G064286

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

CALIFORNIANS FOR HOMEOWNERSHIP, INC.,
Petitioner and Appellant,

v.

CITY OF LA HABRA,
Respondent.

APPEAL FROM ORANGE COUNTY SUPERIOR COURT
DONALD F. GAFNEY, JUDGE • CASE NO. 30-2023-01325471-CU-WM-NJC

AMICI CURIAE BRIEF OF YIMBY LAW, CALIFORNIA HOUSING DEFENSE FUND, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA IN SUPPORT OF PETITIONER

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AMICI CURIAE BRIEF

INTRODUCTION

California has a housing-affordability crisis. The Legislature estimates the state needs to add 2 million more units of housing before home prices have a chance to come back within most Californians' reach. The Legislature has also found that many local governments contribute to this housing shortage by zoning in ways that make it infeasible to build enough housing. To address this concern, state law requires each local government to adopt and periodically update a "housing element," which is a plan setting out how the government will meet its share of regional housing needs. A detailed statutory framework then subjects a local government's updating of its housing element to oversight by the state, the public, and the courts.

The local government must submit its housing-element update to the California Department of Housing and Community Development (HCD), which either approves the update or finds it deficient. The public must also be given an opportunity to review and comment on the proposal, both before the local government submits the housing-element update to the HCD, and, if HCD finds the housing element deficient, again if the local government attempts to correct the deficiencies. In this case, the trial court denied Californians for Homeownership's petition for writ relief by misinterpreting two provisions of that statutory framework.

***First*,** Government Code section 65585—which was recently clarified by Assembly Bill No. 2023 (2023–2024 Reg. Sess.) (Stats. 2024, ch. 269, § 4) (AB 2023)—expressly answers

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the main question presented in this appeal: What must a local government do after the state finds its housing element is deficient? The local government has only two options. It can adopt its update as-is, with findings explaining why it disagrees with HCD. Or, if it "[c]hange[s] the draft element" to address HCD's concerns, it must do so "in accordance with subdivision (b)." That subdivision in turn requires public input for housing-element updates and amendments—requiring 30 days of notice and public comment, followed by an additional 7 days of notice of any changes responsive to the public's comments. Only after completing that process can the local government go back to HCD for another review.

Here, La Habra failed to follow either path. It instead purported to finally "adopt" a housing-element update while authorizing its staff to continue revising its housing element behind closed doors—even after HCD found it deficient. Whether those staff-made edits are viewed as a separate amendment to La Habra's housing element after a (procedurally invalid) final adoption of a prior update *or* are viewed as changes to a never-adopted draft update, the result is the same. La Habra failed to provide the public the statutorily required 30 days of notice and comment. The trial court should have granted writ relief based on that plain statutory violation.

Second, Government Code section 65754 empowers litigants to challenge and courts to correct deficiencies in a local government's housing element: "[I]f the court" finds the housing element "does not substantially comply" with state law, then the

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local government "shall bring" its housing element into compliance "within 120 days." That provision governs this case and displaces the Government Code's generic harmless-error provision. Thus, contrary to the court's ruling, in order to obtain writ relief, Californians for Homeownership had no obligation to pinpoint precisely how, but for the notice-and-comment failure, La Habra's housing element would have been different.

The trial court's ruling, from amici's perspective, doubly undermined this statutory framework by permitting local governments to avoid public scrutiny when revising housing elements the state has already deemed deficient, and then making it unnecessarily difficult for members of the public to prove legal injury when their right to public participation has been extinguished. That is why amici agree with Californians for Homeownership that this court should reverse the judgment with directions for the trial court to require La Habra to comply with the statutory notice-and-comment procedures.

LEGAL ARGUMENT

I. Local governments' adoption of legally compliant "housing elements" is essential to addressing California's housing crisis.

A. California has a housing crisis.

The Legislature has expressly found that California has a housing "affordability crisis of historic proportions," which "stifl[es] economic opportunities for workers and businesses, worsen[s] poverty and homelessness, and undermin[es] the state's environmental and climate objectives." (Gov. Code,

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§ 65589.5, subd. (a)(2)(A).)[1] More than half of renters and more than 40 percent of homeowners are cost-burdened by their housing—meaning they spend more than 30 percent of their household income on their rent or mortgage. (Public Policy Institute of California, Californians and the Housing Crisis <https://tinyurl.com/2pjr764f> [as of May 19, 2025].) And the average home in California now costs *eleven times* the average household income. (Christopher & Tobias, *Californians: Here's Why Your Housing Costs Are So High* (Oct. 15, 2024) Cal Matters <https://tinyurl.com/25bpb4yw> [as of May 19, 2025].)

The Legislature has further found that the state's housing-affordability crisis is driven by a "housing *supply*" crisis. (§ 65589.5, subd. (a)(2)(A), emphasis added.) There is a profound "lack of housing" in the state, with California having about two million fewer housing units than its residents need. (§ 65589.5, subd. (a)(1)(A) & (2)(D).) Fewer units of housing lead to more people competing to rent or buy them—causing prices to soar.

B. California's housing crisis is fueled in part by many local governments not allowing enough housing to be built within their jurisdictions.

The Legislature has also drawn causal conclusions about the housing crisis, finding that California's housing shortage is "partially caused by activities and policies of many local governments that limit the approval of housing." (§ 65589.5, subd. (a)(1)(B).) As the Legislature put it, "Many local

[1] All further statutory references are to the Government Code unless otherwise designated.

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governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects." (§ 65589.5, subd. (a)(1)(D).)

In recent years, California's local governments have permitted only 2.6 units of housing per 100 residents, which is less than half the rate in some other states and well below the national average of 3.9 units. (Leonard, *This Data Shows One Huge Reason California's Housing Shortage Is At Crisis Levels* (Apr. 27, 2023) <https://tinyurl.com/ycyerxjw> [as of May 19, 2025].) Given this slow rate of approval, less than 60 percent of local governments in California permitted enough housing from 2014 to 2021 to meet their constituents' projected housing needs. And in that same time period, California's local governments provided only 20.7 and 31.7 percent of the estimated housing needed for very-low-income and low-income residents, respectively.[2]

C. To ensure each local government does its part to address the housing crisis, state law requires them to adopt a housing element.

Each local government must adopt a "general plan," often likened to the jurisdiction's " 'constitution' . . . for future development." (See *Lesher Communications, Inc. v. City of*

[2] These statistics are based on an analysis of State of California Open Data, "5th Cycle RHNA Progress Report." That data is available for download at: State of California, RHNA Progress Report <https://tinyurl.com/3kuffhjs> [as of May 19, 2025].

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Walnut Creek (1990) 52 Cal.3d 531, 540; see § 65300.) Much like how statutes that conflict with the constitution are void, all zoning and land use approvals within a jurisdiction must be consistent with its general plan. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773.)

A general plan has eight mandatory elements—including, as relevant here, a "housing element," which must be updated every eight years. (§§ 65302, subd. (c), 65588, subd. (e)(3)(A)(i).) This state-law requirement that a local government must periodically update its housing element works hand-in-hand with the Regional Housing Needs Assessment (RHNA) process to ensure that each local government is doing its part to address the housing crisis. Through the RHNA process, population and household growth are projected at the regional level every eight years, and each jurisdiction is assigned a target number of housing units at different income levels that it must help develop. (See § 65584.) A local government's plan to achieve its RHNA allocation must ultimately be codified in its housing element, with the housing element including:

- "An assessment of housing needs," and "constraints" to meeting those needs (§ 65583, subd. (a));
- "An inventory of land suitable and available for residential development" to meet the jurisdiction's RHNA housing-needs allocation at each income level, consisting of sites that have a "realistic and demonstrated potential for redevelopment" (§ 65583, subd. (a)(3));

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- A statement of "goals, quantified objectives, and policies" to affirmatively further fair housing (§ 65583, subd. (b)(1)); and
- A "schedule of actions" to address the housing element's goals and objectives, including any necessary rezonings to ensure the sufficiency of its inventory of sites (§ 65583, subd. (c)).

These contents, in turn, come with significant legal effects. If, for example, a housing element includes a site in its inventory of "land suitable . . . for residential development" and the local government receives a qualifying proposal to ministerially approve a housing project on that site for 10 or fewer units, it must ensure that the project will result in at least as many units as projected for that site in the housing element. (§ 66499.41, subds. (a)(1) & (5).) Similarly, when a housing element's "schedule of actions" includes promises to rezone certain sites in its inventory, those promises are binding—even if the local government fails to ultimately follow through with the promised rezoning. (§ 65583, subds. (c)(1)(A), (f), (g) ["[i]f a local government fails to complete the rezoning," it "may not disapprove" certain proposals if they are consistent with the "objective criteria" "described in the [rezoning] program"].) And a local government cannot deny a housing proposal as inconsistent with a zoning ordinance's density limit if the proposal complies with the density limit set by the housing element. (See § 65589.5, subds. (d)(5)(A) ["[t]his paragraph shall not be utilized to disprove" a qualifying housing proposal if it complies with "the

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density specified in the housing element"], (j)(4) ["a proposed housing development project," including market-rate housing, "is not inconsistent with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria"].)

D. A local government's updating of its housing element is subject to oversight by the state, the public, and the courts.

On top of these substantive requirements that govern *what* a housing element must include, state law also imposes procedural requirements that govern *how* a local government must go about updating its housing element.

Broadly speaking, a local government can make two types of changes to its housing element. By statute, it is required to comprehensively update its housing element every eight years. (See § 65588, subd. (e)(3)(A)(i).) A local government may also make additional changes, separate from those required updates. This brief refers to the former changes as "updates" and the latter changes as "amendments." Apart from some minor differences not relevant here, the same procedural requirements apply to both types of changes. (See § 65585, subd. (b)(1)(A) [governing "a revision" and "a subsequent amendment"].)

A local government must involve the public. Beyond a general public-participation mandate (§ 65351), there are specific public-participation requirements. Before a local government can change its housing element, it must allow 30 days of notice and

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public comment on the draft amendment, take 10 days to review and incorporate received comments, and provide 7 days of notice of any revised draft incorporating those public comments. (§ 65585, subd. (b)(1).)

The local government must then submit its housing element for review by HCD, which issues findings on whether the housing element complies with state law. (See § 65585, subd. (c); section III.A, *post*.)

Important here, if HCD finds a local government's housing element does not substantially comply with state law and the local government then attempts to fix those deficiencies, the local government must again comply with the statutory notice-and-comment process. (§ 65585, subds. (b), (f); section III.A, *post*.) And the local government must finally adopt its housing-element update, after considering any public comments, "by resolution" of the "legislative body," putting the public on notice of the law. (§ 65356.)

Only if a local government meets both the Government Code's substantive requirements and its procedural requirements is its housing element in "substantial compliance" with state law. (§ 65585.03 [expressly referencing section 65585, which lays out procedural requirements, when defining "substantial compliance"].)

If a local government fails to timely adopt a substantially-compliant housing element, it faces several consequences. Constituents and pro-housing organizations can bring lawsuits like this one seeking writ relief that would compel the local

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government to bring its housing element into substantial compliance within 120 days. (§ 65754; section IV.A, *post*.) The California Attorney General may also impose fines on the local government. (§ 65009.1.)

And the jurisdiction is also opened up to application of the "Builder's Remedy," which preempts the jurisdiction's zoning requirements as applied to projects that meet certain affordability requirements—substituting the state's (usually higher) height and density limits for those set by the local government. (§ 65589.5, subd. (d).) The Builder's Remedy is a power tool for creating new housing—dispelling La Habra's suggestion that a court finding its housing element does not substantially comply with state law would "only create delay in the production of housing." (RB 19.) During the period in which La Habra takes the statutorily required actions to come into compliance with state law, the Builder's Remedy would apply its default density limits to eligible housing applications. (See § 65589.5, subd. (h)(5).)

II. Public participation is key to ensuring local governments' housing elements are accurate and based on realistic assumptions.

Given the sheer number of local jurisdictions within California, HCD lacks the resources to comprehensively ensure that every jurisdiction is complying with state housing-element law. Nor does HCD necessarily have the knowledge of local conditions needed to assess, for example, whether a site included in an inventory list has a "realistic and demonstrated potential"

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for residential development. (§ 65583, subd. (a)(3).) But a housing element serves its purpose—having a local government meaningfully demonstrate how it will meet its share of regional housing needs—only if the sites it designates will actually lead to new housing. Public participation in this process is therefore essential, bringing to bear local knowledge and providing a check against inaccurate or overly optimistic housing elements.

Amici YIMBY Law and CalHDF regularly coordinate with other housing advocates around the state, including Abundant Housing LA, Inner City Law Center, petitioner and appellant Californians for Homeownership, Southern California Association of Nonprofit Housing, People For Housing, and many others including affiliate chapters of YIMBY Action, to review and comment on local governments' housing elements. Amici and other housing advocates regularly find issues, both factual and legal, with housing-element drafts, and have used the public comment and public hearing process to improve those drafts and better provide for future housing development. For instance:

- In Orinda, housing advocates commented on the draft housing element's inclusion of small and unrealistic sites in its proposed housing inventory, including a 1-foot-wide strip of land and a hillside in a high-risk fire zone. (See Laurer, *A 1-Foot-Wide Piece of Land? A Tiny Banana-Shaped Parcel? They Were Almost Part of Orinda's Housing Plan* (Feb. 2, 2023) East Bay Times <https://tinyurl.com/3s37vnd3> [as of May 19, 2025].)

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- In San Francisco, housing advocates commented on the draft housing element's plan to include low-income housing next to a property with spilled toxic metals and chemicals in need of remediation. (Dineen, *This Bay Area Community Wants To Put Low-Income Housing Next To A Toxic Dump* (Feb. 24, 2023) San Francisco Chronicle <https://tinyurl.com/mvc5h8z3> [as of May 19, 2025].) Advocates also more generally pushed back on the assumptions underlying the housing element's sites inventory, contending the city was overcounting capacity for development by about 30,000 units. (Letter from David Broockman, Associate Professor of Political Science at UC Berkeley to Kimia Haddadan, Project Manager for the 2022 Housing Element, San Francisco Planning Department (May 31, 2022) <https://tinyurl.com/bdd55hyv> [as of May 19, 2025].) Eventually, the city added a new program that will require additional rezoning and the removal of certain housing restraints if the city does not permit a target amount of housing by 2027. (San Francisco Planning Department, Housing Element: 2022 Update (Jan. 2023), p. 160 <https://tinyurl.com/4zxhsn9j> [as of May 19, 2025].)

- In Walnut Creek, housing advocates conducted detailed research that showed several sites were inaccurately included in the city's inventory. One site, for example, was listed as vacant and developable—but it was, in fact, owned

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by a water conservation district that had no plans to allow development there. (Letter from East Bay for Everyone to Walnut Creek City Council <https://tinyurl.com/344367ru> [as of May 19, 2025].)

- And in Capitola, housing advocates requested a commitment from the city to facilitate and monitor redevelopment of the Capitola Mall building for residential use—a commitment that has the potential to produce 1,777 units of housing, including 15 percent reserved for low-income residents. (City of Capitola, Housing Element of the General Plan 2023–2031 <https://tinyurl.com/27aunrp8> [as of May 19, 2025].)

III. La Habra failed to provide statutorily required notice and comment after the state rejected La Habra's housing element as deficient.

A. Government Code section 65585 specifically requires 30 days of notice and comment after the state rejects a housing element.

In this case, however, the public did not have an opportunity to comment on what La Habra contends is now its housing element. After HCD rejected La Habra's housing element, La Habra revised it behind closed doors.

Section 65585 sets forth a specific procedure for a local government's review, revision, and adoption of a housing element—including what it must do after HCD finds its housing element does not substantially comply with state law.

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As mentioned, a local government must submit its draft housing-element update or amendment to HCD for review. (See § 65585, subds. (b)(3), (d).)[3] HCD then makes written findings on whether the housing element is in substantial compliance with state law—findings which the local government's "legislative body shall consider." (§ 65585, subd. (e).)

If HCD finds a local government's draft housing element is not in substantial compliance with state law, the local government's "legislative body shall take one" of two options. (§ 65585, subd. (f).) The local government can either (1) "[c]hange the draft element or draft amendment to substantially comply with" state law, or (2) "[a]dopt the draft element or draft amendment without changes." (*Ibid.*) If a local government takes the latter option, the "legislative body shall include in its resolution of adoption written findings which explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with this article despite the findings" by HCD. (§ 65585, subd. (f)(2).)

When a local government takes the former option, subdivision (b) establishes a multi-step process to use when amending its housing element. First, the local government "shall make the first draft revision . . . available for public comment for at least 30 days." (§ 65585, subd. (b)(1).) Second, "if any comments are received," the local government "shall take at least

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[3] Section 65585 has not substantively changed in recent years. But for clarity, this section of the brief cites the version of that statute in effect in 2022, when HCD issued its second and third findings that La Habra's housing-element update was deficient.

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10 business days . . . to consider and incorporate public comments." (*Ibid.*; accord, § 65585, subd. (b)(2).) Third, after incorporating comments, the local government "shall post" that further revised version for "at least seven days." (§ 65585, subd. (b)(1).) Only then is the local government authorized to submit its amended housing element to HCD and have its legislative body adopt the amended housing element. (*Ibid.*)

AB 2023, which was adopted in 2024 and is merely "declaratory of[ ] existing law," makes this interaction between subdivisions (b) and (f) even clearer. (Stats. 2024, ch. 269, § 4.) AB 2023 amends section 65585, subdivision (f)(1) to read: "Any change to a draft element or draft amendment pursuant to subparagraph (A)," which refers to HCD findings on noncompliance, "shall be completed in accordance with subdivision (b)." (*Ibid.*) As the Senate Judiciary Committee report on AB 2023 explained, "local governments must still comply with the procedural requirements on them when they make changes to a draft housing element or amendment in response to HCD finding that the element or amendment is not in compliance." Important here, "That means [a local government] must submit the amended draft to HCD, *and must first make the draft available to the public for at least 30 days*." (Exhibit A to Appellant's Motion and Request for Judicial Notice In Support of Appellant's Opening Brief 12, emphasis added.)

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B. La Habra failed to provide that statutorily required notice and comment.

HCD three times found that La Habra's housing element did not substantially comply with state law. (See 1 AA 90 [¶ F] [November 2021], 63 [referencing HCD's "May 23, 2022 review"], 63–69 [November 2022].) The third time came in November 2022, when HCD informed La Habra that "the City has not completed the housing element process for the [current] cycle" and that "additional revisions are necessary to fully comply with State Housing Element Law," providing a five-page appendix laying out required revisions. (1 AA 63–69.)

At that juncture, La Habra had, as explained, two options under section 65585, subdivision (f). It could adopt the housing-element update as-is along with findings explaining why HCD was incorrect. Or, it could change the draft housing element using the required process that begins with 30 days of notice and comment. (*Ante*, section III.A.) But La Habra took neither of these statutorily available options, and instead had its staff revise its housing element behind closed doors. It then emailed a new housing element to the public for 10 days before submitting that new version to HCD. (1 AA 71; 2 AA 513.)

However one views those staff-made edits, they were procedurally improper. The staff-made edits might be construed as a separate amendment to La Habra's housing element—made after La Habra (improperly) purported to adopt its housing-

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element update in September 2022.[4] Or they might be construed as further changes to La Habra's draft update, since that update was never properly adopted. Either way, La Habra was required to follow the public-participation process laid out in section 65585, subdivision (b), which requires 30 days of notice and comment on the revised draft, followed by 10 days in which the city must consider the public's comments.

By departing from the process required to change a housing element, La Habra has also introduced significant confusion. Housing elements carry legal consequences. Yet in La Habra, the public has no assurance of whether La Habra's changes to its housing element are legally operative or which of the competing versions might apply to a housing proposal. The trial court should have granted writ relief to vindicate the public's participation rights and to alleviate the confusion La Habra's statutory violations have created.[5]

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[4] In November 2021 and May 2022, HCD found the draft housing-element updates La Habra submitted to be deficient. (1 AA 63, 90 [¶¶ F, H].) After the May 2022 denial, La Habra amended its draft and then purported to adopt it—without first resubmitting it to HCD, as required. (See 1 AA 90–92 [¶¶ H–K, § 4].) Therefore, this September 2022 "adoption" of the housing element was also procedurally improper. (See § 65585, subd. (b) [requiring submission of draft to HCD].)

[5] Despite Californians for Homeownership identifying the notice-and-comment violation below, the trial court never assessed whether La Habra complied with section 65585. (See 1 AA 7–10 [§§ 18–19] [verified petition for writ of mandate], 51 [opening brief]; 4 AA 1061–1068 [trial court order denying writ].)

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C. La Habra's attempts to excuse its statutory violation fail.

La Habra makes several arguments attempting to resist the conclusion that it violated section 65585, subdivision (b)'s requirement to provide 30 days of notice and comment.

La Habra mainly touts the number of hearings it held on *prior* versions of the housing element and argues that public participation was "meaningful." (RB 1, 12, 19, 22, 24, 31.) Regardless of whether La Habra itself believes it allowed enough public participation, the dispositive question is what the *statute* requires. Section 65585 requires notice and comment, and the city council's consideration of those comments both before and after HCD rejects a draft housing element as deficient. That did not happen here with La Habra's post-"adoption" changes.

La Habra also briefly suggests that it "*did* provide notice and an opportunity for public review and comment." (RB 24.) But the text of La Habra's email circulating the revised housing element forecloses any notion that La Habra provided an opportunity for the public to *comment*. It refers to the revised draft as "final" and says it is "available for public *review* by clicking on the Housing Element link below." (1 AA 71, emphasis added.) The email did not invite comment or indicate that the city would review and incorporate those comments before submitting the revised draft to HCD.

La Habra also argues that it satisfied the third step laid out in section 65585, subdivision (b): providing at least 7 days of just notice. (RB 33.) But that step presupposes 30 days of notice and comment and applies only *after* the city has received and

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incorporated the comments from the 30-day period. Nothing in section 65585, subdivision (b) permits skipping the first two steps and going straight to third step, and this course of conduct does not comply with subdivision (b)'s text or its animating purpose of allowing for the city's consideration of public input.

La Habra also contends that, even before it had staff make further revisions and before it submitted those revisions to HCD, it had somehow adopted a finalized housing element. (RB 32–33.) But this argument defies commonsense and conflicts with the statutory text. A document cannot be both finalized and in flux—particularly when that document has legal consequences and must put the public on notice. Similarly, a city council cannot adopt by resolution a housing element when it is anticipating revisions and does not even know what that housing element will ultimately look like. (See AOB 15–16.) That practice, if allowed, would undermine the Legislature's intent to ensure local governments meaningfully address the state's housing crisis by showing their work in their housing elements.

Moreover, if La Habra had intended to adopt its housing element in September 2022 after receiving its May 2022 HCD rejection, then it would have needed to issue findings explaining why HCD's rejection was incorrect. (§ 65585, subd. (f).) But La Habra never attempted to do so—showing that La Habra was likely operating within the revision route.

Finally, even if La Habra had adopted an update in September 2022, that would have just rendered the subsequent changes a separate amendment to its housing element. That

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separate amendment would have also needed to go through the notice-and-comment process. So however the issue is framed, La Habra omitted statutorily required public participation.

State law does not permit a local government to have it both ways. A local government cannot avoid the consequences of not timely adopting a housing-element update by purporting to adopt a "final" updated housing element after receiving an HCD rejection (albeit without issuing the necessary findings defying HCD) while at the same time continuing to change that update to address the deficiencies identified by HCD. La Habra's post-"adoption" changes to its element were either a subsequent draft of its housing-element update or a separate amendment. Either way, La Habra needed to go through the procedure that state law requires, most notably 30 days of notice and comment and city council consideration of any comments submitted by the public. This court should grant writ relief to Californians for Homeownership directing La Habra to follow that process.

IV. The trial court erred in concluding that, to establish prejudice from a public-participation violation, a litigant must prove the local government would have probably changed its housing element.

A. Housing-element procedural challenges are subject to a unique harmlessness inquiry: whether the element *substantially complies* with state law.

Along with erring on the merits, the trial court erred when assessing prejudice.

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The Planning and Zoning Law[6] establishes a detailed framework for challenging a local government's housing element and reviewing such a challenge. "[A]ny interested party" may file a writ of mandate seeking a determination that a jurisdiction's housing element "does not substantially comply" with state law. (§ 65587, subd. (b) [provision specifically governing housing-element challenges]; see § 65751 [parallel provision for challenges to a general plan or any component thereof].) "[I]f the court . . . finds" the housing element "does not substantially comply" with state law, then it can direct the jurisdiction to bring its housing element "into compliance . . . within 120 days." (§§ 65754, 65755; see, e.g., *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193, 252 (*Martinez*) ["the trial court stated in the judgment it would issue a writ compelling" the local government to " 'adopt, within 120 days, a housing element . . . that substantially complies with Government Code section 65754' "].)

This "substantial compliance" standard *is* the prejudice showing that a petitioner must make when challenging a housing element. "Substantial compliance" means " '*actual* compliance in respect to the substance essential to every reasonable objective of the statute,' as distinguished from 'mere technical imperfections of form.' " (*Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 348 (*Camp*).) In other words, noncompliance is " '*harmless*[ ]' only where it does not compromise any 'reasonable objective' " of the governing statutory scheme. (*Sims v.*

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[6] That is the short title of title VII of the Government Code. (See § 65000.)

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Department of Corrections & Rehabilitation (2013) 216 Cal.App.4th 1059, 1073 (*Sims*), emphasis added [applying the Administrative Procedure Act's (APA) substantial-compliance provision].)

The Legislature has confirmed that substantial compliance—as described in *Camp*—is the harmlessness standard that governs housing-element challenges. (See *Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1058; *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 297 (*Buena Vista*).)[7]

And for the past forty-plus years, courts have used that standard to sort statutory violations that warrant writ relief from those that do not. (See, e.g., *Martinez*, *supra*, 90 Cal.App.5th at p. 252 [city's action "does not substantially comply with the Housing Element law" because it allowed for housing below a state-imposed density level]; *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1118 [the city's "housing element fail[ed] to substantially comply with the statutory mandate of identifying adequate sites which [would] be available through an action program for development of emergency shelters and transitional housing for the homeless"]; *Buena Vista*, *supra*, 175 Cal.App.3d at p. 304 [housing element's failure "to include any *description*" of public participation involved in the adoption

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[7] The statute quoted in these decisions reads: "It is the intent of the Legislature that the term 'substantially complies,' as used in subdivision (b) of [s]ection 65587, be given the same interpretation as was given that term by the court in *Camp*." (Stats. 1984, ch. 1009, § 44, p. 3512.)

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process was a mere "technical imperfection" that did not amount to a lack of substantial compliance (emphasis added)]; *Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 696–700, 705 [land-use element does not "substantially comply" with state law because it fails to specify recommended "population density" standards "for the various districts and other territory" covered by the element], superseded by statute on another ground as stated in *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1173.)

B. The substantial-compliance standard displaces the different-result harmlessness standard that the trial court applied.

When assessing prejudice here, the trial court did not conduct a substantial-compliance analysis. Rather than apply this standard tailored to housing-element challenges, the trial court applied the Planning and Zoning Law's generic prejudice standard, which requires a litigant to show "a different result would have been probable if the error had not occurred." (§ 65010, subd. (b); 4 AA 1066–1068.) This was error.[8]

To begin, neither the trial court's order nor La Habra's respondent's brief cites a single case applying section 65010's different-result harmless-error standard to a housing-element challenge. (See 4 AA 1061–1068; RB 29–32.) Nor are amici aware of any. Instead, as explained, courts have consistently

[8] Californians for Homeownership's opening brief also explains that, even if that section were applied, La Habra's statutory violations are prejudicial under case law interpreting it. (See AOB 17–20.)

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used the substantial-compliance standard to sort prejudicial errors from nonprejudicial ones in housing-element challenges.

The trial court's application of the generic prejudice standard also violated basic principles of statutory interpretation. On this front, *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528 (*Hamilton & High*), is illustrative. In that case, the Sixth District held that the Mitigation Fee Act's specific remedial framework displaces the Planning and Zoning Law's generic harmless-error provision when a litigant brings an action under that statute. (*Id.* at pp. 567–572.) *Hamilton & High*'s reasoning dictates the same result here.

First, when two statutory provisions conflict, courts "give precedence" to the "more specific" provision over the more "general provision." (*Hamilton & High*, *supra*, 89 Cal.App.5th at p. 572; accord, Code Civ. Proc., § 1859 ["when a general and particular provision are inconsistent, the latter is paramount to the former"].) The two provisions here conflict, providing two different standards for when a statutory violation can be deemed harmless. And the two provisions could not be further apart in their levels of generality. The provision the trial court invoked applies to all of title 7 of the Government Code—which encompasses three divisions, over 50 chapters, hundreds of sections, and countless types of government action. By contrast, the provision that the Court of Appeal has applied for the past forty-plus years is laser focused—applying only to writ proceedings challenging a general plan or element thereof like a

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housing element. That discrepancy makes this an easy case for applying the specific-over-general canon.

Second, courts " 'will not interpret a statute in a way that frustrates its fundamental purpose.' " (*Hamilton & High*, *supra*, 89 Cal.App.5th at p. 571.) Here, as in *Hamilton & High*, the "if-then nature of the statutory mandate" precludes imposing another precondition to relief. (*Id.* at pp. 571–572.) "[I]f the court" finds a housing element "does not substantially comply" with state law, then "[t]he city . . . shall bring" its element into compliance within 120 days. (§ 65754.) That if-then structure leaves no room for the different-result showing that the trial court required and La Habra urges on appeal.

Third, courts "seek to avoid 'interpretations that render any language surplusage.' " (*Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 691; *Hamilton & High*, *supra*, 89 Cal.App.5th at p. 572 [adopting the interpretation that "harmonize[s] and give[s] effect to each" statutory provision].) If the heightened, different-result standard were imported into this context, then the substantial-compliance standard would have no effect—despite the Legislature expressly selecting that less onerous standard to govern housing-element challenges.

Moreover, applying the substantial-compliance standard to the type of procedural violation that occurred here, rather than the different-result standard, makes sense. The interest that the Legislature sought to protect is the interest in having the public review and comment on the amendment to the housing element. The exercise of this interest does not always necessarily result in

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the local government changing its amendment—the purpose of the statute is to ensure that the public has the opportunity to *review* the local government's proposal and that the local government can be *informed* by public input, regardless whether that public input drives an actual change in the element. Furthermore, whether a local government actually changes a proposed amendment to a housing element may ultimately depend on many factors besides the results of the public comment, including political, environmental, and economic factors. Thus, requiring the challenger to show that, had the local government complied with the notice-and-comment process, it would necessarily have changed the amendment is both irrelevant to whether the Legislature's purpose in passing the statute was undermined and in many cases unnecessarily burdensome for the challenger, which likely lacks access to information about all the factors that drove the local government's final decision.

C. The complete omission of statutorily required notice and comment is not harmless under the substantial-compliance standard.

La Habra's failure to allow notice and comment on a set of changes to its housing element was not a "mere technical imperfection[ ] of form" that can be deemed "harmless" under the substantial-compliance standard. (*Camp*, *supra*, 123 Cal.App.3d at p. 348.) Instead, that violation undermines the "reasonable objective" of section 65585, subdivisions (b) and (f): giving the public a chance to weigh in and have its comments considered as

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a local government makes the revisions needed to earn certification from HCD. This conclusion is further confirmed by the importance of public input on housing elements. (*Ante*, section II.)

Sims's application of the APA's substantial-compliance standard also shows that La Habra's violation here cannot be deemed harmless. In *Sims*, the plaintiff argued that the rulemaking the California Department of Corrections and Rehabilitation (CDCR) used to adopt its lethal-injection method was procedurally deficient. (*Sims*, *supra*, 216 Cal.App.4th at pp. 1063–1067.) The plaintiff argued, among other things, that CDCR failed to explain its "rejection of alternatives" to the "three-drug protocol" it adopted and "failed to make the complete rulemaking file available to the public." (*Id.* at pp. 1066–1067.) On appeal, CDCR conceded it violated the APA but argued it still substantially complied with the APA's requirements because of "the high level of public participation in the rulemaking process." (*Id.* at pp. 1071–1072.)

The First District found CDCR's argument "far too limited and simplistic." (*Sims*, *supra*, 216 Cal.App.4th at p. 1073.) It explained that compliance with public-participation requirements is "not a numbers game" and that the public can weigh in "on the merits" and meaningfully only if it has "timely received all available information" relevant to the proposed government action. (*Ibid.*) CDCR's statutory violations prevented that quality of public input and were therefore not harmless under the APA's substantial-compliance standard.

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The same is true here. The public never had the opportunity to comment on the version of La Habra's housing element that it purportedly adopted. La Habra's "numbers game" argument fails and the "amount of public participation" on a prior version "cannot diminish the significance" of La Habra's statutory violations regarding its subsequent changes to its housing element. (*Sims*, *supra*, 216 Cal.App.4th at pp. 1073–1074.)

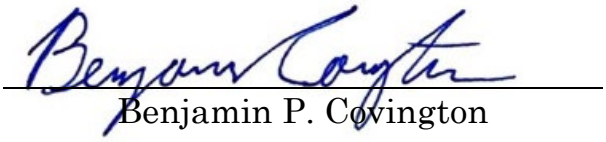
CONCLUSION

For the above reasons, this court should reverse the trial court's decision denying writ relief, and make clear (1) that La Habra needed to provide the statutorily required 30 days of notice and comment, and (2) that failure to comply with this notice-and-comment requirement is reviewed using the substantial-compliance standard.

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Dated: May 23, 2025

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PROOF OF SERVICE

Californians for Homeownership, Inc. v. City of La Habra
Case No. G064286

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On May 23, 2025, I served true copies of the following document(s) described as **AMICI CURIAE BRIEF OF YIMBY LAW, CALIFORNIA HOUSING DEFENSE FUND, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA IN SUPPORT OF PETITIONER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Serena L. Steiner

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