

Part 1. What Does it Mean?

NOTE: There are many unanswered questions about the housing bills adopted in the 2017 legislative session. The bills themselves contain ambiguities and unclear provisions. These answers represent one interpretation of the legislation but public agencies are encouraged to consult with their own city attorney or county counsel for legal advice.

Relevant Government Code provisions in brackets are shown for reference. Provisions applicable to cities also include counties.

Question 1

A developer proposes to knock down an older single family home and build a mcmansion. The building meets all objective design criteria. The developer claims he is exempt from design review because of the Housing Accountability Act.

1. *Does the HAA apply?* Many city attorneys would say 'no' because the HAA applies to "residential units," plural. [65589.5(h)(2)(A)]
2. With an accessory dwelling unit (ADU), it does apply.
3. *If it does apply, what does the city have to do and why?* The city cannot deny the application (or reduce the density if it contains an ADU), unless the city can make a public health and safety finding. [65589.5(j)] However, nothing in the HAA says that the developer can avoid design review; the city just can't deny the project. The city could add conditions of approval so that it can make the required design review findings, so long as those conditions don't have the effect of denying the project or reducing the density or have the same effect as reducing the density. [65588.5(i) & (j)(4)]
4. *What could the city have done to avoid this problem?* It would be better if the city could adopt objective design review standards.
5. *Could the city deny the right to knockdown the building because demolition is different than construction?* No. The statute was amended to state that denial includes denial of any land use approvals necessary for the issuance of a building permit. [65589.5(h)(5)(A)]
6. *Could the developer utilize SB 35?* No, because SB 35 applies to a "multifamily" housing development with two or more units. [65913.4(a)(1)] ADUs are accessory to single-family homes. [65852.2(a)(1)(D)(ii)]

Question 2

A developer proposes a 10 unit development that does not meet the rules for setbacks or heights. The city does not ask if the developer is using the HAA nor does the developer mention it in her proposal. After 45 days, the city asks for modifications to the development because it does not meet the zoning rules. The developer claims that the city missed their 30 day window and must now approve the project.

1. *Who is right?* The project is now 'deemed consistent' [65589.5(j)(2)(B)], and, under the HAA, the City cannot deny it or reduce the density for being inconsistent unless the inconsistency creates

a public health or safety impact that cannot be mitigated and otherwise meets the definition of 'health & safety impact' in the statute. [65589.5(j)(1)]

However, the City could attempt to require that the project meet the required setbacks and heights through conditions of approval, so long as those conditions don't have the effect of denying the project or reducing the density or have the same effect as reducing the density. [65588.5(i) & (j)(4)]

Additionally, because the proposed heights and setbacks were not reviewed in any environmental document, the proposal may trigger an EIR.

NOTE: The 'deemed consistent' provision seems to conflict with many provisions of State planning and zoning law and so is particularly difficult to interpret.

2. *How could the city avoid this problem?* City needs to inform the applicant within 30 days (60 days for projects with more than 75 units) of any inconsistencies with any adopted "plan, program, policy, ordinance, standard, requirement, or other similar provision" and explain why the project is inconsistent [65589.5(j)(2)(A)] and set up procedures to accomplish this. Some cities are requiring developer to demonstrate consistency as part of a complete application.

Note that normally this level of inconsistency would be caught as part of a completeness letter, and the applicant would be told to apply for a variance and warned of the possible need for an EIR.

Question 3

A city rezones downtown to allow buildings up to 60 feet in height, unless extraordinary community benefits are provided, in which case the buildings may be up to 150 feet in height. A developer proposes a 150 foot building that meets all objective criteria. The developer invokes the HAA and claims the community benefits clause is not objective and therefore does not apply [or claims that, in the absence of clear objective standards, the benefits he is offering are adequate, and that anything more than was he is offering will kill the project].

1. *Does the HAA apply?* The answer is not clear. Many city attorneys interpret 'objective' measures to mean that if a use permit or other permit is required for additional height, etc., only the 'base density' is covered by the HAA.
2. *What could the city do to avoid this problem?* Adopt objective criteria for the increased height and density. For instance, one community requires additional affordable housing and higher traffic impact fees.
3. *How would SB 35 apply?* SB 35 states that a development is considered compliant if it is consistent with the maximum density in the land use element. [65913.4(a)(5)] It is possible that a project could be eligible for public benefit density under SB 35.

Question 4

A city rezones the area around a transit station. It allows 60 feet buildings at 80 units per acre. At the edge of the zone, where the property abuts a single family neighborhood, it call for the new buildings to be of similar in size and scope to the existing buildings. The proposed housing development does not reduce its height or massing near the existing neighborhood, but meets the height and density rules. Neighbors are up in arms about the overall density and the interface with their properties. The developer argues that they have met all objective criteria.

1. *Can the city deny the project under the HAA?* City may attempt to argue that 'similar in size and scope' is objective and the major difference in scale may make it obvious it doesn't conform; however, if standard is not objective, City may not be able to make the public safety findings to deny. However, the unforeseen height and density may again trigger the need for an EIR. Here it would be difficult to substantially reduce the heights as a condition of approval because that would almost certainly reduce the density.
2. *What would have been a way to avoid the problem?* Specify precisely maximum heights and type of buildings near a single-family neighborhood.
3. *Could the project qualify for SB 35?* 'Similar in size and scope' is probably not objective under the definition in SB 35.