

## **SB 166 (2017)**

### **NO-NET-LOSS LAW STRENGTHENED FORTIFIED HOUSING ELEMENT SITE PRESERVATION REQUIREMENTS**

#### **OVERVIEW**

The 2017 California legislative session yielded a “housing package” of 15 bills that significantly increased both the financing of affordable housing development and the obligation of local governments to plan, zone and approve affordable housing developments. This memorandum focuses on [SB 166](#) (Skinner), a bill that substantially strengthens the No-Net-Loss Law’s<sup>1</sup> obligations for jurisdictions to preserve sufficient sites to address the community’s identified need for lower-income housing.<sup>2</sup>

SB 166 amends the No-Net-Loss Law to require that the land inventory and site identification programs in the housing element always include sufficient sites to accommodate the unmet RHNA. When a site identified in the housing element as available for the development of housing to accommodate the lower-income portion of the RHNA is actually developed for a higher income group, the locality must either (1) identify and rezone if necessary an adequate substitute site or (2) demonstrate that the land inventory already contains an adequate substitute site.

The bill applies to housing element updates/revisions and amendments and development approvals beginning January 1, 2018. HCD will be publishing technical assistance and eventually guidance memoranda interpreting the law and explaining how the department will implement the requirements in 2018. See [HCD's California's 2017 Housing Package](#). Below are a summary, description and identification of possible implementation issues.

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<sup>1</sup> Government Code § 65863.

<sup>2</sup> PILP also has prepared memoranda analyzing other planning and zoning law pieces of the housing package, including [AB 1397](#) (strengthening the Housing Element Law obligation that housing elements identify and make available adequate sites to meet the RHNA), [AB 1505](#) (authorizing application of inclusionary zoning to rental housing), and [SB 167](#) (strengthening the Housing Accountability Act (“Anti-NIMBY law”)).

## BACKGROUND & SUMMARY

SB 166 modifies the No-Net-Loss Law—Government Code § 65863—to make sure that localities at all times have sites available *and* identified in their housing elements to meet their unmet Regional Housing Needs Allocation (RHNA). Before amendment, the law prohibited local governments from reducing density of a site or approving development on a site at less than the density attributed to the site in the housing element unless it found that there were sufficient other sites in the housing element *or* designated a replacement site. Rather than simply identifying sites for the housing element at the beginning of the planning period, the No-Net-Loss statute requires jurisdictions to ensure that they maintain the availability of sufficient sites at sufficient densities to address the RHNA needs for lower income housing—*or* to take remedial action by identifying and if necessary rezoning, alternative sites to replace the ones not developed at the affordability or the densities projected in the site inventory.

The amendments in SB 166 strengthened these requirements to ensure that the land inventory and site identification programs of a housing element always include sufficient sites to accommodate the community's share of the regional housing needs in all income categories. It requires that, if a local government approves development that does not include lower income housing on a site identified in the housing element to accommodate the lower income RHNA, it must identify and rezone a replacement site if the remaining sites are insufficient to accommodate the lower income RHNA.

The significant amendments to the No-Net-Loss Law are:

- ***“At All times” the Housing Element Land Inventory and Site Identification Program Must Accommodate the Remaining Unmet RHNA.*** (§ 65583(a).)
- ***“At No Time” May A Community Allow Development That Causes the Land Inventory to Become Insufficient to Meet the Unmet RHNA for Lower- and Moderate-Income Households, Unless Alternative Sites Are Made Available in 180 Days.*** (§ 65863(a) & (c)(2).)
- ***Reduction Of Density Prohibited Without Strict Findings:***
  - 1) Reduction consistent with the general plan/housing element, *and*
  - 2) Remaining housing element sites are adequate to accommodate the RHNA for each income level and meet the requirements of §65583.2 (as amended by AB 1397—i.e., sites must be shown to be zoned at sufficient densities and actually available during the planning period with access to infrastructure). (§ 65863(b)(1).)

- **Approval Of Fewer Units Than Attributed to the Site in the Housing Element Prohibited Without Strict Findings that:**
  - 1) The remaining sites identified in the element meet the requirements of § 65583.2 (as amended by AB 1397 [see above]), and
  - 2) The remaining sites are sufficient to accommodate the RHNA. (§ 65863(b)(2).)
- **Exception Allowing Density Reductions:** Density may be reduced even if the remaining housing element sites are insufficient to accommodate the RHNA **if** the jurisdiction identifies sufficient “additional, adequate, and available sites with an equal or greater residential density” so that there is “no net loss of residential capacity.” (§ 65863(c)(1).)
- **Exception Allowing Development of Fewer Units:** If approval of a development results in fewer units by income category than identified in the housing element and remaining sites are insufficient, the jurisdiction must **make sufficient additional sites available within 180 days.** (§ 65863(c)(2).)
- **Definition of “Lower Residential Density.”**
  - 1) *If the jurisdiction’s housing element is in substantial compliance:* the proposed development includes fewer units than were projected for the site in the housing element. (§ 65863(g)(1).)
  - 2) *If the jurisdiction does not have a housing element adopted within 90 days of the statutory deadline or has an element otherwise not in substantial compliance:* a) a residential density that is lower than 80% of maximum density **or** b) 80% of the default density required by § 65583.2(g), whichever is greater. (§ 65863(g)(2).)<sup>3</sup>
- **CEQA Not Applicable to Downzoning a Housing Element Site.** A downzoning that triggers an obligation to identify additional sites pursuant to this law creates no CEQA obligation. *However,* that does not exempt the subsequent rezoning action from CEQA. (§65863(h))

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<sup>3</sup> Default densities are the densities listed in §65853.2 as the densities presumed sufficient to make lower income housing development feasible. They range for 10 units/acre to 30 units/per acre depending on whether the community is rural, suburban or urban.

## DETAILS

### **Housing Element Land Inventories and Site Identification Programs Must Make Sufficient Sites Available to Accommodate Lower- & Moderate-Income RHNA “At All Times.” (§ 65863(a).)**

The legislation first adds that the obligation of the housing element to identify and make available sites to meet the unmet portion of the RHNA applies “at all times,” extending throughout the housing element planning period. It goes on to state that, except as provided in the statute, “at no time” shall the community permit or cause the inventory to become insufficient to meet the unmet lower- and moderate-income RHNA. These two mandates would seem to require that a community amend its housing element if at any time the existing land inventory, together with the housing element programs to rezone sites, does not indicate the community has sufficient site for its lower- and moderate-income needs. So, if a site identified in the element as available to accommodate a portion of the lower income RHNA but instead is to be developed with market rate housing, the community must identify and if necessary rezone sites to replace the lower income housing site developed with market rate housing.

### **Communities May Not Reduce the Density or Allow Development at a “Lower Residential Density” or with “Fewer Units” than Declared in the Housing Element Without Specific Findings. (§ 65863(b).)**

#### **§65863(g)—“Lower Residential Density Defined”**

For a jurisdiction with a housing element in substantial compliance, “lower residential density” means sites where fewer units than projected in the element are proposed. (§65863(g)(1))

For residential or mixed use sites in a jurisdiction *without* an element either not adopted within 90 days of the statutory deadline *or* not brought into compliance within 180 days of the deadline, “lower residential density means:

- 1) For residentially zoned sites, a density that is lower than 80% of maximum density *or* 80% of the default density required by §65583.2(c)(3), whichever is greater. (§ 65863(g)(2)(i).)
- 2) For mixed use sites, a use that would result in development of fewer than 80% of the maximum *units* allowed by the site’s zoning *or* 80% of the *density* that must be allowed under § 65583.2(c)(3), whichever is greater. (§ 65863(g)(2)(ii).)

For instance, if a site designated as a site available to accommodate lower income housing in the housing element because it is zoned at the §65583.2(c)(3) “default” density of 30

units/acre is instead developed at 80% or less of 30 units/acre (i.e. 24 units/acre or less), the site has been developed at a lower density.

#### **§ 65863(b)(1)—Findings Required if Site Density is Reduced**

Under the new legislation, communities are not only precluded from reducing densities to a “lower residential density” unless remaining sites are sufficient to accommodate the RHNA, but they must also ensure that the sites meet the stricter adequacy and site availability requirements added to §65583.2 by AB 1397-- i.e. sites must be shown to be actually available during the planning period with access to infrastructure. Density reduction for sites identified in the housing element must be justified by findings that:

- 1) The reduction is consistent with the housing element, and
- 2) Remaining housing element sites are adequate under the requirements of §65583.2 *and* sufficient to meet the RHNA

To assist with this determination, the bill requires that the finding:

[S]hall include a quantification of the remaining unmet need for the jurisdiction’s share of the regional housing need at each income level and the remaining capacity of sites identified in the housing element to accommodate that need by income level.

(§ 65863(b)(1)(B).)

#### **§ 65863(b)(2)—Findings Required if Fewer Units Approved**

As with approval of reductions in density, if a development is approved with “fewer units by income category than identified in the jurisdiction’s housing element for that parcel,” the community must make a finding whether the remaining Housing Element sites are adequate under the requirements of §65583.2 *and* sufficient to meet the RHNA . The finding must include the same level of quantification required for reduction of density under §65863(b)(1)(B).

#### **A Community May Only Reduce Housing Element Site Density or Approve a Development with Fewer Units if the Community Identifies Sufficient Replacement Sites. (§ 65863(c).)**

A jurisdiction may reduce the allowable density for a particular site even though the remaining housing element sites are insufficient to accommodate the RHNA if the jurisdiction identifies sufficient “additional, adequate, and available sites with an equal or greater residential density” so that there is “no net loss of residential capacity.” (§ 65863(c)(1).) In other words, if a jurisdiction reduces the allowable density for one of the sites it identified to meet its RHNA, and, if that loss of density will result in the overall site inventory becoming insufficient to accommodate the RHNA, then the jurisdiction must identify an alternative site or

sites that (1) are available for the development of housing, (2) have an equal or greater allowable residential density than the site that was downzoned, and (3) are adequate to accommodate the RHNA foregone by the downzoning. It may accomplish this by either identifying a new site or increasing the density of another site not already identified in the inventory as needed to meet a portion of the RHNA.

If a community seeks to approve of a development that would result in *fewer units* by income category than identified in the housing element, and if the remaining sites in the element are insufficient, the jurisdiction must make sufficient additional adequate sites available within 180 days of the approval. (§ 65863(c)(2).)

A jurisdiction, however, may not disapprove a housing development solely on the basis that approving the project would require identification of additional adequate sites.

**An Action That Obligates A Community to Identify Additional Sites Does Not Trigger CEQA. (§ 65863(h).)**

If compliance with the No-Net-Loss law requires a community to identify and make available additional sites, the action triggering the application of the No-Net-Loss law “creates no obligation” under CEQA. However, this exemption does not apply to any action necessary to make the additional sites available, such as rezoning or increasing the density of the additional sites. That subsequent action could be deemed a “project” under CEQA depending on the nature and possible environmental effect of the particular action. If a required rezoning is deemed a project under CEQA, then CEQA analysis could cause the rezoning to take longer than 180 days. A jurisdiction, however, should consider that possibility and move expeditiously to comply with CEQA and accomplish the necessary land use changes within the 180 day envelope.

## IMPLEMENTATION ISSUES

- **Application to Charter Cities.** Some have suggested, incorrectly, we believe, that the No-Net-Loss Law does not apply to charter cities because § 65863 is in the chapter covered by § 65803, which provides, in part, that “[e]xcept as otherwise provided, this chapter shall not apply to a charter city. . . .” But § 65863 implements the site inventory and identification and zoning obligations that the Housing Element Law places on all cities and counties regardless of charter status. Section 65863 expressly specifies the contents of the land inventory and program of action sections the general plan housing element, and consequently, it must be read together with those provisions of the Housing Element Law that clearly apply to charter cities. By its express terms it adds detail and content to all local housing elements by setting out the required contents of the land inventory and site program, and by prohibiting divergence from the its requirements in only very limited circumstances. It is, therefore, an express exception to § 65803.

- **Amendment of Housing Elements.** Some have also wondered whether SB 166 requires formal amendment of the housing element when new sites are identified/rezoned to replace those with reduced densities or development approval for housing for a different affordability level assumed in the housing element. The language of SB 166 mandates that “at all times” the housing element land inventory and site identification programs must make sufficient sites available to accommodate the RHNA for each income actually requires the locality to amend its housing element should the existing land inventory or programs become insufficient. That mandate seems to expressly require amendment of the element so that there can be a proper analysis of the replacement sites and public input into the choice of sites. But, do those specific amendments trigger the formal HCD review required of the mandated 5 year/8 year revisions by § 65585?
- **HCD Enforcement Pursuant to AB 72.** Under AB 72 also adopted in 2017, HCD is empowered to determine whether the actions of a community are out of compliance with the No-Net-Loss law. If it finds the community has violated the law, it may revoke its approval of the housing element if it has approved the housing element, and it may refer the issue to the Attorney General. See Government Code §65863 and PILP’s memorandum on [AB 72](#) on our website.

**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 15<sup>th</sup> Street, Suite 301, Oakland, CA 94612; Telephone: 510-891-9794; Email: [admin@pilpca.org](mailto:admin@pilpca.org); Website: [www.pilpca.org](http://www.pilpca.org).