirk-Silva) (2023)

- Allows detached ADUs to include detached garages
- Prohibits front setback standards

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AB 1763 (Chiu) (2020)

- Qualifying affordable unit development project under Density Bonus Law **must** be awarded:
  - Four incentives or concessions; AND
  - A density bonus equal to 80 percent of the number of units reserved for lower income households; OR
  - If the project is located within ½ mile of a major transit stop, a height increase of up to three additional stories, or 33 feet, AND the City may not impose any maximum controls on density.
    - Major transit stop means a rail station, bus rapid transit station, ferry terminal, or the intersection of two or more major bus routes with fifteen minutes or better service internal frequency during morning afternoon peak periods.

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AB 1763 (Chiu) (Con't)

- Qualifying development projects:
  - Have 5 or more residential units;
  - Restrict 80–100% of the originally proposed units to lower-income households (extremely low-, very low-, or low-income) and up to 20% for moderate-income households;
  - Agree to the continued affordability of units for 55> years.
- Special needs or supportive housing developments that are 100% lower-income are exempt from minimum parking requirements (upon request by developer)
  - A special needs or supportive housing development must have either paratransit service or unobstructed access, within ½ mile, to fixed-bus route service that operates at least 8x a day.

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AB 2334 (Wicks) (2023)

- Qualifying housing development projects get 4 incentives or concessions, unlimited density bonuses, and an automatic height increase of up to 3 stories or 33 feet, if:
  - the project is located in a very low vehicle travel area,
  - at least 80 percent of the units are restricted to lower income households, and
  - no more than 20 percent are for moderate income households.
- Very low vehicle travel area: an urbanized area where the existing residential development generates vehicle miles traveled per capita below 85% of either regional or City vehicle miles traveled per capita.

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Senate Constitutional Amendment No. 2 (Allen) (2023)

- Voters will consider whether to repeal Art. 34 of CA Constitution on the 2024 ballot.
- This Article prohibits the development, construction, or acquisition of a low-rent housing project by the City unless approved by a majority of qualified electors.
- Current statute defines and limits scope of law

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SB 1439 & Levine Act

- The Levine Act previously only applied to state officials and appointed local officials.
- SB 1439 extends these regulations and prohibitions to local *elected* officials when they make decisions regarding licenses, permits, or other land use entitlements, or contracts that are not awarded by competitive bidding.

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SB 1439 Prohibitions

- **Pre-decision:** Prohibited from making, participating in, or influencing an entitlement proceeding if you willfully or knowingly received a contribution greater than $250 within the preceding 12 months from any party, participant, or their agent involved in the proceeding.
    - **Disclosure and Recusal:** Councilmember must disclosure contribution at the beginning of the hearing and then recuse himself or herself from the hearing and decision making.
- **Pending Proceeding:** Prohibited from accepting, soliciting, or directing a contribution greater than $250 from any party, participant, or their agent while an entitlement proceeding is pending.
- **Post-decision:** Prohibited from accepting, soliciting, or directing a contribution greater than $250 from any party, participant, or their agent involved in the decision for 12 months after decision.

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Determining Disqualification

1. Did a Party or a Participant make a contribution of more than $250?
2. Was it made within 12 months before the development application was filed?
3. Does the Participant have a ”financial interest” in the preceding?

Disclosure & Recusal

- Must disclose the contribution at the beginning of the hearing before recusing yourself.
- If there is no hearing, the contribution must be entered into the written record of the proceeding.
- The disclosure shall include:
  - Name of the party and any other person making the contribution;
  - Name of the recipient;
  - The amount of the contribution;
  - The date the contribution was made.
- You must recuse yourself from the hearing and shall not make, participate in making, or in any way attempt to use your official position to influence the decision in a proceeding.

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Returning & Curing

- You can participate if you return the contribution within **30 days** from the time you know or should have known about the contribution and proceeding.
- If you accept, solicit, or direct a contribution greater than $250 in the 12 months following a decision, you may cure the violation by returning the contribution (or the portion greater than $250) within **14 days**.
    - But, can't cure if you *knowingly and willfully* accepted, solicited, or directed the contribution.
- Officer or their controlled committee must maintain a record of any cured violations.

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