



Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework

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As California’s housing crisis swirls through the national news, attention has focused on statewide upzoning bills. Sen. Scott Wiener’s ballyhooed effort to allow 4-5 story buildings near transit was tabled until 2020,¹ but in September of 2019 the legislature effectively terminated single-family zoning by authorizing homeowners to add two “accessory” dwellings to their property.²

Less widely appreciated is that the legislature has also empowered a state oversight body, the Department of Housing and Community Development (HCD), to make local governments rezone for much more housing while removing unnecessary constraints to development. It was not one big bill that put HCD in the driver’s seat. Rather, as we show in a forthcoming law review article,³ the department’s newfound position is the byproduct of a number of individually modest reforms that work together to enable administrative interventions which would have been (legally speaking) unimaginable just a few years ago.



By way of preview: HCD can effectively double the amount of “zoned capacity” that local governments must provide, by requiring local governments to account for development probabilities in their housing plans. The department can also enact metrics and standards for whether the supply of housing within a local government’s territory is substantially constrained. Leveraging these standards, HCD could require poorly performing local governments to commit to speedy, ministerial permitting of projects that conform to the locality’s housing plan.

We’ll return to these ideas momentarily, but first, some context. In 1980, California enacted an ambitious planning framework to make local governments accommodate their “fair share” of “regional housing need” (called the “RHNA”).⁴ But the law on the books was not enough to overcome entrenched local resistance. The Legislative Analyst estimates that between 1980 and 2010, developers produced only about half of the housing units that would have been needed to keep California housing prices from escalating faster than the national average.⁵ Similarly, during the most recent planning cycle, California’s local governments permitted, on average, only about half of what was determined to be their RHNA share.⁶

Some of the blame for these failures rests with the misbegotten process by which California determines RHNAs and then allocates the production target among local governments.⁷ And some of the blame lies with the rickety state-law conveyer belt for converting housing targets into actual production.

This paper focuses on the conveyer belt. In theory, the conveyer belt works like this: (1) a local government, after receiving its RHNA share, revises the housing element of its general plan, showing that there exist developable or redevelopable parcels with “realistic” zoned capacity to accommodate the RHNA share; (2) the draft housing element is submitted to the state housing department, HCD, for review and approval; (3) if HCD disagrees with the housing element’s assessment of capacity, the department may require the local government to include “program actions” for rezoning and removal of other constraints; (4) the local government then enacts the housing element and implements the program actions; and finally (5) if the local government

improperly denies a zoning-compliant project, the developer may sue under the state’s Housing Accountability Act (HAA) to get her project approved.

This conveyor belt was prone to all sorts of breakdowns. But in the last couple of years, the legislature has substantially reinforced it. Among other things, the legislature has amended the HAA to prevent local governments from denying or reducing the density of a proposed housing project *if any reasonable person* could deem the project to be consistent with the general plan (which includes the HCD-approved housing element), notwithstanding local zoning and development standards that are more restrictive.⁸ This effectively reverses the traditional norm of deference to local governments on questions about the consistency of local zoning with the general plan, and it gives developers a workable remedy (a zoning exemption) if a local government fails to complete a rezoning by the deadline stated in its housing element.



Yet the reinvigorated HAA won’t accomplish all that much unless housing elements are beefed up too. This is where HCD’s new authority comes into play. Historically, the department’s reach was tightly circumscribed. HCD could issue interpretive guidelines, but local governments were obligated only to “consider” them. HCD could find a housing element noncompliant, but if the local government then turned to the courts, the courts would likely approve it—deferring to the local government’s judgment at the expense of the department’s. HCD’s review of housing elements was also frustrated by a lack of systematic, reliable information about local permitting practices, zoned capacity, and more.

All of this is changing. The legislature has authorized HCD to issue “standards, forms and definitions” concerning the analytic side of the housing element, including the assessment of developable sites’ capacity,⁹ and the legislature has tightened the rules for what qualifies as a developable site.¹⁰ The department’s new standard-setting charge extends to local governments’ obligation to report annually to HCD on housing development applications, approvals, and processes.¹¹ The legislature has also authorized HCD to decertify housing elements midcycle for failures of implementation,¹² and has backstopped decertification with fiscal penalties and more.¹³ This allows for both a more immediate response by HCD to recalcitrant local governments (rather than waiting through the eight-year cycle until it’s time for a new housing element), and for more effective penalties (in the past, the stiffest penalty was a court order shutting down development in the jurisdiction, a penalty that might not have stung for growth-averse cities). Finally, we argue that the legislature has tacitly ratified HCD’s preferred, functional gloss on whether a housing element complies with state law, abrogating the traditional judicial standard.

The import of any one of these reforms, considered in isolation from the rest, would be modest. But they work together to fundamentally transform the position of HCD. Ambiguities in the new substantive requirements of housing element law provide occasion for HCD to exercise its “standards, forms, and definitions” authority. HCD’s expanded authority over local governments’ reporting will allow the department to obtain information it needs to make good decertification

decisions, and also to shape the analytical side of the housing element. The legislative ratification of HCD's gloss on what is required for a housing element to comply with state law should result in judicial deference to HCD's findings of noncompliance. And judicial deference to the department's decertification decisions, coupled with newly serious penalties for remaining out of compliance, should make local governments much more willing to accede to the department's demands.

To drive home the potential payoff from this transformation, we sketch four examples of what HCD could do with its new authority:

1. *Deem Housing Elements Noncompliant Unless the Site Inventory and Associated Programs Are Likely to Result in Production, During the Planning Period, of the Local Government's Share of Regional Housing Need*

Housing elements must inventory developable parcels and provide an estimate for each parcel of its "realistic" capacity to accommodate a portion of the local government's RHNA share.¹⁴ If total realistic capacity, summed across the inventory parcels, is less than the local government's share of regional need, then the housing element must include rezoning program actions to accommodate 100% of the local government's share.

There are two competing visions of what it means for a housing element to accommodate 100% of the local government's RHNA share. According to the traditional vision, a housing element need only identify sites with suitable zoning on which development of the local government's share of regional need *could* occur. But if production nonetheless fails to materialize during the planning period—perhaps due to lack of demand for the chosen sites, or the transaction costs of assembling small sites into larger tracts, or some owners' speculative decisions to delay development until a future time period—that's not the local government's responsibility. Even if it was entirely foreseeable that some fraction of the sites probably wouldn't be developed during the planning period, the local government has no duty to account for this.

The other vision emphasizes hitting the production target. According to this vision (which finds support in recent legislation), it is not enough for a local government simply to identify sites whose zoning permits construction of the local government's RHNA share. Rather, local governments must design their zoning and development regimes *so that production of the RHNA share is likely to occur during the planning period*, at least if this can be achieved without "[e]xpend[ing] local revenues for the construction of housing, housing subsidies, or land acquisition."¹⁵ Local governments must make a good faith effort to account for market forces and chance occurrences that, in expectation, will result in some, perhaps many inventory parcels going undeveloped over the planning period.

We argue that several recent statutes, read together, allow HCD to adopt and implement a version of the hitting-the-target vision. The department could do this by defining sites' "realistic capacity" as their expected yield in new units over the planning period. Local governments would have to discount the claimed capacity of their inventory sites by the sites' probability of development during the planning period, using simple rules of thumb developed by HCD.

By imposing this discounting requirement, HCD would likely *double*, or more than double, the amount of zoned capacity that local governments must provide through their housing elements. The discounting requirement would also create salutary pressure on regional councils of governments to assign most of their region’s housing target to high-demand jurisdictions. Though some local governments would no doubt miss their targets, housing elements in the aggregate would finally be “realistic” for achieving the overall regional target.

2. Establish Performance Standards for Whether a Local Government Has Substantially Constrained the Supply of Housing in Its Territory



Local governments must include in their housing element an analysis of “potential and actual” governmental constraints to new housing, and, if actual constraints are identified, a program to remove or mitigate them.¹⁶ Yet there are no benchmarks for whether a jurisdiction has “actual constraints,” and it is not uncommon for local governments to claim in their housing element that they have no “actual constraints,” notwithstanding sky-high housing prices and anemic housing production.

There is also a significant ambiguity in housing element law about the meaning of “constraint.” The term could plausibly mean either “barrier to producing the local government’s RHNA share” or “barrier to producing new housing regardless of whether the local government is likely to meet its RHNA-share target.” If the latter, more expansive definition were correct, then flaws in the process for setting and allocating RHNAs would be less consequential, since even local governments that are likely to meet their RHNA-share targets would have to mitigate or remove unnecessary regulatory and pecuniary burdens on housing production.

We argue that HCD may now (a) adopt the more expansive definition of constraint; (b) promulgate objective, outcome-based metrics of cumulative constraint for use in the analysis of constraints; (c) require local governments to submit information the department would need to calculate those metrics; and (d) set performance standards, in terms of those metrics, which would determine whether the local government must take substantive actions to remove constraints. The performance benchmarks could focus on housing outcomes (e.g., elasticity of supply, or the ratio of housing prices to construction costs), as well as “intermediate outcomes” such as project approval times, regulatory compliance costs, and the average allowable residential density on the jurisdiction’s buildable land.

The same metrics could also be used to reward the best performers, via a new state program that gives “prohousing” communities priority for various streams of grant funding.¹⁷

3. Find the Housing Elements of Poorly Performing Local Governments Noncompliant Unless the Housing Element Removes Discretionary Review of Ordinary Multifamily Projects

Most permitting of multifamily housing in California is discretionary.¹⁸ This triggers review under the California Environmental Quality Act, and allows local governments to delay projects indefinitely and impose costly, unexpected conditions. The legislature has taken baby steps to make local governments permit certain projects on an as-of-right basis, within quick timeframes, on pain of the having the project “deemed approved” as a matter of state law. For example, SB 35 (2017) requires local governments that are not making adequate progress toward their housing targets to ministerially review projects that meet statutory affordability and prevailing-wage requirements.¹⁹ Local governments are also barred from imposing discretionary permitting conditions on accessory dwelling units (small homes carved out of an existing structure or placed in the rear yard).²⁰

We submit that once HCD has established reasonable metrics and standards whether the supply of housing is substantially constrained within a local government’s territory, the department will be able to leverage those standards to require poorly performing local governments to commit, through their housing elements, to ministerial review of *all* ordinary multifamily projects—regardless of affordability or prevailing-wage conditions.

What makes this legally and practically feasible is the combination of (a) the legislature’s tacit ratification a functional test for whether housing elements “substantially comply” with state law; (b) the legislature’s recent enactment of a schedule of penalties and other sanctions on local governments that lack a substantially compliant housing element, and of course (c) the new statutory authorization for HCD to promulgate definitions and standards for “constraint,” and to require local governments to provide associated information in their annual reports.

4. Use Housing Element “Standards and Forms” to Strengthen the Zoning-Bypass Provisions of the Housing Accountability Act and the Density Bonus Law



California’s Housing Accountability Act²¹ and Density Bonus Law²² help developers get proposed projects across the finish line to approval. Both laws curtail the discretion of local governments to impose conditions that would have the effect of reducing a project’s density, and both laws allow developers to build to (or beyond) the density allowed under the general plan, notwithstanding more restrictive zoning. However, neither law expressly prevents local governments from

reducing a project's size, and local agencies sometimes try to evade the laws by downsizing a project while "allowing" the developer to build the same number of units she had proposed—albeit in tiny, uneconomic forms.

Though HCD has no *de jure* authority to implement either the Density Bonus Law or the Housing Accountability Act, we argue that HCD could use its new standards-and-forms authority for housing elements to strengthen the former statutes indirectly.

Specifically, the department could (a) establish *standards of equivalence* under housing element law for sites subject to form-based as opposed to density-based zoning (in essence, a formula for converting buildable square feet into dwelling-unit counts, and vice versa); and (b) require local governments to denote in their housing-element site inventories what is deemed to be the *normative density* for a site, as distinguished from the site's "realistic capacity" to provide housing during the planning period.

We think the equivalence standards would be used by courts to determine whether a permitting condition that reduces a project's size is tantamount to a reduction in density, in violation of the Density Bonus Law or Housing Accountability Act. The normative-density designation would resolve a significant ambiguity about what is the "density authorized by the housing element," within the meaning of the Housing Accountability Act.²³

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The legal arguments supporting some of these suggestions are contestable. Our present objective is not to limn the precise bounds of HCD's current authority, but to show how the legislature's various, seemingly small-scale adjustments to the housing framework work together to transform HCD's position and render plausible a range of bold departmental initiatives that have real promise to improve the lives of Californians. By laying the legal foundation for these initiatives, we hope to foster public, administrative, and legislative debate about whether the initiatives should be undertaken, how they should be structured, and what additional personnel or resources HCD would need to carry them out.

What comes of HCD's new authority will also depend on leadership from the governor and pressure from housing advocates. The cities and counties that have spent the last forty years finding ways to "comply" with housing element law without permitting nearly enough new housing are sure to put up a fight if HCD undertakes the initiatives we have sketched, and HCD isn't likely to prevail in this fight unless the governor has its back. When he was running for office, Governor Newsom boldly announced that he would more than triple California's rate of housing production.²⁴ Now the ball is in his court.

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- ¹ Liam Dillon, *The Revenge of the Suburbs: Why California's Effort to Build More Homes in Single-Family-Home Neighborhoods Failed*, L.A. TIMES, May 22, 2019.
- ² CARLA, LET'S TRIPLEXIZE CALIFORNIA, <https://carlaef.org/adus/>.
- ³ Christopher S. Elmendorf, Eric Biber, Paavo Monkkonen & Moira O'Neill, *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 46 ECOLOGY L.Q. (forthcoming 2020).
- ⁴ 1980 Cal. Stat. ch. 1143.
- ⁵ LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (Mar. 17, 2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.
- ⁶ CAL. DEP'T OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES (Feb. 2018), https://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf.
- ⁷ PAAVO MONKKONEN, MICHAEL MANVILLE & SPIKE FRIEDMAN, A FLAWED LAW: REFORMING CALIFORNIA'S HOUSING ELEMENT (UCLA Lewis Center Issue Brief, 2019), <https://www.lewis.ucla.edu/2019/05/10/rhna-flawed-law/>; Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 70 HASTINGS L.J. 79 (forthcoming 2019).
- ⁸ A.B. 3194, 2017-2018 Gen. Assemb. (Cal. 2018); see also Bill Analysis, AB 3194, Sen. Comm. on Hous. & Transp., June 14, 2018.
- ⁹ S.B. 6, 2019-2020 Leg. (Cal. 2019).
- ¹⁰ A.B. 1397, 2017-2018 Gen. Assemb. (Cal. 2017).
- ¹¹ A.B. 879, 2017-2018 Gen. Assemb. (Cal. 2017); A.B. 1483 (2019-2020) (Cal. 2019).
- ¹² A.B. 72, 2017-2018 Gen. Assemb. (Cal. 2017).
- ¹³ A.B. 101, 2019-2020 Gen. Assemb. (Cal. 2019).
- ¹⁴ CAL. GOV'T CODE § 65583.2(c) (West 2019).
- ¹⁵ CAL. GOV'T CODE § 65589(a) (West 2019).
- ¹⁶ CAL. GOV'T CODE § 65583(a) & (c) (West 2019).
- ¹⁷ A.B. 101, 2019-2020 Gen. Assemb. (Cal. 2019); DEP'T OF HOUS. & CMTY. DEV., PROHOUSING POLICIES FRAMEWORK PAPER AND SURVEY (Oct. 2019), <https://files.constantcontact.com/4d29178d401/964e9b77-5215-4e2f-9720-8c46592830c4.pdf>.
- ¹⁸ A forthcoming study of sixteen California cities finds that only three of the cities had zoned any land for multi-family housing (5+ units) as of right. See Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Sustainable Communities or the New Urban Renewal?* (working paper, 2019). In those three cities—Fresno, Los Angeles, and San Diego—only 10% to 33% of the land in high-quality transit areas was zoned to allow at least thirty dwelling units per acre, the density deemed adequate under state law for lower income housing. *Id.* Only one of the three cities (Los Angeles) had a permit-tracking system that allowed the researchers to learn which multifamily projects were granted entitlements through the as-of-right process. In that city, fewer than 7% of the multifamily units entitled during the study period were entitled through the as-of-right channel.
- ¹⁹ S.B. 35, 2017-2018 Leg. (Cal. 2017).
- ²⁰ CAL. GOV'T CODE § 65852.2(c) (West 2019).
- ²¹ CAL. GOV'T CODE § 65589.5 (West 2019).
- ²² CAL. GOV'T CODE § 65915 (West 2019).
- ²³ CAL. GOV'T CODE § 65589.5(d)(5)(A) (West 2019).
- ²⁴ See Liam Dillon, *Q&A: Gov. Newsom Claims Success in First Year of Addressing California's Housing Crisis*, L.A. TIMES, Oct. 21, 2019, <https://www.latimes.com/california/story/2019-10-21/newsom-gavin-affordable-housing-homeless-q-a>.