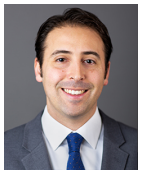
Court of Appeal Issues First Published Opinion Interpreting California Senate Bill 35 Streamlining Provisions

The newly published opinion makes important rulings on impacts to historic resources and other SB 35 eligibility criteria.



by Ellis F. Raskin

Key Points

- The California Court of Appeal has issued the first published opinion interpreting California Senate Bill 35's (SB 35) new laws that streamline the approval of much-needed housing projects. Under SB 35, qualifying housing projects are eligible for ministerial review, which can reduce entitlement processing times by months if not years.
- In *Ruegg & Ellsworth v. City of Berkeley* (Cal. Ct. App., April 20, 2021, No. A159218 [2021 WL 1541065]), the Court of Appeal considered two circumstances that usually render a project ineligible for streamlined review: (1) situations where a project destroys a historic resource; and (2) situations where a project consists of a mix of uses, and the residential component is not large enough to qualify as a "housing" project. In this case, the City argued the project would result in the destruction of the West Berkeley Shellmound, an important cultural resource.
- The Court of Appeal determined the project was eligible for SB 35 processing and rejected the City of Berkeley's contentions, holding:
  a) Housing projects only are ineligible where the project would potentially destroy a historic "structure," whereas the Shellmound was a "site;"
  b) The project was a residential housing project because, though it did contain a commercial component, it complied with a provision in SB 35 that requires two-thirds of the floor area in mixed-use projects be dedicated to residential uses;
  c) That an assembly bill adopted while the case was pending, which requires consultation with California Native American tribes "traditionally and culturally affiliated with the geographic area," did not apply retroactively to project applications considered previously to the bill's adoption; and
  d) That insofar as an agency can reject an SB 35 application for failure to meet objective zoning standards, rules concerning mitigations fees do not qualify as "standards" and, to the extent a standard is cited, it cannot be a guideline, and the threshold at issue and its enforceability must be clear.

On April 20, 2021, the California Court of Appeal issued the first published opinion interpreting new housing streamlining laws that were adopted in 2017 by California Senate Bill 35. ("SB 35;"

effective January 1, 2018, adding section 65913.4 to the Government Code.3; Stats. 2017, ch. 366, § 3.) In *Ruegg & Ellsworth v. City of Berkeley* (Cal. Ct. App., April 20, 2021, No. A159218), the Court of Appeal reversed a lower court decision that found a development project at 1900 4th Street in the City of Berkeley was ineligible for SB 35 streamlining.

The development, which would include 135 apartments and more than 33,000 square feet of retail space, attracted significant controversy because the project site encompassed a sacred Native American burial site known as the West Berkeley Shellmound. Designated as a city landmark, the Shellmound might date back as far as 3,700 B.C.E. Beginning in the 19th Century, local development resulted in the destruction of much of the Shellmound, and no parts of the Shellmound remain visible above ground today. Shellmound materials were scattered throughout the area as agricultural fertilizer and used for road-building and paving.

In 2018, project developers submitted an application to the City of Berkeley pursuant to SB 35. In their application, the developers noted that 50 percent of the residential units would be deed-restricted for occupancy by low-income households. Berkeley planning officials determined that the project was ineligible for streamlining under SB 35 because the project could potentially destroy a historic structure (i.e., the Shellmound). The City also determined that state streamlining provisions did not apply because: (1) SB 35 unlawfully infringed upon local historical preservation authority; (2) the zoning designation for the site made the project ineligible for streamlining; (3) and the project did not comply with objective zoning standards, providing a separate ground for determining the project failed to qualify for streamlining. The Court of Appeal ultimately rejected all of the City's arguments and ordered the trial court to issue a writ of mandate directing the City to approve the developers' SB 35 application.

SB 35's Streamlining Procedures for Housing Projects

SB 35's streamlining procedures established a ministerial approval process for certain affordable housing projects when a local government has failed to provide its share of regional housing needs. (Gov. Code, § 65913.4, subd. (a)(4)(A).) When a proposed development satisfies all of the objective planning standards enumerated in SB 35, the development is eligible for the streamlined approval process, which limits local governments from exercising their discretion to condition a project and requires them to make decisions within 150 to 270 days of application submission (i.e., 60-90 days for the agency to determine an application is eligible; then 90-180 days to make a final determination on the project).

These streamlining procedures include several notable exceptions. Specifically, SB 35 cannot be used when "[t]he development would require the demolition of a historic structure that was placed on a national, state, or local historic register." (Gov. Code, § 65913.4, subd. (a)(7)(C).) Furthermore, the streamlining procedures only apply to residential projects where "at least two-thirds of the square footage of the development is designated for residential use." (*Id.* at subd. (a)(2)(C).) Both of these exceptions were a key focal point for the SB 35 application at issue in the *Ruegg & Ellsworth* case, though the law contains a range of other exceptions that may be applicable to other development projects.

Development at the Shellmound Site

The Court of Appeal analyzed whether the project would involve the demolition of a "historic structure" that would make the project ineligible for SB 35 streamlining. The Court of Appeal noted that the text of SB 35 applies to historic "structures," not "resources" or "sites," and the Court opined that "[t]he Legislature is certainly aware of the distinctions between these terms." (Slip Opinion [Slip Op.] at p. 29.) The Court of Appeal found that "[w]ithout question, the Shellmound is an important historical and cultural resource," but there was "no evidence in the record that the Shellmound is now present on the project site in a state that

could reasonably be viewed as an existing structure, nor even remnants recognizable as part of a structure." (Slip Op. at p. 31.) The Court found that the Shellmound was "not a structure per se but a site," and that SB 35's historic structure exception "is for a 'structure' placed on a historical register, not a site where a structure once existed." (Slip Op. at pp. 31-32.) Accordingly, the Court held that the City should not have denied the developers' SB 35 application on the ground that the Shellmound was a historic structure.

Retroactive Approval of SB 831

While the *Ruegg & Ellsworth* case was pending in Court, the Legislature adopted Assembly Bill No. 831 ("AB 831"), which amended SB 35's streamlining provisions by requiring local governments to engage in "scoping consultation" with California Native American tribes "traditionally and culturally affiliated with the geographic area," if requested by such a tribe upon notice of the intended project application. (Gov. Code, § 65913.4, subd. (b); Stats. 2020, ch. 166, § 3, eff. Sept. 25, 2020; Stats. 2020, ch. 194, § 1.5, eff. September 28, 2020.) As the Court of Appeal noted in its opinion, "[t]hese amendments, in effect, permit a tribe to insist that a proposed project go through the standard discretionary review process, requiring compliance with the [California Environmental Quality Act] and its provisions for tribal consultation (Pub. Resources Code, §§ 21080.3.1, 21080.3.2) that would be avoided under the ministerial approval process." (Slip Op. at pp. 29-30.)

The Confederated Villages of Lisjan, a Native American tribe representing "the rights of Ohlone people of the East Bay Area," intervened in the case and argued that AB 831 applied retroactively to the project at issue in this case. The Court of Appeal rejected this argument and held that it would be "manifestly unfair" to apply AB 831 retroactively to projects that satisfied all SB 35 criteria prior to the effective date of AB 831 but were erroneously denied by a local government. (Slip Op. at p. 35.) According to the Court of Appeal, the fact that "the Legislature allowed for some projects to proceed despite not having been subjected to tribal consultation with respect to potentially threatened cultural resources does not mean the Legislature intended to 'deprive' tribes of protections, only that it was also accounting for the interests of those who relied upon [SB 35] prior to Assembly Bill 831's effective date." (Slip Op. at p. 38.)

The Court of Appeal ultimately held that AB 831 does not apply retroactively to projects that "should have received ministerial approval" under SB 35 (i.e., projects for which "the agency lacks discretion to withhold its approval") prior to the effective date of AB 831. (Slip Op. at pp. 35-36.) The Court did not address the question of whether AB 831 applies to SB 35 applications that were pending prior to the effective date of AB 831 but had not been approved (or erroneously denied). However, California courts have generally held that the mere submission of a planning application does not confer the right to proceed under laws in effect at the time of the submission. (*See generally Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321-322; *but see also, e.g.,* Gov. Code, § 65589.5, as amended by Senate Bill 330 (2019) [allowing certain development projects to proceed under ordinances, policies, and standards adopted and in effect when a preliminary application was submitted]; Gov. Code, § 66498.1, subd. (b) [once a tentative vesting map is approved or conditionally approved, the developer may proceed with development in substantial compliance with the ordinances, policies, and standards in effect on the date that the developer's application for a tentative vesting map was deemed complete].)

Home Rule Issues

The City of Berkeley also argued that SB 35 impermissibly infringed upon its local historical preservation authority. The Court of Appeal rejected this argument, noting that "the constitutionality of [SB 35] does not turn on there being a statewide interest in limiting local historical preservation authority but rather on whether the statewide interest in increasing

affordable housing sufficiently justifies the legislation's impact on that authority." (Slip Op. at p. 43.) The Court held that "the City's ability to exercise discretion over development on a City landmarked site directly interferes with the purpose of [SB 35] to the extent an affordable housing project on this site would otherwise meet the criteria for ministerial approval." (Slip Op. at p. 43.) Therefore, to the extent that these interests conflicted, the Court held that SB 35 superseded the City's local historical preservation authority.

The Court of Appeal also addressed the City's argument that SB 35 impermissibly interfered with the City's home rule authority to regulate commercial uses. The City's municipal code requires a discretionary use permit when the retail space in a mixed-use development comprises 20,000 square feet or more. (*See* Berkeley Mun. Code, § 23E.64.030.) The project at issue, in this case, exceeded that threshold. Because SB 35 provides for a ministerial approval process, the City argued that "it interferes with charter cities' traditional land use authority to determine whether particular commercial uses should be subject to appropriate conditions of approval such as security measures, hours of operations, noise restrictions, light pollution, and emissions controls." (Slip Op. at pp. 56-57.) The Court of Appeal rejected this argument and held that SB 35 "does not unduly interfere with the City's land use authority." (Slip Op. at p. 58.) The Court noted that any interference with local regulation of commercial uses "incidental to [SB 35]'s purpose of facilitating development of affordable housing" and that "nothing in [SB 35] requires or allows ministerial approval of a development that includes commercial uses conflicting with local zoning." (Slip Op. at p. 57.) The Court also observed that SB 35 did not exempt the project's future commercial tenants from permit and licensing requirements for their operations. (Slip Op. at pp. 57-58.)

Application of SB 35 to Mixed-Use Projects

The Court of Appeal also rejected the City's argument that SB 35 only applies to mixed-use sites where local zoning provisions require a minimum of two-thirds of the site to be dedicated to residential use. Specifically, the City argued that a project might only invoke SB 35's streamlining procedures when the project is located on a *site* with a general plan or zoning designation "mandating that at least two-thirds of the square footage of any development [at the site] be designated for residential use." (Slip Op. at p. 51.) The City's argument was based on a provision in SB 35 that, at the time of the administrative and trial court proceedings, read as follow:

"The development [must be] located on a site that satisfies all of the following: [¶] . . . [¶] 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."

That statutory provision has now been amended to state that "[t]he *development and the site* on which it is located [must] satisfy all of the following . . . ." (Gov. Code, § 65913.4, subd. (a)(2)(C) [emphasis added].) The trial court agreed with the City and ruled that SB 35 places "restrictions as to sites on which a project can be located and still be eligible for SB 35 streamlined approval," and SB 35 limits streamlined approval to projects on "mixed-use sites which require minimum two-thirds residential use." (Slip Op. at p. 47.) According to the trial court, the "context and structure" of the statutory text "indicate that the two-thirds proviso is part of a restriction on 'the site' rather than the development project itself." (Slip Op. at p. 47, fn. 26.)

The Court of Appeal disagreed and held that the City's interpretation of SB 35 was not supported by the plain text of the statute, which "consistently uses 'the development' to refer to the project that is the subject of an application for ministerial approval," rather than the site on which the development is located (Slip Op.

at p. 51.) The Court of Appeal concluded that the "two-thirds" requirement, therefore, applies to the project that is the subject of the application rather than the site. Here, the project satisfied this requirement: approximately 88 percent of the project's floor area would be devoted to residential uses (254,888 gross square feet of the project's total 286,809 square feet).

The Court also noted that the City's interpretation "would discourage development of affordable housing by limiting the applicability of the streamlined approval process to projects on sites with a minimum residential requirement for mixed-use developments even if the development itself is at least two-thirds residential." (Slip Op. at p. 52.) The Court also observed that the City's interpretation "would make the proposed project ineligible for ministerial approval despite it being 88 percent residential and located on a site zoned for mixed uses." (Slip Op. at p. 52.)

Project Consistency with Objective Zoning Standards

Finally, the Court of Appeal found that the City improperly rejected the SB 35 application on the ground that the project conflicted with objective zoning standards. The City claimed that the project failed to comply with affordable housing mitigation fee requirements, but the Court of Appeal held that the fee requirements were not an objective standard. The Court noted that SB 35 "requires ministerial approval for a project meeting the specified objective planning standards, and a mitigation fee is not a standard." (Slip Op. at pp. 60-61.)

The Court also held that the City improperly denied the SB 35 application on the grounds that the project did not comply with objective standards for traffic impacts. In its letter denying the SB 35 application, the City informed the developers that the project " 'potentially' conflicted with the 'objective standards' that it '[b]e capable of meeting any applicable performance standards for off-site impacts' and '[n]ot exceed the amount and intensity of use that can be served by available traffic capacity and potential parking supply.' " (Slip Op. at p. 64.) The Court held that the City "made no mention of any specific criterion for measuring traffic impacts" in its letter denying the application, and the City, therefore, failed to comply with SB 35's requirement that a local government provides "written documentation of which standard or standards the development conflicts with." (Slip Op. at p. 65.) The City provided a supplemental letter, which cited a portion of the project's environmental impact report and referenced potential inconsistencies with the City's "Traffic Guidelines." However, the Court held that this supplemental letter "came too late to allow appellants to attempt to address the asserted conflict," and even if the letter was timely, the Traffic Guidelines do not provide objective development standards because the Guidelines "leave room for interpretation – and discretion" when they are applied on a case-by-case basis. (Slip Op. at pp. 65-66).

Implications for Future Projects

Local governments will likely continue to see a steady stream of SB 35 applications in the years ahead. Both developers and local governments should pay careful attention to the specific SB 35 application requirements and potential exceptions. *Ruegg & Ellsworth* highlights that this highly nuanced law continues to evolve. It is important for planners and legal practitioners to be aware of all of the latest developments.

If you have questions about SB 35 and how it may apply to your projects and/or strategic planning, please reach out to Hanson Bridgett's Land Use team.

For more information, please contact:

Ellis F. Raskin, Associate
(415) 995-5835
ERaskin@hansonbridgett.com