



AB 72 (2017)

AB 72 STRENGTHENS MID-CYCLE HOUSING ELEMENT ENFORCEMENT

OVERVIEW

[AB 72](#), which the Legislature passed as part of the 2017 housing package, clarifies the state Department of Housing and Community Development’s (“HCD”) authority to enforce California’s Housing Element Law (Gov. Code, §§ 65580-65589.8). It requires HCD to review certain actions (or failures to act) by local jurisdictions mid-planning period, and to make findings about whether or not those actions comply with Housing Element Law. In certain circumstances, HCD may revoke its prior approval of the adopted housing element until HCD determines that the jurisdiction has come into compliance with Housing Element Law. The new law also requires HCD to notify the jurisdiction—and authorizes HCD to notify the Attorney General—if HCD makes certain findings of noncompliance with Housing Element law and/or other specified affordable housing statutes. AB 72 went into effect January 1, 2018, and HCD plans to issue guidance on AB 72 later this year. The text is attached at the end of this memorandum.

BACKGROUND

Every city and county in California must revise and adopt a new version of the housing element of its general plan on a cycle of every 4, 5, or 8 years, depending on the jurisdiction’s location and prior compliance with Housing Element Law.¹ During this regular update, the jurisdiction must submit its draft housing element to HCD, and HCD makes findings regarding the draft’s compliance—or lack of compliance—with state law.² When making these findings, HCD considers the comments of advocates and others, in addition to consulting with the jurisdiction.³

The jurisdiction must take into account HCD’s findings before adopting its housing element, and, if HCD has not found the housing element to be in compliance with state law, the jurisdiction’s adoption of the housing element must be accompanied by written findings as to why the jurisdiction believes that the housing element substantially complies with housing

¹ To find a particular jurisdiction’s update schedule, check [HCD’s website](#).

² Gov. Code, § 65585, subd. (b)-(d).

³ Gov. Code, § 65585, subd. (c).

element law.⁴ Once the jurisdiction has adopted its housing element, it submits the adopted housing element to HCD for a final review, and HCD issues additional written findings as to whether the adopted housing element complies with state law.

Generally, the enforcement of Housing Element Law in between the required periodic revisions has been borne by private entities, including nonprofit developers, affordable housing advocates, and individual residents concerned with housing affordability in their community. This sometimes results in litigation, and California law has long authorized “any interested party” to bring suit to compel adoption of a housing element in substantial compliance with the Housing Element Law⁵, to compel a jurisdiction’s performance of its housing element programs,⁶ and/or with housing element law generally.

SB 72 maintains Housing Element Law’s rights of private enforcement, but it amends the law to provide clear authority and guidance for HCD to engage in enforcement activities mid-cycle. In doing so, it also provides additional tools for advocates seeking to hold jurisdictions accountable to their housing element obligations.

BILL SUMMARY

AB 72 amended section 65585 of the Government Code to provide that:

1. HCD must review “any action or failure to act by the city, county, or city and county that it determines is inconsistent with an adopted housing element or [Government Code] Section 65583, including any failure to implement any program actions included in the housing element . . .”⁷
2. HCD must issue “written findings to the city, county, or city and county as to whether the action or failure to act substantially complies with Housing Element Law and give the jurisdiction a reasonable time (no more than 30 days) to respond.”⁸
3. If HCD finds that an action or failure to act by the jurisdiction violates Housing Element law, it may revoke its prior approval of the jurisdiction’s housing element until the jurisdiction comes into compliance with the law (after providing the jurisdiction with a reasonable opportunity respond).⁹

⁴ Gov. Code, § 65585, subd. (f).

⁵ Gov. Code, § 65587.

⁶ Gov. Code, § 65583, subd. (h); Gov. Code §65587(d).

⁷ Gov. Code, § 65585, subd. (i)(1)(A).

⁸ Gov. Code, § 65585, subd. (i)(1)(A).

⁹ Gov. Code, § 65585, subd. (i)(1)(B).

4. HCD “may consult with any local government, public agency, group, or person, and shall consider any written comments . . . in determining whether the housing element substantially complies with [Housing Element Law].”¹⁰
5. Additionally, HCD must notify the jurisdiction and may notify the Office of the Attorney General that the jurisdiction is in violation of Housing Element Law, or that the jurisdiction has violated:
 - a. The Housing Accountability Act (Gov. Code, § 65589.5).¹¹
 - b. The “No Net Loss” requirements related to jurisdictions’ duty to ensure that their housing element’s site inventory includes sufficient sites, zoned at sufficient density, to meet the jurisdiction’s unaccommodated Regional Housing Needs Allocation throughout the planning period (Gov. Code, § 65863).¹²
 - c. The Density Bonus Law (Gov. Code, § 65915 et seq.)
 - d. Government Code section 65008’s prohibition against discrimination, including discrimination against lower-income households, in land use decisions.¹³

¹⁰ Gov. Code, § 65585, subd. (i)(2).

¹¹ [See PILP’s memo on SB 167 \(2017\)](#).

¹² [See PILP’s memo on SB 166 \(2017\)](#).

¹³ Gov. Code, § 65585, subd. (j).

AB 72 requires HCD to:	Additionally, AB 72 authorizes HCD to:
<ul style="list-style-type: none"> • Review any action or failure to act that violates Housing Element Law, including any failure to implement housing element programs. • Issue written findings to the jurisdiction about whether the action or failure to act substantially complies with Housing Element Law. • Give the jurisdiction a reasonable time (30 days or less) to respond to HCD’s findings regarding the jurisdiction’s compliance or noncompliance with Housing Element Law. • Consider written comments from any local government, public agency, group, or person any local government, public agency, group, or person regarding the jurisdiction’s compliance or noncompliance with Housing Element Law. • Notify a jurisdiction of any findings that the jurisdiction is in violation of the Housing Accountability Act, the No Net Loss Statute, the Density Bonus Law, Government Code section 65008. 	<ul style="list-style-type: none"> • After providing the jurisdiction written findings of substantial noncompliance and an opportunity to respond, revoke its prior approval of the jurisdiction’s housing element until the jurisdiction comes into compliance with Housing Element Law. • Consult with any local government, public agency, group, or person regarding the jurisdiction’s compliance or noncompliance with Housing Element Law. • Refer violations of Housing Element Law, the Housing Accountability Act, the No Net Loss Statute, the Density Bonus Law, Government Code section 65008, to the Attorney General.

ADVOCACY TIPS

AB 72 requires HCD to play a more active role in determining jurisdictions' compliance with housing element law outside of the regular update process and provides advocates with new tools for holding local cities and counties accountable for their failure to follow state law. AB 72's additions to Housing Element Law provide increased opportunities for administrative advocacy to address non-compliant jurisdictions after adoption of an adequate housing element.

Most of the relevant issues and advocacy strategies for enforcing Housing Element Law will be the same—including during jurisdictions' regular periodic updates of their housing elements—but AB 72 provides an explicit avenue for administrative enforcement mid-cycle, and clarity regarding HCD's role in that enforcement. Options for advocacy include the following steps:

- **Identify** what the local jurisdiction is doing—or not doing—that is 1) inconsistent with its adopted housing element or the general substantive requirements for housing elements under Government Code section 65583 or 2) amounts to a failure to implement a critical housing element program. For example, did the jurisdiction commit to take particular steps or actions as part of a program in the housing element and not follow through with it? Or has the jurisdiction taken an action that is inconsistent with the goals and programs that it set out for itself in its housing element?
- **Comment** to HCD in writing and by phone, and send a copy to the jurisdiction. Under subdivision (i)(2), HCD “*shall* consider any written comments from any public agency, group, or person” regarding the local jurisdiction’s violation of Housing Element Law.
- **Engage** with HCD and with the jurisdiction to ensure that both understand the ways in which the jurisdiction is violating the law, and what actions must be taken in order to remedy its substantial noncompliance.

Contact PILP! The Public Interest Law Project provides technical assistance and advocacy support to local legal services organizations engaging in housing element advocacy. Address: 449 15th Street, Suite 301, Oakland, CA 94612; Telephone: 510-891-9794; Email: admin@pilpca.org; Website: www.pilpca.org.

Assembly Bill No. 72

CHAPTER 370

An act to amend Section 65585 of the Government Code, relating to housing.

[Approved by Governor September 29, 2017. Filed with Secretary of State September 29, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

AB 72, Santiago. Housing.

The Planning and Zoning Law requires a city or county to adopt a comprehensive, long-term general plan for the physical development of the city or county and of any land outside its boundaries that bears relation to its planning. That law also requires the general plan to contain specified mandatory elements, including a housing element for the preservation, improvement, and development of housing. Existing law prescribes requirements for the preparation of the housing element, including a requirement that a planning agency submit a draft of the element or draft amendment to the element to the Department of Housing and Community Development prior to the adoption of the element or amendment to the element. Existing law requires the department to review the draft and report its written findings, as specified. Existing law also requires the department, in its written findings, to determine whether the draft substantially complies with the housing element.

This bill would require the department to also review any action or failure to act by the city, county, or city and county that it determines is inconsistent with an adopted housing element or a specified provision and to issue written findings, as specified, whether the action or failure to act substantially complies with the housing element. If the department finds that the action or failure to act by the city, county, or city and county does not substantially comply with the housing element, and if it has issued findings as described above that an amendment to the housing element substantially complies with the housing element, the bill would authorize the department, after allowing no more than 30 days for a local agency response, to revoke its findings until it determines that the city, county, or city and county has come into compliance with the housing element. The bill would also require the department to notify the city, county, or city and county and authorize the department to notify the Office of the Attorney General that the city, county, or city and county is in violation of state law if the department makes certain findings of noncompliance or a violation.

DIGEST KEY

Vote: MAJORITY Appropriation: NO Fiscal Committee: YES Local Program: NO

SECTION 1.

Section 65585 of the Government Code is amended to read:

65585.

(a) In the preparation of its housing element, each city and county shall consider the guidelines adopted by the department pursuant to Section 50459 of the Health and Safety Code. Those guidelines shall be advisory to each city or county in the preparation of its housing element.

(b) (1) At least 90 days prior to adoption of its housing element, or at least 60 days prior to the adoption of an amendment to this element, the planning agency shall submit a draft element or draft amendment to the department.

(2) The planning agency staff shall collect and compile the public comments regarding the housing element received by the city, county, or city and county, and provide these comments to each member of the legislative body before it adopts the housing element.

(3) The department shall review the draft and report its written findings to the planning agency within 90 days of its receipt of the draft in the case of an adoption or within 60 days of its receipt in the case of a draft amendment.

(c) In the preparation of its findings, the department may consult with any public agency, group, or person. The department shall receive and consider any written comments from any public agency, group, or person regarding the draft or adopted element or amendment under review.

(d) In its written findings, the department shall determine whether the draft element or draft amendment substantially complies with this article.

(e) Prior to the adoption of its draft element or draft amendment, the legislative body shall consider the findings made by the department. If the department's findings are not available within the time limits set by this section, the legislative body may act without them.

(f) If the department finds that the draft element or draft amendment does not substantially comply with this article, the legislative body shall take one of the following actions:

(1) Change the draft element or draft amendment to substantially comply with this article.

(2) Adopt the draft element or draft amendment without changes. The legislative body shall include in its resolution of adoption written findings which explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with this article despite the findings of the department.

(g) Promptly following the adoption of its element or amendment, the planning agency shall submit a copy to the department.

(h) The department shall, within 90 days, review adopted housing elements or amendments and report its findings to the planning agency.

(i) (1) (A) The department shall review any action or failure to act by the city, county, or city and county that it determines is inconsistent with an adopted housing element or Section 65583, including any failure to implement any program actions included in the housing element pursuant to Section 65583.

The department shall issue written findings to the city, county, or city and county as to whether the action or failure to act substantially complies with this article, and provide a reasonable time no longer than 30 days for the city, county, or city and county to respond to the findings before taking any other action authorized by this section, including the action authorized by subparagraph (B).

(B) If the department finds that the action or failure to act by the city, county, or city and county does not substantially comply with this article, and if it has issued findings pursuant to this section that an amendment to the housing element substantially complies with this article, the department may revoke its findings until it determines that the city, county, or city and county has come into compliance with this article.

(2) The department may consult with any local government, public agency, group, or person, and shall receive and consider any written comments from any public agency, group, or person, regarding the action or failure to act by the city, county, or city and county described in paragraph (1), in determining whether the housing element substantially complies with this article.

(j) The department shall notify the city, county, or city and county and may notify the Office of the Attorney General that the city, county, or city and county is in violation of state law if the department finds that the housing element or an amendment to this element, or any action or failure to act described in subdivision (i), does not substantially comply with this article or that any local government has taken an action in violation of the following:

(1) Housing Accountability Act (Section 65589.5 of the Government Code).

(2) Section 65863 of the Government Code.

(3) Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code.

(4) Section 65008 of the Government Code.