HOUSING ELEMENT AND RHNA LAW: RECENT REFORMS

Background

Every city and county must adopt a housing element to help plan how to address its share of the regional need for housing. Each city and county must revise its housing element every eight years (every five years for some rural areas). The housing element includes a program that sets forth a schedule of actions during the planning period to provide for the housing needs of all economic segments of the community. These actions include identifying an inventory of adequate sites on which to provide housing; developing a plan to meet the needs of extremely low-, very low-, low-, and moderate-income households; removing constraints to housing for special needs populations; preserving existing affordable housing stock; promoting and affirmatively furthering fair housing opportunities; and preserving assisted housing developments for low-income households.

Each locality's fair share of housing is determined through the regional housing needs allocation (RHNA) process, which is composed of three main stages. First, the Department of Finance and the state Department of Housing and Community Development (HCD) develop a regional housing needs estimate for each region, which are allocated to councils of government (COGs) throughout the state. Each COG allocates housing within its region based on these estimates (where a COG does not exist, HCD make the determinations). Each city and county then incorporates its allocation into its housing element.

The 2017 housing package: putting teeth into housing element law

Until very recently, communities without an approved housing element have faced limited ramifications. In 2017, the Legislature passed a comprehensive package of housing bills that included a number of bills aimed at strengthening housing element law. The following bills specifically aimed to increase housing element compliance.

- *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. 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 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.

- *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.

- *Shifting the judicial enforcement burden.* AB 72 (Santiago, Chapter 370, Statutes of 2017) authorizes 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 housing element and 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.

- *Ensuring identification of realistic sites for housing*. AB 1397 (Low, Chapter 375, Statutes of 2017) restricts the types of sites a local government may identify as suitable for residential development. AB 1397 addresses 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.

2018 legislation: reforming RHNA methodology

The Legislature built upon the 2017 reforms with two bills, SB 828 (Wiener, Chapter 974, Statutes of 2018) and AB 1771 (Bloom, Chapter 989, Statutes of 2018). These bills made a number of changes aimed at increasing the transparency and accountability of the RHNA allocation process:

- *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.

- *Strengthening enforcement of RHNA statutory objectives*. Requires the COG methodology to further the statutory RHNA objectives[1], 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.

2019 budget: sticks and carrots

The 2019-20 budget agreement provides additional accountability measures through AB 101 (Committee on Budget, Chapter 159, Statutes of 2019), which builds on AB 72 of 2017. AB 101 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.

AB 101 also provides incentives to encourage housing production. It requires HCD to identify a set of "pro-housing" policies, and to designate jurisdictions that have adopted these policies as "pro-housing." It also provides 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.

[1] 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.

2020 legislation: addressing development in fire hazard areas

Due to the reduced bill load during the COVID-19 pandemic, only one bill that addressed housing elements and RHNA made it to the Governor's desk in 2020. SB 182 (Jackson) would have imposed certain fire hazard planning responsibilities on local governments and would have required cities and counties to make specified findings on fire standards prior to permitting development in very high fire hazard severity zones. SB 182 would have amended the RHNA process in two ways. First, it would have added a new factor to the methodology each COG uses to determine RHNA allocations. Specifically, it would have required each COG to consider the amount of land in each member jurisdiction that is within a very high fire risk area, by allocating a lower proportion of housing to a jurisdiction if the jurisdiction would otherwise need to identify lands within a very high fire risk area as adequate sites in order to meet its RHNA allocation. Second, SB 182 would have added, to the objectives that each jurisdiction's RHNA plan must further, the objective of "promoting resilient communities," including reducing development pressure within very high fire risk areas. SB 182 was vetoed by Governor Newsom, who stated in his veto message that while wildfire resilience must become a more consistent part of land use and development decisions, the state's housing needs must also be met.

2020 budget: 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.