

Date of Hearing: August 11, 2020

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
SB 1385 (Caballero and Rubio) – As Amended July 29, 2020

SENATE VOTE: 39-0

SUBJECT: Local planning: housing: commercial zones.

SUMMARY: Enacts the Neighborhood Homes Act, which establishes housing as an allowable use on parcels zoned for office or retail uses, and allows for ministerial approval of those developments under specified conditions. Specifically, **this bill:**

- 1) Makes housing development projects an allowable use on a “neighborhood lot” that is within an office or retail commercial zone, provided that the housing development on the neighborhood lot complies with the following:
 - a) The housing development meets or exceeds minimum default densities applicable to jurisdictions based on the census designations associated with the jurisdiction, commonly referred to as “Mullin’s densities.” Mullin’s densities require a site to meet the following density:
 - i) 10 units per acre for an unincorporated area in a nonmetropolitan county that does not have a micropolitan area;
 - ii) 15 units per acre for an incorporated city within a nonmetropolitan county and for an unincorporated area in a nonmetropolitan county that has a micropolitan area;
 - iii) 20 units per acre for suburban jurisdictions; and,
 - iv) 30 units per acre for a jurisdiction in a metropolitan county;
 - b) The housing development complies with local zoning, parking, and design standards, public notice and hearing procedures, and any other ordinances, code requirements and procedures that apply to the nearest residential parcel that allows use at or above the applicable default Mullin’s density for that jurisdiction; and,
 - c) The housing development complies with all other local requirements that apply to a neighborhood lot except requirements that prohibit residential use or allow residential use at a lower density than the applicable default Mullin’s density for that jurisdiction.
- 2) Requires cities and counties to restrict the rental term of any unit created under the bill to a term of more than 30 days.
- 3) Allows a local agency to exempt a neighborhood lot from housing development by reallocating the lost residential density to another site under the following conditions:
 - a) The site identified for the reallocated density is suitable for residential development, as defined;

- b) The site is subject to an ordinance that allows for development by right; and,
 - c) The density from the original site or sites is reallocated to the new site or sites concurrently so that there is no net loss in residential capacity.
- 4) Provides that nothing in the bill alters or lessens the applicability of any housing, environmental or labor law applicable to a housing development authorized under this bill, as specified.
 - 5) Specifies that, for the purposes of the Housing Accountability Act, a proposed housing development project that is consistent with the neighborhood lot requirements of this bill shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.
 - 6) Specifies that an applicant for a housing development authorized by this section may apply for a density bonus.
 - 7) Requires an applicant for a housing development to provide written notice of the pending application to each commercial tenant on the neighborhood lot.
 - 8) Allows an applicant seeking to develop housing on a neighborhood lot to request that a local agency establish a Mello-Roos Community Facilities District (CFD) or to request that the neighborhood lot be annexed into an existing CFD. Removes the ability of property owners of an existing CFD to protest the annexation of a neighborhood lot into the CFD.
 - 9) Defines “office or retail commercial zone” as any commercial zone, except for zones where office uses and retail uses are not permitted, or are permitted only as an accessory use.
 - 10) Expands the scope of projects eligible for streamlined ministerial review under SB 35 (Weiner), Chapter 366, Statutes of 2017, to include housing developments on sites zoned for office or retail commercial use that have had no commercial tenants on 50% of more of its usable interior square footage for a period of at least three years.

EXISTING LAW:

- 1) Planning and Zoning Law requires every city and county to adopt a general plan that sets out planned uses for all of the area covered by the plan, and requires the general plan to include seven mandatory elements, including a housing element.
- 2) Housing Element Law requires that local housing elements include an identification and analysis of existing and projected housing needs and a statement of goals, policy objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.
- 3) The California Environmental Quality Act (CEQA) requires lead agencies with the principal responsibility for carrying out or approving a proposed project to prepare a negative declaration, mitigated negative declaration, or an environmental impact report (EIR) for this action, unless the project is exempt from CEQA.
- 4) The Housing Accountability Act provides that when a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and

criteria in effect at the time that the housing development project's application is complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon specified written findings.

- 5) The Mello-Roos Community Facilities Act allows counties, cities, special districts, and school districts to finance public works projects and a limited list of public services by levying special taxes (parcel taxes). A (CFD) issues bonds against these special taxes to finance the public works projects.
- 6) SB 35 (Weiner), Chapter 366, Statutes of 2017, establishes until 2026 a streamlined, ministerial review process for housing development projects that meet strict objective standards.
- 7) SB 375 (Steinberg), Chapter 728, Statutes of 2008, requires the California Air Resources Board (CARB), to set regional targets for greenhouse gas (GHG) reductions and requires each metropolitan planning organization (MPO) to prepare a sustainable communities strategy (SCS) as part of its regional transportation plans (RTP). The SCS demonstrates how the region will meet its GHG targets through land use, housing, and transportation strategies.

FISCAL EFFECT: According to the Senate Appropriations Committee:

- The Department of Housing and Community Development (HCD) estimates it would incur costs of \$261,000 in the first year and \$246,000 annually thereafter for 1.25 PY of staff time to ongoing to review and update information regarding state housing laws, develop technical assistance materials, provide consultation and guidance to local agencies and developers, and post updated information on the department's website. (General Fund).
- Unknown local costs to implement the bill, including updating procedures and processes to account for the authorization of housing development on a parcel zoned for office or retail commercial use, and providing for streamlined and expedited review of those projects. These costs are not state-reimbursable because local agencies have general authority to charge and adjust planning and permitting fees to cover their administrative expenses associated with new planning mandates. (local funds).

COMMENTS:

- 1) **Author's Statement.** According to the author, "Large shopping malls, strip malls, and 'big box' retail stores are facing a new reality: consumers' needs are being met online. Many shopping centers have struggled to remain viable as large anchor stores like Sears and Toys R Us have closed their doors or gone out of business, unable to keep up with major online retailers like Amazon. Now, many areas throughout California are left with struggling or vacant, often-times run-down, commercial centers without any interest in development from commercial business. In addition to shifting consumer behavior, employers are embracing permanent work from home policies in light of COVID-19. Recently, tech giants Facebook and Twitter announced employees would work from home permanently. As this trend is likely to continue, local jurisdictions should have the tools to adapt to these changes.

“At the same time retail vacancies are growing, California’s housing crisis continues to worsen. According to the California Budget and Policy Center, over 50% of renters and nearly 40% of homeowners pay more than 30% of their income in rent. In addition, the Public Policy Institute of California recently reported that California’s housing shortage continues to grow as the number of residential building permits issued for 2018 and 2019 were far below the recommended annual average of new homes needed. While there is no single policy to fix California’s housing crisis, providing easy ways for cities to increase their housing supply is a step in the right direction, and SB 1385 will do just that. This bill allows for cities to approve residential development in commercially zoned retail and office spaces that are vacant or no longer viable. By doing so, we open up previously developed land that is a perfect opportunity to convert to residential or mixed-use purposes and expand California’s housing supply.”

- 2) **State Housing Crisis.** California faces a severe housing shortage. In its most recent statewide housing assessment, HCD estimated that California needs to build an additional 100,000 units per year over recent averages of 80,000 units per year to meet the projected need for housing in the state. A variety of causes have contributed to the lack of housing production. Recent reports by the Legislative Analyst’s Office (LAO) and others point to local approval processes as a major factor. They argue that local governments control most of the decisions about where, when, and how to build new housing, and those governments are quick to respond to vocal community members that may not want new neighbors. The building industry also points to CEQA review as an impediment, and housing advocates note a lack of a dedicated source of funds for affordable housing.
- 3) **COVID-19.** The state under-produced housing prior to the onset of COVID-19, and the economic stagnation resulting from the outbreak may further erode housing production. Meanwhile, according to an April 24, 2020, brief published by McKinsey and Company, the onset of COVID-19 has aggravated the existing challenges that the retail sector faces. Several large retailers such as Nieman Marcus, J.C. Penney, J. Crew, and Pier 1 are filing for bankruptcy, and store closings have already been announced or are expected in the future. The investment firm UBS estimates that by 2025, 100,000 stores in the United States will close as online sales grow from 15% to 25% of total retail sales. This bill seeks to capitalize on a potential opportunity for redeveloping vacant or abandoned commercial properties into housing.
- 4) **SCS and Regional Housing Needs Allocation (RHNA).** SB 375 (Steinberg) represents the land use component of the state’s wider strategy to address climate change. The law requires California’s MPOs (which are often also councils of government or COGs) to create a SCS as a part of their federally mandated RTP. The SCS demonstrates how the region will meet its GHG emissions reduction targets through land use, housing, and transportation strategies. SB 375 also aligned the RHNA cycle with the RTP and SCS planning cycle.

Under Housing Element Law, HCD works with the Department of Finance to develop each region’s projected population growth. Based on these projections, HCD allocates a RHNA share to each MPO/COG. The MPO or COG in turn develops a methodology for distributing its RHNA share among the jurisdictions in its region. The COG’s methodology for distributing housing is required to further state goals promoting infill development and socioeconomic equity, the protection of environmental and agricultural resources, the

encouragement of efficient development patterns, and the achievement of the region's greenhouse gas reductions targets provided in the region's SCS.

A recent working paper by the UC Berkeley Turner Center for Housing Innovation found that, after SB 375, RHNA targeted more housing development with high job proximity in most MPOs. In addition to aligning planning processes, SB 375 also provided limited CEQA exemptions designed to further infill development that is consistent with a regions SCS. Recent revisions to the RHNA process will substantially increase the housing units that COGs must distribute to their jurisdiction in a manner that furthers the regions SCS which should lead to more infill development in jobs rich areas.

- 5) **The 6th RHNA Cycle.** As noted above, Housing Element Law requires local jurisdictions to adequately plan to meet their existing and projected housing needs including their share of the regional housing need. In the period between the 5th and 6th revisions of the housing element, legislative changes were made to the RHNA process and methodology to ensure that housing needs reflected not just current demand, but unmet demand as well. As such, throughout the state, many cities and counties will be required to plan for substantially more growth than before. For example, in the 5th RHNA Cycle the Southern California Association of Governments (SCAG) received a RHNA of **409,000 – 438,000**. By contrast, in the 6th RHNA Cycle, SCAG received a RHNA of **1,341,827**. Upon completion of this cycle of housing element revisions, the state is expected to have sufficiently zoned land to accommodate the housing deficit discussed above.
- 6) **Adding SB 1385 Density to RHNA.** This bill substantially increases the total acreage of land in California available for housing development by making housing an allowable use on land zoned for office or retail use. Given the state's housing crisis, increasing the amount of land area available for housing development is sound policy provided that it is tethered to the state's goals for sustainable development and fair housing. However, it is important to consider how the density created by this bill contrasts to the existing RHNA process and numbers at the local level.

As an example, Tehama County has a total population of 65,000 residents and an estimated 27,000 units of housing. The unincorporated county has a default density for low income housing of 15 units per acre under RHNA. The unincorporated county also includes 2,475 acres of land zoned for commercial use. In the 6th RHNA cycle Tehama County is required to identify sites suitable for development of 864 housing units in the unincorporated portion of the county. This is considered to be the county's "fair share" of the state's housing need. In contrast, under the provisions of this bill Tehama County would be required to allow development of up to 37,134 housing units on its existing commercially zoned land 43 times the number of units the state deemed to be the county's fair share of the state's housing need. Preserving just one percent of the county's commercially zoned land under the provision allowed for in this bill would require the county to identify sites suitable for the development of more than 3,700 units of housing stock this is roughly equivalent to the 6th Cycle RHNA assignment for the City of Carlsbad.

The City of Carlsbad has a total population of 115,000 residents and an estimated 45,000 units of housing. The city's default density for low income housing is 30 units per acre under RHNA. The city has a total of 2,104 acres zoned for commercial and industrial uses, which represents eight percent of the city's total land area. In the 6th RHNA cycle, the City of

Carlsbad is required to identify sites suitable for development of 3,873 housing units. Under the provisions of this bill, the city would be required to allow development of up to 63,120 housing units on its commercially zoned land. Similar to Tehama County, preserving one percent of the city's existing commercial corridors would require the city to identify sites for 6,000 units of housing.

Identifying sufficient sites to accommodate the 6th Cycle RHNA numbers is a major undertaking for cities and counties of various sizes. Under this bill, the amount of land that will become available for housing development will exceed what the state considers to be each local government's fair share of the state's housing need by an order of magnitude. Further, the housing density created by this bill is untethered to the state's SCS and transit oriented development priorities that are incorporated into the RHNA process. The legislation seeks to provide a level of local control by empowering cities and counties to preserve key commercial land by reallocating the housing unit density created by this bill to alternative sites. However, the Committee may wish to consider whether it is reasonable to require jurisdictions that wish to preserve commercial revenue, prevent sprawl, or prevent the development of housing adjacent to incompatible uses to identify land for housing that greatly exceeds what the state deemed appropriate for that jurisdiction.

- 7) **Zoning Codes and Designations.** Zoning codes are generally adopted by cities and counties to identify allowable activities (e.g. office, retail, housing, etc.) in specific areas of their jurisdiction. Zoning codes are as varied in detail and specificity as cities and counties themselves, with some jurisdictions opting for broad all-encompassing zoning designations that allow multiple uses, and others adopting remarkably specific zoning designations that regulate allowable uses to a fine degree of detail. For example, the zoning code for the City of Salinas includes 21 base districts, including four types of commercial districts that allow nearly 90 types of different uses ranging from animal boarding, fortunetelling, gas stations, vehicle sales, shopping centers and more.

This bill allows housing developments on neighborhood lots, which are defined as a parcel within any commercial zone, except for zones where office uses and retail uses are not permitted or are only permitted as an accessory use. While cities and counties may denote the conditions under which a use is allowed (e.g. by right, with a conditional use permit, etc.) they do not necessarily specify whether an activity is a permitted use or is an accessory use. Additionally, there is often substantial overlap in activities permitted in commercial and industrial zones, blurring the definition of what is a commercial zone. In the City of Los Angeles, *Restricted and Limited Industrial Zones* specifically allow commercial uses including retail. Similarly, the City of Salinas also allows office uses in all three of its industrial district categories. It is unclear if these activities would be considered permitted uses, therefore making these zones eligible for housing development under this bill, or if these uses would be categorized as accessory uses, which would exempt those sites from housing development projects under the bill.

- 8) **CEQA and Ministerial Review.** CEQA requires the state and local governments to study and mitigate, to the extent feasible, the environmental impacts of proposed projects, providing a key protection for the environment and residents of California. Ministerial approvals remove a project from all discretionary decisions of a local government, including an environmental review under CEQA. Thus, establishing processes to approve certain types of projects ministerially also creates exemptions from CEQA.

A CEQA exemption can provide a tremendous benefit to property owners, developers, local governments and other parties involved in the approval of a project as it allows for the project to be completed in an expedited fashion. In light of the state's ongoing housing crisis, the Legislature has created several exemptions to CEQA that are designed to increase the production of housing. The protection of resources afforded by CEQA is not exempted lightly. The Legislature balances the risk of allowing projects to proceed without a full environmental review by limiting exemptions to projects that comply with scores of objective standards and criteria. These standards and criteria are an expression of the state's values and ensure that exempt projects do not result in harm to public health and safety and the environment.

9) **Policy Considerations.** The Committee may wish to consider the following:

- a) **Ministerial Approval Under SB 35.** This bill expands the scope of projects exempt from CEQA by expanding the types of land eligible for streamlined ministerial approval under SB 35 to include any commercial zone where office and retail uses are allowed if the parcel has not had a commercial tenant on 50% of its total usable net interior square footage for more than three years. At the time of its passage, SB 35 focused on addressing the significant length of time it takes to approve housing even if the project is entirely within zoning. Supporters argued that SB 35 was necessary because it should not take years to approve a zoning-compliant housing development. This bill would expand the scope of SB 35 to provide streamlining in zones where housing is not a compliant use.

Further, to address the fact that the SB 35 projects are exempt from CEQA, the Legislature mitigated the potential for collateral damage on environmentally and culturally sensitive sites by simply excluding those sites from eligibility under SB 35. However, one aspect that SB 35 did not account for was the identification of tribal cultural resources that happens through CEQA.

Finally, SB 35 also requires cities and counties to identify whether a projects conflicts with any of the objective standards established by the bill within a certain period of time (60 days for smaller projects and 90 days for larger projects). Failure to act on the part of a city or county results in a project being deemed approved once the time for the local government to act has expired. Recent litigation has focused on whether a project is affirmatively required to comply with all of SB 35's objective standards, or if the developer enjoys an assumption of compliance with SB 35's objective standards, unless a local agency proactively finds otherwise.

The Committee may wish to consider whether it is appropriate to expand the scope of SB 35 beyond residential zones given the original focus of SB 35, the statutes lack of protection for irreplaceable tribal cultural resources, and the ongoing uncertainty surrounding the validity of the of the objective standards a project is supposed to meet.

- b) **Undeveloped Land.** As drafted, the bill applies broadly to any commercial zone that permits office and retail uses. In several counties such a Yolo County, the vast majority of land is within an agricultural zone. However, as many of these zones specifically allow commercial office and retail uses, it is unclear if these zones would be considered commercial zones under the bill. Absent additional specificity or other infill controls or limitations, these agricultural areas could be subject to sprawling housing development.

The Committee may wish to consider if the provisions of the bill should be explicitly limited to previously developed office and retail sites that are currently vacant.

- c) **AB 3107 (Bloom), Affordability, Infill, Incompatible Uses and RHNA.** The Assembly passed AB 3107 in June of this year. AB 3107 also makes housing developments an allowable use on commercial land. AB 3107 differs from SB 1385 in several key ways. In exchange for the public benefit developers receive when commercial land is opened up for new types of development, AB 3107 requires that at least 20% of the development is affordable to lower income households. Additionally, to control for some of the protections normally afforded through local zoning, the bill restricts developments to infill parcels that are not adjacent to industrial uses. Finally, AB 3107 is only applicable to a city or county until it has completed the rezoning required for the 6th revision of its housing element. This serves as a motivation for cities to complete their rezoning, and recognizes that when they have done so, the city will have met the state's expectations regarding the provision of developable land. The Committee may wish to consider if similar provisions are appropriate for this bill.
- d) **Reallocation Provisions.** In recognition of the fact that cities and counties may seek to preserve some key commercial corridors, SB 1385 provides cities and counties the ability to preserve parcels for commercial use provided that they reallocate that density to another location in the jurisdiction. The bill states that the reallocation of density must occur concurrently, that the site selected for reallocations must meet RHNA's adequate site standards, and that the new site must allow housing by-right.

Reallocating the density created under this bill will likely require cities and counties to rezone land, which is a time consuming process. Requiring that the reallocation is performed concurrently may prevent a local government from preserving commercial corridors until they complete a separate rezoning process. Further, the adequate site standards cited in the bill are not entirely objective, and may be difficult to verify and comply with. Finally, making housing a use by right on any of the reallocated land exempts these future housing developments from CEQA. While the rezoning is normally subject to CEQA, SB 902 (Weiner) proposes to allow certain types of rezoning to be exempt from CEQA potentially creating a CEQA exemption for both the rezoning and the development project without the inclusion of any of the guardrails that typically apply to CEQA-exempt projects. The Committee may wish to consider providing cities and counties more flexibility to accomplish the rezoning expeditiously rather than making projects on rezoned land exempt from CEQA.

- e) **Mello-Roos Districts.** Typically, when a property is annexed into an existing CFD, there is a protest process for the existing property owners. Additionally, new properties are typically required to pay a catch-up rate to ensure that there is equity among the property owners and the benefits they receive from the CFD. This bill eliminates a protest step in the annexation process. The Committee may wish to consider whether eliminating a set of rights currently held by property owners is appropriate.
- f) **Development Standards.** This bill provides a level of local control over the development standards that apply to housing developments on neighborhood lots. The bill seeks to provide this level of local control by extending the development standards the local agency adopted for parcels in Mullin's density zones to the housing projects

allowed by this bill. Mullin's densities are often referred to as "default densities," as they are the default number a local government can employ when it identifies sites for low-income housing. However, cities and counties are not required to use the default densities. They also have the authority to conduct an analysis and determine a density threshold that is unique to their jurisdiction. As a result, it may not be feasible to simply extend the development standards a local government has adopted for a parcel in a Mullin's density zone if the jurisdiction has no parcels in a Mullin's density zone. The Committee may wish to consider a technical amendment that requires cities and counties to align standards with their adopted low-income density, rather than the default low-income Mullin's density.

- 10) **Committee Amendments.** In order to address some of the policy considerations noted above, the Committee may wish to consider the following amendments:
- a) Strike the provisions expanding the scope of projects eligible for ministerial approval pursuant to SB 35 procedures;
 - b) Limit the scope of the bill to developed parcels that have had a vacancy rate of 50% for at least 12 months;
 - c) Limit the scope of the bill to parcels that are not adjacent to industrial uses;
 - d) Limit the scope of the bill to parcels that are located in urbanized areas or clusters, or in cities that have an urbanized area or cluster within their boundaries and meet one of the following criteria:
 - i) The parcel is located in a very low VMT area as defined by the Office of Planning and Research;
 - ii) The parcel is surrounded by developed urban uses on 75% of the perimeter; or,
 - iii) The parcel is within (0.5) miles of a residential parcel;
 - e) Require that at least 20% of the development is affordable to lower income households;
 - f) Amend reallocation provisions to:
 - i) Require that sites must meet the objective standards of the adequate sites criteria under RHNA;
 - ii) Require that rezoning may be exempt from CEQA provided that the rezoned site is not on the list of sites identified in (B) to (K), of paragraph (6) of subdivision (a) of Section 65913.4; and,
 - iii) Strike the by-right provisions;
 - g) Sunset the bill in 2026 and require cities and counties to include information on developments allowed under this bill to HCD in their annual progress report;
 - h) Strike the Mello-Roos/CFD provisions from the bill.

- 11) **Arguments in Support.** California YIMBY writes in support, “SB 1385 will allow local governments to approve housing development on commercial and retail spaces. Allowing this development on existing shopping center or strip mall properties will help the state achieve its housing goals and spur economic activity in regions in the most need of revitalization.”

- 12) **Arguments in Opposition.** The California League of Conservation Voters writes in opposition, “SB 1385 establishes housing as an allowable use on any lot for office or retail commercial uses. We greatly support the intent of this legislation to better utilize underutilized development, and we thank the authors for their attention to this important issue amid California’s escalating affordable housing crisis. However, we feel it is necessary to provide some additional constraints to these provisions, similar and in addition to those included in AB 3107 by Assemblymembers Bloom and Ting, in order to ensure that the intent of the bill is realized without undercutting our jurisdictions’ ability to meet California greenhouse gas (GHG) and vehicle miles travelled (VMT) reduction goals, and without perpetuating historic patterns of segregation.”

REGISTERED SUPPORT / OPPOSITION:

Support

Bay Area Council [SPONSOR]
Bay Area Housing Action Coalition
California Building Industry Association
California Chamber of Commerce
California Forward (Sponsor)
California YIMBY
Council of Infill Builders
County of Monterey
Habitat for Humanity California
Los Angeles County Business Federation (BIZFED)
Sand Hill Property Company
Silicon Valley At Home (SV@HOME)
Southern California Rental Housing Association
SPUR
The Two Hundred
Up for Growth

Support If Amended

American Planning Association, California Chapter
City of Fullerton
State Building and Construction Trades Council of California

Oppose

California Housing Consortium
California Housing Partnership Corporation
California Rural Legal Assistance Foundation
Cities of Buena Park, Cerritos, Cupertino, Newport Beach, Santa Ana, Santa Clarita,
and Thousand Oaks
Housing California
Howard Jarvis Taxpayers Association (HJTA)
Pacific Palisades Community Council
Western Center on Law and Poverty

Oppose Unless Amended

California League of Conservation Voters
Center for Biological Diversity
Planning and Conservation League
City of San Jose
Trabuco Canyon Water District

Analysis Prepared by: Hank Brady / L. GOV. / (916) 319-3958