

The Challenges of Infill Housing

HOUSING SHORTAGES throughout California and the economic and social needs of local communities have sparked a growing interest in infill housing, which is higher density housing, often created in the midst of existing neighborhoods. Infill housing can involve the creation or modification of condominiums, apartments, townhouses, and single-family homes. Infill housing represents not only a response to a housing shortage but also an attempt to address other problems facing California communities. Successful infill housing can only be achieved, however, by understanding the problems, needs, and limitations of each individual community.

In recent decades California has experienced dramatic changes in demographics that have resulted in the recent focus on infill housing. Over the past 30 years, the population of California has greatly increased. As the population grew, many communities experienced a strong trend toward suburban growth, which drew many middle-class households away from the cities. Lower land prices in suburban areas allowed developers to build housing that was more affordable to home buyers. Access to freeways and local governments seeking to enlarge their tax base encouraged this large demographic shift. Suburban development created many communities with low population density that were dependent on the automobile.

Suburban development not only includes residential development but also stimulates the creation of new office, industrial, and retail space. The advent of big box centers, in conjunction with every county's and city's desire for more sales tax, has worked to ensure an abundance of newly constructed retail space. For many residents, however, with this growth has come an increase in the time of the daily commute. As California's population continues to expand, infill housing has arisen as residents seek an equilibrium between many variables, such as housing costs and the need for a shorter commute.

The state's Department of Housing and Community Development estimates an increase of more than 12.5 million residents and approximately 5 million households in California between 1997 and 2020.¹ In the 1990s, only 1.11 million housing units were added, compared to the 2.07 million units built in the previous decade. In addition, multifamily housing fell to a mere 25 percent of total output, falling from a rate of 45 to 49 percent of total housing construction during the 1960s, 1970s, and 1980s.² Projecting these numbers into the future, the result is that less than 60 percent of the new housing units that are needed to accommodate the projected population growth will be built.³ Essentially, an average of 220,000 housing units will need to be built each year to meet the housing requirements of California's growing population.⁴ New planned communities and single-family home tracts will supply a portion of the housing demand in California, but this type of housing cannot fill all the demand.

These trends indicate significant problems for California. The most critical of these may be summarized as a housing shortage and its resulting high cost,⁵ projected increases in traffic congestion over the next 20 years,⁶ a growing concentration of poverty in some urban areas, the loss (or fragmentation) of farmland and open space, and



a decline in economic competitiveness. These problems and issues have helped renew interest in developing more housing in urban centers.

Many policy makers, planners, and developers in California are now focusing on infill housing. Infill housing is relatively dense compared to suburban developments and represents an effective way to meet a community's affordable housing and population growth needs. Infill housing developments are built in proximity to existing transit routes and job centers, or within walking distance of services and entertainment. Such planning and development helps to reduce the automobile use of many residents.

Infill housing typically capitalizes on existing community assets such as parks, transit, and other infrastructure and encourages new community assets such as child care centers, art districts, and shopping areas. Moreover, it has the potential to increase jobs, purchasing power, and public amenities in urban neighborhoods, generate tax dollars for the local government, and promote redevelopment. Such redevelopment contributes to the elimination of crime associated with vacant, abandoned, or underutilized properties.

The demand for infill housing is supported by a wide variety of people, such as empty nesters who raised their children in suburban areas and couples with double income and no children, who prefer higher density living near restaurants and entertainment centers. Moreover, recent developments in Los Angeles, Pasadena, and the mid-Wilshire district have become popular places to live for young professionals.

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Infill housing is not just for the wealthy. By building housing around or near public transportation and other centers, middle- and low-income households can also reap the benefits of infill housing. Everyone from mid-level professionals, such as financial analysts and nurses, to individuals working in the service sector, such as janitors and receptionists, can benefit from living very close to the existing assets of a community. California, along with a few other states, has begun to recognize the potential benefits of infill housing and has adopted several statutes to encourage infill housing.⁷ Some cities encourage infill housing by providing incentives to developers. Examples of incentives include lower impact fees if a developer upgrades infrastructure and amenities; potential fast track and streamlined permitting; and reduced lot size, setback, and parking requirements. Some cities also provide creative zoning for mixed-use developments to increase flexibility and allow for the transitioning of uses among neighborhoods in a community.

Unfortunately, there are also many barriers and challenges to developing infill housing. Often, legislative amendments to the city's general plan and zoning provisions are necessary. Neighborhood opposition to new high density housing may also exist and result in constant battles waged by groups who oppose infill developments in their communities. Fragmented decision making among governmental entities stifles the process. In addition, outdated infrastructure, environmental contamination, the extensive regulations of the California Environmental Quality Act (CEQA), and brownfields development issues plague the potential development of infill housing.

Given these barriers and challenges, the development of infill housing requires an experienced development team, made up of public and private representatives, that is able to invest significant predevelopment time and capital to identify the right type of infill housing and to create a strategic and effective plan for the community.

Successful infill housing requires one to see beyond the vacant or underutilized property and have a thorough understanding of the entire community, with particular attention to the entitlement process. This picture includes an understanding of the parties involved, a community's current plans, a community's needs and problems, infrastructure opportunities and limitations, fiscal problems, and the maze of federal, state, and local laws and regulations.

The parties who may have control or influence in a proposed infill project include government entities; elected representatives; city managers, planners, and economic development directors; property owners and own-

ers of adjacent property; business organizations and owners; construction and permanent lenders; architects, engineers, consultants, and contractors; and utility providers. Each of these actors and their agendas must be considered because they can individually or collectively encourage or impede planning and development.

The General Plan

Once the parties are identified and their interests understood, relevant plans must be closely examined for consistency and be adjusted appropriately. At the heart of this inquiry lies not only the zoning code but what is called the general plan. Each city and county is required to adopt a comprehensive, long-term general plan for the physical development of the city or county and for land outside of its boundaries affected by its plans.⁸ The general plan is often viewed as the document governing the direction of future land use and contains a statement of development policies that sets forth objectives, principles, standards, and proposals.⁹

The California Supreme Court recognized the importance of the general plan in *Lesher Communications, Inc. v. Walnut Creek*.¹⁰ In *Lesher*, the court positioned the general plan at the top of the planning hierarchy—subordinating zoning ordinances, tentative maps, and development agreements to the general plan when they were inconsistent with it. Such inconsistent land use actions were “invalid at the time [they were] passed.”¹¹ Government Code Section 65302 details seven mandatory elements to be included in a general plan.

The first is the land use element. This designates the proposed general location and extent of uses of the land for housing, business, industry, open space, agricultural, and natural resources. The land use element also includes a statement of the population density and building density recommended for the area covered by the plan. Finally, the land use element identifies areas subject to flooding, and designates parcels of land for the production of timber when appropriate.¹² In practice, the land use element is one of the elements of the general plan most frequently at issue.

The second required element of a general plan is circulation, which designates the general location of existing and proposed thoroughfares, major transportation routes, terminals, and other public utilities and facilities in conjunction with the land use element of the general plan.¹³

The third element is housing—the most significant for infill housing purposes—which consists of the identification and analysis of housing needs along with a statement of goals, policies, objectives, and scheduled pro-

grams for the development of housing. The housing element must identify adequate sites for housing for all economic segments of the community.¹⁴

Requirements for the housing element have been codified beginning at Government Code Section 65580. The legislative finding accompanying the enactment of these requirements declares, “The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.”¹⁵ This legislation encourages the cooperation of all levels of government in the achievement of these goals.

In assessing a community's housing needs, the general plan should take into account population and employment trends; household characteristics such as level of payment compared to ability to pay; housing characteristics such as overcrowding; an inventory of land suitable for residential development; an analysis of both governmental and non-governmental constraints upon the maintenance, improvement, or development of housing; an analysis of special housing needs (such as housing for the handicapped, elderly, and large families); and an analysis of opportunities for energy conservation in relation to residential development.¹⁶

In addition, the housing element should also include a statement of the community's goals, quantified objectives, and policies related to the maintenance, improvement, and development of housing. To foster progression towards these goals, the housing element should include a five-year schedule of actions to reach the stated goals.¹⁷

The housing element requirement also includes a provision to determine each local government's share of regional housing needs. The distribution of regional housing needs takes into account market demand for housing, employment opportunities, the availability of suitable sites and public facilities, the type and tenure of housing needs, commuting patterns, and the housing needs of farm workers. The distribution must make a concerted effort to avoid further impacting of areas with high proportions of lower-income households. The Department of Housing and Community Development uses data provided by the Department of Finance and consults with local councils of government to determine the regional share of the statewide housing need. Each council of government also determines housing needs for its region based on data provided by the Department of Housing and Community Development. This determination must be consistent with the statewide housing need.

The fourth required element is conservation. The general plan must address the con-

ervation, development, and utilization of natural resources, including water, forests, soils, rivers, harbors, fisheries, and wildlife.¹⁸

The fifth required element concerns open space and aims for the preservation of parcels of land or water that are essentially unimproved and devoted to an open-space use. The primary purpose of this element is to “assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible.”¹⁹ In addition, it aims to discourage the “premature and unnecessary conversion of open-space land to urban uses.”²⁰ This includes the preservation of natural resources such as habitats for fish and wildlife species; natural resources such as forest lands and agricultural lands; outdoor recreation including areas of significant scenic, historic, and cultural value; and open space for public health and safety, such as areas that require special management or regulation due to hazardous or special conditions (e.g., earthquake fault zones).²¹

The sixth element is noise and the measures and possible solutions for existing and foreseeable noise problems. To that end, the noise element recognizes the guidelines established by the Office of Noise Control in the State Department of Health Services and analyzes the current and projected noise levels for highways and freeways, major local streets, ground rapid transit systems, airport operations, industrial plants, and other ground stationary noise sources that contribute to the community noise environment. The noise element should aim to minimize the exposure of residents to excessive noise.²²

The seventh is the safety element, which details the protection of the community from unreasonable risks associated with seismic and geologic hazards. The safety element includes the mapping of known hazards and should address evacuation routes, minimum road widths, and water supply requirements.²³

A presumption exists that a city’s general plan is valid once adopted. Legal adequacy is the standard used to assess a general plan’s sufficiency. In order to meet this standard, a plan must show substantial compliance with the statutory requirements for general plans as enumerated in Government Code Section 65302. “Substantial compliance” is interpreted to mean actual compliance with respect to the “substance essential to every reasonable objective of the statute,” as distinguished from “mere technical imperfections of form.”²⁴

Failure to enact a legally adequate general plan puts all subsequently proposed land use actions at risk. For instance, in *Resource Defense Fund v. County of Santa Cruz*, the court held that the absence of a valid general

plan precluded the enactment of zoning ordinances and other land use actions.²⁵ Likewise, in *Friends of “B” Street v. City of Hayward*, the court granted injunctive relief against the city of Hayward to prevent the development of a public works project because the general plan failed to include the noise element, making it incomplete.²⁶ Thus, it is imperative that each local government create and enact a general plan that conforms to the relevant statutes.

Other Factors

In addition to the general plan, the pursuit of infill housing must be scrutinized in relation to several other sets of regulations. A specific plan may exist to cover all or a portion of an area covered by a general plan. Specific plans normally cover many of the same subjects as the general plan but in greater detail. Some jurisdictions actually use a specific plan as their zoning for a specific project. In the residential context, specific plans can be advantageous because subdivisions, zone changes, or other actions undertaken to implement a specific plan may be exempt from further environmental review under CEQA.

Under CEQA, California’s public agencies must identify the significant environmental effects of their actions and either avoid or mitigate those effects.²⁷ Governmental discretionary actions on projects that have the potential for impact on the environment, such as the enactment of zoning ordinances, the issuance of conditional use permits, or the approval of tentative subdivision maps, may require evaluation under CEQA for the impact those actions may have on the environment. When the impact is deemed to be potentially significant, a governmental agency may be required to prepare an environmental impact report (EIR), which details the potentially significant environmental effects that a proposed project is likely to have and lists ways to minimize the effects or proposes alternatives. If an EIR has already been prepared under the specific plan, however, the proposed action may be exempt from further environmental review under CEQA.

Another plan, called a redevelopment plan (adopted pursuant to California’s Community Redevelopment Law), may also exist, and any development attempted on land located in a redevelopment plan area must be consistent with the plan.²⁸ A redevelopment plan must conform to a valid general plan but is not required to conform with applicable zoning laws. Thus, a redevelopment plan’s use designations can be different from zoning laws and can, in effect, restrict development that is actually permitted under the zoning regulations.²⁹ As a result, close scrutiny of any redevelopment plan is required for any infill housing development.

In addition, the zoning of any proposed infill project site must be reviewed. Zoning regulations typically concern the height, bulk, and use of structures. Zoning may take a number of different forms, including interim ordinances, conditional zoning, overlay districts, and planned unit developments. In an infill situation, one must not only look at the permitted uses and required structural and architectural provisions contained in the basic zoning regulations and other applicable plans but must also look closely at current or proposed zoning restrictions that are either particular to the property or that would overlay or preempt the basic zoning laws.

California governments continue to cautiously adopt legislation intended to encourage new housing, including infill housing. State law currently requires that the housing element of a general plan be updated every two years and that individual cities bear their fair share of meeting housing needs.³⁰ Other laws, such as AB 1866, which permits “granny units” (typically, small, separate apartments added to the back yards of single family residences),³¹ have also been adopted.

Moreover, in September 2002, AB 857 was passed into law with three stated land use goals: 1) infill development and equitable development in cities, 2) the protection of open space, farmland, and habitat outside cities, and 3) more efficient use of the land where development is to occur. The bill set forth state planning priorities that include the promotion of infill development by requiring state agencies to pursue it. This law also requires that when state agencies request an infrastructure development they are to specify how the improvement is consistent with and supports infill development and redevelopment, cultural and historic resources, environmental and agricultural resources, and efficient development patterns. Although some considered AB 857 to be a tame effort toward dealing with California’s population growth problem, many others opposed it. Opponents argued that the state government was acting prematurely because many local jurisdictions had not been given sufficient time and opportunity to update their land use plans to reflect an emphasis on infill development.³² Whether AB 857 will accomplish its stated goals still remains to be seen.

Other legislation has also been enacted to encourage the development of infill housing. CEQA may exempt housing projects from further environmental review when such projects qualify by meeting certain criteria, such as consistency with an applicable general plan, specific plan, and local coastal program.³³ In a redevelopment situation, if housing was analyzed in the EIR for the redevelopment plan, no further environmental review would be required unless a subsequent EIR or

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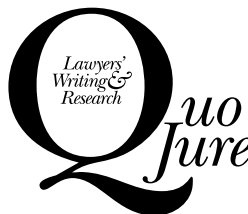
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a supplement to an EIR is required under CEQA.³⁴

Cities and counties are also undertaking a vast array of planning to promote infill housing. For example, Los Angeles adopted Residential/Accessory Services (RAS) zones to provide a mechanism to increase housing opportunities, enhance neighborhoods, and revitalize older commercial corridors.³⁵ Also, the city adopted an Adaptive Reuse Incentive Areas Specific Plan for the areas of Chinatown and Lincoln Heights, the Hollywood Community Redevelopment Project area, certain portions of the Wilshire Center/Koreatown Community Redevelopment Project area, and portions of Central Avenue.³⁶ This specific plan greatly encourages the reuse of existing commercial buildings for residential purposes and provides six incentives: 1) new mezzanines are permitted but not considered new floor area, 2) increased density is permitted by not subjecting dwelling units to lot area requirements, 3) existing automobile parking is considered adequate, 4) projects are exempt from certain shopping center regulations, 5) projects are exempt from site plan review, and 6) loading space requirements are relaxed.

Other cities have adopted similar ordinances. To reach affordable housing goals, a number of cities have adopted (and more are considering) inclusionary housing requirements for new housing developments. These requirements mandate that a certain percentage of units be affordable and rent restricted. Density bonus provisions may be tied into the inclusionary requirements, and some statutory schemes permit the payment of a fee in lieu of including rent-restricted units.

Infill housing will continue to be part of the solution for the housing crisis in California. Infill housing can provide needed housing in addition to housing supplied in master planned communities and single-family home tract development. Infill housing can help redevelopment efforts, mend neighborhoods, and provide individuals with the opportunity to live close to employment centers and underutilized retail centers. Each county and city has its own set of problems, needs, and limitations; therefore, counsel must examine these areas closely in order to help clients develop successful infill housing development plans that will benefit local communities. ■

¹ JOHN D. LANDIS ET AL., RAISING THE ROOF: CALIFORNIA HOUSING DEVELOPMENT PROJECTIONS AND CONSTRAINTS, 1997-2020 (Cal. Dep't of Housing and Cmty. Dev., 2000) [hereinafter LANDIS]. *But see* Daryl Kelley, *California Cuts Its Population Projection*, L.A. TIMES, Oct. 4, 2004, at A1 (Demographic experts project California's population to reach about 51 million by 2040—7 million fewer than they forecast a few years before.).

² U.S. CENSUS BUREAU, CENSUS 2000, available at <http://www.census.gov/main/www/cen2000.html>.

³ LANDIS, *supra* note 1.

⁴ *Id.*

⁵ Press Release, California Association of Realtors, California's Housing Affordability Index at 18 percent in July; unchanged from previous month, down nine points from year ago (Sept. 9, 2004), available at <http://www.car.org/index.php?id=MzQwMTg=> (The median price of a home in California in July 2004 was \$463,540, and only 18% of Californians could afford it.).

⁶ Press Release, Transportation California, State Highway System among Worst in U.S. (May 2001), available at <http://www.transportationca.com/archives/newsletter-05-01-2.shtml> (A road conditions report prepared by the Road Information Program shows an increase in the number of vehicle miles traveled on California's roads between 1980 and 2000, nearly doubling from 155 billion miles to 300 billion miles, and anticipates that vehicle miles may increase another 70% by 2025.).

⁷ COLETTE ALPEN ET AL., SMART GROWTH INITIATIVE (Urban Land Inst., Spring 2002):

[Smart growth is] [d]eveloping compact mixed-use housing, employment centers, and retail sites with easy pedestrian access to regional transit stops, preserving farmland, species habitat, and other important open-space by encouraging compact and mixed-use development, removing fiscal and legal disincentives to the production of much needed housing, developing recreational facilities on former brown-fields, close to downtown and easily accessible by transit, [and] using school siting and improvement decisions to reconnect local residents with a valuable community resource, while also containing sprawl.

⁸ GOV'T CODE §65302. The general plan and other plans are generally available at the city planning office or the office of the city clerk.

⁹ *Id.*

¹⁰ Leshar Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 540 (1990).

¹¹ *Id.* at 544.

¹² GOV'T CODE §65302(a).

¹³ GOV'T CODE §65302(b).

¹⁴ GOV'T CODE §§65583, 65302(c).

¹⁵ GOV'T CODE §65580(a).

¹⁶ GOV'T CODE §65583(a).

¹⁷ GOV'T CODE §§65583(b)-(c).

¹⁸ GOV'T CODE §65302(d).

¹⁹ GOV'T CODE §65562(a).

²⁰ GOV'T CODE §65561(b).

²¹ GOV'T CODE §§65302(e), 65560-65568.

²² GOV'T CODE §65302(f).

²³ GOV'T CODE §65302(g).

²⁴ Camp v. Board of Supervisors, 123 Cal. App. 3d 334, 348 (1981).

²⁵ Resource Defense Fund v. County of Santa Cruz, 133 Cal. App. 3d 800, 806 (1982).

²⁶ Friends of "B" Street v. City of Hayward, 106 Cal. App. 3d 988, 999 (1980).

²⁷ PUB. RES. CODE §§21000 *et seq.*

²⁸ HEALTH & SAFETY CODE §33000.

²⁹ Kehoe v. City of Berkeley, 67 Cal. App. 3d 666, 676 (1977).

³⁰ GOV'T CODE §65584.

³¹ A.B. 1866, 2002-2003 Assem. (Cal. 2002).

³² Lori Weisberg, *State Crafts a Small Rudder to Steer Future Development*, SAN DIEGO UNION-TRIBUNE, Sept. 22, 2002.

³³ See CAL. CODE REGS. tit. 14, §§15181, 15182, available at http://ceres.ca.gov/topic/env_law/ccqa/guidelines/ (visited Oct. 4, 2004).

³⁴ CAL. CODE REGS. tit. 14, §15180.

³⁵ LOS ANGELES CODE §§12.10.5, 12.11.5 (2003).

³⁶ LOS ANGELES, CAL., ORDINANCE 175038 (Dec. 20, 2002).

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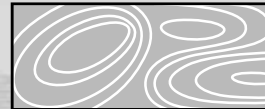
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