

Date of Hearing: July 12, 2017

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

SB 166 (Skinner) – As Amended July 3, 2017

**SENATE VOTE:** 28-12

**SUBJECT:** Residential density and affordability

**SUMMARY:** Requires a local government to accommodate its remaining unmet housing need at all times throughout the housing element planning period. Specifically, **this bill:**

- 1) Modifies the No Net Loss Zoning law to require local governments to maintain adequate housing sites at all times throughout the planning period for all levels of income, as follows:
  - a) Requires local governments to ensure that its housing element inventory or its housing element program to make sites available can accommodate, at all times throughout the planning period, its remaining unmet share of the regional housing need allocated pursuant to existing law, except as provided in e), below.
  - b) Provides, with the exception of e), below, that at no time shall a local government, by administrative, quasi-judicial, legislative, or other action, permit or cause its inventory of sites identified in the housing element to be insufficient to meet its remaining unmet share of the regional housing need for lower- and moderate-income households.
  - c) Requires, when a local government makes findings for the reduction of residential density that specify that the remaining sites identified in the housing element are adequate to meet the requirements of existing housing law, that the findings also include a quantification of the remaining unmet need for the local government's share of the regional housing need at each income level and the remaining capacity of sites identified in the housing element to accommodate that need by income level.
  - d) Provides that if a local government, by administrative, quasi-judicial, legislative, or other action, allows development of any parcel with fewer units by income category than identified in the jurisdiction's housing element for that parcel, the local government shall make a written finding supported by substantial evidence as to whether or not remaining sites identified in the housing element are adequate to meet the requirements of existing law and to accommodate the jurisdiction's share of the regional housing need. The finding shall include a quantification of the remaining unmet need for the local government's share of the regional housing need at each income level and the remaining capacity of sites identified in the housing element to accommodate that need by income level.
  - e) Requires, if the approval of a development project results in fewer units by income category than identified in the jurisdiction's housing element for that parcel and the local government does not find that the remaining sites in the housing element are adequate to accommodate the local government's share of the regional housing need by income level, the local government to, within 180 days, identify and make available additional adequate sites to accommodate its share of the regional housing need by income level. Provides

that nothing in this section shall authorize a local government to disapprove a housing development project on the basis that approval of the housing project would require compliance with this requirement.

- f) Provides that if the local government has not adopted a housing element for the current planning period within 90 days of the deadline, or the adopted housing element is not in substantial compliance with state law within 180 days of the deadline, “lower residential density” means any of the following:
    - i) For residentially zoned sites, a density that is lower than 80% of the maximum allowable residential density for that parcel *or 80% of the maximum density required in housing element law, whichever is greater*; or,
    - ii) For sites on which residential and nonresidential uses are permitted, a use that would result in the development of fewer than 80% of the number of residential units that would be allowed under the maximum residential density for the site parcel *or 80% of the maximum density required by existing housing element law, whichever is greater*.
  - g) Provides that an action that obligates a local government to identify and make available additional adequate sites for residential development pursuant to this section creates no obligation under the California Environmental Quality Act (CEQA) to identify, analyze, or mitigate the environmental impacts of that subsequent action to identify and make available additional adequate sites as a reasonably foreseeable consequence of that action. Nothing in this subdivision shall be construed as a determination as to whether or not the subsequent action by a local government to identify and make available additional adequate sites is a “project” for purposes of CEQA.
- 2) States that no reimbursement is necessary because a local agency has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by the bill’s provisions.

**EXISTING LAW:**

- 1) Requires every city and county to prepare and adopt a general plan containing seven mandatory elements, including a housing element.
- 2) Requires a local government's housing element to identify and analyze existing and projected housing needs, identify adequate sites with appropriate zoning to meet the housing needs of all income segments of the community, and ensure that regulatory systems provide opportunities for, and do not unduly constrain, housing development.
- 3) Requires, prior to each housing element revision, that each council of governments (COG), in conjunction with the Department of Housing and Community Development (HCD), prepare a regional housing needs assessment (RHNA) and allocate to each jurisdiction in the region its fair share of the housing need for all income categories. Where a COG does not exist, HCD determines the local share of the region's housing need.
- 4) Divides the RHNA into the following income categories:

- a) Very low-income (50% or lower of area median income), including extremely low-income (30% or lower of area median income);
  - b) Low-income (80% or lower of area median income);
  - c) Moderate-income (between 80% and 120% of area median income); and,
  - d) Above moderate-income (exceeding 120% area median income).
- 5) Requires a local government to inventory land suitable for residential development to identify sites that can be developed to meet the locality's RHNA for all income levels. Provides that "land suitable for residential development" includes all of the following:
- a) Vacant sites zoned for residential use;
  - b) Vacant sites zoned for nonresidential use that allow residential development;
  - c) Residentially zoned sites that are capable of being developed at higher density, including the airspace above sites owned or leased by a city, county, or city and county; and,
  - d) Sites zoned for nonresidential use that can be redeveloped for and as necessary, rezoned for, residential use, including above sites owned or leased by a city, county, or city and county.
- 6) Provides that the inventory of land suitable for residential development shall include all of the following:
- a) A listing of properties by parcel number or other unique reference;
  - b) The size of each property, and the general plan designation and zoning of each property;
  - c) For nonvacant sites, a description of the existing use of each property;
  - d) A general description of any environmental constraints to the development of housing within the jurisdiction, the documentation for which has been made available to the jurisdiction. This information need not be identified on a site-specific basis;
  - e) A general description of existing or planned water, sewer, and other dry utilities supply, including the availability and access to distribution facilities. This information need not be identified on a site-specific basis;
  - f) Sites identified as available for housing for above-moderate income households in areas not served by public sewer systems. This information need not be identified on a site-specific basis; and,
  - g) A map that shows the location of the sites included in the inventory, such as the land use map from the jurisdiction's general plan, for reference purposes only.
- 7) Requires, pursuant to the No Net Loss Zoning law, the following:

- a) Requires each local government to ensure that its housing element inventory or its housing element program to make sites available, as specified, accommodate its share of the regional housing need throughout the planning period.
- b) Prohibits a local government, by administrative, quasi-judicial, legislative, or other action, from reducing, or requiring or permitting the reduction of, the residential density for any parcel, or allowing development of any parcel at a lower residential density, as defined in f) below, unless the local government makes written findings supported by substantial evidence of both of the following:
  - i) The reduction is consistent with the adopted general plan, including the housing element; and,
  - ii) The remaining sites identified in the housing element are adequate to accommodate the local government's share of the regional housing need, as specified.
- c) Provides that if a reduction in residential density for any parcel would result in the remaining sites in the housing element not being adequate to accommodate the local government's share of the regional housing need, as specified, the local government may reduce the density on that parcel if it identifies sufficient additional, adequate, and available sites with an equal or greater residential density in the local government so that there is no net loss of residential unit capacity.
- d) Specifies that this section of law that requires a local government be solely responsible for compliance with this section, unless a project applicant requests in his or her initial application, as submitted, a density that would result in the remaining sites in the housing element not being adequate to accommodate the jurisdiction's share of the regional housing need, as specified. Allows, in that case, the local government to require the project applicant to comply with this section. Specifies that the submission of an application does not depend on the application being deemed complete or being accepted by the local government.
- e) Provides that this section shall not be construed to apply to parcels that, prior to January 1, 2003, were either (1) subject to a development agreement, or (2) parcels for which an application for a subdivision map had been submitted.
- f) Provides that if the local government has adopted a housing element for the current planning period that is in substantial compliance with state law, that "lower residential density" means the following:
  - i) For sites on which the zoning designation permits residential use and that are identified in the local government's housing element inventory, as specified, fewer units on the site than were projected by the local government to be accommodated on the site pursuant to the housing element; or,
  - ii) For sites that have been or will be rezoned pursuant to the local government's housing element program, fewer units for the site than were projected to be developed on the site in the housing element program.

- g) Provides that if the local government has not adopted a housing element for the current planning period within 90 days of the deadline, or the adopted housing element is not in substantial compliance with state law within 180 days of the deadline, “lower residential density” means any of the following:
- i) For residentially zoned sites, a density that is lower than 80% of the maximum allowable residential density for that parcel; or,
  - ii) For sites on which residential and nonresidential uses are permitted, a use that would result in the development of fewer than 80% of the number of residential units that would be allowed under the maximum residential density for the site.
- h) Provides that if the COG fails to complete a final housing need allocation pursuant to the deadlines established in existing law, then for purposes of the No Net Loss Zoning law, the deadline shall be extended by a time period equal to the number of days of delay incurred by the COG in completing the final housing need allocation.

**FISCAL EFFECT:** Unknown.

**COMMENTS:**

Background: Every local government is required to prepare a housing element as part of its general plan. The housing element process starts when HCD determines the number of new housing units a region is projected to need at all income levels (very low-, low-, moderate-, and above-moderate income) over the course of the next housing element planning period to accommodate population growth and overcome existing deficiencies in the housing supply. This number is known as the RHNA. The COG for the region, or HCD for areas with no COG, then assigns a share of the RHNA number to every city and county in the region based on a variety of factors.

In preparing its housing element, a local government must show how it plans to accommodate its share of the RHNA. The housing element must include an inventory of sites already zoned for housing. If a community does not have enough sites within its existing inventory of residentially zoned land to accommodate its entire RHNA, then the community must adopt a program to rezone land within the first three years of the planning period.

Local governments are required to demonstrate that sites are adequate to accommodate housing for each income group based on the zoning after taking into consideration individual site factors such as property size, existing uses, environmental constraints, and economic constraints. With respect to the zoning, density can be used as a proxy for affordability. Jurisdictions may establish the adequacy of a site for very low- or low-income housing by showing that it is zoned at the “default” density (also referred to as the Mullin density). These densities range from 10 to 30 units per acre depending on the type of jurisdiction. Jurisdictions may also include sites zoned at lower densities by providing an analysis of how the lower density can accommodate the need for affordable housing.

No Net Loss Zoning law: Current law, known as “No Net Loss” Zoning law also prohibits a local government from reducing or permitting the reduction of the residential density or allowing

development at a lower residential density for any parcel, unless the local government makes written findings supported by substantial evidence that both:

- The reduction is consistent with the adopted general plan, including the housing element; and,
- The remaining sites identified in the housing element are adequate to accommodate the local government's share of the regional housing need.

A local government can also reduce the density on a parcel if it identifies sufficient additional, adequate, and available sites with an equal or greater residential density in the local government so that there is no net loss of residential unit capacity.

If the local government has a housing element in compliance with state law, "lower residential density" means the density set out in required identification of available sites. If a local government has not adopted a housing element for the current planning period or the adopted housing element is not in substantial compliance with state law, "lower residential density" means the following:

- For residentially zoned sites, a density that is lower than 80% of the maximum allowable residential density for that parcel; or,
- For sites on which non-residential uses are permitted, a use that would result in the development of fewer than 80% of the number of residential units that would be allowed under the maximum residential density for the site.

Need for this bill: Existing No Net Loss Zoning law ensures that local governments do not approve new housing at significantly lower densities than projected in the housing element without identifying other sites that could accommodate the lost units. However, according to the author, the law does not adequately address other ways in which development approvals can leave a city without sufficient land to accommodate its housing need. For example, "a site identified to accommodate a portion of a local government's need for lower-income households might later be developed with high-end market-rate housing, or the site might be developed for a different use, such as commercial, that is also permitted by the zoning, eliminating a potential site for new housing development. Rather quickly, a city or county's supply of land for housing—especially higher density land suitable for affordable development—can disappear even though the locality has seen little or no development of housing for low- and moderate-income households. SB 166 addresses this by ensuring that as development occurs, local governments assess their ability to accommodate new housing on the remaining sites in their inventory and make adjustments to their zoning if needed."

This bill makes a number of changes to No Net Loss Zoning law, with the goal of ensuring that as development occurs on sites identified for housing, the local government continues to maintain an ongoing supply of sites available to meet the unmet need for housing for all income levels. Specifically this bill:

- Requires each local government to ensure that at all times it maintains an adequate supply of sites to meet the unmet portion of its RHNA.

- Requires a local government, in approving a development on a site identified for housing that results in a development with fewer units than projected in the housing element, to identify additional sites that could accommodate the need not met by the approved development. This could include the following scenarios:
  - A housing development with fewer units than projected in the housing element;
  - A housing development in which the units are affordable to a higher-income group than projected in the housing element;
  - A non-residential development on a site identified for housing; or
  - A rezoning to non-residential use of a site identified for housing.
- If the local government does not have enough residentially zoned sites available to accommodate the unmet need, requires the local government to take action to designate a new site or sites that could accommodate that need in conjunction with the action that triggers the unmet need.
- Provides that an action that obligates a local government to identify and make available additional adequate sites creates no obligation under CEQA to identify, analyze, or mitigate the environmental impacts of that subsequent action to identify and make available additional adequate sites as a reasonably foreseeable consequence of that action. Provides that nothing in this subdivision shall be construed as a determination as to whether or not the subsequent action by a local government to identify and make available additional adequate sites is a “project” for purposes of CEQA.

Arguments in support: Supporters contend that this bill ensures that as development occurs, local governments assess their ability to accommodate new housing on the remaining sites in their inventory and make adjustments to their zoning if needed. By maintaining an adequate supply of land for affordable housing, local governments are keeping their doors open to people who live and work in their communities but cannot afford market-rate housing.

Arguments in opposition: Opponents contend that implementing a rolling adequate sites and rezoning process would be costly and difficult, and may not result in additional affordable housing being built. In opponents' view, the bill could result in the denial of a much-needed housing project because other sites could not be found to accommodate the lost number of units.

Related legislation:

AB 1397 (Low, 2017): Makes a number of changes to housing element law by revising what may be included in a locality's inventory of land suitable for residential development. *This bill is pending in the Senate Transportation and Housing Committee.*

Double-referral: SB 166 is double-referred. It was heard in the Assembly Committee on Local Government and passed out on a vote of 6-2 on June 28, 2017.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California Rural Legal Assistance Foundation (Co-Sponsor)

Public Advocates (Co-Sponsor)  
Western Center on Law and Poverty (Co-Sponsor)  
American Planning Association, California Chapter (if amended)  
California Apartment Association  
California State Association of Electrical Workers  
California State Pipe Trades Council  
LeadingAge California  
Non-Profit Housing Association of Northern California  
Planning and Conservation League  
San Francisco Bay Area Rapid Transit District  
Service Employees International Union  
Western States Council of Sheet Metal Workers

**Opposition**

California State Association of Counties  
Orange County Board of Supervisors

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