Downzonings & Density Reductions

The Problem: State housing element law requires local governments to zone sufficient land to meet their fair share of the region's housing need. After they adopt their zoning plans and establish the density for a site, however, too many local governments, often yielding to neighborhood pressure, require or permit a reduction in density below that provided for by the local government's zoning plan. In some cases, localities have downzoned entire sections of their city in response to affordable housing proposals. Such density reductions undercut state housing element law and local planning goals, exacerbate the housing shortage and increase housing costs.

Findings Required: AB 2292 (Dutra) (Gov Code Section 65863) was signed into law, effective January 1, 2003, and requires local governments to make a finding that proposed residential density reductions (and downzonings) are consistent with the jurisdiction's general plan and housing element and with the density utilized by the state Department of Housing and Community Development in determining compliance with housing element law.

How The Law Works: If a locality has identified residential sites with sufficient density to easily exceed its fair share housing obligation, the locality should be able to reduce a site's density after making the required finding. If, however, a locality has not identified sites with sufficient density to meet its fair share obligation and cannot make the required finding, it may not approve a density reduction or downzoning. In such cases, localities have the option of either not reducing the density for the site or of amending its housing element and identifying alternative sites so that it continues to meet its fair share obligation.

No Net Loss: AB 2292 recognizes that there are circumstances in which market conditions or environmental or other factors make a density reduction appropriate. In such cases, AB 2292 explicitly permits a reduction of density provided the locality identifies alternative sites with sufficient density so that there is "no net loss" of residential capacity.

AB 2292 explicitly provides that: 1) it is the obligation of the local government, *not* the applicantt, pursuant to paragraph (c) of 65863, to identify alternative sites; 2) local governments are obligated, pursuant to paragraph (a) of 65863, to maintain its inventory of adequate sites throughout the planning period, and 3) the alternative sites to be upzoned must, pursuant to paragraph (c) of 65863, be "additional, adequate and available", which are terms of art in housing element law. Pursuant to these provisions, local governments must, in order to meet the "no net loss" test, first amend its housing element and upzone alternative sites prior to a downzoning or density reduction.

Attorneys Fees: AB 2292 also provides for an award of attorneys fees to project applicants if the court finds that a density reduction or downzoning was made illegally. Awards are limited to project applicants, although non-applicants may be entitled to attorney fees under the private attorney general doctrine. Awards are mandatory except in unusual circumstances in which the court finds that the award would not further the purposes of the law. The attorney fees provision sunsets four years following enactment of the statute, in order to give the Legislature time to assess the provision's effectiveness.

Monitoring Needed: AB 2292 was sponsored by the Realtors, Western Center and the CRLA Foundation. The League of Cities opposed the measure and since its enactment has suggested ways that local governments may undercut the bill's intent. Specifically, the League has suggested that cities deny density reductions unless *project applicants* identify alternative sites to be upzoned (contrary to the express provisions of the statute) and *indemnify* the local government against lawsuits. Housing advocates should carefully monitor local government implementation of this important measure and consider available remedies.