Impact of New Housing Laws on Historic Preservation (CA)

A Practical Guidance® Practice Note by
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California has recently adopted a number of new housing laws to lessen regulations on the construction of new housing with a goal of increasing the desperately needed affordable housing supply in the state. However, some of the existing regulations include protections to preserve and otherwise limit impacts to historic resources. This practice note provides an overview of several recently adopted housing laws and how those housing laws could affect existing protections for historic resources, and it offers suggestions on working within the new laws to protect those resources.

For further guidance on ownership of commercial real property in California, see Commercial Real Estate Ownership (CA). For guidance on buying and selling commercial property in California, see Purchasing and Selling Commercial Real Estate Resource Kit (CA). For more information about the California Environmental Quality Act, see California Environmental Quality Act Compliance.

Historic Preservation Protections in California

In Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), the U.S. Supreme Court found that federal, state, and local governments have the right to require preservation of historic resources in part because such restrictions, there a local landmarks law, "are substantially related to the promotion of the general welfare." In California, historic preservation protections are provided mainly through the California Environmental Quality Act (CEQA) as well as local ordinances and regulations.

CEQA Requires Evaluation and Mitigation of Impacts to Historic Resources

CEQA requires local agencies to evaluate the environmental impacts of a proposed project, such as a housing development, and to use that to evaluate whether or not to approve the project or require mitigation be imposed. In making that evaluation, CEQA provides that "[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment." Cal. Pub. Res. Code § 21084.1.

While CEQA provides protections for historic resources through the environmental review process, the requirement to conduct that review only applies to discretionary projects. A discretionary project is one that requires an agency to exercise subjective judgment in approving, disapproving, or imposing conditions upon the project. In contrast, a project is ministerial and exempted from environmental review under CEQA when the approving agency has no authority to deny or shape the project if the project complies with objective standards uniformly imposed upon such approvals. Cal. Pub. Res. Code § 21080(b)(1).) A private party can legally compel an agency to issue a ministerial approval without any changes in the design of its project that might alleviate adverse environmental consequences.

Local Ordinances Can Designate and Protect Historic Resources

Cities and counties can also provide protection for historic resources through the adoption of local historic preservation ordinances. The authority to adopt ordinances to establish special conditions or regulations for the "protection, enhancement, perpetuation, or use" of places with special historical or aesthetic value is provided by California Government Code Sections 25373 (for counties) and 37361 (for cities). Cal. Gov. Code §§ 25373, 37361. These ordinances can work hand in glove with CEQA by defining those activities that require a discretionary approval within the city or county, such as demolition or alteration of historic resources or construction within historic districts or designated zones.

New Laws to Address Lack of Affordable Housing in California

California has a well-documented and long-term lack of adequate supply of affordable housing, with some of the most expensive housing in the nation. This problem has continued to worsen over the years, manifesting in an increasing unhoused population and an inability of would-be new homeowners to afford the skyrocketing prices. California has taken a number of steps to address these housing problems over the years. Recently, the state legislature has focused on legislation intended to limit regulations on the construction of new housing as a means of increasing the total housing stock with California. Several of the new housing laws restrict the application of CEQA to new housing developments and limit local controls in approving new housing construction. Since CEQA and local regulations are the means for protection of historic resources in California, these new housing laws may also reduce or eliminate those existing protections.

This practice note includes an evaluation of the provisions provided by and the potential impacts on historic resources resulting from the adoption of housing development legislation in Senate Bills 9, 10, 330, and 13.

SB 9

Senate Bill No. 9 (SB 9) was signed into law on September 16, 2021, and went into effect on January 1, 2022. 2021 Cal. SB 9. This legislation includes changes to laws relating to housing development through the amendment of Government Code Section 66452.6 and the addition of Government Code Sections 65852.21 and 66411.7, requiring that approval of a housing development proposed within a single-family residential zone that includes no more than two residential units must be considered ministerial. See Cal. Gov. Code §§ 65852.21, 66411.7, 66452.6.

Limits on Local Control and CEQA Review Imposed by SB 9

These changes to land use law put limitations on local zoning control and the application of CEQA by requiring cities and counties to ministerially approve a housing project for two residential units on a site zoned for single-family residential, even though in most areas that zoning was previously limited to one residential unit per site. SB9 prohibits discretionary review or administrative hearings for such projects if certain requirements are met. Cal. Gov. Code § 65852.21(a). Ministerial approval of these projects prevents the application of CEQA, as CEQA applies only to discretionary projects. 14 CCR 15268(a). It also does not allow for the application of any nonstandard conditions or subjective design review.

SB 9 and Historic Preservation

One of the requirements a project must meet to be considered a ministerial approval under this legislation is intended to limit impacts to historic resources. The proposed development must not be "located within a historic district or property included on the State Historic Resources Inventory." Cal. Gov. Code § 65852.21(a)(6). The State Historic Resources Inventory (SHRI) is a compilation of historic resources listed on the California Register of Historic Places or the National Register of Historic Places, or determined eligible for listing if the owner of the site has not provided consent for the listing. Cal. Pub. Res. Code § 5020.1(p). The SHRI also includes resources determined eligible for listing in the National and/or California Registers, as well as resources determined to be historic by qualified historic resource evaluations and surveys submitted by local jurisdictions to the California Historical Resources Information System. Sites that are designated or listed as a city or county landmark or historic property pursuant to city or county ordinance are also excluded from application of SB 9 ministerial status.

The exemption provides protections to a number of historic resources that already have been identified and designated as historic. Because these resources are excluded from relying on the ministerial approval processes of SB 9, CEQA review will be required for those projects that require discretionary approvals, including but not limited to zone changes, variances, or conditional use permits. Additionally, under CEQA, the whole of a project must be analyzed in

environmental review. This means that if a project includes both ministerial approvals and discretionary approvals, the impacts of all of the approvals must be assessed and mitigated through the environmental review process. 14 CCR 15378. For example, if a city or other local jurisdiction allows for the ministerial issuance of demolition permits for a site, but the replacement project includes any discretionary approvals, the adverse impacts associated with the demolition must also be evaluated in the CEQA review document.

While SB 9 does provide for CEQA review and local agency control over sites with designated historic resources, it limits protection for resources that have not yet been listed on the national, California or local register or identified in an historic resources survey. Frequently, designation of historic sites begins at the local level. When a local jurisdiction does not maintain up-to-date surveys of historic resources or its local register of designated resources, historic resources that are not formally designated may be demolished or adversely altered by a housing development that is exempted from environmental review by SB 9.

SB 10

Senate Bill No. 10 (SB 10) was also approved by the Governor on September 16, 2021, with an effective date of January 1, 2022. 2021 Cal. SB 10. Government Code Section 65913.5 is added to existing planning and zoning law by SB 10. Cal. Gov. Code § 65913.5. This legislation addresses a local agency's approval of denser zoning for residential sites in contrast to other housing laws that focus on the approval of specific development.

SB 10 Allows Ministerial Upzoning of Parcels

Under SB 10, a local government's adoption of a local ordinance to zone a parcel for up to 10 residential units at a specified height limit is a ministerial approval. Cal. Gov. Code § 65913.5(a). Unlike SB 9, SB 10 does not limit local control, but instead provides local agencies with the opportunity to upzone parcels without CEQA review. To take advantage of this opportunity, the parcel in question must be located within one-half mile of a major transit stop and on an urban infill site that currently has zoning that allows for residential development. Parcels in high fire areas and sites designated open space land for park or recreational purposes are excluded. Additionally, when the new zoning ordinance would override zoning restrictions adopted by a local initiative, the ordinance must be approved by a greater margin.

SB 10's Potential Indirect Impacts on Historic Preservation

SB 10 does not include any reference to historic resources, nor does it exclude parcels that contain historic resources or are located within an historic district. However, upzoning parcels can then result in future housing development projects being approved ministerially or based on categorical exemptions to CEQA. For example, a parcel with a designated or otherwise identified historic resource located on it that was zoned for only one residential unit could have its zoning changed to now allow up to 10 residential units without any environmental review of that increase in development. If the future housing development no longer requires any discretionary approvals, such as conditional use permits, variances, or rezoning, the project could be constructed without any assessment or mitigation of the impacts to the existing resource. Moreover, without other discretionary approvals, if a local jurisdiction allows the ministerial approval of demolition permits, the historic resource could be demolished to make way for the project without any CEQA review and without the local agency having the ability to deny the demolition.

Further, CEQA provides a categorical exemption from environmental review for infill projects that are compliant with existing zoning. Upzoning the parcel could make projects consistent with zoning for purposes of relying upon a categorical exemption, and thus the impacts of the new development on an historic resource located on the site, or an historic district that surrounds the project site, would not be evaluated or mitigated. CEQA does also include an exception to categorical exemptions for projects that could have adverse impacts on historic resources.

SB 330

Senate Bill 330 (SB 330) went into effect on January 1, 2020, after it was approved on October 9, 2019. Housing Crisis Act of 2019, 2019 Bill Text CA S.B. 330. This legislation amends, repeals, and adds a number of Government Code sections relating to housing by limiting standards applicable to approval of housing development projects.

SB 330 Limits Reliance on Discretionary Local Standards

Under SB 330, a local agency is prohibited from disapproving a housing development project for affordable housing or conditioning such project in a manner that makes the project infeasible, including through the use of

design review standards, unless specific written findings are made. Cal. Gov. Code § 65589.5(d). These findings include that:

- The jurisdiction has already met its regional housing need allocation
- The housing development project would have a specific and adverse unmitigable impact on public health or safety
- The approval is prohibited under a specific federal or state law
- The proposed project site is or is surrounded by agricultural land -or-
- The project is inconsistent with applicable zoning and general plan land use designation at the time of the project application

Cities and counties are also limited in the standards they can apply to any housing development project when determining whether to approve, disapprove, or conditionally approve the project. A housing development project that complies with objective standards in effect at the time the project application was deemed complete can only be denied or conditioned to reduce density if the local agency finds the project would have specific and adverse impacts on public health or safety and there is no way to mitigate those impacts without reducing the project's density. Cal. Gov. Code § 65589.5(j)(1).

A threshold consideration in applying this limitation on local control on housing development projects is: "what are objective standards?" An objective standard is one that involves no personal or subjective judgment by the local agency, often a quantifiable and/or uniform standard. A project applicant reviewing the standard will be able to determine whether or not their project meets that standard without any determination by the local agency. It is in contrast to subjective standards, typically around design issues, that require the local agency to exercise its judgment in determining issues such as whether the project is compatible with the surrounding neighborhood.

Standards Imposed to Limit Impacts to Historic Resources Are Often Subjective

SB 330 includes provisions directly and indirectly addressing historic preservation. The city or county is required to determine whether the site of a proposed housing development project is an historic site for purposes of applying any state or local laws or regulations applicable to such sites "at the time the application for the housing development project is deemed complete." Cal. Gov. Code § 65913.10(a). This would include historic preservation ordinances that prohibit demolition of historic resources or impose standards on development adjacent to historic resources. This determination is required to remain valid throughout the approval and development, with the only exception being if there are archaeological, paleontological, or tribal cultural resources encountered during construction. To aid in this determination, the applicant for a housing development project is required to include information regarding whether there are any historic or cultural resources known to exist on the project site as part of the application for the project. Cal. Gov. Code § 65941.1(a)(9).

The intention of this provision is to provide certainty to applicants early in the development process as to whether the project could impact an historic resource. While that is an understandable goal, conflicts with historic preservation goals can arise when a local jurisdiction does not have a recent survey of historic resources or an updated local register or inventory of historic sites. That limits the information available at the time the housing development application is submitted. It is the outdated nature of many jurisdictions' historic surveys that has led historic preservation groups to seek historic designation of sites once a project has been proposed and a resource becomes threatened with demolition. SB 330 also provides only 30 days for a local agency to determine whether an application is complete, which is unlikely to be enough time for a new survey of the property or for the resource to go through the local designation process. This lack of information, and prohibition on evaluating the historicity of a site through the CEQA process or other local review after the close of that 30-day window, could lead to inaccurate initial determinations that there are no historic resources on a project site, allowing for demolition or alteration of resources that are historic without any mitigation.

SB 330 could also have indirect impacts on historic preservation due to its limit on local agencies to only apply objective standards when evaluating a project. Some standards relevant to historic resources are clearly objective, including:

- Prohibiting demolition of an historic resource
- Requiring new development to comply with an established historic setback
- Requiring specified height limits adjacent to historic sites or within historic districts -or-
- Requiring that new construction use specified types of materials, such as wooden windows

However, many standards intended to protect and preserve historic resources may be considered subjective as they require the local agency to determine whether new

construction is compatible with historic sites. The Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings are the standards by which historic resource consultants evaluate impacts to historic resources. They are also a benchmark CEQA uses to determine a project's impacts on historic resources. 14 CCR 15126.4(b)(1) (projects that comply with these standards "shall generally be considered mitigated below a level of significance and thus is not significant"). The Secretary of the Interior's Standards include subjective determinations such as whether the historic character of a property will be maintained and whether new construction will be compatible with the features, size, scale, and massing of the historic resource.

SB 13

Senate Bill 13 (SB 13), which went into effect January 1, 2020, encourages the creation of affordable housing units in the form of accessory dwelling units (ADUs). 2019 Bill Text CA S.B. 13. ADUs are small residential units located on a residential site either attached to or detached from the existing primary residence that provide housing independent of the primary residence. Existing structures, such as garages, can be converted into ADUs. ADUs can be located within the primary residence, or they can be new construction on the site of the primary residence.

SB 13 Provides for Ministerial Approval of ADUs

SB 13 sets limits on local jurisdictions' ability to prohibit ADU development by requiring them to ministerially approve ADUs. Cal. Gov. Code § 65852.2(a)(3). Local agencies may adopt an ordinance that provides for the creation of ADUs in areas zoned for single-family or multifamily housing if the ordinance meets certain requirements, including:

- Designating the areas where ADUs are permitted
- Setting standards on the height, setbacks, and maximum size of an ADU
- Imposing standards "that prevent adverse impacts on any real property that is listed in the California Register of Historical Resources" -and-
- Restricting the ADU from being sold separate from the primary residence

Cal. Gov. Code § 65852.2(a)(1). If a jurisdiction does not adopt a local ADU ordinance or update its existing ordinance pursuant to state law updates, the local agency must ministerially approve ADUs under standards set within the legislation.

Potential for Impacts to Historic Resources through Construction of ADUs

This legislation does address impacts to historic resources by requiring a local agency's ADU ordinance to include standards that prevent adverse impacts on sites listed in the California Register of Historical Resources. However, this restricts local control of historic resource determinations. Standards to prevent adverse impacts are only provided for resources listed on the California Register, not those sites that have been listed on a local register of historic places or found to be historic by a local survey or other inventory.

Additionally, there is an inherent tension that must be reconciled between the requirement that ADUs only be evaluated using objective standards through a ministerial process and the identified need for local ADU ordinances to prevent adverse impacts to historic resources on the California Register. As discussed above, standards to protect and preserve historic resources, including the Secretary of the Interior's Standards for Treatment of Historic Resources, are often subjective, requiring evaluation of compatibility.

Practical Tips to Protect Historic Resources under Updated Legal Landscape for Housing Developments

This practice note has identified the loss of some protections for historic resources that has resulted under new laws intended to encourage new housing developments in an attempt to enhance the affordability of housing. We conclude by providing suggestions for the cohabitation of historic resources and the provision of affordable housing in California.

Available Tools to Encourage Protection and Adaptive Reuse of Historic Resources

As an initial matter, it is important to recognize that historic sites often provide lower cost residential units. In particular, in areas with rent control ordinances, units in historic buildings can provide housing at rates much more affordable than new market rate housing units.

Additionally, there is available funding and other sources of cost reductions for rehabilitation of historic sites that can further enhance the affordability of units in rehabilitated historic buildings. These include the following:

- The recently adopted California Historic Tax Credit, which provides tax incentives for rehabilitation of historic sites.
- Some local jurisdictions have adopted Mills Act Ordinances, which allow for contracts with owners to reduce tax burdens when rehabilitating their historic properties.
- Additionally, projects including historic sites can rely upon the more relaxed standards included in the State Historical Building Code when adaptively reusing designated historic properties, or when conducting repairs or alterations.

Attorneys and their clients seeking to protect existing historic resources that do or could provide affordable housing should consider providing site-specific information to potential developers of historic sites regarding the ability to offset costs with the above tools. Local jurisdictions that do not already have a Mills Act program in place could be encouraged to adopt such program as a means of assisting in not only protecting historic resources, but also potentially providing affordable housing.

Actions to Encourage Protection of Historic Resources under New Housing Laws

While in some instances, further clarifying legislation may be the most helpful way to ensure protections of historic resources under new housing laws, there are additional actions attorneys or their clients can take or can encourage their local agencies to take to provide protections for historic sites. These actions include the following:

- Encourage local jurisdictions to update historic surveys and registers and submit any inventories of historic resources to the SHRI. Recall the following:
  - SB 9 does not allow for ministerial approval of housing development on historic sites that are included on the SHRI. Encouraging cities and counties to update and submit inventories to the SHRI allows existing protections for historic resources to be enforced.
  - SB 330 requires local agencies to determine whether a site of a proposed housing development is an historic site very early in the project review process. Having updated surveys and inventories makes this determination easier for local agencies. It also provides notice to potential developers of such sites that potential impacts to historic resources will need to be addressed.
  - Having an easy reference to sites with historic resources can also help to inform local agencies decisions regarding appropriate locations for upzoning under SB 10.
- Encourage and work with local jurisdictions to develop objective standards to protect historic resources. This would allow for the following:
  - SB 330 provides that only objective standards can be applied to certain housing development projects. Having objective standards in place can help prevent impacts to historic resources from those developments.
  - SB 13 provides similar restrictions for the development of ADUs that would be assisted by development of objective standards.
- In areas where the local jurisdiction is not able to or interested in updating local inventories of historic resources, individuals and organizations can seek listing of historic resources on the California Register of Historical Resources. Note the following:
  - Resources found eligible for listing on the California Register are included in the SHRI, allowing for the continued protection of those resources under SB 9.
  - This would also provide the early notice of a site's historic significance necessary under SB 330.
  - Further, SB 13 provides that local ADU ordinances must include standards to prevent impacts to resources listed in the California Register.

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Amy worked extensively on CEQA litigation that ultimately resulted in the preservation of the historically significant Lincoln Place apartment complex. She was lead counsel for the successful petitioner in the CESA case Center for Biological Diversity v. Fish & Game Comm. (2008) 166 Cal.App.4th 597. She also represents historic preservation groups throughout the state, including the Palm Springs Modern Committee in its quest to maintain the heritage of modern architecture in Palm Springs and the West Adams Heritage Association in its efforts to protect one of the oldest and grandest neighborhoods in Los Angeles.

Amy currently serves on the California Preservation Foundation's Board of Trustees, co-chairing the organization's Advocacy Committee. She also has written articles and frequently lectures on environmental law and historic preservation. Amy holds an undergraduate degree in natural resources and environmental sciences from the University of Illinois and obtained her Juris Doctorate from the University of Michigan. She is admitted to practice in California, the Eastern and Central Federal District Courts in the State of California, and the United States Ninth Circuit Court of Appeals.