

# Because Housing Is What? *Fundamental.* California’s RHNA System as a Tool for Equitable Housing Growth

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*In 2017 and 2018 the California Legislature passed two packages of bills aiming to address the state’s massive housing shortage. The bills focus on the state’s housing element law and Regional Housing Needs Assessment (RHNA) system. These two mechanisms were created to require cities to plan for their long-term housing growth and to ensure cities built their fair share of housing. This Note will give an overview of these bills and the systems they amend. It will then analyze historic issues and possible fixes for the systems. Historically these systems have lacked enforcement mechanisms and have perpetuated economic and racial disparity in housing development. This paper looks at how the recent changes might address those issues, and what further improvements might still be necessary.*

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## INTRODUCTION

California is currently in the throes of the worst housing affordability crisis in state history. The cost of housing is steadily increasing, rapidly outpacing inflation. This shortage has pushed hundreds of predominately low-income households to relocate, either to the fringes of California's metropolises or out of state. The situation has gotten so bad that the state estimates up to six million Californians have fled the state between 2007 and 2016, leading to a net loss of around one million residents.<sup>1</sup> The emigrants are moving largely to cheaper

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1. Brian Uhler & Justin Garosi, *California Losing Residents Via Domestic Migration*, LEG. ANALYST'S OFFICE, <https://lao.ca.gov/LAOEconTax/Article/Detail/265> (Feb. 21, 2018) (analyzing

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metropolitan regions throughout the Sunbelt States, and are predominately lower wage earners.<sup>2</sup> Conversely, of the five million Americans who moved to California during this period, the majority were highly educated and high-income, coming from other expensive states, notably Illinois and New York.<sup>3</sup> This imbalance and shift of demographics only further contributes to rising home costs, creating a vicious cycle.

The impacts of the housing affordability crisis are widespread. One of the major side effects of the crisis is an increase in greenhouse gas emissions, largely tied to higher automobile usage due to residents having to commute to job centers from farther away.<sup>4</sup> The increase in housing costs also puts additional burdens on communities of color, exacerbating the racial wealth gap throughout the state.<sup>5</sup>

Primarily to blame for these increased housing costs is a distinct lack of building throughout the state. From 2000 to 2015, California was projected to have an annual need of 180,000 new housing units.<sup>6</sup> Unfortunately, as demonstrated in Figure 1, below, that annual need was only met three times in that fifteen-year period. This shortage in production is not limited to major metropolitan areas: statewide, less than half of the housing need was built during the 2003 to 2014 period.<sup>7</sup> While barriers can be found throughout the housing development process, one of the most important areas for improvement is that of onerous or overly restrictive local zoning and permit approval processes.

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interstate migration only: the state still gains population overall with international immigration and birthrates).

2. *Id.*

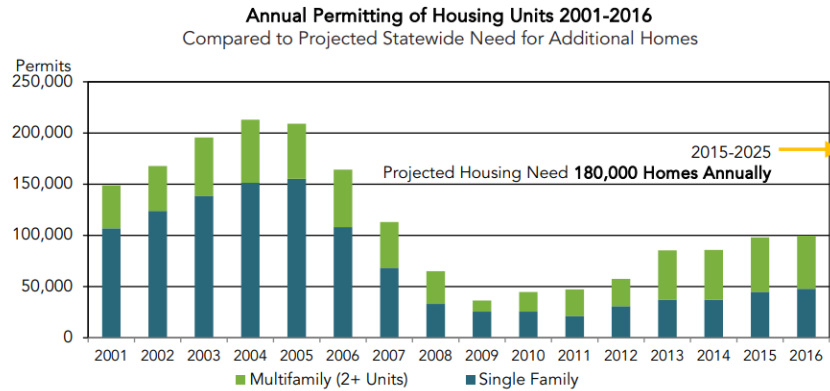
3. *Id.*

4. See PATRICK KALLERMAN & MICAH WEINBERG, ANOTHER INCONVENIENT TRUTH: TO ACHIEVE CLIMATE CHANGE GOALS, CALIFORNIA MUST REMOVE BARRIERS TO SUSTAINABLE LAND USE, BAY AREA COUNCIL ECONOMIC INSTITUTE 2–3 (2016), [http://www.bayareaconomy.org/files/pdf/Another\\_Inconvenient\\_Truth\\_BACEI16.pdf](http://www.bayareaconomy.org/files/pdf/Another_Inconvenient_Truth_BACEI16.pdf). While housing policy and land use decisions have a major impact on green house gas emissions and other climate change related issues, these impacts are beyond the scope of this paper.

5. See DAYNA B. MATHEW ET AL., BROOKINGS INSTITUTE, TIME FOR JUSTICE: TACKLING RACE INEQUALITIES IN HEALTH AND HOUSING (2016), <https://www.brookings.edu/research/time-for-justice-tackling-race-inequalities-in-health-and-housing/>; see also Sarah Burd-Sharps & Rebecca Rasch, *Impact of the US Housing Crisis on the Racial Wealth Gap Across Generations*, SOCIAL SCIENCE RESEARCH COUNCIL, 5, 25, 27 (2015), [https://www.aclu.org/files/field\\_document/discrimlend\\_final.pdf](https://www.aclu.org/files/field_document/discrimlend_final.pdf).

6. CAL. DEP'T OF HOUSING AND CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES, PUBLIC DRAFT—STATEWIDE HOUSING ASSESSMENT 2025, 5 (2017).

7. *Id.* at 5.



*Figure 18*

In 2017, the State Legislature passed a fourteen-bill Housing Package that aimed to combat the housing crisis by addressing systemic challenges of California’s Regional Housing Needs Assessment (RHNA) process, a mechanism for evaluating housing production in California.<sup>9</sup> Three additional bills, passed in 2018, tied up some loose ends of the Housing Package and made further changes to the RHNA process. Specifically, SB 35, a 2017 bill, aimed to streamline residential developments in jurisdictions which have not built their fair share of housing, encouraging approval of housing projects throughout the state in two ways. First, the bill clarified the administrative process which cities must go through to comply with state housing law by adding in distinct benchmarks cities must meet.<sup>10</sup> Second, the bill moved to prevent cities from using subjective criteria to reject housing developments,<sup>11</sup> if those developments otherwise meet affordable housing standards and the local zoning code.<sup>12</sup> The first aspect of SB 35 applies statewide, while the remainder of the bill applies only to those jurisdictions which have not built their “fair share” of housing.<sup>13</sup> Together, SB 35 and the entire Housing Package were an important and overdue step towards making the RHNA process a powerful tool for providing housing

8. *Id.* at 5.

9. *California’s 2017 Housing Package*, CAL. DEP’T OF HOUSING AND CMTY. DEV. (last visited Apr. 24, 2019), available at <http://www.hcd.ca.gov/policy-research/docs/HousingBillMatrix.pdf>.

10. *Infra* Part IV.A. Adds clarification to the housing inventory process and the RHNA distribution process.

11. Subjective criteria are those which can’t be gleaned from the code, but are rather left up to the decision of a person or body, like a zoning board.

12. S.B. 35 § 3, 2017-2018 S. Reg. Sess. (Cal. 2017), amending CAL. GOV’T CODE § 65913.4 (2019); CAL. GOV’T CODE §§ 65400, 65913.4 (2019).

13. S.B. 35 § 3, 2017-2018 S. Reg. Sess. (Cal. 2017), amending CAL. GOV’T CODE § 65913.4 (2019).

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and ensuring equitable growth throughout the state, correcting decades of underproduction, regional dysfunction, and racial and economic inequities.

This Note will unpack these recent attempts at addressing California's housing affordability crisis and will argue that the state is moving in the correct direction, and that further incremental progress must be made. Such incremental progress is key to maintaining a politically viable affordable housing strategy, by keeping local jurisdictions from claiming the state is fully usurping local control. By focusing primarily on the RHNA system and its historical failures, this Note will explain how the new bills can be used to turn it into a major lever for positive change in the state.

Part I will provide an overview of the zoning and planning process, giving the reader a baseline understanding of the various tools used to manage growth. Part II will dive deeper into California planning law, giving an overview of the state's requirements for general plan documents, as well as an in-depth explanation of housing element law. Part III will then give a review of the current RHNA process, reviewing how it is calculated and distributed at the state, regional, and local level. This Part will also discuss the process by which cities may meet their RHNA and give an overview of historic issues with the RHNA process. Part IV will then discuss how the new bills passed in 2017 and 2018 address those issues. Lastly, Part V will discuss RHNA's current position as a potentially powerful tool for encouraging equitable growth in the state. This Part will also include recommendations for how the state could further refine the RHNA process.

## I. BACKGROUND OF ZONING AND PLANNING

To understand the importance of the RHNA process, it is necessary to have a basic understanding of zoning. As discussed in Part III.B., many of the consequences of RHNA noncompliance center around removing the basic discretionary zoning powers of cities. Governments use zoning to plan for the future of a city's development. Zoning decisions have vast implications for the housing market, with the power to restrict or promote growth throughout cities. As cities impose more restrictions or conditions on building, it can also make the development process more expensive, through increased compliance costs due to a need for lawyers or consultants, as well as more upfront costs, like development fees.<sup>14</sup>

Under the California Constitution, all counties and cities "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."<sup>15</sup> This plenary right, commonly referred to as the police power, extends to land use and zoning regulations.<sup>16</sup>

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14. WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 7 (2016).

15. CAL. CONST. art. XI, § 7.

16. *See DeVita v. County of Napa*, 9 Cal. 4th 763, 782 (1995).

Zoning laws aim to govern the future development and use of a city to protect public health, safety, morals, and general welfare.<sup>17</sup> Zoning authority of local jurisdictions is expansive, controlling everything from size and use of proposed buildings to what types of signs may be posted on a façade.<sup>18</sup> While the zoning authority of jurisdictions is broad, the state may restrict or override it with state laws.<sup>19</sup>

Traditionally, Euclidian zoning is used to divide a city into zones based on what use is permitted in various areas.<sup>20</sup> These zones typically fall into three main categories of uses: residential, commercial, and industrial. This separation was believed to benefit cities, allowing them to prevent nuisances like factories from siting near residential areas.<sup>21</sup> These zones are then typically further restricted by intensity of use, such as a unit-density restriction for residential zones or a restriction on the types of industry permitted in an industrial zone.<sup>22</sup>

Historically, single-family residential zoning predominated, leading to the sprawling suburbanization famous in California.<sup>23</sup> In the San Francisco and Los Angeles metro areas, for example, over 75 percent of the land is comprised of neighborhoods where single-family homes are over 60 percent of the housing stock.<sup>24</sup> The prevalence of single-family zoning has drastic effects on housing affordability, as single-family homes tend to be costlier to rent or buy than multifamily units.<sup>25</sup> The focus on producing single-family housing also has vast implications for environmental policies and greenhouse gas emission goals, due to the sprawl caused by single-family developments.<sup>26</sup>

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17. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

18. See *Wal-Mart Stores Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 303 (2006) (upholding the ordinance on prohibiting development of discount superstores); see also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 520–21 (1981) (upholding city ordinance regulating billboards).

19. CAL. CONST. art. XI, § 7.

20. See *Village of Euclid*, 272 U.S. at 380–81. Some cities in the state, such as Richmond and Los Angeles, are moving towards a form-based zoning code. See e.g., *Richmond Livable Corridors Form Based Code*, CITY OF RICHMOND, CALIFORNIA, <http://www.ci.richmond.ca.us/2965/RLC-FBC> (last visited July 12, 2019); *Form-Based Codes*, LA METRO, <https://www.metro.net/projects/tod-toolkit/form-based-codes/> (last visited July 12, 2019). This falls beyond the scope of this paper.

21. See *Village of Euclid*, 272 U.S. at 388.

22. See, e.g., L.A., CAL., ZONING CODE ch. 1, art. 2 §§ 12, 12.07, 12.08, 12.17.5 (1969).

23. See, e.g., SOUTHERN CALIFORNIA STUDIES CENTER AND THE BROOKINGS INSTITUTION CENTER ON URBAN AND METROPOLITAN POLICY, *SPRAWL HITS THE WALL: CONFRONTING THE REALITIES OF METROPOLITAN LOS ANGELES* 8–9 (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/fullreport.pdf>; see also George Galster et al., *Wrestling Sprawl to the Ground: Defining and Measuring an Elusive Concept*, 12 HOUSING POLICY DEBATE 681, 684 (2001).

24. DAVID GARCIA, TERNER CENTER, *ADU UPDATE: EARLY LESSONS AND IMPACTS OF CALIFORNIA'S STATE AND LOCAL POLICY CHANGES* (2017), [https://turnercenter.berkeley.edu/uploads/ADU\\_Update\\_Brief\\_December\\_2017\\_.pdf](https://turnercenter.berkeley.edu/uploads/ADU_Update_Brief_December_2017_.pdf).

25. See, e.g., Margaret Morales, *Map: Where Multi-Family Homes Make Seattle Neighborhoods More Affordable*, SIGHTLINE INSTITUTE (Aug. 30, 2017, 6:30 AM), <https://www.sightline.org/2017/08/30/map-where-multi-family-homes-make-seattle-neighborhoods-more-affordable/>.

26. See Robert Sanders, *Suburban Sprawl Cancels Carbon-footprint Savings of Dense Urban Cores*, BERKELEY NEWS (Jan. 6, 2014), <https://news.berkeley.edu/2014/01/06/suburban-sprawl-cancels->

This Part will give a brief overview of some of the most common types of zoning restrictions and mechanisms utilized by cities. These mechanisms vary greatly in their specificity, from parcel-specific to neighborhood-wide.

#### *A. Variances & Conditional Use Permits (CUPs)*

While zoning generally sets what type of use may be present on a parcel, the law allows for further controls, both through conditional use permits (CUPs) and by way of exceptions known as variances. Cities can require landholders to apply for a CUP to obtain permission—subject to certain criteria—to use their property in a way not otherwise permitted in that zone.<sup>27</sup> While the criteria for CUPs are laid out in a city’s code, the criteria may be vague or subjective, allowing the local zoning board to retain discretion on permit approval.<sup>28</sup> In some cities, CUPs are required for specific uses, like a childcare facility or a liquor store.<sup>29</sup> In other jurisdictions, CUPs or variances are required for virtually any construction, from single-family housing to a high-rise residential building.<sup>30</sup> If a parcel’s proposed use is not subject to any CUPs, it is then considered to be “by right.”<sup>31</sup>

Unlike CUPs, where the use must still adhere to the underlying zoning code, variances allow cities to waive zoning restrictions entirely, allowing a parcel to be used for a use or density otherwise not permitted in the zoning code.<sup>32</sup> This means that a landowner may apply to the city to have a higher density than their parcel is currently zoned for. Cities generally grant variances only in special circumstances, not simply because a landowner disagrees with the parcel’s use or zone designation.<sup>33</sup>

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carbon-footprint-savings-of-dense-urban-cores/; David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in *URBAN SPRAWL: CAUSES, CONSEQUENCES, & POLICY RESPONSES* 23–36 (Gregory D. Squires ed., 2002); Newton et al., *Housing Form, Energy Use and Greenhouse Gas Emissions*, in *ACHIEVING SUSTAINABLE URBAN FORM* 83 (Katie Williams et al. eds., 2000).

27. *Gladden v. District of Columbia Board of Zoning Adjustment*, 659 A.2d 249 (D.C. 1995) (requiring a CUP for the operation of a group home in a residential district).

28. *See id.* (describing presumption for granting if statutory criteria is met, board must make factual finding in issuance or denial). *See also* Jacob Green, *When Conditions Go Bad: An Examination of the Problems Inherent in the Conditional Use Permitting System*, 2014 *BYU L. REV.* 1185, 1196–97 (2014).

29. *See, e.g.*, L.A. MUN. CODE ch. 1, art. 3, § 12.24 (2000).

30. *See, e.g.*, O’Neill et al., *Getting it Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* 7 (Ctr. for Law, Energy & the Env’t, Working Paper, 2018). Explaining that in four of the analyzed jurisdictions, all residential developments with two or more units require discretionary approval. *Id.* at 6.

31. CAL. GOV’T CODE § 65583.2 (2019). “For the purposes of this section . . . the phrase ‘use by right’ shall mean that the local government’s review . . . may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval.” *Id.*

32. *See Matthew v. Smith*, 707 S.W.2d 411, 413 (Mo. 1986). California law only allows variances for density, not use. CAL. GOV’T CODE § 65906 (2019).

33. *See* Robert Widner, *Planning Law Primer - Basics of Variances*, 50 *PLANNING COMM’RS JOURNAL* 1, 1 (2003).

### B. Design Review

Design review is one of the most common, and arguably most powerful, forms of development control. Cities use the design review process to subject proposed structures to conform to design elements.<sup>34</sup> These design elements can be objective (all residential buildings in a neighborhood must be built in the Spanish style), or more subjective (all residential buildings must fit within the neighborhood's character).<sup>35</sup>

This aspect of local control is particularly important, as it can give a city broad discretion in the approval process. This broad discretion can serve to restrict housing growth, by subjecting developments to vague design conditions that allow opponents to halt projects. For example, a project might be subject to design review to ensure that the project "promote[s] the distinctive character . . . of existing neighborhoods."<sup>36</sup> Development opponents can use this statutory vagueness to argue that any project does not conform to what they feel is the "distinctive character" of their neighborhood, especially when that project provides housing at a higher density or is affordable housing.<sup>37</sup>

### C. Density and Intensity Restrictions

Much like other forms of zoning, density and intensity of use restrictions can have vast implications on the housing market by limiting the amount of multifamily housing that may be built in a jurisdiction.<sup>38</sup> These restrictions need not even explicitly forbid multifamily units, but in practice can often do so.<sup>39</sup> Other types of density and intensity restrictions include floor area ratio requirements (FARs), lot size requirements, and even parking requirements.

Perhaps the most common type of restriction is that of a density restriction, controlling what number of housing units may be built on a parcel. Cities will often zone parcels as single-family residential, meaning only one unit of housing or one home may be built on a parcel, even if there is space for more. One

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34. See generally BRENDA CASE SCHEER & WOLFGANG F. E. PRESIER, *DESIGN REVIEW: CHALLENGING URBAN AESTHETIC CONTROL* (1994) (discussing the utilization of design review and offering guidelines on the formation and management of a design review program).

35. See, e.g., L.A. MUN. CODE ch. 1, art. 3, § 13.08(A) (1998); CITY OF LAFAYETTE, RESIDENTIAL DESIGN REVIEW GUIDELINES, 3 (July 30, 1990), <https://www.lovelafayette.org/home/showdocument?id=1303> (noting "[b]uildings should be compatible with surrounding land features and/or other development").

36. See L.A. MUN. CODE ch. 1, art. 3 § 13.08(A) (1998).

37. See Dan Bertolet, *How Seattle's Design Review Sabotages Housing Affordability*, SIGHTLINE INSTITUTE (Sept. 6, 2017), <https://www.sightline.org/2017/09/06/how-seattles-design-review-sabotages-housing-affordability/>.

38. See John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE: J. POL'Y DEV. & RES. 69, 69–72 (2005).

39. See, e.g., AMERICAN SOCIETY OF PLANNING OFFICIALS, *MINIMUM REQUIREMENTS FOR LOT AND BUILDING SIZE* (1952) (a dated report outlining the benefit of lot size requirements, and discussing contemporary judicial decisions around lot size restrictions under the police power).



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workaround to these kinds of restrictions that cities have begun to allow is the creation of Accessory Dwelling Units (ADUs).<sup>40</sup> ADUs are additional housing units that are generally built on a single-family lot, either as an attached construction or a detached building.<sup>41</sup> Types of ADU's include "granny flats," garage units, in-law suites, casitas, and garden units.<sup>42</sup> ADUs are usually much smaller units, allowing for quicker time frames and cheaper construction costs.<sup>43</sup> Additionally, because they are typically built as an addition to a single-family home, they avoid much of the criticism of changing a neighborhood's character that multifamily developments often receive.<sup>44</sup> California law was changed in 2016 to forbid any city from prohibiting ADUs, and encourage all jurisdictions to draft their own ADU ordinances.<sup>45</sup>

Other density controls cities often use are FARs and lot size requirements. FARs set the permitted massing of a building on a lot by restricting growth to a ratio of ground coverage to floor area.<sup>46</sup> For example, a 1,000 square feet lot with a FAR restriction of 0.5 may only have a building with a total floor area of 500 square feet (with no specification for how tall that structure may be). Lot size requirements set the minimum size a lot must be in order to build any type of development.<sup>47</sup> For example, a city could require that there must be a lot size of 2,000 square feet per unit of housing, even if a developer could fit multiple housing units onto a lot of that size. These requirements can make it nearly impossible to build multifamily units or even ADUs, especially in residential urban areas where lot sizes might be smaller than in the suburbs.<sup>48</sup>

Parking requirements are an additional, and increasingly controversial, density control used by city governments. Parking requirements generally

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40. See e.g., *Accessory Dwelling Unit (ADU) & Jr. Accessory Dwelling Unit (JADU)*, City of San Mateo (2019), <https://www.cityofsanmateo.org/3907/Accessory-Dwelling-Unit-ADU>; *Accessory Dwelling Units (ADUs)*, City of Palo Alto (2019) [https://www.cityofpaloalto.org/gov/depts/pln/long\\_range\\_planning/ordinance\\_updates/accessory\\_dwelling\\_units.asp](https://www.cityofpaloalto.org/gov/depts/pln/long_range_planning/ordinance_updates/accessory_dwelling_units.asp).

41. *Id.*

42. *Id.*

43. CHAPPLE ET AL., URBAN LAND INSTITUTE, *JUMPSTARTING THE MARKET FOR ACCESSORY DWELLING UNITS: LESSONS LEARNED FROM PORTLAND, SEATTLE AND VANCOUVER* 15–22 (2018), [http://ternercenter.berkeley.edu/uploads/ADU\\_report\\_4.18.pdf](http://ternercenter.berkeley.edu/uploads/ADU_report_4.18.pdf).

44. See, e.g., ARCHITECTURAL HERITAGE CENTER, *Accessory Dwelling Units: Meeting Density Goals While Preserving Neighborhood Character*, (last visited Apr. 24, 2019), <http://visitahc.org/accessory-dwelling-units-meeting-density-goals-while-preserving-neighborhood-character/>.

45. A.B. 2299, 2015-2016 Assemb., Reg. Sess. (Cal. 2016).

46. For example, if a building has a 1:1 FAR it means they can build a one-story building over the entirety of the lot area, or one two-story building over half the lot area, and so on.

47. See, e.g., L.A. MUN. CODE ch. 1, art. 2 § 12.07 C (2008). Outlining the minimum lot size necessary for development of a single-family home in the "Suburban" designation.

48. See Allison Nemirow & Karen Chapple, *Yes, But Will They Let Us Build? The Feasibility of Secondary Units in the Easy Bay* 5–6 (University of California, Berkeley Institute of Urban and Regional Development, Working Paper, No. 2012-02, 2012). Removing minimum lot size requirements in a half-mile radius of Berkeley's Ashby and North Berkeley BART stations would increase the number of parcels available for ADUs from a current 36 percent to 66 percent. *Id.* at 17.

mandate that a residential development provide a certain number of parking spaces per unit of housing, most often a one-to-one ratio.<sup>49</sup> Parking restrictions can be surprisingly effective in stymying growth, especially in urban areas. For example, in 2016 in San Francisco, building an underground parking space cost an estimated \$38,000, while an aboveground space cost \$29,000.<sup>50</sup> This makes construction of large residential infill<sup>51</sup> projects significantly costlier, as the parking requires either digging down to build underground structures, or uses up surface-level space that could otherwise be used for commercial or residential uses.<sup>52</sup> Parking requirements are also a reason why many ADU projects are not feasible.<sup>53</sup> The restrictive nature of parking requirements has led cities to reduce or even remove parking requirements for urban developments.<sup>54</sup>

#### D. Rezoning and Planned Unit Developments (PUDs)

Rezoning is the process by which an area's underlying zoning can be fully changed to a different use or intensity. The rezoning process is the most difficult to implement of the development controls mentioned, as it requires a full legislative process at the city level.<sup>55</sup> While individual landowners may apply to

49. See L.A. DEP'T OF BLDG. AND SAFETY, SUMMARY OF PARKING REGULATIONS (2002), [http://netinfo.ladbs.org/ladbsec.nsf/d3450fd072c7344c882564e5005d0db4/72f24c5fab8bd39788256a160067e2e2/\\$FILE/Summary%20of%20Parking%20Regulations%20final.pdf](http://netinfo.ladbs.org/ladbsec.nsf/d3450fd072c7344c882564e5005d0db4/72f24c5fab8bd39788256a160067e2e2/$FILE/Summary%20of%20Parking%20Regulations%20final.pdf); see also CITY OF OAKLAND PLANNING DEP'T, SUMMARY OF THE OFF-STREET PARKING AND LOADING UPDATE (2016), <http://www2.oaklandnet.com/oakcal/groups/ceda/documents/agenda/oak060448.pdf>; BERKELEY MUN. CODE ch. 23D.12.050 (2019).

50. See Donald Shoup, *Cutting the Cost of Parking Requirements*, ACCESS MAGAZINE 28 (2016), [http://www.accessmagazine.org/wp-content/uploads/sites/7/2016/05/access48-webprint\\_cuttingthecost.pdf](http://www.accessmagazine.org/wp-content/uploads/sites/7/2016/05/access48-webprint_cuttingthecost.pdf). Costs have almost certainly risen since 2016, with construction costs per square foot having nearly doubled in San Francisco by 2018. *Id.* See Andy Bosselman, *It All Adds Up: The Growing Costs that Prevent New Housing in California*, SPUR (May 9, 2018), <https://www.spur.org/news/2018-05-09/it-all-adds-growing-costs-prevent-new-housing-california>.

51. Infill development refers to building on land that is either unused or underutilized, and usually surrounded by other development. CAL. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, INFILL DEVELOPMENT (last visited Apr. 24, 2019), <http://opr.ca.gov/planning/land-use/infill-development/>.

52. Developers often may apply to have the parking requirement lowered, and many cities have moved to lessen or remove parking requirements in transit-accessible neighborhoods. However, some buildings continue to build with parking, due to many project financiers believing parking is necessary. See, e.g., Bendix Anderson, *Apartment Developers Try to Figure Out the Parking Equation in a World with Fewer Cars*, NATIONAL REAL ESTATE INVESTOR (May 8, 2018), <https://www.nreionline.com/multifamily/apartment-developers-try-figure-out-parking-equation-world-fewer-cars>.

53. Nemirow, *supra* note 48, at 2; see also Brown et al., *Converting Garages into Housing*, 00 J. PLANNING EDUC. & RES. 1, 1 (2017).

54. See, e.g., CITY OF SAN FRANCISCO LAND USE AND TRANSPORTATION COMMITTEE, REG. MTG. (Nov. 26, 2018) (video recording of Committee voting to remove off-street parking requirements) [http://sanfrancisco.granicus.com/player/clip/31870?view\\_id=177](http://sanfrancisco.granicus.com/player/clip/31870?view_id=177).

55. This means a rezone must not only go through a city's planning agency, but also through its legislative body, usually the city council. For example, to rezone a parcel in Los Angeles, a developer must first apply to the Department of City Planning, then the Planning Commission, and finally the rezone decision must be approved by the City Council. L.A. MUN. CODE ch. 1, art. 2 § 12.32(F) & (Q) (2000).

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cities for a rezone, cities often place limits on how drastically a parcel may be rezoned if it is not part of a broader area-wide zoning effort.<sup>56</sup>

Planned Unit Developments (PUDs) are a special type of “floating zone” that allow a developer to build a project that might otherwise not be permitted in the underlying zoning.<sup>57</sup> PUDs are generally permitted in the zoning code, but are not designated on the zoning map.<sup>58</sup> Typically, a developer will apply for a PUD over a large tract of land, and can then build at a higher density than otherwise allowed once the city rezones the land.<sup>59</sup> PUDs generally include the same number of units in the overall development, but at a higher density,<sup>60</sup> allowing for more open space and community space than if those units were built all as single-family, for example. Like CUPs, cities can still include vague requirements in the PUD process that allows the city to extract fees or mitigations from a developer.<sup>61</sup>

#### *E. Fully Entitled*

A building is deemed to be “fully entitled” when it has received all required permits and approvals from the local planning department, giving the developer a legal right to build the project as proposed.<sup>62</sup> With each project, a developer will have to comply with at least one, if not many, of the above land use controls, meaning that the road to being “fully entitled” may be both long and expensive. Once a building has received its full entitlements, the developer may apply to the local building permit authority for building permits, which then give the developer permission to commence construction.

The entitlement process is a vital aspect of the housing affordability crisis, with many blaming the laborious process for much of the cost associated with building housing.<sup>63</sup> Entitlements are also important for the purposes of this Note, as a city cannot count a housing project towards their housing goals until it has become fully entitled.<sup>64</sup>

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56. See L.A. MUN. CODE ch. 1, art. 2 § 12.32(A-F) (2000).

57. Planned Implementation Tools: Planned Unit Development, Center for Land Use Education 1 (2005).

58. See ELLICKSON ET AL, LAND USE CONTROL 4TH EDITION., 358–59 (2013).

59. *Id.*

60. *Id.*

61. For instance, San Francisco’s PUD code includes the vague language that PUDs must “[a]ffirmatively promote applicable objectives and policies of the General Plan.” Such vague language gives the city significant room to add concessions or other requirements so long as they can say it furthers the city’s general plan. S.F. PLANNING CODE art. 3 § 304 (2019).

62. CAL. GOV’T CODE § 65913.4(i)(3) (2019).

63. See MCKINSEY GLOBAL INSTITUTE, MCKINSEY & CO., A TOOLKIT TO CLOSE CALIFORNIA’S HOUSING GAP: 3.5 MILLION HOMES BY 2025, 29 (2016) (noting that “[s]hortening the land-use approval process . . . could save Californians \$1.4 billion a year”); see also O’Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California’s Housing Policy Debates*, 25 HASTINGS ENVTL. L.J. 1, 75 (2019).

64. *Infra* Part III.B.i .

## II. GENERAL PLANS AND HOUSING ELEMENTS

While cities are generally given discretion in controlling their own zoning, California law requires all cities and counties to prepare “comprehensive, long-term general plan[s] for the physical development” of their jurisdiction, which guides their zoning process.<sup>65</sup> These general plans provide residents, developers, and the state an outline of how a city plans to develop in the future.

Within the general plans, cities must specifically outline their approach to the following eight elements: Land Use, Circulation, Conservation, Noise, Open Space, Safety, Environmental Justice, and Housing.<sup>66</sup> While the general plan must address each of these elements, there is broad discretion for how the city can prepare and adopt the plan and its elements.<sup>67</sup>

While state law generally gives discretion for cities to develop general plans as they see fit, the state requires that the plan be consistent.<sup>68</sup> This consistency means that every one of the eight elements must be consistent with each other (known as horizontal consistency), as well as with the overarching general plan document (known as vertical consistency).<sup>69</sup> In other words, the policies of each element must not conflict with any other element, or with the general plan. This requirement ensures that cities plan comprehensively, with an understanding of how each element affects the others.<sup>70</sup>

Members of the public may sue a city if they believe that the city’s plan is not consistent, vertically or horizontally.<sup>71</sup> Consistency also continues down through to the zoning code: a city’s zoning code must be consistent with the goals, policies, and plans laid out in the general plan or any of its constituent elements.<sup>72</sup> The horizontal consistency requirement is particularly important in

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65. CAL. GOV’T CODE § 65300 (2019).

66. CAL. GOV’T CODE § 65302 (2019).

67. See CAL. GOV’T CODE § 65301 (2019) (noting that the plan may be adopted all at once, or in separate parts such as elements). See, e.g., City of Los Angeles Plan which has large separate elements, General Plan Elements, CITY OF LOS ANGELES (last visited May 30, 2019), [https://planning.lacity.org/GP\\_elements.html](https://planning.lacity.org/GP_elements.html).

68. CAL. GOV’T CODE § 65300.5 (2019).

69. “In construing the provisions of this article, the Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency.” *Id.*

70. This requirement also means that when one section is updated, a city must ensure that it is consistent with the entirety of a plan, or risk suit. This is particularly problematic given how many jurisdictions have outdated general plans, something that SB 2 aims to address. See *SB 2 Planning Grants*, CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT (last visited July 12, 2019), <http://www.hcd.ca.gov/grants-funding/active-funding/planning-grants.shtml>.

71. Consistency claims can similarly be brought against any decision made by a city that someone believes is not consistent with their planning documents, such as approval of building permits or other permitting decisions. See, e.g., *Spring Valley Lake Assn. v. City of Victorville*, 248 Cal. App. 4th 91, 100–01 (2016). See also *Families Unafraid to Uphold Rural El Dorado Cty. v. Bd. of Supervisors*, 62 Cal. App. 4th 1332, 1336 (1988).

72. *Analysis of Consistency with General Plan*, CAL. DEP’T OF HOUSING AND CMTY. DEV (last visited Apr. 24, 2019), <http://www.hcd.ca.gov/community-development/building-blocks/other-requirements/analysis-consistency-general-plan.shtml>.

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the housing context, because much of the actual zoning and growth planning is done within the land use element, rather than the housing element. Public lawsuits challenging consistency are a key way in which advocates may push for, or halt, changes to key city policies.<sup>73</sup>

#### A. Housing Elements

The remainder of this Note will focus on the housing element, and its importance in the state's overall housing policy.<sup>74</sup> The housing element is meant to outline a city's strategy for future housing growth, and must include information on how the city plans to meet their RHNA. The state's goal in requiring housing elements is to ensure available "decent housing and a suitable living environment for every Californian," while recognizing that the provision of such housing "requires the cooperation of all levels of government."<sup>75</sup>

As part of this strategy, all cities are required to describe how their policies affirmatively move towards meeting those legislative goals.<sup>76</sup> The housing element must state the city's "goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing."<sup>77</sup> This does not require cities to have a policy for growth, however. Cities may state a desire and plan for maintaining the housing status quo.

Housing elements are drafted by each city's planning agency, with the draft then submitted to the State's Department of Housing and Community Development (HCD).<sup>78</sup> This draft will be analyzed by HCD for compliance with state regulations.<sup>79</sup> HCD then issues written findings to the city either approving the element, or identifying where the element does not substantially comply with the housing element requirements in state law.<sup>80</sup> Cities must either fix the identified sections or explain why they believe the element as it stands complies

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73. See, e.g., Jessie Agatstein, *The Suburbs' Fair Share: How California's Housing Element Law (and Facebook) Can Set a Housing Production Floor* 12 (Real Estate Law Journal, Working Paper), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2592020](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592020) (discussing the different ways local California housing policies stagnate residential development).

74. It is important to note that many of the other elements, particularly the Land Use and Circulation elements, play an important part in determining housing policy, however this paper does not consider these other policies. For more on this, see generally CAL. DEP'T OF HOUSING AND CMTY. DEV., CALIFORNIA HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES—FINAL STATEWIDE HOUSING ASSESSMENT 2025 (2018), available at [http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA\\_Final\\_Combined.pdf](http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf) (report that addresses the housing challenges faced in California with a Housing Action Plan recommendation).

75. CAL. GOV'T CODE § 65580(a) & (c) (2019).

76. CAL. GOV'T CODE § 65583 (2019).

77. CAL. GOV'T CODE § 65583(b)(1) (2019).

78. CAL. GOV'T CODE § 65585 (2019).

79. CAL. GOV'T CODE § 65585(b) (2019).

80. CAL. GOV'T CODE § 65585(f) (2019).

with state law.<sup>81</sup> At this point, the city's legislative body must approve the element and deliver the final element for approval to HCD.<sup>82</sup>

A city must review and update the housing element "as frequently as appropriate" to evaluate the city's housing goals and policies, the effectiveness of the current housing element, and the progress of the city in meeting these goals.<sup>83</sup> State law requires revision of housing elements at least every eight years, though cities may revise more frequently.<sup>84</sup>

The housing element serves as the primary vehicle for a city to demonstrate its compliance to its RHNA, via its required housing inventory and schedule of actions, discussed below. While the housing element serves as the descriptor of a city's housing policies, it is the RHNA requirements that the policies themselves must satisfy.

### III. REGIONAL HOUSING NEED ALLOCATION

One of the primary aspects of the housing element is addressing how a city is planning to meet its fair share of the regional housing burden. California calculates the fair share of housing units that should be built in each region, and assigns this number to regional planning organizations known as Council of Governments (COGs).<sup>85</sup> The COGs then distribute this number of housing units between their constituent jurisdictions.<sup>86</sup> Finally cities must update their housing elements to plan for their assigned number of housing units.<sup>87</sup> This Part will outline the process by which the housing burden is divided by region and by city.

California requires each COG to complete a RHNA process.<sup>88</sup> This process begins with HCD determining the current and projected need for housing in each region of the state, known as the Regional Housing Needs Determination (RHND).<sup>89</sup> The RHND provides an exact number of housing units that a region

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81. *Id.*

82. CAL. GOV'T CODE § 65585(i)(1) (2019).

83. CAL. GOV'T CODE § 65588(a)(1)-(3) (2019). The recently passed Proposition 1 will funnel funding to cities to update their plans, particularly those cities located near transit. Half of all funding from the first year of the bond will go to local cities for this purchase. *See* S.B. 2 § 4, 2017-2018 S. Reg. Sess. (Cal. 2018), updating ch. 2.5 of the Building Homes and Jobs Act.

84. CAL. GOV'T CODE § 65588 (e)(3)(A) (2019). Cities must update their housing elements within 18 months after adoption of every second regional transportation plan update. Federal law requires that regional transportation plan updates occur every four years. 23 C.F.R. § 450.322(c) (2011). As of 2008, with the passage of SB 375, cities must conform their housing element, RHNA plans, and land use elements to their regional Sustainable Community Strategy now required of each COG. Barbara Kautz, Attorney/Presenter, Goldfarb & Lipman LLP, Presentation at the City of Attorneys Conference/League of Cities: SB 375 and Housing Elements (Feb. 25, 2019), *available at* <https://www.cacities.org/UploadedFiles/LeagueInternet/d3/d3b117ee-20b1-47d9-94a8-580d28631701.pdf>.

85. CAL. GOV'T CODE § 65584.04 (West 2019).

86. Council of Governments (COGs) are regional planning organizations made up of representatives from their constituent cities. *Infra* Part III.A.

87. CAL. GOV'T CODE § 65584 (2019).

88. *Id.*

89. *Id.*

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is expected to build, broken up into four income categories: very-low-income, low-income, moderate-income, and above-moderate-income (or market-rate).<sup>90</sup> This determination is based on projected population growth, as well as the current and projected economic and regional housing markets for every region.<sup>91</sup> Once the RHND is completed, HCD assigns each region of the state a certain number of housing units the region as a whole must build in the next eight year housing element cycle.<sup>92</sup>

*A. Council of Governments & the Regional Housing Needs Determination*

California is split into eighteen metropolitan regions, which are each managed by a COG.<sup>93</sup> The three largest COGs are the Association of Bay Area Governments (ABAG), representing the nine-county Bay Area; the Southern California Association of Governments (SCAG), representing Ventura, Los Angeles, Orange, San Bernardino, Riverside, and Imperial counties; and San Diego Association of Governments (SANDAG), representing San Diego County.<sup>94</sup> Within these COGs, smaller regions may form subregions which allow for more localized decision making.<sup>95</sup> A prime example of this is the Orange County Council of Governments (OCCOG), which represents Orange County's planning efforts within the larger SCAG framework.<sup>96</sup> Subregions are considered one jurisdiction for the purposes of RHNA. The COG will assign a RHNA to each subregion, and that subregion will then divide the RHNA amongst its own members, subject to the oversight of the larger COG.<sup>97</sup>

To assist in the preparation of the RHND, every COG must provide HCD with its projection for the region's current and future housing demand.<sup>98</sup> When providing this information, the COG must provide all the data and assumptions

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90. *Id.* HCD defines the different household income categories as follows: Very-low-income is 50 percent of the median family income (MFI) for the county; low-income is 80 percent MFI; moderate-income is 80 to 120 percent MFI; and above-moderate-income is anything above 120 percent MFI. *See* Memorandum from Zachary Olmstead, Deputy Dir., Div. of Hous. and Policy Dev. (Apr. 26, 2018), <http://www.hcd.ca.gov/grants-funding/income-limits/state-and-federal-income-limits/docs/inc2k18.pdf>.

91. CAL. GOV'T CODE § 65584.01 (2019).

92. *Id.*

93. *See A Brief History*, ASS'N OF METRO. PLANNING ORGS. (last visited Apr. 24, 2019), <http://www.ampo.org/about-us/about-mpos/>. Federal law required MPO's for urbanized areas with over 50,000 in population. *Id.* Important to note that COGs are only required for urbanized counties, much of the rural state is not part of a COG, and thus is assigned their RHNA directly from HCD. *See* CAL. GOV'T CODE § 65584.6 (2019).

94. Cal. Ass'n of Councils of Gov'ts, *Our Members* (last visited Apr. 24, 2019), [https://www.calcog.org/index.php?class0\\_0=22&submit=Search&xsearch\\_id=members\\_search1&src=directory&srctype=members\\_list&view=members&submenu=MemberProfiles](https://www.calcog.org/index.php?class0_0=22&submit=Search&xsearch_id=members_search1&src=directory&srctype=members_list&view=members&submenu=MemberProfiles).

95. CAL. GOV'T CODE § 65584.03 (2019).

96. *OCCOG Member Profile*, CAL. ASS'N OF COUNCILS OF GOV'TS (last visited Apr. 24, 2019), [https://www.calcog.org/index.php?src=directory&view=members&submenu=MemberProfiles&query=Type\\_of\\_Agency.eq.Council%20of%20Governments&xsearch\\_id=members\\_search1&class0\\_0=22&query=Type\\_of\\_Agency.eq.Council%20of%20Governments&srctype=detail&back=members&refno=39](https://www.calcog.org/index.php?src=directory&view=members&submenu=MemberProfiles&query=Type_of_Agency.eq.Council%20of%20Governments&xsearch_id=members_search1&class0_0=22&query=Type_of_Agency.eq.Council%20of%20Governments&srctype=detail&back=members&refno=39).

97. CAL. GOV'T CODE § 65584.03 (2019).

98. CAL. GOV'T CODE § 65583.01(b) (2019).

used to calculate its projection, including the factors listed below in Figure 2.<sup>99</sup> HCD will then use the information as it sees fit to modify its own methodology for the RHND process.<sup>100</sup> COGs may object if HCD rejects its provided methods in the RHND process.<sup>101</sup>

| <b>Figure 2: Data and assumptions required to be included in RHND Preparation.</b>         |  |
|--|--|
| 1. Anticipated household growth associated with projected population increases             | 2. Vacancy rates in existing stock, including the standard rate for healthy market functioning and regional mobility |
| 3. Household size data and trends in household size  | 4. Other characteristics of the composition of the projected population  |
| 5. Percentage of renter's households that are overcrowded                                  | 6. Regional rate of household formation  |
| 7. Relationship between jobs and housing, including any imbalance between jobs and housing |  |

Figure 2<sup>102</sup>

Once each COG has received its RHNA from HCD, they must then allocate that amount of future housing among their constituent jurisdictions.<sup>103</sup> State law outlines various factors that COGs must consider when distributing RHNAs to cities.<sup>104</sup> These factors include:

- the jurisdiction's existing and projected jobs and housing relationship, with consideration of the current number of low-wage jobs within the jurisdiction and how many housing units are available for these low-wage workers, as well as specific projected growth for each income level;<sup>105</sup>
- opportunities and constraints to the development of additional housing including lack of capacity for utilities, lack of land suitable for urban development due to federal or other regulation, and lack

99. CAL. GOV'T CODE § 65584.01(b)(1)(A)-(G) (2019).

100. CAL. GOV'T CODE § 65584.01(c) (2019).

101. CAL. GOV'T CODE § 65584.01(c)(2) (2019). Section (2) lists reasons for objection. *Id.*

102. CAL. GOV'T CODE § 65584.01(b)(1)(A)-(G) (2019).

103. CAL. GOV'T CODE § 65584.04 (2019).

104. See CAL. GOV'T CODE § 65584.01 (2019).

105. The job projections and low-wage considerations were only added in the 2018 Housing Package. *Supra* Part IV.D.



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of suitable land due to the land being under state or federal protection;

- the distribution of household growth assumed in the regional transportation plans and opportunities to maximize the use of public transportation and existing transportation infrastructure;
- the rate of overcrowding and percentage of existing households at each income level paying more than 30 percent and more than 50 percent of their income in rent;<sup>106</sup>
- high cost burdens on development;
- the region's overall greenhouse gas emissions targets;
- other factors additionally adopted by the COG, so long as they further the legislative objectives of RHNA.<sup>107</sup>

COGs must release their draft methodology for public comment, and then must provide, in writing, how each of the aforementioned factors was considered and incorporated into its draft RHNA methodology.<sup>108</sup> COGs must develop their RHNA methodology at least two years prior to the next RHNA allocation process.<sup>109</sup>

Similarly, COGs must issue their draft RHNA at least one-and-a-half years prior to the required housing element revision and final RHNA distribution.<sup>110</sup> Upon the release of the draft allocation, cities (or subregions, if applicable) may petition for a revision of their RHNA.<sup>111</sup> This request must be made based on one of the methodology factors outlined above, and must contain adequate documentation and data supporting the revision.<sup>112</sup> The COG must then either accept the request for revision, or deny and indicate why the proposal is inconsistent with the RHNA.<sup>113</sup> A city may appeal this decision back to its COG or subregion, if it believes the COG did not properly consider the city's provided information, the city had a significant and unforeseen change in circumstances that merits a revision, or if it believes the COG failed to calculate the RHNA in accordance with the State code.<sup>114</sup> It is important to note that ordinances, policies, or voter-approved measures that limit the number of residential permits are not considered when calculating RHNA.<sup>115</sup>

106. This consideration was added in the 2018 bill package. *Supra* Part IV.D.

107. CAL. GOV'T CODE § 65584.04(e) (2019).

108. *Id.*

109. CAL. GOV'T CODE § 65584.04(a) (2019).

110. CAL. GOV'T CODE § 65584.05 (2019).

111. CAL. GOV'T CODE § 65584.05(b) (2019).

112. *Id.*

113. CAL. GOV'T CODE § 65584.05(9)(c) (2019).

114. CAL. GOV'T CODE § 65584.05 (2019).

115. CAL. GOV'T CODE § 65584.04(f) (2019). This prevents initiatives like Napa County's Measure J, which prevents agricultural land from being rezoned without voter approval, from being considered and giving Napa less RHNA because of less capacity. *See, e.g.,* Peter Jensen, *Measure J made Napa County Voters Protectors of Agricultural Lands*, NAPA VALLEY REGISTER (Mar. 4, 2012), [https://napavalleyregister.com/news/local/measure-j-made-napa-county-voters-protectors-of-agricultural-lands/article\\_0d4aeeca-65bf-11e1-a220-001871e3ce6c.html](https://napavalleyregister.com/news/local/measure-j-made-napa-county-voters-protectors-of-agricultural-lands/article_0d4aeeca-65bf-11e1-a220-001871e3ce6c.html).

*B. How Does a City Comply with RHNA?*

Once a city has received its final RHNA from its COG, the city must then update its housing element to reflect the new allocation.<sup>116</sup> The updated element must contain both an inventory of the parcels in the city suitable for development at the densities necessary to comply with the RHNA as well as an outline of the policies the city will adopt to meet its new allocation.

*1. Housing Inventory*

The housing inventory is one of the key compliance measures of the RHNA process, and was one of the primary focuses of the 2017 Housing Package.<sup>117</sup> The inventory must list all parcels that the city has identified to be available for residential housing.

When identifying parcels for its inventory, cities must include exact parcel numbers, along with parcel size and its current use and zoning.<sup>118</sup> The inventory must also explain how much of the RHNA and at what income level each parcel will accommodate.<sup>119</sup> Additionally, a city may not list a vacant or currently occupied parcel in the inventory if that parcel was included in the previous two housing cycles, but has not yet been developed.<sup>120</sup> Such a parcel may, however, be included in the inventory if it is rezoned at a higher density and is subject to by-right construction of 20 percent affordable housing.<sup>121</sup> The inventory must also provide an analysis of how adopted density<sup>122</sup> will accommodate the RHNA, including analysis of market demand and financial feasibility as well as development project experience for similar sites.<sup>123</sup> For example, a city could identify ten parcels as suitable for development, but it would have to provide data showing that these ten parcels can be developed to accommodate the planned number of housing units. If the city cannot prove that the parcels will, it must identify additional parcels or change the zoning for the identified parcels.<sup>124</sup> A city may not use parcels smaller than half an acre or larger than ten acres to qualify for its low-income portion of RHNA, unless it can demonstrate previous development of low-income projects on similar sized lots.<sup>125</sup> For an example of how the overall distribution works, from the HCD level through the COGs and down to the city, see Figure 3, below:

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116. CAL. GOV'T CODE § 65588 (2019).

117. *Infra* Part IV.

118. CAL. GOV'T CODE § 65583.2(b) (2019). Added by new bills discussed *infra* Part IV.

119. CAL. GOV'T CODE § 65583.2(c) (2019).

120. *Id.* This prevents cities from using parcels towards their RHNA that have proven to not be amenable to development.

121. CAL. GOV'T CODE § 65583.2(c) (2019).

122. Adopted density means the amount of density a city has approved for a parcel, not necessarily density that will be built or is currently built on that parcel.

123. CAL. GOV'T CODE § 65583.2(c)(3) (2019).

124. CAL. GOV'T CODE § 65584.09 (2019).

125. CAL. GOV'T CODE § 65583.2(c)(2)(a) & (b) (2019). *See also infra* Part I.C.

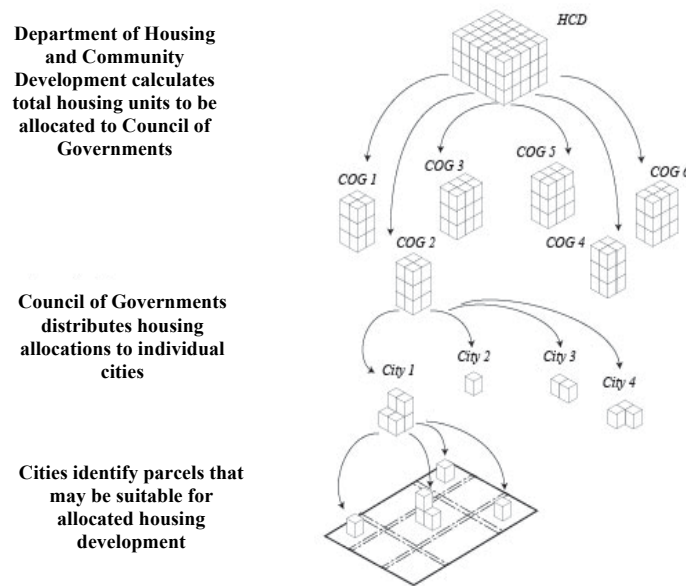


Figure 3126

Cities must also describe any environmental constraints to development, as well as indicate current or planned water, sewer, or other utility supply to the parcels.<sup>127</sup> This allows cities to demonstrate why housing has not been built in the past on that parcel, but also requires that cities account for such constraints in planning for the future. Until recently, there was no requirement that parcels be physically suitable for development, leading to some cities listing parcels in their housing inventory with no current electrical or water connectivity.<sup>128</sup>

Beyond the requirement for physical suitability, cities are not generally constrained in how they identify suitable land for development. Sites identified may include: vacant sites (either zoned for residential, or zoned for a use that allows residential development such as mixed-use commercial); residential zones currently occupied but capable of higher density development; and sites currently not zoned for residential use, but that are slated for rezoning.<sup>129</sup> Cities

126. Figure created by author.

127. CAL. GOV'T CODE § 65583.2(b)(4) & (5) (2019).

128. See *Hearing on A.B. 1397 Before the Assemb. Comm. on Local Gov't*, 2017-2018 Assemb. (Cal. 2017) (statement of Cecilia Aguiar-Curry, Chair, Assemb. Comm. on Local Gov't), available at <https://alcl.assembly.ca.gov/sites/alcl.assembly.ca.gov/files/AB%201397%20analysis.pdf>. Before passage of AB 1397, California law required only a description of utility connectivity, but not actual connectivity. AB 1397 changed this in 2017, imposing stricter requirements on the housing element, including parcel-specific analysis of suitability as well as making low-income developments by-right if the city has not identified a suitable number of parcels for low-income projects. See *infra* Part IV.C.

129. CAL. GOV'T CODE § 65583.2(a)(1)-(4) (2019).

may choose to rezone land for a more intensive use or increase the allowable density on a lot, as well as identify land in which the city plans to permit ADUs.<sup>130</sup>

When using ADUs to count towards the inventory, the city must include its progress in the permitting and construction of ADUs in the previous cycle, as well as the city's current number and demand for such units.<sup>131</sup> This requirement prevents cities from simply identifying ADU capacity for their RHNA if they have not actually demonstrated a market for such units. If a city fails to include the proper information on its ADU progress, by demonstrating how it has eased ADU restrictions or otherwise promoted ADUs, they will not be able to count those potential sites in their inventory, requiring the city to identify different, additional sites and potentially upzoning other sites.<sup>132</sup>

A city may also substitute up to 25 percent of its RHNA inventory for any income category if it also includes a program in its housing element that commits the city to providing direct assistance through either affordable housing or affordable rent assistance.<sup>133</sup> This exception is limited to units that the city has substantially rehabilitated, purchased from foreclosure, purchased and converted from nonaffordable to affordable, or preserved at an affordable rate when the unit would otherwise have aged out of affordability.<sup>134</sup> This 25 percent substitution option is not available to any city which is not currently in full compliance with its RHNA, however, meaning that noncompliant cities must still proceed with identifying enough parcels to accommodate the entire RHNA.<sup>135</sup>

## 2. *Schedule of Actions & Rezoning*

In addition to the housing inventory, cities must include in their housing element a schedule of actions for the coming planning period. This schedule must include a timeline for implementation of the city's housing policies, particularly how the city will ensure the sites identified in the housing inventory will be developed in the planning period.<sup>136</sup> In the event that sites identified in the initial inventory are not currently zoned to permit the necessary number of housing units, the city must rezone those sites within three years.<sup>137</sup> This rezoning must include appropriate minimum density requirements and development standards.<sup>138</sup> The deadline for this rezoning may only be extended if the city has

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130. CAL. GOV'T CODE § 65583.1(a) (2019); *supra* Part I.C.

131. CAL. GOV'T CODE § 65583.1(a) (2019).

132. CAL. GOV'T CODE § 65583.1 (2019).

133. CAL. GOV'T CODE § 65583.1(c)(1) (explaining that if a city was assigned 100 low-income units, they could account for up to twenty-five units (25 percent) by providing a rental assistance program or affordable housing program that provides at least that many units).

134. CAL. GOV'T CODE § 65583.1(c)(2) (2019).

135. CAL. GOV'T CODE § 65583.1(c)(3) (2019).

136. CAL. GOV'T CODE § 65583(c) (2019).

137. CAL. GOV'T CODE § 65583(c)(1)(A) (2019).

138. CAL. GOV'T CODE § 65584.09 (2019).

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zoned enough land for 75 percent of their RHNA and if the city can prove rezoning was prevented for a reason outside of the city’s control, like an outside financial or regulatory constraint.<sup>139</sup> If land is not rezoned under these provisions, it will now be subject to the SB 35 streamlining process.<sup>140</sup>

### C. RHNA: Historic Issues

The RHNA process was instituted in the 1980s to encourage cities across the state to build their “fair share” of housing.<sup>141</sup> Until recently, however, there were no true enforcement mechanisms to ensure cities actually built the assigned amount of housing. Additionally, reporting requirements for cities were weak, with cities only required to provide broad descriptions of their housing policies and progress.

In addition to RHNA’s lack of penalties, it also failed to address long-standing disparities in the provision of housing at all economic levels.<sup>142</sup> Historically, COGs allocated housing units to their cities through a process in which every city was given an equal vote, allowing for smaller and wealthier communities to push higher RHNA numbers on the larger and comparatively poorer cities.<sup>143</sup> This disparity also has a strong racial component, with recent research showing that RHNA distribution tended to give higher allocations to cities with higher populations of color.<sup>144</sup> The state moved to address many of these issues in the 2017 and 2018 Housing Package.

#### 1. Compliance and Reporting Issues with RHNA

One of the most frequent critiques of the RHNA process is that it had no bite, and gave no reason for cities to actually build the number of units they were assigned.<sup>145</sup> Historically, there were effectively no penalties for cities that did not meet their RHNA, as evidenced by the 97 percent of cities that are not in compliance with their RHNA.<sup>146</sup> The range of noncompliance can vary greatly,

139. CAL. GOV’T CODE § 65583(f)(1)-(3) (2019).

140. *Infra* Part IV; Cal Gov’t Code § 65583(g) (2019).

141. LALL ET AL., CENTRAL CITY ASSOCIATION OF LOS ANGELES, REGIONAL HOUSING NEEDS ASSESSMENT: THE NEED FOR REFORM IN FUTURE CYCLES 2 (2018), [https://www.ccala.org/clientuploads/directory/whitepapers/CCA\\_RHNA\\_White\\_Paper\\_-\\_March\\_2018.pdf](https://www.ccala.org/clientuploads/directory/whitepapers/CCA_RHNA_White_Paper_-_March_2018.pdf).

142. *Infra* Parts IV.A.i & IV.C.

143. *Infra* Part IV.C.B.

144. HEATHER BROMFIELD & ELI MOORE, HAAS INSTITUTE, UNFAIR SHARES: RACIAL DISPARITIES AND THE REGIONAL HOUSING NEEDS ALLOCATION PROCESS IN THE BAY AREA 11 (2017).

145. *See generally* MAC TAYLOR, CA LEGISLATIVE ANALYST’S OFFICE, DO COMMUNITIES ADEQUATELY PLAN FOR HOUSING (2017) (reporting that some communities faced “limited ramifications” for their noncompliance); *see also* Thomas A. Brown, *Democratizing the American Dream: The Role of a Regional Housing Legislature in the Production of Affordable Housing*, 37 U. MICH. J. L. REFORM 599, 638–41 (2004).

146. CALIFORNIA HOUSING AND COMMUNITY DEVELOPMENT, SB 35 STATEWIDE DETERMINATION SUMMARY 1–7 (2018). HCD. Only thirteen jurisdictions in the state were found to be in full compliance

with some cities having failed to build enough of any income-level housing and others having only failed to meet production of specific income-levels (usually very-low- and low-income).<sup>147</sup> The failure of RHNA in encouraging housing is readily apparent when looking at California's anemic housing production numbers. According to HCD, 180,000 units must be built annually until 2025 to meet statewide demand.<sup>148</sup> To put that into context, the entire city of Fresno is estimated to have 176,617 housing units.<sup>149</sup> However, between 2005 and 2015 the state produced on average only 80,000 units annually.<sup>150</sup>

In addition to the virtual nonexistence of enforcement mechanisms, state law lacked strong reporting requirements for cities. As discussed above, cities were required to provide information on what sites were available and planned for use in future housing developments. There were not, however, requirements that cities give detailed reports on all the sites.<sup>151</sup> Cities were not required to specifically detail each identified parcel, nor were they required to ensure that the identified parcels were actually suitable for the development they were listed for.<sup>152</sup> Cities were also not required to report the exact number of permit applications received or approved for residential units, meaning there was no way to identify if a city was standing in the way of RHNA compliance or if there was just not a market demand for housing.<sup>153</sup> Now that cities must report on the number of applications received and approved, HCD and the COGs will be able to better analyze if a city is actively working against housing development, or if there simply is just no interest in developing in that city.

Additionally, while cities were required to identify land suitable to meet their RHNA in their housing elements, there was no requirement that they actually ensure the number of permitted buildings met this required number.<sup>154</sup> This meant that if a city approved a project on a parcel at a lower density than it was identified as being suitable for, it was not required to make up for that loss

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with their RHNA as of January 1, 2018. The remaining 526 were found to be out of compliance, and thus subject to SB 35 streamlining. Prior to passage of bills discussed in this Note, the only major compliance mechanism was if HCD found a housing element to be out of compliance. However, it is important to note that a compliant housing element does not mean that a city was in compliance with their RHNA. *Id.*

147. See generally PERRY ET AL., NEXT10, MISSING THE MARK: EXAMINING THE SHORTCOMINGS OF CALIFORNIA'S HOUSING GOALS (report that documents the shortcomings of California's housing market), <https://www.next10.org/sites/default/files/california-housing-goals-2019-4.pdf>.

148. CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES, PUBLIC DRAFT—STATEWIDE HOUSING ASSESSMENT 2025, *supra* note 6, at 5.

149. 2013-2017 American Community Survey 5-Year, UNITED STATES CENSUS BUREAU, AMERICAN FACT FINDER (last visited May 30, 2019), <https://factfinder.census.gov/faces/nav/jsf/pages/index>.

150. CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES, PUBLIC DRAFT—STATEWIDE HOUSING ASSESSMENT 2025, *supra* note 6, at 5–6.

151. See A.B. 1397, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

152. *Id.*

153. See S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2018), adding requirement for reporting of specific number of permit applications received, approved, and denied.

154. See S.B. 166, 2017-2018 S. Reg. Sess. (Cal. 2017), adding in no net loss requirement into RHNA system.

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in units elsewhere.<sup>155</sup> Lastly, HCD did not have the power to review a city's compliance at any time, but instead could only review cities for compliance when they submitted their annual reports or their housing elements.<sup>156</sup>

*a. The Housing Accountability Act*

One of the only enforcement mechanisms prior to the new 2017 and 2018 housing bills was the Housing Accountability Act (HAA). The HAA was passed in 1982, aiming to hold cities accountable for the housing they were expected to build.<sup>157</sup> The HAA allowed developers to sue cities that were unreasonably blocking, or reducing the density of, housing projects, either by onerous noncodified additional requirements, or through unreasonable disapprovals of otherwise compliant projects.<sup>158</sup> The HAA's enforcement mechanisms only applied to those cities which were not in compliance with their RHNA.<sup>159</sup> If a city lost an HAA suit, the developer would be given what is known as a "builder's remedy."<sup>160</sup> A builder's remedy allows a court to order a city to approve a project, allowing it to be built over the city's opposition.<sup>161</sup> One of the issues with the HAA was that the burden of proof was largely on the developer, not the city, and courts largely gave cities deference in their planning decisions.<sup>162</sup> The burden of proof in HAA cases was also the high preponderance of the evidence standard, making it extremely difficult for a developer to succeed in their claim.<sup>163</sup>

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155. In other words, while a city might designate Parcel X as a 100-unit parcel, if a developer applies and is approved to build a project with only seventy-five units, the remaining twenty-five units would not be accounted for in other parcels. In effect even if cities had approved projects on all of their identified parcels, unless they approved at the exact numbers in their inventory, the city would still be underproducing.

156. See *Accountability and Enforcement*, CAL. DEP'T OF HOUS. AND CMTY. DEV. (last visited July 12, 2019), <http://www.hcd.ca.gov/community-development/accountability-enforcement.shtml> (discussing addition of enforcement authority by AB 72).

157. CAL. GOV'T CODE § 65589.5(a)(2)(K) (2019).

158. CAL. GOV'T CODE § 65589.5 (2019).

159. *Id.*

160. See *S. Burlington County NAACP v. Township of Mt. Laurel*, 456 A.2d 390, 413 (1983).

161. *Id.*; see also *Affordable Housing/Builders Remedy Suit: Facts & Frequently Asked Questions*, THE BOROUGH OF DUMONT, NEW JERSEY (last visited Apr. 24, 2019), <https://dumontnj.gov/affordable-housing-faq>.

162. This is not always true, with some housing activists having won HAA suits prior to the new changes. See J.K. Dineen, *A Key Tactic: Sue the Suburbs*, SAN FRANCISCO CHRONICLE (Nov. 1, 2018), <https://www.sfchronicle.com/bayarea/article/In-push-for-housing-YIMBYs-sue-suburbs-13352055.php>. This article points out an important aspect of the HAA, many cities would prefer to simply settle cases than fight them in court. *Id.*

163. Another issue cited often by developers is that HAA projects are still subject to the California Environmental Quality Act (CEQA), meaning that the project in question must go through the often expensive CEQA process before it can sue a city for noncompliance. The effect of CEQA on housing development is beyond the scope of this paper.

### 2. Racial Disparity Issues in the RHNA Process

In addition to RHNA's historical toothlessness, it has a demonstrated history of unequal distribution, largely based on racial lines. UC Berkeley's Haas Institute analyzed the third through fifth RHNA cycle<sup>164</sup> processes in the Bay Area and found that, even when accounting for income disparities, jurisdictions with larger minority populations were disproportionately burdened with higher RHNA requirements for very-low- and low-income units.<sup>165</sup> This inequality is important because it means that even if jurisdictions were in compliance with their RHNA, the burden of supplying housing would still be overwhelmingly on cities with higher minority populations.<sup>166</sup>

The problem with this burden falling on poorer cities, and cities with higher minority populations, is that it will effectively push much of the development burden on these communities who have historically had to bear the brunt of such development.<sup>167</sup> This burden is also more onerous on cities with lower tax bases, as they may not have the resources in their planning department to overhaul their zoning as necessary or to effectively plan. This lack of resources, coupled with SB 35's streamlining, could even lead to developers pushing through many of these cities without the cities having a chance to plan or manage the developments, which could lead to worsening gentrification concerns.

### 3. Economic Disparity Issues in the RHNA Process

An additional point of concern surrounding RHNA is the use of employment data in deciding the RHNA distribution. In considering how to distribute the RHNA, COGs must look at a city's job-housing relationship.<sup>168</sup> A job-housing relationship is a ratio calculated based on the goal of having an equal

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164. The RHNA process occurs as an eight-year cycle. The current cycle (the fifth) covers 2015-2023. The Haas Institute Report analyzed the RHNA system from 1999 through the current cycle. HAAS INSTITUTE, UNFAIR SHARES, *supra* note 144.

165. HAAS INSTITUTE, UNFAIR SHARES, *supra* note 144, at 11.

166. It is important to note that the Haas Institute study did not find that race played a part in actual permitting of RHNA units, only in the allocation process itself. Cities overwhelmingly under-permitted residential units, regardless of their racial makeup. *Id.* at 16.

167. While the issue of pushing development on to poorer cities and cities with minority populations is of major import for this paper, an analysis and discussion of such issues and the effects of housing development on displacement and gentrification are well beyond the scope of this paper. For more information on the historic impacts of racial zoning and impacts on development, see generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (1st ed. 2017) (discussing de jure segregation in American housing policy); Edward Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities*, 48 URBAN STUDIES 1581 (2011) (examining direct and indirect displacement caused by public house transformation); Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 INDIANA L. REV. 555 (examining how programs caused further grievances on segregated communities).

168. CAL. GOV'T CODE § 65584.04(d) (2019).



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number of housing units to support the number of jobs in an area.<sup>169</sup> This ratio is calculated on the city level, not the regional level. That means that cities that border major job centers do not necessarily have their proximity to jobs included in their RHNA calculations. An emblematic example of this paradox can be found in Beverly Hills' RHNA allocation from the fifth RHNA cycle.<sup>170</sup> Beverly Hills, despite bordering the major commercial and office districts of Century City and West Hollywood, was given a RHNA of only three housing units for the 2015–2023 RHNA cycle, presumably because Beverly Hills itself is predominately residential and thus has a low job-housing ratio.<sup>171</sup> By not requiring that COGs take into consideration a city's connection to the regional job market, it can allow smaller, often wealthier enclaves to underbuild while benefiting from the increased housing prices (and thus tax base) that come with proximity to job centers.

#### IV. RHNA AFTER THE HOUSING PACKAGE AND 2018 HOUSING BILLS

In response to the housing crisis, and in trying to address some of the criticisms of current housing law, the California State Legislature passed fourteen bills in 2017 to increase housing development and maintain and increase the affordable housing stock.<sup>172</sup> The legislature then passed three more bills, SB 828, AB 1771, and AB 686, in the 2018 legislative session to add further clarification to the previous Housing Package. The housing bills passed in 2017 and 2018 have moved RHNA from being a well-meaning but ineffective measure of housing needs to what it was designed to be: a tool for requiring cities to approve their fair share of housing.

The focus of this Note is SB 35, which aims to streamline development approvals in cities that are noncompliant with RHNA, and the six RHNA and housing element accountability bills, as well as the three 2018 bills passed by the legislature.<sup>173</sup> The bills passed in 2017 and 2018 have made significant progress in addressing the first major issue with RHNA discussed above—the lack of enforcement and accurate reporting mechanisms.<sup>174</sup> The 2018 bills also work to address the racial disparity issues, though it remains to be seen if they will be enough. Unfortunately, none of the recent bills have implemented the regional-

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169. CALIFORNIA PLANNING ROUNDTABLE, *DECONSTRUCTING JOBS-HOUSING BALANCE 5* (2008), <https://www.sanjoseca.gov/DocumentCenter/View/3309>.

170. *See 5th Cycle RHNA*, SCAG (last visited Apr. 24, 2019), <http://www.scag.ca.gov/programs/Pages/5th-Cycle-RHNA.aspx>.

171. *Id.*

172. *California's 2017 Housing Package*, CAL. DEP'T OF HOUSING AND CMTY. DEV. (last visited Apr. 24, 2019), available at <http://www.hcd.ca.gov/policy-research/docs/HousingBillMatrix.pdf>.

173. *See id.* SB 540, AB 73, and the other Affordable Housing Bills, while important in dealing with the crisis, are beyond the scope of this paper.

174. Importantly, SB 2 provides funds for jurisdictions to update their plans. Many jurisdictions have out of date plans due to lack of resources. The dedicated funding provided in the first year of the bond measure is projected to give millions to local cities to update general plans and housing elements. This funding was approved by voters through passage of Proposition 2 in November 2018.

level planning power that is necessary to address the economic disparity issues discussed briefly above.<sup>175</sup>

A. SB 35

SB 35, authored by State Senator Scott Weiner, aimed to address two of the major criticisms of RHNA: that it lacked any penalties for noncompliance, and that cities were inaccurately identifying parcels in their housing inventories. As discussed above, the RHNA was historically toothless. Cities would be assigned their RHNA, but there were minimal penalties for jurisdictions who made little or no progress towards their goal. SB 35 changes that, streamlining approval of developments in cities that have failed to meet their RHNA goal.<sup>176</sup> This streamlining effectively removes local discretionary control, and requires cities to approve projects so long as they meet the requirements in the city code.<sup>177</sup>

The streamlining process in SB 35 means that cities must approve projects that meet current zoning requirements for the parcel, and may not subject the projects to CUPs or other subjective standards, discussed earlier in Part I.<sup>178</sup> This streamlining extends to design review, allowing only “reasonable objective design standards” to be applied to eligible projects.<sup>179</sup> Such objective zoning and design standards include density, height, and bulk restrictions, but do not include CUPs or any other forms of restriction that give cities flexibility in interpretation. The bill also forbids parking requirements for transit-oriented developments, as well as in historic districts, and limits parking requirements otherwise to one space per unit.<sup>180</sup>

Cities subject to SB 35 streamlining must determine if a project is in compliance with the objective planning standards within sixty or ninety days of application, depending on project size.<sup>181</sup> If a city fails to issue such a determination in this timeframe, the project is automatically approved and entitled.<sup>182</sup> Importantly, cities may not consider any “density bonus”<sup>183</sup> or other

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175. *Infra* Part V.

176. *See* S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2018).

177. *See* CAL. GOV'T CODE § 65913.4 (2019).

178. Projects must be approved under SB 35 if they are “consistent with objective zoning standards and objective design review standards in effect at the time that the development is submitted.” *Id.*

179. CALIFORNIA HOUSING AND COMMUNITY DEVELOPMENT, STREAMLINED MINISTERIAL APPROVAL PROCESS 10 (2018), <http://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf>. An example of objective design standards, as opposed to subjective, would be a requirement that a project be made of specific materials or be designed in a particular architectural style, so long as that style is clearly defined within the code.

180. *See* S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017).

181. Projects with 150 units or fewer, must receive response within ninety calendar days. Projects with more than 150 units must receive a response within 180 days of submittal of the application. *Id.*

182. *See* S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017).

183. State law allows developers to increase project density over that approved by local jurisdictions if the project meets specific affordable housing requirements. *See* Jon Goetz & Tom Sakai, Myers Nave, Guide to the California Density Bonus Law 3–6 (2017), at <https://www.meyersnave.com/wp-content/uploads/California-Density-Bonus-Law.pdf>.

state-provided development incentives when considering if a project follows the objective standards.<sup>184</sup> This means if a project receives a 20 percent density bonus under separate state law, a city may not consider that 20 percent when analyzing if the project fits into their objective code requirements. This takes away a city's ability to condition approval on a project's conformity with a litany of additional changes or requirements that are not in the planning code.

The bill also creates two tiers for streamlining, depending on which income-level of RHNA the city has not built.<sup>185</sup> For all cities who have not met their RHNA for above-moderate income, or have not submitted their most recent annual housing progress report, any project with at least 10 percent affordable units is eligible for SB 35 streamlining.<sup>186</sup> Similarly, for all cities who have not met their RHNA for very-low- and low-income units, any project with at least 50 percent affordable units is eligible for streamlining.<sup>187</sup> As of January 2018, only thirteen jurisdictions in the state are not subject to SB 35 streamlining at some level.<sup>188</sup> SB 35 streamlining is only eligible for projects paying a prevailing wage, and may not apply to projects that require the demolition of affordable housing.<sup>189</sup> This factor is important, ensuring that cities do not approve the demolition of the limited affordable housing currently available in favor of streamlined projects.

SB 35 also updated the inventory requirement of the RHNA process. The inventory must now, as discussed above, list every parcel and detail its suitability for building at the density and income-level necessary for the city to meet its RHNA goal.<sup>190</sup> While cities have always been required to provide an inventory of land identified for RHNA, many cities either did not submit their inventory at all, or would draft their inventory in bad faith. Now, cities must realistically determine whether the parcels they have identified to accommodate future development can feasibly produce the allocated number of housing units: a parcel may be zoned for hundreds of units of housing, where a market feasibility analysis could determine that site may support many fewer units.

SB 35 also clarified what lands could not be identified as suitable for development for the purposes of RHNA, including: land identified for conservation, habitat areas for state or federally protected species, lands prone to flooding, hazardous waste sites, lands in a delineated earthquake zone, wetlands,

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184. See S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017), adding CAL. GOV'T CODE § 65913.4 (2019).

185. See *id.*

186. *Supra* Part III.B.i.

187. See S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017), adding CAL. GOV'T CODE § 65913.4 (2019).

188. SB 35 STATEWIDE DETERMINATION SUMMARY, *supra* note 146, at 1. Of the thirteen jurisdictions not eligible for streamlining, ten are cities and three are counties. 378 cities are eligible for the 10 percent affordability streamlining, and 148 are eligible for the 50 percent affordability streamlining. *Id.* at 1-2, 7.

189. See S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017), adding CAL. GOV'T CODE § 65913.4 (2019).

190. See S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017), amending CAL. GOV'T CODE § 65400 (2019). Also added to by A.B. 1397, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

lands in a very high hazard severity zone, and coastal lands.<sup>191</sup> This prevents cities from identifying land for their inventory that cannot actually be built upon, forcing them to identify, and rezone if necessary, sufficient land for housing.

SB 35 has already shown some limited success in advancing various housing projects in the state, with two prime examples in Berkeley and in Cupertino.<sup>192</sup> The Berkeley projects pushed through over one hundred affordable units in a city renowned for its antidevelopment attitude, while the Cupertino project approved a contested 2,402-unit mixed-use development on the site of an old mall in the center of Silicon Valley.<sup>193</sup> These successes demonstrate how SB 35's streamlining measures can be used to circumvent an otherwise development-hostile local government, and how it can be used on projects of varying sizes.<sup>194</sup> This tool will likely continue to be used throughout the state, as the housing crisis continues and as cities remain noncompliant with their RHNA.

*B. AB 678, SB 167, AB 1515, and the Housing Accountability Act*

In addition to changing the RHNA process, the legislature passed a trio of bills that aimed to strengthen the Housing Accountability Act (HAA). The HAA was one of the only enforcement mechanisms available to use against noncompliant cities, but its weaknesses meant that it was infrequently used.<sup>195</sup> The new bills have shifted the power dynamic in HAA suits from a broad deference to cities to one favoring housing production instead.

SB 167 and AB 678, part of the 2017 Housing Package, raised the burden of proof on cities, requiring them to provide more information detailing their reasons for rejection of a project.<sup>196</sup> The HAA now prevents cities that have not met their RHNA from disapproving or reducing the density of a housing development unless the city can prove, with substantial evidence, that the project would: have a specific adverse impact on health or safety with no feasible mitigation; violate a specific state or federal law if approved; or be inconsistent

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191. See S.B. 35, 2017-2018 S. Reg. Sess. (Cal. 2017), adding CAL. GOV'T CODE § 65913.4 (2019).

192. *Vallco Town Center SB 35 Application*, CITY OF CUPERTINO (last visited Apr. 23, 2019), <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco-sb-35-application>; Tony Hicks, *Berkeley Approves Two Affordable Housing Projects in Record Time under New State Law, SB 35*, BERKELEYSIDE (Jan. 17, 2019), <https://www.berkeleyside.com/2019/01/17/berkeley-approves-two-affordable-housing-projects-in-record-time-under-new-state-law-sb-35>.

193. See Hicks, *supra* note 192; see also *Vallco Town Center SB 35 Application*, *supra* note 192.

194. Berkeley provides a counter example, with the city rejecting a contentious SB 35 project, arguing that the project did not comply with the objective affordability and traffic rules, as well as debatably demolishing an historic structure, making the project ineligible for SB 35 streamlining. Natalie Orenstein, *Berkeley Rejects SB 35 Application for Spenger's Lot Development, Again*, S.F. CHRON. (Sept. 6, 2018), <https://www.sfgate.com/bayarea/article/Berkeley-rejects-SB35-application-for-Spenger-s-13210036.php>.

195. *Supra* Part IV.A.1.; see Dineen, *supra* note 162.

196. See S.B. 167, 2017-2018 S. Reg. Sess. (Cal. 2017); A.B. 678, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

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with the zoning ordinance and general plan of the city.<sup>197</sup> The HAA also forbids cities from conditioning approval, or utilizing design review, in a manner that would effectively render the development infeasible for development of very-low-, low-, or moderate-income housing.<sup>198</sup> One further enforcement mechanism instituted by these bills is a mandatory \$10,000 per unit fine if a city violates the HAA.<sup>199</sup>

AB 1515 created a “reasonable person” standard for determining if a project conforms with local land use requirements.<sup>200</sup> This standard means that if there is substantial evidence that would lead a reasonable person to find that a development is in conformity with local regulations, it should be approved under the HAA.

In combination, these three bills make it so that a developer must prove, with the lower standard of substantial evidence, that a city has unreasonably rejected their project. The court must then apply the reasonable person standard, instead of giving its traditional deference to the city. These changes should make the HAA more effective in pursuing its goal, holding noncompliant cities accountable for their decision processes. While these new laws strengthened the HAA, it remains unclear if they will change what is often asserted as its biggest drawback: developers might not want to sue the jurisdictions they hope to build in, for fear of creating further ill will. This concern was partially addressed by allowing the Attorney General to enforce the HAA, rather than relying solely on developer lawsuits.<sup>201</sup> Additionally, it might be hard to prove the success of these reforms, as many cities will likely approve projects that they are worried could otherwise be subject to the steep HAA penalties.

### *C. SB 166, AB 72, AB 879, and AB 1397*

Four of the recently passed bills directly address housing element law, increasing HCD review power, and strengthening the annual reporting requirement. These bills together aim to ensure cities are in compliance with the housing element, and clarify how cities may identify sites for the purposes of RHNA.

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197. CAL. GOV'T CODE § 65589.5(d)(1)-(5) (2019).

198. CAL. GOV'T CODE § 65589.5(d) (2019).

199. See S.B. 166, 2017-2018 S. Reg. Sess. (Cal. 2017).

200. See A.B. 1515, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

201. Under AB 72, the Attorney General may now enforce Housing Element compliance (of which the HAA is a part) at any time. At the time of writing, the Attorney General has initiated one lawsuit against the City of Huntington Beach, and Governor Gavin Newsom has indicated support for further lawsuits against noncompliant cities who do not make changes in a timely manner to comply. See Liam Dillon, *After Huntington Beach Lawsuit, Newsom Warns Cities He'll Continue Housing Law Crackdown*, L.A. TIMES (Feb. 19, 2019), <https://www.latimes.com/politics/la-pol-ca-gavin-newsom-housing-cities-summit-20190219-story.html>; see also Press Release, Office of Governor, In the Face of Unprecedented Housing Crisis, California Takes Action to Hold Cities Accountable for Standing in the Way of New Housing (Jan. 25, 2019), <https://www.gov.ca.gov/2019/01/25/housing-accountability/>.

AB 1397 tackles the issue of cities improperly or insufficiently identifying sites suitable for very-low- and low-income housing. AB 1397 requires that cities zone spaces appropriately for low-income units, and makes developments on these sites by-right if they are at least 20 percent affordable to lower-income households.<sup>202</sup> AB 1397 also requires that cities have significant justification when identifying nonvacant sites for purposes of the RHNA inventory.<sup>203</sup> Cities may only use nonvacant sites for RHNA if that site has not been used previously to meet the RHNA.<sup>204</sup> Additionally, AB 1397 clarified that sites must be “realistically . . . available” for development, aiming to prevent cities from identifying parcels that have a low likelihood for development.<sup>205</sup>

SB 166 requires that when sites identified in the RHNA inventory are developed, there are no net losses of units at any income level.<sup>206</sup> Under this bill, if a site is identified in the RHNA inventory as suitable for a certain number of low-income units, if any less units are built when the site is developed, the city must subsequently identify additional sites that will make up for these units.<sup>207</sup>

AB 879 and AB 72 updated the housing element and reporting requirements. Under AB 879, similar to SB 35, cities must provide annual housing reports to HCD, sharing data on their progress towards meeting their RHNA.<sup>208</sup> This bill applied the reporting requirement to all cities.<sup>209</sup> AB 879 increased the required specificity of the annual reports, requiring the number of project applications and approvals, details on the processing times for permitting and applications, and the approval process to be included.<sup>210</sup> AB 72 gave HCD the authority to find a jurisdiction out of compliance with state housing law at any time, where before it could only do so when housing elements were being updated and submitted for HCD approval.<sup>211</sup> HCD may now report noncompliant cities at any time to the state Attorney General, if their actions are inconsistent with their adopted and approved housing element.<sup>212</sup>

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202. CAL. GOV'T CODE § 65583.2(c) (2019).

203. CAL. GOV'T CODE §§ 65583.2(c) & (g) (2019).

204. CAL. GOV'T CODE 65583.2(c) (2019).

205. CAL. GOV'T CODE § 65580 (2019).

206. *See* S.B. 166, 2017-2018 S. Reg. Sess. (Cal. 2017).

207. *See id.*

208. *See* A.B. 879, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

209. Previously, charter cities were exempt from the annual housing report requirement. *See id.*

210. *See id.*

211. *See* A.B. 72, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).

212. As of October 31, 2018, HCD has: issued warnings about noncompliance to forty-six cities, decertified two cities' housing elements, and referred one city to the attorney general. Ben Metcalf, Presentation to CED Class: The State's Role in Supporting Housing in California. (Oct. 13, 2018). It is important to note that this will likely be a significant increase in duties for HCD, and without increased funding, might not lead to significant enforcement levels.

*D. SB 828, AB 1771, and AB 686: Affirmatively Furthering Fair Housing*

In 2018, the state legislature continued to focus on housing policy, enacting three new bills focusing on additional deficiencies that were not addressed in the 2017 Housing Package. These new bills each addressed one of the RHNA issues discussed above, by adding transparency to the RHNA process, updating RHNA consideration factors to focus more on racial and economic equity, and by working to make RHNA more reflective of the current housing reality.

The bills overlapped in their goals, with each adjusting the factors that COGs must consider when drafting their RHNA and importing the now-defunct federal “Affirmatively Furthering Fair Housing” (AFFH) standard into state law.<sup>213</sup> The bills also refined the RHNA consideration by requiring COGs to include the number of households who are rent burdened (spend more than 30 percent of their income on housing) and the number of overcrowded households (more than one resident per bedroom) in their RHNA consideration.<sup>214</sup> The implications of these changes are vast: even without any population growth, jurisdictions will still be required to build more housing if their COG or HCD finds that too many of their households are rent burdened or overcrowded. This means that cities must not only respond to future growth trends, but also to the effects of decades of underproduction of housing units.

This will likely increase RHNA numbers in many cities, since it moves the housing need analysis from being predominately focused on future needs, to also focusing on the current needs of overcrowded and overburdened households.

The bills also clarified the housing element law to set a healthy vacancy rate of no less than 5 percent of future planning efforts, which will likely increase the number of planned for housing units. Finally, AB 1771 ties the RHNA process closer to California’s greenhouse gas reduction goals and restricts a COG’s ability to add additional factors to their RHNA consideration unless they can be shown to further the stated goals of the RHNA process.<sup>215</sup>

Of particular importance for this Note was the addition of the AFFH standard into California’s housing element law. While all three bills added “affirmatively further fair housing” into the Government Code, AB 686 specifically tied this language to the AFFH Rule issued in 2015 by the Department of Housing and Urban Development under President Obama.<sup>216</sup> While that rule has since been withdrawn and significantly changed by the

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213. S.B. 828, 2017-2018 S., Reg. Sess. (Cal. 2018); A.B. 1771, 2017-2018 Assemb., Reg. Sess. (Cal. 2018).

214. *Id.*

215. See A.B. 1771, 2017-2018 Assemb., Reg. Sess. (Cal. 2018). This is important as it removes a COG’s ability to include any factors that they can’t prove contribute to the goal of equitable housing distribution. *Id.*

216. See A.B. 686, 2017-2018 Assemb., Reg. Sess. (Cal. 2018); CAL. GOV’T CODE § 65583(c)(9)(B) (2019).

Department of Housing and Urban Development,<sup>217</sup> its guiding language has been incorporated into state housing element law.<sup>218</sup> This addition requires that all jurisdictions not only consider past patterns of housing segregation in the jurisdiction, but “affirmatively” work to remedy these injustices. Such analysis will be a part of any housing element update starting January 1, 2021.<sup>219</sup>

The addition of the AFFH considerations, along with HCD’s oversight and enforcement capabilities provided by AB 72, will hopefully force jurisdictions to face their problematic pasts and deal with them appropriately.<sup>220</sup> SB 828 specifically requires that the RHNA process assign additional weight to past racial and wealth disparities for cities that have a median employed household income above the fiftieth percentile for the region and either contain a regional job center (as determined by the COG) or have high-quality transportation connecting the city to a regional job center.<sup>221</sup> This will likely increase RHNA allocations for many of the wealthy and generally homogenous communities who have otherwise been able to avoid significant RHNA allocations.<sup>222</sup> Importantly, this increase in RHNA will likely not mean just more housing generally, but particularly more affordable housing in wealthy areas. This focus on transit accessibility further underscores the state’s commitment to streamlining housing policy to work towards a greener future.<sup>223</sup>

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217. Interestingly, the Department of Housing and Urban Development revoked the rule claiming that it did not provide enough local decision making, and by increasing requirements for building affordable housing, was making affordable housing more difficult to produce. *See* Press Release, Dep’t of House and Urban Dev., HUD Seeks to Streamline and Enhance ‘Affirmatively Furthering Fair Housing’ Rule (Aug. 13, 2018), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_18\\_079](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_18_079).

218. CAL GOV’T CODE § 8899.50(a)(1) (2019). Incorporating the Housing and Urban Development AFFH definition: “‘Affirmatively furthering fair housing’ means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a public agency’s activities and programs relating to housing and community development.” *Id.*

219. *See* A.B. 686, 2017-2018 Assemb., Reg. Sess. (Cal. 2018); CAL GOV’T CODE § 65583(c)(9)(C) (2019).

220. *Supra* Part IV.C.

221. *See* S.B. 828, 2017-2018 S. Reg. Sess. (Cal. 2018); *see also* Memorandum from S.F. Planning Department to S.F. Planning Commission 2 (July 12, 2018), [http://commissions.sfplanning.org/cpcpackets/2018\\_07\\_10%20SB%20828%20AB%201771%20Memo.pdf](http://commissions.sfplanning.org/cpcpackets/2018_07_10%20SB%20828%20AB%201771%20Memo.pdf).

222. *Id.* at 7.

223. AB 1771 also added language to the RHNA framework requiring that the RHNA must further the state’s greenhouse gas reduction targets by focusing housing in transit accessible areas. CAL. GOV’T CODE § 68854(d)(2) (2019). While the full connection of RHNA to greenhouse gas reduction goals is beyond the scope of this paper, it is an important consideration, especially in relation to environmental justice issues and the disproportionate impact of climate change and vehicle emissions on communities of color.



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Additionally, these three bills aimed to make RHNA reflect the reality of the housing crisis by tweaking the factors that COGs must consider in their RHNA analysis. Of particular importance is the requirement for an analysis of overcrowded and cost-burdened households.<sup>224</sup> This analysis will require COGs to take into account the fact that increasingly large numbers of households are cost burdened or are only meeting their housing needs by crowding more people into single units.<sup>225</sup> An important caveat, however, is that these bills did not specify an appropriate number of cost-burdened households or an appropriate overcrowding rate. Instead, the analysis will be done comparatively, aiming to ensure that the rates are “no more than the average . . . in comparable regions throughout the nation,” as determined by the COGs.<sup>226</sup> This lack of exactitude might hamper the goals of these additions, particularly because the cities that are likely comparable to San Francisco and Los Angeles, for example, are also experiencing similar housing crunches.<sup>227</sup> This means that the resulting averages in these two factors could still be higher than what would be viewed as acceptable in smaller or more affordable cities, leading to lower increases in the RHNA allocation than the drafters might have intended. Regardless, the addition of these two factors will still likely increase RHNA allocations in the major urban cities of the state, due to their higher cost of living and higher overcrowding rates, even relative to these other metropolitan areas.<sup>228</sup>

An additional factor these bills added to the RHNA calculation is defining the healthy vacancy rate as no less than 5 percent.<sup>229</sup> This will also increase the overall RHNA allocation for many cities throughout the state. By setting a fixed vacancy rate for purposes of predicting current and future housing need under RHNA, the COGs must aim to have enough housing produced to meet this vacancy rate. For context, the current vacancy rate in the Oakland-Hayward-Berkeley housing market area is a mere 0.6 percent for sales and 2.7 percent for

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224. See S.B. 828, 2017-2018 S. Reg. Sess. (Cal. 2018); A.B. 1771, 2017-2018 Assemb., Reg. Sess. (Cal. 2018); CAL. GOV'T CODE § 65584.0(b)(1)(C) & (H) (2019).

225. See Sara Kimberlin, *Californians in All Parts of the State Pay More Than They Can Afford for Housing*, CALIFORNIA BUDGET & POLICY CENTER (Sept. 2017), <https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing/>; see also CAL. DEP'T OF PUBLIC HEALTH, HEALTHY COMMUNITIES DATA AND INDICATORS PROJECT, PERCENT OF HOUSEHOLD OVERCROWDING (> 1.0 PERSONS PER ROOM) AND SEVERE OVERCROWDING (> 1.5 PERSONS PER ROOM) (2017), <https://data.chhs.ca.gov/dataset/housing-crowding>.

226. CAL. GOV'T CODE § 65584.01(b)(1)(C) & (H) (2019).

227. Michael Hobbes, *America's Housing Crisis is a Ticking Time Bomb*, HUFFINGTON POST (June 19, 2018), [https://www.huffpost.com/entry/housing-crisis-inequality-harvard-report\\_n\\_5b27c1f1e4b056b2263c621e](https://www.huffpost.com/entry/housing-crisis-inequality-harvard-report_n_5b27c1f1e4b056b2263c621e) (discussing the housing crisis in coastal cities across the nation, including New York, Seattle, and Boston, all cities which would likely be considered “comparable” for these calculations).

228. See Memo to Planning Commission, *supra* note 221, at 3, 6; see also CAL. DEP'T OF PUBLIC HEALTH, *supra* note 225.

229. See S.B. 828, 2017-2018 S. Reg. Sess. (Cal. 2018); A.B. 1771, 2017-2018 Assemb., Reg. Sess. (Cal. 2018); CAL. GOV'T CODE § 65584.01(b)(1)(E) (2019).

rentals.<sup>230</sup> This change will require local government to zone for more housing to attempt to reach what the bill deems a “healthy” vacancy rate.

SB 828 also addressed some of the major critiques of the weakness of the housing element and RHNA laws, particularly the state’s lenient attitude to noncompliant jurisdictions. Specifically, SB 828 changes the RHNA calculation to forbid COGs from considering a jurisdiction’s previous noncompliance when assigning new RHNA numbers.<sup>231</sup> In the past, COGs would effectively reward poor performing cities by giving them even fewer housing units in their RHNA.<sup>232</sup> This bill goes even further, requiring that COGs explicitly consider prior underproduction of housing, and count that underproduction against cities, adding to their overall RHNA number.<sup>233</sup> For example, if a city was allocated 100 units, and only built fifty in that cycle, their COG would have to assign them the missing fifty units *in addition* to their new RHNA. This means that cities will now have to account for underbuilding, and digging themselves out of their deficit, or else be subject to SB 35 streamlining and thus lose discretionary power over developments.

This frustration with historical leniency is also reflected clearly in SB 828’s edits to the code section that lays out the legislature’s intent in creating and refining the RHNA system. SB 828 changed the language from: “it is recognized that future housing production may not equal” the housing need, to the much stronger: “it is the intent of the Legislature . . . that future regional housing production *meets, at a minimum*” the regional housing need.<sup>234</sup> This is a clear message from the California legislature that its patience with cities’ failure to plan and zone for enough housing is nearing its end. It is also a return to the initial goal of RHNA—to set a baseline for housing production, not simply a maximum goal.

### *E. Repeals in the 2017 and 2018 Housing Packages*

While the majority of these bills looked to add more to the RHNA system, there were a few important repeals built in. Important for the purposes of this paper was the removal of two key pieces of the RHNA system: the ability for jurisdictions to trade RHNA distributions between themselves, and the

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230. Office of Policy Dev. and Research, U.S. Dep’t of Housing and Urban Dev., *Comprehensive Housing Market Analysis, Oakland-Hayward-Berkeley, Ca*, 1 (2017), <https://www.huduser.gov/portal/publications/pdf/OaklandCA-comp-17.pdf>.

231. See S.B. 828, 2017-2018 S. Reg. Sess. (Cal. 2018); CAL. GOV’T CODE § 65584.04(f)(2) (2019).

232. See Dennis Lynch, *Developers can Expect more Friendly Zoning with New Housing Law*, THE REAL DEAL (Oct. 2, 2018), <https://therealdeal.com/la/2018/10/02/developers-can-expect-more-friendly-zoning-with-sb-828/>.

233. CAL. GOV’T CODE § 65584.04(g)(2) (2019). Prior to this bill, if a city was currently short 1,000 units but was projected to add only 200 residents the RHNA would only require them to zone for the projected 200 residents. Now, with the update, in this scenario that city would be required to zone for 1,200 residents in their housing element.

234. See S.B. 828, 2017-2018 S. Reg. Sess. (Cal. 2018); CAL. GOV’T CODE § 65584 (2019) (emphasis added).

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consideration of “the market demand for housing” from the RHNA process.<sup>235</sup> Previously, cities within a COG or subregion had the ability to trade their RHNA allocations with one another.<sup>236</sup> Some argue this trading has been beneficial for the production of below-market rate housing, because wealthier cities that do not want to build or that have higher housing construction costs could pay other jurisdictions to build those units instead.<sup>237</sup> However, from an equity standpoint, such trading could lead to even more severe racial and economic segregations, effectively creating a pay-to-exclude model. The second change removes the ability for jurisdictions to argue that the market conditions do not exist for them to meet a higher RHNA allocation. In other words, cities used to be able to argue that no matter how lax housing restrictions may have been, the housing market (and developers) were not able to build new housing units due to external market forces. Going forward, HCD and the COGs will use vacancy rates, job projections, overcrowding, and cost-burden to analyze if there is a demand for housing. The prevailing logic assumes these metrics predict demand for additional housing units that may be captured by new development in cities.

However, this removal has been critiqued. Some argue that it may actually undermine the assignment of low- and moderate-income housing units, because it does not consider the market forces (like higher-income housing demand) that are largely blamed for housing price increases throughout the state.<sup>238</sup> In other words, using the factors identified above, a city may now have a low vacancy rate, high overcrowding, and high job projection, but the housing market may respond by providing only market rate housing for high-income earners. This paradigm would leave low-income earners still in overcrowded units and with limited or no affordable housing production, due to lack of profit or other reasons from housing developers.

#### V. RHNA: WHERE ARE WE NOW, AND WHERE DO WE NEED TO GO?

The California housing bills of 2017 and 2018 have made significant changes that will improve the RHNA system, moving it towards a force for equity that it was created to be. The recent legislation’s focus on correcting the major issue—lack of accountability and enforcement mechanism—will hopefully push cities to actively work to meet their RHNA, helping alleviate the state’s housing crisis and lessening the burden on individuals. The changes also work to tie the RHNA process to the state’s climate goals, further flagging housing as not only an economic and equity issue, but also an environmental

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235. See A.B. 1771, 2017-2018 Assemb., Reg. Sess. (Cal. 2018); CAL GOV’T CODE § 65584.04(e)(2) (2019).

236. *Id.*

237. See, e.g., Civil Grand Jury of Santa Clara County, *Affordable Housing Crisis – Density is Our Destiny* (2018), [http://www.sccourt.org/court\\_divisions/civil/cgi/2018/BMRH%20Rpt%202018-06-19%20REVISED%20FINAL.pdf](http://www.sccourt.org/court_divisions/civil/cgi/2018/BMRH%20Rpt%202018-06-19%20REVISED%20FINAL.pdf) (arguing for the creation of a subregion for Santa Clara County, that would allow for higher-cost cities to trade RHNA with cheaper cities and still ensure housing is built).

238. See, e.g., Memo to Planning Commission, *supra* note 221, at 8.

concern.<sup>239</sup> Lastly, the addition of the AFFH standard will hopefully lead to a larger focus on racial and economic equity, which was undoubtedly one of the major historic flaws in the RHNA process.<sup>240</sup>

These bills emphasize one of the key benefits of the RHNA system: while it can be a contentious issue for COGs and cities, its esoteric nature helps keep the public eye (and potential political backlash) away from it.<sup>241</sup> As has been discussed frequently in the media,<sup>242</sup> the Not In My Back Yard (NIMBY) sentiment in California has frequently been able to prevent major overhauls of local control with residents aiming to keep development out of their communities. By reforming the RHNA system piecemeal, and adding in enforcement mechanisms like SB 35's streamlining, state legislators are able to keep the political pressure away from these changes, allowing for meaningful change that will hopefully yield more housing throughout the state. The move of legislators, like SB 35 sponsor Senator Weiner, to group housing bills together with other larger legislative goals (like funding for veteran and affordable housing with SB 3) further removes the focus off of such changes, which might otherwise fail to gain support from the more local-control-minded state legislators.

With the strengthened position of RHNA, due largely to SB 35's streamlining and the improved HAA enforcement system, California has gained a powerful tool to push local governments to actively pursue equitable housing development. While it will not be clear if these updates have truly had the planned effect until well into the next RHNA process, such reforms are a hopeful indicator that the state remains committed to addressing these issues, even if cities may not be.<sup>243</sup>

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239. See Chanell Fletcher, *Real Solutions California's Housing Crisis: An Update and a Look Ahead*, CLIMATEPLAN (Oct. 25, 2018), [https://www.climateplan.org/real\\_solutions\\_to\\_californias\\_housing\\_crisis](https://www.climateplan.org/real_solutions_to_californias_housing_crisis).

240. See HAAS INSTITUTE, UNFAIR SHARES, *supra* note 144, at 5.

241. Compare, for example, to the uproar that occurred when Senator Scott Weiner pushed forward SB 827, which would have taken away local control over height and densities for all parcels within one half mile of transit. Benjamin Schneider, *Yimby Defeated as California's Transit Density Bills Stalls*, CITYLAB (Apr. 18, 2018), <https://www.citylab.com/equity/2018/04/californias-transit-density-bill-stalls/558341/>.

242. See, e.g., Benjamin Schneider, *In California, Momentum Builds for Radical Action on Housing*, CITYLAB (Mar. 5, 2019), <https://www.citylab.com/equity/2018/03/in-california-momentum-builds-for-radical-action-on-housing/554768/>; Tribune Editorial Board, *State's 'Anti-NIMBY Law' will Bring more Housing to SLO, Whether Neighbors like it or Not*, SAN LUIS OBISPO TRIBUNE, (Aug. 11, 2018), <https://www.sanluisobispo.com/opinion/editorials/article215874275.html>; Dan Walters, *Should Sacramento or NIMBYs Control Land Use in California?*, O.C. REGISTER (Apr. 30, 2018), <https://www.oregister.com/2018/04/30/should-sacramento-or-nimbys-control-land-use-in-california/>.

243. The current RHNA cycle, the fifth, is 2015-2023, so any changes wrought by these new standards will not be seen until the implementation of the sixth Cycle, in 2023.

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*A. California should further its commitment to remedying past racial inequities in housing*

While the implementation of the AFFH standard for the RHNA and housing element processes is a powerful step towards addressing racial inequities in the land use process, the state should continue to push cities to remedy past racially inequitable policies. Currently, even under the AFFH standard, cities are only charged with “address[ing] significant disparities” and moving towards integration, without much mention of cities making up for their past mistakes.<sup>244</sup> The legislature should continue to push cities to reckon with their past mistakes by introducing an additional factor into the RHNA process: an analysis of the extent to which racial policies such as “red-lining” and other exclusionary zoning<sup>245</sup> techniques have stifled development or pushed out poorer communities and communities of color. This factor would require cities to provide data on their past policies and impacts, not just the current reality, allowing HCD and COGs to distribute the RHNA in a way that not only addresses current shortcomings, but also requires cities who have historically exclusionary policies to make amends through providing even more housing. This analysis could be broadened even further, to also focus on communities that have otherwise prevented low-income housing from being built in their jurisdictions.<sup>246</sup>

*B. California should shift the RHNA employment analysis to a regional analysis*

Additionally, while SB 828 added consideration of proximity to job centers when distributing the RHNA, it does not do enough to remedy structural issues that prevent smaller exclave cities from receiving higher RHNA allocations. This disparity is largely due to the recent legislation’s goals of tying development directly to transit proximity<sup>247</sup> (to reduce the number of vehicle-miles traveled),

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244. See CAL. GOV’T CODE § 8899.50(a)(1) (2019).

245. Exclusionary zoning is when a city introduces zoning policies that effectively exclude low-income residents from its communities. Often this is done by making it more difficult to build multifamily units, or by requiring that single-family units be on particularly large lots. See, e.g., Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, THE CENTURY FOUNDATION (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?agreed=1>; Richard V. Reeves, ‘Exclusionary Zoning’ is Opportunity Hoarding by Upper Middle Class, BROOKINGS INSTITUTE (May 24, 2017), <https://www.brookings.edu/opinions/exclusionary-zoning-is-opportunity-hoarding-by-upper-middle-class/>; Edward G. Weil and Stephen F. Ross, *Exclusionary Zoning in California: A Statutory Mechanism for Judicial Nondeference*, 67 CALIF. L. REV. 1154, 1154–55 (1979).

246. It is worth noting that while such analyses have been conducted on a broad level, to get jurisdiction-level data on such historical trends would likely require an immense effort, and would likely need to be funded on a state level, or otherwise risk it not occurring. See generally Rothstein, *supra* note 167 (discussing systemic de jure housing discrimination and segregation).

247. See *Transit Oriented Development Housing Program*, Cal. Dep’t of Housing and Cmty. Dev. (last visited Apr. 24, 2019), <http://www.hcd.ca.gov/grants-funding/active-no-funding/tod.shtml>.

which then benefits those cities who have resisted transportation projects in the past. A prime example of this is the cities of Beverly Hills and Piedmont, California: both border much larger cities and job centers, but neither currently has a particularly robust transit system.<sup>248</sup> Under the existing RHNA analysis, due to their relatively stable job numbers (both cities operate primarily as commuter cities to their neighboring metros), both Beverly Hills and Piedmont have received low RHNA allocations relative to their neighboring cities.<sup>249</sup> This low allocation is problematic as it continually pushes the burden onto the larger and poorer cities, allowing these smaller wealthier enclaves to continue to build well below their capacity, or not build at all.<sup>250</sup>

The state legislature should consider requiring COGs to analyze proximity to job centers more broadly, rather than focusing solely on transit connections. While encouraging transit-oriented developments certainly should be a priority, especially when focusing on greenhouse emissions, such a goal should not let many of the wealthier fringe cities off the hook for building more housing. A stronger analysis should focus on densifying current single-family neighborhoods, encouraging the development of more low- and mid-density construction like duplexes and triplexes. The importance of encouraging density in such neighborhoods can actually work in tandem with the state's climate goal, by encouraging enough density so as to make transit a financial possibility.<sup>251</sup> By considering general proximity to a job center, rather than tying it to existing transit lines, such a policy can encourage equitable distribution of the RHNA throughout a metro region, and can thereby encourage a broader transportation system, all within California's broader climate goals.

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248. Beverly Hills borders the Century City neighborhood of Los Angeles, while Piedmont is a small enclave in the Oakland Hills. Beverly Hills received intense press coverage for its opposition to the Los Angeles Metro's plan to build a subway line under the city. Laura Bills, *Beverly Hills Has Financed its Metro Fight with \$13 Million in Local Taxes*, CITYLAB (Oct. 22, 2018), <https://www.citylab.com/transportation/2018/10/beverly-hills-has-financed-its-metro-fight-13-million-local-taxes/573265/>. Piedmont's location off the main BART lines through Oakland has led to a heavy reliance on personal vehicles, which makes it less attractive for RHNA placement under the new bills. *Transportation Element*, CITY OF PIEDMONT 4-16 (Nov. 6, 2012), <http://www.ci.piedmont.ca.us/publicworks/generalplan/04-Transportation.pdf>.

249. *Infra* Part III.C.3., discussion over economic disparities, with Beverly Hills assigned only three total units for the fifth RHNA Cycle (2015-2023). Piedmont was required to build only sixty units total, despite its proximity to the overheated Oakland and San Francisco housing markets. Compare this to nearby Emeryville, which despite only being half a square mile larger, received a RHNA of 1498 units. *2015-2023 Regional Housing Needs Allocation*, ASS'N OF BAY AREA GOV'TS (last visited Apr. 24, 2019), <https://abag.ca.gov/planning/housingneeds/rhna2015-2023.html>.

250. This problem is only furthered by SB 375 which commits state transportation funding towards the cities that have higher housing production. This makes it even harder and less likely for these enclaves to ever build the appropriate level of transportation needed. *See The Basics of SB 35*, THE INSTITUTE FOR LOCAL GOV'T (last visited Apr. 24, 2019), <https://www.ca-ilg.org/post/basics-sb-375>.

251. In order to justify the construction or creation of transit lines, there must generally be a certain density of residents, to ensure enough riders to pay off the costs of running such transportation. *See, e.g.*, Erick Guerra & Robert Cervero, *Transit and the "D" Word*, ACCESS MAGAZINE 2, (2012) [http://www.accessmagazine.org/wp-content/uploads/sites/7/2016/01/access40\\_transitanddensity-1.pdf](http://www.accessmagazine.org/wp-content/uploads/sites/7/2016/01/access40_transitanddensity-1.pdf).

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*C. California should quantify the overcrowding and cost-burden metrics in the RHNA analysis*

The legislature should consider returning to the overcrowding and cost-burden factors introduced into the RHNA consideration by the 2018 housing bills. While these considerations are an important way to make sure the RHNA process reflects the current housing reality of the state, without setting a specific metric, it remains weak. As discussed above, these factors are to be analyzed in comparison with similar regions in the nation, with the goal that the Californian regions are no worse than the average. This metric is a low bar, since housing prices, and thus cost-burden and overcrowding, are increasing in comparable metro areas across the nation. The legislature should work with HCD to decide on a metric that can be used as a baseline, similar to the 5 percent “healthy” vacancy rate set by the same bills, rather than having it be comparative.

*D. California should change the COG voting structures to shift power from small towns to the regional metros*

An additional change the state should consider in the RHNA process is a modification of the COG voting system, shifting power from the multitude of smaller cities to the larger metropolitan regions. Such a change would encourage more comprehensive regional planning, with less ability for smaller cities to halt large projects that inconvenience them.<sup>252</sup> Currently the RHNA process is openly critiqued as being full of “political horse-trading”<sup>253</sup> and being “heavily influenced by local politics.”<sup>254</sup> One way to change the balance of power in this process would be to require COGs move to a weighted voted system, as recently adopted by SANDAG.

Currently the COGs have varied voting styles, with some (ABAG) having a one-city-one-vote structure<sup>255</sup> and others (SCAG) with a structure that is loosely tied to population.<sup>256</sup> These systems give smaller cities more control over

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252. Commonly, these are large transit projects, which plays into the point discussed above, that transportation is a key reason for smaller cities not receiving higher housing allocations. *See e.g.*, Laura Bliss, *Beverly Hills Has Financed Its Metro Fight With \$13 Million in Local Taxes*, CITYLAB (Oct. 22, 2018), <https://www.citylab.com/transportation/2018/10/beverly-hills-has-financed-its-metro-fight-13-million-local-taxes/573265/>.

253. Liam Dillon, *A Little-known Bill could Reshape Housing Development across California*, L.A. TIMES (Apr. 12, 2018), <https://www.latimes.com/politics/la-pol-ca-under-the-radar-housing-bill-20180412-story.html>.

254. Press Release, Assembly member Richard Bloom, 50th Dist., Major Housing Reform Passes State Senate (Aug. 29, 2018), <https://a50.asmdc.org/press-releases/20180829-major-housing-reform-passes-california-state-senate>.

255. *ABAG Governance: General Assembly*, ASS’N OF BAY AREA GOVERNMENTS (last visited Apr. 23, 2019), <https://abag.ca.gov/overview/ga.html>.

256. SCAG is governed by a Regional Council of eighty-six members, made up of elected officials from across its six constituent counties: seven county representatives (two from Los Angeles County, one from each of the remaining), one tribal government representative, each of the Los Angeles City Council Members (fifteen total), and then sixty-seven district representatives each representing one or more cities,

the COGs, allowing for more political maneuvering by these small jurisdictions to keep RHNA's lower and to force development into the larger city centers, thereby not building their true fair share.

Such political maneuvering and the power imbalance caused by these systems, along with some public scandal over financial mismanagement, led the state legislature to pass AB 805 in 2017, which shifted SANDAG's voting system from a one-city-one-vote system (much like ABAG's current system) to a system weighted on population.<sup>257</sup> The new system gives each jurisdiction a number of votes (from a total of 100) based on their percentage of the population.<sup>258</sup> Within this system, a vote may only pass as long as it receives 51 percent of the votes, with at least four jurisdictions voting (or at least 22 percent of the number of cities in SANDAG). This allows for the major metropolitan body (San Diego), which drives the economic engine of the region and the center of much of the transportation, to have much more control in policies. This shift also means that the smaller cities will no longer be able to use their COG power to bargain themselves out of RHNA allocations, as they have been accused of in the past.

While surely not a panacea, California should consider passing legislation changing all of the COGs structures to a weighted vote system, to encourage a more consistent regional planning effort rather than the current balkanized system. By moving all COGs to the same voting system, it would also allow more clarity for both the state and the constituent cities. Because the housing crisis is a state issue, and is being addressed at a state level, every COG should have the same structure. This would be beneficial not only in the context of housing, but also in regional transportation planning. This model would encourage more cohesive planning in both the Los Angeles and Bay Area regions, allowing for the cities that make up the majority of the population to make sure the smaller enclaves do their fair share both in housing, but also in access to transportation projects.

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with each district representing approximately equal populations. *Regional Council*, SCAG (last visited Apr. 24, 2019), <http://www.scag.ca.gov/committees/Pages/CommitteeL2/Granicus.aspx?CID=43>. Even with giving a seat for each of the fifteen Los Angeles City councilmembers, Los Angeles has a smaller proportional vote on the council than the other regional representatives. This is despite Los Angeles' significantly larger size, both population- and land-wise. *See Our Members*, SCAG, <https://www.scag.ca.gov/about/Pages/members.aspx> (last visited July 12, 2019).

257. Joshua Stewart, *Small Cities Oppose Bill that would Strip them of Power on SANDAG*, SAN DIEGO UNION-TRIBUNE (May 17, 2017), <https://www.sandiegouniontribune.com/news/politics/sd-me-sandag-overhaul-20170515-story.html>; *see generally* SANDAG, REGIONAL HOUSING NEEDS ASSESSMENT PLAN, FIFTH HOUSING ELEMENT CYCLE, PLANNING FOR HOUSING IN THE SAN DIEGO REGION 2010-2020 (2011), *available at* [https://www.sandag.org/uploads/publicationid/publicationid\\_1661\\_14392.pdf](https://www.sandag.org/uploads/publicationid/publicationid_1661_14392.pdf) (discussing San Diego's new housing policy). It is important to note that this bill was passed separately from the 2017 Housing Package, and was a response to local issues in SANDAG governance. *See* Joshua Emerson Smith, *In Wake of Scandal, SANDAG Overhaul Signed by Governor*, SAN DIEGO UNION-TRIB. (Oct. 11, 2017), <https://www.sandiegouniontribune.com/news/politics/sd-me-sandag-overhaul-20171011-story.html>.

258. A.B. 805, 2017-2018 Assemb., Reg. Sess. (Cal. 2017).



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#### CONCLUSION

The California legislature has taken important steps to address the massive housing affordability crisis. The 2017 and 2018 housing bills have transformed RHNA from an impotent bureaucratic process to a powerful tool to advance much-needed housing development in California. Where previously cities have either ignored their RHNA, or at the very least not feared failing to meet it, the new threat of losing local land use control due to SB 35 means cities will need to actively work to comply. While the housing changes move the state closer to solving the housing crisis, work still remains. As outlined above, this Note suggests several strategies to strengthen the state's housing laws: modifying the RHNA analysis further, requiring cities to address past inequities in housing planning and production, and adjusting the COG system to better reflect economic realities. Alongside these additional strategies, this wave of housing bills may soon be remembered as a watershed moment when California truly addressed its housing crisis. A renewed dedication to more sustainable, equitable, and resilient housing development will return California to its position as a national leader and help redefine the American dream.<sup>259</sup>

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We welcome responses to this Note. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.

