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## MEMORANDUM

TO: Mayor London Breed; Board of Supervisors; Board of Appeals; Planning Commission; Building Inspection Commission; Public Works Commission; Historic Preservation Commission; Public Utilities Commission; Public Health Commission

FROM: Austin Yang *AY*  
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Deputy City Attorneys

DATE: November 8, 2023

RE: Senate Bill 423 (Wiener) – Expanding SB 35 Ministerial Approval to Code-Complying Residential Projects with Two Units or More, and Providing for Special Annual HCD Review of San Francisco

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### I. SUMMARY

The City continues to face increased scrutiny over its review and approval of housing development projects from both the California Department of Housing and Community Development (“HCD”) and the Legislature. HCD recently published its “Policies and Practices Review,” which finds that San Francisco’s “local rules around discretionary permitting and post-entitlement appeals prevent full implementation of the goals and aims of state housing laws,” and imposes a number of requirements on San Francisco to change its laws and practices to facilitate approval of housing projects. Also, the State recently enacted Senate Bill 423 (Wiener) (“SB 423”), which extends and expands 2017’s Senate Bill 35 (“SB 35”), with specific requirements for San Francisco.

Today, in San Francisco, SB 35 requires the streamlined, ministerial approval of housing projects that dedicate at least 50% of units as affordable to lower income households. Beginning in early 2024, SB 423 will markedly expand SB 35 in San Francisco to require the ministerial, streamlined approval of most code-complying development projects with two to 10 residential units, as well as code-complying housing projects with 11 or more units that set aside at least 10% of units as affordable. SB 423 extends SB 35, which was set to expire at the end of 2025, to now expire in 2036. SB 423 also amends SB 35 to require more deeply affordable rental units; allow construction in most parts of the Coastal Zone beginning in 2025; and require non-100% affordable housing projects over 85 feet to use a skilled and trained workforce.

By way of brief background, SB 35 added California Government Code Section 65913.4, which applies to cities and counties, including charter cities and counties, if they fail to meet their Regional Housing Needs Assessment (“RHNA”) goals to produce lower or above-moderate income housing. Cities or counties that did not meet their RHNA goals for above-moderate income housing must ministerially approve eligible housing projects of two or more units, and projects with more than 10 units that include at least 10% of units as affordable. Cities or counties that did not meet their RHNA goals for very-low or low income housing must

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ministerially approve eligible housing projects that included at least 50% of units as affordable. Because San Francisco has not met its RHNA goals for very-low or low income housing (but has met its goals for above-moderate income housing), it is currently subject to SB 35's 50% requirement, although in practice, most SB 35 projects have been 100% affordable housing projects.

In this memorandum, we provide an updated overview of Government Code Section 65913.4, noting in particular the amendments to SB 35 included in SB 423. We refer to the statutory scheme, including the original requirements in SB 35, collectively, as "SB 423." To qualify under SB 423, a project must comply with objective zoning and design standards, must include at least two units, and must meet certain locational requirements. Mixed-use projects are eligible, but at least two-thirds of the project must be residential. Projects may not demolish rental units that have been occupied by tenants in the past 10 years, units governed by rent control, or units that are restricted as affordable. Developments cannot be located on sites used as housing that were demolished within 10 years before the application. Projects on sites that have been subdivided and are occupied by tenants are also ineligible. Projects with more than 10 units must comply with certain labor standards, and must include at least 10% of units as affordable. We summarize the eligibility requirements for projects under SB 423 in an attached chart.

If a project qualifies under SB 423, then the City must ministerially approve it. That also means the project would not be subject to environmental review, including any appeal, under the California Environmental Quality Act ("CEQA"). Eligible projects may be subject to limited design review. Under the provisions of recently adopted Assembly Bill 1114 (Haney) ("AB 1114"), building permits, and certain subsequent permits for SB 423 projects would not be appealable, including to the Board of Appeals. (In conjunction with this memorandum, we are issuing a separate memorandum summarizing the impact of AB 1114 on San Francisco.)

One of the most significant changes for the City is that SB 423 requires HCD to review San Francisco's RHNA progress reports annually, rather than every four years. Because San Francisco is very unlikely to meet its above-moderate income housing goals, once HCD reviews the City's annual RHNA progress report, which could occur as soon as early 2024, San Francisco will be required to ministerially approve projects with two or more units.

## II. SB 423 ELIGIBILITY

To qualify for streamlined, ministerial approval under SB 423, a project must meet a number of eligibility criteria. Projects must contain two or more residential units, where at least two-thirds of the total square footage of the development is dedicated to residential use. (Gov't Code §§ 65913.4(a)(1) and (a)(2)(C)(ii).) An SB 35 project must be consistent with objective zoning standards and objective design review standards in effect at the time a project developer submits a preliminary application. (Gov't Code § 65913.4(a)(5).) SB 423 defines "objective" zoning and design review standards to be those that require no personal or subjective judgment by a public official and that are uniformly verifiable by reference to an external and uniform benchmark available and knowable by the applicant and public official prior to submittal of the application. (*Id.*) Eligible SB 423 projects are also eligible for the State Density Bonus statute (Government Code Section 65915), and may receive additional density, concessions and

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incentives, and waivers of development standards; such projects are considered “code-complying” under SB 423. (*Id.*)

**A. Locational Requirements**

While SB 423 projects are only allowed in certain locations; most sites in San Francisco qualify. At least 75% of the perimeter of the site must adjoin parcels that are developed with urban uses. (Gov’t Code §§ 65913.4(a)(2)(A) and (B).) Urban uses include “current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses.” (Gov’t Code § 65913.4(m)(13).) The site must be zoned for, or have a general plan designation allowing residential use or residential mixed-use development. (Gov’t Code § 65913.4(a)(2)(C)(i)(II).) Projects that meet the requirements of the Middle-Class Housing Act of 2022 (known as SB 6 (2022)), which allows residential uses in areas zoned for commercial, retail or parking, would also be eligible. (Gov’t Code § 65913.4(a)(2)(C)(i)(III).)

The development may not be located on prime farmland, wetlands, in a high fire hazard severity zone, on a hazardous waste site, a delineated earthquake fault zone, a flood plain, a floodway, a community conservation plan area, a habitat for protected species, or on a parcel that is under a conservation easement. (Gov’t Code § 65913.4(a)(6).) As originally drafted, SB 35 excluded all parcels within the Coastal Zone, or generally, 1,000 yards inland from the mean high tide line. But beginning January 1, 2025, SB 423 amends that prohibition to allow projects in the Coastal Zone if the parcel is zoned for multi-family housing and not otherwise in a sensitive area, such as areas within 100 feet of a wetland. (Gov’t Code § 65913.4(a)(6)(A) and § 65913.4(t).) Finally, the project may alter, but may not demolish, an historic structure that was placed on a national, state, or local historic register. (Gov’t Code § 65913.4(a)(7)(C).)

**B. Tenant Protections**

SB 423 has a number of requirements designed to protect tenants. An eligible project may not demolish any housing units that have been occupied by tenants in the last 10 years, are subject to any form of rent or price control, or are subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very-low incomes. (Gov’t Code § 65913.4(a)(7)(A).) The development site may not previously have been used for housing that was occupied by tenants and was demolished within 10 years before the developer applies for SB 423 approval. (Gov’t Code § 65913.4(a)(7)(B).) The property may not contain “units that are occupied by tenants, and the units at the property are, or were, subsequently offered for sale to the general public” – in other words, condominiums occupied by tenants. (Gov’t Code § 65913.4(a)(7)(D).)

**C. Labor Requirements**

Eligible projects with more than 10 units must comply with certain labor requirements. The requirements are quite detailed, and we summarize them only generally here. A development that is not a public work, as defined in the California Labor Code, must certify that all construction workers, including in those working for subcontractors, are paid prevailing wages. (Gov’t Code § 65913.4 (a)(8)(A)(i).) Developments with 50 or more housing units must participate in an apprenticeship program and make health care expenditures. (Gov’t Code §§ 65913.4 (a)(8)(E)(i) and (ii).) Projects that are not 100% affordable and with a height over 85 feet must use a skilled and trained workforce, so long as the project receives at least three

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qualifying bids. (Gov't Code §§ 65913.4 (a)(8)(F)(i) and (ii).) Projects with between two and 10 units are not subject to any labor requirements under SB 423.

**D. Affordable Housing****1. RHNA Goal Reporting Period**

As noted above, SB 423 applies to local jurisdictions that are not meeting their very-low, low, or above-moderate income RHNA goals. SB 423 requires HCD to determine whether a jurisdiction is meeting its lower or above-moderate income RHNA goals for a defined “reporting period.” A “reporting period” is defined as either the first half or last half of the regional housing needs assessment cycle, or generally, every four years. (Gov't Code § 65913.4(m)(12)(A).) In HCD's last determination for San Francisco in 2022, HCD found that San Francisco was meeting its RHNA goals for above-moderate income households, but not its very-low or low income housing goals, for the last half of the 2014-2022 reporting period. Thus, San Francisco is currently subject to the requirement to ministerially approve residential projects with at least 50% affordable units.

But beginning in early 2024, HCD will reassess whether San Francisco is meeting its RHNA goals every year, rather than every four years. SB 423 defines the term “reporting period” for San Francisco (and San Francisco only) as “annually” rather than every four years. (Gov't Code § 65913.4(m)(12)(B).) As a result, HCD will re-assess whether San Francisco has met the pro rata annual amount of its above-moderate income RHNA goals for the 2023-2031 reporting period (35,471 units) in 2024, rather than 2027. San Francisco is very unlikely to meet this goal, and thus will need to ministerially approve all eligible two or more unit projects that meet objective standards, and projects with more than 10 units that provide at least 10% of the units as affordable to low-income households (together, “the 10% requirement”).

Generally, HCD reassesses whether local jurisdictions have met their goals based on housing reports sent to HCD by April 1, and HCD publishes its determinations in June. But HCD could conclude its review sooner. We anticipate that San Francisco will be subject to the 10% requirement, rather than the 50% requirement, sometime in early 2024 when HCD completes its review.

**2. Affordability Requirements**

Under the 10% requirement, projects of more than 10 units must include 10% of units as affordable. Ownership units must be affordable to households earning at or below 80% of the area median income (“AMI”). Rental units must be affordable to households earning 50% or less of AMI. If the local government has adopted an ordinance that requires “greater than 10% of units to be affordable below 50% AMI” (for rental projects), or 80% AMI (for ownership projects), the local ordinance will apply. (Gov't Code §§ 65913.4(a)(4)(B)(i)(I) and (II).)

Instead of these requirements, projects in the Bay Area (defined as the nine Bay Area counties including San Francisco) may elect to provide 20% of units as affordable to households earning up to 100% AMI, with an average income of the units at or below 80% of AMI. (Gov't Code §§ 65913.4(a)(4)(B)(i)(III).) But a local ordinance will apply if the ordinance requires greater than 20% of the units at 100% AMI or requires that any units be dedicated at a less than 100% AMI. (*Id.*)

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Projects must still comply with all objective standards – and San Francisco’s Inclusionary Housing Ordinance, which applies to all projects of 10 or more units, qualifies as an objective standard. (Gov’t Code § 65913.4(a)(5) [Objective standards “may be embodied in ... inclusionary zoning ordinances.”].) Among other options, the Inclusionary Housing Ordinance – as recently amended in Ordinance No. 187-23 – generally requires housing developments to provide 15% on-site units, or pay a fee; or, projects may provide a combination of the two. (Planning Code § 415.6.) Thus, to qualify under SB 423, a project of exactly 10 units must comply with the Inclusionary Housing Ordinance (which could include payment of a fee), while a project of more than 10 units would need to provide at least 10% of units on-site as affordable (the SB 423 requirement) and provide additional on-site units or pay a fee (the Inclusionary Housing Ordinance requirement) to benefit from SB 423 ministerial approval.

In sum, no state or local affordable housing requirements apply to eligible SB 423 projects of two to nine units. Eligible projects of exactly 10 units can qualify for streamlined, ministerial approval, and would need to comply with the San Francisco’s Inclusionary Housing Ordinance, which can include payment of a fee. Projects of 11 units or more would need to provide at least 10% of units as affordable to be eligible for streamlined, ministerial approval, but must also comply with Planning Code Section 415.

#### **E. Process Requirements**

If an eligible project meets objective planning and design standards, it is subject to a “streamlined, ministerial approval process ... and not subject to a conditional use permit.” (Gov’t Code § 65913.4(a).) Once an application is submitted to the local government, the planning director or equivalent position must provide written documentation of any conflicts with objective planning standards. (Gov’t Code § 65913.4(c)(1).) For projects containing 150 or fewer housing units, such documentation must be provided within 60 days. If a project contains more than 150 units, then the documentation must be provided within 90 days. If the planning director fails to comply with these time frames, then the project will be deemed to satisfy the objective planning standards. (Gov’t Code § 65913.4(c)(2).)

Any design review of the development may be conducted by the local government’s planning commission or any equivalent board or commission responsible for review and approval of development projects, or the board of supervisors. (Gov’t Code § 65913.4(d)(1).) The design review must be “objective and strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction.” (*Id.*) This design review must be completed within 90 days of the application if the development contains 150 or fewer housing units, or within 180 days if the development contains more than 150 housing units. (*Id.*) The review and oversight “shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect, as applicable.” (*Id.*)

SB 423 project approvals do not expire if the development includes public investment in housing affordability beyond tax credits, and if at least 50% of the units are affordable. (Gov’t Code § 65913.4(g)(1).) If a project does not include public investment beyond tax credits, or if less than 50% of units are affordable, the approval is valid for three years, and remains valid if construction is in progress. (Gov’t Code § 65913.4(g)(2).)

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SB 423 amended SB 35 to specify that local governments may not require a developer to provide any “studies, information, or other materials” that do not pertain directly to determining if a project meets objective standards, or complies with standards necessary to receive a “post-entitlement permit,” such as a site or building permit. (Gov’t Code § 65913.4(f).) Although SB 423 provides that “subsequent permits” should be processed without “unreasonable delay,” AB 1114 imposes strict timelines on the review and approval of postentitlement permits. See the accompanying memorandum on AB 1114, dated November 8, 2023. If an SB 423 project requires an improvement on land owned by the local government that requires local government approval, such as creation of a bicycle lane or the modification of an intersection, the local government “shall not exercise its discretion ... in a manner that would inhibit, chill, or preclude the development.” (Gov’t Code § 65913.4(i)(3)(A).)

**F. Public Meeting Requirements for Projects in Certain Neighborhoods**

Before applying for an SB 35 approval, an applicant must file a “notice of intent” to submit the application. (Gov’t Code § 65913.4(b)(1)(A)(i).) As amended by SB 423, Government Code Section 65913.4 requires that within 45 days of receiving a notice of intent, and before the development proponent submits an application for an SB 423 approval, the local government must provide for a public meeting to allow the public and the local government to comment on the development if the project is located in a moderate or low resource area, or an area of high segregation and poverty on the most recent California Tax Credit Allocation Committee and the Department of Housing and Community Development Opportunity Maps. (Gov’t Code § 65913.4(q).) In San Francisco, these areas are concentrated in the eastern and southern sections of the City, and include the Bayview, Tenderloin, Chinatown, Mission, and Excelsior neighborhoods. In jurisdictions with a population of more than 250,000, the meeting must be held at a regular meeting of the Planning Commission. (Gov’t Code § 65913.4(q)(3).) The public may comment at the meeting, or in writing before the meeting, and the development proponent must “attest in writing that it attended the meeting, and reviewed the public testimony and written comments” in its SB 423 application. (Gov’t Code §§ 65913.4(q)(4) and (5).) If the local government fails to hold the meeting, then the development proponent must hold a public meeting before applying for an SB 423 approval. (Gov’t Code § 65913.4(q)(6).)

**G. Tribal Notification**

The notice of intent to apply for SB 423 approval also triggers the need to consult with any California Native American tribes that are traditionally and culturally affiliated with the area where the project is located. (Gov’t Code § 65913.4(b)(1)(A)(ii).) The local agency has 30 days from receipt of the notice of intent to notify the tribes, and the tribes have 30 days to respond to the local agency’s notification. (Gov’t Code §§ 65913.4(b)(1)(A)(iii)(I) and (II).) If a California Native American tribe determines that the development will impact a tribal cultural resource, the parties must agree on “methods, measures, and conditions for tribal cultural resource treatment.” (Gov’t Code § 65913.4(b)(2)(B).) If the parties cannot agree, the local agency must document in writing that the development is ineligible for SB 423, and provide information on how the developer can proceed under a conditional use or other discretionary approval process. (Gov’t Code § 65913.4(b)(5).) The Planning Department implemented a process for consulting with Native American Tribes under this provision when it was first required in 2020 as part of Assembly Bill 168 (Aguilar-Curry).

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**III. APPLICATION TO SAN FRANCISCO PERMIT APPROVALS**

San Francisco treats most development permits as discretionary decisions. In particular, the Charter and Planning Code provide for the Planning Commission, the Historic Preservation Commission, or the Board of Appeals to consider discretionary factors related to granting particular kinds of permits, including conditional use permits, permits related to historic buildings under Article 10 and 11, and building permits.

**A. Ministerial Approval Only**

SB 423 requires ministerial approval of projects that meet the criteria listed above. Currently, this streamlining requirement means that San Francisco must follow a ministerial approval process for projects with 50% on-site affordable units and which are consistent with objective zoning standards and objective design review standards in effect at the time of application submittal. But as mentioned above, beginning in early 2024, San Francisco will need to follow a ministerial approval process for all eligible projects with between two and 10 units, and for projects with more than 10 units, where 10% of the units are affordable. If a project meets the objective zoning and design review standards, San Francisco cannot exercise its usual discretionary review authority. Also, once the project sponsor submits its building permit application, the City's review of that application must be consistent with AB 1114, which imposes tight timelines on permit review and issuance, and eliminates building permit appeals.

**B. No CEQA Review and Limited Design Review**

By requiring that SB 423 eligible projects be “streamlined and ministerially approved,” SB 423 eliminates environmental review under CEQA because CEQA applies only to discretionary decisions and not ministerial ones. (Pub. Resources Code §§ 21080(a) and (b)(1).)

SB 423 allows design review by a public body, such as the Planning Commission or any equivalent board or commission responsible for review and approval of development projects, or the Board of Supervisors. (Gov't Code § 65913.4(c).) This design review could also include the Historic Preservation Commission. This review must also take place relatively quickly, within 90 days of submittal if the development contains 150 or fewer housing units, or 180 days if the development contains more than 150 housing units.

**IV. CONCLUSION**

Since SB 35's adoption in 2017, the Planning Department has reviewed, and San Francisco has ministerially approved, over two dozen SB 35 projects that included at least 50% of units as affordable. The amendments to SB 35 in SB 423 – to require ministerial approval of most code-complying projects of two units or more – will significantly expand the use of SB 35 for housing projects in San Francisco, and may help San Francisco meet its housing goals.

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**SENATE BILL 423 (Government Code § 65913.4)**

	<b>2-9 units</b>	<b>10 units exactly</b>	<b>11-49 units</b>	<b>50 - 150 units</b>	<b>151 + units</b>
<b>Affordability</b>	No affordability requirements	Must comply with Inclusionary Housing Ordinance	Must comply with Inclusionary Housing Ordinance, and include at least 10% of units as on-site affordable units (early 2024).		
<b>Labor requirements</b>	No labor requirements	No labor requirements	See Gov't Code §65913.4(a)(8)	See Gov't Code § 65913.4(a)(8)(E)	
<b>Eligibility Review deadline</b> (from submittal)	60 days	60 days	60 days	60 days	90 days
<b>Approval deadline, including Design Review</b> (from submittal)	90 days	90 days	90 days	90 days	180 days
<b>Locational criteria</b>	At least 75% of the perimeter developed with urban uses. Zoned for residential use or residential mixed-use development. Not located on: farmland, wetlands, in a fire hazard severity zone, on a hazardous waste site, an earthquake fault zone, a flood plain, a floodway, a community conservation plan area, a habitat for protected species, or on a parcel under a conservation easement, or sensitive areas in the Coastal Zone. Not located on site used for housing that was occupied by tenants and was demolished within 10 years. No demolition of a historic structure on a national, state, or local historic register; housing units that have been occupied by tenants in the last 10 years; housing subject to rent or price control; restricted affordable housing.				