State of California
Office of the Attorney General

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To: All Cities and Counties in California

Dear Colleagues:

In recent years, the Legislature has passed several laws responding to California's housing crisis by mandating that local governments ministerially approve proposed housing developments under certain circumstances. Such laws include (but are not limited to) Senate Bill 9 (SB 9) (Gov. Code §§ 65852.21, 66411.7), which took effect January 1, 2022, and addresses lot splits and duplexes in single-family zoned neighborhoods, and Assembly Bill 2011 (AB 2011), which takes effect July 1, 2023, and addresses affordable housing permitting on commercial zoned land.

Following the enactment of SB 9, some local jurisdictions enacted "urgency zoning ordinances" aiming to restrict or impose additional requirements on projects that were otherwise subject to ministerial approval under SB 9. Interim urgency ordinances provide a procedural tool to quickly respond to an immediate threat to public health, safety, or welfare, and do not circumvent the substantive requirements of state housing laws such as SB 9 or AB 2011. This guidance reminds local jurisdictions of the strict state law requirements that apply to the enactment of urgency ordinances. The Attorney General encourages local jurisdictions to review their existing urgency ordinances for validity, and properly implement California's housing laws moving forward.

Analysis

A. Legal Requirements for Urgency Ordinances

1. "Current and Immediate Threat to Public Health, Safety, or Welfare"

Under limited emergency circumstances, local jurisdictions may pass urgency zoning ordinances that prohibit projects and land uses that conflict with a city's planning or zoning. (Gov. Code, § 65858, subds. (a)-(c); see also *216 Sutter Bay Associates v. County of Sutter*

(1997) 58 Cal.App.4th 860, 869.)[1] An urgency ordinance is initially valid for only 45 days, but can be extended for a total of two years, subject to the requirements discussed below. (§ 65858, subds. (a), (b).)

To be valid, urgency ordinances amending zoning regulations must be supported by written legislative findings that "there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare." (§ 65858, subd. (c).) Failure to make the showings required by Section 65858 renders an urgency ordinance invalid as a matter of law. (*California Charter Schools Assn. v. City of Huntington Park* (2019) 35 Cal.App.5th 362, 365.) Urgency ordinances must be adopted by a four-fifths vote. (§ 65858, subds. (a), (b).)

The legislative findings must establish a threat to the public health, safety, or welfare that is current and immediate. (§ 65858, subd. (c); *Building Industry Legal Defense* Foundation *v. Superior Court* (1999) 72 Cal.App.4th 1410.) Courts have generally found that the immediacy requirement is satisfied in "situations where local agencies were faced with immediate threats of development." (*Id*. at p. 1419, citing *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860; *Conway v. City of Imperial Beach* (1997) 52 Cal.App.4th 78; *Metro Realty v. County of El Dorad*o (1963) 222 Cal.App.2d 508.) Urgency ordinances are intended to be limited "to situations where an approval of an entitlement of use was imminent." (*Building Industry*, *supra*, 72 Cal.App.4th at pp. 1418–1419; accord *California Charter Schools Assn., supra,* 35 Cal.App.5th at p. 370; *Crown Motors v. City of Redding* (1991) 232 Cal.App.3d 173, 179–180 [a pending permit application would constitute an immediate threat because, absent an urgency ordinance, the permit at issue would have been approved within 30 days].)

Local jurisdictions must provide evidence documenting the immediacy of the threat to public health, safety, or welfare. In *California Charter Schools Assn. v. City of Huntington* Park, Huntington Park enacted an urgency ordinance that temporarily barred development of new charter schools while the City considered amending its zoning code. (*California Charter Schools Assn. v. City of Huntington Park* (2019) 35 Cal.App.5th 362, 365.) Huntington Park claimed that new charter schools would increase traffic and prevent the development of commercial tax-generating properties, which posed an immediate threat to public health, safety, or welfare. (*Id.* at p. 366.) As evidence for its claim, Huntington Park proffered "at least five inquiries" it had received requesting charter schools and "several serious sit down discussions" it had conducted with charter school representatives. (*Id*. at p. 369.) Upon reviewing this evidence, the Court concluded that "mere inquiries, requests, and meetings do not constitute a current and immediate threat within the meaning of [section 65858,] subdivision (c)." (*Id*. at p. 371.) Local jurisdictions are therefore required to show an actual imminent threat to the public health, safety, or welfare and make specific supportive factual findings. An urgency ordinance that is not supported by a sufficient showing of an immediate threat to public safety, health, or welfare is invalid as a matter of law. (*Id*. at p. 365.)

[1] Statutory references that follow are to the Government Code unless otherwise stated.

An urgency ordinance's findings must also document the nature of the threat to public health, safety, or welfare. In *216 Sutter Bay Associates v. County of Sutter*, the County justified its urgency ordinance by showing that a proposed amendment to the general plan would create a new 140,000-person community in a county of only 65,000, and that an urgency ordinance was needed to preserve a countywide vote on the proposed amendment. (*216 Sutter Bay Associates*, *supra*, 58 Cal.App.4th at p. 864.) The Court of Appeal in *Sutter Bay* held that the County's showing that the amendment "could alter—in a radical and fundamental manner—the current way of life for Sutter County residents" satisfied the findings required by Section 65858. (*Id*. at p. 868.) By contrast, statements about the uncertainty of implementation of a new state housing law or generalized concerns about visual or aesthetic standards are insufficient to support an urgency ordinance.

2. Extension of Urgency Ordinance Beyond Initial 45 Days: "Objective, identified written public health or safety standards, policies, or conditions"

An urgency ordinance that "has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing," defined as one-third of the total square footage of the project, is subject to additional requirements upon its extension. (§ 65858, subds. (c), (h).) Such ordinances may not be extended beyond the initial 45 days except upon written findings adopted by the legislative body, supported by substantial evidence in the record, of a "specific, adverse impact upon the public health and safety," which is defined as "a significant, quantifiable, direct, and unavoidable impact based on objective, identified written public health or safety standards, policies, or conditions" existing at the time that the urgency ordinance is adopted. (§ 65858, subd. (c)(1)). The findings must further demonstrate that there is no feasible alternative that would mitigate or avoid the adverse impact "as well or better, with a less burdensome or restrictive effect," than the urgency ordinance. (§ 65858, subd. (c)(3).) In addition, a city must "issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance" at least ten days before its extension. (§ 65858, subd. (d).)

This provision applying to urgency ordinances that would deny multifamily housing development would likely apply to interim ordinances responding to SB 9 and AB 2011. SB 9's provisions allowing for duplexes would entail multifamily development and AB 2011 is specifically directed to multifamily housing.

Local jurisdictions must make these findings with enough specificity to support an adverse impact. In *Hoffman Street, LLC. v. City of West Hollywood*¸ developer petitioners sought a writ of mandate against West Hollywood for enacting an urgency ordinance that barred petitioners from developing a condominium project. (*Hoffman Street, LLC. v. City of West Hollywood* (2009) 179 Cal.App.4th 754.) West Hollywood's urgency ordinance, which limited permitting in certain zones to increase density and affordability, was based on the claim that "'the significant unmet need for smaller affordable housing units [is] posing a current and immediate threat to the public health, safety and welfare.'" (*Id.* at pp. 760–761.) The Court noted that the requirements for urgency ordinances limiting multifamily development under subsection (c)(1) of section 65858 are "more extensive and more specific than the findings required upon the adoption or extension of any interim ordinance." (*Id*. at p. 771.) The Court held that West

Hollywood's findings "failed to identify 'a *specific,* adverse impact on the public health or safety." (*Id.* at p. 772, emphasis added.) West Hollywood's findings also "failed to identify any 'written public health or safety standards, policies, or conditions' on which such an impact would be based." (*Ibid*., citing § 65858, subd. (c)(1).)

Therefore, the findings supporting an urgency ordinance extension that affects multifamily housing must be specifically targeted to the issues arising on particular parcels that create the adverse public health and safety impact.

B. Recently Enacted State Housing Laws Limiting Local Discretion

Urgency ordinances provide a procedural tool to respond to current and immediate public health and safety threats, but they do not provide an avenue to avoid the substantive application of relevant state law. The passage of laws like SB 9 and AB 2011 does not, in and of itself, pose a current and immediate threat to public health, safety, or welfare. Accordingly, the enactment of such a law generally cannot — standing alone — support an urgency ordinance.

As described below, California's housing laws generally empower local jurisdictions to regulate or deny projects on a case-by-case basis based on specific health or safety grounds, without an urgency ordinance. For example, SB 9 expressly allows local agencies to deny permits upon written objective findings addressing public health and safety and AB 2011 allows jurisdictions to exempt some parcels from its requirements under specified conditions. Urgency ordinances are unsupportable when public health and safety concerns arising from a permit application can be addressed without an urgency ordinance.

1. SB 9

SB 9, which took effect on January 1, 2022, enacted Government Code sections 65852.21 and 66411.7. Together, these sections allow property owners to build duplexes on single-family lots and split single-family lots in two. Importantly, both sections expressly bar SB 9's application to potentially dangerous areas such as very high fire hazard severity zones, special flood hazard areas, and earthquake fault zones. SB 9 incorporates these safety exemptions from SB 35, another housing law requiring ministerial approval of some housing applications that was passed in 2017. (§§ 65852.21(a)(2), 664117(a)(3)(C) [incorporating the requirements of § 65913.4, subds. (a)(6)(B)-(a)(6)(K)].)

a. Section 65852.21 (Duplexes)

Government Code section 65852.21 provides that proposed housing projects of two residential units located on a single-family residential zone will be reviewed ministerially, without discretionary review, if they meet specific criteria, such as being located within a city. (§ 65852.21.) Local jurisdictions may impose on such projects objective zoning, subdivision, and design review standards, defined as standards devoid of "personal or subjective judgment by a public official" and that "are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal." (§ 65852.21, subd. (i)(2).)

Local jurisdictions may deny housing project applications under SB 9 if they make a "written finding, based upon a preponderance of the evidence, that the proposed housing development project would have a specific, adverse impact … upon public health and safety or the physical environment." (§ 65852.21, subd. (d).) Central to this power to deny is the "specific, adverse impact," which is defined by Government Code section 65589.5 as "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed completed." (§ 65589.5, subd. (d)(2), incorporated by reference in § 65852.21.)

In light of the fact that section 65852.21 authorizes local jurisdictions to deny individual duplex applications based on findings that the project would have an adverse impact on health and safety or the environment, an urgency ordinance seeking to restrict all such projects across the board cannot be justified.

b. Section 66411.7 (Lot Splits)

Government Code section 66411.7 requires local jurisdictions to ministerially review requests to split urban single-family lots into two approximately equal parcels, if those lots meet specific requirements. (§ 66411.7.) Lots created in this manner shall be exclusively for residential purposes. (§ 66411.7, subd. (f).) Local jurisdictions may impose objective zoning, subdivision, and design standards on such projects unless such standards "physically preclude[e] the construction of two units on either of the resulting parcels or that would result in a unit size of less than 800 square feet." (§ 66411.7, subd. (c)(1)(2).)

As with duplexes, local jurisdictions may deny requests to split lots when the relevant official makes written objective findings that the lot split would have a specific and adverse impact on public health and safety or the physical environment. (§ 66411.7, subd. (d).) Thus section 66411.7, like section 65589.21, offers local jurisdictions a case-by-case instrument for preserving their public health, safety, and physical environment and there can be no justification for an urgency ordinance with a broad exemption.

2. AB 2011

AB 2011 requires ministerial review for affordable housing projects located in commercial zones. Specifically, it provides ministerial approval for two types of projects: (1) projects that provide entirely (100%) affordable multifamily housing and are in an urban infill area that is zoned commercial (§ 65912.114), and (2) projects that provide mixed-income housing, with a certain percentage of affordability, and are located along commercial corridors in urban infill areas (§ 65912.124).

Like SB 9, AB 2011 is not applicable in potentially dangerous areas such as very high fire hazard severity zones, special flood hazard areas, and earthquake fault zones. (§§ 65912.111, subd. (e), 65912.121, subd. (g).) Like SB 9, these sections accomplish this by incorporating the requirements of section 65913.4, subdivisions (a)(6)(B) through (a)(6)(K). In addition, AB 2011 provides specific requirements to assess and mitigate environmental hazards. (§§ 65912.113,

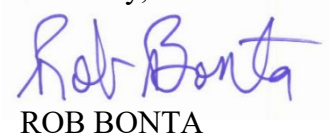
subd. (c), 65912.123, subd. (f).) Also, a local jurisdiction may exempt parcels from AB 2011 if it makes available other replacement parcels for development, at specified densities and subject to other provisions of AB 2011, and makes findings that the replacement results in no net loss of total zoned capacity or zoned capacity for affordable units and affirmatively furthers fair housing. (§§ 65912.114, subd. (i), 65912.124, subd. (i).) AB 2011 delayed operation of its provisions for nine months, which provided local jurisdictions ample opportunity to utilize this exemption before applying AB 2011 to project applications. All these provisions allow jurisdictions to protect public health, safety, and physical environment, provided that they contribute to increasing California's housing supply and affirmatively further fair housing. A generalized urgency ordinance in response to AB 2011 is unnecessary.

C. Conclusion

Where state housing laws expressly authorize local governments to deny specific proposed projects based on health and safety concerns, as SB 9 does, or exempt specific properties from its ambit, as AB 2011 does, it is unclear how the high bar for an urgency ordinance can be satisfied. The mere fact that a state law provides for a ministerial — as opposed to discretionary — review process does not, standing alone, establish the type of immediate threat to public health, safety, or welfare required to justify an urgency ordinance. Further, an interim urgency ordinance is a procedural tool to expeditiously adopt local regulations pending a city's contemplated plan adoption or zoning ordinance. Such an ordinance must comply with the substantive requirements of state housing laws and cannot be used in an attempt to circumvent substantive legal requirements.

Local jurisdictions are urged to review any existing urgency ordinances for compliance with the requirements of section 65858, and repeal urgency ordinances that do not comply with these standards. Where needed, jurisdictions are encouraged to use their existing authority under state housing laws to review individual projects on health and safety grounds, rather than enacting overly broad and legally unjustifiable urgency ordinances. If implementation of a ministerial housing approval statute poses an immediate, current, and substantiated public health and safety threat, local legislative bodies must make the requisite written findings to justify an urgency ordinance. Given that such an ordinance likely would impact multifamily housing, findings supporting an extension must also satisfy the heightened standards applicable under Section 65858(c)(1)-(3) of establishing "a significant, quantifiable, direct, and unavoidable impact based on objective, identified written public health or safety standards, policies, or conditions." Developers, property owners, and permit applicants are advised that jurisdictions with insufficiently supported urgency ordinances are vulnerable to legal challenge under existing case law.

Sincerely,



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