

CALIFORNIA HOUSING ELEMENT MANUAL

3rd Edition

Law, Advocacy, and Litigation

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California Affordable Housing Law Project,
of the Public Interest Law Project



**PUBLIC INTEREST
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PILP provides statewide support, including litigation, policy advocacy, consultation and training for local legal services and other public interest law programs in the areas of housing, public benefits, civil rights, redevelopment, and health. CAHLP is a project of PILP that offers technical assistance, policy analysis and litigation support on housing issues throughout the state, focusing on cases addressing housing elements, community redevelopment, fair housing, displacement, and relocation assistance.

We could not have produced this 3rd edition without the research, drafting and editorial assistance of **Colin Furlow, Ruth Desmond, Cory Turner, Noah Kirshbaum-Ray** and **Megan Sallomi**. We are currently editing the 4th Edition of the California Housing Element Manual and Appendices. Please excuse any citation errors or omissions to the July 2017 Appendices and Attachments in this November 2013 update to the 3rd Edition to the California Housing Element Manual.

CAHLP produces four other affordable housing law manuals:

- *Laws Affecting the Location and Approval of Affordable Housing* (March 2000, update in progress)
- *Inclusionary Zoning: Policy Considerations & Best Practices* (December 2002, with Western Center on Law & Poverty)
- *Inclusionary Zoning: Legal Issues* (December 2002, with Western Center on Law & Poverty, update in progress)
- *Inclusionary Zoning After Palmer & Patterson—Alive and Well in California* (May 2010)

All of CAHLP's manuals can be downloaded from our website:



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INTRODUCTION

Why Housing Elements?—The Need to Plan for Affordable Housing

This manual provides affordable housing advocates and attorneys with the tools for analyzing, advocating, and litigating around California’s law mandating comprehensive planning for housing needs by local governments. Why focus on housing element advocacy? Quite simply, unless communities plan for production and preservation of affordable housing, new housing will not be built, and we risk losing what we have worked so hard to produce. Adequate zoning, removal of regulatory barriers, protection of existing stock and targeting of resources are essential predicates to obtaining a sufficient permanent supply of housing affordable to all economic segments of the community.¹

Since the initial publication of this manual in 2000, there has been substantial progress in the movement to increase the supply of below-market rate housing in California due to the efforts of housing advocates and nonprofit housing developers towards opening up exclusionary communities and obtaining a permanent source of funding for affordable housing. However, there have also been substantial setbacks—the devaluation of tax credit financing because of the Great Recession, the recent elimination of redevelopment agencies and substantial cutbacks in federal assistance for affordable housing. Consequently, as we said in 2000:

California remains in a prolonged and systemic housing crisis of staggering proportion. Thousands of California households pay more than 50% of their income for housing while thousands more wander homeless among us. The crisis stems from the failure of American society to devote sufficient resources to nonprofit affordable housing development. The for-profit private sector is unable to produce housing

¹ The United Nations Committee on the Elimination of Racial Discrimination (“CERD”) singled out California Housing Element Law as a national model and an important step towards reducing discrimination. *Concluding Observations*, UN CERD/C/USA/CO/6 (March 7, 2008) p. 2. It made these findings after review of the U.S. report to the Committee under the International Convention on the Elimination of All Forms of Racial Discrimination. The Housing Element Law was one of the few bright spots in findings that focused on substantial concerns.

affordable to lower income households and the state and federal governments have lacked the political will to redirect public revenues to affordable housing programs. In the face of this, some local governments and a growing and effective nonprofit sector struggle daily to parlay what meager affordable housing resources exist into attractive and creative developments.

Today, although the number of local governments giving serious attention to the crisis in affordable housing has increased, and nonprofit housing developers have produced thousands of units of housing affordable to a broad range of incomes, we still have a long, long way to go. And even if financial resources became available to produce housing affordable to all in need, the nonprofit sector could not build for that need without adequate planning by local communities. Local governments play a crucial role in the affordable housing development equation. They must provide appropriate zoning and infrastructure to make development feasible, and they must maintain a development approval process that encourages and facilitates approval of plans and permits for affordable housing. Uncooperative local governments or Not-In-My-Back-Yard (NIMBY) residents can effectively shutout affordable housing if allowed to do so. Adequate resources cannot produce affordable housing without adequate local planning.

To foster adequate planning and to overcome NIMBYism, since 1980 California has mandated local planning for affordable housing, requiring each city and county to revise and update a detailed housing element as part of its general plan every five years. The housing element must make adequate provision for the housing needs of all economic segments of the community. Although not requiring the community to develop the housing, Housing Element law requires the community to plan for housing. Recognizing that local governments may lack adequate resources to house all those in need, the law nevertheless mandates that the community do all that it can and that it not engage in exclusionary zoning practices.

Through the housing element the locality must ensure it zones enough sites at appropriate densities and served with adequate infrastructure to meet the locality's "fair share" of the regional need for affordable housing, and in most cases the community must allow development at multifamily densities *by right* (*i.e.* without a conditional use permit or other discretionary permits). The element must also establish the maximum number of units to be constructed, rehabilitated or conserved. And, it must include a program to remove local governmental constraints to affordable housing development.

As an element of the local general plan, the housing element is part of the community's constitution for future community action. The local government has a legal obligation to implement the policies and programs of the element. And significantly, all local government actions, laws and other plans, including other elements of the general plan and any redevelopment plan, must be consistent with the housing element.

Importance of the Housing Element to the Siting and Approval of Affordable Housing

First, when the community is preparing its housing element, it *must include residents and community groups in the process*. This provides an opportunity for affordable housing advocates to urge the inclusion of policies and programs that promote affordable housing and to forge partnership with other groups in the community. Some important programs advocates have won include inclusionary zoning, affordable housing trust funds and policies prohibiting discrimination against Section 8 housing assistance.

Second, an adopted housing element *must identify sites appropriate for affordable housing* development and include a program mandating the locality to amend its zoning ordinance to permit the development of *transitional housing* or *homeless shelters*. And if the community failed to zone enough sites to meet its affordable housing needs from its last housing element period, the housing element must also include a program in its new housing element to rezone enough sites to meet those needs within one year of the due date of the new element.

Third, the law provides housing proponents with *significant legal leverage* in gaining approval of developments. If the locality fails to adopt a housing element or adopts one that is inadequate, a court can order the local government to halt all development until an adequate element is adopted *or* order approval of a specific affordable housing development. And if the local government *fails to implement a program* by the date specified in the element, a court can order the jurisdiction to carry out the program.

Local advocates, therefore, possess some significant legal clout to use against recalcitrant or exclusionary communities. Failure to adopt an adequate housing element or taking actions inconsistent with the element subjects the local government to significant legal consequences. Finding inadequacy, a court *must* issue an order curtailing the right of the local government to approve residential and nonresidential development until it adopts an adequate element.

It may also order approval of an affordable housing development. Finding inconsistency, the court should issue an order enjoining the inconsistent action.

In the housing element obligation, California affordable housing advocates have a potent weapon in their efforts to bring affordable housing their communities. We intend this manual to enable advocates to use this law effectively. Although the housing element obligation does not mandate local governments to build affordable housing, it requires communities to limit other development until they plan for affordable housing— and that often provides sufficient incentive for them to do a lot more than plan, including making commitments in their housing elements to provide land and financial resources.

Recent Legislation

Since the Second Edition of this Manual, there have been several significant changes to California's housing element law. These measures are included here both as an update and to assist advocates tracking prior law.

AB 325 (Alejo) Partially Restores Gov. Code §65009(d)'s Special Statute of Limitations for Challenging Housing Elements.

The Legislature in 2013 adopted AB 325 partially restoring the housing element exception to the short 90 day limitations period to challenge a general plan element. The previous long standing exception had been severely limited by *Urban Habitat Programs v. City of Pleasanton*, 164 Cal.4th 1561 2008. Under AB 325's amendments to §65009(d), for housing elements found out of compliance by HCD, advocates have two years to send a 60 day notice to the local government explaining the deficiencies in the housing element. After the 60 day period there is an additional one year period to bring suit. For elements found in substantial compliance by HCD, advocates have 270 days to send a 60 day notice, followed by a six month period to file suit.

Amendments to §65583.1's Alternative to the Adequate Sites Requirement.

§65583.1(c)(1) allows jurisdictions to meet up to 25% of their obligation to identify adequate sites to accommodate the RHNA by providing "committed assistance" to make existing units available through substantial rehabilitation, acquisition or purchase of affordability covenants. Three recent bills have amended this section.

AB 720 (Caballero) [Stats.2009, c. 467] amended §65583.1 to broaden the period during which a local government committing assistance to affordable

housing may subtract the assisted units from its very low or low income RHNA up to 25% of the total. Under prior law, governments were required to provide “committed assistance”, the funds designated to making existing units affordable through substantial rehabilitation during the first two years of the “projection” period, i.e. the period beginning when the RHNA is allocated to the *region*, but *before* the housing element must be adopted. AB 720 allows local governments to enter into a legally enforceable agreement to commit the funds up until the end of the second year of the “planning period”—the period beginning *after* the housing element must be adopted. The agreement to provide committed assistance must provide that the assisted units be made available for occupancy within two years of the execution of the agreement. This bill also amends §65583 (a)(8) to encourage weatherization and energy efficiency improvements when affordable housing units are substantially rehabilitated.

AB 1867 (Harkey) [Stats. 2010, c. 367] further amended §65583.1 to allow jurisdictions to count units converted to affordable units with committed assistance in multi-family *rental or ownership* complexes of *three or more* units towards up to 25% of the lower income RHNA. Prior law only allowed counting units developed rental projects with four or more units.

AB 1103 (Huffman) [Stats. 2011, c. 210] also amended §65583.1 to allow counting certain foreclosed units converted to affordable housing through acquisition or purchase of affordability covenants.

Amendments to Housing Element Due Dates Due to SB 375.

SB 575 (Steinberg) [[Stats.2009, c. 354](#)] is a follow-up to SB 375 (Steinberg) [Stats 2008, c. 728 §§6-12]. SB 375 attempts to integrate allocation of regional housing needs (RHNA) planning with the preparation of the regional transportation plans (RTP) by requiring consistency between the RHNA and the “sustainable communities strategy” (SCS) that must be included in the RTP. SB 375 aligns the RHNA planning periods with the RTP planning periods, creating eight-year RHNA cycles for local governments with four-year RTP cycles. **SB 575** builds on SB 375 by amending §65588 to establish interim or contingent timeframes for local governments to adopt the fifth revision of their housing elements.

Specifically, **SB 575**:

- Establishes deadlines for local governments within the jurisdiction of the San Diego Association of Governments (SANDAG) contingent on either the adoption of an RTP or the fourth revision of the housing element. It imposes a subsequent four-year revision cycle for local governments that

fail to adopt housing element or meet rezoning requirements by required deadlines.

- For local governments not in SANDAG’s area and transitioning to an eight-year RHNA cycle, **SB 575** imposes a deadline of 18 months after the adoption of the first post-transition RTP. Subsequent revisions may then take place on an eight-year schedule. Local governments that do not adopt a housing element within 120 days of the deadline, however, must revise every four years until they have met two consecutive deadlines.
- Requires the Department of Transportation (DOT) to publish RTP adoption dates and housing element due dates on its web site. **SB 575** also requires COGs to publish housing element due dates on its web site and notify local governments of due dates.

Amendments to the Regional Needs Determination Process

SB 251 (Committee on Transportation and Housing) [[Stats.2009, c. 632](#)] requires COGs to submit RHNA plans to Department of Housing and Community Development (HCD) in timely fashion. **SB 251** amends §65584.05 to require COGs to submit final RHNA plans to HCD within 3 days of adoption. HCD then has 60 days to determine whether the allocation plan is consistent with regional housing needs.

Appendix “A” to this manual includes the text of all the housing element statutes and most related statutes referred to in this manual.

HCD Interpretive Guides

The Department of Housing and Community Development (HCD) also updated or issued the following interpretive guides. They are all available on the department’s website at: <http://www.hcd.ca.gov/hpd/> And most are included in the appendices to this manual.

- *Building Blocks for Effective Housing Elements*² (“*HCD Building Blocks*”) (last updated 5/6/2010) are included as **Attachment 1**. The *HCD Building Blocks* are an online resource guide designed to help local governments understand the requirements of State housing element law and meet community housing needs. They include sample programs, charts, and links to data sources and other resources. Citations to the *HCD Building Blocks* have been added throughout the manual.³

² http://housing.hcd.ca.gov/hpd/housing_element2/index.php

³ See **Attachment 1** for PILP’s table of contents to the Building Blocks online directory. Citations are

- *June 9, 2005 Technical Assistance Memorandum* focusing on the AB 2348 amendments dated June 9, 2005. A copy of that memorandum, along with its appendices is included as **Appendix “B”** to this manual.
- *June 17, 2002 “SB 520” Technical Assistance Memorandum* interpreting the requirement to analyze any local constraints on the development of housing for persons with disabilities (included as **Appendix “C”**).
- *June 20, 2007 “AB 1233” Technical Assistance Memorandum* interpreting the requirement that communities that failed to identify or rezone adequate sites during current housing element period must rezone within one year of due date for the next housing element. (Included as **Appendix “D.”**)
- *May 7, 2008 (updated April 10, 2013) “SB 2” Technical Assistance Memorandum* (interpreting the requirement to zone for “by right” approval of emergency shelters, transitional and supportive housing and limiting the authority of local government to deny approval of those facilities. (Included as **Appendix “E.”**)
- *June 21, 2012 “SB 812 Persons with Developmental Disabilities” Technical Assistance Memorandum* (interpreting the requirement to analyze the housing needs of persons with developmental disabilities—included as **Appendix “F.”**)
- *June 20, 2012 “Default Density Standard 2010 Census Update” Technical Assistance Memorandum* (updating the densities deemed appropriate to accommodate housing for lower income households based on the 2010 Census—included as **Appendix “G.”**)
- *August 24, 2012 “Recent Housing Element Legislation Amending Alternative Adequate Sites”* (explaining legislation amending the requirements of Government Code §65583.1 allowing some planned affordable housing development, subsidy or acquisition to count towards meeting the jurisdictions obligation to zone for its

keyed to the table of contents. Please note that because the Department of Housing and Community Development makes periodic navigation and content updates to its website, citations and the table of contents may not reflect the latest version of *Building Blocks*.

Regional Housing Needs Allocation (RHNA)—included as **Appendix “H.”**)

- *December, 2012 Housing Element Streamlined Update Guidance* is attached as **Appendix “I”**. The guidance includes four sections:
 - 1) The *Implementation Review* to determine whether the site rezoning programs in the past element were implemented,
 - 2) The *Completeness Checklist* to determine whether the draft housing element is complete in form,
 - 3) A *Streamlined Update Template* for jurisdictions whose elements for the prior planning period were found in substantial compliance with the law. The guidance is HCD’s attempt to provide a streamlined update process and focused HCD review by allowing jurisdictions to submit substantially updated versions of previously approved elements.
 - 4) *Housing Element Review Process and Timelines*—a flow chart showing the steps for submission, comment and review of draft and adopted elements

The checklist and streamlined update may help expedite preparation, community review and submission by ensuring that at the very least a housing element will not be submitted until it has addressed all the requirements of the statute. It should add some uniformity to the housing element format, and it will serve as a helpful index to each element because the jurisdiction must indicate on which pages each statutory requirement is addressed. Advocates will need to make sure that all updates required by the statute are included, and that all provisions of the Housing Element statutes receive complete review.

Lastly, since the manual was last published, the deadlines for the revisions of the housing elements have been changed primarily due to the passage of SB 375 linking the due dates of most housing elements to the date of adoption of the Regional Transportation Plan (RTP). The deadlines for each region, as of the publication of this manual, are listed in **Table 1** on pages 24-25.



I. OVERVIEW

The authority for local governments in California to adopt zoning ordinances and other land use policies is the “police power.” This power emanates from the Tenth Amendment to the United States Constitution, which reserved to the states their inherent powers. The police power entitles communities to take actions and adopt laws and policies that protect the public’s health, safety, and welfare. *See Euclid v. Amber Realty Company*, 272 U.S. 365 (1926).

The California Constitution expressly authorizes cities and counties to exercise the police power, providing that either “may make and enforce within its limits all local, police, sanitary, and other ordinances or regulations not in conflict with the general laws.” California Constitution, Article XI, section 7. Even before *Euclid*, the California Supreme Court found that local governments could legitimately employ their police powers to protect the general welfare by enacting zoning ordinances creating residential zones reserved for single-family housing. *Miller v. Board of Public Works*, 195 Cal. 477 (1925).

Over the years, the courts have held the police power to be quite broad, especially in the context of local land use law. It has been deemed “elastic,” expanding to meet ever-changing conditions of the modern world. *See Euclid* at 387, *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980). The depth and elasticity of the police power provide local governments with broad discretion to determine use and development of the finite supply of land within their borders. Any controls or regulations that are not unreasonable and bear some relationship to the general welfare of the community are permissible unless proscribed by preemptive state or federal laws or by the federal or California constitutions. Inherent in the police power, then, is the power to exclude or condition development.

The exclusionary aspect of the power has manifested itself over the years in the form of policies and practices that have excluded affordable housing. “Exclusionary zoning” as it came to be called further exacerbated patterns of racial and economic segregation and contributed to a substantial regional

imbalance between the location of jobs and housing. Fortunately, the power of local government to exclude affordable housing has been circumscribed somewhat in recent years by judicial and statutory limitations. State courts have taken the lead in the constitutional realm, with the New Jersey Supreme Court holding that the New Jersey Constitution obligated local governments to use their land use powers to affirmatively plan for and make available the reasonable opportunity for low and moderate cost housing to meet the needs of people desiring to live within the community. See *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808 (1975) (*Mount Laurel I*).

Following this lead, the California Supreme Court adopted the regional welfare standard in *Associated Homebuilders of the Greater East Bay, Inc., v. City of Livermore*, 18 Cal. 3d 582 (1976):

[If] a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region.

Id. at 601.

The local power to regulate land use also has been limited by statute. Beginning in the 1960's, Congress and state legislatures started to recognize the disastrous effects that unfettered local discretion can have on racial integration, the environment, and the provision of affordable housing. Federal and state laws—especially state mandated local planning laws and fair housing laws—placed significant limitations on local power to exclude housing, balancing the need for affordable housing and equal opportunity with the need for local decision making. Generally, these laws not only restrict exclusionary or discriminatory land use policies, but also require communities to affirmatively plan for inclusion of affordable housing.

California has taken the lead nationally, adopting the Housing Element Law⁴ mandating that all local governments adopt a housing element as part of the local general plan, which “make[s] adequate provision for the housing needs of all economic segments of the community.” Cal. Govt. Code §65583 *et seq.* California’s fair housing laws also expressly prohibit discriminatory land use policies (Cal. Govt. Code §12955 *et seq.*) and discrimination against affordable housing (Cal. Govt. Code §65008). And the state’s “anti-NIMBY” law requires local government to approve certain affordable housing developments unless

⁴ Cal. Government Code §§65580 – 65589.8.

certain rigorous findings are made (Cal. Govt. Code §65589.5—the Housing Accountability Act).

A. The General Plan Obligation

The housing element is one element of a community's general plan. All general law and charter cities and counties in California must have a general plan. The general plan must provide a long-range plan for the future physical development of the community. *See* Government Code §65000 *et seq.*⁵ It must include seven mandatory elements: land use, circulation, housing, conservation, open space, noise and safety (seismic and fire). §65302. Following standard planning methodology, each element normally will consist of three parts: 1) an analysis of needs, resources, and constraints, 2) a declaration of goals and quantified objectives, and 3) programs addressing the needs and constraints and devised to achieve the goals and objectives. Housing elements must also evaluate the appropriateness, effectiveness and progress in implementation of the previous housing element.

But the general plan is more than a vision of possibilities. The courts have found that the general plan is the “*constitution*” for future development in the community. It is the preeminent planning document, sitting atop the hierarchy of local land use measures. Once adopted, it has binding effect on the locality. All actions taken by the jurisdiction must be *consistent* with the general plan.⁶ This is known as the “consistency doctrine,” and it imbues the general plan with the force of law. *See* §65300.5 and *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531; *Citizens of Goleta Valley v. Bd. of Supervisors*, (1990) 52 Cal.3d 553; *Community for Responsible Planning v. City of Indian Wells*, (1989) 209 Cal.App.3d, 1005, 1013; *Neighborhood Action Group v. City of Calaveras* (1984) 156 Cal.App.3d 1176; *O’Loane v. O’Rourke* (1965) 231 Cal.App.2d 774.

B. The Consistency Requirements

There are two kinds of consistency. First, the general plan must be an “internally consistent” document. (§65300.5) That means that no general plan element, including the housing element, may contain provisions inconsistent with provisions in other elements. For example, the land use element may not

⁵ Unless otherwise indicated, all citations in this manual are to the **Government Code**.

⁶ Except that the zoning ordinances of *charter* cities need not be consistent (§65860)-- a legislative anomaly that makes little sense in this era and the Legislature should act to eliminate it. *See Garat v. City of Riverside* (1991) 2 Cal.App.4th 259. In fact, it is unlikely that HCD would approve a housing element that does not include a program requiring consistency between the element and the zoning ordinance.

designate the same parcel for commercial use that the housing element designates as available for residential use.

The second part of the consistency doctrine relates to the constitutional status of the general plan in relation to all other local land use and zoning laws: all development-related local actions must be consistent with the general plan, including the housing element. Because the general plan is the community's constitution for development, the local government may not take actions inconsistent with the plan. Actions required to be consistent with the general plan include the *zoning ordinances, subdivision maps, specific plans, building permits, developer agreements, and redevelopment plans.* (See §V.B.3 and, e.g., §§65860, 66473.5 and 65583(c) and Health & Safety Code §§33300-- 33002.)

C. The Housing Element & “Fair Share” Needs Obligations

Every general plan must contain a housing element that makes "adequate provision for the existing and projected housing needs of all economic segments of the community." (§65583 and see §§65302(c) & 65580) Unlike the other elements, the housing element must be revised and updated at regular intervals (every eight years for the fifth revision for most jurisdictions.⁷ (§65588) Despite the wording, a community is not obligated to actually *provide* housing to all in need. The housing element is a planning document, requiring the community to *plan* for meeting its "fair share" of the regional housing needs. More specifically, through its zoning and land use laws the community must “make available” sufficient sites zoned at appropriate densities and with sufficient public facilities and infrastructure to make feasible the development of housing to accommodate the regional need in each income category.

Two years before the housing element is due, the state Department of Housing and Community Development (HCD) determines the total regional housing need for the next *projection* period⁸ for each region in the state and allocates that need to the regional Council of Governments (COG). (See

⁷ More stringent rules apply to local governments who fail to meet update deadlines. These local governments are required to update the housing element every four years until they come into compliance. (§65588(e)(4).)

⁸ The “projection period” is the period beginning two years before the housing element due date and extending to the end of the period covered by the housing element. (§65588(f)(2).) The “planning period” is the time between the due date of the housing element and the due date for subsequent housing element. (§65588(f)(1).) For example, the planning period for an eight-year housing element due June 30, 2014 is the eight year period beginning with that date and ending June 30, 2022. The projection period for a housing element due June 30, 2014 is the period beginning with the allocation of the RHNA to the COG by HCD—two years before the housing element due date (June 30, 2012)—and ending when the subsequent housing element is due June 30, 2022—ten years. In other words the projection period includes the planning period.

§§65584-65584.09) [For example, there is a COG covering the Bay Area– the Association of Bay Area Governments (ABAG).] This allocation is termed the “Regional Housing Needs Allocation” or “RHNA.”

Next, the COGs (or HCD for cities and counties not covered by a COG), after input from local governments (including an appeal process), allocates to each local jurisdiction its “fair share” of the RHNA for the housing element planning period. Generally, each jurisdiction receives its assignment of need one year prior to the date by which it must revise its housing element. The assigned need is broken down by income categories: very low, low, moderate, and above moderate. It is this regional housing needs determination that communities must begin with when planning to make adequate provision for their housing needs in their housing elements. (See §II.C.) In *addition* to the needs determined by the COGs (or HCD), the local jurisdiction must determine what portion of the allocated very low income need is comprised of the need for housing affordable to extremely low income households. (See §65583(a)(1).)

D. The Contents of the Housing Element

The housing element must contain four basic sections:

- 1) "An assessment of housing needs and an inventory of resources and constraints relevant to meeting these needs." (§65583(a))
- 2) "A statement of the community's goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing." (§65583(b))
- 3) "A program which sets forth a five-year schedule of actions...to implement the policies and achieve the goals and objectives...." (§65583(c))
- 4) A review and evaluation of the previous element, including an evaluation of the appropriateness of the goals and policies, the effectiveness in attaining the goals and objectives, and the progress in the implementation of the element's programs. (§65588(a))

Each local government must review and revise its housing element "as appropriate" but not less than every five years (eight for future revisions in most regions). (§65588)⁹ As explained above, this periodic revision requirement

⁹ Note, the next revisions for the Southern California Association of Governments (SCAG) and Association of Bay Area Governments (ABAG) have been delayed to 2008 and 2009 respectively to

coincides with the jurisdiction's receipt of its regional housing needs determination. The housing element is the only element of the general plan for which regular revision is mandated.

Most importantly, the housing element must contain eight critical parts:

1) **An Analysis of Existing and Project Housing Needs.** The analysis must begin with the needs identified in the RHNA allocated to the jurisdiction and also must analyze the special housing needs of seniors, persons with disabilities, large families, farmworkers, families with female heads of households, and families with persons in need of emergency shelter. (§65583(a)(1) & (a)(7).)

2) **A Site-Specific Land Inventory.** The inventory identify vacant sites and sites with redevelopment potential, which are suitable for housing and included an analysis of the zoning and public facilities available to these sites. It also must demonstrate that the jurisdiction has a zone where emergency shelters are permitted without other discretionary permits (i.e. “by right”). (§65583(a)(3) & (a)(4); §65583.2(a) & (b).)

3) **An Analysis of Governmental Constraints to Residential Development for All Incomes.** The analysis must consider constraints to development of all types of housing, including housing for persons with disabilities. (§65583(a)(5).)

4) **A Program To Identify Adequate Sites**—sites that will be *made available* during the planning period. The sites must have appropriate zoning densities and infrastructure to meet the community's need for housing (including its need for housing for extremely low, low, and very low income households and mobilehomes, farmworker housing and emergency shelters). (§65583(c)(1) & §65583.2.)

5) **A Program to Make Sites Available for Lower Income Housing “By Right.”** Where the inventory demonstrates the jurisdiction lacks sufficient sites to accommodate its need for low and very low income housing, the element must contain a program that will make sufficient sites available at multifamily densities available for development with discretionary approval. (§65583(c)(1); §65583.2(h) & (i).)

allow for synchronization with federal transportation planning time-lines. *See* §65584.02 and [Table 1 on pages 24-25](#).

6) **A Program to Zone Sites to Accommodate Any Lower Income RHNA Not Zoned to Accommodate the Previous Planning Period RHNA.** If a jurisdiction failed to rezone sufficient sites to accommodate its RHNA for the previous planning period, its housing element must include a program demonstrating that the zoning will be accomplished within one year of the due date of the new housing element. (§65584.09; §65583(c)(1).) *Note* that the jurisdiction must rezone sufficient sites to accommodate this need regardless of whether the housing element includes such a program. (§65584.09(b).)

7) **A Program to "Address, and where appropriate and legally possible, remove governmental constraints"** to housing development. The obligation to remove governmental constraints compels local government to deal with exclusionary zoning practices, policies restricting affordable housing and shelter development, unreasonable processing requirements, prohibitive development fees and standards, and NIMBY opposition. (§65583(c)(3).)

8) **Programs to Conserve and Preserve Existing Private Market and Subsidized Affordable Housing.** (§65583(c)(4) & (c)(6).)

It is through the implementation of these eight requirements that the housing element process can increase the opportunities for the development of affordable housing.

E. Housing Element Preparation, HCD Review & Annual Reporting

In preparing the housing element, the local government must "make a diligent effort to achieve public participation of all economic segments of the community...." (§65583(c)(8).)

Prior to the adoption of a housing element or the amendment to a housing element, the local government must submit a draft to HCD for review. HCD reviews the draft and issues written findings determining whether the draft substantially complies with the housing element law. If HCD finds the element out of compliance, the local government then must either change the draft or adopt the draft without changes, making findings indicating why the locality believes the element complies with the law. Once adopted, the jurisdiction must immediately submit the final element to HCD, and HCD must issue a written determination indicating whether the element substantially complies with the law. (§65585.)

Annually, the community must report to HCD on the progress made by the community in implementing the programs of the element. (§65400.)

F. Enforcement and Implementation

Failure to Adopt or Adoption of an Inadequate Element. Failure to timely adopt a housing element in substantial compliance with state housing element law exposes the local government to litigation that can result in a court order curtailing the locality's powers to approve development. (§§65754, 65754.5 & 65755) Indeed, if a court finds that the jurisdiction has failed to adopt an element in compliance with the law, the court must issue an order that either suspends the community's power to take various development approval actions or requires the community to approve proposed residential developments containing affordable housing. Just the threat of this remedy often provides a powerful incentive for the local government to negotiate adoption of an adequate element.

Inconsistent Actions. The general plan consistency requirement provides another means of enforcing the housing element obligation. Once adopted, the housing element becomes the primary land use planning policy and program statement for the local government. As explained previously, the local government may not take actions inconsistent with the housing element. Consequently, if a locality approves a commercial development for sites identified as available for housing, the project can be challenged as inconsistent with the housing element. By the same token, if the local government fails to adopt an adequate element, its general plan is inadequate, and therefore any action required to be consistent with the general plan could be found inconsistent per se.

Failure to Implement. The adoption of a housing element also creates a mandatory duty to take the actions mandated in the element. If the element obligates the community to take a particular action, failure to implement that aspect of the housing element breaches the mandatory duty created by the element and, therefore, constitutes an act inconsistent with the element. A suit to compel performance of the action may be brought as a writ of mandate. §65583(h).

Failure to Rezone Sites For the Prior Housing Element. If the community fails to identify sites or implement a program to rezone sufficient sites to accommodate its share of the need for lower income housing by the date

the next housing element is due, it must rezone enough sites to accommodate the need within one year. (§65584.09)¹⁰

G. Basis for Federal Consolidated Plan (*see* 42 U.S.C. §§12701 *et seq.*, 42 U.S.C. §§5301 *et seq.*, 24 CFR Parts 91 & 570)

California’s system of planning for affordable housing development through the adoption and implementation of local housing elements was used as a model for what is now the federal Consolidated Plan requirement. In order to receive federal community development funds from the Department of Housing and Urban Development (HUD), cities (“entitlement” jurisdictions), urban counties and smaller cities (“consortia”), and states (on behalf of rural communities) must prepare a consolidated plan to assess the needs of its lower income households and prioritize how it will allocate these funds. (The funds include the Community Development Block Grant (CDBG) program, Home Investment Partnership Act (HOME) funds, and funds for the McKinney Homeless Assistance Program.)

Like the housing element, the ConPlan is a plan that must be regularly updated (every five years) and must: 1) identify housing needs, 2) identify barriers to affordable housing development, and 3) prioritize the needs and establish programs addressing the needs and the barriers. And like the housing element law, the ConPlan laws mandate that the local activities funded by the HUD programs be consistent with the ConPlan. In most California communities, the next five-year ConPlan will be due in the year 2015.

In addressing barriers to housing development, the ConPlan must include an Analysis of the Impediments to Fair Housing Choice (otherwise known as the “AI”). *See Attachment 1, [HCD Building Blocks 4.E](#)*. The impediments identified should be addressed in the housing elements analysis of governmental constraints. The AI and the rest of the ConPlan’s analysis, if well done, can help guide advocates when considering what local laws and regulations present constraints to the development of affordable housing, and what action programs should be included in the element to promote fair housing pursuant to §65583(c)(5).

¹⁰ If a court finds that a local government with an eight year housing element failed to complete, within the required three years, the rezoning needed to accommodate the RHNA for very low and low income housing, the court must issue an order or judgment compelling the locality to complete the rezonings within 60 days or the earliest time consistent with public notice and hearing requirements. The court may also impose sanctions for failure to rezone. §65587(d)(1).



II. PROCESS AND TIME LINES

A. HCD & COG Determination and Allocation of Share of Regional Housing Need (§65584 *et seq.*)

The revision and update of the housing element begins at least two years before the revision is due, with the determination of the region's overall housing need—the regional housing need allocation (RHNA)— and then an allocation of that need to the cities and counties within the region. A city or county's share of the RHNA is derived from the housing needs of people of *all* income levels in the “area significantly affected” by the general plan. (§65584(a)) The RHNA figures, therefore, must be determined for very low income, low income, moderate income, and above moderate income households.¹¹ The Department of Housing and Community Development (HCD) first determines the RHNA for the region, then the Council of Governments (COG) allocates a share of the regional need to each city and county. In counties not within the jurisdiction of a COG, HCD may delegate the allocation of RHNA to the county or HCD may perform the allocation. The RHNA must be determined and allocated to local jurisdictions no later than *one year* before the housing elements are due (§65584(b)). See **Table 1** on pages 24-25 for a schedule of the dates housing elements are due in each region.

1. HCD Determination of the RHNA for the Region

First, in consultation with the regional COG at least 26 months before the housing element is due, HCD determines each region's share of housing needs no

¹¹ See 25 C.C.R. §§6910, 6926-6932, Health & Safety Code §50093 and State of California General Plan Guidelines, p. 74 (Governor's Office of Planning and Research, 2003 [This is the current version as of 6/24/10. OPR is in the process of updating] (available on the OPR website: <http://www.opr.ca.gov/>)) for definitions of income levels. Generally, income levels are defined as follows, assuming four person households-- **very low income**: no more than 50% of area median income (Health & Safety Code §50105); **low income**: between 50 and 80% of median (Health & Safety Code §5079.5); **moderate income**: between 80% and 120% of median (Health & Safety Code §50093); and **above moderate income**: above 120% of median (Health & Safety Code §50093). And, as explained in Chapter III, jurisdictions must derive the local need for **extremely low income housing** (30% of median (Health & Safety Code §50106)) from the very low income RHNA.

more than 24 months before the elements are due.¹² (**§65584 & §65584.01; and see §65588**)¹³ The department’s determination is based on both the population projections of the state Department of Finance (DOF) and the regional population forecasts used in preparing the regional transportation plans. (If the difference between the DOF projections and the regional forecast is less than 3%, HCD must base the determination on the regional population forecast.) To assist HCD in making the determination, the COG must also provide HCD with available data relating to anticipated household growth, household size trends, the rate of household formation (based on age, gender and ethnicity), vacancy rates (including rates necessary for a “healthy” housing market) and replacement housing needs.

If the COG objects to HCD’s RHNA determination it may file an objection within 30 days of the determination. HCD must then make a final determination within 45 days. (**§65584.01(d)**)

Alternative Processes

At least six month prior to the date HCD must determine the RHNA, the COG may request the use of population and household forecast assumptions used in the regional transportation plan (RTP). (**§65584.02**) The request may include a request for an extension of the deadlines allocating the RHNA and for preparation of housing elements by local jurisdictions in order to synchronize these deadlines with the federal regional transportation deadlines. (For regions where the housing element update is due before January 2007, HCD may only approve a request submitted prior to December 31, 2004.) HCD must consult with the COG regarding the request and may consult with DOF, the state Department of Transportation, other contiguous COGs and anyone else deemed necessary. HCD has the discretion to reject the request.

2. COG Allocation of RHNA to Local Governments

The Methodology. At least two years prior to the housing element revision date, each COG or subregion must develop a proposed methodology for distributing the RHNA to its local governments.¹⁴ (**§65584.04**) To develop this

¹² *Except* for the Southern California Association of Governments, discussed below.

¹³ The RHNA due dates of HCD or of the COGs may be extended by HCD for no more than 60 days if extension would enable access to more recent critical data. If the HCD or COG deadlines are extended, the deadlines of the local governments for preparing their housing elements must also be extended by no more than 60 days. (**§65584.01(c)**)

¹⁴ At least 28 months prior to the scheduled housing element revision date, two or more cities and a county, or multiple counties, may form a subregional entity for the purpose of allocation of the subregion's RHNA among its members. (**§65584.03**).

methodology, no more than six months before developing the proposal, the COG or subregion must survey the local governments regarding factors including: jobs-housing ratio, opportunities and constraints on development, distribution of household growth relative to transportation infrastructure, market demand for housing, local agreements to direct growth to unincorporated areas, loss of subsidized housing, housing cost burdens and farmworker housing needs. However, no ordinance, policy, voter-approved measure, or standard that directly or indirectly limits the number of residential building permits issued may be used as a basis for a reduction in the RHNA. (§65584.04(f))¹⁵

Public Participation. The COG or the subregion must make a diligent effort to procure participation of all economic segments of the region in making the RHNA determination. They must conduct at least one public hearing on the proposed methodology.

Allocation. 18 months prior to the housing element revision date, the COG or subregion must distribute the draft allocation to each local government. (§65584.05) Within 60 days of the distribution, a local government may request a revision of its share in accordance with factors surveyed and based upon comparable data from all affected jurisdictions. Within 60 days of the request, the COG or subregion must either accept, reject or modify the proposed revision. The local government may appeal its draft allocation if it is not satisfied with the decision. If the decision is appealed, the COG or subregion must conduct public hearings on the appeal within 60 days of the date it establishes to file appeals.

If the final action on the appeal reduces the jurisdiction's RHNA, the reduction must be reallocated to other jurisdictions in the region or subregion. (§65584.05(e)) The decision must be issued within 45 days of the end of the 60-day period for hearing appeals. (§65584.05 (f)) If the total of all reductions to the RHNAs of appealing jurisdictions is 7% or less of the total regional housing needs, the adjustment is redistributed proportionately to all local governments. (§65584.05(g)) If the total adjustments are greater than 7%, the COG or subregion must develop a methodology to redistribute the amount greater 7%. Two or more localities may agree to an alternate distribution of the appealed housing allocations.

Within 45 days of the proposed final distribution of the RHNA, the COG must hold a public hearing to adopt the final plan. (§65584.05 (h)) Then, within 60 days of the adoption, HCD must determine whether the final allocation is

¹⁵ For most of the RHNA allocations issued in advance of the fifth and sixth revisions of housing elements, the allocations must be consistent with the development pattern described in the sustainable communities strategy (SCS) prepared as part of the regional transportation plan (RTP) pursuant to SB 375.

consistent with the total RHNA it initially assigned to the region. HCD may revise the determination of the COG if necessary to achieve consistency.

3. HCD Distribution of RHNA to Local Governments not in Regions Covered by a COG

HCD determines the RHNA for cities and counties without COGs. **(§65584.06)** HCD may delegate this responsibility to a county or counties if it determines that a county or counties and a majority of the cities within a county or counties representing the majority of the population possesses the capability and has agreed to accept the responsibility.

Within 90 days of HCD's draft RHNA distribution to cities and counties, a local government may propose to revise its RHNA share. HCD must issue a decision on the proposal within 60 days following the end of the 90-day period. The jurisdiction may request a public hearing to review the determination within 30 days of the decision. Before making its decision after the hearing, HCD must consider all comments and provide a written response to each request for a revision from a locality. As with COG assigned RHNA, if HCD reduces the RHNA of one jurisdiction it must reallocate the forgone portion to other jurisdictions in the region. HCD must issue a final RHNA distribution for all local governments within 45 days of the completion of the local review period.

B. Transfer of Regional Housing Needs Allocation–Prior to Adoption; New Cities; Annexations (§65584.07)

After the adoption of the final RHNA distribution plan, but before the due date for the housing element update (*i.e.* during the year before the housing elements are due), a county may transfer shares of RHNA to one or more cities under the following conditions, pursuant to §65584.07:¹⁶

- 1) the city (or cities) agrees to increase its RHNA by an equivalent amount;

¹⁶ Previously, the law allowed a jurisdiction to transfer a percentage of its share of the regional housing needs to another jurisdiction in limited circumstances up until the year 2000. **(§65584.5)** No transfers occurred (and the law remains on the books). Note however, HCD's prior interpretation of the now repealed §65584(c)(5) (effective through 2004) allowed transfers without the limiting circumstances of the current **§65584.5**. AB 2158 (2004) enacted more specific transfer conditions during the RHNA process, and thereby should eliminate disagreement over the meaning of these transfer provisions. Also, **§65584.6** permitted the County of Napa to receive credit towards meeting up to 15% of its fair share needs for units it funds through its trust fund in incorporated areas. Napa transferred the full 15% for the allowed planning period, but this pilot program expired June 30, 2007.

- 2) the transfer occurs only between a county and cities within the county;
- 3) the county's share of low-income and very low-income housing is reduced in the same proportion as the county's share of moderate- and above moderate-income housing is reduced; and
- 4) the COG or HCD, whichever assigned the RHNA, determines that the first three conditions have been satisfied. Counties and cities that have executed transfers must include the revised RHNA in their updated housing element.

New Cities. If an incorporation of a city occurs after the final RHNA has been distributed, the new city and the county may agree to a revised allocation, with the new city accepting part of the county's allocation. If they cannot reach agreement, then either party may request the COG (or HCD where there is no COG) to make a revised determination. The revision must be made within one year of the incorporation. The revision must be based upon the methodology described above for transferring RHNA from a county to existing cities. The revision may neither reduce the total RHNA of all cities and the county nor change the RHNA of the existing cities.

Annexations. §65584.07(d). If a city annexes territory after distribution of the final RHNA, the city and county may agree to revise the allocation so that the city accepts a share of the county's RHNA. If the two cannot agree, one may request the COG (or HCD where there is no COG) to make a revised allocation. The determination must be made within six months of a written request. It must be based on the RHNA methodology adopted by the COG, unless the annexed land is subject to a development agreement entered into prior to January 1, 2008. In that case, the reallocation is based on the number of units allowed by the development agreement.

However, a revised determination may not be made if: 1) the land was within the city's sphere of influence when the RHNA was first allocated, 2) the COG or HCD certifies that the land was fully incorporated into the determination of the city's RHNA *and* 3) the area covered by the annexation is the same as that used to determine the city's RHNA.

C. Statutory Deadlines & SB 375 Eight Year Elements. (§65588)

Section 65588 sets up a schedule for periodic review of the housing element. "Each local government shall review its housing element as frequently as appropriate" in order to evaluate:

1. "The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal."
2. "The effectiveness of the housing element in attainment of the community's housing goals and objectives."
3. "The progress ... in implementation of the housing element."

The statute prescribes deadlines for completion, staggered by geographic region. Although the revision dates initially were every five years, the Legislature extended the dates for the third and fourth revisions due to the failure to include budget appropriations to fund the COGs to perform the regional housing needs allocations. A summary of the deadlines is listed in **Table 1** beginning on the next page, however some of the due dates are not known at the time of this publication, so for the most current due dates, *see* HCD's web site: www.hcd.ca.gov/hpd/hrc/plan/he/

Beginning with the fifth revision, pursuant to *SB 375 (Steinberg 2008)*, the due dates are now set 18 months following the adoption of the regional transportation plan (RTP). §65588(e). As of the sixth revision, the housing elements of most jurisdictions in most regions will be due every *eight years*. *See discussion of SB 375 following Table 1. (However, jurisdictions that fail to adopt elements within 120 days of the statutory deadline must prepare their housing elements every four years.)*

Table 1–Regional Jurisdictions	Third Revision Date	Fourth Revision Date	Fifth Revision Date
San Diego Association of Governments (SANDAG): San Diego County and all cities within the County.	December 31, 1999	June 30, 2005	April 30, 2013
Southern California Association of Governments (SCAG): Counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, Ventura, and all cities within each County.	December 31, 2000	June 30, 2008	October 15, 2013
Sacramento Area Council of Governments (SACOG): Counties of El Dorado,* Placer,* Sacramento, Sutter, Yolo, Yuba, and all cities within each County. (<i>Placer and El Dorado jurisdictions have a 2009 option for the 4th Revision.</i>)	June 30, 2002	June 30, 2008	October 31, 2013
Tahoe Regional Transportation Agency (TRPA): City of South Lake Tahoe.		Aug 31, 2009	June 15, 2014
Butte County Association of Governments: Butte County and all cities within the County.		Aug 31, 2009	June 15, 2014
Other Local Governments: Counties of Alpine, Amador, Calaveras, Colusa, Del Norte, Glenn, Humboldt, Inyo, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Nevada, Placer, Plumas, San Benito, San Joaquin, San Luis Obispo, Santa Barbara, Shasta, Sierra, Siskiyou, Stanislaus, Tehama, Trinity, Tulare, Tuolumne and all cities within each County.	December 31, 2003	Aug. 31, 2009	June 30, 2014
Association of Bay Area Governments (ABAG): Counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma, and all cities within each County.	December 31, 2001	June 30, 2009	See HCD web site
Fresno Council of Governments (FCOG): Fresno County and all cities within the County.	June 30, 2002	June 30, 2008	See HCD web site
Kern Council of Governments (KCOG): Kern County and all cities within the County.			See HCD web site
Association of Monterey Bay Area Governments (AMBAG): Counties of Monterey, Santa Cruz, and all cities within each County.	December 31, 2002	June 30, 2009	See HCD web site

Table 1—Regional Jurisdictions	Third Revision Date	Fourth Revision Date	Fifth Revision Date
<p>Santa Barbara County Association of Governments (SBCAG): Santa Barbara County and all cities within the County.</p> <p>Madera County Transportation Commission (MCTC): Madera County and all cities within the County.</p> <p>Merced County Association of Governments (MCAG): Merced County and all cities within the County.</p> <p>San Joaquin County Council of Governments (SJCOG): San Joaquin County and all cities within the County.</p> <p>Tulare County Association of Governments (TCAG): Tulare County and all cities within the County.</p> <p>Stanislaus County Council of Governments (StanCOG): Stanislaus County and all cities within the County.</p> <p>Kings County Council of Governments: Kings County and all cities within the County.</p> <p>San Benito County Council of Governments: San Benito County and all cities within the County.</p>		Aug. 31, 2009	See HCD web site

Limited Authority of HCD to Extend Deadlines.

If HCD extends the date of a COG to complete the RHNA allocation, then it must extend the date for communities within the COG to prepare their housing elements, but not for more than 60 days (§65584.01(c).) As of 2009, under the newly enacted provisions of **SB 375** subsequent revisions will be due at no more than eight year intervals following the fourth revision, depending on several factors. (§65588(e).)

D. SB 375—Housing and Transportation Planning Now Linked—Goal to Reduce Greenhouse Gas Emissions

The Legislature passed SB 375 in 2008 [Stats. 2008, ch. 728] as the land use and transportation planning component of the state’s effort to achieve the greenhouse gas emission reduction goals of The Global Warming Solutions Act of 2006 (AB 32 [Stats. 2006, ch. 488]). The legislation is an attempt to integrate preparation of the RHNA and regional transportation plans (RTP) by requiring consistency between the RHNA and the “sustainable communities strategy” (SCS), which must be part of the RTP. It links funding for transportation projects to the SCS, requiring consistency between the SCS and the financial and action elements of the RTP. §65080(b)(2)(B).

The SCS and APS. An SCS must be included in the first RTP adopted by the regional metropolitan transportation organization (MTO) after June 30, 2010. It must establish a reduced development blueprint for the region which will reduce greenhouse gas emissions. But, it must also take into account the state housing goals contained in the Housing Element Law and identify areas sufficient to house all economic segments of the population over the 20 to 30 year term of an RTP, *including areas sufficient to accommodate an eight year RHNA.* If the MTO determines that the draft SCS is unable to reduce greenhouse gases to target levels established by the California Air Resources Board (ARB), it must prepare an alternative planning strategy (APS). §65080(b)(2)(I).

Submission to the ARB. The MTO then adopts either an SCS or APS and submits it to the ARB. If the ARB finds the SCS will not achieve targeted greenhouse gas reductions, the MTO must either revise the SCS or adopt an APS (unless already adopted instead of a SCS) that identifies the impediments to achieving the SCS and describes how the APS would achieve the emission reduction targets. §65080(b)(2)(J).

Relation to Local Land Use Authority. Neither the SCS nor the APS regulates or supersedes the land use authority of local government. It also does *not* require consistency with local land use laws or policies, including the general plan, and the RTP, including the SCS, or the APS. §65080(b)(2)(J). However, the legislation does require consistency between the SCS and the allocation of the RHNA to local governments. §65584.04(K).

SB 375 and SB 575 Changes in Housing Element Due Dates—Fifth and Sixth Revisions. The actual due dates depend on several interrelated variables.

Fifth Revision. For local governments within a region classified as “nonattainment” under the federal Clean Air Act (42 U.S.C. §7506)—*most large COGs*—the fifth revision is due “no later than 18 months after adoption of the first regional transportation plan to be adopted after September 30, 2010” (the date that the Air Resources Board must provide target emission standards to each region). Local governments in regions that adopt an RTP every five years, including jurisdictions that have attained adequate air quality standards under the Clean Air Act, must complete their fifth revisions five years after the due dates of the fourth revisions set out in §§65588(e)(1)(A-F). §65588(e).

San Diego region communities have a different transition schedule and implementation process. Under SB 375, as for other communities, the fifth revision is due “no later than 18 months after adoption of the first regional

transportation plan update to be adopted after September 30, 2010.” §65588(e)(2)(B)(i). However, if a community in the San Diego region did not adopt a fourth revision by January 1, 2009, it must revise every four years unless it adopts a housing element by March 31, 2010, and completes rezoning by June 30, 2010. Additionally, it must identify or rezone adequate sites “to accommodate a prorated portion of its share of the regional housing need for the projection period representing the period from July 1, 2010, to the deadline [for the fifth revision]”.

Sixth Revision. For local governments in nonattainment Clean Air Act regions *or* those in regions that have elected to adopt an RTP every four years, the sixth revision and subsequent revisions are due not less than every eight years. *However, if a jurisdiction fails to adopt a housing element within 120 days of the deadline for adoption, the sixth and subsequent revisions are due every four years.* §65588(e)(4)(A).

In the *San Diego* region, the sixth revision is due 18 months after the adoption of the first RTP to be adopted after the fifth revision due date. §65588(e)(2)(B)(ii)(II).

E. HCD Review (§65585)

Before a local government adopts or amends a housing element, it must be submitted to HCD for review. *Initial* housing elements must be submitted at least 90 days prior to adoption; but all other amendments, updates and revisions must be submitted at least 60 days prior to adoption. HCD interprets this to mean that, except for the first housing element adopted by a community, all amendments and revisions must be submitted at least 60 days before adoption.

HCD then conducts a review and must issue written findings determining whether the element or amendment "substantially complies" with the housing element laws. Any public agency, group, or person may submit written comments during the review process. HCD must consider these comments and report its findings to the local government within 60 days of the receipt of a draft revised element or a proposed amendment.

CAUTION: HCD has issue a timeline in chart form describing its process during the 60 day review period. It indicates that comments from the public should be submitted early in the review period to ensure that the comments are considered. (It is included in Appendix “P” and is online at:

www.hcd.ca.gov/hpd/Attachment%204_ReviewProcessTimelines.pdf

Advocates should contact HCD as soon as the community submits the element and tell the reviewing staff that they intend to provide comments.

The local legislative body must consider HCD's findings. If HCD finds the element or amendment is out of substantial compliance with the housing element laws, §65585(f) requires the legislative body to either:

- (1) Change the draft to achieve substantial compliance; or
- (2) Adopt the draft without changes and include written findings explaining why the legislature believes the draft does substantially comply.

Not “Self-Certification.” Option two is sometimes called “self-certification” by local governments. But, that is a misnomer. A jurisdiction cannot render its housing element in substantial compliance with the law simply by adopting written findings that reject HCD’s determination. The question of whether an element complies with the statute is a question of law, and a court will give HCD’s determination (essentially, HCD’s construction of the statute) deference when evaluating the legal adequacy of a housing element.

Upon adoption of the final element, the local government must submit it to HCD for review. HCD must then report its written findings to the local government within 90 days.

F. Annual Progress Report (§65400(b)(2))

After the legislative body has adopted the housing element or other part of the general plan, the local planning commission must provide an annual report to the local legislative body, the Governor’s Office of Planning & Research and HCD on the status of the plan and progress in implementation. The report must be considered at an annual meeting of the legislative body and must describe the progress made by the locality in meeting its share of the regional housing needs and the efforts to remove governmental constraints to the maintenance, improvement and development of housing (pursuant to §65583(c)(3)). The report must be prepared “through the use of forms and definitions” adopted by HCD. (As of March 27, 2010, HCD completed the rulemaking process and has issued regulations, forms, and instructions on its website. See [HCD Building Blocks, 6.D](#). And it must be submitted to the local legislative body by April 1 of each year. See [HCD Building Blocks, 6.D](#).

If the local government fails to submit the annual report or submits an inadequate report, it is subject to suit. If the court finds that the reporting requirements have been violated, it must issue an order requiring the jurisdiction to comply within 60 days and instituting “appropriate sanctions.” The court may also retain jurisdiction to enforce the order.

G. Water & Sewer Service Priority for Developments Addressing RHNA (§65589.7)

After adoption of an initial or amended housing element, the local government must deliver a copy of the element to all public and private entities that provide water and sewer services within the territorial jurisdiction of the local government. See [HCD Building Blocks 6.B](#). The water and sewer provider, in turn, must grant a priority to any proposed affordable housing development:

Each public agency or private entity providing water or sewer services shall grant a priority for the provision of these services to proposed developments that include housing units affordable to lower income households.

§65589.7(a). Importantly, failure of the local government to deliver the housing element to the infrastructure provider does *not* exempt the provider from granting the affordable housing priority. **§65589.7(e)**.

§65589.7(b) now also requires these infrastructure providers to have developed policies and procedures by July 1, 2006 for granting this priority, and to update these every five years. For *private* providers regulated by the Public Utilities Commission, the PUC is charged with developing these companies.

In addition to requiring a priority for affordable housing development, a water or sewer provider may not deny service to an affordable housing development (or condition or reduce the amount of services applied for) unless it makes written findings that the denial, condition or reduction is necessary based on:

(1) The provider does not have "sufficient water supply," [as defined] or is operating under a water shortage emergency [as defined], or does not have sufficient water treatment or distribution capacity, to serve the needs of the proposed development, as demonstrated by a written engineering analysis and report.

(2) The provider is subject to a compliance order issued by the State Department of Health Services that prohibits new water connections.

(3) The provider does not have sufficient treatment or collection capacity, as demonstrated by a written engineering analysis and report on the condition of the treatment or collection works, to serve the needs of the proposed development.

(4) The provider is under an order issued by a regional water quality control board that prohibits new sewer connections.

(5) The applicant has failed to agree to reasonable terms and conditions relating to the provision of service generally applicable to development projects, or payment of a fee or charge imposed pursuant to Section 66013.

See §65589.7(c).



III. HOUSING ELEMENT CONTENTS

The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing ... and shall make adequate provision for the existing and projected needs of all economic segments of the community.¹⁷

(§65583) The purpose of the housing element is to plan for the housing needs of all income levels. By "adequate provision", the statute means the housing element must make adequate plans for low and very low income households as well as middle and upper income households. Originally conceived to require and enable communities to eliminate exclusionary land use policies and practices that lock in patterns of racial and economic segregation, the core of the housing element obligation is the requirement to identify "adequate sites." It means that the local government must zone land at sufficient densities and served by adequate infrastructure to facilitate the development of housing to meet even the lowest income levels.

The specific requirements for the contents of the housing element are contained in §65583. It provides a detailed description of the subjects and analyses that the element must include. Of the seven elements that comprise the local general plan, only the content of the housing element is prescribed with such detailed specificity. See *Buena Vista Garden Apartments Ass'n. v. City of San Diego Planning Dept.*, 175 Cal.App.3d 289, 296-98 (1985). §65583 as well as the other housing element statutes are attached as **Appendix A**. The chapter addresses each particular requirement.

The Department of Housing and Community Development (HCD) website provides *Building Blocks for Effective Housing Elements* ("HCD Building Blocks"), which contains the department's interpretation of the

¹⁷ All statutory citations in this manual include changes made during the 2012 legislative session, which are effective January 1, 2013.

statutory requirements along with suggestions on their implementation. This is included as [Attachment 1](#) to this manual. It is available online at: www.hcd.ca.gov/hpd/housing_element2/index.php

A. Review of Progress Under Prior Housing Element (§65588(a))

To lay the basis for preparation of an element with the contents required by §65583, the housing element must first evaluate “the effectiveness of the housing element in attainment of the community’s housing goals and objectives,” and the progress of the jurisdiction “in implementation of the housing element.” (§65588(a)) In this section, the locality should describe and quantify the actual progress towards fulfilling and implementing of the previous element’s goals, objectives, policies, and programs. The section should include the reasons for major differences between what was projected or planned and what was achieved. Finally, this part should contain a discussion of how the goals, objectives, policies, and programs of the revised and updated element incorporate the lessons from the results of implementing the previous element. See [HCD Building Blocks 1.C](#)

B. Needs Assessment and Inventory of Resources and Constraints (§65583(a))

The first substantive section of the updated housing element is the analysis of the community’s current and projected housing needs in comparison to the resources available and the constraints to meeting the identified needs. Here the local government must provide an up-to-date appraisal of the state of the unmet housing needs of all economic segments of the community, including the community’s share of the regional housing need, and an inventory of the land and resources that are available to meet these needs. This part must contain:

(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following:....

1. Analysis of Population & Employment Trends & Housing Needs, Including the Needs of Extremely Low Income Households (§65583(a)(1))

(1) An analysis of population and employment trends and documentation of projections and a quantification of the locality’s existing and projected housing needs for all income levels, including extremely low income households. . . . These existing and projected needs shall include the

locality's share of the regional housing need in accordance with Section 65584. Local agencies shall calculate the subset of very low income households allotted under Section 65584 that qualify as extremely low income households. The local agency may either use available census data to calculate the percentage of very low income households that qualify as extremely low income households or presume that 50 percent of the very low income households qualify as extremely low income households. The number of extremely low income households and very low income households shall equal the jurisdiction's allocation of very low income households pursuant to Section 65584. [Emphasis added.]

This analysis must start with the regional housing needs share allocation for each income category as assigned by the regional COG or HCD (*i.e.* very low, low, mod and above-mod). It must also determine what portion of the jurisdiction's very low income need comprises the needs of extremely low income households. In assessing the need for extremely low income housing, the locality may either conduct an independent analysis or assume that the need is 50% of the regional need allocation for very low income housing.

The regional fair share numbers, therefore are just a starting point– a minimum. Any local conditions or circumstances that have increased the need or any data the jurisdiction obtains indicating additional need (such as Census data) should be incorporated into the analysis. This analysis is the critical beginning of the preparation of the housing element. Everything else– the number and type of sites needed, the goals and objectives, and the programs– flow from these needs determinations. See [HCD Building Blocks 2.Ai ii iii](#) (provides a more detailed breakdown of how to analyze demographics & housing characteristics by subtopic, including tables and suggested data sources. It also explains how to perform the analysis of the need for extremely low income housing).

2. Analysis and Documentation of Household and Housing Characteristics (§65583(a)(2))

- (2) *Analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition.*

This analysis provides crucial information on the needs of existing households and the condition of the housing stock, and therefore helps provide a more complete picture of the real housing needs of the community. It should

contain more than merely a recitation of Census data. Other, more current sources of data should be surveyed, and the information should be *analyzed*. See [HCD Building Blocks 2.Ai, ii, iii, iv](#).

3. Inventory of Land and Analysis of Zoning and Public Facilities (§65583(a)(3) & §65583.2)

*(3) An inventory of land **suitable** for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites. [§65583(a)(3), emphasis added.]*

This is the critical corollary to the assessment of need—preparing an inventory of the sites that are or could be appropriate for housing development. Here the community must provide a comprehensive inventory and analysis of *specific* sites that are available for housing development to address the identified needs. The inventory is used to:

identify sites that can be developed for housing within the planning period and that are sufficient to provide for the jurisdictions share of the regional housing need for all income levels....

(§65583.2(a)) For HCD’s current interpretation of the land inventory and analysis requirement, see its *June 9, 2005 Technical Assistance Memorandum* included in this manual as **Appendix B**. See also [HCD Building Blocks, 3.A](#).

In addition to vacant sites, the element must contain a catalog of sites having the potential for redevelopment. Land suitable for residential development includes:

- Vacant sites zoned for residential use
- Vacant sites zoned for uses that include residential use
- Residential sites that can be developed at a higher density
- Sites zoned for non-residential use that can be:
 - redeveloped for residential use *or*
 - as necessary, rezoned for residential use

(§65583.2(a))

And, to determine whether the site is truly available for development for housing affordable to a particular income group, **§65583.2(b)** requires the inventory and analysis of zoning and public facilities must include:

1. **List of parcels** by parcel number or other unique reference
2. **Size, general plan designation** and **zoning** of each parcel
3. **Non-vacant sites: a description of the existing use**
4. **Environmental constraints.** A general description of these constraints to residential development (to the extent documentation of the constraint is available to the locality). This information need not be site-specific, *however*, “the analysis must clearly demonstrate the identified sites can accommodate projected residential capacities and future residential development” within the planning period.¹⁸ Environmental constraints would include the slope and topography, and whether there are environmental barriers to development such wetlands or toxic contamination. (See [HCD Building Blocks, 3.B.iv.](#))
5. **Infrastructure.** A general description of existing or planned infrastructure (water, sewer and other “dry utilities” (including the availability and access to “distribution facilities” (e.g. sewer treatment plants). This information also need not be site-specific, nevertheless:

“The element must include sufficient detail to determine whether water delivery systems and sewer treatment capacity is or will be (i.e. within the planning period) available to the identified sites. However, if parcel specific detail is available, this information could be included in the element.”¹⁹

6. Sites identified for above-moderate income housing in areas not served by public sewer (need not be site-specific).
7. **A map** that shows the location of the sites included in the inventory, such as the general plan land use map.

See [HCD Building Blocks 3.A, B](#). The inventory and analysis should include definitions of all residential land use and zoning categories, including density ranges. In this context, the analysis of zoning should consider the historical land use patterns, densities and indicated trends, and it should also indicate which sites are developable “as-of-right.”

¹⁸ HCD 6/9/05 Technical Assistance Memorandum, p. 1 (attached as Appendix B)

¹⁹ §65583.2(b). And although site-specific information regarding availability of this infrastructure may not be readily available, the *general* availability of water and sewer services should be easily obtainable from the water and sewer providers. Moreover, these providers are mandated to provide priority for affordable housing developments *and* prohibited from denying or reducing provision of services unless they can make specific findings that they lack capacity. §65589.7 and *see* discussion in Chapter II, §G.

◆ **Analysis of the Capacity of the Inventory to Accommodate the RHNA for Each Income Level (§65583.2(c)—(g))**

Based on the information and analysis in the inventory, the local government must determine whether *each site* in the inventory can accommodate some portion of the jurisdiction’s share of the RHNA *by income category* during the housing element planning period. See HCD’s *June 9, 2005 Technical Assistance Memorandum* included as **Appendix B** and [HCD Building Blocks 3.B.i, iii](#). This analysis must be included in the housing element and must determine whether the inventory can accommodate a variety of housing types, including multifamily rental, factory-built, mobile homes, farmworker housing, emergency shelters and transitional housing. The number of units developable on each site is determined as follows:

- Site *capacity* is determined by any applicable local minimum density requirement, or, if minimum density is not required, the locality must calculate the unit capacity and demonstrate how the number of units for the site will be accommodated.
- The capacity determination must be adjusted downward if land use controls, development standards or site improvement requirements would preclude the development of that number of units.
- For sites determined suitable for housing for *very low or low-income households*, the capacity determination must either:
 - 1) Provide an analysis demonstrating how the adopted zoning densities can accommodate housing affordable to these households, *or*
 - 2) Use the following default assumptions [sometimes called “Mullin Densities” from the adopting legislation—AB 2348 (Mullin) [Stats. 2004, ch. 724]:
 - 15 units/acre—cities within non-metropolitan counties; non-metropolitan counties with micropolitan areas
 - 10 units/acre—unincorporated areas in all non-metropolitan counties not included in the 15 units/acre category
 - 20 units/acre—suburban jurisdictions
 - 30 units/acre—jurisdictions in metropolitan counties

(§65583.2(d), (e), & (f) define metropolitan and non-metropolitan counties and cities, micropolitan counties, and suburban jurisdiction.)

Non Vacant Sites.

If the inventory relies on non-vacant sites to address part of the RHNA, the element must describe the realistic development potential during the planning period. (§65583.2(g)) “The analysis *must* describe the methodology used to establish the development potential,” including:

- The extent to which existing uses may impede residential development
- Recent development trends in the area and for similar sites
- Market conditions affecting development potential
- Existing or proposed incentives, including financing or regulatory relief to encourage residential development on the identified sites.

HCD *June 9, 2005 Technical Assistance Memorandum*, p. 3-4 (included as **Appendix B**) and [*HCD Building Blocks 3.B.ii.*](#)

Some communities have used examination of *assessed valuation* of parcels with existing uses to determine whether a site is available for housing development. They make the assumption that if a site is assessed at a below-market value it is “under-utilized” and therefore available for alternative development. But although the value of a parcel may increase if its use is changed to residential, that, by itself, is not a sufficient indication that the site will be available for residential development if it is zoned or rezoned for residential use. The existing use may remain vital, profitable, and ongoing notwithstanding the possible change in use.

4. Identification of Zones Permitting Emergency Shelters (§65583(a)(4))

(4) (A) The identification of a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit. The identified zone or zones shall include sufficient capacity to accommodate the need for emergency shelter identified in paragraph (7), except that each local government shall identify a zone or zones that can accommodate at least one year-round emergency shelter. If the local government cannot identify a zone or zones with sufficient capacity, the local government shall include a program to amend its

zoning ordinance to meet the requirements of this paragraph within one year of the adoption of the housing element. The local government may identify additional zones where emergency shelters are permitted with a conditional use permit. The local government shall also demonstrate that existing or proposed permit processing, development, and management standards are objective and encourage and facilitate the development of, or conversion to, emergency shelters. Emergency shelters may only be subject to those development and management standards that apply to residential or commercial development within the same zone except that a local government may apply written, objective standards that include all of the following:

(i) The maximum number of beds or persons permitted to be served nightly by the facility.

(ii) Off-street parking based upon demonstrated need, provided that the standards do not require more parking for emergency shelters than for other residential or commercial uses within the same zone.

(iii) The size and location of exterior and interior onsite waiting and client intake areas.

(iv) The provision of onsite management.

(v) The proximity to other emergency shelters, provided that emergency shelters are not required to be more than 300 feet apart.

(vi) The length of stay.

(vii) Lighting.

(viii) Security during hours that the emergency shelter is in operation.

(B) The permit processing, development, and management standards applied under this paragraph shall not be deemed to be discretionary acts within the meaning of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(C) A local government that can demonstrate to the satisfaction of the department the existence of one or more emergency shelters either within its jurisdiction or pursuant to a multijurisdictional agreement that can accommodate that jurisdiction's need for emergency shelter identified in paragraph (7) may comply with the zoning requirements of subparagraph (A) by identifying a zone or zones where new emergency shelters are allowed with a conditional use permit.

(D) A local government with an existing ordinance or ordinances that comply with this paragraph shall not be required to take additional action to identify zones for emergency shelters. The housing element must only describe how existing ordinances, policies, and standards are consistent with the requirements of this paragraph.

This provision, added in 2008, requires that housing elements identify any zones where emergency shelters may be developed as a permitted use, without a conditional use permit or other discretionary permit. HCD has issued a technical assistance memorandum and manual for implementation of this subdivision, which is included as **Appendix E. HCD, May 7, 2008 (Amended 4-10-13) “SB 2” Technical Assistance Memorandum.** If the local government cannot identify areas in the community zoned for “by right” development of shelters, or if the sites on which shelters would be a permitted use have insufficient capacity to accommodate the need for emergency shelter determined in the analysis required by (a)(7) (*see below*), the element must include a program to rezone. The program must require amendment of the zoning code to provide adequate zoning to accommodate the need shelter within one year of the adoption of the housing element.

Regardless of need, all communities must identify a zone that can accommodate at least one year-round shelter. However, if a community can demonstrate that it has at least one shelter, or that it is served by a shelter in another community pursuant to a multi-jurisdiction agreement, that can accommodate its need for shelters, HCD may allow the locality to comply with this provision by identifying a zone where shelters are allowed with a conditional use permit.

The element must also analyze existing or proposed permit processing, development, and management standards for emergency shelters, demonstrate that the standards are objective, and encourage and facilitate the development of shelters. The analysis must also demonstrate that shelters are only subject to development and management standards that apply to residential or commercial development within the same zone except that the local government may establish written, objective standards specifically for shelters. The standards may cover maximum capacity, length of stay, parking, management, lighting, security, and proximity to other shelters. Parking standards may not require the shelter to have more parking than other commercial or residential structures in the zone. A community cannot require shelters to be more than 300 feet apart. *See [HCD Building Blocks 3.C](#).*

5. Analysis of Governmental Constraints and Efforts to Remove Them (§65583(a)(5))

(5) An analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the types of housing identified in paragraph (1) of subdivision (c), and for persons with disabilities as identified in the

analysis pursuant to paragraph (7), including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures. The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need in accordance with Section 65584 and from meeting the need for housing for persons with disabilities identified pursuant to paragraph (7). Transitional and supportive housing shall be considered a residential use of property, and shall be subject only to those restrictions that apply to other residential dwellings of the same type in the same zone

This analysis provides the necessary corollary to the inventory of sites. Even if the community has enough sites to address its housing needs, building standards, fees, conditional use permit procedures, design review, and protracted processing can present significant barriers to development of affordable housing *and* housing for persons with disabilities, and have the effect of excluding that housing. Consequently, they could have a disparate impact on persons or groups protected by state and federal fair housing laws. See [HCD Building Blocks 4](#). The statute was amended in 2006 to clarify that the analysis must include assessment of constraints on the particular types of housing listed in (c)(1), the subdivision requiring identification of sites. Those types are: multifamily rental housing, factory-built housing, mobilehomes, farmworker housing, supportive housing, emergency shelters, and transitional housing.

Examples of constraints other than those listed in the statute include growth controls, moratoria, open space requirements, parking requirements, minimum street widths and lot sizes, maximum lot coverage, historic preservation, fees and exactions, processing and permit procedures and restrictions on second units, mobilehomes, or mixed uses. See [HCD Building Blocks 4.A, B, C, D, E](#).

The analysis must also demonstrate efforts to remove the identified constraints. *This requirement is somewhat confusing because it is quite possible that a community has yet to take actions to remove the constraints turned up in the analysis.* (c)(3) requires that the element include a program of future actions to remove constraints, so the obligation in this paragraph to demonstrate efforts to remove existing constraints probably should be read to 1) require description of existing efforts to remove constraints, and 2) clarify the mandate of (c)(3) to remove constraints.

Analysis of Growth Controls.

Local ordinances, policies, or regulations that specifically limit the *amount* or *timing* of residential development should be analyzed for their specific impact on the *cost* and *supply* of housing. The element should describe the permit allocation process and criteria and any incentives for affordable housing. It should also demonstrate efforts to remove these constraints.

Examples of growth controls that must be analyzed include:

- Area-wide downzoning
- Urban limit lines, growth boundaries, greenbelts
- Annexation restrictions
- Building permit and other development caps
- Requirements for voter approval of upzoning, rezoning, or other general plan changes
- Requirements of “super-majority” votes of legislative bodies for upzoning, rezoning or general plan changes
- Across the board restricting of development standards, including height limits and Floor-Area-Ratios.
- Ordinances or policies limiting development based on adequacy of public facilities (such as sewer and water facilities)

See [HCD Building Blocks 4.A.](#)

Analysis of Constraints to Housing for Persons with Disabilities.

For comprehensive guidance on analyzing constraints on housing for persons with disabilities, see HCD’s *June 17, 2002 “SB 520” Technical Assistance Memorandum* interpreting this requirement. It is included in this manual as **Appendix C**. See also [HCD Building Blocks 4.E](#). Among other things, the element should review:

- Whether the jurisdiction has adopted universal design elements in its building code.
- Whether current building codes present barriers to developing housing accessible to persons with disabilities
- Whether zoning regulations present barriers to developing of residences intended for occupancy by persons with disabilities, such as group homes (*e.g.* prohibitions against group homes for more than six persons, or minimum distance requirements for housing for disabled persons)

- Whether the jurisdiction has a zoning provision, policy or ordinance providing for “*reasonable accommodations*”²⁰ for housing for persons with disabilities in its zoning ordinances and development standards (e.g. provisions that allow for variances in zoning regulations to make development of housing for disabled persons feasible, both economically and physically)

The HCD memo references and attaches the Attorney General’s May 15, 2001 letter encouraging local governments to adopt procedures for handling requests for reasonable accommodations.

Analysis of Constraints for Transitional and Supportive Housing.

The last sentence of §65583(a)(5) provides that in assessing constraints on the development, *transitional or supportive housing* must be considered a residential use of property, and subject only to the restrictions that apply to other residential dwellings of the same type in the same zone. This provision was added as part of SB 2’s requirement that communities provide zones where shelters are allowed as a permitted use. See [HCD Building Blocks 3.C.ix](#); HCD, May 7, 2008 “SB 2” Technical Assistance Memorandum, attached as **Appendix E**.

Relation to the Federal Consolidated Plan and AI.

In jurisdictions that have prepared Consolidated Plans for submission to the Department of Housing and Urban Development (HUD) as requirement for receiving federal community and housing development funds, the analysis of constraints should also address any findings made in the localities Analysis of Impediments to Fair Housing Choice (AI). See Chapter I, §G; [HCD Building Blocks 4.E](#).

6. Analysis of Nongovernmental Constraints (§65583(a)(6))

(6) An analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, and the cost of construction.

²⁰ The federal Fair Housing Act (42 U.S.C. §3601 *et seq.*), the state Fair Employment and Housing Act (at Gov. Code §§12927(c)(1) & 12955(l), Title II of the Americans with Disabilities Act (42 U.S.C. §§12131-65), and section 504 of the Rehabilitation Act (at 29 U.S.C. §794) all impose an affirmative duty on localities to make reasonable accommodation (including reasonable modification or exceptions) to their laws, regulations, and practices when the accommodations are necessary to equal opportunity, including equal opportunity “to use and enjoy a dwelling unit.” 42 U.S.C. 3604(f)(3)(B).

Nongovernmental constraints can be just about anything outside the purview of government. At minimum, this analysis should consider the effect of market forces, environmental concerns, and NIMBY opposition to the preservation, conservation, and development of housing for all economic segments of the community. In analyzing, the availability of financing the locality should consider financing for both developers and homebuyers and the possibility of redlining. Environmental constraints include slope, seismic, water supply, toxic contamination, wetlands, flood plain, etc. The analysis of the effect of NIMBY sentiment should consider both the history of such opposition in the community and the opportunities for opposition provided by the community's development approval processes. See [HCD Building Blocks 4.F](#).

7. Analysis of Special Housing Needs (§65583(a)(7))

(7) An analysis of any special housing needs, such as those of the elderly; persons with disabilities, including a developmental disability, as defined in Section 4512 of the Welfare and Institutions Code; large families; farmworkers; families with female heads of households; and families and persons in need of emergency shelter. The need for emergency shelter shall be assessed based on annual and seasonal need. The need for emergency shelter may be reduced by the number of supportive housing units that are identified in an adopted 10-year plan to end chronic homelessness and that are either vacant or for which funding has been identified to allow construction during the planning period.

The analysis of these special housing needs for particular populations is an important corollary to the analysis of housing needs by income level required by subdivision (a)(1). While the assessment of need by income category provides an indication of the *number* of units that are needed, this analysis provides an indication of the *type* of housing that is needed. However, because the community's share of the regional housing need is derived from projections that likely are based on inadequate data regarding farmworkers, persons with disabilities and homeless persons, the regional needs figures may need to be adjusted upwards to account for these special needs.

The needs of each group should be analyzed separately. It should include:

- Quantification of persons/households
- Quantification and qualitative description of need
- Identification of resources available to meet the need
- Description of program or policy options for addressing the need

See [HCD Building Blocks 2.B](#). Some funding resources available to address these needs include federal CDBG, HOME, HOPWA, and McKinney Act funds, federal public, subsidized, and Section 8 housing resources, and state housing funding.

Analysis of the Needs of Emergency Shelters & Homeless Persons

Analysis of the homeless population is essential to determining the need for emergency shelters and transitional housing. This analysis should include estimates of numbers and types of households (*e.g.* single males, females, families, persons with disabilities, including substance abuse problems). It should also include an estimate of units/beds/vouchers currently available to assist this population. See HCD’s “Shelter for the Homeless: Housing Element Requirements” (Sept. 2001- not available online) and [HCD Building Blocks 2.B.v](#).

The emergency shelter need must be based on both annual and seasonal need to ensure that communities provide for sufficient shelter during periods of cold and inclement weather. The need for emergency shelter may be reduced by the number of supportive housing units that are identified in a jurisdiction’s 10-year plan to end chronic homelessness, provided the units are either vacant or will be constructed during the planning period with funding has been identified. See *HCD, May 7, 2008 (updated April 10, 2013) “SB 2” Technical Assistance Memorandum*, attached as **Appendix E**.

Analysis of Farmworker Housing Need

This analysis should include estimates of the number of permanent and migrant workers. Starting places for this data include local agricultural employment and Farm Bureau offices. There may also be farmworker employment data collected by growers’ organizations, school districts, or county government. See [HCD Building Blocks 2.B.iv](#).²¹

Analysis of the Needs of Elderly Persons

Basic data will be found in the Census. Comparing the number of elderly households below the poverty level with the number of existing affordable senior

²¹ See *The California Farm Labor Force Overview and Trends from the National Agricultural Workers Survey* (University of California at Davis, Agricultural Center (2005) <http://agcenter.ucdavis.edu/AgDoc/CalifFarmLaborForceNAWS.pdf> ; see also Alice C. Larson’s “Migrant and Seasonal Farmworker Enumeration Profiles Study, California (U.S. Dept. of Health and Human Services, 2000)

units will provide a good starting point for determining need. Also helpful will be waiting lists for senior housing and information from agencies that provide services to seniors. See [HCD Building Blocks 2.B.ii](#).

Analysis of the Needs of Larger Families & Female-Headed Households

Start with Census data and compare the number of households with five or more persons, the number of overcrowded units, and the number of housing units with three or more bedrooms (and the vacancy rates for these units). Data on households with children and just one adult can give an indication of female-headed households. Local social services offices should also have information on the gender of heads of households receiving public benefits. See [HCD Building Blocks 2.B.iii](#).

8. Analysis of Opportunities for Energy Conservation (§65583(a)(8))

(8) An analysis of opportunities for energy conservation with respect to residential development. Cities and counties are encouraged to include weatherization and energy efficiency improvements as part of publicly subsidized housing rehabilitation projects. This may include energy efficiency measures that encompass the building envelope, its heating and cooling systems, and its electrical system.

This part should assess both what subsidies, incentives are available from public and private sources for energy conservation, and what changes could be made in the local building codes to increase energy conservation. *However*, it is important that any consideration of increased building code standards should address the potential constraints such changes may place on affordable housing development in the form of increased costs. The analysis should consider the importance of the energy conservation achieved in relation to the effect on housing affordability. See [HCD Building Blocks 3.F](#).

9. Analysis of Assisted Housing Eligible for Conversion (§65583(a)(9))

(9) An analysis of existing assisted housing developments that are eligible to change from low-income housing uses during the next 10 years due to termination of subsidy contracts, mortgage prepayment, or expiration of restrictions on use. "Assisted housing developments," for the purpose of this section, shall mean multifamily rental housing that receives

governmental assistance under federal programs listed in subdivision (a) of Section 65863.10, state and local multifamily revenue bond programs, local redevelopment programs, the federal Community Development Block Grant Program, or local in-lieu fees. "Assisted housing developments" shall also include multifamily rental units that were developed pursuant to a local inclusionary housing program or used to qualify for a density bonus pursuant to Section 65916.

(A) The analysis shall include a listing of each development by project name and address, the type of governmental assistance received, the earliest possible date of change from low-income use and the total number of elderly and nonelderly units that could be lost from the locality's low-income housing stock in each year during the 10-year period. For purposes of state and federally funded projects, the analysis required by this subparagraph need only contain information available on a statewide basis.

(B) The analysis shall estimate the total cost of producing new rental housing that is comparable in size and rent levels, to replace the units that could change from low-income use, and an estimated cost of preserving the assisted housing developments. This cost analysis for replacement housing may be done aggregately for each five-year period and does not have to contain a project by project cost estimate.

(C) The analysis shall identify public and private nonprofit corporations known to the local government which have legal and managerial capacity to acquire and manage these housing developments.

(D) The analysis shall identify and consider the use of all federal, state, and local financing and subsidy programs which can be used to preserve, for lower income households, the assisted housing developments, identified in this paragraph, including, but not limited to, federal Community Development Block Grant Program funds, tax increment funds received by a redevelopment agency of the community, and administrative fees received by a housing authority operating within the community. In considering the use of these financing and subsidy programs, the analysis shall identify the amounts of funds under each available program which have not been legally obligated for other purposes and which could be available for use in preserving assisted housing developments.

This provision is intended to address the potential loss of thousands of government subsidized, privately-owned units throughout the state due to expiration of the affordability restrictions imposed as condition of a government grant, subsidized loan, or mortgage insurance. The description and analysis should include:

- 1) An inventory of the units subject to expiration *during the planning period of the housing element*,²²
- 2) Assessment of preservation versus replacement costs,
- 3) Public and nonprofit entities for potential acquisition, and
- 4) Potential local, state, and federal funding sources.

For a comprehensive discussion of what should be included in this analysis and how it should be conducted, see [HCD Building Blocks 2.A.v](#).

C. Statement of Goals, Quantified Objectives and Policies (§65583(b))

The second principal section of the housing element is the community's formulation of goals and policies and quantification of objectives addressing the housing needs, resources, and constraints assessed and analyzed in the first part of the element. The second part must contain:

(b) (1) A statement of the community's goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing.

(2) It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements outlined in Article 5 (commencing with Section 65300). Under these circumstances, the quantified objectives need not be identical to the total housing needs. The quantified objectives shall establish the maximum number of housing units by income category, including extremely low income, that can be constructed, rehabilitated, and conserved over a five-year time period [sic – this reference to a five year period was missed by the drafters of SB 375 which generally changed the period covered by the housing element to eight years].

There should be a corresponding goal and policy for each housing need, resource inadequacy, and constraint identified in the assessment section of the housing element. In addition, there must be a quantified objective for each housing need identified in the first section.

²² Information on the complexes at risk in a community is available from the **California Housing Partnership**. To request a listing of federally subsidized affordable housing at risk of market-rate conversion in your region, please contact James Pappas, Housing Policy and Preservation Associate, at (415) 433-6804, ext. 320, or jpappas@chpc.net. CHPC also has a mapping tool to view federally subsidized housing in your region. <http://www.chpc.net/preservation/MappingWidget.html>

The *goals* for meeting the housing needs should be at least equivalent to the entire identified needs. Recognizing that the community may not be able to marshal the resources to actually meet the full need and achieve the goals, the law permits the element to formulate quantified *objectives* for the number of units to be developed or assisted that are less than the total housing needs. However, these quantified objectives must establish the *maximum* number of housing units *by income category* (extremely low, very low, low, moderate & above moderate) that can be developed or conserved over the time frame of the element. In order to demonstrate that the quantified objectives truly are the maximum, the element should include an indication of the bases for arriving at each number. In this context, the quantified objectives must be equated with the identified housing needs. *Buena Vista Gardens Apartments Ass’n. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 305.

Therefore, the quantified objectives should, at minimum, list the number of housing units that can be constructed, rehabilitated and conserved (including preservation of affordable units) for each income category of need (very low, low, moderate & above moderate). And if the construction objective is less than the regional share for an income level, the element should include a quantitative analysis providing the basis for the conclusion and establishing the maximum number of units, by income category, which can reasonably be developed, rehabilitated, and conserved over the planning period. *See Hoffmaster v. City of San Diego*, 55 Cal.App.4th 1098, 1108 (1997). The analysis should take into account the number of units projected by each action program listed in the element pursuant to §65583(c) discussed below. The objective also should be based on assessments of current and anticipated economic conditions and available resources. Available resources should include funds available from state and federal sources, such as federal HOME funds, as well as local funds, such as redevelopment agency “tax increment” funds. *See [HCD Building Blocks 5.A](#)*.

D. Program Setting Forth A Five Year Schedule of Implementation Actions (§65583(c) & 65583.2(h))

The final section of the housing element is the program of actions. In this part, the community sets out concrete programs for fulfilling the goals, policies, and quantified objectives established in the second section. Just as the second part of the element should include a corresponding goal/policy/objective for each need/resource deficiency/constraint identified in the first section, this final section should have a corresponding implementation action for each goal, policy, and objective.

1. General Requirements– Types of Actions & Essential Components

Generally, the third section must contain:

(c) A program which sets forth a schedule of actions during the planning period, each with a timeline for implementation, which may recognize that certain programs are ongoing, such that there will be beneficial impacts of the programs within the planning period, that the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives, and the utilization of appropriate federal and state financing and subsidy programs when available and the utilization of moneys in a low and moderate-income housing fund of an agency if the locality has established a redevelopment project area pursuant to the Community Redevelopment Law (Division 24 (commencing with Section 33000) of the Health and Safety Code). . . .

Therefore, the program section must include implementation actions which involve:

- the administration of land use *and* development controls
- the provision of regulatory concessions *and* incentives
- the utilization of appropriate federal and state financing and subsidy programs when available (*see [HCD Building Blocks 5.A](#)*)
- the utilization of redevelopment housing set aside funds (if the community has a redevelopment area) (*see [HCD Building Blocks 5.A](#)*)

Each specific action should indicate the following:

1) “[T]he **agencies and officials responsible** for the implementation.” (§65583(c)(7), **emphasis added**)

2) **The timeline** or “schedule” in which the action will be carried out. The action must be scheduled within the time frame of the element so that there will be “beneficial impacts” during the planning period. The “beneficial impacts” provision was added in 2008 by SB 375 and means, essentially, that programs must be scheduled for completion before the end of the planning period so that they will have their intended effect during the planning period. In *Buena Vista Gardens Apartments Ass’n. v. City of San Diego Planning Dept.*

supra, 175 Cal.App.3d 289, the court found that in some cases it is appropriate for actions to be designated as "continuing."

3) **The proposed measurable outcomes, including numbers of units to be assisted.** (While one appellate court case found that this was not essential to legal compliance – *Buena Vista Gardens Apartments Ass’n. v. City of San Diego Planning Dept. supra*, 175 Cal.App.3d 289 (at least with respect to the obligation to identify adequate sites (*see* discussion below)), quantification of the number of units that can be accommodated by the sites is essential to determining whether sufficient sites have been identified to meet the community’s share of regional need.)

The more specific the implementation action, the more likely it is to be implemented, especially because the commitment to undertake a specific action is much easier to enforce than a vague or general goal. For example, a program to “encourage development of affordable housing” is not really a program at all—it does not require a specific action. It is far less meaningful than, for example, a program to mandate development by committing the local government to adopting an inclusionary zoning ordinance by a particular date. An adequate program should require a particular action to be taken by a particular date. (*See HCD Building Blocks 5.A*), which contains a list of critical program elements and an example.) HCD’s Building Blocks explains that, *in addition* to the features described above, programs should include:

- specific action steps
- proposed measurable outcomes
- demonstrate the locality’s firm commitment to implement
- identify funding sources, where appropriate

The program of actions must contain implementation actions in six specific areas, discussed below.

2. Identification of Adequate Sites (§65583(c)(1), §65583.2(h) & §65584.09)

Based on the results of the inventory of sites prepared in accordance with the assessment section of the element, the program of actions must identify sites for a variety of types of housing sufficient to meet the community’s RHNA for the planning period. **§§65583(c)(1) & 65583.2(h).** *In addition*, if the community failed to make available sites to accommodate any portion of the RHNA *of the prior planning period*, the program should also contain an action program to zone or rezone adequate sites to accommodate that shortfall.

§65583(c)(1) and §65584.09. *And, if the inventory of sites demonstrates that the community lacks sufficient sites to accommodate the RHNA for all income levels or the need for farmworker housing, the element must identify adequate sites to accommodate the shortfall of sites for lower income households and farmworkers that are developable “by-right,” that is, without discretionary review. §§65583(c)(1) & 65583(h).*

*Beginning with the sixth revision of the housing element (see **Table 1, p. 24-25—the revisions due beginning in 2013**), SB 375 provides that jurisdictions with eight year housing elements must rezone sites within three years after either the date of the adoption of the element or 90 days after receipt of HCD’s comments on the draft element, whichever is earlier. **§65583(c)(1)(A).** This deadline for rezoning can be extended by one year, but only if the community has already completed 75% of the required rezoning, and only if it makes findings that the rezonings cannot be completed because either: 1) circumstances beyond the locality’s control, 2) infrastructure deficiencies due to fiscal or regulatory constraints or 3) the local government must undertake a major revision to its general plan in order to accommodate housing related policies of a Sustainable Communities Strategy or Alternative Planning Strategy. These finding must be sent to HCD with a detailed budget and schedule for adoption of the rezonings. **§65583(f).***

The obligation to identify and make sites available is one of the most important parts of the housing element because it obligates the community to zone sites at high enough densities and with sufficient infrastructure to make the development of affordable housing feasible. It is the principal legal weapon to combat exclusionary zoning practices. (It also correlates to **§65913.1** (the “Least Cost Zoning” law, discussed below) which requires communities to at all times zone sufficient vacant sites to meet their entire RHNA for each income category.)

(a) In General

The program must:

(1) Identify actions that will be taken to make sites available during the planning period of the general plan with appropriate zoning and development standards and with services and facilities, to accommodate that portion of the city’s or county’s share of the regional housing need for each income level that could not be accommodated on sites identified in the inventory completed pursuant to paragraph (3) of subdivision (a) without rezoning, and to comply with the requirements of Section

65584.09. Sites shall be identified as needed to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing, factory-built housing, mobilehomes, housing for agricultural employees, supportive housing, single room occupancy units, emergency shelters, and transitional housing.

§65583(c)(1). **§65584.09** provides, in relevant part:

(a) For housing elements due pursuant to Section 65588 on or after January 1, 2006, if a city or county in the prior planning period failed to identify or make available adequate sites to accommodate that portion of the regional housing need allocated pursuant to Section 65584, the city or county shall, within the first year of the planning period of the new housing element, zone or rezone adequate sites to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period.

Therefore, the program must contain implementation actions to identify enough sites to accommodate:

- 1) **The number of units necessary to meet the RHNA for the new planning period, and**
- 2) **The number of units the locality failed to provide sites to accommodate in the prior planning period. See [HCD Building Blocks 1.C](#).**

The implementation actions must identify sites that:

- Will be made available for development during the time frame of the element,
- Are served by infrastructure so that they are actually available for development, and
- Have appropriate zoning and development standards that facilitate and encourage a variety of housing for all income levels, including:
 - multifamily rental housing
 - factory built housing
 - mobilehomes
 - farmworker housing
 - supportive housing
 - emergency shelters (which includes shelters for homeless persons)

– transitional housing

See HCD June 20, 2007 “AB 1233” Technical Assistance Memorandum (included as **Appendix “D”**) and – [HCD Building Blocks 5.B](#) for HCD’s description of this program requirement and lists of examples of actions a community can include in its element to make sites available.

➤ **What is an “Available” Site?**

The Court of Appeal has indicated (in the context of sites for homeless shelters and transitional housing) that an adequate and “available” site:

is one available for immediate development, which is located within reasonable access to public agencies and transportation services; will not require unusually high site development costs; has available public services and facilities; is consistent with the General Plan designation and site zoning so as to permit development of, conversion to or use of, a shelter or transitional housing without undue regulatory approval; and is consistent with applicable parking requirements, fire regulations and design standards.

Hoffmaster v. City of San Diego (1997) 55 Cal.App.4th 1098, 1112-13.

The sites must also be identified *specifically*. **§65583.2** Although one older appellate court case had indicated that the identification need not indicate specific sites (*Buena Vista Garden Apartments Ass’n., supra.*), the more recent *Hoffmaster* decision from the same appellate district found otherwise, and the Legislature ended the debate in 2004 when it adopted AB 2348 clarifying that sites identified in the inventory must be identified by specific parcel. §65583.2(b). This only makes sense because, as the *Hoffmaster* court explained:

[F]or identification to be meaningful, it must necessarily be specific. It must set for sites which will be available to be developed, without restrictive zoning burdens which combined with the NIMBY (Not In My Back Yard) factor... become insurmountable or produce protracted delays and deterrent cost increases.... Finally, through its action program, City bears the responsibility to ensure the regulatory process actually encourages the development of emergency shelters and transitional housing.

Id. at 1114.²³ See also [HCD Building Blocks 5.B](#).

²³ *Fonseca v. City of Gilroy*, 148 Cal.App.4th 1174, 1204 (2007), fn 32, found this statement *dicta* when

As discussed above in §B.3 of this chapter, a community may consider *non-vacant* sites as suitable and available for residential development provided the site is realistically available for redevelopment during the housing element planning period. See HCD June 9, 2005 “AB 2348” Technical Assistance Memorandum, p. 3-4 (included as **Appendix B**) and [HCD Building Blocks 5.B](#).

➤ **What are “Appropriate Zoning and Development Standards?”**

A community either must use the “default zoning densities” listed in **§65583.2(c)(3)(B)** (described in the discussion of the land inventory, above, B.3)²⁴ to determine whether a site is adequately zoned for lower income housing *or* must provide an analysis demonstrating how existing zoning densities are sufficient to facilitate the development of housing affordable to the particular income level for which the site is deemed appropriate. The analysis must include market demand, financial feasibility, and information based on the experience of the community in developing housing for lower income households. (**§65583(c)(3)(A)**)

If the zoning establishes *minimum densities*, HCD must accept the community’s calculation of the housing capacity of a site based on the minimum density. If there is no minimum density for the site, the planning agency must demonstrate the basis for assigning a particular number of units to the site. (**§65583.2(c)(1)**)

If the inventory demonstrates that the community lacks zoning or sites that can accommodate the variety of types of housing required—multifamily rental, factory-built, mobilehomes, farmworker housing, emergency shelters, or transitional housing—the program should provide actions that will result in the necessary rezoning or amendment of the zoning code to make appropriate sites available in those categories. (**§65583.2(c)**)

holding that Housing Element Law *prior* to the adoption of §65583.2 did not require identification of *specific* sites, *but* the court also recognized that site specificity “facilitates the assessment of whether a locality’s housing element complies with the ‘adequate sites’ requirement . . .” *Id.* at 1199, fn 24.

²⁴ The so-called “Mullin” or “default densities” after the adopting bill (SB 2348 (Mullin) [Stats. 2004, ch 724]):

- 15 units/acre—cities within non-metropolitan counties; non-metropolitan counties with micropolitan areas
- 10 units/acre—unincorporated areas in all non-metropolitan counties not included in the 15 units/acre category
- 20 units/acre—suburban jurisdictions
- 30 units/acre—jurisdictions in metropolitan counties

Appropriate development standards— *i.e.* land use controls, building codes, site improvement and setback standards, Floor Area Ratios (FARs), etc.— are those that do not place a significant constraint on the physical or financial development of housing for persons at the income level designated for the site. *See also* the articulation of this principle in the “Least Cost Zoning” Law, §65913.1, discussed in (b), below. The determination of the appropriateness of specific development standards should be made in the context of the analysis of governmental constraints completed pursuant to §65583(a)(4) (discussed in §B.4 of this chapter). *See also*, [HCD Building Blocks 5.B](#).

(b) “By Right” Multifamily Sites For Low & Very Low Income Household Needs (§65583(c)(1)(A) & (B) and §65583.2(h))

Where the inventory reveals insufficient sites to accommodate the housing needs for all income levels, the program section must provide sufficient sites, developable “by right” at multifamily densities, and with “minimum density and development standards” to provide “100% of the shortfall of sites necessary to accommodate the remaining housing need for very low- and low-income households.” HCD June 9, 2005 “AB 2348” Technical Assistance Memorandum, p. 3-4 (included as **Appendix B**), interpreting §65583(c)(1) and §65583.2(h).

The requirement is codified specifically in sub-paragraphs (A) and (B) of §65583(c)(1). (A) governs eight year elements and provides for completion of rezoning within three years; (B) applies to elements of periods less than eight years and provides that rezonings must be completed so that *development* can occur within the planning period.

(A) Where the inventory of sites pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, rezonings of those sites, including minimum density and development standards, for jurisdictions with an eight-year housing element planning period pursuant to Section 65588, shall be completed no later than three years after either the date the housing element is adopted pursuant to subdivision (f) of Section 65585 or the date that is 90 days after receipt of comments from the department pursuant to subdivision (b) of Section 65585, whichever is earlier, unless the deadline is extended pursuant to subdivision(f). Notwithstanding the foregoing, for a local government that fails to adopt a housing element within 120 days of the statutory deadline in Section 65588 for adoption of the housing element, rezoning of those

sites, including adoption of minimum density and development standards, shall be completed no later than three years and 120 days from the statutory deadline in Section 65588 for adoption of the housing element.

(B) Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, the program shall identify sites that can be developed for housing within the planning period pursuant to subdivision (h) of Section 65583.2. The identification of sites shall include all components specified in subdivision (b) of Section 65583.2.

And §65583.2(h) provides adds the “by right” requirement:

The program required by subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 shall accommodate 100 percent of the need for housing for very low and low-income households allocated pursuant to Section 65584 for which site capacity has not been identified in the inventory of sites pursuant to paragraph (3) of subdivision (a) on sites that shall be zoned to permit owner-occupied and rental multifamily residential use by right during the planning period....

➤ **What Does “By Right” Mean?**

(i) For purposes of this section [65583.2] and Section 65583, the phrase “use by right” shall mean the local government's review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a “project” for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code [CEQA]. Any subdivision of the sites shall be subject to all laws, including, but not limited to, the local government ordinance implementing the Subdivision Map Act. A local ordinance may provide that “use by right” does not exempt the use from design review. However, that design review shall not constitute a “project” for purposes of [CEQA]. Use by right for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5.²⁵

The concept is to require the community to identify sites that are available for development with affordable housing without any discretionary review,

²⁵ §65589.5(f) permits a local agency to require developments to comply with development standards consistent with meeting the quantified objectives and to impose fees to provide services and facilities.

which could result in the denial of a building permit or imposition of prohibitive or unreasonable development conditions or standards. “Use by right” generally means that the use is a “permitted” use, not subject to any conditions, including a conditional use permit. If the developer presents a project that complies with the locality’s zoning and building standards, the community must issue building permit *ministerially*, *i.e.* without imposition of conditions or standards over and about those required by the zoning ordinance or building code. See [HCD Building Blocks 5.Bii](#). By right zoning, therefore, enables affordable housing developers to avoid public hearings and legislative body review, which presents opportunities for NIMBYs to oppose and seek denial of developments.

The only exception to the by-right approval requirement is that the community may subject a development to its local design review process. However, the design review process may not go beyond requiring compliance with previously defined design standards. Otherwise, it would rise to the level of discretionary review, which is expressly prohibited.

The statute references the California Environmental Quality Act (“CEQA”– Pub. Res. C. §21100 *et seq.*) and its definition of “project” as a shorthand way of determining when local permit issuance requirements constitute discretionary review prohibited by the statute. Under CEQA, local government actions only become a *project* triggering environmental review when they involve *discretionary* action. Discretionary action or review is a process or procedure by which a local government body or official is vested with the discretion to approve or deny a development or to impose additional conditions.

➤ **What is “Multifamily?”**

The statute refers to “multifamily,” but it defines it in terms of *minimum lot size, density and development standards*, rather than building type:

....These sites shall be zoned with minimum density and development standards that permit at least 16 units per site at a density of at least 16 units per acre in jurisdictions described in [§65583.2(c)(3)(B)(i)] and at least 20 units per acre in jurisdictions described in [§65583.2(c)(3)(B)(iii) & (iv)]....

§65583.2(h)

Therefore, for localities within *non-metropolitan counties* or for *non-metropolitan counties* with *micropolitan* areas, multifamily means lots that can

accommodate at least 16 units on one acre. For localities in *suburban jurisdictions* or *metropolitan counties*, multifamily means lots that can accommodate at least 20 units on one acre. See the discussion of these categories in §B.3 of this chapter and in HCD 6/9/05 *Technical Assistance Memorandum* (included as **Appendix B**), which includes definitions and a table indicating the category of each California jurisdiction. See also [HCD Building Blocks 5.B.ii](#).

➤ **50% of the Lower Income RHNA Need Must be Accommodated on Sites Zoned Exclusively for Residential Use.**

....At least 50 percent of the very low-income housing need shall be accommodated on sites designated for residential use and for which nonresidential uses or mixed-uses are not permitted.

§65583.2(h).

Prior to the adoption of AB 2348, communities could designate mixed-use sites exclusively to satisfy the obligation to identify sites developable by-right. Now, of the sites identified as by-right to meet the locality’s short fall of sites to accommodate its low and very low income RHNA, at least half of the need must be accommodated on sites zoned for residential use only. Where a mixed use site is identified as developable by-right, both the residential and nonresidential uses must be permitted by right. See [HCD Building Blocks 5.B.ii](#).

(c) Correlation to the “Least Cost Zoning Law” (§65913.1) and §65863.

This obligation [to zone multifamily sites as developable by right if there are insufficient sites to meet the community’s share of the regional housing need for very low and low income housing] must be applied in conjunction with **§65913.1** (the “least cost zoning” statute) and **§65863**. §65913.1 requires communities to zone sufficient sites to meet the entire share of the regional housing needs. Taken together, these linked obligations mandate the locality to designate and zone sufficient sites to meet the community’s RHNA for very low, low and moderate income households during the housing element period, soon enough to enable development during the planning period. See [HCD Building Blocks 5.B.iii](#).²⁶ §65913.1 provides, in part:

²⁶ *Fonseca v. City of Gilroy*, 148 Cal.App.4th 1174 (2007) held that the tandem requirements of the Housing Element Law and Least Cost Zoning Law “do not require immediate action and permits a locality to act within the planning period to meet the regional needs.” *Id.* at 1209. But since the opinion was issued the Housing Element Law has been amended to mandate that rezoning required by a housing element be completed within three years (§65583(c)(1)(A) and that any zoning required by a prior

In exercising its authority to zone for land uses and in revising its housing element pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3, a city, county, or city and county shall designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan to meet housing needs for all income categories as identified in the housing element of the general plan. For the purposes of this section:

(1) "Appropriate standards" means densities and requirements with respect to minimum floor areas, building setbacks, rear and side yards, parking, the percentage of a lot that may be occupied by a structure, amenities, and other requirements imposed on residential lots pursuant to the zoning authority which contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors, the public health and safety, and the need to facilitate the development of housing affordable to persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, and to persons and families of lower income, as defined in Section 50079.5 of the Health and Safety Code. However, nothing in this section shall be construed to enlarge or diminish the authority of a city, county, or city and county to require a developer to construct this housing.

Similarly, **§65863(a)** requires a local government to ensure that its land inventory [§65583(a)(3)] or programs for adequate sites [§65583(c)(1)] can accommodate its share of the regional housing need throughout the planning period.

Consequently, in addition to identifying sites, that are available, served by infrastructure and zoned for multifamily development by right, to comply with the obligation to identify *adequate* sites, the implementation action must indicate that there are enough sites to accommodate the community's share of the regional need.

(d) Sites for Farmworker Housing (§65583(c)(1)(C))

(C) Where the inventory of sites pursuant to paragraph (3) of subdivision (a) does not identify adequate sites to accommodate the need for farmworker housing, the program shall provide for sufficient sites to meet

housing element but not completed, must be completed within one year of the due date of the new housing element (§65584.09.) See §C.2.a., above.

the need with zoning that permits farmworker housing use by right, including density and development standards that could accommodate and facilitate the feasibility of the development of farmworker housing for low- and very low income households.

(§65583(c)(1)(C)).

This obligation is similar to the requirement to zone sites for by-right multifamily development where the inventory of sites falls short of the community's share of the regional need discussed above. These provisions trigger an obligation to include an implementation action that will result in zoning that permits farmworker housing development by-right where the inventory does not include enough sites to meet the community's need for farmworker housing. The community is required to assess the need for farmworker housing in the first section of the housing element. **(§65583(a)(7).)** As with sites for very low and low income housing, the sites identified for farmworker housing must be zoned at densities that make the development of housing for low and very low income farmworker households feasible. The sites also must not be subject to development standards so restrictive as to undermine development feasibility.

The sites should be appropriate in terms of location and development standards to facilitate housing for farmworkers. The program should identify zones where housing for permanent and, if needed, migrant farmworker housing is permitted. See [HCD Building Blocks 3.C.v and 5.B.ii](#).

(e) Sites for Emergency Shelters and Transitional Housing (§65583(c)(1) & (d))

As discussed, SB 2 requires communities to provide zones where shelters and transitional housing are permitted. **(§65583(a)(4).)** The programs of actions, consequently, must include a program to establish zoning for shelters and transitional housing if the current zoning does not permit the use. **(§65583(c)(1).)** A local government may satisfy all or part of this requirement to identify zones for suitable sites by entering into a multijurisdictional agreement. **(§65583(d).)** The agreement must require that the jurisdictions develop at least one year-round shelter within two years of the start of the housing element planning period.

The agreement must allocate a portion of new shelter capacity to each jurisdiction as a credit towards its emergency shelter need (as determined pursuant to **§65583(a)(7)**), and the housing element must indicate how the credit

was allocated. In addition, the element must describe: 1) how the joint facility will meet the jurisdictions shelter need, 2) the jurisdictions contribution to the facility, and 3) the amount and source of funding contributed by the facility. (**§65583(d).**) See *HCD, May 7, 2008 (updated April 10, 2013) “SB 2” Technical Assistance Memorandum*, attached as **Appendix E**.

Sites for emergency shelters, including shelters for homeless people, and transitional housing should be located near public services and public transportation. The zoning and development standards and the development for the sites should facilitate and encourage, rather than burden or impede development or invite community opposition. See *Hoffmaster v. City of San Diego*, 55 Cal.App.4th 1098, 1112-13 (1997). Most communities accomplish this by allowing development of shelters and transitional housing in particular zones. If the jurisdiction imposes conditions on development, they should regulate the use, not the users. See [HCD Building Blocks 3.C.ii-iii](#) and [5.B.ii](#).

(f) Alternative Methods of Identifying Sites (§65583.1)

Just as the inventory of sites may include developed sites with redevelopment potential as well as vacant land (**§65583(a)(3)**), HCD is authorized to allow identification a variety of means:

(a) The Department of Housing and Community Development, in evaluating a proposed or adopted housing element for substantial compliance with this article, may allow a city or county to identify adequate sites, as required pursuant to Section 65583, by a variety of methods, including, but not limited to, redesignation of property to a more intense land use category and increasing the density allowed within one or more categories. The department may also allow a city or county to identify sites for second units based on the number of second units developed in the prior housing element planning period whether or not the units are permitted by right, the need for these units in the community, the resources or incentives available for their development, and any other relevant factors, as determined by the department. Nothing in this section reduces the responsibility of a city or county to identify, by income category, the total number of sites for residential development as required by this article.

(§65583.1(a)) [emphasis added]. These include:

➤ **Redevelopment, Rezoning and Annexation**

In this context, HCD will allow sites with the following redevelopment potential:

- mixed use zoning
- second units
- recycling of developed land to residential use
- increasing densities of under-utilized land

HCD in some circumstances will also permit a community to identify sites by an implementation action that results in rezoning vacant, nonresidential land or annexation of land for residential use. The inclusion of these kinds of sites is only appropriate if the implementation action includes a requirement that the rezoning or annexation occur in sufficient time to permit development during the housing element period of the element.

➤ **Military Base Reuse**

§65583.1(b) permits a community to include permanent housing units on military bases undergoing closure in limited circumstances. The site must be available during the period of the housing element and sites designated for demolition or conversion do not qualify.

➤ **Rehabilitation, Acquisition or Subsidy**

Although a primary purpose of the Housing Element Law is to ensure that communities *increase* the supply of housing to meet their needs, the law recognizes that in some circumstances the rehabilitation, preservation or conversion/acquisition of existing units is an appropriate means of increasing affordable housing and *may be counted for no more than 25% of the RHNA* in any income category. *However, the law requires that any displaced tenants are provided comparable housing and relocation assistance.* §65583.1(c) permits HCD to allow a community to:

substitute the provision of units for up to 25 percent of the community's obligation to identify adequate sites for any income category in its housing element...where the community includes in its housing element a program committing the local government to provide units in that income category within the city or county that will be made available through the provision of committed assistance during the planning period...to low- and very low income households at affordable housing costs or affordable rents....

This subdivision is quite intricate, and anyone faced with a jurisdiction attempting to utilize the provision should consult HCD’s *Building Blocks* on this issue. See [HCD Building Blocks 3.E](#) and HCD’s *Recent Housing Element Legislation Amending Alternative Adequate Sites* (8-24-12) (attached as **Appendix “H”**). In summary, the provision permits HCD to allow communities to subtract from the RHNA in any income category a number equal to the number of units provided through an action that increases the supply of units through the provision “committed assistance” to either 1) rehabilitate dilapidated units, 2) convert non-affordable units to affordable units, or 3) preserve existing affordable units during the time frame of the element. If the committed assistance is not provided by the third year of the housing element period, the community must amend its element by the fourth year to identify adequate sites to accommodate the number of units that were not provided.

Rehabilitated Units (§65583.1(c)(2)(A).) For rehabilitated units to qualify, 1) the units must be extremely dilapidated, 2) any tenant must be provided with full relocation benefits, comparable housing and the right to reoccupy (*see below*), and 3) the units must remain affordable for 20 years. Units affordable between 10 and 20 years may be counted on a 1 to 3 basis— *i.e.*, for every three units rehabilitated, one unit may be subtracted from the regional needs).

Acquired or Converted Market Rate Units and Certain Foreclosed Units in Multifamily Complexes. (§65583.1(c)(2)(B).) Eligible units are rental and ownership units in complexes of three units or more that are non-affordable and unoccupied by low or very low income households and are converted to units available and affordable to low or very low income households for 55 years through acquisition or the purchase of “affordability covenants.” See [HCD Building Blocks 3.E](#). If ownership units are converted to affordable units, they only may be counted against the RHNA *if the housing element demonstrates that for each unit an affordable rental unit will also be added sometime within the housing element planning period.*

Preservation Units. (§65583.1(c)(2)(C).) A community may be allowed to receive credit towards their site identification obligation if it preserves existing government subsidized units for a period of at least 40 years through acquisition or the purchase of affordability covenants. See [HCD Building Blocks 3.E](#).

► **Displaced Tenants Must Be Relocated & Receive Relocation Assistance**

If tenants are displaced from units the locality seeks to count towards its RHNA due to rehabilitation, *the units may not be counted unless the tenants are provided with relocation assistance payments equivalent to those required by California’s Relocation Assistance law (Government Code §7260 et seq.) prior to displacement. §65583.1(c)(2)(A)(I).* The relocation assistance statutes require that tenants be moved to *comparable housing* and provided with enough funds to cover moving expenses and sufficient rent subsidy to ensure that tenants pay no more than 30% of their income for at least 42 months. See [HCD Building Blocks 3.E](#).

If tenants are displaced due to acquisition, the units may not be counted unless the tenants are provided with relocation assistance, prior to displacement, that at minimum provides “*the equivalent of four months rent and moving expenses and comparable replacement housing consistent with the moving expenses and comparable replacement housing required by Section 7260.*” §65583.1(c)(2)(B)(iii).

3. Assist in the Development of Affordable Housing (§65583(c)(2))

(2) Assist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households.

(§65583(c)(2)). The program must include implementation actions that provide some assistance in the development of housing to meet the community’s affordable housing needs. Assistance is can probably take many forms, but the action should be concrete and specific. This is where the program might address the *utilization of local housing trust funds, funds from any program enacted to replace the loss of redevelopment and federal and state subsidies* (as required by general portion of §65583(c)-- see D.1). See [HCD Building Blocks 5.C](#).

4. Address and Remove Governmental Constraints (§65583(c)(3))

(3) Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities. The program shall remove constraints to, and provide reasonable accommodations for housing

designed for, intended for occupancy by, or with supportive services for, persons with disabilities.

(§65583(c)(3) emphasis added.) This is the corollary of the requirement to analyze governmental constraints in the first section of the housing element (§65583(a)(4)). For each constraint identified in that subdivision and for any additional constraints included in the analysis by the local government, the program section should include an implementation action which addresses the constraint in concrete fashion. This program must also include actions to remove constraints to, or make “reasonable accommodations” for, the development of housing for persons with disabilities.

If the implementation actions addressing constraints do not provide for removal of each constraint, the program should explain the reason for the decision not to remove, *i.e.* an explanation of why it is not appropriate and/or not legally possible to remove the constraint. An example of a constraint that is not legally possible to remove would be a development restriction required by state or federal environmental laws. An example of legal constraint that is possible to remove or cease enforcing is a growth restriction law—even one adopted by initiative—that conflicts with state law. *See e.g. Urban Habitat Programs v. Pleasanton*, 164 Cal.App.4th 1561 (2008), indicating that Pleasanton’s initiative adopted growth cap was inconsistent with the Housing Element Law.

Removal of Constraints to Housing for Lower Income Households

The program must address barriers imposed by local government to affordable housing development in the following areas: land use controls, codes or code enforcement procedures, site improvement requirements, fees and exactions, and permit processing procedures. *See [HCD Building Blocks 5.F](#) for examples of action programs.* Actions pursuant to this subdivision could include some required by the beginning paragraph of §65583(c): 1) *regulatory concessions and incentives* for the development of affordable housing (like those described the Density Bonus law— §65915); and 2) relaxation of *administration of land use and development controls*. (See §D.1 of this chapter)

Removal of Constraints & Provision of Reasonable Accommodations for Housing for Persons with Disabilities.

Based on the analysis of constraints in accordance with HCD’s *June 17, 2002 “SB 520” Technical Assistance Memorandum* interpreting the requirement to analyze any local constraints on the development of housing for persons with disabilities (included as **Appendix “C”**) the program must address and, if possible, remove identified barriers. (See §B.5 of this chapter.) If the locality

lacks a process or standards for developers to request reasonable accommodations for housing for disabled persons, the locality's programs should include an implementation action to establish these. If the locality has barriers to development of housing with supportive services, such as *group homes*, the program should include an implementation action to address the barriers.

5. Conserve and Improve Condition of Affordable Housing Stock (§65583(c)(4))

(4) Conserve and improve the condition of the existing affordable housing stock, which may include addressing ways to mitigate the loss of dwelling units demolished by public or private action.

(§65583(c)(4)). Implementation actions under this subdivision must, at minimum, address any needs based on housing characteristics, including *overcrowding* and *housing conditions* identified in the analysis required in the first section of the element. (§65583(a)(2)) They should also focus on issues of *code enforcement* and inspection. And, this subdivision provides an opportunity for communities to address the issues of controlling *demolitions and conversions* (including condominium conversions) and requiring *relocation benefits and replacement housing* for persons displaced. See [HCD Building Blocks 5.D](#).

► San Diego failed to substantially comply with this requirement where its element included *no* programs addressing conservation of mobile home parks or affordable apartments. *Buena Vista Gardens Apartments Ass'n. v. City of San Diego Planning Dept*, 175 Cal.App.3d 289 (1985).

6. Promote Fair Housing (§65583(c)(5))

(5) Promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability.

(§65583(c)(5)). Pursuant to this subdivision, the housing element must include implementation actions that promote equal housing opportunities. The language mentions particular groups, but the provision requires components that promote fair housing for *all persons*. In this context, HCD has construed obligation to mean that the program must address all groups currently protected by state and federal fair housing laws, and the protected characteristics now include *disability, families with children, source of income, and sexual orientation*. (See §12955 *et seq.*) See [HCD Building Blocks 5.G](#).

Implementation actions in this area at the very least should provide some means of receiving, investigating and resolving complaints of discrimination. The actions should also address discrimination by lenders. See [HCD Building Blocks 5.G.ii](#).

In addition to protecting the protected classes from discrimination in the sale and rental of housing, state and federal fair housing laws also prohibit local governments from discriminating in the exercise of their land use and zoning powers. (See §§**12955(1)** and **65008**) Those protected include not only the traditional classifications but also the developers and occupants of low and moderate income housing, transitional housing, and emergency shelters. Any local law or policy that treats subsidized housing or the low income occupants of subsidized housing differently than market rate housing or its occupants violates these laws. Consequently, the implementation actions should address both discrimination in the sale and rental of housing and in the land use laws, policies and actions of the local government.

In preparing this part of the program of actions, the local government should also keep in mind that the fair housing laws prohibit laws and actions that have a discriminatory effect on the protected groups as well as those that intentionally discriminate. (See §**12955.8**) An outwardly neutral practice– such as a prohibition on the development of multifamily housing– could violate the fair housing laws if the exclusion of multifamily housing falls disproportionately on minority households or low income households. Accordingly, constraints to the development of affordable housing identified in the analysis section of the element should also be analyzed for their impacts on groups protected by the fair housing laws.

In this regard, in jurisdictions that prepare Consolidated Plans as a condition for receiving funds from HUD, this part of the program should include actions that address the “Analysis of Impediments to Fair Housing Choice” (AI) contained in the ConPlan. See Chapter I, §H.

7. Preserve Assisted Housing (§65583(c)(6))

(6) Preserve for lower income households the assisted housing developments identified pursuant to paragraph (9) of subdivision (a). The program for preservation of assisted housing developments shall utilize, to the extent necessary, all available federal, state, and local financing and subsidy programs identified in paragraph (9) of subdivision (a), except where a community has other urgent needs for which alternative

funding sources are not available. The program may include strategies that involve local regulation and technical assistance.

(§65583(c)(6).) This requirement is very precise. The program must address every assisted development identified as being at risk of conversion to market rate housing must be addressed with an implementation action. And to the degree necessary the actions must provide for the application for and utilization of any available federal, state or local funding, unless the community can demonstrate that it has “other urgent needs” for the funding. Other urgent needs would probably include completion of new assisted housing to which the locality has already made a commitment, or the development of replacement housing for the units being lost. See [HCD Building Blocks 5.E](#).

8. Public Participation (§65583(c)(8))

(8) Included a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element and the program shall describe this effort.

(§65583(c)(8).) Prior to adopting or amending any portion of its general plan, the planning commission and legislative body of the local government must hold properly noticed public hearings. Consequently, the subdivision requires local government to do more. (However, *Buena Vista Gardens Apartments Ass’n. v. City of San Diego Planning Dept. supra*, 175 Cal.App.3d 289 (1985) held failure to include this is not fatal if adequate participation was *actually* achieved.)

The program of actions must demonstrate that the locality took affirmative steps to get input from low income persons and their representatives as well as other members of the community in *the development* of the housing element. This means that input should be sought, received, and considered *before* the *draft* housing element is completed. Examples of ways of achieving public participation include setting up citizen advisory committees, the circulation of initial drafts to interested persons and groups, and targeted outreach such as presentations to community groups, public meetings and public service announcements. See [HCD Building Blocks 1.B](#).

9. Consistency with the General Plan and Other Community Goals (§65583(c)(7))

(7) Include...the means by which consistency will be achieved with other general plan elements and community goals.

(§65583(c)(7).) As discussed in Chapter I, all land use decisions, ordinances, and policies must be consistent with the general plan and all elements of the plan must be internally consistent. *See* §65300.5. Because the housing element is the only element of the general plan that must be updated regularly, it is quite possible that goals and policies and implementation actions developed when the element is revised could conflict with those of other elements. This is often the case with the land use element, which addresses the land use designations and zoning and, therefore, necessarily overlaps with the housing element. As part of the revision of the housing element, the land use element may need revision as well in order to achieve consistency between the elements. The program should address this and provide an implementation action requiring the revision of any inconsistent elements at the same time as the adoption of the final housing element.

The community may also have other land use documents which contain policies and programs that may be inconsistent with the revised housing element. These could be a local redevelopment plan or stand-alone statement of policy (*i.e.* “Mayor’s Housing Program”). The housing element preparation process should identify and resolve these conflicts, and the describe the achievement of consistency in the final element. *See* [HCD Building Blocks 6.A.i](#).

E. Additional Requirements for Coastal Zone Communities

§65588(c) requires that communities in coastal zones must take into account the affordable housing provided or required pursuant to coastal zone affordable housing mandates of §65590 (the “Mello Act”). §65590 obligates the protection of existing units occupied by low or moderate income households (including mobilehomes and residential hotels), limiting demolition or conversion of those units. When demolition of low or moderate income units is permitted, replacement housing must be provided. And, where *feasible*, new development must include low and moderate income housing.

§65588(d) requires that the review of these coastal zone obligations in the updated housing element must, at least, include:

- The number of units approved for construction after January 1, 1982.
- The number of affordable units required to be provided either within the coastal zone or within three miles of the zone.
- The number of units occupied by low and moderate income households authorized for demolition or conversion since 1982.

- The number of low and moderate income units required, either within the coastal zone or within three miles of it, to replace those units demolished or converted.

Beyond documenting the compliance with the requirements of §65590, §65588(c) mandates that the review and revision of the housing element “take into account” the units required or provided pursuant to §65590. This indicates that these units should be given specific attention in each section of the housing element. For example, the units that remain to be provided should be added to the housing needs assessment in the first section and to the quantified objectives in the second section. And in the last section the updated element should identify sites for these units (c)(1), include implementation actions to provide any necessary development assistance (c)(2), address any constraints to their development (c)(3), and describe the ways the loss demolished units will be mitigated (c)(4). See [HCD Building Blocks 6.A.ii.](#)

F. Applicability of Statutory Amendments

(e) Except as otherwise provided in this article, amendments to this article that alter the required content of a housing element shall apply to both of the following:

(1) A housing element or housing element amendment prepared pursuant to subdivision (e) of Section 65588 or Section 65584.02 where a city, county, or city and county submits a first draft to the department for review pursuant to Section 65585 more than 90 days after the effective date of the amendment to this section.

(2) Any housing element or housing element amendment prepared pursuant to subdivision (e) of Section 65588 or Section 65584.02, where the city, county, or city and county fails to submit the first draft to the department before the due date specified in Section 65588 or 65584.02.

(§65583(e).)

Many communities fail to adopt a housing element found in compliance by HCD by the statutory deadlines. Consequently, a question often arises as to whether amendments to the housing element statutes made after the housing element is due apply to tardy housing elements. Under the provision above, effective January 1, 2007 [Stats. 2006, ch. 891, §2], amendments to housing element law affecting the contents of the housing element apply to a tardy element if a locality submits its first draft of its revised element to HCD either: 1) more than 90 days after the effective date of the statutory amendments or 2) after the statutory due date of tardy element.



IV. REVIEW AND ADVOCACY

A. Determine the Status of Jurisdiction's Adopted & Draft Elements

1. Immediately Contact HCD & Review Website.

HCD must review a draft housing element within *60 days of submission*. §65585. Under new guidelines for review that the department implemented in January 2013 (*see Appendix “I”*, attached to this manual), HCD will review draft elements according to this schedule and will endeavor to complete review of the element, *including the review of initial public comments*, within 30 days:

- **3 days:** Post whether the jurisdiction has requested streamlined review
- **1 week:** HCD reviewer contacts jurisdiction
- **2 weeks:** HCD determines a) whether the element is complete and b) whether the element is eligible for streamlined review
- **30 days:** HCD completes review, including review of public comments
- **Week 5:** Discusses preliminary review and areas of concern with the jurisdiction; receives proposed revisions to draft; receives additional public comments.
- **Weeks 6 – 8:** HCD completes final review—revisions and public comments received after this date may not be considered

Consequently, it is extremely important to determine the status of the housing element by quickly checking HCD’s website:

www.hcd.ca.gov/hpd/hrc/plan/he/status.pdf

The website is updated monthly and there you can find:

- 1) Housing Element Status. This chart shows whether a community's element is:
 - IN - The element is adopted & in compliance (includes date received and date reviewed)
 - OUT - The jurisdiction submitted a draft, but has not adopted an element *or* has adopted an element that has been found out of compliance (includes date received and date reviewed)
 - DUE - The jurisdiction has not yet submitted a draft element
- 2) Housing Elements Under Review. This chart indicates whether the community has either a draft of adopted element that is currently under review. It lists the dates on which the element was submitted, when the HCD review is due. HCD has a separate on-line list of elements under review at:

www.hcd.ca.gov/hpd/hrc/plan/he/review.pdf

Then, call HCD ((916) 445-4728) to determine the most up-to-date status of the housing element. Find out who in the department is responsible for reviewing the element and let them know that you are interested in the community's housing policies and will be reviewing the element *and providing comments*.

CAUTION: If HCD is in the process of reviewing an element or is discussing possible amendments with the jurisdiction, find out the reviewer's schedule for completing the review and ask:

- If the jurisdiction has asked for an expedited review
- The reviewers preliminary thoughts on whether the element substantially complies with the law
- The reviewer neither make any final decisions on the status of the element nor give the locality an indication of the status until you have first had a chance to submit your comments.

Finally, request a copy of the most recent HCD review letter sent to the local government as well as any correspondence received from the local government. Letters issued after November 1, 2004 are available on the website, but call and ask if the most recent letter has been posted. You should send a formal California Public Records Act (Gov. C. §6250 *et seq.*) request, asking

that HCD send you all written correspondence it has received from the jurisdiction *and* other interested people and agencies. Often HCD sends written *interim* correspondence responding to oral or written comments by local government staff. It is in this informal “back and forth” between HCD and local government that HCD sometimes makes significant representations to local governments about the adequacy of the draft housing element.

2. Contact the Local Government & Review its Website.

Check the locality’s website and formally request a copy of the most recent adopted element *and* any draft elements in preparation. You probably will also need to send the locality a formal Public Records Act request as well. *See below.*

B. Obtain Documents

Although HCD and probably the local government will provide documents simply after a phone call, it is a good idea to put the request in writing so that there is a record if the request is disputed later. Persons have the right to receive copies of public documents under the California Public Records Act, §6250 *et seq.* It is good practice to include a statement in any written request that the request is made pursuant to the Public Records Act. If a governmental entity refuses a request made pursuant to the Act, a court may order it to produce the records. If a “standing” public records act request is made to HCD, the staff *should* send you a copy of any official correspondence they send to or receive from the locality.

1. Local government documents (often available online):
 - **Housing Element**, including any staff reports or “background reports” that were produced in support of the preparation of the draft or adopted element.
 - **Land Use Element** (and possibly the **Open Space element**)—these are the ones most likely to be directly related to issues covered in the housing element.
 - **Consolidated Plan** submitted to HUD (if the jurisdiction is an “entitlement community”)—if the community is a small city that joined with a consortium of other cities in a county ConPlan, contact the county and obtain a copy. As part of the ConPlan, jurisdictions must produce an *Analysis of Impediments to Fair Housing Choice* (“AI”)—make sure you ask for this as well—it could

contain information that will be extremely helpful in analyzing the community's governmental constraints on housing.

- **Reports or Studies** on housing produced by task forces or commissions established by the local government.
- **Environmental Impact Reports (EIR)** on recently approved or pending developments– these documents often contain very useful information on housing.

2. HCD documents:

- All official **review letters**—as mentioned, these are now available on-line at:
www.hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/
- All **correspondence from and to the local jurisdiction**
- All **3rd party correspondence**

3. Data On Housing Needs, Characteristics & Resources

State, Regional and Local Sources

- **Housing Authorities**– the required Public Housing Authority Plans (which for most housing authorities must be completed before most ConPlans are due) should have valuable information on the current needs for subsidized housing, including the number of households currently on the housing authorities' *waiting lists* and "interest lists."
- **Non-profit housing developers** and managers– these organizations will also have waiting lists and interest or "inquiry" lists indicating a measure of the need for housing. Some may keep records on the number of households that have applied for housing at their complexes. They may also have conducted studies or surveys on housing needs of lower income households or special needs households such as homeless persons or persons with disabilities.
- The **Council of Government's (COG) latest Regional Housing Needs Allocations (RHNA)** and latest projections for growth. The latter document projects the probable increase in population, jobs, and housing over the next twenty years.
- **Recent studies by local non-profit agencies** which analyze the housing needs for particular groups, *e.g.* studies or surveys of

emergency services providers documenting the need for housing for homeless persons.

- **Social services or health services agency** studies which may contain information on current housing needs for the particular populations served.
- **Employment Development Department and Farm Bureau** estimates of farmworker employment in the area.
- **Vacancy Rates**– from the Post Office and utility companies

National Sources

- **The National Low Income Housing Coalition (NLIHC)** website: <http://nlihc.org> is a great one-stop source of and links to the most up-to-date data sources. Especially helpful is the “2006 Advocates Guide To Housing and Community Development.”
 - “*Out of Reach*,” NLIHC’s annual study of the cost of housing for each SMSA organized by percentage of income and wage level necessary to procure affordable housing. (The most recent edition is 2013, available on the NLIHC website: <http://nlihc.org>).
 - **The Consortium for Citizens with Disabilities Housing Task Force** “*Opening Doors*” study on the lack of affordable housing for persons with disabilities.
 - **U.S. Census.** Used as the basis of many reports, here you will find the primary data, including the most recent updated information from the Census Bureau’s latest American Housing Survey and American Community Survey.
 - **H.U.D.** At www.HUDuser.org/, you will find a wide range of data sources and links to data sources, some of it local and regional.
4. The **media** often report on studies and reports released by educational or research institutions, which address housing needs issues.

C. Demand Involvement and Participate

Citizen participation by representatives of all economic segments of the community is required by the housing element law. (§65583(c)(8)) Request that the community create citizen’s task force with broad participation (including representatives from community groups representing low income persons) and with meetings that are open to the public. Also ask the local government to hold open community meetings and forums. Remember, it is the local government’s obligation to make a diligent effort to obtain the participation of all economic segments of the community.

D. Review the Current and/or Draft Element

Use HCD's **Housing Element Update Guidance, Attachment 2—Completeness Checklist** (attached as **Appendix “I”**) to go through each requirement of the statute and compare it to the corresponding section on the worksheet and to the housing element itself. See if the element addresses all the requirements of the statute. Then, use the summary of the contents included in this manual (Chapter III) and HCD’s online *Building Blocks* (table of contents included as [Attachment 1](#)) to assess the adequacy of the element and to assist you in developing ideas for revisions. If HCD has already issued a **review letter** for the draft or the adopted element, use the inadequacies listed in the appendix of the letter to help focus your analysis. For each provision of the statutory requirement, note the deficiencies, omissions, and lack of specificity.

1. Needs, Resources and Constraints (§65583(a))

In this section, look for missing, incomplete or faulty analysis or data. Are the housing needs fully assessed? Was all available data used? Is the site inventory complete and sufficiently specific with in the requirements of §65583(a)(3) and §65583.2? Are all constraints analyzed and is there a discussion of efforts to remove them? Is each special need adequately analyzed; was all available data utilized or could the community have easily obtained better data?

- Is there an adequate basis for the determination of the extent of a particular need or lack of need?
- Is there an adequate basis for the determination of the existence or non-existence of a particular constraint?

Finally, what additional needs, resources, and constraints should be assessed and analyzed in this particular community? Examples of questions to ask with respect to constraints include:

- Is there a *growth control* measure or *moratorium* in effect?
- Does the community permit multifamily development of rental housing *by right*?
- Does the land inventory identify any sites that are developable at the *densities* established in **§65583.2(c)(3)(B)**?
- Does the community require developers of affordable housing or group homes or developers receiving city subsidies to *notify the neighborhood* before development can proceed or funding is granted?
- Does the community improperly restrict single family household occupancy to “persons related by blood” or “traditional” families?

2. Goals, Policies and Quantified Objectives (§65583(b))

- Is there a corresponding goal and policy for each identified need (including special needs), inadequate resource, and development constraint?
- If the goals or quantified objectives are less than the share of the regional housing need for each income category, is an explanation given?
- If the quantified objectives list a specific number of units for an income category, does the objective indicate which prospective developments or which housing element programs on which the numbers are base? For example, are a specific number of affordable units attributed to a particular development or to a particular programs such as inclusionary zoning?

Are there any additional goals or policies needed in this community?

3. Program of Actions (§65583(c))

In this part, generally determine whether there is a corresponding implementation action for each identified need, inadequate resource, constraint, goal, and objective. The most critical parts of the program are the identification of sites and the removal of governmental constraints because it is the implementation actions in this section that will ensure that enough sites feasible

for the development of housing to meet the low and very low income household need will be available.

Remember, each action should indicate the time frame for its implementation (during the five year time frame of the housing element) and the agency responsible for the implementation. And be thinking of additional actions or alternative actions that may better address a particular problem.

(a) Identification of Adequate Sites (§65583(c)(1) & §65583.2(h))

The program should demonstrate that the community has sufficient sites to accommodate its regional needs (RHNA) for each income category. If the Inventory of Sites reveals that available sites are insufficient, the program must include implementation actions to provide the sites.

Sufficient Unit Capacity?

- Inventory of Sites sufficient? Can you determine the number of units that can be accommodated? See §65583.2(b) and Chapter III, §B.3. In some cases, the inventory will lack the necessary information, and the review can go no further.
- Sufficient Sites with the capacity to accommodate the total RHNA?
- Sites served by Infrastructure? i.e. water & sewer, etc.
- Zoned at Multifamily Densities to accommodate Lower Income RHNA? Are there enough sites zoned at the “default” densities specified in §65583.2(c)(3)(B) to accommodate the regional *needs share for units for low and very low income households?*²⁷ See Chapter III, §B.3 & §D.2.
- “By-Right” Sites? If there are insufficient sites in the inventory zoned at appropriate densities and served by infrastructure to meet the need for low and very low income housing, does the program include an implementation action that will permit “*by right*” development of multifamily sites as required by §65583.2(h)? See Chapter III, §D.2.
- Special Needs Sites? Are there sufficient and appropriate sites to meet the identified housing needs of households with persons of disability, elderly households, female headed households, large families, homeless people, and farmworkers? See Chapter III, §B.7 & §D.2.

²⁷ 10 units/acre—unincorporated areas in all non-metropolitan counties not included in the 15 units/acre category; 15 units/acre—cities within non-metropolitan counties; non-metropolitan counties with micropolitan areas; 20 units/acre—suburban jurisdictions; 30 units/acre—jurisdictions in metropolitan counties.

- *Emergency Shelters Permitted By Right?* Does the inventory identify zones where emergency shelters can be developed without discretionary review? *See §65583(a)(4).*
- *Farmworker Sites By-Right?* If there are insufficient sites to accommodate the housing needs of *farmworkers*, is there an action program that provides for identification of sites zoned for “by-right” development of farmworker housing? *See §65583(c)(1)(C) and See Chapter III, §B.7 & §D.2.d.*
- *Sites to Accommodate Unaccommodated Need from Prior Housing Element Period?* If the community failed to take the steps required by its last housing element to rezone sites to meet the lower income RHNA of the prior planning period, it must include a program to rezone sufficient sites within a year. *See §65584.09 & Chapter III, §D.2.*

Variety of Housing Types

Determine whether the program provides adequate zoning for multifamily rental housing, factory built housing, mobilehomes, housing for agricultural employees, emergency shelters, single room occupancy housing, and transitional housing. Other than multifamily housing for which the community may be required to provide “by-right” zoning, adequate zoning for the other types of housing is probably zoning which allows development as a conditionally permitted use. This means the zoning ordinance could require that development of those types of housing require a conditional use permit. However, the conditions imposed may not be so restrictive as to be insurmountable or produce protracted delays and deterrent cost burdens. *See Hoffmaster v. City of San Diego, 55 Cal.App.4th 1098 (1997).*

(b) Assist Development of Affordable Housing (§65583(c)(2))

If the community has a redevelopment area, does the program contain actions related to utilization of the *Low and Moderate Income Housing Fund*? Is the use of all available *state and federal housing development assistance* addressed here or somewhere else in the program? *See examples in §G, below.*

(c) Remove Governmental Constraints (§65583 (c)(3))

These implementation actions are the critical corollary to the identification of adequate sites. Even if enough sites are made available at adequate densities with sufficient infrastructure, regulatory constraints or procedures that encourage

NIMBY opposition can ultimately thwart the development of affordable housing. These actions must also address constraints to development of housing for *persons with disabilities* identified in the analysis required by §65583(a)(5). See Chapter III, §B.5.

Are all the identified constraints addressed? If the program does not contain implementation *actions to remove* all the constraints, does it include an explanation as to why removal is not appropriate or legally possible? Is the provision of regulatory concessions and incentives or the administration of land use and development controls addressed here or elsewhere?

(d) Other Required Implementation Actions (§65583 (c)(4)-(6))

Conservation of Stock, Promotion of Fair Housing & Preservation of Assisted Housing. In addition to an implementation action for each identified need in these areas, does the program include actions that address:

- *Conversion or demolition ((c)(4))* of affordable housing (market rate or assisted)
- *Enforcement of fair housing laws ((c)(5))*, including :
 - 1) facilitation of local fair housing programs to receive and investigate discrimination complaints,
 - 2) policies to remove impediments to fair housing choice (as described in the applicable Analysis of Impediments (AI) and
 - 3) land use and zoning policies, laws and regulations that facilitate reasonable accommodation of development of housing for persons with disabilities
- *Financing and Subsidy programs for the Preservation of Assisted Housing ((c)(6))*, including utilization of local, state and federal funding

For examples of programs to suggest, see §G, below.

E. Review Other Relevant Parts of the General Plan and Other Relevant Documents

After reviewing the housing element, compare the data, analyses, goals and programs with those that appear in the land use element (and other elements of the general plan) that might address overlapping areas with the housing element—the open space element and possibly the transportation element— and any of the

other official government documents (*see* §B, above). If there are discrepancies or inconsistencies, note them.

F. Written Comments and Oral Testimony at Public Hearings

1. Contact HCD & Make *Timely* Written Comments

HCD has only 60 days to review draft elements (§65585), so prepare written comments as soon as possible based on your review of the housing element and other relevant documents. As explained at the beginning of this chapter, under new HCD procedures HCD will be performing a preliminary review of draft housing elements within 30 days of receipt of the element. **Therefore, contact HCD when you first become involved and inform the staff that comments will be coming. Ask when HCD plans to complete its review– sometimes local jurisdictions request expedited review.** By contacting HCD as soon as possible, its staff 1) will know to expect your comments before making its final recommendations, and 2) will be able to contact you if they have questions about the submitted element.

Comments

The comments should cover each deficiency noted *and* include recommendations for remedying the deficiencies. Where applicable, your comments should *reference the statutes, HCD’s review letters* (http://www.hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/), and *HCD’s Building Blocks* (http://www.hcd.ca.gov/hpd/housing_element2/index.php)

If the needs, resources, and constraints are inadequately addressed, *identify the specific shortcomings* in any analyses. If the goals, objectives, and policies are incomplete or lack adequate justification, specify the particular deficiency. And if the programs are incomplete or fall short, address each one in kind. Finally, ***include any additional or alternative implementation actions*** that will better address the housing problems in the community. (*See* §G, below.)

Communications

When the comments are completed, submit them to the local government *and* to HCD by mail and by email (cover letter should indicate that the comments have been sent to HCD). **Find out if the local government has submitted explanatory comments to HCD– if they have, then make sure that you ask for copies and address those comments in your comments.** Review

any revisions the local government makes, or that HCD indicates the locality has suggested, and prepare supplementary written comments.

Keep in Regular Contact with HCD! HCD’s review of a submitted draft or adopted element usually involves many communications between HCD and local government staff. Although it is HCD’s policy not to make final commitments to local staff regarding what will suffice as legally adequate until it has considered all the comments of advocates (indeed §65585 requires as much), if advocates do not stay in continuous communications with HCD, they risk HCD sanctioning aspects of an element that, unbeknownst to HCD, may be deficient.

2. Oral Testimony & Public Hearings

Comments should also be presented orally at any opportunity, but comments must be made at the noticed public hearing at which the housing element is adopted. If comments are not presented either in writing or orally at or prior to the official public hearing, a subsequent legal attack on the adopted element may be prohibited. (*See §65009(b)* limiting legal challenges of general plan elements to issues raised in writing before the public hearing or orally at the public hearing.)

3. Arrange Oral and Written Comments from Other Groups

Comments from other community groups, faith-based organizations, environmental organizations and labor unions can help show the importance and political support for the positions taken. Affordable housing is critical to the goals of all these groups—it furthers integration, provides housing for the workforce and reduces greenhouse gasses by enabling people to live closer to their jobs. Involvement of as many constituencies as possible will also ensure a more comprehensive analysis and critique of the housing element because each group will have its own special perspective, knowledge, and experience.

4. Utilize Experts, Especially *Nonprofit Developers*

Advocates often lack the expertise to evaluate the accuracy of some of the data or analyses in the housing element or adequacy of sites identified for affordable housing development. They are also sometimes confronted with local officials reluctant to give credence to the advocates’ critique because the housing element has been prepared by consultants or planning staff that have substantial expertise in planning, community development or land use. While there is nothing really complicated about the analyses and programs in an element,

sometimes it helps to have someone with “credentials” weighing in with comments.

Local nonprofit developers can be extremely helpful because they have experience developing affordable housing in the area. They have an interest in getting the community to rezone appropriate sites to adequate densities and to reduce regulatory barriers to affordable housing development. But, they also may want to distance themselves from direct advocacy for policy changes because they do not want to risk damaging their relationship with the local government, given that they must obtain approvals (and sometimes funding) for their projects from the locality. Consequently, nonprofit staff often welcome the efforts of advocates and do what they can to provide us with the information we need to advocate successfully.

Nonprofits can, in particular, assess whether identified sites have adequate densities, infrastructure, access, or topography, or whether they are subject to any environmental limitations or contaminated with toxic pollutants. They also have experience with the local land use laws and processes, providing a perfect source for information on which local zoning and building requirements present constraints to affordable housing development.

Sometimes nonprofit development staff will be willing to look at sites identified in a draft element as appropriate for development and provide real-world insight regarding the feasibility of developing the parcels. Frequently you find that they already have particular sites that they view as the most suitable for affordable housing. This kind of input can be very helpful in determining what are the most meaningful implementation actions, in particular actions for the development of specific projects a nonprofit developer be planning. (See discussion of “What to Ask For” below.)

Some other possibilities for persons with expert knowledge are:

- Affordable housing development consultants, and
- College or university urban planning professors.

Could be Important for Litigation: To ensure that available expert opinion can be utilized as evidence if litigation becomes necessary, if at all possible arrange to have the individuals with expertise provide their opinion in writing or at the public hearing of the legislative body. Some courts may prohibit use of expert opinions not submitted to the local government prior to the adoption of the housing element.

G. Programs to Ask For

Of course, what to ask the community to include in the element depends largely on the needs of the particular community and the particular deficiencies in the housing element revealed by the review described above. Below are some suggestions to consider, especially in the area of the program of actions.

First, there must be compliance with each specific requirement of the statute–§65583 (see Chapter III)—all missing determinations, analyses, goals, objectives, policies, and implementation actions must be included. Next, there must be a *corresponding goal and implementation action* for every need, inadequate resource, and constraint identified in the element. Finally, the program of actions should contain *concrete and specific implementation actions*, mandated for implementation within the five year time frame of the element.

1. Greater Specificity in the Implementation Programs

(a) Ordinance required?

Sometimes the adoption of an ordinance is needed or required in order to ensure implementation of the action. For example, a *density bonus* program *must* be adopted in the form of an ordinance. (§65915) And an inclusionary zoning program needs an implementation ordinance to ensure uniform application and legal adequacy.

(b) Time frame and Responsibility for Action Indicated?

Without a specified time or a delegation of specific responsibility for carrying out the action, it will be difficult to enforce the action of the action if the community fails to implement it. A specific time frame is required by §65583(c)

(c) Amount of Funds or Number of Units Specified?

Implementation actions that commit the community to appropriating funds or actually developing units should also be as specific as possible. Not only will this help ensure implementation, it will help make the actions legally enforceable because there will be little question about what commitment was actually made.

2. Some Suggested Implementation Actions

Below are a list of several possible programs that have been included in housing elements and successfully implemented. This list is just illustrative. Be creative, and try to come up with the best implementation action for the particular community need being targeted. A good, though somewhat dated summary of many programs used by California local governments to provide affordable housing are described in the **Blueprint for Bay Area Housing**, available from the Association of Bay Area Governments (www.abag.ca.gov/planning/housingneeds/blueprint.html, ABAG 2001). Also see HCD's *Building Blocks*: www.hcd.ca.gov/hpd/housing_element2/index.php (included as Attachment 1), which includes some suggested programs in the sections addressing housing element programs and actions.

(a) **Providing Adequate Sites** ([*HCD Building Blocks 3.E, 5.B*](#))

If there are insufficient sites to meet the community's share of the regional need for very low, low or moderate income housing *or, if the jurisdiction failed to implement a program in the previous element that required rezoning* (see §65584.09), the housing element must include a program to rezone sites that are developable *by-right*. Enough sites must be rezoned to accommodate both the shortfall of sites for very low and low income households under the current RHNA, *and* the rezoning that was promised under the previous element. Rezoning that was supposed to be done under the previous element must be completed within one year of the due date of the new element. (§65584.09)

Here are some methods of addressing the problem that could be formulated as implementation actions. Remember that for the sites provided through any of these means to qualify as adequate sites, the action must ensure that the sites will be available soon enough so that they can be developed during the five year time frame of the element.

- *Re-zone or Annex* to increase sites.
- *Up-zone* to increase densities.
- *By-Right Zoning*. Zone medium and high density sites for “by-right” development to decrease the opportunity for NIMBY opposition at conditional use permit hearings [If the land inventory demonstrates that the community lacks sufficient sites to accommodate the RHNA for all income categories, the community may be *mandated* to rezone sites to

allow multifamily development by right–*see* Chapter III, §B. 3 & §D.2 and §65583.2(a) & (h).]

- *Zoning Overlays*– An amendment to the zoning ordinance that “overlays” different zoning standards on particular sites for housing developments meeting specified affordability requirements. Typically, the overlay will allow increased densities and/or by-right development on the designated sites.
- *Mixed use zoning*– allow residential development in certain commercial and retail zones with minimal conditions. **Caution:** If residential development is not appropriate or likely in a commercial area (*e.g.* the commercial area is isolated or far from services, public transportation or schools), rezoning of those sites to allow residential development should not count as adequate sites for lower income households. And, if a community must zone sites for by-right multifamily development because its inventory shows a shortfall of sites to meet the lower income housing need, it may only utilize mixed use sites to meet 50% of the shortfall. §65583.2(h).
- *Expand Infrastructure* to unserved sites– utilize state Mello-Roos bond funds to expand or improve sewer and water.
- *Minimum Densities*– in medium and high density zones, prohibit development at lower densities than the range of the zone (*e.g.* if zoning is medium density, 12 to 18 units/acre, developments of less than 12 units would be prohibited).
- *Permit Emergency Shelters & Transitional Housing as a “By Right” use* in some zones and permitted use in a range of zones in the community. This is now mandatory for most jurisdictions. *See* §65583(a)(4).
- *Permit Farmworker Housing as a “By Right” use in some zones and a permitted use in a range of zones.* This is mandatory if the analysis of farmworker housing need shows that the community has insufficient housing to meet the need. *See* §65583(c)(1)(C).

(b) Procuring Development Funds

- *Commercial Development/ “Jobs-Housing” Linkage Fees*– On nonresidential development– involves conducting a “nexus” study to determine the housing needs created by nonresidential development and

the amount of the fee necessary to facilitate development of affordable housing to meet those needs

- *Local Housing Trust Fund*—funded by in lieu fees from inclusionary zoning ordinances, commercial development affordable housing fees, affordable housing impact fees, redevelopment “boomerang funds”
- *Redevelopment “Boomerang Funds”*—since the dissolution of redevelopment agencies, other taxing entities in a county are now receiving the tax monies that formerly went to the redevelopment agency. Some of these funds will “boomerang” back to cities and counties. Some communities are adopting programs committing a substantial portion of these funds to affordable housing.
- *Float Bonds*— Communities can apply for authority to float either *tax exempt* or *general revenue* bonds
- *Federal HOME Funds*— Program to provide local *match* funds to facilitate eligibility for developments funded by this program
- *General Funds*— Commit general funds to affordable housing development or as a match for federal HOME funds
- *Tax Credit Authorization*— Program authorizing use of federal/state tax credit financing for affordable housing in the jurisdiction (eligibility for tax credits generally requires local government approval)

(c) Assisting Affordable Housing Development (See [*HCD Building Blocks 5.C*](#))

- *Inclusionary Zoning*— Requiring new developments to include a percentage of low and very low income housing (*e.g.* 10% or 20%), or, if the community already has an inclusionary program, increase the percentage targeted to very low or extremely low income housing. See our *Inclusionary Zoning: Best Practices*, available for download from our website—www.pilpca.org. [*caveat*: HCD may require such a program to be analyzed as a governmental constraint. However, the severity of the need for affordable housing is usually sufficient to justify the program.]
- *Inclusionary Commercial Zoning*— Requiring certain kinds of new commercial developments to include affordable housing to accommodate the workforce generated by the development. This program probably is

most appropriate for retail and office development where housing is compatible with the commercial use. This is somewhat akin to commercial development “linkage fees” (*see* above). And, because the obligation to include affordable housing in the development is based on the need generated by the new development, to implement the program, the jurisdiction will have to conduct a “nexus study” to determine the housing need generated by commercial development.

- *Financial Support to local Nonprofit Developer to cover staff and /or pre-development costs*
- *Hold an Article 34 election*– Pursuant to Article 34 of the state Constitution, developments financed by the government in which more than 50% of the housing is low income housing sometimes must be sanctioned by a local election authorizing the development of a particular number of units of low income housing. While most affordable housing developments these days are by nonprofits utilizing funding sources that do not trigger Article 34, sometimes passing a measure to provide for a certain number of units with “Article 34 authority” can help the local government utilize funds that may not otherwise be available.
- *Density Bonus ordinance* in compliance with §§**65915, 65913.5 and 65917**– these sections mandate that each community adopt an ordinance that provides a density bonus *or* equivalent incentives to developers of housing that includes a certain percentage of affordable units.²⁸
- *Donate Sites* owned by the local government to nonprofit developers for affordable housing development.

(d) Removing Constraints (*See [HCD Building Blocks 5.F](#)*)

- *Reduce Conditional Use Permit requirements* for affordable housing or group homes. (Sometimes these requirements allow localities to add any condition that would “benefit” the community—an invitation for NIMBYs to ask for conditions that could make a development infeasible.)
- *Reduce Development Standards*, such as parking requirements, as a regulatory concession for the development of affordable housing [*See Rethinking Residential Parking–Myths & Facts* (Non-Profit Housing

²⁸ The percentage of units and the degree of the density bonus varies depending on the level of affordability, *e.g.*, a bonus of 20% must be granted when the development includes 5% affordable to very low, *or* 10% affordable to low.

Association of Northern California (April 2001) (www.nonprohthousing.org).)]

- *Reduce, Defer, or Waive development and permit process Fees* for affordable housing.
- *Reduce & Expedite the Permitting Process.*
- *Reduce & Expedite the Design Review process* for affordable housing, particularly limiting criteria to clear, objective standards that require the least cost to obtain the design objective.
- *Repeal any Requirements Limiting the Location of Affordable Housing.* (These kind of conditions are probably illegal under §65008, which prohibitions local government discrimination against affordable housing.)
- *Amend the Permitting Process for Emergency Shelters & Transitional Housing to ensure:* 1) by-right zoning for emergency shelters (§65583(a)(4)), and, 2) that zoning burdens combined with NIMBY opposition cannot present an insurmountable barriers to development.
- *Repeal Notification of Neighbors Requirements.* Some communities require special notification of neighbors and businesses before an affordable housing development can be approved. (If provisions like these apply only to affordable housing, they probably violate §65008, which prohibits local governments from discriminating against affordable housing.)

(e) Conserving & Improving the Condition of Affordable Housing

- *Relocation Benefits.* Program to provide persons displaced by local code enforcement or private conversion or demolition with relocations assistance. (Local governments are generally only required when they finance or causes the displacement, and are permitted to step in and provide assistance when a building is closed due to code enforcement.)
- *Controls on Conversion or Demolition.* E.g. regulation of condominium or residential hotel conversions. These regulations must be consistent with the Ellis Act (§7060), which prohibits local governments from preventing landlords from “going out of business,” but may provide for substantial relocation assistance. The Ellis Act also does not prohibit the

local government from regulating requests for changes in the use of a site after a landlord has elected to go out of business.

- *Rent Control or Eviction Protections such as Good Cause Eviction.*

(f) Promoting Fair Housing

- *Adequately Fund a local Fair Housing Counseling and Enforcement Agency.*
- *Ordinance Prohibiting Discrimination Against the Recipients of Section 8 and other rental housing subsidies.*
- *Conform local Occupancy Standards to the state Housing Code standards so that large families and group homes are not unreasonably denied housing opportunities.*
- *Remove any Restrictive Definition of Family– some old ordinances still illegally permit exclusion from single family zones of households larger than five or six unrelated persons or households of unrelated persons.*
- *Reasonable Accommodation Policy & Procedure. Amend Zoning Ordinance to ensure developers of housing for Disabled Persons, particularly *Group Homes and Residential Care Facilities* are afforded “reasonable accommodation” when applying for land use approval for such developments.*

(g) Preserving Assisted Housing

- *Apply for Funding in conjunction with a nonprofit developer or the local housing authority by a specific date.*
- *Ordinance Requiring Advance Notice of the intent to convert to the local government and Prohibiting Eviction except for cause.*



Attachment 1. Building Blocks: A Comprehensive Housing Element Guide

Department of Housing and Community Development

Please note that because the Department of Housing and Community Development makes periodic navigation and content updates to its website, citations to the building blocks in this November 2013 update to the 3rd Edition of the California Housing Element Manual do not reflect the current version.

The current version of the Building Blocks is available through HCD's website:
<http://www.hcd.ca.gov/community-development/building-blocks/index.shtml>

Please see HCD's homepage at [http:// hcd.ca.gov/](http://hcd.ca.gov/) for more information.