

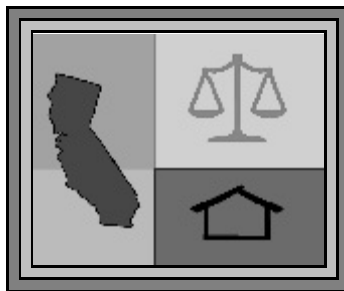
# **CALIFORNIA HOUSING ELEMENT MANUAL**

2<sup>nd</sup> Edition

## **Law, Advocacy and Litigation**

April 2008

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



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*Government Code §§ 65580-65589.8, 65751-65761*

#### “LEAST COST” ZONING LAW

*Government Code §§ 65913-65913.2*

#### PROHIBITION ON DISCRIMINATION AGAINST AFFORDABLE HOUSING

*Government Code §65008*

#### STATUTE OF LIMITATIONS

*Government Code §65009*

**APPENDIX “B”–** HCD, *Housing Element Questions and Answers–A Guide for Preparation of Housing Elements*

**APPENDIX “C”–** HCD, *June 9, 2005 Technical Assistance Paper* (focusing on the AB 2138)

**APPENDIX “D”–** HCD, *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)

**APPENDIX “E”–** HCD, *Housing Element Review Worksheet* (A checklist used by HCD reviewers when analyzing a draft or adopted housing element)

**APPENDIX “F”**– HCD, *June 20, 2007 “AB 1233” Technical Assistance Memorandum* (interpreting the requirement that, where a local government fails to identify or implement programs to rezone adequate sites during the housing element period, it must rezone sufficient sites within one year of the adoption of due date for the next element)



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## INTRODUCTION

### **Why Housing Elements?—The Need to Plan For Affordable Housing**

This manual is intended to provide 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 get built, and we risk losing what we’ve 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.<sup>1</sup>

Since the initial publication of this manual in 2000, not much has changed in terms of the chronic lack of sufficient below-market rate housing in California. As we said then:

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 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

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<sup>1</sup> The United Nations Committee on the Elimination of Racial Discrimination (“CERD”) recently 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.

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.

What has changed is the number of local governments giving serious attention to the crisis in affordable housing and the increased success of nonprofit housing developers in producing housing affordable to a broad range of incomes and which enhances communities in many ways. Utilizing funds from statewide bonds, tax credits, redevelopment monies and other public and private resources, nonprofits are spreading a permanent source of decent, affordable and attractive housing throughout California.

Yet 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) citizens can effectively shut-out 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 provide for the housing of all 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 that can 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.

**Second**, an adopted housing element *may identify sites appropriate for affordable housing* development; or the element may include a program mandating the locality to amend its zoning ordinance to permit the development of transitional housing or homeless shelters.

**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.

Local advocates, therefore, possess some legal clout to use against recalcitrant or exclusionary communities. Failure to adopt an adequate housing element or taking actions inconsistent with the element subject 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.

### What's New

Since 2000, there have been major revisions to California's Housing Element law:

**SB 520.** In 2001, the Legislature adopted **SB 520** (Chesbro) [Stats. 2001, ch. 671] requiring that in the analysis and program sections the element contain an assessment of constraints on housing for persons with disabilities and an action program addressing those constraints.

**AB 2348 & AB 2158.** Most significantly, the Legislature passed **AB 2348** (Mullin) [Stats. 2004, ch. 724] and **AB 2158** (Lowenthal) [Stats. 2004, ch. 696]. AB 2138 made significant amendments clarifying the required contents of a housing element, including clarification of the land inventory and site identification program requirements. AB 2158 made significant reforms to the process and standards for determination of the regional housing needs allocation (RHNA)—the “fair share” allocation to each community of the regional need for very low, low, moderate and above moderate income housing. The amendments reflect the consensus achieved by the Housing Element Working Group (HEWG) convened by the Department of Housing and Community Development (HCD). The working group included “stakeholders” representing local governments, regional Councils of Governments

(COGs), planners, builders and affordable housing advocates.

**AB 1233.** In 2005 the Legislature made another significant change, passing **AB 1233** (Jones) [Stats. 2005, ch 614]. AB 1233 added §65584.09, which requires communities that failed to comply with requirements to make available sufficient sites to meet their regional housing needs in the previous planning period must, within the first year of the new planning period, zone or rezone enough sites to accommodate the RHNA not accommodated from the previous planning period.

**SB 1087.** Also in 2005, **SB 1087** (Florez) [Stats. 2005, ch 727] was adopted amending §65589.7 to clarify that water and sewer providers must grant a priority to affordable housing developers, to require that providers adopt procedures and policies for granting the priority and to forbid providers from denying services to affordable housing developers unless they find that the capacity is unavailable to all applicants.

**AB 2511.** In 2006 Assembly member Jones once again improved Housing Element law with the passage of his **AB 2511** [Stats. 2006, ch 888, §3]. The bill puts some teeth into the annual reporting requirement of local government. It mandates the court to order jurisdictions that fail to substantially comply with the reporting obligation to comply within 60 days and authorizes the court to grant appropriate sanctions.

**AB 2634.** Also in 2006, the Legislature took a step towards ensuring that communities assess the housing needs of extremely low income households in adopting **AB 2634** (Lieber) [Stats. 2006, ch 891, §2]. Although not requiring HCD or regional COGs to determine the needs of extremely low income households when determining regional housing needs, the legislation mandates that localities calculate the subset of the very low income need allocated by the COG that constitutes extremely low income and to plan for the specific needs of those households. (The bill also provides that future amendments to housing element law apply to elements or amendments to elements: 1) where the 1<sup>st</sup> draft was submitted to HCD more than 90 days after the effective date of the amendment, or 2) where the community fails to submit the first draft to HCD before the due date for the element.)

**SB 2.** Finally, in 2007 the Housing Element law was amended by **SB 2** (Cedillo) [Stats. 2007, ch 633 §1-§3] to require housing elements to identify zones where emergency shelters can be developed “by right,” that is, without a conditional use permit or other discretionary permit. 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, the element must include a program requiring amendment of the zoning code to provide adequate zoning to accommodate the need shelter within one year of the adoption of the housing element.

**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:

- *Housing Element Questions and Answers—A Guide for Preparation of Housing Elements* (October 2006) is included as **Appendix “B.”** Citations to the Q’s & A’s have been added throughout the manual.
- ***Building Blocks for Effective Housing Elements***, added to HCD’s website just this year.<sup>2</sup> These cover much the same territory as the Q’s & A’s, but in more detail and with sample programs, charts and links to data sources and other resources.
- *June 9, 2005 Technical Assistance Paper* focusing on the AB 2138 amendments dated June 9, 2005. A copy of that paper, along with its appendices is included as **Appendix “C”** 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 “D”**).

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<sup>2</sup> [http://housing.hcd.ca.gov/hpd/housing\\_element/index.html](http://housing.hcd.ca.gov/hpd/housing_element/index.html)

- *Housing Element Review Worksheet.* A checklist used by HCD reviewers when analyzing a draft or adopted housing element. (Included as **Appendix “E.”**)
- *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 “F.”**)

Lastly, since the manual was last published, the deadlines for the five year revisions of the housing elements have been changed by the Legislature several times, mostly in reaction to the failure in some years of the Legislature and the Governor to agree on allocating funds to the COGs to allocate the regional fair share housing needs—the RHNA—to local governments. The deadlines for each region, as of the publication of this manual, are listed in **Table A** on page 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 has also 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, mandating that all local governments adopt a housing element as part of the local general plan, that “makes adequate provision for the housing needs of all economic segments of the community.” Cal. Govt. Code §65580 *et seq.* California’s fair housing laws also expressly prohibit discriminatory land use polices (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 certain rigorous findings are made (Cal. Govt. Code §65589.5).

### 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 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.*<sup>3</sup> 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.

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.<sup>4</sup> This is known as the “consistency doctrine,” and it imbues the general plan with the force

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<sup>3</sup> Unless otherwise indicated, all citations are to the **Government Code**.

<sup>4</sup> 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 CA4th 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.

of law. See § 65300.5 and *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 C3d 531; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 C3d 553; *Community for Responsible Planning v. City of Indian Wells* (1989) 209 CA3d, 1005, 1013; *Neighborhood Action Group v. City of Calaveras* (1984) 156 CA3d 1176; *O'Loane v. O'Rourke* (1965) 231 CA2d 774.

## **B. The Consistency Requirements**

There are two kinds of consistency. 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 designate the same parcel for commercial use that the housing element designates as available for residential use.

But the second part of the consistency doctrine is 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 every five years. (§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.

Every five years, coinciding with the five year housing element cycle, the state Department of Housing and Community Development (HCD) determines the total regional housing need for the next planning period for all jurisdictions covered by a regional Council of Governments (COG). (§§65584-65584.09) [For example, there is a COG covering the Bay Area— the Association of Bay Area Governments (ABAG).] This allocation occurs two years before the five-year housing element must be adopted. It is termed the “Regional Housing Needs Allocation” or “RHNA.”

The COGs (or HCD for cities and counties not covered by a COG), after input from local governments (including an appeal process) then allocates to each local jurisdiction its “fair share” of the RHNA for the five year housing element 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." (§ 65588)<sup>5</sup> As explained above, this periodic revision requirement coincides with the jurisdiction's receipt of its five 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:

- 1) **Contain a Site-Specific Inventory & Identify adequate sites** with 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) **that will be made available during the planning period** (§65583(c)(1) & §65583.2), and

- 2) "Address, and where appropriate and legally possible, **remove governmental constraints**" to housing development (§65583(c)(3)).

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

The obligation to identify adequate sites requires the local government to zone enough sites to meet the community's fair share of the regional need for very

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<sup>5</sup> Note that the Legislature has twice extended this revision period to exceed five years. The revisions of housing elements originally due 1994 through 1997 were delayed until 2000 through 2003 because of state budget issues. See §65588. And, the next revisions for the Southern California Association of Governments (SCAG) and ABAG have been delayed to 2008 and 2009 respectively to allow for synchronization with federal transportation planning time-lines. See §65584.02 and Table A on page 25.

low and low income housing. Where the element's inventory of sites does not include sufficient sites to meet these needs, the element must contain a program that provides for sites zoned for multifamily use by right at densities and standards sufficient to make the development of affordable housing feasible. (§65583(c)(1) & §65583.2(h)) 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.

### **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)(6)(B))

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. Some jurisdictions mistakenly believe these findings constitute "self certification," however that process is only available to San Diego jurisdictions, described below. 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 and 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. Consequently, the failure to implement a provision of a housing element can be challenged as a breach of mandatory duty and as an inconsistent act.

If the community fails to identify sites or implement a program to identify 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)

## **G. Special Requirements for San Diego County**

As a pilot program until June 30, 2010, §65585.1 permits the San Diego Association of Governments, its housing advisory committee, the cities and county and HCD to participate in a housing element “self certification” process. Working

with a consultant, these entities determine the maximum number of housing units that can be constructed, acquired, rehabilitated and preserved and the maximum number of units or households that can be assisted with rental or ownership assistance by each jurisdiction to meet the existing and future housing needs for low, very low *and extremely low income* households. San Diego jurisdictions may self certify their housing elements due June 30, 2005 as complying with state law if they have met their fair share housing needs for the *previous* housing element period. For succeeding housing element revisions, the jurisdiction may self certify if it has met the maximum number of housing units developable in the previous five-year housing element period as determined by the process described above.

Once a self-certification is properly adopted, the jurisdiction need not submit its housing element to HCD, and a court’s review of the self certification is limited to determining whether the certification is accurate and complete. And where there has not been a successful challenge to a self certification, there is a rebuttable presumption of the validity of the housing element.

**H. 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”), an 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 included 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 five year plan that must: 1) identify housing needs, 2) identify barriers to affordable housing development, 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 2010.

In addressing barriers to housing development, the ConPlan must include an Analysis of the Impediments to Fair Housing Choice (otherwise know as the “AI”). This analysis 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).



## II

### PROCESS AND TIME LINES

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

The five year 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.<sup>6</sup> 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 One** on page 25 for a schedule of the dates housing elements are due in each region.

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<sup>6</sup> 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 (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.

## 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 more than 24 months before the elements are due.<sup>7</sup> (§65584 & §65584.01; and see §65588)<sup>8</sup> The departments' 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, within 30 days of the determination it may file an objection. HCD must then make a final determination within 45 days. (§65584.01(d))

### Alternative Processes

**Alternative RHNA Determination for the Southern California Association of Governments (SCAG).** For the fourth revision of the housing element only (Table One, page 25) this COG will use a substantially revised procedure and methodology for determining and allocating the RHNA. § 65584.08. Initially, SCAG will determine the regional existing and projected housing need based, generally, on growth forecasts, rather than population forecasts. Then, HCD will determine the RHNA

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<sup>7</sup> *Except* for the Southern California Association of Governments, discussed below.

<sup>8</sup> 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))

**Other COGs.** 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. (§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.** *Except for SCAG (see below),* 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<sup>9</sup>. (§65584.04) To develop this 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))

**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.

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<sup>9</sup> 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).

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

**Distribution of RHNA to Local Governments in the SCAG Region.** § 65584.08. For the fourth revision of the housing element only (see **Table One**, page 25), SCAG (or its subregional entities) will survey local jurisdictions by way of a public workshop regarding the methodology for determining allocations. SCAG must then hold at least 14 public workshops to discuss the regional growth forecast and the allocation methodology. The methodology and the allocation process must comply with the requirements of § 65584.04 and be consistent with the goals in § 65584. After this process, SCAG will issue a draft RHNA, and local governments may then request of revision of its share. SCAG will issue the final RHNA by June 30, 2007, and a locality may file one appeal of the allocation pursuant to §65584.05.

### **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 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<sup>10</sup>.

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<sup>10</sup> 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 more 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. However, **§65584.6** does permit the County of Napa to receive credit towards meeting up to 15% of its fair share needs for units it funds through its trust

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

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fund in incorporated areas. Napa has already transferred the full 15% for the current planning period, and this pilot program is scheduled to expire June 30, 2007, which is prior to the date the County's next housing element is due.

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. (§ 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" but not less than every five years, 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 of the second five-year revision, staggered by geographic region, the earliest being July 1, 1989 and the latest July 1, 1992. All subsequent revisions are due five years after those dates except that the Legislature extended the dates for the third revision for *six* years due to the failure to include budget appropriations to fund the COGs to perform the regional housing needs allocations. The fourth revision dates were also extended by the legislature. The latest deadlines are listed in **Table 1** on the next page, and can also be found on HCD's web site <http://housing.hcd.ca.gov/hpd/hrc/plan/he/>. See *HCD Q's & A's #5 & #6*. HCD has granted the requests of SCAG and ABAG, and extended the deadlines for preparation of local housing elements in those regions until June 30, 2008 and June 30, 2009 respectively. And, the Legislature extended the deadline for smaller counties from June 30, 2009 to August 31 2009. See HCD's web site for documentation of these extensions, <http://housing.hcd.ca.gov/hpd/hrc/plan/he/>.



<b>TABLE 1 REGIONAL JURISDICTIONS</b>	<b>Third Revision Date</b>	<b>Fourth Revision Date</b>
<b>San Diego Association of Governments:</b> San Diego County and all cities within the County.	December 31, 1999	June 30, 2005
<b>Southern California Association of Governments (SCAG):</b> Counties of Imperial, Los Angeles, Orange, Riverside, San Bernardino, Ventura, and all cities within each County.  <i># SCAG's date was extended from 2006 by HCD pursuant to §65584.02</i>	December 31, 2000	June 30, 2008 <sup>#</sup>
<b>Association of Bay Area Governments (ABAG):</b> Counties of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma, and all cities within each County.  <i># ABAG's date was extended from 2007 by HCD pursuant to §65584.02</i>	December 31, 2001	June 30, 2009 <sup>#</sup>
<b>Council of Fresno County Governments:</b> Fresno County and all cities within the County.  <b>Kern County Council of Governments:</b> Kern County and all cities within the County.  <b>Sacramento Area Council of Governments (SACOG):</b> Counties of Placer*, Sacramento, Sutter, Yolo, Yuba, and all cities within each County.  <i>*Placer County and El Dorado County jurisdictions have 2009 option for 4th revision.</i>	June 30, 2002	June 30, 2008
<b>Association of Monterey Bay Area Governments (AMBAG):</b> Counties of Monterey, Santa Cruz, and all cities within each County.	December 31, 2002	June 30, 2009
<b>All Other Local Governments:</b> Counties of Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado*, Glenn, Humboldt, Inyo, Kings, 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

Subsequent revisions are due at five year intervals following the fourth revision. (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).)

#### **D. 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, including the five year 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. (See "Standard of Review" in chapter VI, §C for a discussion of the legal meaning of substantial compliance.) 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.

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. *See* discussion of the deference accorded the determinations of administrative agencies in Chapter VI §C.

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.

**San Diego County Self-Certification.** As explained in Chapter I §G, San Diego County jurisdictions may certify their housing elements due June 30, 2005 as complying with state law if they have met their RHNA for the *prior* housing element period. For all other housing element revisions, the locality may self-certify only if it has met the maximum number of housing units developable in the previous housing element period.

#### **E. 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 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 February 2007, HCD has issued draft forms for comment, which will be finalized by March 2007.) And it must be submitted to the local legislative body by April 1 of each year (except for 2006, when the report was due October 1). *See HCD Q’s & A’s #63.*

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.

## **F. Water & Sewer Service Priority for Developments Addressing RHNA (§65589.7)**

After adoption 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 Q's & A's #65.* 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

## 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.<sup>11</sup>*

**(§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, 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

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<sup>11</sup> All statutory citations in this manual include changes made during the 2007 legislative session, which are effective January 1, 2008.

plan, only the contents of the housing element is prescribe with such detailed specificity. *See Buena Vista Garden Apartments Assn. v. City of San Diego Planning Dept.*, 175 Cal.App.3d 289, 296-98 (1985). §Section 65583 as well as the other housing element statutes are attached as Appendix F. Each particular requirement of the statute is addressed in this chapter.

The Department of Housing and Community Development (HCD) publishes *Housing Element Questions and Answers—A Guide to the Preparation of Housing Elements* (October 2006) [*Q & A's*], which contains the department's interpretation of the statutory requirements along with suggestions on their implementation. This is attached as **Appendix B**. HCD has updated them to address the changes made in AB 2138 (Mullin) [Stats. 2004, ch. 724] and AB 2158 (Lowenthal) [Stats. 2004, ch. 696]. Finally, HCD provides a comprehensive review worksheet that contains an outline of all the statutory obligations. It is attached as **Appendix E**.

#### **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 the 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 Q's & A's #5 and #6.*

#### **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 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. 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). And beginning in 2007, it must also determine what portion of the jurisdiction's very low income need comprises the needs of extremely low income households. *See* Stats. 2006, ch 891, §2 (AB 2634 (Lieber)). 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 Q's & A's #'s 7 & 8* (existing housing needs include households overpaying for 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 Q's & A's #'s 7 & 8*

## **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 Paper included in this manual as Appendix C. See also Q’s & A’s #’s 18 - 27.

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 a 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.<sup>12</sup>

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<sup>12</sup> HCD 6/9/05 Technical Assistance Paper, p. 1 (attached as Appendix C)

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Environmental constraints would include the slope and topography, and whether there are environmental barriers to development such as wetlands or toxic contamination.

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.”<sup>13</sup>*

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 Q’s & A’s #20.* 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.”

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<sup>13</sup> *Id.* 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. Since July 1, 2006, 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 of this law in §F of chapter II.

◆ **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 Paper* included as **Appendix C** and *Q's & A's #21*. 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, mobilehomes, 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 nonmetropolitan counties;  
nonmetropolitan counties with micropolitan areas

10 units/acre—unincorporated areas in all nonmetropolitan  
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 nonmetropolitan 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 Paper*, pp. 3-4 (included as **Appendix C**) and *Q’s & A’s #23 & #24*.

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 new provision was added by SB 2 (Cedillo) in 2007 [Stats. 2007, ch 633]. It 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 is in the process of drafting a *Technical Assistance Manual* for implementation of this subdivision, which should be completed by the summer of 2008. 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 requiring 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 and 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.

## **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 (6), 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 (6).*

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 Q's & A's #'s 31, 32, & 33.* 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 Q's & A's # 32 & 33.*



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 Q's & A's #33.*

**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 “**Exhibit D.**” 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*”<sup>14</sup> 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.

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<sup>14</sup> 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).

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* §H in chapter II.

## **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.*

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 home buyers 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 Q's & A's #35 and #35.*

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

*(7) An analysis of any special housing needs, such as those of the handicapped, elderly, 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 based 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 may have been based on inadequate data regarding farmworkers and homeless persons, the number of units needed for these populations may be in addition to regional needs numbers.

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 Q's & A's # 9 & #10.* Some funding sources that should be considered are redevelopment funds, federal CDBG, HOME, HOPWA and McKinney Act funds, and public, subsidized and Section 8 housing resources.

### **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) and *Q's & A's #11*.

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. (*HCD* is drafting a

*Technical Assistance Manual* to help with compliance with this provision, which should be completed by summer, 2008.)

### **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 Q's & A's #12.*<sup>15</sup>

### **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 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.

### **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.

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<sup>15</sup> The most recent statewide assessment is Alice C. Larson's "Migrant and Seasonal Farmworker Enumeration Profiles Study, California (U.S. Dept. of Health and Human Services, 2000)

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

*(8) An analysis of opportunities for energy conservation with respect to residential development.*

This part should assess both what subsidies and 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.

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

*(8) 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 5-year planning period*,<sup>16</sup>
- 2) Assessment of preservation versus replacement costs,

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<sup>16</sup> Information on the complexes at risk in a community can be obtained from the website of the **California Housing Partnership**, [www.chpc.net/at-risk](http://www.chpc.net/at-risk). At the site, at-risk projects can be searched by county. The site also contains links to data sources at the government agencies that subsidize these units, e.g. HCD, HUD, Calif. Housing Finance Agency, USDA (rural development) and the **California Debt Limit Allocation Committee**, [www.treasurer.ca.gov/cdlac](http://www.treasurer.ca.gov/cdlac).

- 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 Q's & A's #13 and #14.*

### **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.*

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.

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 Assn. v. City of San Diego Planning Dept.* (1985) 175 CA3d 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 CA4th 1098, 1108 (1997). The analysis 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 Q’s & A’s #’s 59-61.*

#### **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 Elements

Generally, the third section must contain:

*(c) A program which sets forth a five-year schedule of actions 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 Q's & A's # 39*)
- the utilization redevelopment housing set aside funds (if the community has a redevelopment area) (*see Q's & A's #37 & 38*)

Each specific action should indicate the following:

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

2) **The time frame** or “schedule” in which the action will be carried out. The action must be scheduled within the five year time frame of the element. In *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept. supra*, 175 CA3d 289, the court found that in some cases it is appropriate for actions to be designated as "continuing."

3) **The numbers of units to be assisted.** (While one appellate court case found that this was not essential to legal compliance – *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept. supra* – 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 far less meaningful than 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. Q’s & A’s #36 (which contains a list of critical program elements and an example.) # 36 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. *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. *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.

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 an implementation actions to identify enough sites to accommodate:

- 1) **The number of units necessary to meet the RHNA for the new five-year planning period, and**
- 2) **The number of units the locality failed to provide sites to accommodate in the prior planning period. See Q's & A's #46.**

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 Technical Assistance Memorandum (included as **Appendix “F”**) and Q's & A's #40 - 42 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*. Although one appellate court case had indicated that the identification need not indicate specific sites (*Buena Vista Garden Apartments Assn., 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.<sup>17</sup> See also *Q’s & A’s #44*.

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<sup>17</sup> The court in *Fonseca v. City of Gilroy*, 148 Cal.App.4th 1174, 1204 (2007), fn 32, found this statement *dicta* when 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

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 five year planning period. See HCD June 9, 2005 *Technical Assistance Paper*, pp. 3-4 (included as **Appendix C**) and *Q's & A's #47*.

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

A community must use the default zoning densities listed in **§65583.2(c)(3)(B)** (described in the discussion of the land inventory, above, B.3)<sup>18</sup> to determine whether a site is adequately zoned for lower income housing *or* it 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)**)

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“facilitates the assessment of whether a locality’s housing element complies with the ‘adequate sites’ requirement . . . .” *Id.* at 1199, fn 24.

<sup>18</sup> The so-called “Mullin densities” after the adopting bill SB 2348 (Mullin) [Stats. 2004, ch 724]:

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

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))

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*, Q’s & A’s #44.

**(b) “By Right” Multifamily Sites For Low & Very Low Income Household Needs (§65583(c)(1)(A) & §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, to provide “100% of the shortfall of sites necessary to accommodate the remaining housing need for very low- and low-income households.” HCD 6/9/05 Paper, interpreting §65583(c)(1)(A) and §65583.2(h). §65583(c)(1)(A) provides:

*(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, the program shall identify sites that can be developed for housing within the planning period pursuant to subdivision (h) 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 use does 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.<sup>19</sup>*

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

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<sup>19</sup> §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.

required by the zoning ordinance or building code. *See Q's & A's # 41.* 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 *nonmetropolitan counties* or for *nonmetropolitan 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

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in HCD 6/9/05 *Technical Assistance Paper*, which includes definitions and a table indicating the category of each California jurisdiction. *See also Q's & A's #40.*

**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 Q's & A's #40.*

**(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 Q's & A's #44.*<sup>20</sup> §65913.1 provides,

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<sup>20</sup> *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

in part:

*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, **§85863(a)** requires that a local governments must “ensure that its inventory or programs for adequate sites pursuant to [§§65583(a)(3) & (c)(1)] can accommodate its share of the regional housing need pursuant to Section 65584 throughout the planning period.” See *Q’s & A’s* # 48.

Consequently, in addition to identifying sites, that are available, served by

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1209. There plaintiffs argued that sites must be rezoned within a reasonable time after adoption of the element. The opinion leaves open how long a community can wait before undertaking necessary rezoning. Certainly waiting until the end of the housing element period runs completely contrary to purpose of facilitating development to accommodate the housing needs during the period covered by the housing element.

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)(B))**

*(B) 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 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)(B)).**

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 Q's & A's #12 & 40.*

**(e) Sites for Emergency Shelters and Transitional Housing. (§65583(c)(1))**

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. *Q's & A's #11 & #40*.

**(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].

▶ **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 will also, in some circumstances, permit a community to identify sites by an implementation action that results in rezoning vacant, nonresidential land or in 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 five year 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. *See Q's & A's # 49.*

▶ **Rehabilitation, Acquisition or Subsidy**

Although a primary purpose of the housing element obligation is to ensure that communities *increase* the supply of housing to meet their unmet needs, the Legislature has recognized that in some circumstances the rehabilitation of dilapidated housing or the preservation or conversion of existing units is an appropriate and necessary means of increasing the supply of housing for low and very low income households, *provided 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 element a program committing the local government to provide units in that category with 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 interpretation letter of October 26, 1998 (*Memo on AB 438*, available on HCD's website: <http://housing.hcd.ca.gov/hpd/>). See also, *Q's & A's #50*. In summary, the provision permits HCD to allow communities to subtract from the number of sites they must identify in any income category a number equal to the number of units provided through a housing element implementation action that increases the supply of units through the provision "committed assistance" to rehabilitate dilapidated units, convert non-affordable units to affordable units, or 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))**. To qualify, rehabilitated units must be extremely dilapidated, any tenant must be provided with full relocation benefits, comparable housing and the right to reoccupy (*see below*), and the units must remain affordable for 20 years (except that 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 Market Rate Units in Multifamily Complexes. (§65583.1(c)(2)(B))** Eligible units are rental complexes of four units or more that are nonaffordable 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 *Q's & A's #50*.

**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 *Q's & A's #50*.



▶ **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).* That law 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 Q’s & A’s #50.*

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 redevelopment low and moderate income housing funds and the use of federal and state subsidies* (as required by general portion of §65583(c)-- see D.1). *See Q’s & A’s #51.*

#### **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 preservation 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 growth restriction law adopted by initiative.

#### **Removal of Constraints to Housing for Lower Income Households**

Barriers imposed by local government to affordable housing development in the following areas should be addressed: land use controls, codes or code enforcement procedures, site improvement requirements, fees and exactions, and permit processing procedures. *See Q’s & A’s #52 and #53 for examples of action programs.* Actions pursuant to this subdivision could include some required by the general part of §65583(c): 1) those providing for *regulatory concessions and incentives* for the development of affordable housing (like those described the Density Bonus law– §65915); and 2) those addressing the *administration of land use and development controls*. (See D.1. of this chapter)

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

Based on the analysis of constraints (which should have followed the guidance of 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 “D”**)—see B.3 of this chapter) the element should include actions to address and, if possible, remove identified barriers. If the locality lacks a process or standards for developers to request reasonable accommodations for housing for disabled persons, program 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 *Q’s & A’s #54*.

► 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 Assn. v. City of San Diego Planning Dept*, 175 CA3d 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 *Q's & A's* #57.

Implementation actions in this area should at the very least provide some means receiving, investigating and resolving complaints of discrimination. The actions should also address discrimination by *lenders*. *Q's & A's* #57.

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 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 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 § H of chapter II.

### **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. Every assisted development identified in the assessment portion of the housing element 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 *Q’s & A’s* #55 & #56.

### **8. Public Participation (§65583(c)(7))**

*(7) . . . The local government shall make a diligent effort 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)(7)).** 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 Assn. v. City of San Diego Planning Dept. supra*, 175 CA3d 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 to 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 *Q's & A's #'s 1 - 4*.

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

*(7) . . . The program shall 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 time the final housing element is adopted.

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 this should be described in the final element. *See Q’s & A’s #62.*

### **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 Q's & A's #64.*

#### **F. Applicability of Statutory Amendments**

*(d) 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.*

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. Contact with HCD & the Locality; Determine Current Status of Jurisdiction's Element**

##### **1. Contact HCD.**

*First*, determine the status of the housing element by quickly checking HCD's website:

<http://housing.hcd.ca.gov/hpd/hrc/plan/he/>

The website is updated monthly and there you can find:

- ▶ Housing Element Review Status. This chart shows whether a community's element is:
  - IN - The element is adopted & in compliance
  - OUT - The jurisdiction submitted a draft, but has adopted an element *or* has adopted an element that has been found out of compliance
  - DUE - The jurisdiction has not yet submitted a draft element
  
- ▶ 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 and whether the review is being

*expedited.* (An expedited review occurs when the local government requests, and HCD agrees, to perform the review in less than the 60 days established by **§65585**.)

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. If HCD is in the process of reviewing an element or is discussing possible amendments with the jurisdiction, ask: a) for the reviewers preliminary thoughts on whether the element substantially complies with the law, and b) that the review 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. Under **§65585**, HCD must take into consideration the comments of the public and interested parties before it issues its final determination.

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 sometimes

## **2. Call the Local Government.**

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 at a later date. 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 being 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 the entity refuses. If a “standing” public records act request is made to HCD, the staff will automatically send you a copy of any official correspondence they send to or receive from the locality.

Obtain the following documents:

1. From the local government:
  - **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 city’s 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. From HCD:
  - All official **review letters**
  - All **correspondence from and to the local jurisdiction**
  - All **3<sup>rd</sup> party correspondence**
  
3. Data On Housing Needs, Characteristics & Resources

State, Regional and Local Sources

- **Housing Authorities**– the newly mandated 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 2007, 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 2003 American Community Survey.
  - **H.U.D.** At [www.Huduser.org](http://www.Huduser.org) you will find a wide range of data sources and links to data sources, some of it local and regional.
- ▶ 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. (§ 65583(c)(6)(B)) 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. The local government should also be asked 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 draft **Housing Element Worksheet** (attached as Appendix E) 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 all the requirements of the statute are at least addressed. Then, use the summary of the contents included in this manual (chapter III) and HCD's **Housing Element Questions and Answers** (attached as Appendix B) 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? And 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 it will not be, and the review can go no further.
- ▶ Sufficient Sites 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 densities specified in §65583.2(c)(3)(B) to accommodate the regional needs share for units for low and very low income households?<sup>21</sup> 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

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



- 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 disabled households, elderly households, families with female headed households, large families, homeless people, and farmworkers? See chapter III, §B.6. & §D.2.
  - ▶ *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)(B)** and See chapter III, §B.6. & §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 CA 4<sup>th</sup> 1098 (1997).

**b) Assist Development of Affordable Housing (c)(2)**

If the community has a redevelopment area, does 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 (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.4.

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 (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*
- ▶ *Enforcement of fair housing laws ((c)(5), including facilitation of local fair housing programs to receive and investigate discrimination complaints*
- ▶ *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 previously, **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 statute, HCD’s review letters and HCD’s “Housing Element Questions and Answers” and HCD’s “Building Blocks”* (on its website, <http://www.hcd.ca.gov/hpd/hrc/plan/he/>)

If the assessment is inadequate, specify where the needs, resources and constraint that are inadequately addressed and *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. (The 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 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. These should then be sent to both the local government and HCD.

**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 and labor unions can help show the importance and political support for the positions taken. 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 some one 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 advocated 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. What 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 an 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 (ABAG 2000 (update in progress)). Also helpful is HCD's *Questions & Answers* (October 2006) (attached as Appendix B), which includes some suggested programs in the sections addressing housing element programs and actions.

**(a) Providing Adequate Sites** (*See Q's & A's 40 - 50*)

If there are insufficient sites to meet the community's share of the regional need for very low, low or moderate income housing, 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 me 50% of the shortfall. (§65583.2(h))



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- ▶ *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)(B)**.

### **(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
- ▶ *Creating or Expanding a Redevelopment Area*– At least 20% of the funds must be used for affordable housing and a percentage of housing developed in the area must be affordable
- ▶ *Increasing the Percentage of Redevelopment Funds Set Aside for housing* above the minimum 20%
- ▶ *Target the Redevelopment Funds* set aside for affordable housing to low, very low and extremely low income households (state law permits use of the funds for moderate income housing, but requires

that these funds be apportioned for very low and low income housing based on the RHNA for those income groups relative to the total RHNA for very low, low and moderate incomes,<sup>22</sup> *see* Health & Safety C. §33334.4)

- ▶ *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 Q's & A's # 51*)

- ▶ *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](http://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]

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<sup>22</sup> *E.g.* If the very low/low/mod RHNA is: 300 very low, 300 low & 300 mod, then at least 1/3 of housing tax increment funds must be allocated to very low income housing and at least 1/3 must go to low income housing. Some jurisdictions have adopted policies increasing the proportion of funds allocated to very low and low.

- ▶ *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 don’t 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<sup>23</sup>

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<sup>23</sup> 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.

- ▶ *Donate Sites* owned by the local government to nonprofit developers for affordable housing development

**(d) Removing Constraints** (*See Q's & A's # 53*)

- ▶ *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 Association of Northern California (April 2001) ([www.nonprohous.org](http://www.nonprohous.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 prohibits 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 an 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 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