To: Honorable Mayor and Members of the City Council

From: Dee Williams-Ridley, City Manager

Submitted by: Zach Cowan, City Attorney

Subject: Housing Accountability Act

INTRODUCTION
At its meeting on November 14, 2016, the Agenda Committee requested a report on the Housing Accountability Act (Gov. Code § 65589.5; Attachment 1).

CURRENT SITUATION AND ITS EFFECTS
The City reviews and acts on many applications every year for development projects, including many residential and mixed-use projects. The Housing Accountability Act constrains the City’s discretion with respect to some of these projects.

BACKGROUND
The Housing Accountability Act was originally enacted in 1982 and has been amended a number of times over the years. The original legislation, now designated as subdivision (j) of Section 65589.5 now reads:

(j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a “specific, adverse impact” means 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 complete.
(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.\(^1\)

For purposes of Section 65589.5, “housing development project” means a use consisting of residential units as well as mixed-use developments, provided that nonresidential uses are limited to “neighborhood commercial” uses and to the first floor of buildings that are two or more stories. “Neighborhood commercial” is defined as “small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood.” “Housing development project” also includes “transitional housing or supportive housing”.

In addition, “disapproving” a development project includes denying approval as well as failing to comply with the Permit Streamlining Act (Gov. Code §§ 65950 et seq.)

Senator Greene, the author of the bill, stated that the intent of the legislation was to address the “problems in some cases where local governments adopt housing policies and then fail to comply with their own policies when specific projects are at stake. Presently, there is no effective remedy for the proponents of such a project. The obvious problem is that when developers of housing cannot rely on housing policies in proposing projects, then substantial uncertainty is created.”

Other provisions of Section 65589.5 apply more specifically to projects containing below-market rate units (see subds. (d) and (k))\(^2\), but we focus here on the more generally-applicable provision, subdivision (j).

Since its adoption in 1982, Section 65589.5(j) has been largely ignored. In part this was due to a belief that despite its language it only applied to projects that included below market rate units. This notion was effectively put to rest in Honchariw v. County of Stanislaus (2011)200 Cal.App.4th 1066, 1074-76.

Subject to limited exceptions discussed below, Section 65589.5(j) requires local governments to approve any “housing development project”, including specified mixed-use projects, if they comply with “applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete…”

As Honchariw explained, this language was intended to “tak[e] away an agency’s ability to use what might be called a ‘subjective’ development ‘policy’ (for example,

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\(^1\) The current language closely reflects the original language, but there have been some amendments to it as well.

\(^2\) These were discussed in a May 7, 2002, information report to the Council (Attachment 2.)
‘suitability’)” to deny a project or reduce it in density. Id. With respect to design review standards, the court went on to “interpret that phrase to mean design review standards that are part of ‘applicable, objective general plan and zoning standards and criteria.’” Id. at 1077.

The City’s general plan and zoning ordinance contain “objective general plan and zoning standards and criteria”, such as lot development standards and in some cases density or building intensity standards. Section 65589.5(j) does not override these lot development standards; nor does it compel approval of projects that require discretionary approvals to exceed these standards, such as reductions in setbacks or additional stories. Rather, it overrides the use of policies like neighborhood compatibility or detriment when a project complies with all applicable lot development standards.

Under Section 65589.5(j), a housing development project may be disapproved or reduced in density only if there is no other way to “satisfactorily mitigate or avoid” a “specific, adverse impact upon the public health or safety”. A “specific, adverse impact” “means 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 complete.” It is important to note that the reference to “health or safety” standards is much narrower than the typical “health, safety and welfare” basis for general police power regulations. The City does not have such standards that are typically applicable to housing development projects.

A few possible approaches to addressing the potential impacts of Section 65589.5(j) are:

- Amend the General Plan and Zoning Ordinance to adopt numerical density and/or building intensity standards that can be applied on a parcel-by-parcel basis in an easy and predictable manner. These would constitute reliable and understandable “objective general plan and zoning standards” that would establish known maximum densities. This could be done across the board or for specified districts.
- Devise and adopt “objective, identified written public health or safety standards” applicable to new housing development projects.
- Adopt “design review standards that are part of ‘applicable, objective general plan and zoning standards and criteria’”.

ENVIRONMENTAL SUSTAINABILITY
No effect; compliance is mandated by statute.

POSSIBLE FUTURE ACTION
The Council may wish to revisit relevant zoning and/or general plan provisions.

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3 Lot development standards include such things as setbacks, FAR limits, height limits, and parking requirements.
FISCAL IMPACTS OF POSSIBLE FUTURE ACTION
No action is required. If the Council wishes to revisit zoning and/or general plan provisions, the cost could be substantial.

CONTACT PERSON
Zach Cowan, City Attorney, 981-6950

Attachments:
1: Government Code section 65589.5
2: May 7, 2002 Information Report
State of California

GOVERNMENT CODE

Section 65589.5

65589.5. (a) The Legislature finds and declares all of the following:

(1) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.

(2) California housing has become the most expensive in the nation. The excessive cost of the state’s housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.

(3) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.

(4) Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for housing projects.

(b) It is the policy of the state that a local government not reject or make infeasible housing developments, including emergency shelters, that contribute to meeting the need determined pursuant to this article without a thorough analysis of the economic, social, and environmental effects of the action and without complying with subdivision (d).

(c) The Legislature also recognizes that premature and unnecessary development of agricultural lands for urban uses continues to have adverse effects on the availability of those lands for food and fiber production and on the economy of the state. Furthermore, it is the policy of the state that development should be guided away from prime agricultural lands; therefore, in implementing this section, local jurisdictions should encourage, to the maximum extent practicable, in filling existing urban areas.

(d) A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (h) of Section 50199.7 of the Health and Safety Code, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon substantial evidence in the record, as to one of the following:
(1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation pursuant to Section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by Section 65008. If the housing development project includes a mix of income categories, and the jurisdiction has not met or exceeded its share of the regional housing need for one or more of those categories, then this paragraph shall not be used to disapprove or conditionally approve the project. The share of the regional housing need met by the jurisdiction shall be calculated consistently with the forms and definitions that may be adopted by the Department of Housing and Community Development pursuant to Section 65400. In the case of an emergency shelter, the jurisdiction shall have met or exceeded the need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. Any disapproval or conditional approval pursuant to this paragraph shall be in accordance with applicable law, rule, or standards.

(2) The development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a “specific, adverse impact” means 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 complete. Inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety.

(3) The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(4) The development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.

(5) The development project or emergency shelter is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article.

(A) This paragraph cannot be utilized to disapprove or conditionally approve a housing development project if the development project is proposed on a site that is identified as suitable or available for very low, low-, or moderate-income households
in the jurisdiction’s housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation.

(B) If the local agency has failed to identify in the inventory of land in its housing element sites that can be developed for housing within the planning period and are sufficient to provide for the jurisdiction’s share of the regional housing need for all income levels pursuant to Section 65584, then this paragraph shall not be utilized to disapprove or conditionally approve a housing development project proposed for a site designated in any element of the general plan for residential uses or designated in any element of the general plan for commercial uses if residential uses are permitted or conditionally permitted within commercial designations. In any action in court, the burden of proof shall be on the local agency to show that its housing element does identify adequate sites with appropriate zoning and development standards and with services and facilities to accommodate the local agency’s share of the regional housing need for the very low and low-income categories.

(C) If the local agency has failed to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit, has failed to demonstrate that the identified zone or zones include sufficient capacity to accommodate the need for emergency shelter identified in paragraph (7) of subdivision (a) of Section 65583, or has failed to demonstrate that the identified zone or zones can accommodate at least one emergency shelter, as required by paragraph (4) of subdivision (a) of Section 65583, then this paragraph shall not be utilized to disapprove or conditionally approve an emergency shelter proposed for a site designated in any element of the general plan for industrial, commercial, or multifamily residential uses. In any action in court, the burden of proof shall be on the local agency to show that its housing element does satisfy the requirements of paragraph (4) of subdivision (a) of Section 65583.

(e) Nothing in this section shall be construed to relieve the local agency from complying with the congestion management program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7 or the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(f) (1) Nothing in this section shall be construed to prohibit a local agency from requiring the development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction’s share of the regional housing need pursuant to Section 65584. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development.
(2) Nothing in this section shall be construed to prohibit a local agency from requiring an emergency shelter project to comply with objective, quantifiable, written development standards, conditions, and policies that are consistent with paragraph (4) of subdivision (a) of Section 65583 and appropriate to, and consistent with, meeting the jurisdiction’s need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. However, the development standards, conditions, and policies shall be applied by the local agency to facilitate and accommodate the development of the emergency shelter project.

(3) This section does not prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the development project or emergency shelter.

(g) This section shall be applicable to charter cities because the Legislature finds that the lack of housing, including emergency shelter, is a critical statewide problem.

(h) The following definitions apply for the purposes of this section:

(1) “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.

(2) “Housing development project” means a use consisting of any of the following:

(A) Residential units only.

(B) Mixed-use developments consisting of residential and nonresidential uses in which nonresidential uses are limited to neighborhood commercial uses and to the first floor of buildings that are two or more stories. As used in this paragraph, “neighborhood commercial” means small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood.

(C) Transitional housing or supportive housing.

(3) “Housing for very low, low-, or moderate-income households” means that either (A) at least 20 percent of the total units shall be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of this code. Housing units targeted for lower income households shall be made available at a monthly housing cost that does not exceed 30 percent of 60 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the lower income eligibility limits are based. Housing units targeted for persons and families of moderate income shall be made available at a monthly housing cost that does not exceed 30 percent of 100 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the moderate-income eligibility limits are based.

(4) “Area median income” means area median income as periodically established by the Department of Housing and Community Development pursuant to Section 50093 of the Health and Safety Code. The developer shall provide sufficient legal commitments to ensure continued availability of units for very low or low-income households in accordance with the provisions of this subdivision for 30 years.
(5) “Disapprove the development project” includes any instance in which a local
agency does either of the following:

(A) Votes on a proposed housing development project application and the
application is disapproved.

(B) Fails to comply with the time periods specified in subdivision (a) of Section
65950. An extension of time pursuant to Article 5 (commencing with Section 65950)
shall be deemed to be an extension of time pursuant to this paragraph.

(i) If any city, county, or city and county denies approval or imposes restrictions,
including design changes, a reduction of allowable densities or the percentage of a
lot that may be occupied by a building or structure under the applicable planning and
zoning in force at the time the application is deemed complete pursuant to Section
65943, that have a substantial adverse effect on the viability or affordability of a
housing development for very low, low-, or moderate-income households, and the
denial of the development or the imposition of restrictions on the development is the
subject of a court action which challenges the denial, then the burden of proof shall
be on the local legislative body to show that its decision is consistent with the findings
as described in subdivision (d) and that the findings are supported by substantial
evidence in the record.

(j) When a proposed housing development project complies with applicable,
objective general plan and zoning standards and criteria, including design review
standards, in effect at the time that the housing development project’s application is
determined to be complete, but the local agency proposes to disapprove the project
or to approve it upon the condition that the project be developed at a lower density,
the local agency shall base its decision regarding the proposed housing development
project upon written findings supported by substantial evidence on the record that
both of the following conditions exist:

(1) The housing development project would have a specific, adverse impact upon
the public health or safety unless the project is disapproved or approved upon the
condition that the project be developed at a lower density. As used in this paragraph,
a “specific, adverse impact” means 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 complete.

(2) There is no feasible method to satisfactorily mitigate or avoid the adverse
impact identified pursuant to paragraph (1), other than the disapproval of the housing
development project or the approval of the project upon the condition that it be
developed at a lower density.

(k) The applicant or any person who would be eligible to apply for residency in
the development or emergency shelter may bring an action to enforce this section. If,
in any action brought to enforce the provisions of this section, a court finds that the
local agency disapproved a project or conditioned its approval in a manner rendering
it infeasible for the development of an emergency shelter, or housing for very low,
low-, or moderate-income households, including farmworker housing, without making
the findings required by this section or without making sufficient findings supported
by substantial evidence, the court shall issue an order or judgment compelling
compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the development project or emergency shelter. The court shall retain jurisdiction to ensure that its order or judgment is carried out and shall award reasonable attorney’s fees and costs of suit to the plaintiff or petitioner who proposed the housing development or emergency shelter, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section. If the court determines that its order or judgment has not been carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of this section are fulfilled, including, but not limited to, an order to vacate the decision of the local agency, in which case the application for the project, as constituted at the time the local agency took the initial action determined to be in violation of this section, along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects, shall be deemed approved unless the applicant consents to a different decision or action by the local agency.

(l) If the court finds that the local agency (1) acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section and (2) failed to carry out the court’s order or judgment within 60 days as described in subdivision (k), the court, in addition to any other remedies provided by this section, may impose fines upon the local agency that the local agency shall be required to deposit into a housing trust fund. Fines shall not be paid from funds that are already dedicated for affordable housing, including, but not limited to, redevelopment or low- and moderate-income housing funds and federal HOME and CDBG funds. The local agency shall commit the money in the trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low, very low, or low-income households. For purposes of this section, “bad faith” shall mean an action that is frivolous or otherwise entirely without merit.

(m) Any action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure, and the local agency shall prepare and certify the record of proceedings in accordance with subdivision (c) of Section 1094.6 of the Code of Civil Procedure no later than 30 days after the petition is served, provided that the cost of preparation of the record shall be borne by the local agency. Upon entry of the trial court’s order, a party shall, in order to obtain appellate review of the order, file a petition within 20 days after service upon it of a written notice of the entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant.

(n) In any action, the record of the proceedings before the local agency shall be filed as expeditiously as possible and, notwithstanding Section 1094.6 of the Code of Civil Procedure or subdivision (m) of this section, all or part of the record may be prepared (1) by the petitioner with the petition or petitioner’s points and authorities, (2) by the respondent with respondent’s points and authorities, (3) after payment of
costs by the petitioner, or (4) as otherwise directed by the court. If the expense of preparing the record has been borne by the petitioner and the petitioner is the prevailing party, the expense shall be taxable as costs.

(o) This section shall be known, and may be cited, as the Housing Accountability Act.

(Amended by Stats. 2015, Ch. 349, Sec. 2. (AB 1516) Effective January 1, 2016.)
To:       Honorable Mayor and
         Members of the City Council

From:    Weldon R. Riehl, City Manager

Subject: 2517 SACRAMENTO STREET APPEAL – USE PERMIT #01-10000085 - PUBLIC
         HEARING - SUPPLEMENTAL REPORT

STATUS:

California Health and Safety Code section 65589.5 likely applies to the 2517 Sacramento Street project.

BACKGROUND:

California Health and Safety Code Section 65589.5 states that a “housing development project” which meets certain requirements for inclusion of low and moderate income housing shall not be disapproved or conditioned in a manner which renders the project infeasible for the use of low and moderate income households unless the local agency can make findings, based on substantial evidence in the record, that one of the following applies:

(1) the jurisdiction has adopted a housing element and that this project is not needed to meet its share of the regional housing needs;

(2) the project would have a specific, adverse impact upon the public health or safety and there is no feasible alternative to mitigate the impact without rendering the project unaffordable to low and moderate income households;

(3) the denial or conditioning of the project is required by state or federal law and there is no feasible alternative to comply with this law without rendering the project unaffordable to low and moderate income households;

(4) approval of the project would increase the concentration of lower income households in a neighborhood that already has a disproportionately high number of lower income households and there is no feasible method of approving the development for a different site without rendering the project unaffordable to low and moderate income households;

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1 As a practical matter, all projects which are subject to Berkeley’s inclusionary ordinance meet the requirements for provision of low and moderate income housing described in this section.
(5) the project is proposed for land zoned for agriculture or resource preservation which is surrounded on at least two sides by land being used for agriculture or resource preservation purposes or which does not have adequate water or wastewater facilities to serve the project; or

(6) the project is inconsistent with the jurisdiction’s zoning ordinance and general plan land use designation and the jurisdiction has adopted a housing element.

1. Application to the 2517 Sacramento Street Project

The 2517 Sacramento Street project is arguably subject to Section 65589.5 since it meets the City’s inclusionary requirements and, therefore, meets the standards of provision of low income housing of this section as well. In addition, none of the above findings could be made based on substantial evidence in the record with regard to this project.

Previously, a similar mixed-use project (2700 San Pablo) was proposed and it too met the City’s inclusionary requirements and none of the findings could have been made in that case either. Consequently, the developer of the San Pablo project argued that this section applied to his proposal. Conversely, the opponents’ attorney argued that this section did not apply because it proposed a mixed-use project including commercial as well as residential development. In response, the developer argued that mixed-use projects are not exempt from the requirements of Section 65589.5. Unfortunately, there is no clear answer to this question since the term “housing development project” is not defined.

2. Legislative History

Without clear statutory language, courts will look to the legislative history to interpret the meaning of a statute. Therefore, the City Attorney’s Office reviewed the legislative history of this section to attempt to determine if the legislature intended to include mixed-use developments in the definition.

Regrettably, the legislative history does not provide much guidance. The only fact it clearly establishes is that the legislature gave no consideration to the matter. In fact, a lobbyist from the California League of Cities who was involved in negotiations on the passage of the bill remembered that she had suggested that the term needed to be defined and the legislators discounted this suggestion.

The legislation was proposed in response to the rejection of a low income housing project in San Diego. San Diego had adopted a housing element as required by law. The proposed project was a 74 unit development without commercial or other uses proposed. However, it needed a density bonus to render it feasible. Apparently, it met all the requirements for a density bonus, but was rejected because adjacent homeowners and flower growers did not want the site used for low income housing.

Senator Greene, the author of the bill, stated that the intent of the legislation was to address the “problems in some cases where local governments adopt housing policies and then fail to comply with their own policies when specific projects are at stake. Presently, there is no effective remedy for the proponents of such a project. The obvious problem is that when developers of housing cannot rely on housing policies in proposing projects, then substantial uncertainty is created. The result in additional delay and cost adds to the final cost of housing to the consumer.”
Thus, this type of evidence in the legislative history establishes that the bill was authored in response to a housing development project, which consisted only of residential housing, being rejected by a County which adopted a housing element that identified it needed this exact type of housing to meet the regional needs of low income housing. There is no evidence in the record that the author intended it to apply to mixed-use developments. On the other hand, there is no evidence in the legislative history that it was intended to apply to projects containing housing exclusively.

3. Other Definitions of “Housing Development Project” in California Law

Since neither the law nor its legislative history gives a clear indication as to whether mixed-use projects were intended to be included within the definition of “housing development project”, the City Attorney’s Office looked to other California statutes which define this term for guidance.2

The only section found which deals with the issue is California Health and Safety Code Section 50073.3 This section states:

"Housing development", for the purpose of housing assisted by the department, means any work or undertaking of new construction or rehabilitation, or the acquisition of existing residential structures in good condition, for the provision of housing which is financed pursuant to the provisions of this division for the primary purpose of providing decent, safe, and sanitary housing for persons and families of low or moderate income. A housing development may include nonhousing facilities, such as administrative, community, health, recreational, educational, commercial facilities, and child-care facilities which the agency determines are an integral part of a housing development or developments.

This section relates to housing developments which are financed through the California Housing Finance Agency (CHFA). The City Attorney’s Office contacted the legal department for this agency regarding their interpretation of the definition. The City Attorney’s Office was told that “for the primary purpose of providing housing for persons and families of low or moderate income” meant that at least 51% of the units of any development would qualify as low and/or moderate income housing.

It was also explained that, although the definition allows the agency to finance projects which include commercial facilities “integral to a housing development”, as a practical matter, this never occurs. CHFA can structure what it considers a “development” by the type of financing it provides. The CHFA attorneys asserted that the agency never finances the commercial part of any development and, therefore, they have never had to interpret the meaning of “integral” to a housing development. As a result, this definition does not shed any light on whether Section 65589.5 includes mixed-use developments.

2 Courts have held that “Generally, identical words in different parts of the same act or in different statutes relating to the same subject matter are construed as having the same meaning.” (Chandis Securities Co. v. City of Dana Point (1996) 52 Cal.App.4th 475, 486 citing Dept. of Revenue of Ore. v. ACF Industries, Inc. (1994) 510 U.S. 332, 341.)

3 The 2700 San Pablo project applicant has provided a letter from State Senator Richard Alarcon concluding that a mixed-use housing project which consists of one floor of commercial space and several stories of housing units is a “housing project” under Section 65589.5. However, Senator Alarcon is not the author of the language in question and, in any event, a legislator’s statement of his or her intent is not considered relevant to determining the entire legislature’s intent. (People v. Patterson (1999) 72 Cal.App.4th 438, 443 and Metropolitan Water Dist. v. Imperial Irrigation Dist. (2000) 80 Cal.App.4th 1403, 1426.)
4. The California Department of Housing and Community Development

This agency is charged with promulgating and implementing policies and practices to develop low income housing in California. The City Attorney’s Office also contacted the legal department of this agency. The legal department’s position is that Section 65589.5 does include mixed-use developments since the purpose of the law is to encourage low income housing and this type of development often allows this type of project to be financially feasible. It concluded that the law would apply to a development which consisted of 15 percent commercial space and 85 percent of residential space (the 2700 San Pablo project). In addition, they stated that, if asked, they would provide such an opinion. The opinion of a state agency charged with enforcing a particular law, although not binding on a court, is entitled to a degree of deference. *(Smith v. Anderson (1967) 67 Cal.2d 635, 641.)*

The HCD lawyers were not willing to provide any further guidance on future projects and felt that the determinations would have to be made on a case by case basis. Here, not only does the 2517 Sacramento Street project have a very similar ratio of residential to commercial space (20% commercial and 80% residential), 100% of the housing units are affordable to low income households. Thus, it can be reasonably assumed that HCD’s position with regard to this project would be identical.

In addition, the HCD legal department did state that they felt an agency would be able to identify whether a developer was simply trying to avail itself of the protections offered by Section 65589.5 without actually offering a low or moderate income housing development.

5. Prudent Legal Course

As discussed above, there is no clear legislative history as to whether mixed-use projects fall within the definition of a “housing development project” of Section 65589.5. However, applying the protections afforded under Section 65589.5 to mixed-use projects is harmonious with the legislative intent to encourage low-income housing. Moreover, HCD, the state housing agency, interprets this section as including a mixed-use development such as this one. In addition, as this report now explains, HCD’s interpretation is consistent with the City’s zoning laws as applied to housing developments.

Berkeley's zoning districts for mixed-use development generally occur along major commercial arterial streets, and in commercial nodes. The height limits vary from two stories in low intensity areas, to four stories along the arterials. All of the mixed-use development approved and constructed in the last four years have had a minimum of four stories.

The development standards of those zoning districts generally require retail space to be located on the ground floor of a given project. In addition, some amount of parking is also required. This mix of ground floor space generally allows approximately 50% of the ground floor to be used for commercial purposes. The balance of the floor area for these projects is residential floor area, which generally equates to about 75% of the total floor area.

Given these factors, the mix of floor area for Berkeley's mixed-use projects generally works out to be 75% residential, and 25% non residential. The non residential component is split between parking and retail so the gross percentage of commercial floor area is approximately 13-20% of a project's gross floor area.
Consequently, applying Section 65589.5 to mixed-use projects in consideration of the ratio of residential to commercial floor area seems appropriate given that the overwhelming majority of floor area is dedicated to residential use.

In light of all these factors, the City Attorney’s Office believes that the legally prudent course of action would be to treat this development as though it is subject to the findings requirement of Section 65589.5.

CONTACT PERSON:

Manuela Albuquerque, City Attorney

981-6950

Approved by:

Zach Cowan, Acting City Attorney
May 6, 2002

Sherry Kelley  
City Clerk  
City of Berkeley

Dear City Council and Mayor,

This is a letter of support for the “Outback Senior Homes” by Affordable Housing Associates. This is a proposed 40 unit affordable housing development at Sacramento and Dwight for our senior citizens. This site is especially suitable because of its access to public transportation (three bus lines) and appropriate services. The Pacific Center is acutely aware of the shortage of well managed affordable housing in particular for seniors. Affordable housing is one of our biggest inquiries on our information and referral phone line. Worries about housing destroy the quality of life for so many individuals. This proposal will provide much needed peace for some of our struggling seniors and we wholeheartedly support it. We ask that you, the leaders of our City, also support this project.

Sincerely,

[Signature]
Frank Gurucharri  
Executive Director  
Pacific Center for Human Growth