GIBSON DUNN

October 25, 2021

CALIFORNIA GOVERNOR NEWSOM SIGNS THREE IMPORTANT NEW BILLS INTO LAW IMPACTING RESIDENTIAL ZONING AND DEVELOPMENT

To Our Clients and Friends:

On September 16, 2021, Governor Gavin Newsom signed bipartisan legislation intended to expand housing production in California, streamline the process for cities to zone for multi-family housing, and increase residential density, all in an effort to help ease California's housing shortage. The suite of housing bills includes California Senate Bill ("SB") 8 (Skinner), SB 9 (Atkins), and SB 10 (Weiner). Each of the bills will take effect on January 1, 2022. Some have characterized the bills as "the end of single family zoning." In practice the results may be more nuanced, but the net effect will be to allow significantly more development of housing units "by right."

SB 8

SB 8 is an omnibus clean-up bill impacting several previous housing initiatives. Notably, it extends key provisions of SB 330, also known as the Housing Crisis Act of 2019 (previously set to expire in 2025), until January 1, 2030. That act set limits on the local approval process for housing projects, curtailed local governments' ability to downzone residential parcels after project initiation, and limited fee increases on housing applications, among other key provisions. If a qualifying preliminary application for a housing development is submitted prior to January 1, 2030, then rights to complete that project can vest until January 1, 2034. The amendment specifies that it does not prohibit a housing development project from being subject to ordinances, policies, and standards adopted after a preliminary application was submitted if the project has not commenced construction within two and a half (2.5) years, or three and a half (3.5) years if the project is an affordable housing project.

Existing law provides that if a proposed housing development project complies with the applicable objective general plan and zoning standards in effect at the time an application is deemed complete, then after the application is deemed complete, a city, county, or city and county shall not conduct more than five hearings pursuant to Section 65905, or any other law requiring a public hearing in connection with the approval of that housing development project. SB 8 expands the definition of "hearing" from any public hearing, workshop, or similar meeting to explicitly include "any appeal" conducted by the city or county with respect to the housing development project. A "housing development project" is also defined to include projects that involve no discretionary approvals, projects that involve both discretionary and nondiscretionary approvals, and projects to construct a single dwelling unit. The receipt of a density bonus does not constitute a valid basis on which to find that a proposed housing project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision. This section applies to housing

development projects that submit a preliminary application after January 1, 2022 and before January 1, 2030.

SB 8 further amends the Government Code to state that with respect to land where housing is an allowable use, an affected city of county, defined as a city, including charter city, that the Department of Housing and Community Development determines is in an urbanized area or urban cluster, as designated by the Census Bureau, shall not enact a development policy, standard or condition that would have the effect of changing the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing general plan land use designation, specific plan land use designation, or zoning district in effect at the time of the proposed change. "Reducing the intensity of land use" includes, but is not limited to, reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site's residential development capacity.

SB 8 further provides that a city or county may not approve a housing development project that will require the demolition of occupied or vacant protected rental units unless all requirements are met. These requirements include that the project will replace all existing or demolished protected units and that the housing development project will include at least as many residential dwelling units as the greatest number of residential dwelling units that existed on the project site within the last five years. "Protected units" means any of the following: (i) residential dwelling units that are or were subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income within the past five years, (ii) residential dwelling units that are or were subject to any form of rent control within the past five years, (iii) residential dwelling units that are or were occupied rented by lower or very low income households within the past five years, and (iv) residential dwelling units that were withdrawn from rent or lease in accordance with the Ellis Act within the past 10 years.

SB 8 adds the general requirement that any existing occupants that are required to leave their units shall be allowed to return at their prior rental rate if the demolition does not proceed and the property is returned to the rental market (with no time limit specified in the bill text). The developer must agree to provide existing occupants of any protected units that are of lower income households: relocation benefits and a right of first refusal for a comparable unit (defined as either a unit containing the same number of bedrooms if the single-family home contains three or fewer bedrooms or a unit containing three bedrooms if the single-family home contains four or more bedrooms) available in the new housing development affordable to the household at an affordable rent (as defined in Section 50053 of the Health and Safety Code).

SB 9

SB 9, the California Housing Opportunity and More Efficiency ("HOME") Act, facilitates the process for homeowners to subdivide their current residential lot or build a duplex. State law currently provides for the creation of accessory dwelling units by local ordinance, or, if a local agency has not adopted an ordinance, by ministerial approval, in accordance with specified standards and conditions. SB 9 allows

for ministerial approval, without discretionary review or hearings, of duplex residential development on single-family zoned parcels.

SB 9 allows housing development projects of no more than two dwelling units on a single-family zoned parcel to be permitted on a ministerial basis if the project satisfies the SB 9 requirements. In order for a housing project to qualify under SB 9 the project must be located within a city, the boundaries of which must include some portion of either urbanized area or urban cluster, as designated by the United States Census Bureau, or, for unincorporated areas, the parcel must be wholly within the boundaries of an urbanized area or urban cluster. The project may not require demolition or alteration of the following types of housing: (i) housing that is subject to a recorded covenant, ordinance, or law that restricts rents to affordable levels, (ii) housing subject to rent control, or (iii) housing that has been tenant-occupied in the last three (3) years (with no distinction drawn between market rate and affordable housing). Further, the project may not have been withdrawn from the rental market under the Ellis Act within the past fifteen (15) years. The proposed development also may not demolish more than twenty-five percent (25%) of existing exterior structural walls, unless expressly permitted by a local ordinance or the project has not been tenant occupied within the past three years.

The project may not be located within a historic district or property included on the State Historic Resources Inventory or within a site that is designated as a city or county landmark or historic property pursuant to local ordinance. A local agency may impose objective zoning standards, subdivision standards, and design standards unless they would preclude either of the two units from being at least 800 square feet in floor area.

No setback may be required for an existing structure or a structure constructed in the same location and dimensions as an existing structure. In other circumstances, a local agency may require a setback of up to four feet (4') from the side and rear lot lines. Off-street parking of up to one (1) space per unit may be required by the local agency, except if the project is located within a half-mile walking distance of a high-quality transit corridor or a major transit stop, or if there is a car share vehicle within one block of the parcel. If a local agency makes a written finding that a project would create a specific, adverse impact upon public health and safety or the environment without a feasible way to mitigate such impact, the agency still may deny the housing project.

A local agency must require that rental of a unit created pursuant to SB 9 be for a term longer than 30 days, thus preventing application of SB 9 to promote speculation in the short-term rental market.

SB 9 does not supersede the California Coastal Act, except that the local agency is not required to hold public hearings for coastal development permit applications for a housing development pursuant to SB 9. A local agency may not reject an application solely because it proposes adjacent or connected structures, provided that they meet building code safety standards and are sufficient to allow separate conveyance .

Projects that meet the SB 9 requirements must be approved by a local agency ministerially and are not subject to the California Environmental Quality Act ("CEQA").

SB 9 also allows for qualifying lot splits to be approved ministerially upon meeting the bill requirements. Each parcel may not be smaller than forty (40%) percent of the original parcel size and each parcel must

be at least one thousand two hundred (1,200) square feet in size unless permitted by local ordinance. The parcel must also be limited to residential use. Neither the owner of the parcel being subdivided nor any person acting in concert with the owner may have previously subdivided an adjacent parcel using a lot split as provided for in SB 9. The applicant must also provide an affidavit that the applicant intends to use one of the housing units as a principal residence for at least three (3) years from the date of approval.

A local agency may not condition its approval of a project under SB 9 upon a right-of-way dedication, any off-site improvements, or correction of nonconforming zoning conditions. The local agency is not required to approve more than two (2) units on a parcel. The local agency may require easements for public services and facilities and access to the public right-of-way.

SB 9 changes the rules regarding the life of subdivision maps by extending the additional expiration limit for a tentative map that may be provided by local ordinance, from 12 months to 24 months.

SB 10

SB 10 creates a voluntary process for local governments to pass ordinances prior to January 1, 2029 to zone any parcel for up to ten (10) residential units if located in transit rich areas and urban infill sites. Adopting a local ordinance or a resolution to amend a general plan consistent with such an ordinance would be exempt from review under the California Environmental Quality Act ("CEQA"). This provides cities, including charter cities, an increased ability to upzone property for housing without the processing delays and litigation risks associated with CEQA. However, if the new housing authorized by the general plan would require a discretionary approval to actually build the housing (for example, a subdivision map or design review), CEQA review would be required for those subsequent approvals, and the benefits of the law may prove limited. Moreover, in contrast to SB 9, each individual city or county must affirmatively pass an ordinance authorizing the upzoning.

A "transit rich area" means a parcel within one-half mile of a major transit stop, as defined in Section 21064.3 of the Public Resources Code, or a parcel on a high quality bus corridor. A "high quality bus corridor" means a corridor with fixed route bus service that meets all of the following criteria: (i) it has average service intervals of no more than 15 minutes during the three peak hours between 6 a.m. to 10 a.m., inclusive, and the three peak hours between 3 p.m. and 7 p.m., inclusive, on Monday through Friday; (ii) it has average service intervals of no more than 20 minutes during the hours of 6 a.m. to 10 p.m., inclusive, on Monday through Friday; and (iii) it has average intervals of no more than 30 minutes during the hours of 8 a.m. to 10 p.m., inclusive, on Saturday and Sunday. An "urban infill site" is a site that satisfies all of the following: (i) it is a legal parcel or parcels located in a city if, and only if, the city boundaries include some portion of either an urbanized area or urban cluster, or, for unincorporated areas, a legal parcel or parcels wholly within the boundaries of an urbanized area or urban cluster, as designated by the United States Census Bureau; (ii) a site in which at least seventy-five percent (75%) of the perimeter of the site adjoins parcels that are developed with urban uses (parcels that are only separated by a street or highway shall be considered to be adjoined); and (iii) a site that is zoned for residential use or residential mixed-use development, or has a general plan designation that allows residential use or a mix of residential and nonresidential uses, with at least two-thirds of the square footage of the development designated for residential use.

Zoning ordinances adopted pursuant to the authority granted under SB 10 must explicitly declare that the ordinance is adopted pursuant to SB 10 and clearly demarcate the areas that are zoned pursuant to SB 10, and the local legislative body must make a finding that the increased density authorized by such ordinance is consistent with the city or county's obligations to further fair housing pursuant to Government Code Section 8899.50. A legislative body that approves a zoning ordinance pursuant to SB 10 may not subsequently reduce the density of any parcel subject to the ordinance. The bill text does not explicitly state a sunset on this restriction.

A zoning ordinance adopted pursuant to SB 10 may override a local ballot initiative which restricts zoning only if adopted by a two-thirds vote of the members of the legislative body. The creation of up to two accessory dwelling units ("ADUs") or junior ADUs ("JADUs") per parcel is allowed, and these units would not count towards the ten unit count.

SB 10 does not apply to parcels located within a high or very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection, but this restriction 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. SB 10 also does not apply to any local restriction enacted or approved by a local ballot initiative that designates publicly owned land as open-space land, as defined in Section 65560(h), or for park or recreational purposes. Furthermore, a project may not be divided into smaller projects in order to exclude the project from the limitations of SB 10.

The following Gibson Dunn attorneys prepared this client update: Amy Forbes, Doug Champion, and Maribel Garcia Ochoa.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following leaders and members of the firm's Land Use and Development or Real Estate practice groups in California:

Doug Champion – Los Angeles (+1 213-229-7128, dchampion@gibsondunn.com)
Amy Forbes – Los Angeles (+1 213-229-7151, aforbes@gibsondunn.com)
Mary G. Murphy – San Francisco (+1 415-393-8257, mgmurphy@gibsondunn.com)