

Cities Struggle to Comply With Tougher Housing Element Rules

Josh Stephens on Feb 14, 2022

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The layers of bureaucracy that lie between the state’s estimated housing need, as expressed by projections by the Department of Housing and Community Development, and the actual zoning for new units at the local level are seemingly infinite—from the legislature to metropolitan planning organizations to local agencies, with an array of stakeholders and agencies thrown in for good measure.

But, for the sixth cycle of the Regional Housing Needs Allocation program, the rubber is finally hitting the road.

Cities across the state are required to draft and adopt housing elements that not only accommodate, in most cases, significantly higher targets (for both market-rate and affordable units) than ever before but also must do so in greater detail and with a greater level of certainty than ever before.

“There’s a lot of new requirements, there’s higher bars, higher standards. They have to really utilize the housing elements to show the potential for new development,” said Melinda Coy, Land Use and Planning Manager at California Department of Housing & Community Development.

So far, roughly half the participating jurisdictions in the state have submitted draft housing elements to HCD for review and approval. The early results suggest that there are going to be some growing pains. Out of roughly 200 drafts submitted from the Southern California Association of Governments region and the San Diego Association of Governments region, more than 70% have needed revisions—some minor, some not-so-minor—in order for HCD to deem them in compliance. (Housing elements updates for cities in the Bay Area and Sacramento region are due within the next year.)

“Pretty much every element that we’ve seen has gotten a findings letter,” said Coy. “Consistently, it is the analysis related to affirmatively furthering fair housing... and identification of sites that have potential for development in the planning period.” Findings letters ask cities to clarify or justify potentially noncompliant aspects of their housing elements. If those responses do not satisfy HCD, cities may receive a notice of potential violation and have 30 days to remedy the violations.

The sites identified in the new housing elements must have a reasonable chance of being developed -- a requirement that was essentially absent in previous RHNA cycles.

The newly strengthened process came about by a series of laws, including Assembly Bill 828 of 2018 and AB 1397 of 2017. Importantly, the state has new powers of enforcement as well. They include the withholding of state funds for noncompliant cities. For many housing-shy cities, the greater threat is that noncompliance may force them to accept certain types of by-right development.

“Whatever was happening in the last cycle was substantially a waste of time and energy,” said Christopher Elemendorf, professor of law at the University of California at Davis. “Now we have something that is probably not a waste of time and energy. There are a lot more requirements that have some potential to have a desegregative effect.... upzoning effect.... some potential to crack down on cities’ obvious ruses.”

Some of the most prominent and, arguably, burdensome elements of this cycle center on the likelihood of development and on cities’ efforts to “affirmatively further fair housing” (AFFH)—which refers to a suite of policies designed to promote equity, integration, and widespread distribution of affordable housing. Cities also must identify barriers to housing development—such as overly burdensome permitting processes—and pledge to reduce those barriers.

The results are mixed so far.

“They’re relying on a series of tricks and sleight-of-hand to make it look like they’re following the law on paper,” said Anthony Dedousis, former policy manager for housing advocacy group Abundant Housing Los Angeles, referring to the approaches cities are taking. “But, in reality, not doing enough to create conditions on the ground whereby enough housing would be built that meets the RHNA targets.”

Generally, cities with relatively few geographic constraints and lower costs have produced housing elements with few problems. Many coastal cities, where demand for housing is generally highest, have raised concerns.

“When you go out to the far suburbs, there are places like Redlands, Fontana. . . . they have enough space that they can create a compliant housing element with very minor tweaks,” said Josh Albrektson, a medical doctor and pro-housing activist who has publicly scrutinized and commented on many housing elements in the Los Angeles area. “Once you move inland, every city I’ve seen is trying to violate the law in significant manners.”

Cities that have received particularly extensive and strident letters from HCD include South Pasadena, Redondo Beach, and Beverly Hills—all of which have historically expressed resisted the development of new housing and, in particular, of their sixth cycle RHNA allocations.

“A number of municipalities appealed their RHNA numbers citing unique challenges faced by their respective communities,” said Beverly Hills Community Development Director Ryan Gohlich. “Beverly Hills is no different, and although we believe we have demonstrated that the RHNA is achievable we will continue to make refinements in response to HCD’s comments.”

Manipulation or Honest Mistakes?

Critics such as Albrektson, have pointed out what they consider patently ridiculous instances in which cities appear to be, wittingly or not, fudging their numbers.

Some particularly egregious examples of unrealistic development sites include city halls, thriving grocery stores, commercial strips, and veterans halls. Albrektson noted that the City of Alhambra included a proposed development called The Villages in its housing element and, upon adoption of the element, turned around and denied the project (for which it is now being sued by the developer). Coy said that some cities have provided compelling evidence for listing such sites; others have simply removed the sites from their housing elements.

Other discrepancies have arisen over the potential to develop accessory dwelling units. Because ADUs are not traditional redevelopments, cities cannot readily identify potential sites. HCD has published guidelines for how cities can project future ADU development based on their respective trends in recent years. But, some cities may be overstating their projects. For instance, Dedousis said that cities may be counting each step in an ADU development process — such as permitting, groundbreaking, and completion—as discrete ADUs, thus inflating their past performance and future projections.

In some cases, noncompliant factors such as these could be honest results of adhering to and adapting to a new process.

“I don’t necessarily think the requirements of the law are impossible,” said Elemendorf. “But I do think the legislature, plus HCD, have created a world in which it’s very hard for cities to know what they have to do going into the process.”

Added Albrektson: “I fully believe that there are planners out there who had no idea about the update of the laws. They are continuing on what they would have been allowed to do in the fifth cycle. That was probably accurate about six months ago, but people are becoming more and more aware of the new laws.”

In some cases, noncompliance may not be cities’ fault, at least not directly. Because of the magnitude of drafting a housing element, many cities are relying on consultants (and the state is helping fund consultants via SB 2). Many of those consultants might not have been up to speed when they were drafting housing elements last year.

“The majority of jurisdictions hire consultants. The elements that we’re receiving now are reflecting of the learning curve of those consultants,” said Coy. Coy added that HCD has mainly been offering technical assistance to help cities bring their draft elements into compliance. Cities that remain noncompliant may be

referred to the attorney general's office, which has recently assembled a "strike force" to compel cities to follow housing law, including potential lawsuits.

Elmendorf added that the current regulations include very few "safe harbors," meaning that cities have few options that are guaranteed to be in compliance. The majority of the analysis in housing elements are up to the cities, and cities will not necessarily know ahead of time how HCD will respond.

Some cities seem to have gotten it right essentially right out of the gate. The City of Los Angeles in particular has drawn widespread praise.

Because of its size, Los Angeles was not able to evaluate every parcel for redevelopment potential. Instead, the city conducted a detailed economic analysis to determine the general likelihood of redevelopment based on market conditions—essentially looking at the city's residential parcels from a developers' perspective to see what might "pencil out."

What Will Actual Results "On the Ground" Look Like?

As it turns out, actual development is likely to lag far behind cities' zoned capacities, whatever their capacities may be.

"When that requirement was added to the law, nobody had any sense of how it would work in practice or what the typical redevelopment rate for even good sites for redevelopment might be," said Elmendorf. "Now we have some evidence from LA and the Bay Area showing that redevelopment rates are tiny."

Many cities are actively trying to avoid upzoning, according to Dedousis. Upzoning presents a bureaucratic challenge for cities' planning departments and, of course, with upzoning comes a higher likelihood of redevelopment, as compared to the status quo, even if cities can theoretically accommodate new development. In the fifth cycle, noted Elmendorf, cities needed to rezone to accommodate a grand total of 35,000 units—out of a total of roughly 800,000 units across the state's four major regions.

"They really, really don't want to rezone to allow more housing," said Dedousis. "They'll do anything to avoid that."

The question, for both cities and HCD, is what comes next.

In many cases, HCD's comments have been fairly minor, and cities have responded to them with little trouble.

"They're definitely taking a deeper dive on that in regards to affirmatively furthering fair housing," said David Moe, assistant director of community development at the City of Camarillo. "They're kind of digging down into the weeds on this. We'll give it a shot and tell the story a little bit more. Hopefully they'll accept that."

However, as more challenging cases, and more reluctant cities, come along, HCD will have to decide whether to get tough or whether to interpret housing elements generously. Getting tough would mean that noncompliant cities could be forced to approve some developments ministerially under SB35. As well, cities whose housing elements are not approved by HDC within four months of their submission deadlines will be given only one year to rezone rather than three years, meaning that the process might be rushed (and cities could be less deliberative) and that new development could start two years sooner than it otherwise would.

"Many cities will find themselves in a scenario whereby they have to rezone and implement reforms within one year of passing their housing element, which means that they're kind of hitting the fast-forward button on a lot of these things," said Dedousis. "That can be good, because housing delayed is housing denied."

The deadline for SCAG cities was October 12, meaning that February 12 was the threshold for gaining HCD approval. Many SCAG cities are now out of compliance and must rezone by October 10. Even for cities in compliance, HCD's Housing Enforcement Unit will monitor cities to determine whether they are implementing their housing elements properly.

"With the new requirements and the new authorities HCD has, we think of a housing elements as contracts — specific commitments on specific timeframes," said David Zisser, director of the Housing Accountability Unit.

It is observers like Albrekston who, in many cases, are ensuring that HCD is not overly generous. Albrekston said he submitted comments on over 50 housing elements in Southern California and was gratified that many of the concerns that he raised appeared in HCD's own letters to cities.

HCD officials acknowledge that they welcome public comment and that the perspective of people on the ground can be crucial. Though HCD has significantly beefed up its staff to review housing elements and its enforcement unit, the agency cannot, of course, scrutinize every site in every draft.

“During the housing element review process, we really appreciate third-party comments that give us that on-the-ground perspective on sites,” said Coy.

Ultimately, conflicts between reticent cities and HCD may be resolved in court, with plenty of precedents yet to be set.

“We're in uncharted territory, but it's better to be in uncharted territory with the potential for something good to come out of it,” said Elemendorf.

Contacts & Resources

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