YIMBY HEAT Sheet

An Explainer for the

Housing Element Audit Tool



First, THANK YOU for auditing housing elements with us!

At the end of the 6th cycle, there will be over 500 new housing elements that will be adopted by California cities, and we want these housing elements to be (a) compliant with state law, and (b) supportive of housing that will help alleviate the housing shortage that we all face. **By reviewing housing elements, you can help us catch cities who are trying to avoid their responsibilities.** We don't want bad housing elements to be adopted, certified and on the books for the next eight years! These audits will also create a record to improve state legislation in years to come.

The following Explainer - which we call the "HEAT Sheet" - outlines several key topics of housing elements which carry legal weight and are top priority for housing advocates. Each subject will have a section of explanatory material ("About This Topic") followed by an "Audit" section. The Audit questions correspond to the HEAT Airtable Form, which collects your responses for other advocates to view.

Housing elements are both analytical and programmatic documents. The analytical side is supposed to reveal problems with the city's housing stock and housing policies. The programmatic side is supposed to commit the city to fixing those problems in specific ways. A housing element must show how the city will accommodate its share of regional housing need allocation ("RHNA") in each of four income categories: housing for very low-income, low-income, moderate-income, and above moderate-income households. A housing element must also affirmatively further fair housing, opening up neighborhoods from which lower-income and minority households have historically been excluded. Last, a housing element must mitigate or remove constraints to the development of housing at all levels of affordability.

Pro Tips

- Download this HEAT Sheet as a Word document (File > Download > Microsoft Word) or make a copy as a Google Doc (File > Make a Copy) and use it to follow along and take notes while reviewing your housing element, then use the HEAT Airtable Form to submit your answers;
- Share the Google Doc copy with other advocates and your local organizer so they can learn more about your city's housing element draft;
- In the "View" menu, select "Show document outline" for a convenient table of contents;
- Most of the time we reference "cities" but we use this as a shorthand for "jurisdictions." Most housing elements are drafted by cities, but counties will also draft housing elements for land in unincorporated areas;
- Symbol Key:
    - 🚨 - Issues that we should be able to block now
    - ⏰ - Issues that we *might* be able to block now, with support from HCD
    - 🚩 - Issues that we want to flag to build a record for future legislation
- Land use and housing is rife with jargon, so if there are words that you think would be helpful for us to define at the beginning of a topic, let us know!
- Feel free to work on an audit across multiple sessions. The Airtable form doesn't allow users to save their work, so just click submit every time you finish a session and take a break. We can go into the system and combine your submittals later, and that way you don't have to work any longer than you'd like.
- Please feel free to send comments and suggestions! We hope that this tool will improve over time. If you have any questions or comments, please send them to housingelements@yimbylaw.org.

When you're ready to submit your audit, fill out the Audit Form at **www.fairhousingelements.org/audit**

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1. Site Capacity

About This Topic

Introduction

"Site capacity and quantified objectives" is the most difficult and the most important topic for Housing Element Watchdogs to address.

Cities must show through their housing element how they will accommodate their assigned shares of "Regional Housing Need Allocation" (RHNA) at each of four levels of affordability: housing for very-low-income, low-income, moderate income, and above-moderate-income households. **This is the Housing Element Law's principal lever for making cities rezone for higher density, relatively affordable housing.**

The traditional view was that a city just needed to provide an inventory of potentially developable parcels and to zone those sites so that if every parcel in the inventory were to be developed at or close to its maximum zoned capacity, the new housing units would equal or exceed the city's RHNA. Cities were also required to set "quantified objectives" for production of units at each level of affordability. These quantified objectives could be much lower than the city's RHNA targets, especially for affordable housing. For example, if the city did not have sufficient resources to subsidize production of its full very-low-income RHNA, the city could set a lesser quantified objective for very-low-income production. This is because Housing Element Law excuses cities from any duty to spend "local revenues" on land for housing, affordable housing, or housing subsidies. Gov. Code § 65589(a).

However, recent changes to the Housing Element Law require the assessment of inventory parcels' capacity for new housing during the planning period to be more realistic. Now cities must use an "expected yield" definition of site capacity for certain categories of site. Expected yield is the likelihood of development for the site during the planning period multiplied by the number of units in a typical project on the site.

If a city uses the expected yield definition of site capacity, then the combined capacity of all parcels in its site inventory would be similar to a "quantified objective" for production on inventory sites. The one salient difference is that the site capacity calculation uses certain artificial but pragmatic assumptions: specifically, the site's capacity is assigned to a RHNA affordability tier based on the zoned density of the site, rather than based on the expected

affordability of new units on the site. Thus, if the zoned density of the site equals or exceeds the so-called "Mullin density" (more on this below), then the site's "realistic capacity" may be counted toward the city's very-low-income or low-income RHNA target, regardless of whether market-rate housing is more likely than subsidized housing to be built on the site.

Here's an illustration. Imagine a 1-acre parcel whose maximum density under base zoning is 50 dwelling units per acre. There is presently no housing on the site. Based on recent experience, the city asserts that a typical project will have 90% of the maximum number of units allowed under base zoning. Recent experience also shows that when sites get developed in this zoning district, an average of 20% of the units are deed-restricted and affordable to low-income households, and the other 80% are market-rate and affordable only to above-moderate-income households. Finally, assume that the parcel has a 25% chance of getting developed during the planning period (8 years). The Mullin density for this jurisdiction is 30 dwelling units / acre.

- Under the old, **unrealistic definition of site capacity**, this parcel would count as accommodating 0.9 * 50 = **45 units of the city's lower-income RHNA**. (It counts toward the lower-income RHNA because its zoned density meets the *Mullin Density* threshold.)

- Under the **expected-yield definition of site capacity**, this parcel would count as accommodating 0.25 * 0.9 * 50 = **11.25 units of the city's lower income RHNA**.

- For purposes of **quantified objectives**, this parcel would count as 11.25 * 0.20 = **2.25 low-income units** and 11.25 * 0.80 = **9 above-moderate-income units**.

Definitions

- **Mixed Use Sites:** Sites whose base zoning allows both residential and commercial use, OR sites whose base zoning allows only one type of use but where an "overlay zone" permits other types of uses.
- **Vacant Site**: A site with no existing structure or income-generating use. (*Site Inventory Guidebook*, p. 24.)
- **Density**: Number of dwelling units per unit of land area (typically an acre).

- **Mullin Density**: The zoned density that, according to state law, is appropriate for lower income housing in this jurisdiction: 30, 20, or 15 dwelling units per acre, depending on the size of the jurisdiction.
- **Base Zoning/Base Density:** The uses and density allowed "by right" by the city's zoning code in a certain zoning designation (i.e. R1, R3, C2, etc) before any development incentives are granted.
- **Deed-Restricted Units:** Units that are required to be provided to qualifying lower or moderate income households with rental cap at around 30% of household income. The income levels and rent caps are set by HCD on an annual basis, and the commitment to the affordability is recorded on the deed of the property, typically lasting for a set number of years.
- **Inclusionary Zoning:** A law that requires a percentage of units in any new housing development to be rented at below-market rates to lower or moderate income households. No development incentives are offered.
- **Density Bonus**: An allowance for additional density, floor area, reduced parking, or other waivers of development standards in exchange for the provision of deed-restricted units or other specified public benefits.
- **Realistic Capacity**: The term for the number of housing units, by affordability level, that a housing element inventory site is "counted" for vis-a-vis the city's RHNA.
- **Quantified Objectives:** The term for a city's stated housing production goals, identified by affordability level.

Realistic Capacity & Expected Yield

A housing element must demonstrate that the city has, or will provide through rezoning, "realistic capacity" in their site inventory sufficient to accommodate the city's RHNA in each income category.

While the definition of realistic capacity under state law remains somewhat uncertain, the most appropriate definition is the site's "expected yield" in new units during the planning period. A site's expected yield is its likelihood of development during the planning period, multiplied by the net number of new housing units that can be developed based on the underlying zoning:

> *(Realistic Capacity) = (Likelihood of Development) x [(# units if developed) - (# existing units)]*

For example, if a site has a 25% likelihood of development during the period, no existing homes, and could provide 20 new units if developed, the site's expected yield would be 0.25 * 20 = 5 units. If there were an existing duplex on the site, then the site's expected yield would be 0.25 * (20-2) = 4.5.

Site Categories

Vacant vs. Nonvacant. The HCD *Housing Element Completeness Checklist* is clear that **the likelihood-of-development factor must be applied to nonvacant sites** (p. 9). Conversely, HCD's *Site Inventory Guidebook* excuses local governments from applying a likelihood-of-development factor if the site is vacant, zoned exclusively for residential use, and "counted" at the site's minimum zoned density. If a city does not have minimum density in their zoning code, then they must calculate realistic capacity using other factors (*Guidebook*, p. 19, "Step 2"). Note: most zones prescribe a *maximum* density, but some also require a *minimum* density, or the lowest number of units allowed to be developed on-site. (*Guidebook*, p. 19, "Step 1").

Mixed Use. Some cities may apply a discount factor that adjusts only for the relative likelihood of development for residential versus commercial uses on mixed use sites, assuming that development will occur. For example, if 75% of the mixed-use sites that were developed during the previous planning period were developed for residential projects, and 25% were developed for commercial projects, the housing element would discount the zoned residential capacity of mixed-use sites by 25%. In this scenario, all mixed-use sites would "count" for 75% of their zoned residential capacity. This calculation was common during the last planning cycle, but it is not sufficient because it presumes the site will definitely be developed for some type of project, commercial or residential. The reality is that some (perhaps most) mixed-use sites will remain undeveloped throughout the planning period.

If a parcel's base zoning equals or exceeds the Mullin density, then the parcel's unit capacity may be counted toward the city's very-low or low-income RHNA (or, if the city wishes, toward its moderate- or above-moderate-income RHNA). If the parcel's base zoning *does not* exceed the Mullin density, it may not be counted toward the lower income RHNA categories unless the city demonstrates that the site can feasibly be developed for lower income housing. (*Site Inventory Guidebook*, pp. 13-14). There is no guidance from HCD or the

statute about zoning or other attributes that make a site suitable for the moderate-income category.

Likelihood of Development

Share of Sites Method. In general, HCD has provided very little guidance concerning estimation of the likelihood of development. The *Guidebook* states, "if no information about the rate of development of similar parcels is available, report the proportion of parcels in the previous housing element's site inventory that were developed during the previous planning period" (p. 21). We call this the "Share of Sites" method. For example, if 20 out of 100 site inventory candidate sites were developed in the last planning period, one would estimate a 20% likelihood of development for sites in the current planning period.

$$= \frac{(number\ of\ 5th\ cycle\ inventory\ sites\ developed\ during\ 5th\ cycle)}{(number\ of\ sites\ in\ 5th\ cycle\ inventory)}$$

Share of Capacity Method. Another defensible method for current sites' likelihood of development is the number of housing units produced in the city during the 5th cycle divided by the capacity that the city claimed at the start of the period. Because 5th cycle housing elements did not use likelihood of development, the capacity claimed in the 5th cycle housing element is roughly equivalent to total housing yield if every site were to be developed. We call this the "Share of Capacity" method. For example, if a city developed 1000 units in the last planning period, but had claimed a total capacity for 4000 units in that period, one would estimate a 25% likelihood of development for sites in the current planning period.

$$= \frac{(number\ of\ housing\ units\ produced\ during\ 5th\ cycle)}{(total\ claimed\ capacity\ of\ 5th\ cycle\ inventory)}$$

A few cities produced more housing units during the 5th cycle than the capacity they claimed in their housing element. If these cities used the Share of Capacity method to approximate all 6th Cycle sites' likelihood of development, the estimate would be logically impossible because the probability of development would be greater than 1. In general, the Share of Capacity method overstates inventory sites' likelihood of development since it counts units produced on non-inventory sites in the numerator.

If a housing element assumes a likelihood of development that is substantially higher than that implied by the Share of Sites or Share of Capacity method, the housing element should provide an account of how the city has revised its permitting process, fees, design requirements, etc., so as to increase the rate at which inventory sites will be developed. **It should also provide for mid-cycle adjustments in case the likelihood-of-development projections prove to be too optimistic.**

Discontinuation of Existing Use

If a city assigns 50% or more of its lower-income RHNA to nonvacant sites, the city must make "findings based on substantial evidence that the [existing] use [of the sites] is likely to be discontinued during the planning period." (Gov. Code § 65583.2(g)(2).) According to the HCD *Site Inventory Guidebook,* a site is considered "nonvacant" if there is a structure on it, even if dilapidated, or if it has a current income-generating use, e.g., a parking lot. (*Guidebook*, p. 24.)

Proving discontinuation of existing use is not important if a city properly discounts the capacity of nonvacant sites by the likelihood of development during the planning period. By definition, the likelihood of development is smaller than the probability of discontinuation of the existing use because discontinuation is a first step toward redevelopment. However, if a housing element <u>does not</u> apply a likelihood of development discount factor, then the "discontinuation of existing use" finding becomes much more important. Indeed, it can function as a partial substitute for likelihood of development. Here's how:

Exclusion Method. In a city with just a few nonvacant sites in its inventory, the most straightforward way to make the finding is to ask the sites' owners if they plan to discontinue their current use on the property within the planning period. With written answers on record, the city can then exclude nonvacant sites about which (a) they did not receive a response or (b) received confirmation that the owner *was not* planning to discontinue the use. By excluding the sites, the city essentially acknowledges that there is a 0% likelihood of development.

Survey Method. But if the city is relying on *many* nonvacant sites, contacting every owner will be impractical. A more feasible option is to use statistical methods to approximate the share of nonvacant sites whose existing use is likely to be discontinued during the planning period, and then to discount the site's capacity accordingly. In this way, the "discontinuation

of existing use" findings requirement would function as a partial substitute for likelihood-of-development discounting. The data for this method is collected by surveying all nonvacant owners or a randomized sample. The city then asks if the owner plans to discontinue the site's current use and sell or redevelop the site during the next eight years. The number of the *respondents* to the survey (not the *recipients* of the survey) who plan to discontinue the use on their site is divided by the total number of survey respondents, and that rate serves as the discount factor for all the nonvacant sites in the site inventory.

$$= \frac{(number\ of\ owners\ who\ say\ they\ intend\ to\ discontinue\ use\ during\ next\ 8\ years)}{(total\ number\ of\ respondents)}$$

For example, a city sends out a survey to 100 owners of nonvacant sites. If 50 property owners answer the survey, and 25 of them state that they intend to discontinue their current use, the city could assume that the existing use is likely to be discontinued on 50% of the nonvacant sites. All nonvacant sites would be included in the inventory and counted toward the lower-income RHNA, but the capacity of each site would be discounted by 50%.

Tricks Cities Use to Reduce the Amount of "Realistic Capacity" They Must Provide

In principle, the sum of "realistic capacity" across all the parcels in a housing element's site inventory should equal or exceed the city's RHNA in each income bin. However, the Housing Element Law provides a few escape hatches that may let cities get away with providing less capacity. It is important to scrutinize cities' use of these techniques:

- **Accessory Dwelling Units**. Cities may count forecasted ADU production toward their RHNA. This is a sufficiently important topic that we take it up separately, below.
- **Approved Projects**. "Projects that have been approved, permitted, or received a certificate of occupancy since the beginning of the RHNA projection period may be credited toward meeting the RHNA allocation based on the affordability and unit count of the development." *Site Inventory Guidebook*, p. 5. The city must demonstrate that build-out of the project during the planning period is realistic, and the project's units must be credited toward RHNA affordability bins based on projected sales price and rents, not the density of the project alone. *Site Inventory Guidebook*, pp. 5-6. **Hint for watchdoggers**: if a city is relying on "approved projects" for more than a small fraction of its RHNA, check the city's previous housing element for "approved projects" and ascertain what fraction of the units were actually developed during the

previous period. Then demand that the city discount the claimed capacity of the current stock of "approved projects" accordingly. (Alternatively, contact owners of the current "approved projects" and ask whether they have imminent plans to pull permits and break ground.)

- **Committed Assistance**. In narrow, complicated circumstances (explained here), a city that enters into a legally binding agreement to convert existing market-rate housing to low-income housing, or to preserve existing low-income housing, may count these units toward their lower income RHNA (up to a limit of 25% of the lower income RHNA). There is no requirement that cities offset the loss of market-rate units with additional site capacity for market-rate production.

No Net Loss Buffer

California's No Net Loss law provides that if a city's remaining site capacity in an income category falls below its remaining RHNA in that category--at any point during the planning period--the city must rezone within six months to make up the difference (Gov. Code § 65863). This is a particular concern for sites designated as suitable for the lower-income RHNA, since (a) state law establishes strict rules for which sites are suitable for very low- and low-income housing (together, *lower-income housing*), and (b) most of the housing actually developed on such sites is likely to be market-rate housing. To avoid No Net Loss violations, HCD strongly recommends that cities include a "buffer," or extra site capacity, totalling at least 15-30% of the lower-income RHNA (*Guidebook*, p. 22).

Quantified Objectives

The Housing Element Law excuses cities from any duty to spend "local revenues" on land for housing, affordable housing, or housing subsidies (Gov. Code § 65589(a)). Related to this, it authorizes cities to set lesser quantified objectives by income category if achieving the full RHNA is not feasible. (Gov. Code § 65583(b)(2).) Whereas the analysis of sites' "realistic capacity" counts all projected housing units on a site toward the site's affordability bin-- regardless of whether the city actually expects housing built on the site to be affordable at the designated level--the "quantified objectives" are supposed to be realistic goals for the production, or preservation, of units that actually realize a given level of affordability.

HCD's housing element "Building Blocks" instruct that quantified objectives should be reported in tabular form, as follows:

Income Category	New Construction	Rehabilitation	Conservation/ Preservation
Extremely Low			
Very Low			
Low			
Moderate			
Above Moderate			
TOTALS			

The "New Construction" objective (in the table above) refers to the number of new units that could be constructed using public and/or private sources over the planning period, given the locality's land resources, constraints, and proposed programs. The "Rehabilitation" objective refers to the number of existing, degraded units expected to be rehabilitated during the planning period. The "Conservation/Preservation" objective refers to the preservation of the existing affordable housing stock throughout the planning period. To determine the number of units to be conserved, a locality could, for example, quantify the number of existing housing units that will be preserved through the provision of more stable zoning for mobilehome parks or other affordable housing types.

Best Practices

A **model housing element** will apply reasonable likelihood-of-development discount factors to estimate the capacity of all inventory sites, vacant and nonvacant. A model housing element will also include a program to monitor the rate at which inventory sites are developed and the number of units built when sites are developed. Additionally, it will commit to making mid-cycle adjustments if the site inventory's actual yield during the first half of the planning period falls short of what was projected. These adjustments could include an automatic density bonus, ministerial permitting, reduced impact fees and parking requirements, or other relief from constraints.

A model housing element should not set quantified objectives for affordable housing at less than the RHNA (for the corresponding level of affordability) unless the city has exhausted all practicable options for upzoning of high-demand neighborhoods with feasible inclusionary requirements.

A model housing element that uses “committed assistance” to accommodate a portion of the lower-income RHNA will offset the loss of market-rate units with a voluntary upward adjustment to the city’s above-moderate-income target.

References

Housing Element Completeness Checklist (HCD)
Site Inventory Guidebook (HCD)
Building Blocks: Program Overview and Quantified Objectives (HCD)
CA Government Code § 65863 (No Net Loss), 65583.2 (capacity assessment for nonvacant sites)

Site Capacity Audit

1A: 5th Cycle Development Rate. Does housing element report share of 5th cycle sites that were developed, or are on track to be developed, during the 5th cycle planning period?

Yes
No
Not clear

1B: Likelihood of Development - Which Sites? ⏰ For which category of sites (if any) did the city apply a likelihood-of-development discount when estimating the sites' capacity to accommodate a portion of the city's RHNA? (By "likelihood of development," we mean the likelihood of any development or redevelopment of the site during the planning period, not the relative likelihood of commercial vs. residential redevelopment) [Choose one]

All sites
All sites except vacant sites that used minimum zoned density rule
Nonvacant & mixed use sites only
Nonvacant sites only
No sites
Other

1C: Likelihood of Development - Which Method? ⏰ How did the city estimate the likelihood of development? [Choose all that apply]

Share of Sites Method
Share of Capacity Method
Other
N/A – the city did not estimate the likelihood of development

1D: Nonvacant Sites. Does the housing element plan to accommodate 50% or more of their lower-income RHNA units using nonvacant sites?

Yes
No
Not Clear / Other

1E: Discontinuation of Existing Use 🚨 If the housing element assigns 50% or more of lower-income RHNA to nonvacant sites, how does it address the required "discontinuation" finding?

Exclusion Method
Survey Method
Estimating the overall likelihood of development
Not Clear / Other
N/A, lower-income sites are on less than 50% nonvacant sites

1F: Alternatives to Zoning - Total RHNA ⏰ What proportion of the total RHNA does the city claim to accommodate through some combination of approved projects, ADUs, and/or committed assistance?

1G: Alternatives to Zoning - Lower Income RHNA ⏰ What proportion of the lower-income RHNA does the city claim to accommodate through some combination of approved projects, ADUs, and/or committed assistance?

1H: No Net Loss Buffer. ⏰ Does the housing element provide a site capacity buffer of at least 15%-30% of the city's lower-income RHNA to avoid No Net Loss? [Choose one]

Yes
No, but the housing element commits to provide this buffer through rezoning
No
Not Clear / Other

1I: Mid-Cycle Adjustments. 🚩 Does the housing element include a program to monitor housing production (other than ADU production) and make mid-cycle adjustments if production falls short of expected yield during the first half of the planning period? [Choose one]

Yes, and some / all of the adjustments would be automatic
Yes, but none of the adjustments would be automatic
No
Not Clear / Other

1J: Quantified Objectives. If the housing element sets quantified objectives for lower-income housing, how do they compare to the city's lower-income RHNA?

Higher than RHNA
Same as RHNA
Lower than RHNA
The city does not set Quantified Objectives
Not Clear / Other

1K: Quantified Objectives Discussion. Describe the Quantified Objectives in the housing element and the justification provided for them. Are they grounded in evidence or calculations about what's feasible for the city to achieve, or are they just aspirational? If the city set quantified objectives below its RHNA for an income group that cannot afford market-rate housing, did the city explore possibilities for producing more such housing through upzoning with an economically feasible inclusionary requirement?

1L: Specific Problems. Please describe any specific problems you see with the housing element's quantified objectives and / or estimation of site capacity, such as overoptimistic or unexplained likelihood-of-development factors, unrealistic or missing "discontinuation of existing use" findings (if city assigned at least 50% of lower-income RHNA to nonvacant sites), or unjustified reliance on the assumption that all "approved" projects will actually be developed during the projection period. Include citations to page numbers of the document you're reviewing. If the housing element relies on sites which obviously won't be

developed during the planning period, such as city hall, police stations, municipal water tanks, high-tension power line easements, etc., call out those sites here. Also call out reliance on “approved projects” which haven’t actually been approved yet, or a failure to discount the number of units in “approved projects” using a reasonable estimate the share of such projects that will be developed during the period. Finally, if you know of categories of sites with development potential (if suitably rezoned) that the housing element overlooks, note those here.

1M: Specific Virtues. Please describe any specific virtues you see with the housing element’s quantified objectives and/or estimation of site capacity and its program to provide and maintain adequate housing capacity. Include citations to page numbers of the document you’re reviewing.

1N: Site Capacity Notes

2. Accessory Dwelling Units

About This Topic

Introduction

The potential for new accessory dwelling units ("ADUs") and junior accessory dwelling units ("JADUs") is both a very important source of capacity and an opportunity for cities to abuse the Housing Element process by avoiding rezoning for multifamily housing. To the extent that a city accommodates its RHNA through projected ADU production, the city may elect to provide less capacity through the housing element site inventory.

ADU Production Estimates

The statute and HCD's *Site Inventory Guidebook* allow cities to count prospective ADUs toward the city's RHNA based on expected production during the planning period. The *Guidebook* also provides two "safe harbors" that cities may use in calculating their ADU capacity.

First, a city may use "trends in ADU construction since January 2018 to estimate new production" (*Guidebook*, p. 31). This is calculated by taking the average number of ADUs permitted per year since January 2018 and projecting that number of ADUs for each of the eight years of the planning period. For example, assume a city has permitted 10 ADUs in 2018, 20 in 2019, and 15 in 2020. That city should estimate it will permit 15 ADUs per year, which is then multiplied by eight years for a total estimate of 120 units counted toward the city's RHNA.

ADU Safe Harbor 1:

$$8 * \frac{(\#\ ADUs\ in\ 2018 + \#\ in\ 2019 + \#\ in\ 2020)}{3}$$

Second, "**where no other data is available**, assume an average increase of five times the previous planning period construction trends prior to 2018" (*Guidebook*, p. 31). Again, the

"trend" is determined by taking the average over recent years (pre-2018) for which the city has ADU production data.

ADU Safe Harbor 2:

$$5 * 8 * \frac{(\#\ ADUs\ in\ Year\ 1 + \#\ in\ Year\ 2 + \ldots + \#\ in\ Year\ N)}{N}$$

Cities may use other methods as well, but they need to provide strong evidence to back up their projection. Any projection that exceeds the two safe harbor methods should be accompanied with programs that incentivize ADU production, lower or remove ADU development fees and/or constraints, or otherwise demonstrate that they can reasonably expect a significant increase in ADU production.

However a city estimates future ADU production, its housing element should "include a monitoring program that (a) tracks ADU and JADU creation and affordability levels, and (b) commits to a review at the planning cycle mid-point to evaluate if production estimates are being achieved" (*Guidebook*, p. 31). Ideally, the housing element will build in an automatic mid-cycle adjustment that would take effect at the midpoint of the cycle without further legislative action by the city council.

Affordability

Unless the ADUs will be deed restricted, cities must allocate these future ADUs to an income category based on evidence of market rents for similar units (*Guidebook*, p. 30). Many cities will rely on a regional study to justify affordability estimates, such as the *SCAG Regional Accessory Dwelling Unit Affordability Analysis*. Watchdogs should ensure that cities are applying the study findings appropriately, given the particular qualities of the jurisdiction (i.e. size, demographics, housing market, etc). When no regional study exists, a survey of rents charged by ADU owners is best. Be sure the city reports when ADU owners do not charge rent or charge low rents to friends and family members, since those rates are not accessible on the open market and cities often use those circumstances to claim deeper affordability throughout their stock of ADUs. Beware of lazy comparisons between neighboring cities with different housing markets, like South Pasadena and Alhambra, Anaheim and Yorba Linda, Monterey and Seaside, Poway and Del Mar, Oakland and Piedmont, Fresno and Clovis, etc.

Best Practices

A **model housing element** will address the uncertainties of ADU forecasting by (a) using one of the safe harbor methods for establishing a baseline estimate for the planning period, (b) providing for automatic mid-cycle adjustments, through a density bonus law or otherwise, if ADU production falls short of the target, and (c) basing any affordability assumptions on local rental data in general or local ADU rental data in particular.

References

HCD, Site Inventory Guidebook
SCAG, Regional Accessory Dwelling Unit Affordability Analysis

ADU Audit

2A: ADU Safe Harbors. 🚨 Does the housing element's ADU estimate use one of HCD's safe harbors? [Choose one]

Yes, Safe Harbor #1: ADU trends after January 2018
Yes, Safe Harbor #2: 5x ADU trends before 2018
No, but the ADU estimates are lower than the safe harbors
No, and the ADU estimates seem overoptimistic
Not Clear / Other
N/A - the city did not rely on ADUs to meet RHNA

2B: ADU Mid-Cycle Adjustments. 🚨 Does the housing element include a program to monitor ADU production and affordability and make mid-cycle adjustments if necessary? [Choose one]

Yes, and the adjustments would be automatic
Yes, but the adjustments would not be automatic
No
Not clear

2C: Specific Problems. Please describe any specific problems you see with the housing element's projection of ADU capacity and affordability, or the ADU monitoring and mid-cycle adjustment program. Please cite page numbers of the section(s) you reference.

2D: Specific Virtues. Please describe any specific virtues you see with the housing element's projection of ADU capacity and affordability, or the ADU monitoring and mid-cycle adjustment program. Please cite page numbers of the section(s) you reference.

2E: ADU Notes.

3. Affirmatively Furthering Fair Housing

About This Topic

Introduction

Housing elements must affirmatively further fair housing ("AFFH"). This is generally understood to mean reducing racial and socioeconomic segregation while protecting disadvantaged tenants from displacement. However, the Housing Element Law gives cities some discretion to set their own "fair housing priorities and goals," and to choose corresponding strategies and actions "which may include…enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, and protecting existing residents from displacement." (Gov. Code § 65583(a)(10)).

The AFFH requirement is the principal source of leverage over cities' choice of which neighborhoods to rezone for additional housing capacity. In cities that are homogeneously affluent, AFFH may also help activists make the case for rezoning single-family neighborhoods above and beyond what's needed to accommodate the city's RHNA.

HCD AFFH Guidance

In April 2021, HCD issued an AFFH Guidance Memo, which the department intends to update from time to time, and an online data tool for AFFH analysis. The guidance establishes a number of important principles, and the data tool provides the means of implementation. The principles include:

- A city's AFFH analysis should reveal "current and historical spatial patterns of subsidized housing within and surrounding the jurisdiction, including emergency shelters, subsidized affordable housing, supportive housing, and usage of housing choice vouchers." *AFFH Guidance Memo*, p. 46.
- The spatial distribution of housing-element inventory sites with lower or moderate income capacity must not be skewed toward lower-income neighborhoods. To demonstrate that the site inventory furthers fair housing, the city must calculate the percentage of households at lower, moderate, and above-moderate income levels in

each census tract or "block group" in the city, and then do the same for the lower, moderate, and above-moderate-income RHNA units assigned to the tract or block group. See *AFFH Guidance Memo*, p. 47. The share of lower-income RHNA units assigned to tracts (or block groups) with a higher-than-average share of lower-income households should be less than the current share of lower-income households in those tracts. *Id.*

- The housing element must benchmark the citywide distribution of household incomes against the distribution in the county or region, and state. *AFFH Guidance Memo*, pp. 15, 32-34, 77. The AFFH program of a predominantly high-income city--a "concentration of affluence"--shall break down barriers that keep lower income and minority households from accessing housing in the city. *Id.*

- "Goals, policies, and actions" to further fair housing must be "aggressively set to overcome … contributing factors [to fair housing problems, and thus] to meet the 'meaningful impact' requirement in statute." *AFFH Guidance Memo*, p. 52. The list of actions shall include concrete timeframes for implementation, measurable outcomes, explicit prioritization ("high," "medium," or "low"), and "must be created with the intention to have a significant impact, well beyond a continuation of past actions." *AFFH Guidance Memo* pp. 52, 71.

- "The schedule of actions generally must" (1) enhance the mobility of low-income and minority communities, (2) encourage the development of new affordable housing in high-opportunity areas, (3) protect existing residents from displacement, and (4) invest in disadvantaged places. *AFFH Guidance Memo*, p. 54.

To facilitate public assessment of a city's proposed AFFH program, the city should release its draft site inventory in electronic form, using the HCD-issued spreadsheet, so that citizens can do their own analysis of the inventory using HCD's fair housing tool.

Best Practices

A model housing element's AFFH program will:

- Ensure that the inventory sites that are, or will be, suitably zoned for affordable multifamily housing are predominantly located in high-opportunity neighborhoods (to the extent feasible). Cf. *AFFH Guidance*, pp. 46-47.

- Eliminate single-family zoning in every Census tract or block group (1) that is located near transit or centers of employment, and (2) whose distribution of household incomes skews substantially more affluent than the distribution in the region or state as a whole. Cf. *AFFH Guidance*, p. 55 (noting that "patterns of isolation in higher income areas" "may warrant rezoning above and beyond regional housing need to promote more housing choices and affordability").

- Reduce or eliminate zoning and design standards that raise the cost of building "missing middle" housing types (townhomes, duplexes, 4plexes, 6plexes, etc.) in the rezoned, formerly single-family neighborhoods. For example: minimum lot size requirements, parking requirements, setback requirements, private open space requirements, and the like. Cf. *AFFH Guidanc*e, p. 26 (listing "common zoning and land use barriers").

- Commit the city to providing temporary replacement housing or housing vouchers to low-income tenants who are temporarily displaced by redevelopment of the parcel on which their apartment is located. (Under state law, tenants of a redeveloped site have a right to return at their previous rent, but no entitlement to subsidized housing during the period of redevelopment.) Cf. *AFFH Guidance*, p. 54 (stating that AFFH programs generally must include some anti-displacement measures).

References

HCD's AFFH webpage hosts the AFFH Data Tool and AFFH Guidance Memo.

AFFH Audit

3A: Site Inventory Spreadsheet. ⏰ Has the city made an electronic spreadsheet available for download with the proposed site inventory parcels, including APNs for each parcel? [Choose one]

Yes, as a spreadsheet (i.e. an Excel file)
Yes, as a PDF
No
Not sure / Other

3B: AFFH Analysis. Which of the following AFFH analyses are included in the housing element? [Choose all that apply]

Spatial distribution of site inventory vs. household income
Spatial distribution of existing affordable housing vs. household income
Household incomes in city relative to state or region
Racial / ethnic concentrated areas of poverty (R/ECAP)
Racial / ethnic concentrated areas of affluence (RCAA)

3C: AFFH Programs. ⏰ Do the AFFH programs include any of the following? [Choose all that apply]

Upzoning of single-family neighborhoods
Upzoning of affluent neighborhoods
Removal of non-zoning constraints to multifamily housing
Temporary replacement housing for tenants during redevelopment
Housing-voucher programs to access high-opportunity neighborhoods

3D: Specific Problems: Describe any specific problems you see with the housing element's fair housing analysis and programs. Please cite page numbers of the section(s) you reference. Remember that an AFFH program is supposed to "aggressively" attack contributing factors to racial and socioeconomic exclusion "with the intention to have a

significant impact, well beyond a continuation of past actions," and that the program shall include concrete timeframes for implementation, measurable outcomes, and explicit prioritization ("high," "medium," or "low"). *AFFH Guidance* pp. 52, 71.

3E: Specific Virtues. Please describe any specific virtues you see with the housing element's fair housing analysis and programs. Please cite page numbers of the section(s) you reference.

3F: AFFH Notes

4. Rezoning Program

About This Topic

Introduction

If a housing element's site capacity under existing zoning is not sufficient to accommodate the city's RHNA, the housing element must include a rezoning program. Sites rezoned to accommodate lower-income housing (80% or less of area median income) must allow by-right development of 20% lower-income projects at the so-called "Mullin densities" (*HCD Site Inventory Guidebook*, pp. 33-38).

The housing element's site-capacity analysis and ADU forecast will determine how much new capacity the city must provide through rezoning. The AFFH analysis will shape how that capacity is distributed across the city.

A critical question for watchdoggers is whether the housing element commits the city to rezoning specific parcels, as opposed to stating that "some" or "enough" parcels in designated areas will be rezoned. As explained below, a statement in the housing element that specific parcels will be rezoned would allow developers to get projects entitled on those sites at the contemplated higher density, even if the city fails to complete the rezoning on schedule.

Mullin Densities

The "Mullin densities" are defined by the Government code as minimum zoning densities that can be used to assume that a site will be able to accommodate lower-income housing. Mullin densities vary according to the type of jurisdiction.

***What is the Mullin Density? (*Default Densities Appropriate to Accommodate Housing for Lower-Income Households by Region)**			
Incorporated cities within nonmetropolitan / rural counties and nonmetropolitan	Unincorporated areas in all nonmetropolitan counties not included under I	Suburban jurisdictions	Metropolitan jurisdictions

counties with *micropolitan areas			
Density: At least 15 dwelling units/acre	Density: At least 10 dwelling units/acre	Density: At least 20 dwelling units/acre	Density: At least 30 dwelling units/acre

*Micropolitan: Urban cluster of at least a 10,000 population, but less than a 50,000 population.
**Metropolitan Statistical Area (MSA): A city with 50,000 or more inhabitants, or the presence of an Urbanized Area (UA) and a total population of at least 100,000.
***Housing Elements, Gov. Code § 65583.2(e)(2)(A)(i): If a county that is in the San Francisco-Oakland-Fremont California MSA has a population of less than 400,000, that county shall be considered suburban. If this county includes an incorporated city that has a population of less than 100,000, this city shall also be considered suburban. This paragraph shall apply to a housing element revision cycle, as described in subparagraph (A) of paragraph (3) of subdivision (e) of Section 65588, that is in effect from July 1, 2014, to December 31, 2028, inclusive.

Housing Accountability Act

Under the Housing Accountability Act (HAA), a city may not deny or reduce the density of a 20% Lower-Income or 100% Moderate-Income project on a site designated by the housing element as suitable for Lower- or Moderate-Income housing if the density of the project is "consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation" (Gov. Code § 65589.5(d)(5)(A)).

Because of this provision of the HAA, a housing element *should* enable sites designated for rezoning to be developed at the higher density even if the city fails to complete its rezoning program. However, if the housing element is vague about exactly which sites will be rezoned, the city may be able to wiggle out of this HAA obligation. For example, if the housing element's rezoning program states only that the city will rezone "some" or "enough" of a larger set of sites to accommodate its lower-income RHNA, the city could argue that the housing element doesn't actually commit the city to specific densities on any given site listed as a candidate for rezoning in the inventory. **This is a key issue for reviewers**.

To be clear, a city may always change the sites designated for rezoning, or the densities to be provided on those sites, by amending its housing element. However, amendments must be submitted to HCD for review, which is an important check on backdoor downzoning.

Site Inventory Form

Cities must submit their site inventory on a standard-form electronic spreadsheet issued by HCD. Table A of the spreadsheet has current zoning information of all sites. The subset of sites which are designated for rezoning are also listed in Table B. In **Table B, columns N-P**, the city is supposed to indicate the density that will be allowed on the site *after* rezoning.

References

HCD Site Inventory Form and Instructions
HCD Site Inventory Guidebook
HCD Housing Accountability Act Advisory Memo

Rezoning Audit

4A: Rezoning. 🚨Does the HE include a rezoning program?

Yes
No, but site capacity appears sufficient without rezoning
No, and site capacity appears insufficient without rezoning
Not clear

4B: Site Specificity. ⏰ If 4A is "Yes," is the housing element specific, or vague or noncommittal, about which sites will be rezoned?

Specific - Committed to rezone identified sites
Vague / Noncommittal
Not Clear / Other

4C: New Densities. 🚨In the Maximum Density Allowed column of Table B of the Site Inventory Form (Column P), does the city assign new densities that are higher than the current Maximum Density Allowed (Table A, Column I)?

Yes, for all sites identified for rezoning
Yes, for some of the sites identified for rezoning
No
Not clear
N/A (no rezoning program)
Site inventory spreadsheet is not available

4D: Specific Problems. Please describe any specific problems you see with the housing element's rezoning program. Please cite page numbers of the section(s) you reference.

4E: Specific Virtues. Please describe any specific virtues you see with the housing element's rezoning program. Please cite page numbers of the section(s) you reference.

4F: Rezoning Notes.

5. Constraints Analysis and Programs

About This Topic

Introduction

A housing element must include an analysis of "constraints" to housing development at all affordability levels, and a program to mitigate or remove constraints. Unfortunately, HCD's guidance for constraints analysis and programs is pretty mushy.

It's not clear whether HCD will reject housing elements on the ground that the constraints analysis and associated programs are weak. Even so, careful watchdogging of the constraints analysis and programs is important, both to put pressure on HCD and to develop an evidentiary record for future legislative reforms.

Reviewers can also play an important role by flagging potential constraints that they know about but which the housing element overlooks. If a number of such constraints are identified, this should prompt HCD to scrutinize the housing element more closely.

What Is an Actionable Constraint?

Constraints take lots of different forms. Broadly speaking, they can be categorized as (1) **zoning restrictions**, such as height and floor-area limits, setback requirements, and use restrictions; (2) **process constraints**, i.e., a time-consuming or unpredictable approval process; (3) **"fees and feature" requirements**, that is, mandates that raise the cost of developing new housing units within whatever physical structure the zoning code allows on a site (examples: impact fees, inclusionary requirements, and requirements to provide amenities such as parking spaces, private outdoor space, or a minimum unit size), and (4) **aggregate caps** (limits on the number of dwelling units, or rate of housing stock growth, within in a district or citywide).

A central challenge of the constraints analysis and program is that virtually any land-use restriction, fee, or procedural requirement can be a "constraint," yet no one thinks the Legislature intended to make all cities eliminate all land use controls and development fees on all sites. So, HCD needs to draw a line between reasonable and excessive constraints. Here are several ways that that line might be drawn:

1. Use the constraints analysis to ensure that the city is complying with other state laws meant to facilitate housing development. (As noted below, many state laws address process constraints.)
2. Use housing production rates to distinguish "ordinary" from "bad actor" local governments, and demand stronger constraint removal actions from the latter.
3. Require special constraint-mitigation measures on sites that a housing element deems suitable for a demographic group that cannot afford to pay market rents in the jurisdiction.
4. Focus the constraint removal program on arbitrary constraints, those that serve no legitimate, substantial public purpose.

HCD's guidance for constraints analysis and programs, provided through "Building Blocks" on the department's website, does not draw clear conceptual or pragmatic lines for distinguishing reasonable from excessive constraints. Thus the Building Blocks do not, as yet, instruct cities to demonstrate compliance with state-law permitting benchmarks; or tie cities' duty to remove or mitigate constraints to outcome-based metrics of cumulative constraint; and or require special constraint mitigation measures on inventory sites that the city deems suitable for relatively affordable housing.

The Building Blocks do require cities to report typical permitting times and typical fees, and they also call out a few types of constraints for special attention: height limits of less than 3 stories in a multifamily zoning district, conditional use permit requirements for multifamily housing in a multifamily zoning district; fees that total more than 15% of "overall development costs"; fees that exceed those in neighboring jurisdictions; and parking requirements exceeding those in the Building Blocks' parking table; and minimum lot-size and setback requirements in excess of certain thresholds.

Statutory Benchmarks (Process Constraints)

With respect to process constraints, state law provides the following benchmarks:

- **ADU Approval.** ADU projects must be approved or denied within 60 days of receiving a complete application. Gov Code § 65852.2(a)(3).
- **HAA Notice of Noncompliance.** Written notice of a housing development project's noncompliance with any applicable objective standard must be provided within 30

or 60 days (depending on the size of the project) of the application's "determined to be complete" date (Housing Accountability Act; Gov Code § 65589.5(j)(2))

- **SB 35 Notice of Noncompliance.** Written notice of an SB 35 project's noncompliance with any applicable objective standard must be provided within 60 or 90 days (depending on project size) of submittal of the complete project application (SB 35; Gov Code § 65913.4(c)(1))
- **Five Hearing Limit.** No more than five public hearings may be held on a housing development project before the project is approved or denied (SB 330; Gov Code § 65905.5(a))
- **PSA 60-Day Approval for CEQA Exempt Projects.** Projects that are CEQA-exempt but subject to some local discretionary review must be approved or denied within 60 days of the application's determined-to-be-complete date, or else they are "deemed approved" as a matter of law (Permit Streamlining Act; Gov. Code § 65950(a)(5)). A project subject to local discretionary review is deemed approved if the city fails to approve or deny the project within the time limits specified by the PSA. Because of CEQA Guidelines issued by the Office of Planning and Research, these time limits matter only for CEQA-exempt projects.
- **CEQA Determination.** City shall determine what kind of CEQA document to prepare for a project (exemption, negative declaration, mitigated negative declaration, or environmental impact report) within 30 days of the application's determined-to-be-complete date (CEQA; Pub. Res. Code §§ 21080.1, 21080.2.)
- **Neg Dec 180.** City shall complete and certify a negative declaration or mitigated negative declaration within 180 days of the application's determined-to-be-complete date (CEQA; Pub. Res. Code § 21151.5(a))
- **EIR 365.** City shall complete and certify an environmental impact report within one year of the application's determined-to-be-complete date (CEQA; Pub. Res. Code § 21151.5(a))
- **30-Day Incomplete Notice.** City must provide written notice within 30 days of receiving a project application of any missing or incomplete items (Permit Streamlining Act; Gov. Code § 65943)

Best Practices

A **model housing element**'s constraints analysis and programs will:

- **Ascertain whether the city is in compliance with permitting benchmarks (i.e., timeframes) under state law and release the data upon which the city relies to make these determinations.** If the city's project tracking system is not set up in a manner that enables such self-audits, the housing element should acknowledge the problem and include a program action to update the project-tracking system.

- **Use outcome-based metrics, such as the city's relative rank by rents and housing production, to gauge whether the city is cumulatively constrained.** Cities with high rents should be growing their housing stock at a relatively fast clip. If a city's rank by production is substantially lower than its rank by market rent, that's a warning sign that something is amiss. The ratio of housing price (or rent) to replacement cost is also a good outcome-based measure of constraint, though it picks up regional as well as city-specific constraints. A city that has substantial cumulative constraints as revealed by outcome-based metrics should include in its housing element a strong program to remove constraints.

- **Use strategies that mitigate the cumulative, interactive effects of multiple constraints.** For example, instead of promising to reform some discrete aspect of its permitting process, a city could commit in its housing element to allow developers who have been unable to obtain a permit for more than a set number of months to withdraw their application and resubmit it for ministerial ("by right") processing under a strict timeframe. A city could also commit to providing regulatory relief if a developer shows that the cumulative effect of municipal regulations renders redevelopment of a site economically infeasible. Another good strategy is to pre-approve project designs, as Los Angeles and San Jose are doing with ADUs. Builders who elect to use a pre-approved design can get their permits on the spot, without further review.

- **Use municipal authority to mitigate the burden of constraints that arise from the interaction of local and state law.** The main culprit here is the California Environmental Quality Act (CEQA). There are two critical steps that cities can take to defang CEQA as a NIMBY tool, without diminishing CEQA's legitimate role in planning and zoning. First, every site in a housing element's inventory should be covered by a recent Environmental Impact Report (EIR) prepared for a zoning ordinance, specific plan, or general plan that developers can "tier" off of. In lay terms, this means the environmental analysis of the project can be limited to unique site-specific issues, rather than the general or typical impacts of a zoning-compliant

project on the site. Second, cities should either make review of housing projects ministerial (and thus exempt from CEQA), or limit the scope of their project-level discretionary review to aesthetic issues. Under *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, aesthetic review does not trigger CEQA unless the project is in an historic district.

- **Remove amenity constraints on sites the housing element deems suitable for households that cannot afford market rents in the city.** The city should Investigate whether typical market-rate housing units in the jurisdiction are affordable to, respectively, Very Low-Income households (up to 50% of AMI), Low-Income households (51% to 80% of AMI), and Moderate-income households (81% to 120% of area median income). If the answer is *no*, then inventory sites designated as suitable for the income category in question should be subject to a program to remove amenity constraints. An amenity constraint is any local regulation that requires housing development projects to provide a minimum level of amenities for future owners or tenants of the units beyond what the state building code requires. The amenity could be parking, open space (such as balconies or roof decks), a minimum unit size or minimum number of bedrooms, requirements for finishes and appliances that go beyond what the state building code mandates, or a limit on density within the allowable building envelope. The basic idea is that if typical market-rate units are not, in general, affordable to the target population, the city should remove all regulatory requirements that prevent developers from building less expensive units within the designated zoning envelope, unless the requirement is necessary for public health or safety, at least on sites the housing element designates as appropriate for lower cost housing.

- **Release and explain the data on which any empirical assertions are based**. HCD's Building Blocks ask cities to report "typical" permitting times, and "typical" fees for single-family and multifamily projects. A housing element that makes any assertion about typicality should explain the basis in fact for the assertion. For example, did the city gather data from a random sample of projects within a category? All projects within a category? Are these data available on a public website?

References

HCD Building Blocks: Land Use Controls
HCD Building Blocks: Fees and Exactions
HCD Building Blocks: Processing and Permitting Procedures
HCD Building Blocks: Codes and Enforcement of Onsite/Offsite Improvement Standards
HCD Building Blocks: Address and Remove (or Mitigate) Constraints
Christopher S. Elmendorf et al., "State Administrative Review of Local Constraints on Housing Development: Improving the California Model," *Arizona Law Review* (forthcoming)

Constraints Audit

5A: Permitting Compliance Assessment. ⏰Does the housing element assess the city's compliance with any permitting benchmarks under state law, and does it provide access to the data on which this assessment is based? [Choose one]

Yes, some benchmarks are assessed, with data available
Yes, some benchmarks are assessed, but no data is provided
No
Not clear

5B: Permitting Compliance - Which Benchmarks? ⏰ Which state benchmarks does the housing element examine? [Choose all that apply]

ADU Approval (60 days)
HAA Notice of Noncompliance (30 or 60 days)
SB 35 Notice of Noncompliance (60 or 90 days)
Five Hearing Limit
PSA 60 Day Approval (CEQA-exempt projects)
CEQA: Type-of-Review Determination (30 days)
CEQA: Negative Declaration (180 days)
CEQA: EIR (one year)
Application-Incomplete Notice (30 days)

5C: Permit Streamlining Act. ⏰Does the housing element explain whether the city's planning and building departments have established procedures for recognizing and issuing permits for projects that were "deemed approved" by operation of the Permit Streamlining Act? [Choose one]

Yes
No
Not clear

5D: Outcome Metrics. 🚩Does the housing element's analysis of constraints use outcome-based metrics, such as production and prices, to assess cumulative constraints? [Choose one]

Yes
No
Not clear

5E: Data Transparency. ⏰Does the housing element provide clear evidence for the claims about typical fees, permitting times, etc., and base these claims on data that the public can access to confirm the city's assertions? [Choose all that apply]

Yes, the data is well explained
Yes, the data is publicly available
The data is neither well explained nor publicly available
Not Clear / Other

5F: EIR for Inventory Parcels. ⏰Does the housing element say that its site inventory parcels are or will be covered by an EIR that developers can "tier" off of? See Best Practices Item D in the Constraints Explainer [Choose one]

Yes, all parcels are covered at this time
Yes, all parcels will be covered after rezoning is completed
Yes, for some but not all parcels
No
Not clear

5G: Discretionary Review for Inventory Parcels. 🚩 Does the housing element say that the city has or will eliminate discretionary review for projects on site inventory parcels, or calibrate the scope of discretionary review to *McCorkle*, thereby avoiding project-level CEQA review? See Best Practices Item D in the Explainer [Choose one]

Yes, ministerial review for at least some projects on some sites
Yes, ministerial review for all zoning compliant projects on all sites
Yes, *McCorkle*-calibrated review for some projects on some sites
Yes, *McCorkle*-calibrated review for all compliant projects on all sites
No
Not clear

5H: Amenity Constraints. 🚩Does the housing element assess affordability of new market-rate housing to Very Low-, Low-, and Moderate-Income households and, if it's not affordable, commit to removing significant amenity constraints? [Choose one]

Yes, and market rate units are affordable to all income levels
Yes, market rate is unaffordable and city will remove amenity constraints
Yes, market rate is unaffordable but city will not remove amenity constraints
No affordability assessment was done on market-rate housing
Not clear

5I: Specific Problems. Please describe any specific problems you see with the housing element's analysis of constraints and program to mitigate or remove constraints. Please cite page numbers of the section(s) you reference.

5J: Specific Virtues. Please describe any specific virtues you see with the housing element's analysis of constraints and program to mitigate or remove constraints. Please cite page numbers of the section(s) you reference.

5K: Constraints Notes.

6. Policy & Programs

About This Topic

Introduction

A housing element's programs represent the city's path forward. The programs shall consist of "a schedule of actions during the planning period, each with a timeline for implementation," that will have "beneficial impacts" during the period. (Gov. Code 65583(c).) A good housing element will be clear about which programs are meant to be legally binding commitments, and which ones are aspirational.

A housing element's programs are more likely to be effective if they're at least tacitly responsive to the political dynamics that tend to derail housing projects, particularly in affluent neighborhoods. Often, city council members have a veto over projects in their respective districts. Municipal requirements for public hearings and discretionary review may allow disgruntled neighbors to delay projects indefinitely. Programs to eliminate *de facto* or *de jure* "neighborhood vetoes" over housing proposals thus merit special consideration.

Also worth considering are programs that put rezoning or constraint removal on autopilot. For example, the housing element could state that a constraint shall cease to have legal effect, or that a density bonus will become available, if specified conditions occur.

Courts are reluctant to enforce general plans (which include the housing element) unless the matter in question implicates a "fundamental, mandatory, and clear" policy of the plan. Thus, a housing element will more effectively constrain the city if it makes clear which policies and programs are intended to be "fundamental, mandatory, and clear."

A legally binding policy or program of the housing element may be changed down the road by amending the housing element, but because amendments must be submitted to HCD for review, and because HCD can respond to a bad amendment by decertifying the housing element, commitments made through the housing elements are "stickier" than commitments made through normal municipal ordinances.

Best Practices

A **model housing element**'s programs will:

- Establish or manifest clear priorities.

- Constrain the city, particularly with respect to decisions that implicate development in neighborhoods where NIMBY interests tend to be well organized. An example of a constraining program: "reduce parking requirements to 0.5 spaces per dwelling unit in the following districts: ___." An example of a non-constraining program: "prioritize review of affordable housing projects."

- Provide for adjustments--ideally automatic adjustments--if specified benchmarks aren't met. For example, the housing element could provide that the city's density bonus law will provide larger bonuses starting midway through the planning period if specified production targets haven't been met.

- Clearly distinguish policies that are meant to be judicially enforceable from aspirational policies. For example, the housing element could include an appendix or table that lists the policies and programs that the city considers to be "fundamental, mandatory, and clear."

Pro Tip

Make a note of the range of pages for the city's housing policies, programs, and objectives, then search the housing element for the words *fundamental*, *mandatory*, and *clear*. If there's no match for any of these words in the range of pages you noted, then that's your answer: The city just doesn't have any policies, programs, or objectives that use this language.

References

Christopher S. Elmendorf et al., "'I Would, If Only I Could': How Cities Can Use California's Housing Element to Overcome Neighborhood Resistance to New Housing (UCLA Lewis Center, Dec. 2020)

Policy & Programs Audit

6A: Clarity About Legal Effect. 🚩Does the housing element clearly designate which policies and programs it considers to be "fundamental, mandatory, and clear," or otherwise judicially enforceable?

Yes
No
Not Clear / Other

6B: Self-Constraint. 🚩Does the housing element establish or provide a policy for substantial new limits on the city's discretion with respect to housing development, particularly in affluent neighborhoods?

Yes, immediately
Yes, in the future
Under consideration
No
Not clear

6C: Specific Problems. Please describe any specific problems you see with this topic. Please cite page numbers of the section(s) you reference.

6D: Specific Virtues. Please describe any specific virtues you see with this topic. Please cite page numbers of the section(s) you reference.

6E: Policy & Programs Notes.