

# HOUSING ELEMENT AND REGIONAL HOUSING NEEDS ASSESSMENT LAW: RECENT REFORMS

## Introduction and the Importance of Housing Elements

California has the largest concentration of severely unaffordable housing markets in the nation, with the average home value in California at \$773,363. To keep up with demand, the state Department of Housing and Community Development (HCD) estimates that California must plan for the development of more than 2.5 million homes over the next eight years, and no less than one million of those homes must meet the needs of lower-income households (more than 640,000 very low-income and 385,000 low-income units are needed).

For decades, not enough housing was constructed to meet need, resulting in a severe undersupply of housing. New construction of housing — both single family homes and apartments — continues to lag behind historical averages, and lags further behind the number of new units needed to meet housing demand.

Housing Elements are critical planning tools designed to meet statewide housing goals and create the environment locally for the successful construction of desperately needed housing at all income levels. Unless communities plan for production and preservation of affordable housing and ensure they adopt a compliant housing element on time, new housing will not be built. Adequate zoning, removal of regulatory barriers, protection of existing stock, affirmatively furthering fair housing, and targeting of resources are essential to obtaining a sufficient permanent supply of housing affordable to all economic segments of the community. Although it does not require the city or county itself to develop the housing, housing element law requires the community to plan for housing with input from the community members. By making these changes, developers are able to navigate the development process more quickly and significantly reduce both time and overall development costs.

Until very recently, communities without an approved housing element have faced limited ramifications for their failure to comply with state law. In the 2017-18 legislative session, the Legislature passed a comprehensive package of housing bills that strengthened housing element law and reformed the process by which local governments are required to accommodate their regional housing needs (also known as the regional housing needs assessment or “RHNA” process). Additionally, the Legislature and Governor have provided HCD with significantly more authority to enforce housing element law. In effect, these reforms and increased accountability measures have turned a paper exercise into a critical piece of the long-term solution to the housing crisis.

This document explores the following issues related to local housing planning:

- Background of housing elements and RHNA process
- Critical reforms to housing element law and the RHNA process in 2017-18
- Improving compliance with state housing law
- Penalties for noncompliance with housing element law
- Development in fire prone areas
- Facilitating housing preservation

## Housing Elements and RHNA Process Generally

Every city and county in California is required to develop a general plan that outlines the community's vision of future development through a series of policy statements and goals. A community's general plan lays the foundation for all future land use decisions, as these decisions must be consistent with the plan. General plans are comprised of several elements that address various land use topics. State law mandates seven elements: land use, circulation (e.g., traffic), housing, conservation, open-space, noise, and safety.

Each community's general plan must include a housing element, which outlines a long-term plan for meeting the community's existing and projected housing needs. The housing element demonstrates how the community plans to accommodate its "fair share" of its region's housing needs. Following a staggered schedule, cities and counties located within the territory of a metropolitan planning organization (MPO) must revise their housing elements every eight years, and cities and counties in rural non-MPO regions must revise their housing elements every five years. These five- and eight-year periods are known as the housing element planning period.

Before each revision, each community is assigned its fair share of the region's housing need for four separate income categories (very low-, low-, moderate-, and above-moderate income households) through a two-step process known as RHNA. In the first step, HCD determines the aggregate housing need for the region during the planning period the housing element will cover. In the second step, the council of governments (COG) for the region allocates the regional housing need to each city and county within the region.

In general, a housing element must identify and analyze existing and projected housing needs, identify adequate sites with appropriate zoning to meet its share of the RHNA, and ensure that regulatory systems provide opportunities for, and do not unduly constrain, housing development. Among other things, the element specifically must include an analysis of existing subsidized housing developments that are eligible to convert to market-rate rental housing upon the expiration of affordability restrictions, and identify all public resources.

As part of the process to identify adequate sites, a city or county first prepares an inventory of existing sites zoned for housing. When the inventory of existing sites is insufficient to accommodate the need for one or more income categories, the housing element must contain a program to rezone sites within the first year of the planning period.

*Site Inventory and Analysis.* The purpose of the land inventory is to identify specific sites that are suitable for residential development in order to compare the local government's RHNA with its residential development capacity. Inventories assist in determining whether there are sufficient sites to accommodate the regional housing need in total, and by income category. A thorough sites inventory and analysis help cities determine whether program actions must be adopted to "make sites available" with appropriate zoning, development standards, and infrastructure capacity to accommodate the new construction need. Preparing the site inventory is a two-part process and includes the preparation of a parcel specific inventory of sites and accompanying site suitability analysis. While statute outlines the requirements and factors that are included in the site inventory and analysis, HCD does not prescribe any one specific methodology in addressing those requirements.

*Inventory of Suitable Land.* The housing element must identify specific sites or parcels that are available for residential development. Land suitable for residential development must be

appropriate and available for residential use in the planning period. Identified sites that require rezoning may be included in the inventory, provided the housing element includes a program to accomplish the rezoning early within the planning period. Other characteristics to consider when evaluating the appropriateness of sites include, physical features (*e.g.*, susceptibility to flooding, slope instability or erosion, or environmental considerations) and location (proximity to transit, job centers, and public or community services). Land suitable for residential development includes all of the following:

- a) Vacant sites that are zoned for residential development.
- b) Vacant sites that are not zoned for residential development, but that allow residential development.
- c) Underutilized sites that are zoned for residential development and capable of being developed at a higher density or with greater intensity.
- d) Sites that are not zoned for residential development, but can be redeveloped for, and/or rezoned for, residential use (via program actions).
- e) Sites owned or leased by a city, county, or city and county.

The inventory can also include sites that are in the process of being made available (*i.e.*, planned) for residential uses via rezones or specific plans, provided the housing element includes a program that commits the local government to completing all necessary administrative and legislative actions early in the planning period.

## The 2017-2018 Reforms to Housing Element Law

As noted above, the Legislature passed and the governor signed groundbreaking and foundational reforms in the 2017-18 Legislative session to ensure a housing element creates an environment conducive to allowing housing development throughout the planning process. Notable changes made to housing elements include:

- *Strengthening “No Net Loss.”* SB 166 (Skinner, Chapter 367, Statutes of 2017) modified the No Net Loss Zoning Law to require local governments to maintain adequate housing sites at all times throughout the planning period for all levels of income. This is intended to help ensure that a locality continues to maintain an ongoing supply of available land to accommodate the remaining unmet housing need throughout the eight-year period of the housing element, rather than simply identifying the inventory once every eight years.
- *Ensuring identification of realistic sites for housing.* AB 1397 (Low, Chapter 375, Statutes of 2017) restricted the types of sites a local government may identify as suitable for residential development. AB 1397 addressed concerns that the law allowed local governments to designate very small sites that could not realistically be developed for their intended use, or to designate non-vacant sites with an ongoing commercial or residential use, even though the current use is expected to continue indefinitely. Under AB 1397, identified sites must have a sufficient available water, sewer, and dry utilities supply and must be available and accessible to support housing development or be included in an existing general plan program or other mandatory program or plan.

Additionally, two key bills — SB 828 (Wiener, Chapter 974, Statutes of 2018) and AB 1771 (Bloom, Chapter 989, Statutes of 2018) — made a number of changes aimed at increasing the transparency and accountability of the RHNA allocation process:

### Accountability

- *Revising the COG methodology.* Revises the data COGs must provide to HCD (which helps HCD compile the regional estimates), including additional information on overcrowding, vacancy rates, and cost burdened households in the COG as compared to a healthy housing market. Sets the vacancy rate for a healthy housing market at 5%, meaning that housing production should increase to a point that vacancy rates fall within that range; this in turn could help stabilize or drive down prices in high-cost areas.
- *Starting fresh.* Prohibits a COG from using prior underproduction of housing, or stable population numbers, as justification for a determination or reduction in the city's or county's RHNA share.
- *Revising HCD methodology.* Authorizes HCD's RHNA methodology to include existing households in the region's projected household numbers. This provision aims to ensure that existing unmet need is not overlooked.

Collectively these accountability measures ensured, for the first time, that the state and localities planned for sufficient housing units to meet the actual demand of each region. These measures raised the floor on the number of units allocated to COGs and jurisdictions through the RHNA process. This dramatically increased the number of units that the state and localities are required to plan for in all subsequent RHNA cycles.

### Transparency

- *Strengthening enforcement of RHNA statutory objectives.* Requires the COG methodology to further the statutory RHNA objectives<sup>1</sup>, rather than to just be consistent with them. Requires HCD to determine whether the methodology furthers the statutory objectives, but allows a COG to keep its methodology, provided it makes written justification, in the face of an HCD finding to the contrary.
- *Increasing transparency for RHNA allocations.* Requires a COG to publish on its website an explanation of how its RHNA methodology furthers the statutory objectives. Also requires a COG to post its draft RHNA allocation methodology on its website and to submit it to HCD for review and to post draft allocations on its website.
- *Eliminating "swaps."* Deletes the authority of two localities to agree to an alternative distribution of appealed housing allocations between the affected local governments. This provision aims to address the practice of certain jurisdictions offloading most or all of their RHNA allocations onto politically weaker jurisdictions.
- *Increasing transparency in the appeals process.* Requires a locality, if it disagrees with its RHNA allocation, to submit a request for revision that includes a statement as to why the proposed allocation is not appropriate and why a revision is necessary to further the statutory objectives.

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<sup>1</sup> Statute outlines the following objectives for RHNA plans: increasing the housing supply and the mix of housing types, tenure, and affordability; promoting infill development and socioeconomic equity, protection of environmental and agricultural resources, encouraging efficient development patterns, and achievement of the state's greenhouse gas reduction targets; promoting an improved intraregional relationship between jobs and housing; allocating a lower proportion of housing to an income category when a jurisdiction already has a disproportionately high share of households in that income category; and affirmatively furthering fair housing.

## Improving Compliance with State Law

The 2017-2018 reforms to housing element law also included measures that increased accountability for noncompliance with state law. Further, the 2019-20 budget agreement provided additional accountability measures through AB 101 (Committee on Budget, Chapter 159, Statutes of 2019).

### *The Carrots*

AB 101 provided incentives to encourage housing production. It required HCD to identify a set of “pro-housing” policies, and to designate jurisdictions that have a compliant housing element and have adopted these policies as “pro-housing.” It also provided that these “pro-housing” local governments shall be awarded additional points for three competitive grant programs: the Affordable Housing and Sustainable Communities Program, the Transformative Climate Communities Program, and the Infill Infrastructure Grants Program.

Additionally, various state grant and loan programs require an HCD-certified housing element. Examples of active state funding sources that require housing element compliance for eligibility include the following:

- Permanent Local Housing Allocation (PLHA)
- Affordable Housing and Sustainable Communities (AHSC)
- CalHOME Program
- Infill Infrastructure Grants (IIG)
- Local Housing Trust Fund Program (LHTF)

### *The Sticks*

AB 72 (Santiago, Chapter 370, Statutes of 2017) authorized HCD to find a locality’s housing element out of substantial compliance if it finds the locality has acted, or failed to act, in compliance with its adopted housing element that HCD had previously found it in substantial compliance. AB 72 also authorizes HCD to refer violations of housing element law to the state Attorney General. The primary mechanism to enforce state housing law is through the judicial system. It takes significant resources and time to pursue judicial remedies; moreover, developers are hesitant to antagonize localities where they intend to have future development. AB 72 instead places this judicial enforcement burden on the state.

AB 101 builds on AB 72 of 2017 and provides that, following an opportunity for a local government to discuss housing element violations with HCD, the Attorney General may seek certain remedies if a court finds that a local government is not substantially compliant with housing element law. Upon such a finding, the court may issue an order directing the locality to bring its housing element into compliance. If the locality fails to comply within a specified period, the court must impose fines starting at \$10,000 per month, up to \$600,000 per month, as specified. As a last resort, an agent of the court may be appointed to bring the housing element into substantial compliance.

Since 2019, the Legislature has increased HCD’s oversight authority to include state laws that regulate local land use. As part of the 2021-2022 state budget, HCD received additional staff to grow its accountability efforts and formed the Housing Accountability Unit (HAU). While education and technical assistance is always the first step in HCD’s accountability efforts, the HAU holds jurisdictions accountable for meeting their housing element commitments and complying with state housing laws. Violations of these state laws may lead to consequences including revocation of housing element certification and/or

referral to the California Office of the Attorney General. Bills such as AB 215 (Chiu, Chapter 342, Statutes of 2021) have added to the enforcement authority of HCD in relation to violations of state housing law.<sup>2</sup>

Additionally AB 1398 (Santiago, Chapter 358, Statutes of 2021) required cities and counties that fail to adopt a legally compliant housing element within 120 days of the statutory deadline to complete a rezone program within one year (reduced from three years).

## Noncompliance Penalties

In addition to the broad accountability measures related to housing element law noted above, HCD is authorized to review any action or failure to act by a local government that it determines is inconsistent with an adopted housing element or housing element law. This includes failure to implement program actions included in the housing element. HCD may revoke housing element compliance if the local government's actions do not comply with state law. Recent legislation made it more difficult for cities to allege compliance by clarifying that a housing element or amendment is not considered substantially compliant with housing element law until the local agency has adopted a housing element that HCD has determined is in substantial compliance with housing element law, as specified (AB 1886, Alvarez, Chapter 267, Statutes of 2024).

Examples of penalties and consequences of housing element noncompliance:

- *Inability to apply for state funding* (as noted above in the “Sticks and Carrots for Compliance with State Law” section).
- *General Plan Inadequacy and Loss of Permitting Authority.* The housing element is a mandatory element of the General Plan. When a jurisdiction's housing element is found to be out of compliance, its General Plan could be found inadequate, and therefore invalid. Local governments with an invalid General Plan can no longer make permitting decisions. Courts have authority to take local government residential and nonresidential permit authority to bring the jurisdiction's General Plan and housing element into substantial compliance with State law. The court may suspend the locality's authority to issue building permits or grant zoning changes, variances, or subdivision map approvals – giving local governments a strong incentive to bring its housing element into compliance.
- *Legal Suits and Attorney Fees.* Local governments with noncompliant housing elements are vulnerable to litigation from housing rights' organization, developers, and HCD. If a jurisdiction faces a court action stemming from its lack of compliance and either loses or settles the case, it often must pay substantial attorney fees to the plaintiff's attorneys in addition to the fees paid to its own attorneys. Potential consequences of lawsuits include: mandatory compliance within 120 days, suspension of local control on building matters, and court approval of housing developments. SB 1037 (Wiener, Chapter 293, Statutes of 2024) specified that additional financial penalties may accrue from the date of the violation to the date the violation is cured.
- *Streamlining development in non-compliant jurisdictions.* SB 35 (Wiener, Chapter 366, Statutes of 2017) requires cities and counties to streamline housing developments that include specified percentages of affordable housing, if the city or county has not met all of its RHNA requirements or if the city or county failed to adopt a housing element that that HCD has determined is in substantial

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<sup>2</sup> For a list of laws that are within HCD's oversight authority, please visit: <https://www.hcd.ca.gov/planning-and-community-development/accountability-and-enforcement>

compliance with housing element law. This new requirement has added additional weight to the RNHA process because the trigger for whether or not a jurisdiction must streamline is based on whether or not they have met their RNHA numbers for above moderate-income (120% of Area Median Income (AMI) or above) or lower-income (80% of AMI or below). Most jurisdictions have not met their lower-income RNHA, meaning they must streamline projects that set aside at least 50% of units for lower-income. In 2023, SB 423 (Wiener, Chapter 778, Statutes of 2023) extended the sunset for SB 35 by 11 years to January 1, 2036. This also enabled SB 35 to apply in cities without a compliant housing element, as determined by HCD, and on specified sites in the coastal zone.

- *Application of the Builder’s Remedy.* A component of the Housing Accountability Act (HAA) provides that a housing development project may bypass local development standards in jurisdictions that fail to adopt a substantially compliant housing element. The housing element cycle following the major reforms noted above (sixth housing element cycle) saw the first significant effort by developers to invoke this “penalty” in jurisdictions that failed to adopt a compliant housing element. AB 1893 (Wicks, Chapter 268, Statutes of 2024) revised the standards a housing development project must meet in order to qualify for the “Builder’s Remedy.” AB 1893 also expanded the scope of actions that constitute disapproval of a housing development project by a local government for the purposes of the HAA.
- *Financial Penalties.* Court-issued judgement directing the jurisdictions to bring its housing element in substantial compliance with state housing element law. If a jurisdiction’s housing element continues to be found out of compliance, courts can multiply financial penalties by a factor of six.
- *Court Receivership.* Courts may appoint an agent with all powers necessary to remedy identified housing element deficiencies and bring the jurisdiction’s housing element into substantial compliance with housing element law.

## Facilitating Rehabilitation and Preservation

The 2020-21 budget agreement includes a provision to ease requirements for “committed assistance,” through AB 83 (Committee on Budget, Chapter 15, Statutes of 2020). Existing law allows a locality that met its RHNA obligation in the prior planning period, to meet up to 25% of its obligation in the next planning period through committed assistance – essentially, rehabilitation and preservation of existing very low- and low-income units. These units must be substantially rehabilitated; located on a foreclosed property or in a multifamily rental or ownership development of three or more units that are converted from market to affordable rent levels; and preserved at levels affordable to low- or very-low-income households, as specified. Since the purpose of RHNA is to identify a locality’s capacity to meet housing need by identifying development for new housing units, this exception was written to be used only under narrow circumstances.

AB 83 incentivizes localities to provide more very-low and low-income units by allowing them to count units in a motel, hotel, or hostel that are converted from nonresidential to residential, toward the jurisdiction’s adequate sites inventory. Specified conditions, such as the unit being part of a long-term recovery response to COVID-19, must be met. AB 83 also authorizes spaces in certain mobilehome parks to be counted toward committed assistance. Finally, it requires a city or county to enter into a legally enforceable agreement for committed assistance by the end of the fourth year, instead of the third year, of the planning period.