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Governor Signs SB 423, Extending and Expanding SB 35's Streamlined, Ministerial Approval Process for Multifamily Housing Developments

Summary

On October 11, 2023, Governor Newsom signed into law Senate Bill 423 ("SB 423"), which expands and strengthens Senate Bill 35 (2017) ("SB 35"). Specifically, SB 423 amends Government Code Section 65913.4's streamlined, ministerial approval process for multifamily housing developments to cover more jurisdictions and more types of projects. SB 423 also extends the sunset of SB 35 by 10 years, from January 1, 2026, to January 1, 2036.

Originally passed in 2017, SB 35 requires cities and counties that have failed to meet their Regional Housing Needs Assessment ("RHNA") housing production targets to ministerially approve multifamily housing developments that meet certain requirements. As explained below, SB 423 will also apply these requirements to jurisdictions that fail to obtain HCD certification of their housing element.

Ultimately, SB 423 requires cities and counties to approve a housing development application for a multifamily housing project with at least two units that fulfills the following criteria:

- The project must provide a minimum percentage of below market rate housing subject to recorded restrictions or covenants for at least 55 years for rental units and 45 years for ownership units.
- The site must be located in an urban area, which means it is in a city that includes an urbanized area or cluster or in an unincorporated area if the entire parcel is within an urbanized area or cluster.
- The site must be an infill site with 75% of its perimeter adjoining parcel developed with urban uses.
- The site must be zoned for residential or mixed uses, have a general plan designation that allows residential or mixed use development, or be zoned for office or retail uses and meets the criteria of the Middle Class Housing Act of 2022 (SB 6).
- The project must be consistent with any objective zoning

standards, objective subdivision standards, and objective design review standards, provided that the developer may modify adopted objective standards through a density bonus, incentives, concessions, waivers, and/or parking reductions allowed under the State Density Bonus Law.

- The developer must meet certain labor standards, such as a commitment to pay prevailing wages on projects of more than 10 units, and the following:
 - For projects with 50 units or more, the developer must provide healthcare benefits to workers.
 - For projects over 85 feet tall, the developer must prioritize hiring skilled and trained workers.
 - If available, developers must hire workers participating in an apprentice program.
- The site must not be located in farmland, wetlands, a certain fire risk zones, a hazardous waste site, floodplains or floodways, a protected habitat, or land under a conservation plan or easement.
- The project must not demolish housing occupied by tenants or be on a site governed by laws that regulate mobile homes, campers, or recreational vehicles.
- The project site may not contain tribal cultural resources, and jurisdictions must engage in a tribal consultation process prior to accepting an application for streamlined, ministerial approval.

While all local governments in California should be aware of SB 423's changes, jurisdictions with land in the coastal zone should pay particular attention, because SB 423 makes certain parcels in the coastal zone eligible for streamlined, ministerial approval for the first time.

Changes to Existing Law

Multifamily Housing Developments on State-Owned or Leased Property

SB 35 (old): Local governments reviewed and approved qualifying multifamily housing development projects within their jurisdiction.

AB 423 (new): The Department of General Services may choose to act in the place of a locality or local government to review and approve qualifying multifamily housing development projects on property owned or leased by the state.

Impact: In circumstances in which a local government could previously review SB 35 projects, on state-owned land, the state will now be able to step in and control processing of the project.

Applicability

SB 35 (old): Project located in a jurisdiction that failed to produce the number of units specified in its RHNA allocation (plus various other requirements).

AB 423 (new): Project located in a jurisdiction that failed to produce the number of units specified in its RHNA allocation, or the locality did not adopt a housing element that HCD found to be substantially compliant by the statutory deadline (plus various other requirements). Jurisdictions subject to SB 423 because they do not have a certified Housing Element must allow projects that reserve 10% of their units for very low income households in rental projects or for low income households in for-sale projects.

Impact: This change expands the basis for a jurisdiction to be subject to the streamlined, ministerial process. It also creates an additional incentive to not only adopt a Housing Element but to obtain HCD certification.

Consistency Determination

SB 35 (old): A local government must approve a development if the local government determines the development is consistent with the objective planning standards.

AB 423 (new): A local government must approve a development if the planning director or equivalent position determines the development is consistent with the objective planning standards.

Impact: SB 423 clarifies that a jurisdiction's planning director is required to make determinations about a project's eligibility for streamlined, ministerial approval and ultimately take action to approve or deny the application. This empowers staff to make determinations based on applicable, objective standards without additional process or political pressure.

Permissible Review of a Development Application

SB 35 (old): A planning commission or any equivalent board or commission may conduct design review or public oversight of the development.

AB 423 (new): A planning commission or any equivalent board or commission's oversight is strictly limited to design review.

Impact: As with the previous change, SB 423 requires staff - rather than elected or appointed officials - to make final decisions about approving or denying ministerial projects. A design review hearing remains allowed, however, the final action on the project will be taken

by staff.

Prerequisites to Project Approval

SB 35 (old): N/A

AB 423 (new): Local governments cannot require any of the following before approving a development that meets the requirements for an SB 35 project:

- Studies, information, or other materials that do not pertain directly to determining whether the development is consistent with the objective planning standards applicable to the development
- Compliance with any standards necessary to receive a postentitlement permit (though local governments can require compliance with such standards after a development project is approved)

Impact: Local governments must wait until later in the development process to enforce certain standards. Local governments still have the ability to enforce such standards; however, local governments cannot withhold project approval to address postentitlement concerns.

Preapplication Materials

SB 35 (old): Before submitting an application for a qualifying multifamily development, the developer must submit to the local government a notice of intent to submit an application.

AB 423 (new): Same requirement as before, plus for developments proposed in a census tract that is designated either as a moderate resource area, low resource area, or an area of high segregation and poverty, the local government must hold a public meeting to provide an opportunity for the public and the local government to comment on the development. This meeting must be held within 45 days of receiving the notice of intent and before the development proponent submits an application for the proposed development.

Impact: To ensure that the public has adequate notice about streamlined, ministerial projects and an opportunity to provide non-binding comments before a project is submitted, SB 423 requires additional public outreach for projects in low- or moderate-resource areas and in areas of high segregation of poverty.

Development in Coastal Zones

SB 35 (old): No streamlined, ministerial approval process for multifamily housing developments located in a coastal zone.

AB 423 (new): No streamlined, ministerial approval process for multifamily housing developments that (1) are located in a coastal zone and (2) meet any one of specified conditions:

- Located between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.
- Located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.
- Located in an area that is not subject to a certified local coastal program or a certified land use plan.
- Located in an area that is vulnerable to five feet of sea level rise, as determined by the National Oceanic and Atmospheric Administration, the Ocean Protection Council, the United States Geological Survey, the University of California, or a local government's coastal hazards vulnerability assessment.
- Located on a parcel that is not zoned for multifamily housing.
- Located on, or within a 100-foot radius of, a wetland, as defined in Section 30121 of the Public Resources Code.
- Located On prime agricultural land, as defined in Sections 30113 and 30241 of the Public Resources Code.

Impact: Certain coastal zone land that was previously ineligible for streamlined multifamily housing development is now subject to streamlined multifamily housing development. These changes have no effect on local governments whose jurisdiction includes no coastal zone land. Jurisdictions with land in the coastal zone should be aware of these changes.

Development in Fire Hazard Zones

SB 35 (old): No streamlined, ministerial approval process for housing developments located in a very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178, or within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection pursuant to Section 4202 of the Public Resources Code.

- Exception: does not apply to sites excluded from the specified hazard zones by a local agency, pursuant to subdivision (b) of Section 51179, or sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.

AB 423 (new): No streamlined, ministerial approval process for housing developments located in a very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178, or within the state responsibility area, as defined in Section 4102 of the Public Resources Code.

- Exception: does not apply to sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development, including, but not limited to, standards established under all of the following or their successor provisions:

(i) Section 4291 of the Public Resources Code or Section 51182, as applicable.

(ii) Section 4290 of the Public Resources Code.

(iii) Chapter 7A of the California Building Code (Title 24 of the California Code of Regulations).

Impact: SB 423 defines additional standards under which multifamily housing may be developed to mitigate risks associated with high or very high fire hazards severity zones.

Conclusion

SB 423 extends SB 35 to January 1, 2036, and expands both how jurisdictions become subject to streamlined, ministerial approvals and the types of projects that can qualify for approval under this process. SB 423 makes jurisdictions without an HCD certified Housing Element subject to the streamlined, ministerial approval process and refines the labor standards necessary to qualify in an effort to make more projects financially viable.

In addition, jurisdictions with land in coastal zones should pay particular attention to SB 423, as land previously not subject to SB 35's streamlined multifamily housing development may now be subject to such development.