



## News & Publications

### Governor Signs Legislation Enacting Significant Amendments to SB 35, Increasing Opportunities for Development of Multi-Family Housing (Part I)

11.17.23 | Client Alert

Authored by Senator Scott Wiener and signed into law on October 11 by Governor Newsom, Senate Bill (“SB”) 423 amends Senator Wiener’s 2017 landmark housing bill SB 35. These amendments include a 10-year extension of SB 35 (extending the sunset date to January 1, 2036), an expansion of the scope and geographic reach of SB 35’s ministerial review process, and modification of SB 35’s labor and affordability requirements. The bill takes effect on January 1, 2024; however, some of the amendments in the bill do not become operative until later, while others have a limited duration.

As background, SB 35 added Section 65913.4 to the California Government Code<sup>[1]</sup> and provides that eligible multi-family housing development projects located on infill sites in jurisdictions that have not met their Regional Needs Housing Allocation (“RHNA”) targets may qualify for a streamlined, ministerial approval process—allowing applicants to avoid uncertainties associated with local discretionary review and application of the California Environmental Quality Act (“CEQA”). We anticipate that SB 423 will expand the applicability of SB 35 to additional housing development projects.

California YIMBY, the California Housing Consortium, the California Conference of Carpenters, the Inner City Law Center, and the Local Initiative Support Corporation sponsored SB 423. While the State Building and Construction Trades Council initially opposed the bill, the trades dropped their opposition in June after the addition of increased labor protections to the bill. The California League of Cities

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opposed the bill.

SB 423 includes a Legislative finding that ensuring access to affordable housing is a matter of statewide concern and is not a municipal affair, and, therefore, the amendments to Government Code Section 65913.4 apply to all cities, including charter cities.

Due to the comprehensive nature of the SB 423's amendments to SB 35, we are presenting this update in a **three-part series**. In this first installment, we summarize SB 423's revisions regarding the circumstances triggering SB 35 streamlining and the criteria for project eligibility. **Part II** will summarize SB 423's revisions to SB 35's labor requirements. **Part III** will provide a summary of SB 423's more procedural and technical revisions.

- **Expands Application of SB 35 to Jurisdictions Lacking Compliant Housing Elements.** SB 35 currently applies to jurisdictions that have not issued sufficient building permits to meet their RHNA share by income category for the applicable reporting period. SB 423 expands these criteria to additionally apply SB 35 to jurisdictions that lack compliant Housing Elements as follows:
  - For the **Sixth Cycle** (current) or earlier Housing Element cycles, localities that have not yet adopted a Housing Element that the California Department of Housing and Community Development ("HCD") has found to be in substantial compliance with Housing Element Law. These jurisdictions will remain eligible until they obtain a substantial compliance determination from HCD.
  - For the **Seventh Cycle** or later Housing Element cycles, localities that do not adopt a Housing Element that HCD finds to be in substantial compliance with Housing Element Law by the statutory deadline. These jurisdictions will remain eligible until HCD's determination for the next reporting period.
  - The **HCD 2023 SB 35 Statewide Determination Summary**, showing which jurisdictions are currently subject to SB 35 streamlining, is available [here](#).
  - The **HCD Housing Element Review Report**, showing the status of HCD's review of each jurisdiction's Housing Element, can be accessed [here](#).
- **Increases Affordability Requirements:**
  - In jurisdictions that are subject to SB 35 streamlining as a result of failure to submit a production report or failure to issue building permits for sufficient *above moderate-income units* to meet their share of RHNA, SB 35 streamlining currently applies to eligible projects that dedicate (i) 10 percent of units to housing affordable to households making at or below 80 percent of area median income ("AMI"), or (ii) in nine-county San Francisco Bay Area ("Bay Area"), 20 percent of units to housing affordable to households making below 120 percent of AMI with the average income at or below 100 percent of AMI.
  - **Rental Projects:** SB 423 imposes deeper affordability requirements for eligible "for-rent projects" to qualify for SB 35 streamlining. In jurisdictions that are subject to SB 35 streamlining as a result of failure to adopt a substantially compliant Housing Element as determined by HCD, failure to submit a production report, or failure to issue building permits for sufficient *above moderate-income units* to meet their share of RHNA, SB 423 provides that SB 35 streamlining applies to eligible projects that dedicate 10 percent of units to housing affordable to households making at or below **50 percent** of AMI.

- *For both rental and for-sale projects, where the local inclusionary housing ordinance requires a greater percentage, in certain circumstances, the local ordinance applies. SB 423, however, establishes that if a local requirement for affordable housing requires units that are restricted to households with incomes higher than the applicable income limits required by SB 35, then units that meet the applicable income limits required by SB 35 are deemed to satisfy those local requirements for higher income units.*
- **Optional Bay Area Criteria:** SB 423 also increases the affordability requirements under the optional criteria for Bay Area developments (either rental or for-sale), requiring the developments to dedicate 20 percent of units to housing affordable to households making at or below **100 percent** of AMI with the average income at or below **80 percent** of AMI.
  - *If the local inclusionary ordinance requires more than 20 percent at or below 100 percent of AMI or requires a deeper level of affordability than an average of 100 percent of AMI, the local requirement will apply.*
- **Accelerates Application of SB 35 in San Francisco.** Under current law, a locality that has issued fewer building permits than required to satisfy its RHNA share by income category for a reporting period is subject to SB 35 streamlining until the next reporting period. A “reporting period” is either the first half or the last half of the eight-year Housing Element cycle. For the City and County of San Francisco only, SB 423 shortens the reporting period to one year. Because San Francisco is unlikely to meet its above-market rate RHNA production targets in the first year of the Sixth Cycle, San Francisco likely will become an eligible SB 35 jurisdiction for projects including 10 or 20 percent affordable units (as provided above) after the first Sixth Cycle reporting period (rather than after the first half of the 6<sup>th</sup> Cycle).
- **Extends SB 35 to Some Properties in the Coastal Zone Starting in January 2025.** Currently, SB 35 does not apply to sites in the Coastal Zone. SB 423 expands the reach of SB 35 to qualifying developments in the Coastal Zone starting on January 1, 2025. In the original draft in the Legislature, the bill would have applied broadly within the Coastal Zone. Following Coastal Commission opposition, however, the Legislature amended the bill to limit the circumstances under which SB 35 applies within the Coastal Zone. Requirements for SB 35 eligibility in the Coastal Zone added by SB 423 include:
  - The development *must be* located on a property in an area of the Coastal Zone that is subject to a certified land use plan (LUP) or a certified local coastal program (LCP).
  - The development *must not* be located on a property that is either (a) 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, or (b) 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.
  - The property *must not* be in an area of the Coastal Zone that is vulnerable to five feet of sea level rise, as determined by any of several listed federal, state, and local entities.
  - The development *cannot* be located on or within a 100-foot radius of a wetland, or in a parcel on prime agricultural land, as those terms are defined in the Public Resources Code.
  - The development *must be* located on a parcel zoned for multifamily housing.



Coastal Zone development eligible for SB 35 streamlining must obtain a coastal development permit (“CDP”) from the agency with permitting authority. Where there is a certified LCP, that agency generally would be the local agency (unless the site is within the Commission’s appellate jurisdiction). Where there is only a certified LUP, that agency would be the Commission. Under SB 423, the permitting agency must approve the CDP if the development is consistent with all objective standards of the LCP or the LUP, as applicable.

SB 423 provides that receipt of any density bonus, concessions/incentives, waivers or reductions of development standards, and parking ratios cannot be used by the permitting agency as a basis to find the development inconsistent with the LCP.

- **Extends SB 35 to a Broader Range of Zoning Districts.** Currently, in order to be eligible for SB 35 streamlining, a site must either have a general plan or zoning designation that allows residential use or residential mixed-use development *or* be zoned for office or retail commercial use *and* meet the requirements of the Middle Class Housing Act (last year’s SB 6). SB 423 modifies the eligibility criteria to include sites within any zone where office, retail, or parking are a principally permitted use. This change allows application of SB 35 to a broader range of zoning districts, including some that do not permit residential use.
- **Changes SB 35 Applicability to Properties in Fire Hazard Severity Zones.** Currently, SB 35 does not apply to sites in very high fire hazard severity zones as determined by the Department of Forestry and Fire Protection pursuant to Government Code Section 51178 or in high or very high fire hazard severity zones as indicated on maps of the Department of Forestry and Fire Protection pursuant to Public Resources Code Section 4202, unless the site is excluded from the specified hazard zone by the local agency pursuant to Government Code Section 51179 or has adopted specified fire hazard mitigation measures. SB 423 modifies this exclusion.
  - SB 423 deletes the exclusion of properties 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 [Public Resources Code] Section 4202,” and replaces it with an exclusion for sites within the state responsibility area, as defined in Public Resources Code Section 4102. State responsibility areas include zones mapped as **moderate fire hazard severity zones**—not just those in high and very high zones, resulting in an expansion of the scope of this exclusion.
  - The bill also deletes the current language in SB 35 providing that the exclusion does not apply to sites excluded from the specified hazard zones by a local agency pursuant to Government Code section 51179.
  - SB 423 modifies the exception to the exclusion for sites that have adopted specified fire hazard mitigation measures by adding a non-exclusive list of statutory standards that can serve as potential fire hazard mitigation measures.
  - The State’s Fire Hazard Severity Zone Viewer ([available here](#)) identifies areas within the state located within state responsibility areas and local responsibility areas.
- **Makes Cleanup Changes Regarding Subdivision Projects.** In 2019, Assembly Bill (“AB”) 1485 included cleanup provisions to clarify that SB 35 applies to projects that involve subdivisions. In connection with revisions to SB 35’s labor provisions (to be discussed in Part II of this Client Alert), SB 423 includes an additional cleanup change to delete a remnant provision of SB 35 providing that streamlining is not available unless the subdivision meets certain labor standards.



In addition to extending SB 35 for another decade, SB 423 extends SB 35 to a broader range of properties and expands its reach to more California jurisdictions. As estimated by the Turner Center at U.C. Berkeley, between 2018 and 2021 an estimated 156 projects (comprising over 18,000 housing units) were approved under the provisions of SB 35. With SB 423's revisions, housing developers have the opportunity to construct tens of thousands of additional units under SB 35's streamlined ministerial permit process.

In **Part II of this Client Alert** we will summarize SB 423's revisions to SB 35's labor requirements, specifically how those revisions expand upon the existing prevailing wage requirements.

Please feel free to contact any of the authors of this Client Alert if you would like further information on SB 35's streamlining provisions as amended by SB 423.

**Prior CCN Alerts on SB 35:**

- The Legislature Gives the SB 35 Streamlined and Ministerial Approval Process a Boost
- SB 35 Works, Increasing Affordable Housing Production

[1] "SB 35" as used herein references Government Code section 65913.4, as amended.