City's Denial of SB 35 Streamlining for Mixed-Use Project Overturned

05.10.2021

ATTORNEYS

Diana H. Varat

In the first appellate decision to interpret Senate Bill (SB) 35, a housing streamlining bill enacted in 2017, the Court of Appeal ruled against the City of Berkeley's denial of an application for expedited review of a mixed-use housing complex. As a result, the City will be required to approve the project.

SB 35 streamlines consideration of qualifying multifamily and mixed-use housing applications in cities and counties that have not made sufficient progress towards their Regional Housing Needs Assessment (RHNA) targets. Under SB 35, agencies must review applications through a ministerial process, without CEQA review, considering only whether the project meets objective standards.

The project in ***Ruegg & Ellsworth v. City of Berkeley*** is proposed to be located at the site of the West Berkeley Shellmound – a historic, cultural, and sacred site of the Ohlone Tribe. The City gave several reasons that the proposal did not qualify for SB 35 streamlining: (1) SB 35 is unconstitutional as applied to the project, because it would interfere with the City's home rule authority over historic preservation; (2) construction would require a historic "structure" to be demolished, in conflict with the express terms of SB 35; and (3) the project conflicted with other objective zoning, subdivision, and design review standards. The Court ruled against the City on each point.

Importantly, a number of the legal issues in the *Ruegg* case have been addressed by statutory changes. For example, SB 35 now includes a tribal consultation process that requires the local agency and affiliated tribes to agree on measures to mitigate potential impacts to tribal cultural resources before a project can qualify for SB 35 streamlining. State law also has been clarified to confirm that SB 35 streamlining does apply to a qualifying mixed use project. As such, the facts of the *Ruegg* case are unlikely to be repeated.

However, the Court's rationale provides a cautionary tale for cities as they process housing applications. SB 35, much like the Housing Accountability Act (HAA), requires agencies to identify in writing any objective zoning, subdivision,

and design standards with which the project conflicts, and to explain the reasons for the conflict. Failure to inform the applicant of such inconsistencies in the prescribed timeframe results in the project being "deemed consistent" with local standards. In this case, Berkeley notified the applicant of a conflict with its traffic impact guidelines, but did not call out specific standards or explain the nature of the conflict. The Court found the City's letter to be inadequate, and therefore deemed the project to be consistent with the City's objective standards.

In light of the *Ruegg* decision, cities should pay careful attention to the procedural requirements in both SB 35 and the HAA, especially in communicating inconsistencies with local standards to applicants. If a project is believed to be inconsistent with applicable standards, planning staff should cite to each of the specific standards and explain the ways in which the project does not conform. Under *Ruegg,* letters of inconsistency under SB 35 (and likely under the HAA as well) should be comprehensive and specific to avoid a project being "deemed consistent" with local standards.

If you have any questions about your application review process or how the *Ruegg* decision may affect your city, contact **Casey Strong** or **Diana Varat**.