



American Planning Association  
California Chapter

Creating Great Communities for All

July 20, 2020

Assembly Member Lorena Gonzalez  
State Capitol, Room 2114  
Sacramento, CA 95814

SUBJECT: **Concerns Regarding AB 1850 (Gonzalez) and AB 5 (2019) Worker Classification Clean Up Amendments Needed to Address Critical Planning Work** – In Senate Labor, Public Employment and Retirement Committee

Dear Assembly Member Gonzalez:

The American Planning Association, California Chapter (APA California) must respectfully express concerns related to impacts on the planning profession after the passage of AB 5 (2019). Your bill, AB 1850, currently seeks to exempt certain occupations from the 3-part ABC test for employment status and instead applies the test set forth in the California Supreme Court's *Borello* decision to those occupations. It is our understanding that AB 1850 is the vehicle for other AB 5 clarifications that are critical, and APA has discussed with your staff the need for similar relief for planning consultants and public agencies. That critical relief remains to be addressed.

APA California is made up of nearly 7,000 practicing planners. Many planners are either independent consultants or work as employees for planning-related companies that may be hired by public agencies, other planning businesses, or individuals to provide services related to specific planning documents, projects, functions and other important requirements necessary to implement various state and local statutes and finalize development projects. Last year, APA California focused on the business-to-business exemption that was inserted into AB 5. However, this business-to-business exemption as enacted within the Labor Code, Section 2750.3 (e) does not include the businesses *receiving* service such as public agencies (not just the planners performing services) and planning contractors and public agencies would still be required to meet additional tests listed in the statute that are creating hurdles preventing the hiring of planning consultants. Specifically, there is nothing in this section, or elsewhere in AB 5, that addresses businesses contracting with local public agencies or the state.

As APA California members and public agencies have worked to comply with AB 5 this year, APA continues to receive urgent requests from concerned APA members to amend AB 5 because they do not meet the tests for independent contractors in AB 5 even though many have worked in this capacity for decades. Even more troubling, we have heard that many public agencies have begun to stop all outside contracting for planning services to avoid inadvertently violating the new law that is not yet fully understood, even when those contracting are already employees of a planning consulting firm. There are at the same time cities and counties that have taken the position that AB 5 does not apply to public agencies and may contract with individuals and businesses without regard to Labor Code Section 2750.3. Still others have determined that public agencies are not subject to the bill, but public employees may be subject to several sections of the Labor Code and are subject to AB 5. Public agencies are giving mixed messages by approaching this question differently across jurisdictions, in part because AB 5 does not provide sufficient guidance to public agencies to ensure uniform application.

#### **Potential Legislative Fixes**

Given the impacts described above, APA California suggests the following amendments that would address not only the concerns of planning consultants, but likely many other impacted professions that contract with public agencies and individuals to provide services that include expertise in specific fields and laws:

#### **Exempt or Clarify Public Agencies:**

- Clarify that public agencies and state agencies are not considered “employers” under AB 5, which would allow contracting practices with consultants prior to AB 5 to continue, as long as the consultant can satisfy the Borello test.

OR

- Specify that public agencies are a “business” under the business-to-business exemption, which would then apply the business-to-business tests to planning professionals which, along with the clarifications below, would allow planning consultants to continue working as independent contractors.

**Provide Specific Clarifications for Planning Consultants under the Business-to-Business Exemption:**

The business-to-business exemption in AB 5 doesn’t fully allow for contracts between two lawful businesses in all situations. Planning consultants also often contract with other planning firms for contract work or with individuals such as developers working through the planning process. Below are additional aspects of the exemption that need clarification:

- Clarify the definition of “usual course of business”. A business should be able to contract with another business to provide services, particularly those that require specific expertise such as CEQA, drafting housing elements, and permit compliance, despite whether the services might be considered similar to the “usual course of business” for the city or county or individual employer. Similar to tax preparers, all citizens are required to do their taxes, but most do not have the expertise to do it without assistance. The exemption should allow for a contractor and another business or public agency to agree that they are entering into a contract with an independent contractor, similar to that allowed under the *Borello* tests.
- Clarify the definition of “business location that is separate from the hiring entity”. There are instances where planning consultants provide temporary work, for example as an interim planning director, to a public agency where the planner contractor is actually filling in temporarily and working in City Hall or other government buildings. This runs afoul of AB 5 since one of the AB 5 tests is that the contractor maintains a business location that is separate from the hiring entity. In these interim hiring situations, however, the process of hiring a planning director and other planning employees is quite lengthy spanning many months. Without an exemption in these cases the city or county would be without the expertise and staff they need to run the planning department, which is critical to ensuring that housing projects and other development continues to get approved and built.

APA California greatly appreciates the time your staff spent in April listening to our concerns. It was our understanding after that discussion that AB 5’s business-to-business exemption was not intended to apply to public agencies, as written. But that is exactly the reason for APA California’s amendments listed above to be addressed as soon as possible. We also understood that you would be working on language that would be broad enough to apply to contractors, like planning professionals, that work with public agencies and others that would likely address APA California’s concerns though we have not seen those amendments.

We understand that COVID-19 has severely impacted the work of the Legislature but this issue is one that has been of interest from numerous other industry sectors. Unfortunately, COVID-19 is also impacting local agencies as many may not believe they have the legal authority under AB 5 to have hire the experts they need to complete their 6<sup>th</sup> cycle housing element, CEQA documents, or other critical services needed to keep development and housing going in California. This uncertainty is impacting important work that planners do that is of high priority to the Legislature and required by law. APA California has accompanied this letter with more details on the type of work that will continue to be impacted – see below. In addition, many planners have in the midst of this crisis not been able to earn an income through contract work, which is currently challenged with the application of AB 5 to public agencies. As we said in April, we are willing to work with you to draft amendments to AB 1850 in the next few weeks to address the concerns of the planning profession and local governments.

Sincerely,



Eric Phillips  
Vice President Policy and Legislation  
APA California

cc: Senate Labor, Public Employment and Retirement Committee, Assembly Labor Committee, the Governor

## **IMPACTS OF AB 5 ON THE PLANNING PROFESSION**

### **CRITICAL WORK AND STATE GOALS THAT MAY SUFFER**

Without the ability to use independent planning consultants, state goals such as those related to increasing the production of housing, protecting the environment, ensuring equity, and reducing vehicle miles traveled will be detrimentally impacted. Planning consultants and their employees have historically been hired by public agencies, businesses, and individuals to provide specialized skills and expertise, assist in a short-term projects, prepare, submit, or process documents in a timely manner to meet state law, and/or to fill a temporary position. Cities and counties also find it difficult to staff up and down depending on the housing market, and still meet mandated deadlines and keep up with constantly changing requirements, with the level of expertise these state laws require. For instance, ADU permit applications (AB 2299 and SB 1069, 2016), by right development applications (SB 35, 2017), wireless cell tower, solar and other permit applications, all have very short timelines for review. Local agencies use planning contractors to process and provide full review of these applications within those short timelines so that all health, safety and performance standards have been met. And CEQA alone requires a level of expertise that most cities and counties, and private developers cannot maintain in house. Likewise, development companies or individuals often hire planners to ensure that their project applications meet state and local planning requirements, facilitating their review and approval in a way that is consistent with the state's development goals.

### **Below are a few examples of the types of services that planning consultants provide:**

- Completing CEQA documents and assistance with CEQA public hearings and scoping meetings
- Performing VMT and other transportation analyses
- Writing General Plans and other long-range planning documents
- Drafting housing element updates
- Assisting project applicants to obtain permits
- Assisting project applicants through the project approval process
- Filling in as a temporary planning director or other positions during the lengthy process of hiring a permanent director
- Providing temporary services to enable smaller planning departments to process project applications in a timely manner to meet statutory deadlines and to avoid deemed complete triggers

### **PRE-EXISTING LAW ALLOWED PUBLIC AGENCIES TO CONTRACT OUT PLANNING WORK**

It has been standard practice for cities and counties to contract out for planning services so that development applications, CEQA documents, plans and permits can be processed or completed as quickly and accurately as possible, consistent with state law, using the expertise of the independent planning contractor.

### **INDEPENDENT PLANNING CONSULTANTS ARE UNLIKELY TO BE MISCLASSIFIED**

Unlike other employment sectors that AB 5 was signed into law to address, independent contractors performing planning functions are not misclassified employees of public agencies. These planning consultants are providing important professional services that public agencies, private developers, and individuals have come to depend on that would otherwise leave the public agency or builder subject to legal challenge, without the expertise to complete a task and meet state requirements, and without the ability to meet statutory deadlines. These planning professionals want to remain independent businesses and have set up those businesses specifically to specialize in these types of services, and they need to be sure that public agencies and individuals are able to continue contracting for their services without creating a formal employer-employee relationship.