

# Subjective No More

---

LESSONS FROM HAA AND SB35 EARLY ADOPTERS



Planning  
Innovations



# Welcome

---

Joshua Abrams, Baird + Driskell Community Planning  
[abrams@bdplanning.com](mailto:abrams@bdplanning.com)

Eric S. Phillips, Goldfarb & Lipman LLP  
[ephillips@goldfarblipman.com](mailto:ephillips@goldfarblipman.com)

Suzanne Thorsen, City of Benicia  
[SThorsen@ci.benicia.ca.us](mailto:SThorsen@ci.benicia.ca.us)

Edward Manasse, City of Oakland  
[emanasse@oaklandca.gov](mailto:emanasse@oaklandca.gov)

Ada Chan, MTC/ABAG  
[achan@bayareametro.gov](mailto:achan@bayareametro.gov)

# SUBJECTIVE NO MORE:

Lessons from HAA and SB 35 Early Adopters

September 7, 2018

## **Goldfarb & Lipman LLP**

1300 Clay Street, 11<sup>th</sup> Floor  
Oakland, California 94612  
(510) 836-6336

**Eric S. Phillips**

[ephillips@goldfarblipman.com](mailto:ephillips@goldfarblipman.com)

goldfarb lipman attorneys

# HAA AND SB 35

4

## Housing Accountability Act

- Government Code Sec. 65589.5
- Affects all residential projects

## SB 35

- Government Code Sec. 65913.4
- “Streamlining” for some residential projects

Both laws focus on “objective standards” and favor predictability over flexibility.

# What Is An “Objective” Standard?

5

SB 35 definition:

- “Standards that involve **no personal or subjective judgment** by a public official and are **uniformly verifiable** by reference to an external and uniform benchmark or criterion available and **knowable** by both the development applicant and the public official **prior to submittal.**”
- Examples:
  - ▣ Height, setbacks, lot coverage, % open space, density, FAR, etc.

# What Is Not “Objective”?

6

Standards found not to be “objective:”

- “Address unmet need for senior housing.”
- “Special care shall be taken to avoid obstructing views to the surrounding hills.”
- “Produce high quality authentic design.”
- “Reflect look and feel of the community.”
- *Honchariw*: Map Act finding that “the site is not physically suitable for the proposed development.”

# HAA Processing Requirements

7

- **Time to comply:**
  - 150 or fewer units: within 30 days of completeness
  - More than 150 units: within 60 days of completeness
- **A jurisdiction must:**
  - Provide written list of any inconsistencies with any “plan, program, policy, ordinance, standard, requirement or similar provision”;
  - Explain why the project inconsistent; or
  - “Deemed consistent.”

# HAA Processing Strategies

8

## □ **Short-Term:**

- Develop a checklist of applicable “plans, programs, policies, ordinances, standards, requirements”
- Update application requirements to require applicant to demonstrate consistency as part of complete application

## □ **Longer-Term:**

- Update development standards as needed to incorporate more objective criteria

# HAA Review Strategies

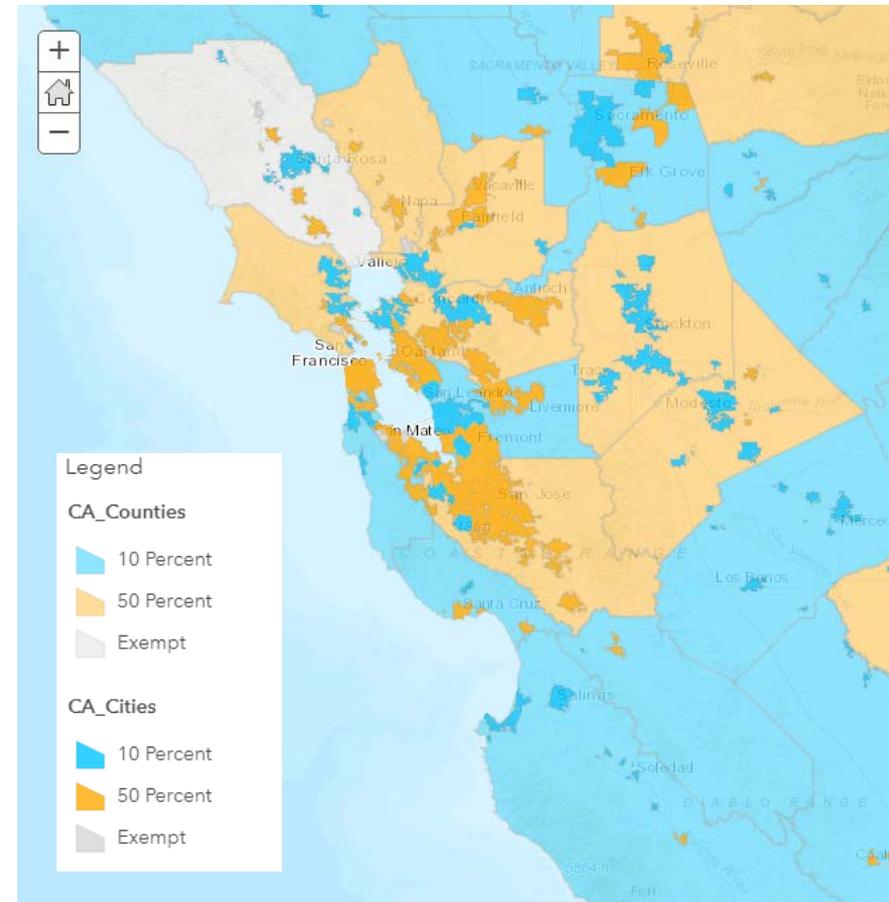
9

- Use checklists to make sure standards are not left out of consistency analysis
- Be detailed and meticulous when drafting findings for denial
  - ▣ All conclusions must be backed up with explanations and evidence
- Craft conditions of approval to respond to community concerns while still approving projects
- Continue CEQA analysis
  - ▣ And Coastal Act, if applicable

# SB 35 Eligible Projects

10

- Must meet affordable housing requirements
- Projects with 10 or more units must pay prevailing wages
- Must use “skilled and trained workforce” for larger projects
  - ▣ Threshold varies by location
  - ▣ 100% affordable projects exempt



# SB 35 Processing Requirements

11

- Within 60 to 90 days of **submittal**:
  - ▣ Provide list of all inconsistencies with ‘objective’ zoning and design review standards in effect at submittal or project “deemed consistent”
  
- Within 90 to 180 days of **submittal**:
  - ▣ Complete any design review or “public oversight” of a housing development
  
  - ▣ Prohibited from in any way “inhibiting, chilling or precluding” the ministerial approval of a project

# SB 35 Strategies

12

- **Be prepared to evaluate consistency** with all objective standards
  - ▣ As with HAA, develop checklist to assist with evaluation
  - ▣ Consider adding objective standards in the General Plan
- Develop **application material specific to SB 35**
  - ▣ Opportunity to require applicants to do initial analysis
  - ▣ Develop requirements for documenting compliance with affordability and labor requirements

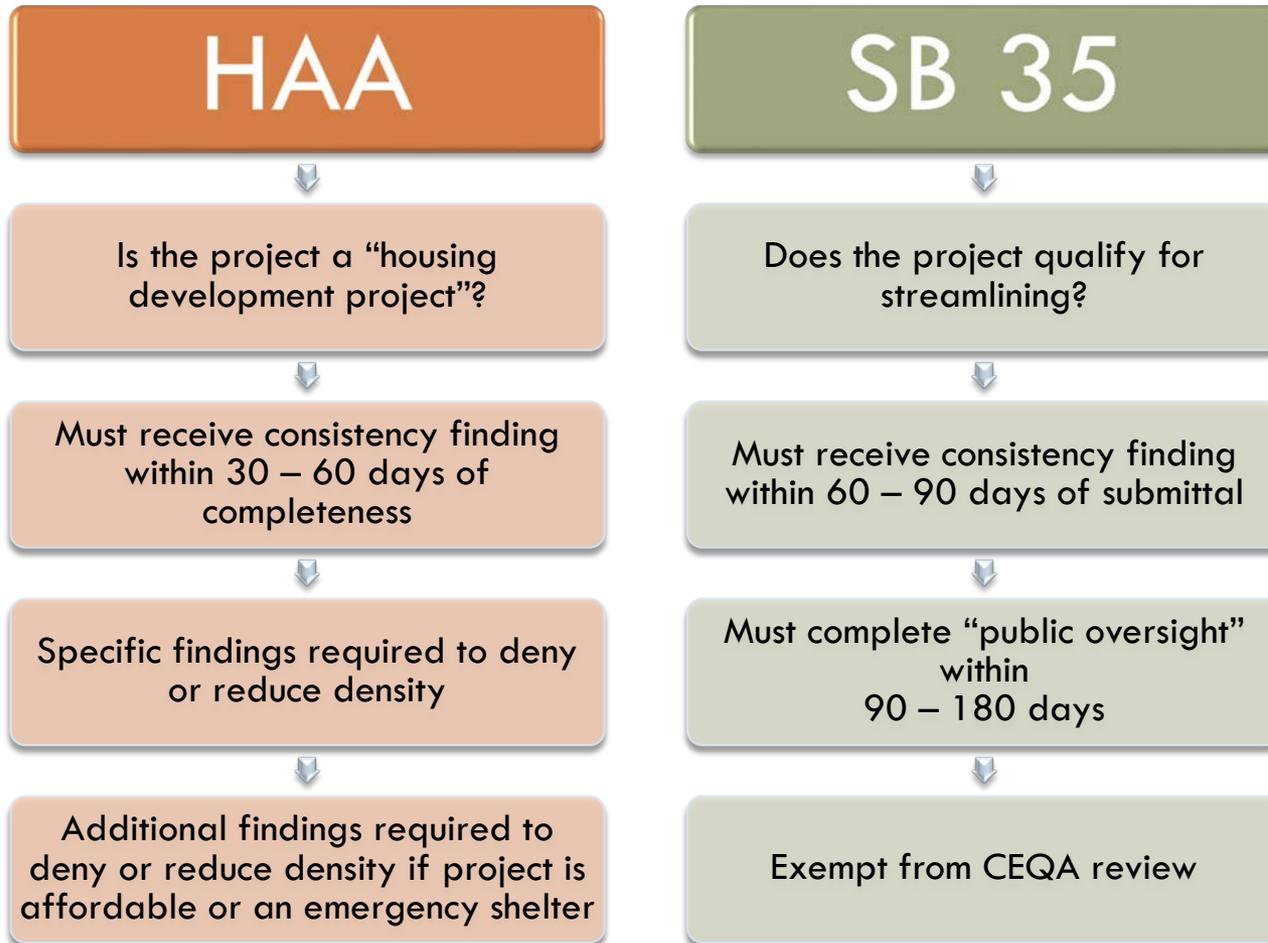
# SB 35 Strategies

13

- Define process for review and decision-making
  - ▣ Any role for design review, PC, CC, or the public?
- Understand SB 35 limitations: do you have sites that actually qualify?
- Develop partnerships with affordable housing developers
  - ▣ More control available to public agencies who are also funding a project
  - ▣ Opportunity to address public concerns outside of project approval process

# Putting it all together . . .

14

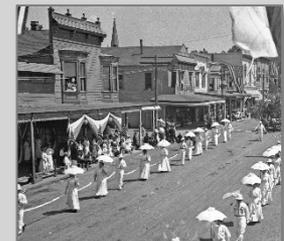
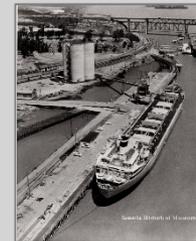
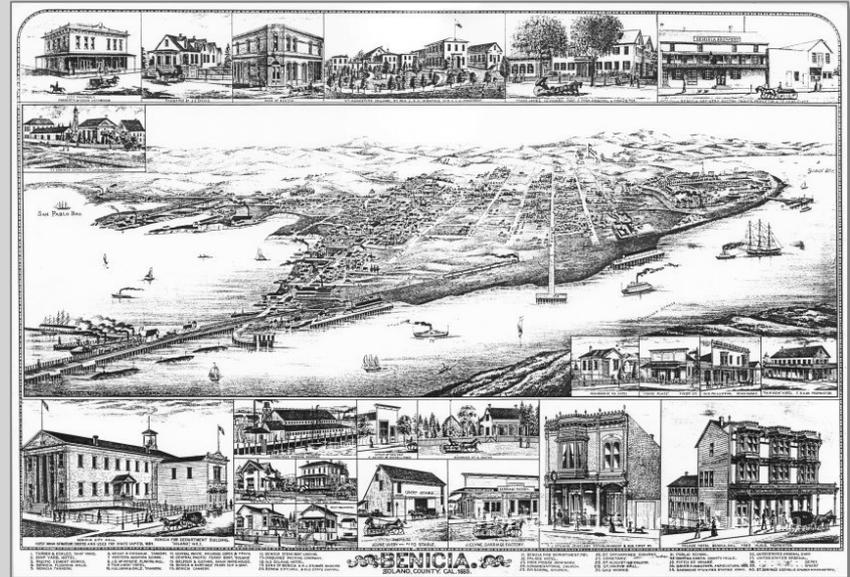
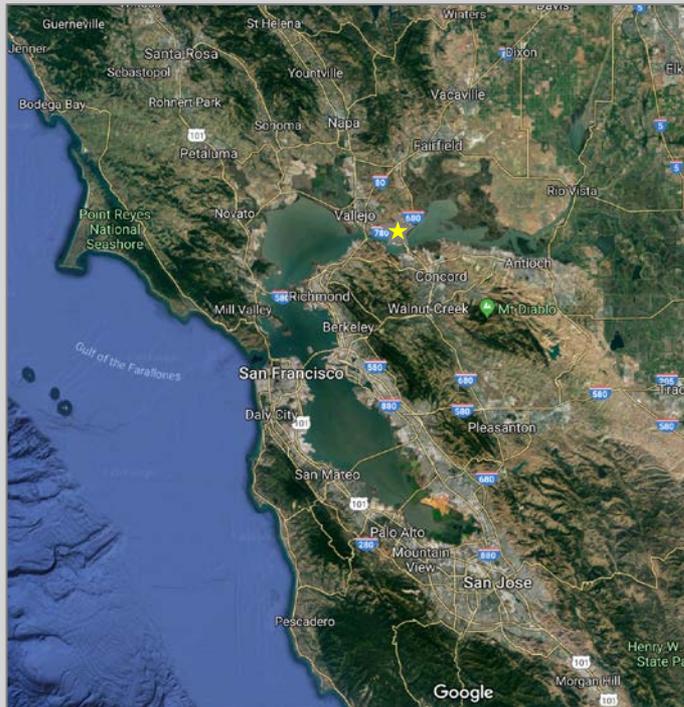


# Senate Bill 35 in Benicia



*Image courtesy: Benicia Economic  
Development*

# About Benicia



# Benicia's Approach



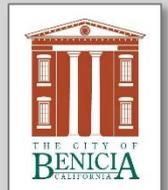
Pre-Application Meetings

Urgency Ordinance (03/18)

- Work-Live Units
- Design Standards

Zoning Amendment (*underway*)

- Stakeholders & Community
- Commissions



# Achieving Compatibility

## Guidelines

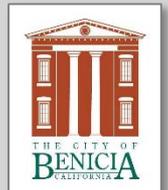
- Flexible
- Contextual
- Judgment
- Historic Districts

*“may”, “should”*

## Standards

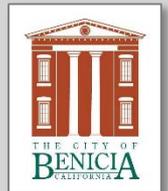
- Rigid
- Absolute
- Objective
- Citywide

*“must”, “shall”*



# Building Form/Site Standards

- Building Placement
- Building Height
- Site Development
- Building Form
- Parking



# Building Form Example

## B. Roof

1. *Mixed Use Districts:* Refer to Zoning Standards

2. *All Other Districts:*

a. Roofs shall have a minimum 2:12 pitch.

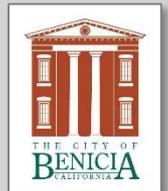
b. Mansard and gambrel roof forms are not allowed.

c. Faux variations of hip roofs are permitted where necessary to accommodate concealment of rooftop mechanical units in a roof well or similar recessed area.

d. Eaves shall have a minimum overhang depth of twenty-four (24) inches.

# Architectural Standards

- Façade Composition & Elements
- Building Materials and Colors
- Signage



# Architectural Standard Example

## Facade Composition and Elements

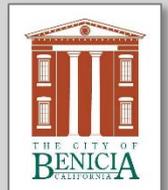
### A. Base, Middle, Cap

1. The building shall have a base, middle, and cap; these elements shall be distinguished as prescribed herein:
  - a. Base: Use stone, concrete masonry materials along the base of the building to “ground” the structure.
  - b. Middle: This element establishes the vertical proportion and will be constructed of the primary building material.
  - c. Cap: This is the roof or parapet of the building. Cornice or fascia trim shall be incorporated along the roofline.

# Lessons & Takeaways



- Scope
- Let it “sink in”
- Limits of precedent
- Model & test
- Ambiguities





**Implementation of  
SB 35 in Oakland  
Sept. 8, 2018**

# IMPLEMENTATION PROCESS TO DATE

---

- City attorney assigned to review law and assist in implementation
- Checklist created to review projects for SB 35 applicability
- Existing guidelines reviewed for potential conversion to objective standards

# Oakland's SB 35 Streamlining Checklist (Part 1)

Staff reviews a series of questions (sample below). If the answer for any question is “NO,” the proposed project is not subject to SB 35 streamlining:

**YES NO** Does the proposed project dedicate at least 50% of the proposed residential units as affordable to households at 80% AMI for either rental or ownership delivery (moderate income)?

**YES NO** Does the proposed project contain at least two or more residential units?

**YES NO** Is the development located on a legal parcel or parcels that is/are zoned for residential or residential mixed use or has/ have a General Plan designation that allows residential use or a mix of residential and non-residential uses, with at least 2/3 of the floor area of the proposed building or buildings dedicated to residential uses?

**YES NO** Is the proposed property located on property that is **not** within a coastal zone, prime farmland, wetlands, a high fire severity zone, hazardous waste site, a delineated earthquake fault zone, a flood plain, a floodway, a community conservation plan area, a habitat for protected species, or under/ encumbered by a conservation easement?

**YES NO** Is the proposed project **completely consistent** with **all objective standards of the Planning Code at the time of SB 35 application submittal**, including all dimensional, height, setback and density (for purposes of this question, any waivers, concessions or incentives conferred through the State Density Bonus Law are considered code compliant, and thus consistent with objective standards)?

# Oakland's SB 35 Streamlining Checklist (Part 2)

Staff reviews the additional questions below. If the answer for any of these question is “YES,” the proposed project is not subject to SB 35 streamlining:

**YES NO** Does the proposed project require demolition of any housing units that have been occupied by tenants in the last 10 years; are subject to any form of rent or price control, or subject to any recorded covenant, law or ordinance that restricts rents to levels affordable to persons and families of moderate, low or very low incomes?

**YES NO** Does the proposed project require demolition of a historic structure that is on a national, state or local historic register? A local historic register includes the Oakland Local Register of Historic Resources.

**YES NO** Unless the proposed project either: i) receives a low-income housing tax credit and is subject to the requirement that prevailing wages be paid, or ii) is subject to the requirements to pay prevailing wages and use a skilled and trained workforce, does the proposed project involve the subdivision of a parcel that is subject to the California Subdivision Map Act?

## Questions Still to be Addressed in use of SB 35

- At the time of **Planning** approval, how can the city ensure compliance with the SB 35 requirement that all construction workers will be paid prevailing wage?
- Again, at the time of **Planning** approval, how can the city ensure that the construction work will be performed by a “skilled and trained workforce”?

## Additional Implementation Measures Underway

- The Oakland Planning Bureau is currently reviewing all of the city's design guidelines applicable in specific areas and for specific types of projects, and determining if any can be re-stated as a question or statement that can be answered by a simple **“YES/NO”** *to allow for ministerial application of design standards...*

# Questions

---