# City of Alameda • California

Date: February 8, 2018

To: Honorable Mayor and Members of the City Council

From: Janet C. Kern, City Attorney JCK
Celena H. Chen, Assistant City Attorney CHC

Re: Executive Summary of Memorandum regarding California Housing Laws

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This Executive Summary provides a high-level overview of how key California housing laws – the Housing Accountability Act, Housing Element Law, State Density Bonus Law, and SB 35 – apply to land use decisions in Alameda. A more in-depth analysis of each of these laws, as well as how the laws relate to the Encinal Terminals project and future projects, is included in the memorandum accompanying this Executive Summary.

**Housing Accountability Act (§ 65589.5).**[1] The Housing Accountability Act (HAA) applies to all "housing development projects" proposed in Alameda. It requires the City to approve applications for residential development, transitional and supportive housing, and residential mixed-use development that are consistent with its "objective" development standards without reducing the proposed density, unless the City makes specific findings related to "specific, adverse impacts" to public health and safety. Additional findings are required for the City to deny or reduce the density of affordable housing projects.

As a result, the HAA makes it very difficult for the City to deny or reduce the density of proposed projects that are consistent with the City's General Plan and Zoning Code. Moreover, projects that take advantage of the Density Bonus Law to increase the maximum density or modify otherwise-applicable development standards are considered "consistent" with the City's development standards for purposes of the HAA.

Accordingly, the Alameda Planning Board and City Council must carefully consider proposed residential projects and be prepared to approve the maximum allowable density on each parcel zoned for residential use, plus potential density bonuses up to 35 percent above the otherwise-allowable maximum density.

**Housing Element Law (§ 65580 *et seq.*).** State law requires Alameda to adopt a Housing Element as a component of the City's General Plan to demonstrate that it has adequate sites available to accommodate the City's Regional Housing Need Allocation (RHNA) for lower income, moderate income, and above-moderate income households.

A key component of the Housing Element is the local land inventory, which identifies specific sites that are available for housing development. Housing Element Law includes special protections for projects proposed on inventory sites, and it requires the City to maintain enough sites at appropriate zoning to accommodate the RHNA.

Exhibit 2
Item 7-C, 3/12/18
Planning Board Meeting

[1] All statutory references are to the California Government Code unless otherwise specified.

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Under state law, the California Department of Housing and Community Development (HCD) is responsible for reviewing the City's draft Housing Element and certifying that it complies with the Housing Element Law's requirements. HCD is also authorized to review subsequent City actions or inactions for consistency with the Housing Element and Housing Element Law, and it is empowered to de-certify the City's Housing Element or refer violations to the Attorney General's office. Therefore, it is important for the City to review development applications and other land use decisions for consistency with Housing Element Law and to avoid actions that could lead HCD to de-certify the Housing Element.

**Density Bonus Law (§ 65915 *et seq.*).** To further encourage housing development, state law includes a mandatory density bonus program. Under Density Bonus Law, if a project includes specified amounts of very-low-, low-, or in some cases, moderate-income housing, it is entitled to up to a 35 percent increase above the otherwise-applicable maximum density for the site.

In addition to the bonus units, projects using Density Bonus Law are entitled to reduced parking requirements and up to three regulatory incentives that result in actual and identifiable cost reductions to provide for the affordable housing. Moreover, the City is required to waive any development standards that would "physically preclude" the project from developing at the density allowed under the Density Bonus Law.

Density Bonus Law not only imposes a mandatory duty on the City, but also provides a means for applicants to enforce this duty through civil proceedings, and it authorizes attorneys' fees if a court finds that the refusal to grant a requested density bonus is in violation of the law.

**SB 35 (§ 65913.4).** SB 35 establishes a developer-initiated process to streamline the approval process for housing developments meeting specific criteria. Such housing projects will be eligible for ministerial approval, which means the project is exempt from environmental review under CEQA and will only be subject to "objective" planning standards.

For a project to be eligible for streamlined approval, the applicant must request review under the streamlining provisions, and the project must: (a) propose two or more multifamily units on a site in an urban area that is zoned or planned for residential or mixed-use development; (b) meet all objective planning standards; (c) meet affordable housing requirements (at least 50% of the units for lower-income households); and (d) meet labor requirements (projects with more than 10 units must pay prevailing wage, and projects with more than 75 units must use a "skilled and trained workforce").

Although SB 35 limits the City's ability to deny qualifying projects, it is not anticipated that many projects (apart from those developed by the Alameda Housing Authority) are likely to qualify for its provisions.

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Each of the above laws summarized above has numerous complex provisions, and this Executive Summary only touches on some of the laws' key provisions. Please refer to the accompanying memorandum and contact the City Attorney's Office for more information regarding the effects of these laws and their applicability to specific projects.

# City of Alameda • California

Date: February 8, 2018

To: Honorable Mayor and Members of the City Council

From: Janet C. Kern, City Attorney
Celena H. Chen, Assistant City Attorney

Re: Memorandum regarding California Housing Laws, Encinal Terminals Project, and Future Housing Project Decisions

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## I. Background

This memorandum responds to recent City Council questions regarding various housing-related laws and their applicability to the Encinal Terminals project, which was considered by the City Council on December 19, 2017. The purpose of this memorandum is to provide the City Council with an overview of the Housing Accountability Act, Housing Element Law, State Density Bonus Law, and SB 35 and to answer specific questions related to the Encinal Terminals project.

## II. Applicable California Housing Laws

There are many state laws designed to implement statewide objectives to facilitate the construction of housing for all income levels, including the Housing Accountability Act (HAA), Housing Element Law, Density Bonus Law, and SB 35. The Legislature's intent in enacting Density Bonus Law and the HAA in 1979 and 1982, respectively, and in expanding their provisions since then was to address the housing shortage crisis. The Legislature has more recently responded to the state's housing crisis by passing California's 2017 Housing Package, which includes SB 35 and became effective on January 1, 2018. Each of these laws applies to charter cities, and must be considered when reviewing and considering housing applications in Alameda. This memorandum also briefly addresses the "no net loss" statute, which currently applies only to general law cities and counties, but may become applicable to charter cities in the future.

### A. Housing Accountability Act (§ 65589.5[1])

#### 1. Key Provisions Applicable to All Housing Projects

The Housing Accountability Act (§ 65589.5) applies to ***all*** housing development projects, whether affordable, market rate, or mixed use, where at least two-thirds of the square footage is designated for residential use. The HAA restricts a city's ability to deny, reduce the density of, or make infeasible housing developments that are consistent with objective development standards, and puts the burden of proof on the city to justify any action to deny, reduce the density of, or make a housing project infeasible. § 65589.5(j)(1); *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066. The HAA is applicable to charter cities.

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Under the HAA, an applicant is entitled to the full density allowed by the zoning and/or General Plan provided that the project complies with all objective General Plan, zoning, and subdivision standards and provided that the full density proposed does not result in a specific, adverse impact on public health and safety that cannot be mitigated in any other way. § 65589.5(j)(1).

### a. Objective Standards

In evaluating project compliance with objective standards, a city must apply its development standards and policies "to facilitate and accommodate development at the density permitted on the site and proposed by the development." § 65589.5(f)(1). In Alameda, sites zoned with the MF (Multifamily Housing) designation allow up to 30 units to the acre pursuant to the MF zoning and General Plan Housing Element. With few exceptions, most of Alameda's other major residentially zoned sites allow up to 21 units to the acre pursuant to the site zoning and General Plan. Applicants that provide affordable housing or other specified public benefits can also increase the number of permitted units by up to 35 percent under State Density Bonus Law.

Examples of objective standards are those that are measurable and have clear criteria that are determined in advance, such as a numerical setback, height limit, universal design, lot coverage requirement, or parking requirement. Standards that are not objective include "neighborhood compatibility" or provisions in the Alameda Municipal Code (AMC) that are intended to preserve flexibility, such as the subjective "mixed use" requirement in the MX (Mixed Use) zoning designation that requires open space and another non-residential use in addition to a residential use. Subjective requirements are those that are not measurable, but open to discretion, and cannot be the basis for denying or reducing the density of a housing project.

### b. Specific, Adverse Impact to Public Health & Safety

A "specific, adverse impact" is one that is significant, quantifiable, direct and unavoidable, and based on an objective, identified written public health or safety standard or policy in effect at the time an application is deemed complete. §§ 65589.5(d)(2), (j)(1)(A). The inconvenience of parking shortages, or the inconvenience of traffic congestion and longer commute times are not "public health and safety" impacts.

If so desired, the City may be able to consider adopting additional written health and safety standards related to automobiles that could apply to future projects. For example, the City could review evidence related to respiratory problems for residents that are caused by degraded air quality resulting from traffic congestion. If the evidence warrants, the City could adopt a standard to prevent health impacts from pollution caused by congestion that it could apply when reviewing new car-generating uses, including proposed housing development projects.

## 2. Additional Findings Required To Deny Affordable Housing Projects

The HAA provides additional protections to affordable housing developments beyond those afforded to market rate developments, even if they do not comply with the City's objective standards. Affordable housing developments include those where at least 20 percent of the units are affordable to lower income households or 100 percent of the units are affordable to either moderate- or middle-income households. § 65589.5(h)(3). For these projects, additional findings must be made to deny the project, reduce the density, or add a condition making the project

infeasible. § 65589.5(d). In Alameda, these provisions would likely apply to most if not all Alameda Housing Authority projects, but very few for-profit development projects, which typically include about 13 to 15% affordable units.

### 3. Remedies

The HAA was recently amended to strengthen the penalties for failure to comply with the law. If a city improperly denies any housing project, whether market rate or affordable, the prevailing party in a lawsuit brought under the HAA is entitled to attorneys' fees. In addition, a city is subject to mandatory minimum fines of $10,000 per unit if it fails to comply with a court order to approve a project pursuant to the HAA. These penalties can increase to five times this amount if the court finds a city acted in bad faith. § 65589.5(k).

### 4. Implications

The HAA is essentially based upon the following concept: once a city makes a decision to zone a site for residential use, then it is accountable for permitting the owner of the property to develop at the maximum allowable density and within any objective, written standards in effect at the time an application is deemed complete. In Alameda, there are two major implications of this law:

a) The Alameda Planning Board and City Council must carefully consider when land is zoned for residential use and be prepared to approve the maximum allowable density on each parcel zoned for residential use, plus potential density bonuses up to 35 percent above the otherwise-allowable maximum density.

b) If the Planning Board or City Council seeks to deny or reduce the density of any housing development project, it must first identify any specific "applicable, objective" standards with which the project does not comply. If none can be found, the City may deny or reduce the density of the project ***only*** if it can find a "specific, adverse impact upon the public health and safety," as specified in Section 65589.5(j). Otherwise, the City cannot deny or reduce the density of the project.

   Therefore, the Alameda Planning Board and City Council cannot reduce the density in a proposed project based on concerns or findings that a housing development project is "too dense," that is does not fit in with "the character of the community," or that the project "has too many units which will cause too much traffic." The only way to reduce the density of a housing development project that complies with objective standards is to make findings supported by a preponderance of the evidence that the project would result in a specific adverse impact to public health and safety, based on a written, objective standard in effect at the time the application is complete, and that the impact can't be mitigated in any other way other than denying the project or reducing its density.

   Furthermore, the Planning Board and City Council cannot use subjective criteria to reduce the number of units in a project. For example, the MX zoning district requires that each project include open space and non-residential uses in addition to the residential uses. The Planning Board and City Council may use their discretion to require more open space or more commercial uses in an MX project, but they cannot use that subjective discretion in a way that would reduce the number of units in the project. Similarly, the Planning Board

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and City Council may use their discretion to require that a new roadway within the project be dedicated to the City as a public street, but cannot use that discretion as a basis to reduce the number of units in the project. In addition to constitutional limitations that require conditions of approval to have an essential nexus and rough proportionality between a project and the impact to be addressed, the City must be careful that its conditions of approval do not result in a density reduction or a de facto denial of a housing development project.

## B. Housing Element Law (§ 65580 *et seq.*)

Like every city and county in California, Alameda is required by state law to maintain a General Plan (§ 65300), which serves as the local "constitution" for all land use and land use-related decisions in Alameda. The California Legislature has determined that the provision of housing for all income levels is a matter of statewide importance, and that city and county zoning provisions play an important role in the state's ability to provide housing. For this reason, since 1969, California has required that every general plan must include a housing element to demonstrate how the jurisdiction can accommodate its share of regional growth, and the law requires that housing elements include an extensive amount of information about local land use regulations and zoning requirements that might restrict certain types of housing that is needed in California.

### 1. Site Inventory Requirements

Each city and county must demonstrate in its housing element that it has enough sites properly zoned for housing to allow its total Regional Housing Need Allocation (RHNA) to be built in the next five to eight years by including an inventory of land or list of sites that permit housing development. For each site, the inventory must list the number of housing units that can be accommodated on the site, given the zoning and other constraints. In other words, the mandated Housing Element land inventory must demonstrate that a city has enough land to accommodate the RHNA, and the Housing Element must show that the land on the inventory is zoned in a manner that allows the full range of housing types and facilitates and accommodates development of affordable housing.

In Alameda, with very few exceptions, the Alameda Planning Board and City Council have limited their rezoning of land for residential purposes to the amount of land necessary to meet the City's legal obligations under State Housing Element Law. Once a city zones enough land to accommodate its RHNA, the State Department of Housing and Community Development (HCD) relies on the Housing Accountability Act and other state laws to ensure that cities actually approve housing projects on the sites that have been zoned residential to accommodate their RHNA.

### 2. Realistic Capacity

Under state law, HCD is responsible for reviewing each city's draft Housing Element to determine if the proposed local land inventory adequately demonstrates that the city is able to provide for its RHNA. As part of HCD's review of both the 2007-2014 draft Alameda Housing Element and the 2015-2023 draft Alameda Housing Element, HCD required that the City of Alameda use a ratio to determine a "realistic housing capacity" for each site. HCD instructed the City to assume that future property owners and developers would not propose to develop their sites at the maximum density allowed by the zoning designation. HCD also instructed the City to assume that

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residentially zoned sites would result in a realistic capacity equivalent to 90% of the maximum allowed by the zoning and that mixed use zoned sites would result in a realistic capacity equal to 60% of the maximum density allowed by the zoning. It is important to note that the "realistic capacity ratios" are not established or required by state law; they were included at HCD's direction as a precondition to certifying the City's Housing Element to reflect HCD's estimate of how much land would need to be zoned for residential uses to accommodate buildout of the City's full RHNA.

Some members of the community contend that since HCD did not give the City credit for 100% of the density permitted on each site for the purpose of the Housing Element certification process, the City should therefore not be required to allow a developer to build to the maximum density permitted by the zoning. They claim that the City Council only needs to approve an amount equal to the "realistic capacity." However, this reasoning is incorrect because the City's zoning and entire General Plan, not the Housing Element's capacity estimate provided by HCD, establish a site's maximum density. As stated above, under the Housing Accountability Act, the City is prohibited from denying or reducing the density of any housing project that conforms with all objective general plan, zoning, and subdivision standards unless specific health and safety findings can be made. In other words, the Housing Element's "realistic capacity" establishes a floor for development, not a ceiling.

### 3. Enforcement

Recent amendments to Housing Element Law authorize increased enforcement by HCD. For example, HCD has explicit authority to revoke its original housing element compliance finding, and requires HCD to review any action or failure to act that it determines is inconsistent with either an adopted housing element or State Housing Element Law, such as a failure to complete a required rezoning or failure to implement programs identified in the City's Housing Element. HCD may refer the violation to the California Attorney General for potential action. In addition, HCD may also report any violations of the Housing Accountability Act, the "no net loss" statute, State Density Bonus Law, or anti-discrimination provisions to the Attorney General.

## C. Density Bonus Law (§ 65915 *et seq.*)

State law imposes a mandatory density bonus program (§§ 65915-65918) that requires a city to permit the construction of additional residential units, and, if requested by the applicant, provide reduced parking standards, regulatory incentives/concessions, and waivers to developers who agree to build a certain percentage of affordable housing that meets the statutory criteria. § 65915(b)(1). The purpose of density bonus law is to encourage and provide incentives to developers to include low- and moderate-income housing units in their developments. *Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933, 940-941.

Density bonus law was amended in 2016 (effective January 1, 2017) to explicitly state that the law must be interpreted liberally to produce the maximum number of housing units. § 65915(r). The amendments also clarify that each component of any density bonus calculation resulting in a fractional unit must be rounded up to the next highest whole number, including the base density, the number of bonus units, and the number of affordable units required to be eligible for a density bonus. § 65915(q).

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Every city in California, including every charter city, is required to implement the State Density Bonus Law. Alameda's density bonus ordinance was adopted in 2009, and is codified in AMC section 30-17. To the extent Alameda's density bonus ordinance includes any provisions that are inconsistent with state law, those provisions would be preempted.

1. **Base Density Calculation**

The first step in a density bonus calculation is to determine the base density, which is the "otherwise maximum allowable ***gross*** residential density ***as of the date of application***." § 65915(f) (emphasis added). For density bonus projects that are providing on-site affordable housing, base density is based on "gross residential density" (i.e., the entire site, including those portions of the site that might otherwise be netted out because of development constraints). In other words, the site area should not be reduced to account for open space, topography, or other non-buildable features. In comparison to the affordable housing density bonus, Section 65915(g) provides a density bonus in exchange for land donation, defined as an "increase above the otherwise maximum allowable residential density," but leaves out the term "gross." The Legislature's use of the term "gross" when describing residential density in Section 65915(f), reflects its intent that the entirety of the site be utilized in calculating the base density for density bonus projects that are providing on-site affordable housing.

The "maximum allowable residential density" means the density allowed under the zoning ordinance and land use element of the general plan. § 65915(o)(2). Where the density allowed under the zoning ordinance is inconsistent with the general plan, the general plan prevails; courts have held that zoning ordinances that permit higher base density than the general plan land use designation should be used to calculate base density when a city finds the zoning consistent with the general plan. § 65915(o)(2); *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329.

In Alameda, the maximum residential density allowed on each of the General Plan Housing Element Housing Opportunity Sites can be found in the AMC zoning designation for each site. Sites with the MF zoning designation have a maximum residential density of 30 units to the acre as the base density, which can be increased to 41 units per acre with a maximum density bonus of 35%.

2. **Density Bonus Incentives Available to Qualifying Projects**

Once the applicant and City determine the maximum allowable gross residential density, the next step is to determine whether the proposed number of affordable deed-restricted units qualifies the project for a density bonus. Density bonus projects potentially qualify for an up to 35% increase in density, depending on the percentage of affordable units provided. Density bonus law also requires reduced parking requirements for projects that qualify for a density bonus even if a developer does not request a density bonus, incentives/concessions, or waivers, and further reduces vehicular parking ratios if a project is located within one-half mile of a major transit stop with "unobstructed access." § 65915(p).

In addition to density bonuses and parking reductions, applicants who provide the required amount of affordable housing may request various zoning modifications (defined as "incentives and concessions" or "waivers"). Incentives and concessions are modifications to development standards or regulations that result in "identifiable and actual cost reductions" to provide affordable

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housing (§ 65915(d), (k)), and waivers are reductions in development standards that would physically preclude the construction of the project with the density bonus or incentives and concessions to which a project is entitled (§ 65915(e)). Both can be used to obtain changes in development standards, including (without limitation) reduced setbacks, reduced on-site open space requirements, higher buildings, and additional floor area ratio, without a variance, rezoning, or other discretionary approval. § 65915(o)(1). Although there are no grounds in the statute to deny a developer's request for a density bonus, the law does contain specific findings by which incentives, concessions and waivers may be denied.

### 3. Enforcement

State law not only imposes a mandatory duty on the City, but also provides a means for developers to enforce this duty through civil proceedings, and authorizes attorneys' fees if a court finds that the refusal to grant a requested density bonus is in violation of the law. §§ 65915(d)(3), (e)(1).

### 4. Relationship to Housing Accountability Act

When considering a project that has invoked State Density Bonus Law provisions, the Planning Board and City Council are further restricted from using their discretionary land use authority to reduce the number of units in the project beyond the restrictions of the Housing Accountability Act. Under the HAA, the Planning Board and City Council may enforce "objective standards" such as an existing height limit or setback standards to reduce the number of units in a project. However, the HAA specifically provides that the receipt of a density bonus "shall not constitute a valid basis on which to find a proposed housing development project inconsistent, not in compliance, or not in conformity" with objective City standards. § 65589.5(j)(3). That means if a project qualifies for a density bonus under State Density Bonus Law, the Planning Board and City Council must waive that objective standard if the standard is preventing the project from taking full advantage of its density bonus (i.e., the maximum number of units permitted by the zoning with the required bonus units).

## D. Application of State Law to Encinal Terminals Project

On December 19, 2017, the City Council declined to approve a Tidelands Exchange and Development Agreement proposed by North Waterfront Cove, LLC, which among other provisions, included a Master Plan and Density Bonus application for up to 589 housing units. Since the City Council did not approve the Tidelands Exchange and Development Agreement, it did not need to take action on the Master Plan and Density Bonus Application. However, it should be anticipated that the applicant will return to the City Council with a Master Plan and Density Bonus Application (and without a Tidelands Agreement and Development Agreement). More specific analysis related to the application of state law to the Encinal Terminals project is included in Appendix A.

## E. SB 35 (§ 65913.4)

SB 35 (§ 65913.4), which became effective on January 1, 2018, requires cities and counties to use a streamlined ministerial review process for multifamily housing developments that comply with the jurisdiction's "objective" planning standards and that meet other specific criteria. SB 35 provides for a developer-initiated process and is applicable to charter cities. If SB 35 applies to a

project, its review will be limited to compliance with objective standards published before submission of the development application. In addition, the project will be exempt from environmental review under the California Environmental Quality Act and subject to limited parking requirements (i.e., one parking space per unit maximum).

1. **Is Jurisdiction Subject to SB 35?**

A city is subject to SB 35 streamlining if HCD determines (1) it has not issued enough building permits to satisfy its RHNA by income category for that reporting period, or (2) it has not submitted its required annual report to HCD for at least 2 consecutive years. Alameda will be subject to SB 35 because it has not issued enough building permits to meet its RHNA allocation for low- and very low- income households; however, to invoke SB 35 in 2018, an applicant will be required to reserve at least 50 percent of a project's total units as affordable housing to households making below 80 percent of the area median income.

2. **Is Project Eligible for Streamlining?**

For a project to be eligible for streamlined approval, the applicant must request review under the streamlining provisions, and the project must: (a) propose two or more multifamily units in an urban area, zoned or planned for residential or mixed-use development; (b) meet all objective planning standards; and (c) meet affordable housing and labor requirements (prevailing wage or a "skilled and trained workforce").

3. **Do Site Exclusions Apply?**

If the project meets the qualifications above, it may be eligible for streamlining if no exclusions apply. Relevant exclusions include the following: (1) the site must not have contained housing occupied by tenants within the last 10 years; (2) the site must not be in the coastal zone, agricultural land, wetlands, fire hazard zones, hazardous waste sites, former mobilehome park, floodplain, floodway, fault zone, or other specified areas; and (3) the project may not involve a subdivision unless it is financed with low income housing tax credits and pays prevailing wage or satisfies all labor requirements.

4. **Implications**

Based upon discussions with local housing developers, staff anticipates that SB 35's requirement that the project include a prevailing wage requirement, which results in increased construction costs, will discourage most private, for profit, housing developers from pursuing streamlining under SB 35. Similarly, SB 35's affordable housing requirement, which also increases project costs, will discourage most private for profit developers from pursuing streamlining under SB 35, particularly as long as projects must reserve 50 percent of their total units for lower income households.

City staff anticipates that the prevailing wage and affordable housing requirements will not be a major obstacle to use SB 35 for affordable housing developers, such as the Alameda Housing Authority. Finally, some smaller private for profit projects (less than 10 unit projects) may choose to take advantage of SB 35, because SB 35 does not require these projects conform to the labor wage requirements, although the affordability requirements would continue to apply to such

projects as long as the City continues to issue enough building permits to accommodate its RHNA for above-moderate income households.

### F. "No Net Loss" Statute (§ 65863)

Currently, the "no net loss" statute (§ 65863) is only applicable to general law cities, and has not been made applicable to charter cities. However, the statute is briefly addressed in this memorandum as it could become applicable to charter cities in the future.

The "no net loss" statute applies to all development on sites listed in the Housing Element. Cities and counties subject to the provision must make "no net loss" findings if projects are approved on housing element sites with either fewer units or a different income category than shown in the housing element. If a site is identified as being suitable for lower- or moderate-income housing is developed with market-rate units (even with the same number of units as shown in the housing element), the local government must either make a written finding (including unmet need and the remaining capacity of sites by income level) that other sites shown in the housing element are adequate to meet the RHNA for lower- or moderate-income housing, as applicable; or identify "additional, adequate, and available sites" within 180 days so that there is "no net loss" of site available for affordable housing development.

## III. Conclusion

Each of the above laws has numerous complex provisions, and this memorandum only provides highlights. Please contact the City Attorney's Office for more information regarding the effects of these laws and their applicability to specific projects. As new housing projects are proposed in Alameda, staff will provide updates and analysis in the staff reports related to application of state law to the proposed project.

Attachment: Appendix A

cc: Jill Keimach, City Manager
Liz Warmerdam, Assistant City Manager
Debbie Potter, Community Development Director
Andrew Thomas, Assistant Community Development Director
Sarah Henry, Public Information Officer
Vanessa Cooper, Executive Director, Alameda Housing Authority

## APPENDIX A

Below are questions and responses applying state housing laws to the Encinal Terminals project.

***Question 1: How will the total number of units permitted be calculated at Encinal Terminals?***

If the project qualifies for a density bonus and is otherwise consistent with the zoning and General Plan, the maximum allowable residential density would be calculated as follows:

- The developer owns 15.48 acres zoned within the MF overlay, which allows 30 units/acre. 15.48 acres x 30 units/acre = 464.4 units, rounded up to 465 units
- The developer owns 1.25 acres zoned MX, which allows 21.78 units/acre. 1.25 acres x 21.78 units/acre = 27.2 units, rounded up to 28 units
- In combination, the zoning on the two parcels permits a maximum allowable residential base density of 493 units. 465 + 28 = 493 units

If the developer proposes that 5% of the 493 units will be available to very low-income households, the project will qualify for a 20% density bonus. A maximum allowable residential density of 493 with a 20% density bonus results in 591.6 units, rounded up to 592. If the developer proposes more than 5% of the 493 units for very low-income households, a larger bonus will be required, up to a maximum bonus of 35%.

Some members of the community assert that the density bonus should be based upon the "net residential land" available at Encinal Terminals, by deducting land owned by the property owner at the time of application that is planned to be used by the applicant for streets, parks, commercial or other non-residential uses. As described in Section II.C. of the Memorandum, this interpretation is in conflict with state law. For density bonus projects that are providing on-site affordable housing, the base density is calculated by multiplying the total acreage that is zoned residential ("gross residential density") by the number of units per acre allowed by the zoning district. For example, if 10 acres are zoned MF (30 units/acre), and the applicant uses 3 acres of the site for non-residential uses (e.g., open space, streets, commercial, etc.), that does not mean that the allowable density is calculated using the remaining 7 acres to be used for housing. The maximum allowable residential density would be 300 units (10 acres x 30 units/acre).

***Question 2: Is the project "entitled" to 592 dwelling units?***

As calculated above, if the applicant invokes State Density Bonus Law, and the project is otherwise consistent with the zoning and General Plan, and provides a certain percentage of affordable housing that meets the statutory criteria, the City must grant a density bonus under state law above the 493 dwelling units to which it is entitled as the base density. Pursuant to state law, the bonus may be as little as 5% or as large as 35%. State law provides that the developer may elect a lesser percentage of density increase, including no increase in density, but the City cannot require a lesser percentage or no increase in density.

If the project complies with objective planning standards, notwithstanding any standards that are modified or waived under the Density Bonus Law, then under the HAA, the City may only deny the project or reduce its density if it makes the public health and safety findings described in Section II.A. of the Memorandum.

***Question 3: If the City Council seeks to increase the amount of commercial development at Encinal Terminals, does this alter/reduce the density calculation?***

AMC section 30-4.20 provides the City Council with flexibility to determine the appropriate mixture of land uses for properties in the MX zone, including residential, retail, offices, recreational, and other related uses. However, under the HAA, an applicant is entitled to the full density (including density under State Density Bonus Law) allowed by the zoning and/or General Plan provided that the project complies with all objective standards unless the full density proposed results in a specific, adverse impact on public health and safety that cannot be mitigated in any other way. For Encinal Terminals, the City Council may increase the amount of commercial development, however, it may not reduce the residential density in doing so.

***Question 4: Is the 1.25-acre site zoned MX a site that can actually accommodate housing units? Does this alter/reduce the base density calculation?***

The 1.25-acre site can accommodate housing units. The MX zoning allows up to 21.78 residential units per acre. Although the MX zoning does not include specified setbacks, height limits, or minimum unit sizes, any new housing unit would need to comply with the requirements of the California Building Code, which allows for very small living units and construction of a living unit adjacent to a property line. Therefore, it would be possible to place 14 small duplexes for a total of 28 units on the 1.25-acre site.

More importantly, whether a parcel is "developable" does not reduce the maximum allowable residential density. State law defines "maximum allowable residential density" to mean the density allowed under the zoning ordinance and Land Use Element of the General Plan, and requires that Density Bonus Law be interpreted liberally in favor of producing the maximum number of total housing units. The applicant's maximum allowable residential density is calculated at the time of application, using the entirety of the site zoned to allow residential uses.

***Question 5: Can the City Council downzone a property to reduce the unit count of a proposed project?***

Once a housing development application is complete, the HAA requires the City to review the application based on the standards in place at that time. § 65589.5(j)(1). In other words, the City cannot downzone a property to permit fewer units after it receives a complete application to develop housing on that property; it can only reduce the density if the project does not comply with the City's objective standards or if the City makes the findings specified in the HAA.

In addition, even though the "no net loss" statute does not currently apply to Alameda because it is a charter city, the City must also take care before downzoning any sites that are specifically discussed in the Housing Element or identified in its Housing Element Site Inventory. HCD is now authorized to review the City's actions and inactions for consistency with the Housing Element. If the City were to downzone a site, and that action brought its Housing Element out of compliance, HCD would have the power to decertify the City's Housing Element and refer state law violations to the Attorney General for enforcement. Therefore, if the City were to consider downzoning properties in advance of receiving a complete application, it should make sure that its actions do not bring its Housing Element out of compliance with state law.