



# Housing Policy and Practices Advisory Group

## Staff Report: Housing Element Implementation

**Overview:** Per SB 375, HCD is reviewing most housing elements on an eight (8) year cycle instead of five (5) year cycle. After HCD has determined element compliance, some jurisdictions: (1) do not report on progress in meeting requirement (APR); (2) do not follow through on key actions in the housing element (e.g. rezoning, ordinances, removing constraint) and/or (3) take conflicting actions (e.g. growth control, site change, downzoning, use conditions) that do not comply with the housing element or State housing law and that fundamentally change the contents of the element found in compliance.

### HCD Preliminary Proposals:

*Proposal A:* Amend statute to expressly enable HCD to (1) find a housing element in conditional compliance based upon a jurisdiction’s commitment to complete specified action(s) by a date early in the planning period and (2) rescind compliance when a jurisdiction’s actions or inactions conflict with major housing element provisions that HCD determined to be in compliance.

Type of Recommended Change			
<input type="checkbox"/> Policy	<input type="checkbox"/> Procedural	<input checked="" type="checkbox"/> Legislative	<input type="checkbox"/> No Change

*Proposal B:* Develop a technical assistance paper on Government Code Section 65863 (no-net-loss Law), clarifying, among other things, how capacity calculation is done in relationship to the income categories.

Type of Recommended Change			
<input checked="" type="checkbox"/> Policy	<input type="checkbox"/> Procedural	<input type="checkbox"/> Legislative	<input type="checkbox"/> No Change

*Proposal C:* Provide HCD with more authority related to the implementation of housing elements. Among other things, development of technical assistance program to assist jurisdictions in implementing the housing element, this may include: site visits, clearinghouse of best practices, development of sample ordinances.

Type of Recommended Change			
<input checked="" type="checkbox"/> Policy	<input checked="" type="checkbox"/> Procedural	<input type="checkbox"/> Legislative	<input type="checkbox"/> No Change

*Proposal D:* Identify incentives for jurisdictions to implement the housing element. For example, identify funding programs that could interface with housing element compliance and implementation.

Type of Recommended Change			
<input checked="" type="checkbox"/> Policy	<input type="checkbox"/> Procedural	<input type="checkbox"/> Legislative	<input type="checkbox"/> No Change

*Proposal D:* Amend statute to require charter cities to submit housing element annual progress reports.

Type of Recommended Change			
<input type="checkbox"/> Policy	<input type="checkbox"/> Procedural	<input checked="" type="checkbox"/> Legislative	<input type="checkbox"/> No Change

**Background Information:**

**Relevant Government Code Sections:**

**65400.**

(a) (2) Provide by April 1 of each year an annual report to the legislative body, the Office of Planning and Research, and the Department of Housing and Community Development that includes all of the following:

(A) The status of the plan and progress in its implementation.

(B) The progress in meeting its share of regional housing needs determined pursuant to Section 65584 and local efforts to remove governmental constraints to the maintenance, improvement, and development of housing pursuant to paragraph (3) of subdivision (c) of Section 65583.

The housing element portion of the annual report, as required by this paragraph, shall be prepared through the use of forms and definitions adopted by the Department of Housing and Community Development pursuant to the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2). Prior to and after adoption of the forms, the housing element portion of the annual report shall include a section that describes the actions taken by the local government towards completion of the programs and status of the local government's compliance with the deadlines in its housing element. That report shall be considered at an annual public meeting before the legislative body where members of the public shall be allowed to provide oral testimony and written comments.

The report may include the number of units that have been substantially rehabilitated, converted from nonaffordable to affordable by acquisition, and preserved consistent with the standards set forth in paragraph (2) of subdivision (c) of Section 65583.1. The report shall document how the units meet the standards set forth in that subdivision.

(C) The degree to which its approved general plan complies with the guidelines developed and adopted pursuant to Section 65040.2 and the date of the last revision to the general plan.

(b) If a court finds, upon a motion to that effect, that a city, county, or city and county failed to submit, within 60 days of the deadline established in this section, the housing element portion of the report required pursuant to subparagraph (B) of paragraph (2) of subdivision (a) that substantially complies with the requirements of this section, the court shall issue an order or judgment compelling compliance with this section within 60 days. If the city, county, or city and county fails to comply with the court's order within 60 days, the plaintiff or petitioner may move for sanctions, and the court may, upon that motion,

grant appropriate sanctions. The court shall retain jurisdiction to ensure that its order or judgment is carried out. If the court determines that its order or judgment is not carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of this section are fulfilled. This subdivision applies to proceedings initiated on or after the first day of October following the adoption of forms and definitions by the Department of Housing and Community Development pursuant to paragraph (2) of subdivision (a), but no sooner than six months following that adoption.

#### **65585.**

(b) At least 90 days prior to adoption of its housing element, or at least 60 days prior to the adoption of an amendment to this element, the planning agency shall submit a draft element or draft amendment to the department. The department shall review the draft and report its written findings to the planning agency within 90 days of its receipt of the draft in the case of an adoption or within 60 days of its receipt in the case of a draft amendment.

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

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

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

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

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

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

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

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

#### **65863.**

(a) Each city, county, or city and county shall ensure that its housing element inventory described in paragraph (3) of subdivision (a) of Section 65583 or its housing element program to make sites available pursuant to paragraph (1) of subdivision (c) of Section 65583 can accommodate its share of the regional housing need pursuant to Section 65584, throughout the planning period.

(b) No city, county, or city and county shall, by administrative, quasi-judicial, legislative, or other action, reduce, or require or permit the reduction of, the residential density for any parcel to, or allow development of any parcel at, a lower residential density, as defined in paragraphs (1) and (2) of subdivision (g), unless the city, county, or city and county makes written findings supported by substantial evidence of both of the following:

- (1) The reduction is consistent with the adopted general plan, including the housing element.
- (2) The remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584.
- (c) If a reduction in residential density for any parcel would result in the remaining sites in the housing element not being adequate to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584, the jurisdiction may reduce the density on that parcel if it identifies sufficient additional, adequate, and available sites with an equal or greater residential density in the jurisdiction so that there is no net loss of residential unit capacity.
- (d) The requirements of this section shall be in addition to any other law that may restrict or limit the reduction of residential density.
- (e) This section requires that a city, county, or city and county be solely responsible for compliance with this section, unless a project applicant requests in his or her initial application, as submitted, a density that would result in the remaining sites in the housing element not being adequate to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584. In that case, the city, county, or city and county may require the project applicant to comply with this section. The submission of an application for purposes of this subdivision does not depend on the application being deemed complete or being accepted by the city, county, or city and county.
- (f) This section shall not be construed to apply to parcels that, prior to January 1, 2003, were either (1) subject to a development agreement, or (2) parcels for which an application for a subdivision map had been submitted.
- (g) (1) If the local jurisdiction has adopted a housing element for the current planning period that is in substantial compliance with Article 10.6 (commencing with Section 65580) of Chapter 3, for purposes of this section, "lower residential density" means the following:
- (A) For sites on which the zoning designation permits residential use and that are identified in the local jurisdiction's housing element inventory described in paragraph (3) of subdivision (a) of Section 65583, fewer units on the site than were projected by the jurisdiction to be accommodated on the site pursuant to subdivision (c) of Section 65583.2.
- (B) For sites that have been or will be rezoned pursuant to the local jurisdiction's housing element program described in paragraph (1) of subdivision (c) of Section 65583, fewer units for the site than were projected to be developed on the site in the housing element program.
- (2) (A) If the local jurisdiction has not adopted a housing element for the current planning period within 90 days of the deadline established by Section 65588 or the adopted housing element is not in substantial compliance with Article 10.6 (commencing with Section 65580) of Chapter 3 within 180 days of the deadline established by Section 65588, "lower residential density" means any of the following:
- (i) For residentially zoned sites, a density that is lower than 80 percent of the maximum allowable residential density for that parcel.
- (ii) For sites on which residential and nonresidential uses are permitted, a use that would result in the development of fewer than 80 percent of the number of residential units that would be allowed under the maximum residential density for the site.
- (B) If the council of governments fails to complete a final housing need allocation pursuant to the deadlines established by Section 65584.05, then for purposes of this paragraph, the deadline pursuant to Section 65588 shall be extended by a time period equal to the number of days of delay incurred by the council of governments in completing the final housing need allocation.

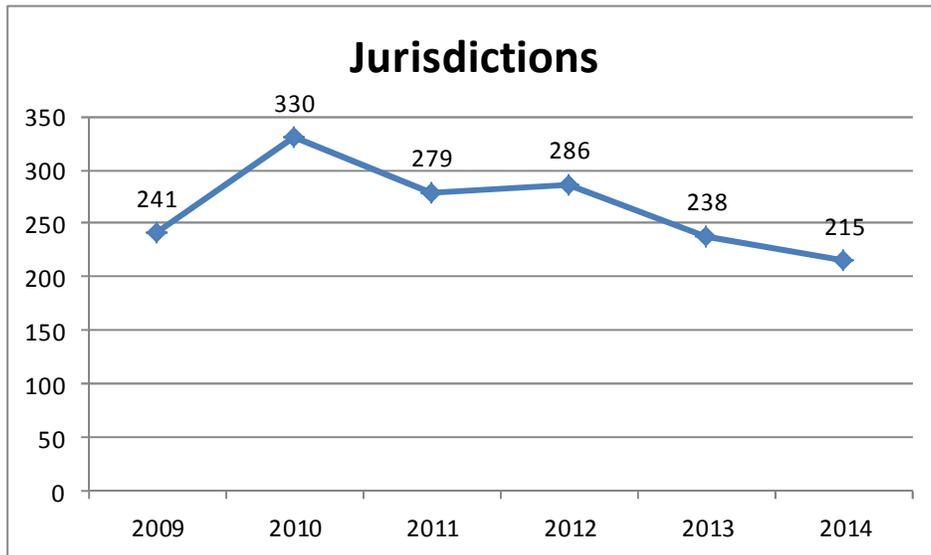
Discussion:

*Annual Progress Reports:*

Government Code Section 65400 requires each governing body (City Council or Board of Supervisors) to prepare an annual report on the status and progress in implementing the jurisdiction's housing element of the general plan using forms and definitions adopted by the Department of Housing and Community Development (Department). In 2010 the Department adopted regulations for the content of housing element annual progress report which can be found in Title 25, Division 1, Chapter 6, Subchapter 2, Sections 6200, 6201, 6202, and 6203.

The purpose of the report is to apprise decision makers and the public of the progress towards meeting housing goals to be accountable to the public and inform priorities and resource allocations. The Department uses these reports to verify implementation of key programs such as rezoning, and to collect data used in various reports. Some Council of Governments including SANDAG and ABAG also collect this information. Stakeholders use this data to monitor progress on housing issues in a variety of jurisdictions. Currently, this tool is underutilized as not all jurisdictions report (Charter Cities are exempt from reporting), and the content of the report is not closely reviewed.

**Table 1**  
**Number of APRs received for CY 2009 - 2014**



## *Enforcement*

With the passing of SB 375 most jurisdictions are on a longer (or electing to be on the longer) planning period of eight years. In order for the housing element to continue to be a useful tool in addressing California's housing crisis on the longer planning horizon, jurisdictions need to implement the adopted programs and policies. Tools the Department has utilized to ensure continued compliance with state housing element requirements include 1) conditional compliances, 2) enforcement of statutory requirements, and 3) targeted review of portions of the housing element when jurisdictions make amendments either directly to the housing element or de-facto amendments due to changes in specific plans or zoning codes. Examples of actions the Department has taken in each of these areas are presented below:

1) Department uses its review authority to condition compliance on key programs which, once implemented allows the housing element to be in compliance with State Law. This is a critical tool as but for the implementation of these programs, the housing element would fail to meet the requirements of housing element law. Areas that conditional compliances are typically used are in the sites inventory (i.e. rezoning programs) and governmental constraints (i.e. removal of a CUP for MF).

For Example: Sausalito

The City of Sausalito updated their housing element late in the 4<sup>th</sup> cycle. The sites inventory relied on construction of second units to meet a portion of their RHNA requirement. While the City had a high pent-up demand, its zoning code did not allow second units and the element included a program to adopt the second unit ordinance within a year so that there would be sufficient time in the planning period for construction of legal second units as anticipated in the analysis. The use of a conditional compliance in this case allowed the department flexibility to find the City in compliance and ensure that the City had the ability to meet the adequate sites requirement of housing element law. Subsequently the City did adopt the second unit ordinance and the condition was removed.

2) There are a few areas within the statute that require actions to be taken by a date certain for the housing element to comply with state law. These situations include rezoning within the first year of the planning period to accommodate a shortfall from the previous planning period, zoning for emergency shelters, and rezoning to accommodate the jurisdictions shortfall for the current housing element. Should the jurisdiction fail to implement these programs, the housing element no longer complies with state law and the Department may change the jurisdiction's compliance status.

For Example: Placerville

HCD certified Placerville's 5<sup>th</sup> cycle housing element in compliance on March 5, 2014. The element was found to be in compliance as it included a program to rezone sufficient sites to accommodate a shortfall of 106 units from the 4<sup>th</sup> housing element cycle and 133 units from the 5<sup>th</sup> housing element cycle by October 31, 2014. The rezoning was not completed. HCD received third party comments regarding actions taken by the City to create a new zone to accommodate the required rezoning. No sites had been rezoned to the newly-created zone. As a result HCD rescinded the City's housing element compliance on March 19, 2015. Subsequently, HCD met with the City to discuss housing element status. Primary reasons cited by the City for why the rezoning wasn't completed include the need to complete an EIR due to traffic impacts and lack of funding for the EIR. In addition, strong objections were stated by property owners. Currently Placerville is out of compliance with State Law.

3) Occasionally a jurisdiction will take an action such as amendment of another element of the general plan that effects the housing element, establishment of a growth control ordinance or major modifications to sites identified in the sites inventory, etc. that constitute substantive changes and conflicts with the analysis and information within the housing element. Typically, jurisdictions make the required modifications to the general plan (housing element) prior to changes to subordinate documents. However, there are occasions which the reverse is true. The Department considers such changes as de-facto amendments to the housing element. In such cases, on request of third party commenters, we have reviewed these changes to determine compliance with State Housing Element Law.

For Example: Huntington Beach

On May 4, 2015 the City's amended provisions of the Beach and Edinger Corridors Specific Plan (BECSP) to change the maximum number of allowable units to an amount less than the City's remaining regional housing need allocation. This action fundamentally altered the inventory of available sites and resulted in inadequate sites to accommodate the City's housing need. In addition development standards were changed reducing unit density by requiring additional parking and restricting development flexibility by requiring a conditional use permit posing a constraints to the development of housing, particularly on sites identified in the land inventory to meet the City's remaining housing need. The Department found amendments to the BECSP changed the premise upon which the Department's prior Certification was based, thereby nullifying that prior Certification. The City has since hired a consultant to make necessary changes to their housing element.

### Relevant survey information:

#### *Annual Reports (Housing Element Annual Progress Report (APR))*

- HCD should make available the information from the annual reports both in their original form and in a summary that will be useful to assess performance of the programs and housing production in each locality.
- Minimum standards for the contents of APR should be set and enforced.
- Monitoring of program implementation already done through APR. Might like to see public (website) tally of housing unit production
- Tighten requirements around APR submissions to HCD so the public and advocacy groups can monitor progress.
- The existing systems that HCD uses to collect and maintain this data are cumbersome and make it hard to see and understand regional and local patterns related to performance in meeting housing goals.

#### *Conditional Compliance and Compliance Revocation*

- Stronger and more consistent use of conditional compliance would help enforcement, as would a clear process for revocation of HCD's finding of compliance during the planning period if key programs or rezoning commitments are not implemented.
- HCD's rescinding element compliance is an appropriate mechanism to assist the state in ensuring that jurisdictions comply with housing element law. Rescinding element compliance during the planning period could occur when certain provisions (e.g. rezone requirements) are not met and/or when other actions are taken that are inconsistent with the element and/or are unlawful impediments to the development of low-income housing.
- Given the current drought conditions, more flexibility (adding incentives, flexible min. density standards, etc.) and less punitive measures (rescinding element compliance) will likely be in order.
- Rescinding element compliance should not be pursued; enough resources are already devoted to 'paper' processes which often do not yield product.
- Once compliance findings (letter) are issued by HCD, the County does not support the idea of rescinding a jurisdiction's housing element. As an option, the County would like an option for mid-cycle HE amendments in order to remain in compliance.
- Some MPOs have conditioned certain federal transportation funds on jurisdictions obtaining HCD certification of the housing element. We are seeing cities game the system by submitting elements to HCD that make no mention of any constraints that would warrant a moratorium on housing, then getting certified and thus eligible for transportation funds, then proposing a moratorium or other anti-housing policy.

#### *Greater Enforcement of Housing Elements*

- Given that many communities now have 8 years to implement their housing elements it is critical that programs in the housing elements establish meaningful quantified objectives (where possible), and qualitative objectives

where not, to allow for meaningful review by HCD and the public as to the progress of jurisdictions in implementing their housing elements.

- It is often very difficult to enforce commitments that jurisdictions make in their housing elements, which undermines the effectiveness of the housing element system, erodes public confidence, and impedes affordable housing development. This is especially true of programs, but also applies to rezoning commitments.
- HCD should reopen housing element approvals where programs (including rezoning) have not been implemented in a timely fashion. Its role should not end once an element has been approved. Incentives and monitoring to encourage program implementation should be utilized.
- All rezoning to accomplish low-income housing must require that low-income housing is what gets built.
- It is important for HCD to have defined boundaries for enforcement of housing element performance/non-performance.
- There seems to be very little concern on the part of many city staff and elected officials that they need to implement when it comes to affordable housing and other related issues impacting low-income residents.
- COG and the state need the ability to change zoning and entitlement law in cities that fail to build on adequate sites. This should take the form of an emergency mechanism that kicks in when appropriate housing goals aren't met.

#### *Incentives for Housing Element Implementation*

- Incentives and monitoring to encourage program implementation should be utilized.
- Only give out transportation funds to jurisdictions that meet or exceed their housing plans.
- Agree with the concept of adding incentives to encourage program implementation, but also consider enforcing consequences for failing to implement adopted programs.
- Currently, the incentives that are in place do not result in the outcomes that these laws were created to address.
- Some cities take the RHNA goals seriously and direct resources and policies to align with trying to meet the requirement. Since there is no penalty for not meeting the goal, it's discouraging for cities that make the goal a priority and see other cities basically ignore the challenge. Maybe some kind of "effort" acknowledgement would be helpful.
- Jurisdictions with a funding source to actually produce affordable housing should be rewarded vs cities and counties that identify sites but have no intention of every supporting their development.
- CEQA streamlining for housing element and then development on sites.
- Pool resources or provide greater financial or economic incentives for smaller-scale (affordable by design) housing and greater emphasis on incentivizing mixed-use development.

*No Net Loss Law*

- Agree with the suggestion in this section that the no net loss policy be implemented throughout the planning period through an enforcement mechanism.
- Do not support changes to the no net loss law that will reduce flexibility to make adjustments during the planning period. Cities and counties should be able to up-zone, down-zone or identify previously overlooked sites as long as they maintain adequate land to accommodate their respective RHNA allocations.