

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

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Since 1980, California has had an ambitious planning framework on the books to make local governments accommodate their fair share of regionally needed housing. The framework long relied, however, on a rickety and complicated conveyor belt for converting regional housing targets into actual production. Superintending the conveyor belt was an administrative entity, the Department of Housing and Community Development, whose rules had no legal effect, and whose judgments about the adequacy of a local government's housing plan received virtually no deference from the courts. This Article contends that the Department's position has been fundamentally transformed by a series of individually modest but complementary bills enacted from 2017 to 2019. The Department now has authority to strengthen, simplify, and supplement the conveyor belt in ways that would have been (legally speaking) unimaginable just a few years ago. More specifically, the Department may (1) adopt an "expected yield" definition of site capacity, which would more than double the amount of nominal zoned capacity that local governments must provide; (2) promulgate metrics and standards for whether the supply of housing within a local government's territory is substantially constrained; and (3) insist, as a condition of housing-plan approval, that poorly performing local governments adopt major, substantive reforms to local development processes, regulations, and fees. Though it's doubtful that the Department could mandate particular constraint-mitigation measures, such as ministerial permitting, the Department may incentivize their adoption by announcing compliance safe harbors.

DOI: <https://doi.org/10.15779/Z38FF3M128>

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INTRODUCTION

California, erstwhile land of opportunity, is today home to many of the nation's most dysfunctional and expensive housing markets.¹ In a well-functioning market, high prices lead to ramped-up production of multifamily housing, the most efficient form of housing where developable land is scarce. But in California, this dynamic has broken down.² Statewide, the metropolitan areas with the highest housing prices from 2008 to 2012 produced no more multifamily housing over the next five years than did other metro areas.³ In the San Francisco, San Jose, San Diego, and Sacramento regions, cities where housing was more expensive actually produced *less* multifamily housing in the ensuing years than did less expensive cities.⁴ The state's flagship cities, San Francisco and Los Angeles, have some of the least price-responsive housing supplies in the United States.⁵

These failures of multifamily housing supply are ironic, as California's codebooks are filled with laws meant to support it. The centerpiece is the housing-element law, which requires local governments to periodically adopt a state-approved plan, called a housing element, to accommodate the locality's share of "regional housing need."⁶ The legislature has declared that housing elements shall "facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing."⁷ A further goal is to concentrate housing near transit nodes and job centers.⁸

This Article is the first of several motivated by the disjuncture between what California says it wants to do (accommodate high-density development, especially near transit) and what it has managed to do (quash the supply of

1. The typical California home costs more than twice as much as the typical home elsewhere, and the problem is even worse in the state's economically productive coastal cities. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 6–7 (Mar. 17, 2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.

2. JENNY SCHUETZ & CECILE MURRAY, U.C. BERKELEY TERNER CTR. FOR HOUS. INNOVATION, IS CALIFORNIA'S APARTMENT MARKET BROKEN? 1 (2019), <https://www.brookings.edu/research/is-californias-apartment-market-broken/>.

3. *Id.* at 10; *see also id.* at 13, tbl.2 (showing that across cities, higher rents do not correlate with higher multifamily housing production).

4. *Id.* at 9 fig.7.

5. Salim Furth, *Housing Supply in the 2010s* 32 tbl.2 (Mercatus Ctr., Working Paper, 2019), <https://www.mercatus.org/system/files/furth-housing-supply-mercatus-working-paper-v1.pdf>.

6. CAL. GOV'T CODE § 65584.01 (West 2020).

7. *Id.* § 65583(c).

8. S.B. 375, 2007–2008 Reg., Leg. Sess. (Cal. 2008); *see also* CAL. GOV'T CODE § 65589.5(c) (West 2020) (noting that "it is the policy of the state that development should be guided away from prime agricultural lands; therefore, in implementing this section, local jurisdictions should encourage, to the maximum extent practicable, in filling existing urban areas"); *id.* § 65584(d) (stating that the intraregional allocation of the RHNA shall "[p]romot[e] infill development and socioeconomic equity, the protection of environmental and agricultural resources, the encouragement of efficient development patterns, and the achievement of the region's greenhouse gas reductions targets"); *id.* § 65583(c)(9) (requiring housing elements to include a program to "affirmatively further fair housing," such as "enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity").

multifamily housing where there is demand for it). The question we ask is whether there might be some new way to administer the housing-element law that would realize the state's ambitious production and equity goals. To meet these goals, the state will have to unlock the supply of multifamily housing—both market rate and subsidized—in high-cost metro areas.

We approach our question from two angles. First, in this Article, we delve into the law and identify new points of leverage that the state housing agency might use against local barriers to multifamily housing. Second, in future work, we will take a deep dive into the housing elements of fifteen local governments for which some members of the research team are also conducting stakeholder interviews and collecting data on development entitlements. We will juxtapose housing elements' analyses of development constraints against objective evidence of cumulative supply constraint in the corresponding housing market and also against the observations of stakeholders in each jurisdiction. The present Article focuses on the law, though with some reference to agency practice and the information we have gleaned from housing elements.⁹ Our subsequent work will focus on housing-element practice and policy and will include more specific recommendations.

Our overriding conclusion is that the Department of Housing and Community Development (HCD or Department) could use the state's planning framework in substantially new ways to bring about meaningful increases in the amount of land on which dense multifamily housing is allowed, as well as substantial reductions in the cost and time required to develop such housing. The requisite statutory authority to do this already exists, or arguably exists. That caveat—*arguably*—is important, and it's why the first Article in this series is more about law than policy. Before diving deeply into what HCD should do, we need to establish what it may do.

What the Department may do is in flux. The legislature has passed a flurry of recent bills tweaking the housing-element framework.¹⁰ Our claim in this Article is that these various emendations interact with one another to fundamentally alter the legal and practical authority of the state housing agency vis-à-vis local barriers to new housing.

Historically, HCD's authority has not matched the ambitions of California's housing laws. HCD could issue advisory guidelines, but local governments were obligated only to "consider" them.¹¹ HCD could find a housing element noncompliant, but if the local government then turned to the courts, the courts would defer to the local government's judgment at the expense of HCD's.¹²

9. We read the fifth-cycle (most recent) housing elements of the following cities: Folsom, Fresno, Los Angeles, Long Beach, Mountain View, Oakland, Palo Alto, Pasadena, Redondo Beach, Redwood City, Sacramento, San Diego, San Jose, San Francisco, and Santa Monica.

10. See *infra* Part II.

11. CAL. GOV'T CODE § 65585(a) (West 2020).

12. See *infra* Subpart I.B.3.

Amazingly, whether a housing element was likely to work was *irrelevant as a matter of law* to the housing element's validity.¹³

In just the past few years, however, the legislature has empowered HCD to issue “standards, forms, and definitions” concerning what we call the analytic side of the housing element, wherein the local government inventories developable parcels, assesses their capacity to accommodate housing, and analyzes potential constraints to development. We shall argue that the legislature has also ratified, albeit tacitly, HCD's preferred, functional test for whether a housing element complies with state law. Meanwhile, noncompliance determinations have been backstopped with fiscal penalties and more.¹⁴ Put these (and a few other) pieces together, and it becomes apparent that administrative interventions that would have been beyond the pale just a few years ago are live options today.

We develop three examples to illustrate this point. First, HCD can require local governments to account for sites' probability of development when planning to accommodate the local share of regional housing need.¹⁵ Traditionally, housing elements have been deemed compliant if aggregate zoned capacity on theoretically developable sites equals or exceeds the local government's housing target, notwithstanding that only a fraction of the sites are likely to be developed during the eight-year planning period.¹⁶ If HCD defined site capacity as the site's *expected yield* in new units during the planning period, that would more than double the amount of zoned capacity that local governments must provide.

Second, HCD can establish reporting requirements and performance standards to determine whether a local government has substantially constrained the supply of housing in its territory.¹⁷ Housing elements have long been required to include an “analysis of . . . constraints” on housing development and an associated program to “address and, where appropriate and legally possible, remove . . . constraints.”¹⁸ But these analyses haven't been grounded in standards or in data.¹⁹ Not surprisingly, many local governments report that they have no actual constraints at all.²⁰ New legislation gives HCD broad standard-

13. *Fonseca v. City of Gilroy*, 56 Cal. Rptr. 3d 374, 387 (Cal. Ct. App. 2007) (refusing to consider “merits” of a housing element).

14. *See infra* Subpart II.D.

15. *See infra* Subparts II.E.1.c, II.E.1.d.

16. To be clear, HCD did require local governments to account for development standards that reduced the permissible or likely size of a project below the nominal zoned capacity of the site. But sites were still counted for their capacity *if developed*, rather than for their expected yield in units during the planning period. *See infra* Subpart I.B.1.

17. *See infra* Subparts II.E.1.b, II.E.1.c.

18. CAL GOV'T CODE § 65583(a) & (c) (West 2020).

19. Christopher S. Elmendorf et al., *Superintending Local Constraints on Housing Development: How California Can Do It Better* 4–5 (July 8, 2020), <https://ssrn.com/abstract=3614085>.

20. *Id.*

setting authority with respect to the analytic side of the housing element,²¹ which the Department could use to create meaningful protocols and standards for the analysis of constraints.

Third, although HCD still lacks *de jure* standard-setting authority with respect to the programmatic side of the housing element—including programs to rezone, to remove development constraints, and to affirmatively further fair housing—the Department can shape housing-element programs by issuing advisory safe harbors.²² While such safe harbors might have been ignored in the past, the new penalties for noncompliance, coupled with the legislature’s (tacit) ratification of HCD’s functional test for whether a housing element is compliant, will make it quite risky for local governments to ignore even advisory recommendations going forward. HCD could further incentivize use of the safe harbors by waiving or relaxing reporting requirements for local governments that opt for the safe harbor.

There is much more to say about these and other initiatives that HCD might undertake with its new authority. Most of this will come in future papers.²³ Our present objective is simply to lay the legal foundations to show that such initiatives are within reach, under the law as it stands today. This, we hope, will foster public, administrative, and legislative debate about whether the initiatives should be undertaken, how they should be structured, and what additional personnel or resources HCD would need to carry them out.

This Article proceeds in two parts. Part I explains how California’s planning-for-housing framework has traditionally worked—or failed to work.²⁴ This is necessary context for Part II, where we walk the reader through the landscape of recently enacted reforms and show how HCD emerges as an actor that can powerfully shape, and reshape, California land use law. The Appendix provides a summary table relating legislative to potential administrative reforms and a flowchart illustrating the current operation of the California framework.

I. HOW CALIFORNIA-STYLE PLANNING FOR HOUSING HAS WORKED (OR NOT)

The centerpiece of the California housing framework is the so-called Regional Housing Need Determination (RHND).²⁵ Using population forecasts from the California Department of Finance and data on rates of household formation from the census, regional “councils of governments” estimate the number of new housing units that their regions will need over a five- to eight-

21. The requirements for what we call the “analytic side” of the housing element are spelled out in section 65583(a) of the California Government Code. The most (potentially) important pieces are the analysis of site capacity and constraints on housing development.

22. *See infra* Subpart I.E.2.

23. *E.g.*, Elmendorf et al., *supra* note 19 (presenting recommendations for constraints analysis and programs).

24. *See infra* Part I.

25. CAL. GOV’T CODE § 65584 (West 2020).

year planning cycle.²⁶ The total unit count is then partitioned according to the region's demographics into four affordability bands: units for very-low-income, low-income, moderate-income, and above-moderate-income households.²⁷ These estimates are submitted to the state housing department, HCD, which makes the final determination of regional need, called the RHND.²⁸ Councils of governments then allocate their respective RHNDs among the local governments in their regions.²⁹ The share that each local government receives is called its Regional Housing Needs Allocation (RHNA).³⁰

After receiving their RHNAs, local governments must update the housing element of their general plans and submit them to HCD for review and approval.³¹ To comply with state law, a housing element must include an inventory of developable sites, an analysis of development constraints, and a schedule of actions to make sites available and remove constraints, including, but not limited to, rezoning.³² Should the local government later downzone a housing-element site,³³ or approve a project with fewer units than the housing element contemplated for the site, a “no net loss” proviso obligates the local government to quickly rezone additional sites and make up the difference.³⁴ These requirements *should* work hand-in-glove with California's Housing Accountability Act (HAA), which disallows local governments from denying or reducing the density of a housing project that complied with applicable, objective standards at the time the project application was submitted (unless the project would have a specific adverse effect on public health or safety).³⁵ Housing elements *should* bring about the elimination of unjustified local restrictions, through the schedule of actions to remove constraints, while the HAA *should* prevent local governments from denying projects on the basis of ad hoc, discretionary substitutes for any overt constraint that the housing element's program has eliminated. Meanwhile, the background legal precept that the general plan (of which the housing element is a part) supersedes contrary local ordinances *should* prevent local governments from adopting new standards and

26. *Id.* § 65588(e)(3).

27. *Id.* § 65584(f).

28. *Id.* § 65584.01(c). HCD may “accept or reject” information provided by the council of governments or modify the operative assumptions. *Id.*

29. *Id.* §§ 65584.04, 65584.05.

30. *Id.* § 65584.05; *Regional Housing Needs Allocation and Housing Elements*, CAL. DEP'T OF HOUS. & HUMAN DEV., available at <https://www.hcd.ca.gov/community-development/housing-element/index.shtml>.

31. *Id.* §§ 65585, 65587, 65588.

32. *Id.* § 65583(a), (c).

33. To “downzone” a site is to reduce the permissible residential density or scale allowed on the site under the municipality's zoning and development ordinances. See *Downzone*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/downzone> (last visited Feb. 20, 2021).

34. CAL. GOV'T CODE § 65863 (West 2020) (requiring rezoning within 180 days).

35. *Id.* § 65589.5(a).

procedures at cross purposes with their housing elements,³⁶ unless the local governments go through the formal process of housing-element amendment, including HCD review.³⁷

It's a beautiful scheme on paper, but not yet in practice. As this Part will explain, there are—or traditionally have been—some pretty fundamental problems with the framework. One is that the determination and allocation of housing need have been obtuse to the workings of housing markets. The other is the great complexity and heroic assumptions of the mechanisms for converting the RHNA into actual entitlements to build housing.

A. “Housing Need,” Obtuse to Markets

Under any functional planning-for-housing regime, regions with very expensive housing and lots of jobs would presumptively receive very big housing targets. Similarly, intraregional distributions of the RHNA would be heavily weighted toward localities with expensive housing and growing demand for workers. New housing belongs where people want to live.³⁸

This is not how California does it. A recent report by Paavo Monkkonen and Spike Friedman finds that if *every* parcel designated for new housing in *every* local government's housing element were to be developed to the *maximum* capacity specified in the housing element, the state would produce only 2.8 million new units of housing over the current (fifth) planning cycle,³⁹ which is considerably less than the 3.5 million target that the governor and several independent analysts have embraced.⁴⁰ Moreover, during the fourth planning

36. See *Leshner Commc'ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 321–22, 540 (1990) (describing a general plan as the “constitution” for development).

37. To amend its housing element, a local government must give advance notice to HCD, review the agency's comments, and make findings explaining and justifying its disagreement if it adopts the amendment over HCD's objections. See CAL GOV'T CODE § 65585 (West 2020). Today, amending the housing element over HCD's objections would expose the local government to a serious risk of decertification. See *Kennedy Commc'n v. City of Huntington Beach*, 224 Cal. Rptr. 3d 665, 667–69 (Cal. Ct. App. 2017) (recounting history of decertification of Huntington Beach's housing element); A.B. 72, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (confirming HCD's authority to decertify a housing element midcycle).

38. It is of course possible that new development in some places where people want to live would cause shadowing or other local disamenities that outweigh the benefits of the new housing. However, studies that try to quantify the benefits as well as costs of typical urban and suburban land-use regulation have generally found that the costs far outweigh the benefits. See David Albouy & Gabriel Ehrlich, *Housing Productivity and the Social Cost of Land-Use Restrictions*, 107 J. URB. ECON. 101, 102 (2018), and sources cited therein. The very high per-square-foot prices commanded by city-center residences, relative to prices of suburban residences in less dense locations, are also inconsistent with the “density as disamenity” thesis.

39. PAAVO MONKKONEN & SPIKE FRIEDMAN, UCLA LEWIS CTR. FOR REG'L POL'Y STUD., NOT NEARLY ENOUGH: CALIFORNIA LACKS CAPACITY TO MEET LOFTING HOUSING GOALS 1 (Feb. 2019), <https://escholarship.org/uc/item/7t335284>.

40. Regarding the governor's embrace of a 3.5-million-unit target—and his limited progress to date—see Liam Dillon, *Newsom Says He's Done a Good Job Fixing California's Housing Crisis. Facts Say Otherwise*, L.A. TIMES (Oct. 21, 2019, 3:00 AM), <https://www.latimes.com/california/story/2019-10-21/gavin-newsom-california-housing-crisis-solution>. For recent efforts to quantify the state's housing

cycle (roughly 2003 to 2014), California’s local governments permitted only about 47 percent of the housing for which they had planned, which suggests that a goal of 3.5 million units may require planned capacity on the order of 7 million, nearly three times the current figure of 2.8 million.⁴¹ Monkkonen and Friedman also show that most planned capacity is in the state’s low-cost, low-demand periphery, rather than in coastal cities with high demand, lots of jobs, and good public transit.⁴² This makes no sense economically or environmentally.⁴³ With new housing relegated to far-flung locales, it should come as no surprise that California’s transportation sector has become the biggest stumbling block to achieving the state’s greenhouse gas reduction targets.⁴⁴

Why are RHNDs so small and so misallocated within regions? A fundamental problem is that California law has long defined regional housing need in terms of projected population and household growth.⁴⁵ Regions with little household growth receive small RHNDs, and within regions, local governments that have experienced little household growth can use the “projected households” conception of need to argue for a miniscule share of the

shortage, see MADELINE BARON ET AL., UP FOR GROWTH NAT’L COAL., HOUSING UNDERPRODUCTION IN THE U.S. 9 (2018), https://www.upforgrowth.org/sites/default/files/2018-09/housing_underproduction.pdf (estimating that California would have produced about 3.4 million more units of housing between 2000 and 2015 if housing production in the state had expanded at the nationally normal rate during that period); JONATHAN WOETZEL ET AL., MCKINSEY GLOBAL INST., A TOOL KIT TO CLOSE CALIFORNIA’S HOUSING GAP: 3.5 MILLION HOMES BY 2025 1 (Oct. 2016), <https://www.mckinsey.com/featured-insights/urbanization/closing-californias-housing-gap> (estimating need for 3.5 million units based on number of housing units per household in comparable states); TAYLOR, *supra* note 1, at 20–24 (estimating that an additional 90,000 units per year (2.7 million in total) would have had to be built between 1980 and 2010 to keep California’s median home price from rising faster than the national median during this period); Breakthrough Institute, Quantifying and Reversing the Bay Area Housing Shortage (Oct. 2019) (unpublished memorandum) (on file with authors) (estimating that California would have to accommodate another 3.4 to 7.7 million units to bring housing costs for median household down to 30 percent of household income).

41. MONKKONEN & FRIEDMAN, *supra* note 39, at 2.

42. *Id.* at 3. The low-income RHNA targets have also been disproportionately allocated to jurisdictions with larger poor and minority populations. See HEATHER BROMFIELD & ELI MOORE, U.C. BERKELEY HAAS INST. FOR A FAIR & INCLUSIVE SOC’Y, UNFAIR SHARES: RACIAL DISPARITIES AND THE REGIONAL HOUSING NEEDS ALLOCATION PROCESS IN THE BAY AREA 11 (Aug. 2017), https://haasinstitute.berkeley.edu/sites/default/files/haasinstitute_unfairshares_rhnabayarea_publish.pdf.

43. Nor does it make sense to ignore the effect of a home’s location on the household’s likely transportation expenditures when calculating the “affordability” of the home to households at various income levels.

44. CAL. AIR RES. BD., 2018 PROGRESS REPORT: CALIFORNIA’S SUSTAINABLE COMMUNITIES AND CLIMATE PROTECTION ACT 5 (2018), https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf.

45. See Christopher S. Elmendorf, *Beyond the Double Veto Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 107–10 (2019). During the fifth planning cycle, which followed on the heels of the Great Recession and associated foreclosure crisis, an additional factor was at work: HCD made substantial downward adjustments to the baseline population-forecast RHNAs to account for the number of foreclosed-on properties. In essence, these properties were treated as if they provided new capacity. See, e.g., Memorandum from Cal. Dep’t of Hous. & Cmty. Dev. to S. Cal. Ass’n of Gov’ts at 1–2 & Attachment 2 (Aug. 17, 2011), https://www.hcd.ca.gov/community-development/housing-element/docs/scag_5rhana081711.pdf (explaining fifth-cycle RHNA determination).

regional target.⁴⁶ *The state's traditional conception of need overlooks the fact that household growth is a consequence of land-use policies.* As one of us put it recently:

A region that has allowed little new housing will have a depressed rate of household formation, but this hardly means that the region has little need for new housing. On the contrary, if many people want to live in the region, the barriers to new housing will manifest as sky-high prices for existing housing; this, in turn, slows the rate of new household formation. Young adults who cannot afford a place of their own will live with their parents or stacked up with roommates. The corresponding slowdown in the rate of household formation yields a smaller projection of “regional housing need,” while the economic reality is exactly the opposite.⁴⁷

A further problem is that California presumes that the need for housing affordable to families at a particular income level can only be met with new housing units that are sold or rented to those families (at a price they can afford).⁴⁸ This overlooks the potential effect of new market-rate housing—or its absence—on the availability and price of existing units within the region.⁴⁹ If developers produce loads of new market-rate housing, some people will trade up, and existing, less fancy units will become available and more affordable.⁵⁰ Conversely, if there are serious barriers to meeting demand for new market-rate units, developers will scoop up existing, less fancy homes and outfit them with luxury renovations.⁵¹

A recent study of the nation's rental housing stock from 1985 to 2011 found that *less than 10 percent of the net increase in affordable units* came in the form of new construction or subdivision of existing units.⁵² The rest was due to

46. See Elmendorf, *supra* note 45, at 130.

47. See *id.* at 107, and sources cited therein.

48. For example, local governments' progress toward meeting their RHNA targets is assessed by assigning each completed unit to one of the four “affordability bins” based on the price at which it is rented or sold on completion. See CAL. GOV'T CODE § 65400(a)(2) (West 2020); CAL. DEP'T OF HOUS. & CMTY. DEV., Housing Element Annual Progress Report (APR) Instructions 13 (rev'd Feb. 11, 2019), <http://www.hcd.ca.gov/community-development/housing-element/docs/Housing-Element-Annual-Progress-Report-Instructions-2018.pdf> (detailing methods for assigning new units to affordability bins based on estimate of market price, in absence of an affordability restriction). Local governments receive no credit (or pay no price) for the indirect effects of new market-rate units on the affordability and availability of other units.

49. See, e.g., Stuart S. Rosenthal, *Are Private Markets and Filtering a Viable Source of Low-Income Housing? Estimates from a “Repeat Income” Model*, 104 AM. ECON. REV. 687, 689 (2014) (finding based on 1985-2011 panel data that new housing units become about 2 percent more affordable with each year but that filtering is about 0.5 percentage points slower in the Northeast and West where housing supply is constrained); Michael Manville et al., *Zoning and Affordability: A Reply to Storper and Rodriguez-Pose, Part II* (May 17, 2019), <https://scag.ca.gov/sites/main/files/file-attachments/052319paavomonkkonen.pdf?1605647698> (reviewing literature).

50. See *infra* notes 63–65 and accompanying text.

51. See generally John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91 (2014).

52. JOHN C. WEICHER ET AL., THE LONG-TERM DYNAMICS OF AFFORDABLE RENTAL HOUSING, A REPORT TO THE JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION 9–10 (Sept. 15, 2017).

downward filtering of older rental units and tenure switches between owner-occupied and rental housing.⁵³ While filtering toward affordability is slow—the price of a given dwelling falls about 2 percent annually⁵⁴—the construction of new market-rate units may free up existing, more affordable units quite rapidly. One national study finds that when 100 new units are constructed in a high-income census tract, the induced “chain of moves” releases—within five years—about forty-five to seventy units in below-median-income census tracts in the same metro area and seventeen to thirty-nine units in bottom-quintile census tracts.⁵⁵ This occurs because many residents of the new building previously lived in another building in the region; when they trade up, other folks move into their former units, and still others move into the units those movers vacated. Before long, the chain of moves results in an open unit in an affordable area.⁵⁶

To be sure, these estimates should not be treated as gospel truth. In the most desirable of metro regions, the “chains of moves” induced by new market-rate housing may bring in a larger share of people from outside the region, reducing the rate at which moderate- and low-income units within the region are freed up. Moreover, the least expensive unsubsidized housing may never adequately serve poor households, even in unconstrained markets.⁵⁷ But, for present purposes, the important point is that California’s housing framework does not even try to account for chain-of-moves dynamics. Local governments that fail to meet their housing targets are not required to produce extra housing in the next planning period to compensate for the burden their underproduction has placed on other municipalities in the region.⁵⁸ And local governments that surpass their above-moderate-income RHNA targets receive no credit for the indirect effects of the “extra” units (through chains-of-moves, or filtering) on the availability of less expensive housing within the region.⁵⁹ (Nor is there any consideration of possible intra-neighborhood “gentrification effects” from new market-rate housing on existing, more affordable units.⁶⁰)

53. *Id.*

54. Rosenthal, *supra* note 49, at 689. Rosenthal finds that downward filtering in supply-constrained markets is about 25 percent slower. *Id.* The lack of new construction in these markets presumably results in more competition for and improvement (upward filtering) of older units.

55. Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market* (Upjohn Inst., Working Paper No. 19-307, 2019).

56. *Id.*

57. *Cf.* MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (chronicling housing insecurity in Milwaukee, Wisconsin).

58. California requires carryforward of unfulfilled RHNA from one cycle to the next only in the very narrow circumstance where a local government had to rezone in one cycle to make adequate sites or density available and failed to complete the rezoning *throughout the entire eight-year period*. See CAL. GOV'T CODE § 65584.09 (West 2020).

59. *Cf.* Roderick M. Hills, Jr., *Saving Mount Laurel?*, 40 *FORDHAM URB. L.J.* 1611, 1643 (2012) (arguing that local governments in New Jersey should receive “filtering credits” toward their affordable housing obligations if they permit exceptionally large numbers of new market-rate units).

60. Much local opposition to new housing in expensive cities is premised on concern about such “gentrification effects.” See generally Vicki Been et al., *Supply Skepticism Housing Supply and Affordability*, 29 *HOUSING POL'Y DEBATE* 25 (2019). However, it is difficult to establish whether such

Because of California's presupposition that new subsidized housing is the only way to meet the needs of families who cannot afford new market-rate units, the entire RHNA/planning process has an air of unreality about it. Take San Francisco. Prices for new market-rate housing in the city are far beyond the reach of even "moderate income" households, so the moderate- and low-income portions of the city's RHNA target must be accommodated by "planning for" subsidized, below-market-rate housing.⁶¹ Most of this housing will not be built for decades, if ever, because meeting the city's RHNA targets would require public subsidies on the order of \$660 million a year,⁶² nearly one-third of the city's entire discretionary general fund.⁶³ Meanwhile, state law instructs,

effects have occurred, since rational developers will choose to build where they expect rents to escalate most rapidly in the near future. This generates a spurious correlation between new market-rate housing and future rents. One recent paper explores plausibly exogenous variation in the timing of the completion of new market-rate projects and finds that the downward pressure on prices from increased supply more than offsets upward pressure from local amenity effects. See Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?* (Dec. 16, 2019) (unpublished working paper), <https://www.fanniema.com/media/35821/display>. Another compares the rental price of units very close to new market-rate buildings with the rental price of units that are a little farther away and finds that in high-cost metro regions, new construction reduces nearby rents and induces in-migration of people from low-income census tracts, relative to "control" buildings that are a little farther away. Brian Asquith et al., *Supply Shock versus Demand Shock: The Local Effects of New Housing in Low-Income Areas*, (Upjohn Inst., Working Paper No. 19-316, Dec. 19, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507532. On the other hand, one study of a relatively affordable market (Minneapolis) finds that new construction causes an uptick in the rental price of low-cost apartments nearby, even as it reduces nearby rents on average. Anthony Damiano & Chris Frenier, Univ. of Minn. Ctr. for Urb. & Reg'l Affs., *Build Baby Build? Housing Submarkets and the Effects of New Construction on Existing Rents* (Feb. 12, 2020) (unpublished working paper), <https://www.tonydamiano.com/project/new-con/bbb-wp.pdf>.

Of course, it goes pretty much without saying that a given number of new units of price-restricted affordable housing would do more to help low-income families than the same number of new units of market-rate housing. Cf. MIRIAM ZUK & KAREN CHAPPLE, U.C. BERKELEY INST. FOR GOVERNMENTAL STUD., *HOUSING PRODUCTION, FILTERING AND DISPLACEMENT: UNTANGLING THE RELATIONSHIPS* (May 2016), https://www.urbandisplacement.org/sites/default/files/images/udp_research_brief_052316.pdf (finding that production of price-restricted housing correlates positively with likelihood that net number of poor people in a census tract will not decline over the ensuing ten to twenty years). But in cases where public resources are insufficient to build the target number of new units of price-restricted housing, what limited evidence we have suggests that lower- and moderate-income households will be better off (even those who live near new market-rate developments) if market-rate housing is built instead. See also Quentin Brummet & Davin Reed, *The Effects of Gentrification on the Well-Being and Opportunity of Original Resident Adults and Children* (Fed. Reserve Bank of Philadelphia, Working Paper No. 19-30, July 2019), <https://doi.org/10.21799/frbp.wp.2019.30> (finding, based on longitudinal census microdata, that gentrification increases the welfare of poor residents of gentrifying neighborhoods who remain in the neighborhood and has no effect on objective indicia of the welfare of poor people who are displaced or choose to leave); SHANE PHILLIPS ET AL., UCLA LEWIS CTR. FOR REG'L POL'Y STUD., *RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS* (Feb. 2021), <https://escholarship.org/uc/item/5d00z61m> (reviewing literature).

61. CITY OF SAN FRANCISCO, CAL., GENERAL PLAN, 2014 HOUSING ELEMENT Pt. I (2015).

62. *Id.* at I.101 (2015) (estimating that production of the city's RHNA over the eight-year planning cycle would require about \$5.3 billion in public subsidies, equivalent to \$661 million annually over the planning period).

63. See Dominic Fracassa, *SF's Budget Soars by \$937 Million and Will Top \$11 Billion for First Time*, S.F. CHRON. (May 31, 2018, 6:00AM), <https://www.sfchronicle.com/bayarea/article/SF-s-budget->

“Nothing in [the housing-element article] shall require a city . . . to [e]xpend local revenues for the construction of housing, housing subsidies, or land acquisition.”⁶⁴ When famously rich and progressive San Francisco adopted its current housing element, the city’s annual affordable housing budget was about \$50 million.⁶⁵

But what if San Francisco could produce enough market-rate units over the planning cycle to free up, through Bay Area chains-of-moves, a number of moderate-income units equal to the city’s RHNA for that income bin? This possibility is not farfetched,⁶⁶ yet the city’s housing element doesn’t even consider it, and nothing in California’s planning-for-housing framework encourages the city to do so.⁶⁷

B. *Plans without Consequences?*

As recently as 2017, some municipal officials were openly proclaiming that they had no intention of approving projects that conformed to their housing

soars-by-937-million-and-will-top-12955416.php (explaining that most of city’s budget is controlled by enterprise agencies and set-asides, leaving \$2.2 billion of discretionary funds).

64. CAL. GOV’T CODE § 65589(a) (West 2020).

65. CITY OF SAN FRANCISCO, CAL., GENERAL PLAN, 2014 HOUSING ELEMENT, A.18 (2015).

66. The RHNA for San Francisco County (which “has the highest total RHNA target assigned relative to population of all counties in the state,” NEXT10, MISSING THE MARK: EXAMINING THE SHORTCOMINGS OF CALIFORNIA’S HOUSING GOALS 6 (Feb. 28, 2019), <https://www.next10.org/housing-goals>, is expected to produce a mere 7.7 percent increase in its housing stock over the current eight-year planning cycle (San Francisco RHNA for the cycle is 28,869 and its housing stock in the year 2010 consisted of 372,560 units. CITY OF SAN FRANCISCO, CAL., GENERAL PLAN, 2014 HOUSING ELEMENT, I.22, I.41 (adopted Apr. 27, 2015)). Through upzoning and constraint removal, it should be easy for the city to produce at least that much market-rate housing, given that the price of new housing in San Francisco is roughly three times the cost of construction, *see* Christopher S. Elmendorf & Darien Shankse, *Auctioning the Upzone*, 70 CASE WESTERN RES. L. REV. 513, 542–45 (2020), and given that the nation’s economically productive but housing-affordable metro areas have managed to increase their housing stock by 30 to 60 percent in barely more than a decade, *see* Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSP. 3, 19, fig.3 (2018). If San Francisco received, say, a moderate-income credit of 0.5 units for each new market-rate unit above its “above moderate income” target, the city could meet its moderate-income RHNA (about 20 percent of the total) by permitting twice as many market-rate units as its above-moderate-income target. *Cf.* Mast, *supra* note 55 (estimating that a new market-rate unit frees up 0.45–0.79 below-median units and 0.17–0.39 bottom-quintile units).

This is not to say that local governments should be allowed to buy their way out, as it were, of all of their *low*-income housing obligations with chain-of-moves credits. Providing low-income families with access to high-opportunity cities and neighborhoods is a necessary step towards reducing spatial inequality, and recent amendments to the housing-element law require local governments to “affirmatively further fair housing,” for example, by providing housing opportunities for low-income and minority families in high-opportunity neighborhoods. CAL. GOV’T CODE § 65583(c)(5), (10) (West 2020). It seems unlikely that chain-of-moves credits would advance this dimension of California’s housing policy, since most of the units freed up “down the chain” are likely to be found in low-opportunity locations. Those units are comparatively inexpensive—and freed up by movers—for a reason.

67. In fact, permitting market-rate units on sites that the housing element deems suitable for low-income housing is actively discouraged by certain “findings” and rezoning requirements. *See infra* notes 172–178 and accompanying text.

elements.⁶⁸ How could they get away with this? Because California did next to nothing to make local governments actually permit the housing for which they were required to “plan.”

The state’s framework establishes a conveyor belt for converting the RHNA into housing. It works like this: (1) a local government, through the site inventory of its draft housing element, tries to show that there exist developable or redevelopable parcels with adequate zoned capacity to accommodate the RHNA;⁶⁹ (2) if HCD disagrees with the local government’s assessment, the Department can require the local government to include in the housing-element program actions for rezoning and removal of other constraints;⁷⁰ (3) after enacting the housing element, the local government implements the program actions; and finally (4) if the local government improperly denies a zoning-compliant project, the developer may sue the local government under the HAA to get the project approved.⁷¹

This conveyor belt is prone to all sorts of failures. As this Subpart will explain, there have been serious problems with the site inventory as a means for assessing development capacity; the mechanisms for getting local governments to implement the rezoning and constraint-removal programs in their housing elements; and the authority of HCD itself. An underlying concern is information: The conveyor-belt model rests on strong assumptions about local governments’ abilities to gauge the future development potential of parcels within their territories and about the capacity of a lightly staffed state agency to assess and monitor local plans.

Empirical claims about the overall effect of California’s planning-for-housing framework must be taken with several grains of salt because the counterfactual outcome—how much housing would have been allowed in the absence of the framework—is never observed, and it cannot be estimated without making very strong assumptions. But the available evidence is not encouraging. A 2005 study found that local governments with HCD-approved housing elements issued no more building permits than noncompliant jurisdictions, controlling for observable jurisdiction-level characteristics.⁷² A follow-up study found some evidence that localities with HCD-certified housing elements approved more subsidized housing, but less market-rate housing, than similar

68. See, e.g., Liam Dillon, *California Lawmakers Have Tried for 50 Years to Fix the State’s Housing Crisis. Here’s Why They’ve Failed*, L.A. TIMES (June 29, 2017), <https://www.latimes.com/projects/la-pol-ca-housing-supply/> (quoting Foster City Councilman Herb Perez on the city’s housing element and mentioning other similar examples: “What I’m seeing here is an elaborate shell game. Because we’re kind of lying. It’s the only word I can come up with. We have no intention of actually building the units.”).

69. Cal. Gov’t Code §§ 65583(a)(3), 65583.2 (West 2020).

70. *Id.* §§ 65585(b), 65583(c)(1).

71. *Id.* § 65589.5.

72. Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUSING POL’Y DEBATE 173, 173 (2005).

jurisdictions without certified housing elements.⁷³ Today, nearly all local governments in the state have HCD-approved housing elements in place,⁷⁴ yet the market for multifamily housing in California is nonetheless clearly broken.⁷⁵ Perhaps the collapse of multifamily housing supply would have been even worse in the absence of the state's planning-for-housing framework, but to the extent that the framework is working, it's not working well enough.

1. Zoned-Capacity Problems

A housing element shall identify “sites . . . that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing need.”⁷⁶ Elaborate rules govern which parcels may be included in the inventory and what may be claimed as the capacity of a parcel to accommodate a portion of the local government's RHNA for a given income category.⁷⁷ If aggregate development capacity, summed across all parcels in the inventory, is less than the local government's RHNA in any income bin,⁷⁸ then the housing element must include program actions to make additional sites or density available.⁷⁹

The tricky part of this process is figuring out how much development is realistic for a given parcel over the planning period.⁸⁰ The number of units that a parcel is expected to yield over the period can be approximated as:⁸¹

73. Darrel Ramsey-Musolf, *Evaluating California's Housing Element Law, Housing Equity, and Housing Production (1990–2007)*, 26 HOUSING POL'Y DEBATE 488, 488 (2016) (comparing jurisdictions in the Los Angeles and Sacramento regions with and without approved housing elements). A problem with studies in this vein is that rich jurisdictions are likely to have more planning capacity, more anti-housing sentiment, and more opportunities to extract rents through inclusionary zoning requirements than poor jurisdictions; also, planning capacity is probably correlated with having an approved housing element. This would bias the results of studies that treat jurisdictions without an approved element as counterfactuals for jurisdictions with an approved element, unless one has good measures of planning capacity and NIMBYism.

74. According to the most recent statistics, only 4 percent of jurisdictions are out of compliance. See CAL. DEP'T OF HOUS. & CMTY. DEV., CURRENT HOUSING ELEMENT STATUS REPORT (Oct. 28, 2019) (most recent statistics available at <https://www.hcd.ca.gov/community-development/housing-element/docs/status.pdf>) (last visited Dec. 11, 2020); see also CAL. DEP'T. OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES 56–57 (2018), http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf (documenting rising compliance rates over time, reaching 90 percent by the fourth cycle, 2005–2015).

75. See SCHUETZ & MURRAY, *supra* note 2.

76. CAL. GOV'T CODE § 65583.2(a) (West 2020).

77. See *id.*

78. By “income bin,” we mean the four affordability categories into which the overall housing target is partitioned. See *supra* note 27.

79. *Id.* § 65583(c)(1).

80. The planning periods are prescribed by statute. See *id.* § 65588(e).

81. A stickler for detail would recognize that the site could actually be developed at various different unit counts across the income bins and that probability of each scenario is different. $Expected\ Units = \sum_i \sum_j (Probability\ of\ scenario_i) * (Units_{ij})$, where i indexes development scenarios and j indexes the income bins. But this is more complexity than the housing-element framework can practicably accommodate; $(probability\ of\ development) * (unit\ gain\ conditional\ on\ development)$ is an adequate simplification.

Expected Yield = (Probability of Site's Development During Period) * [(Number of Units if Developed) - (Number of Existing Units)].

The rules and conventions of housing-element practice recognize that the second term on the right side of the equation—units conditional on development—may be less than the density nominally allowed under the zoning code.⁸² Design requirements, objections from neighbors, site conditions, and other factors may drive the “as entitled” density for new housing projects well below the maximum density allowed under the zoning code. It is thus typical for housing elements to discount nominal zoned capacity for inventory sites by the ratio of realized units to zoned capacity for recently approved projects on similar sites.⁸³ Additional discounts are applied if the site is zoned for mixed use,

82. See CAL. GOV'T CODE § 65583.2 (West 2020); *Analysis of Sites and Zoning*, CAL. DEP'T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/community-development/building-blocks/site-inventory-analysis/analysis-of-sites-and-zoning.shtml#realistic> (last visited Oct. 28, 2019).

83. All but one of the fifteen housing elements in our sample made this kind of adjustment for at least some inventory parcels. The exception (which proves the rule) is Long Beach, which used the same underlying logic—a parcel counts for the capacity that similar parcels have achieved when developed—to count the inventory parcels at full zoned capacity. See CITY OF LONG BEACH, CAL., GENERAL PLAN 2013-2021 HOUSING ELEMENT, at 91 (adopted Jan. 7, 2014) (“In estimating development potential, the maximum permitted densities are used” because “[s]ome recent developments demonstrate that the maximum permitted densities are achievable with the development standards established for the zones.”). The main difference among the other fourteen housing elements, with respect to “realistic” capacity assessment, is that some housing elements *expressly* justified the discount factor based on achieved densities of recent projects or developer interviews, whereas other housing elements used a rule of thumb whose evidentiary foundation was not explained.

For examples of housing elements that justify the discount factor(s) with reference to data from recent projects or developer interviews, see FRESNO, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 3-9–3-17 (adopted Apr. 13, 2017) (counting some sites for “the number of units that could be included” per developers’ estimates and other sites at minimum or maximum allowable density under zoning code); CITY OF MOUNTAIN VIEW, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT tbl.7-2 (adopted Oct. 14, 2014) (assuming “a conservative buildout of 50% of the maximum density on mixed use sites and 85% of the maximum buildout of residential only sites although historic land use and entitlement patterns in Mountain View show much higher capacity for residential development on mixed use sites”); CITY OF OAKLAND, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 393 & tbl.C-6 (adopted Dec. 9, 2014) (“In determining the residential development potential of a site with no current specific development proposal (Group 4), the City used projections that are based on conservative estimates of the capacity of these sites based on other existing proximate similar developments”; tbl.C-6 reports the potential “build out” of each site); CITY OF PALO ALTO, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 61–63 (adopted Nov. 10, 2014) (starting with baseline presumption that each parcel can be developed at 80 percent of zoned capacity, then making ad hoc adjustments based on planner’s observation of densities of unspecified recent developments “near” each site); CITY OF SACRAMENTO, CAL., GENERAL PLAN 2013-2021 HOUSING ELEMENT H 5-9 (adopted Dec. 17, 2013) (treating 80 percent of zoned capacity as realistic capacity of residential sites, and 25 percent as realistic for mixed use sites, corresponding to average densities achieved by projects completed between 2003 and 2008); CITY OF SANTA MONICA, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT, Appendix A (adopted Dec. 10, 2013) (assuming that mixed-use sites can realistically be developed to 40 to 80 percent of nominal capacity, depending on the zone, and that sites with historic resources can realistically be developed to 50 percent of nominal capacity, as evidenced by “recently developed and proposed projects and draft/specific area plan recommendations”); CITY OF SAN DIEGO, CAL., GENERAL PLAN, 2013-2020 HOUSING ELEMENT, HE-157 (adopted Mar. 4, 2013) (assuming “based on recent experience” that “development will occur at 85% of the maximum zone density”); CITY OF REDONDO BEACH, CAL., GENERAL PLAN, HOUSING ELEMENT 2013-2021, at 86, 87 tbl.H-46 (Apr. 2014) (treating 80 percent of zoned capacity as

reflecting the fact that some portion of the development that does occur on such sites is likely to be commercial rather than residential.⁸⁴ The final number is a more or less reasonable proxy for “number of units if developed.”

But then two dubious assumptions kick in. One, expressly authorized by statute, permits local governments to “count” any site whose zoning complies with statutory densities toward the low-income RHNA bins.⁸⁵ This is like a conclusive presumption that any housing built on these sites will take the form of subsidized, deed-restricted, affordable units. It is a ridiculous but practical accommodation to the unreality of the RHNA targets for subsidized housing.⁸⁶

realistic capacity based on recent experience); CITY OF SAN FRANCISCO, CAL., GENERAL PLAN, 2014 HOUSING ELEMENT D.3–D.6 (adopted Apr. 27, 2015) (enumerating realistic capacity discount factors that vary by zone, ostensibly “based on existing development patterns including commercial and residential mix” and emphasizing that the capacity estimate is at “buildout,” without regard to *when* development may occur).

For examples of housing elements that neither provide nor refer to any evidence to support the discount factor(s), see CITY OF FOLSOM, CAL., GENERAL PLAN, HOUSING ELEMENT 2013-2021 3-67–3-68 (adopted Oct. 22, 2013) (“The Specific Plan assumes, on average, that residential sites will be built at approximately 80 percent of maximum residential capacity. The Specific Plan assumes 60 percent residential and 40 percent commercial on sites designated Mixed Use.”); CITY OF LOS ANGELES, CAL., GENERAL PLAN, 2013-2021 HOUSING ELEMENT 3-9 (adopted Dec. 3, 2013) (“In Community Commercial areas . . . we assume that only 10% of the capacity of commercially-zoned sites in the inventory will be utilized for residential uses. In Community Commercial areas . . . a 50% factor is used”); CITY OF PASADENA, CAL., GENERAL PLAN, HOUSING ELEMENT 2013-2021 tbl.C-2 (adopted Feb. 3, 2014) (assigning to each inventory parcel both a “max density” and a smaller “potential units” count, without explaining how the latter was estimated); CITY OF SAN JOSE, CAL., GENERAL PLAN, HOUSING ELEMENT 2014-2023 V-12 (adopted Jan. 27, 2015) (“Estimates of housing [capacity for vacant sites] were derived using General Plan designations and conservative estimates within the density range specified for the associated land use category.”).

HCD encourages the use of recently developed projects as a benchmark for site capacity. See *Analysis of Sites and Zoning*, *supra* note 82 (“To support a realistic, residential-capacity assumption, the housing element could include a description of the build-out yields of recently constructed residential projects.”).

84. See examples cited in note 83, *supra*.

85. CAL. GOV’T CODE § 65583.2(c)(3). While the state sets separate targets for “[l]ower” and “[v]ery low” income households, *see id.* § 65584, the lower- and very-low-income targets are pooled for many purposes. *See, e.g., id.* § 65583.2(c) (establishing various rules governing site-adequacy and site-capacity determinations with respect to low-income housing); *id.* § 65913.4 (requiring local governments to fast-track certain projects depending on local government’s progress toward the low-income (below 80 percent of median income) housing targets). We will use the terms “low-income bins” and “low-income targets” to refer collectively to the “low” and “very-low” income targets.

86. These “default densities” for the low-income RHNA were introduced by Assembly Bill 2348, in 2004 and are sometimes referred to as “Mullin densities” in honor of the bill’s author. The first official bill summary explains their purpose thus: “This section provides a ‘voluntary’ rule of thumb option for local governments” in order to “[p]romote efficient use of land resources and provide local government with certainty regarding state review of land inventory of housing element . . . [T]he amendments impose a mandate on the Department to accept specified densities as adequate.” Bill Analysis, A.B. 2348, Assemb. Comm. on Local Gov’t 4 (Apr. 21, 2004), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040AB2348 (under date “April 20, 2004”); *see also* Bill Analysis, A.B. 2348, Assemb. Floor 2 (May 21, 2004), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040AB2348 (“This bill reflects [Housing Element Working Group’s] recommended changes to the land inventory and adequate sites requirement to provide greater certainty in the development process and provide local governments with greater clarity and certainty about the statutory requirements.”).

In effect, the low-income RHNA allocation has become a stick to make local governments zone for denser housing than they might otherwise allow, rather than a mandate to build or otherwise make available a number of affordable units equal to the lower-income RHNA.⁸⁷

The other dubious assumption is more tacit and also more pernicious: the probability of development of every parcel in the jurisdiction is treated *as if* it were either one or zero. If the local government can show that a site has adequate infrastructure, no serious environmental problems, and existing uses that are pretty low in value relative to the site's redevelopment potential, the local government may include the site in its inventory, "counting it" toward the locality's RHNA for the number of units it would probably yield *if developed or redeveloped*.⁸⁸ This is like assuming a development probability of one for every site in the inventory. Conversely, sites with significant barriers to redevelopment are excluded from the inventory⁸⁹ and generally ignored in gauging whether the local government has adequate capacity vis-à-vis its RHNA.⁹⁰ This is like assuming a development probability of zero for all noninventory sites.⁹¹ (Of

87. To be sure, the local government must have a plan to "[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households," CAL. GOV'T CODE § 65583(c)(2) (West 2019), but because local governments need not "expend local revenue" to this end, *see supra* note 64, and because local governments get no credits for the indirect effects of new market-rate housing on existing, more affordable housing in the region, *see supra* text accompanying notes 48–59, the obligation to "assist in the development" of low-income housing does not require a realistic plan for producing or freeing up the targeted number of units. On the contrary, housing-element law expressly acknowledges that "available resources" may be insufficient to meet the targets, in which case the local government may set "quantified objectives" below its RHNA. *See id.* § 65583(b)(2).

88. *See Analysis of Sites and Zoning, supra* note 82. Other screening factors are sometimes applied too, such as parcel size, age of existing dwellings, and the ratio of the number of current dwelling units to the site's zoned capacity. For present purposes, the details of this screening process are unimportant; what matters is that once a site makes it through, the site is counted for its likely unit count *conditional on development or redevelopment*, rather than its expected yield in new units during the cycle.

89. *See* CAL. GOV'T CODE § 65583.2(g) (West 2020) (defining conditions for inclusion of nonvacant sites in inventory).

90. There is one exception: local governments may count some potential capacity for accessory dwelling units on sites that are not sufficiently vacant or redevelopable to be included in the site inventory. *See infra* note 94 and accompanying text.

91. Unlike the "statutory densities result in low-income housing" assumption, the "probability of development equals zero or one" assumption is not expressly mandated by housing-element law. But HCD's housing-element guidelines do not ask local governments to estimate the probability of development for inventory sites, *see* HCD Building Blocks, *Analysis of Sites and Zoning, supra* note 82, and none of the fifteen housing elements in our sample provided estimates. Instead, any site that made it into the inventory was counted for its putative "realistic capacity" conditional on development. *See* discussion, *supra* note 83. Several of the housing elements did assert that their assumptions about capacity were "conservative," and one might interpret this as a roundabout way of accounting for the fact that the probability of an inventory site's development during the planning period is less than one. Yet no housing element justified its supposedly conservative assumptions in this way.

For a vivid illustration of the prevailing assumption that "realistic" capacity assessments do not require realism about development probabilities, consider the housing elements of Los Angeles and San Diego. Uniquely among the cities we studied, Los Angeles and San Diego actually forecasted their housing production over the planning cycle—and predicted that they would fall well short of their overall RHNA targets. *See* CITY OF LOS ANGELES, CAL., GENERAL PLAN, 2013–2021 HOUSING ELEMENT

course, some sites with significant development potential may be excluded from the inventory for political reasons, such as to propitiate neighborhood NIMBYs.⁹²)

One housing type—the accessory dwelling unit (ADU)—is treated differently.⁹³ Both the statute and HCD’s guidelines suggest that local governments may count only the number of ADUs likely to be produced during the planning period toward the locality’s RHNA, rather than counting every site that could accommodate an ADU for the number of ADUs it probably would host *if* the owner decided to add accessory units.⁹⁴ This accounting convention ought to be used for all housing types, not just ADUs.

The *de facto* assumption that a parcel’s probability of development is either one or zero has had two bad consequences. First, it results in a picture of site-inventory capacity that is grossly misleading, at least if one wants to know whether the local government is likely to meet its aggregate RHNA-share target

(adopted Dec. 3, 2013), at c-xxi, 3-6 (claiming realistic site capacity of 308,052 units, while forecasting production of 46,500 units, considerably less than the city’s RHNA of 82,002 units); CITY OF SAN DIEGO, CAL., GENERAL PLAN, 2013-2020 HOUSING ELEMENT (adopted Mar. 4, 2013), at HE-3–HE-4 (reporting total realistic site capacity of 126,259 units, while stating that 45,100 is “the number of housing units which may feasibly be constructed, rehabilitated, and preserved during the Housing Element Cycle,” well less than the city’s RHNA of 88,096 units). *Cf.* CITY OF SAN FRANCISCO, CAL., GENERAL PLAN, 2014 HOUSING ELEMENT (adopted April 27, 2015), at D-6 (emphasizing that estimated site-inventory capacity is at “buildout,” not expected production within the planning period). Yet they saw no apparent problem with this, nor with the massive disparity between their asserted site capacity and their forecasted production over the cycle. Evidently, HCD didn’t see a problem either, as the Department approved both housing elements without commenting on the gaps. *See* Letter from Glen A. Campora, Asst. Deputy Director, Cal. Dep’t of Hous. & Cmty. Dev. to Kelly Broughton, Director, Dev. Serv., City of San Diego (Nov. 13, 2012) (approving draft housing element); Letter from Glen A. Campora, Asst. Deputy Director, Cal. Dep’t of Hous. & Cmty. Dev. to Hon. Bob Filner, Mayor, City of San Diego (Apr. 5, 2013) (approving final housing element); Letter from Glen A. Campora, Asst. Deputy Director, Cal. Dep’t of Hous. & Cmty. Dev. to Michael LoGrande, Director of Planning, City of Los Angeles (Apr. 2, 2014) (approving final housing element). These letters may be downloaded from HCD’s website, <https://www.hcd.ca.gov/community-development/housing-element/index.shtml>.

92. “NIMBY” is a colloquial acronym for “Not In My Backyard”; it describes people who oppose development in their neighborhoods. *NIMBY*, WIKIPEDIA, <https://en.wikipedia.org/wiki/NIMBY> (last visited Feb. 20, 2021).

93. An ADU, sometimes called a “granny flat,” “in-law unit,” or “casita,” is a small dwelling unit added to the same lot as a larger home or homes. *See Accessory Dwelling Unit*, HOUSING WIKI, https://housing.wiki/wiki/Accessory_Dwelling_Unit (last visited Feb. 20, 2021).

94. CAL. GOV’T CODE § 65583.1 (West 2020) (“The department may . . . allow a city or county to identify sites for second units based on the number of second units developed in the prior housing element planning period. . . .”); *Accessory Dwelling Units (ADU) and Junior Accessory Dwelling Units (JADUs)*, CAL. DEP’T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/community-development/building-blocks/site-inventory-analysis/accessory-dwelling-units.shtml> (last visited Feb. 20, 2021) (“To rely on ADUs or JADUs as part of an overall adequate sites strategy to accommodate (a portion) of the regional housing need, the element must include an estimate of the potential number of these units to be developed in the planning period . . .”). Palo Alto’s housing element nicely illustrates how ADUs are treated differently. *See* CITY OF PALO ALTO, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT (adopted Nov. 10, 2014), at 58 & tbl.3-9 (assessing ADU capacity as thirty-two units over the eight-year planning period, based on recent history of granting four ADU permits annually; table 3-9, which summarizes total capacity across all sites, tellingly labels ADU capacity as “estimated production” and all other forms of capacity as “potential”).

(total units summed across the affordability bins). As Table 1 shows, the median city is on track to permit only about one-third of the housing units that it claimed “capacity” to accommodate in its housing element for the current cycle.

Table 1. Development Rates: Building Permits during Fifth-Cycle Planning Period as a Share of Fifth-Cycle Nominal Capacity

Distribution	All municipalities with data (N=411)	Municipalities in large regions (N=328)
10th percentile	0.03	0.04
25th percentile	0.11	0.12
Median	0.31	0.36
75th percentile	0.60	0.63
90th percentile	1.08	1.19

“Development rate” is the number of building permits issued by a city divided by the city’s total capacity for new housing according to the site inventory of its fifth-cycle housing element. Depending on the jurisdiction, the fifth-cycle period began in 2013, 2014, 2015, or early 2016 and runs for eight years. *California Department of Housing and Community Development Housing Element Update Schedule for Regional Housing Need Assessment (RHNA)*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/community-development/housing-element/docs/5th-web-he-duedate.pdf> (last updated Jan. 28, 2020). Permits for the period were estimated using U.S. Census data from the start of the cycle through 2019 (prior to the shock caused by the Coronavirus pandemic), assuming that local governments would normally permit housing during the remainder of the eight-year period at their average annual rate from the start of the cycle through 2019. The data on fifth-cycle nominal capacity is from PAAVO MONKKONEN, MICHAEL LENS & MICHAEL MANVILLE, U.C. BERKELEY TERNER CTR. FOR HOUS. INNOVATION, BUILT-OUT CITIES? HOW CALIFORNIA CITIES RESTRICT HOUSING PRODUCTION THROUGH PROHIBITION AND PROCESS (Feb. 2020). We categorize a region as “large” if it contains nine or more permit-issuing jurisdictions.

If the development probabilities of a local government’s inventory sites average 0.33, then the housing element will probably yield only about one-third of its claimed capacity as actual units over the planning cycle.⁹⁵ This runs contrary to the legislature’s recently stated intent to “ensure that future housing production meets, at a minimum, the regional housing need established for

95. This assumes that development probabilities are uncorrelated with sites’ capacity conditional on development. If sites with relatively high capacity also have relatively high development probabilities, then the housing element will probably yield more than 50 percent of its claimed capacity over the previous, even if the (unweighted) mean development probability is 0.5.

planning purposes.”⁹⁶ Meanwhile, the assumption that noninventory sites have negligible potential means that housing elements do not quantify the expected housing yield of these sites or attend to measures that could be taken to increase their yield.

Here is an illustration. Imagine a suburban jurisdiction in which nearly all residentially zoned parcels have already been developed for single family homes. There is a modest commercial corridor with some parking lots and older storefronts. If the local government rezones the commercial corridor to allow midrise, mixed-use buildings, the parking lots and run-down storefronts will be prime candidates for redevelopment. Let’s stipulate that ten parking-lot sites will have a 0.75 probability of redevelopment over the planning period (if rezoned for mixed use), and ten storefront sites will have a 0.60 probability. Based on recent experience or developer interviews, the local government infers that only about half of any mixed-use projects will include a residential component. Let’s assume that the typical residential component for such a project is fifty units.

The expected yield over the planning cycle from rezoning the commercial strip is therefore: $(10 \text{ [number of parking-lot parcels]} * 0.75 \text{ [redevelopment probability]} * 0.5 \text{ [share of projects with residential component]} * 50 \text{ [number of units per project with residential component]}) + (10 \text{ [number storefront parcels]} * 0.6 \text{ [redevelopment probability]} * 0.5 \text{ [share of projects with residential component]} * 50 \text{ [number of units per project with residential component]}) = 337.5 \text{ units}$. But if added to the site inventory, these parcels are counted as accommodating $(10 * 1 * 0.5 * 50) + (10 * 1 * 0.5 * 50) = 500 \text{ units}$ of the local government’s RHNA, nearly 50 percent more than their likely yield. The housing element’s assessment of capacity accounts for the fact that some development on mixed-use sites is likely to be commercial rather than residential but not for the fact that some fraction of the mixed-use sites probably will not be redeveloped *at all* during the next period in the planning cycle.⁹⁷

Let us assume as well that this suburb could rezone 5,000 parcels now occupied by single family homes. Stipulate that if these parcels are rezoned for fourplexes, the redevelopment probability for each parcel over the planning period will be 0.05 (one in twenty). The expected yield from this rezoning is: $5,000 * 0.05 * (4 - 1) = 750 \text{ net units}$ —more than *two times* the expected yield

96. S.B. 828, 2017–2018 Reg., Leg. Sess. (Cal. 2018); CAL. GOV’T CODE § 65584(a)(2) (West 2020).

97. Again, it is possible that some housing elements use conservative discount factors as a way of indirectly accounting for development probabilities, though the predominant practice in our sample was to use the average (realized density) / (zoned capacity) ratio observed in recent developments. See *supra* note 83. The only probabilistic events that these housing elements overtly accounted for were (1) the possibility of project on a mixed-use site lacking a residential component (conditional on a project being developed), see *supra* note 83, and, (2) in the case of one housing element, the possibility that a city council would relax certain plan-based growth controls midway through the planning cycle. See CITY OF SAN JOSE, CAL., GENERAL PLAN, HOUSING ELEMENT 2014-23 (adopted Jan. 27, 2015), at V-7–V-8 (counting 500 units of a potential 5,000 in an area slated for development some years down the road, pending future approval by the city council).

from the commercial rezoning. Assume further that if the local government eliminates a conditional use permit requirement for demolition of single-family homes, the probability of redevelopment under the fourplex plan will increase from 0.05 to 0.15. The expected yield from the residential rezoning becomes $5,000 * 0.15 * (4 - 1) = 2,250$ units.

In short, there is vastly greater potential for housing development over the planning cycle in the existing residential neighborhood than in the commercial corridor. Yet California's planning-for-housing framework directs attention to the commercial corridor because that's where one can find sites *likely* to be developed. And then the framework counts those sites for more than they're worth.⁹⁸

No one really knows how much development occurs on noninventory sites. Prior to the 2017 housing package, local governments weren't required to report inventory parcels' tax identification numbers or to link annual production reports to specific sites in the inventory.⁹⁹ HCD once tried to geocode and link housing production to the site inventories, but the effort was unavailing.¹⁰⁰ However, the legislative analyst estimates that during California's fourth planning cycle, a majority of all projects with five or more housing units were built on noninventory sites and that in 2015 and 2016, more than two-thirds of the larger projects approved in San Francisco, Los Angeles, and San Jose were located on sites omitted from the housing element.¹⁰¹ Not a single larger project in Sacramento was on a housing-element site.¹⁰² These numbers should be regarded with circumspection, given possible geocoding issues.¹⁰³ But in one sense, they are cause for optimism: They suggest that there is considerably more

98. An HCD veteran told us that it's very unusual for local governments to include parcels with existing residential uses in their housing-element inventories. Modesto is the rare example of a city that did so during the fifth cycle. Forty-one percent of the Modesto housing element's putative capacity consists of underdeveloped residential sites on which the current number of dwelling units is less than two-thirds of the site's zoned capacity. See CITY OF MODESTO, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 4-14-4-16, tbl.4-10 (Nov. 2016). While the city claimed development capacity of almost 3,500 units for these sites, the city made no effort to estimate the sites' probability of redevelopment during the planning period, let alone to discount claimed capacity by the probability of redevelopment. Instead, the city justified the inclusion of these sites by noting that about thirty-five similar residential intensification projects had been approved during some unspecified but "recent" period of time. See *id.*, Appendix A. This is consistent with a very high or (more likely) very low probability of development for the sites during the planning period; it all depends on the unreported time period and the unreported denominator for the thirty-five projects in Appendix A. (Thirty-five sites *out of how many similar underdeveloped sites* were redeveloped, and over what period of time?)

99. See A.B. 879, 2017-2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV'T CODE § 65400(a)(2)(C)-(G), which require reporting of the tax-parcel number of each project approved and constructed thus far in the cycle and the number of units that that project contributes by income band); A.B. 1397, 2017-2018 Reg., Leg. Sess. (Cal. 2017) (amending CAL. GOV'T CODE § 65583.2(b)(1) to require tax assessor numbers for each inventory parcel).

100. Personal communication from staffer at Dep't Hous. & Cmty. Dev. to author (Oct. 16, 2018).

101. MAC TAYLOR, LEGISLATIVE ANALYST OFFICE, DO COMMUNITIES ADEQUATELY PLAN FOR HOUSING? 8 (Mar. 8, 2017), <https://lao.ca.gov/publications/report/3605>.

102. See *id.*

103. See *supra* notes 99-100.

development capacity under local regimes of land-use regulation than one would infer from housing elements' site inventories. On the other hand, to the extent that statutory law and administrative norms cause the drafters and reviewers of housing elements to focus narrowly on the inventory sites, barriers to development that are more important in practice may end up overlooked.

2. *Follow-through Problems (Which Defang the Housing Accountability Act)*

After a local government has compiled its site inventory and conducted the analysis of constraints, it writes the program side of its housing element.¹⁰⁴ The program must “set[] forth a schedule of actions during the planning period, each with a timeline for implementation, . . . to implement the policies and achieve the goals and objectives of the housing element.”¹⁰⁵ If the site inventory does not demonstrate adequate capacity to accommodate the local government’s RHNA, the program must include rezoning actions to close the gap.¹⁰⁶ The program must also “[a]ddress and, where appropriate and legally possible, remove governmental and nongovernmental constraints to . . . housing” of all types¹⁰⁷ and “assist in the development of adequate housing” for low- and moderate-income households.¹⁰⁸

The substantive heart of the housing element is the program’s schedule of actions. Yet the mechanisms for getting local governments to follow through and actually implement the promised actions traditionally did not amount to much. Penalties for not carrying out a required action were distant and usually insubstantial.¹⁰⁹ In the worst-case scenario, HCD might have disapproved the local government’s *next* housing element, but that just disqualified the local government from eligibility for certain affordable housing grants (which the local government might not want in the first place).¹¹⁰ Eventually the legislature

104. Compare CAL. GOV’T CODE § 65583(a) (West 2020) (prescribing analytic requirements for housing element) with *id.* § 65583(c) (describing programmatic elements and relating them to conclusions of analysis per section 65583(a)).

105. *Id.* § 65583(c).

106. *Id.* § 65583(c)(1) (stating that the program must “make sites available during the planning period with appropriate zoning and development standards . . . to accommodate that portion of the city’s or county’s share of the regional housing need . . . that could not be accommodated on [inventory sites] without rezoning”).

107. *Id.* § 65583(c)(3).

108. *Id.* § 65583(c)(2).

109. See Jessie Agatstein, *The Suburbs’ Fair Share: How California’s Housing Element Law (and Facebook) Can Set a Housing Production Floor*, 44 REAL EST. L.J. 219, 232 (2015) (noting that this was the case historically, while emphasizing the increasing number and significance of state grants tied to housing-element compliance).

110. See CAL. DEP’T HOUS. & CMTY. DEV., INCENTIVES FOR HOUSING ELEMENT COMPLIANCE 1 (2008), https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Commissions/incentives_for_compliance.pdf. The penalties were more substantial if a *court* found the jurisdiction out of compliance with housing-element law, but, as we explain in Subpart 1.B.3, the judicial test for compliance was incredibly lax. See *infra* text accompanying notes 132–134.

said that rezonings to allow adequate density on the inventory sites must be carried out within three years¹¹¹ and, further, that if the rezoning never occurs over the entire five- to eight-year planning cycle, then the locality's *next* housing element must promise to complete the rezoning within one year rather than three.¹¹² But what's to keep a local government that's dragged its feet on required rezonings through one cycle from dragging on past a deadline in the next?

In theory, developers or housing advocates could sue the local government to make it follow through on the promised rezoning. The housing element is a component of the general plan, and under background principles of California law, the general plan is the "constitution" for development and trumps any inconsistent ordinances or practices of the local government.¹¹³ Yet California courts have been very deferential to local governments when local actions, or inactions, are challenged as inconsistent with the plan. The general rule is that the local action or inaction at issue will be deemed consistent unless "no reasonable person" could judge it so.¹¹⁴ On the other hand, if the applicable plan provision is "fundamental, mandatory, and clear," the courts say they will enforce it.¹¹⁵

We have looked in vain for cases in which a court characterized any provision of a housing element as "fundamental, mandatory, and clear."¹¹⁶ In the few cases in which courts have found local laws to be preempted by the housing element or state planning framework, it was conceded that the local measures under attack had made it *impossible* for the local government to provide adequate sites for its RHNA.¹¹⁷

Judicial enforcement of a housing element's commitments has been further curtailed by a statute of limitations that requires consistency challenges to new

111. S.B. 375, 2007–2008 Reg., Leg. Sess. (Cal. 2008) (adding CAL. GOV'T CODE § 65583(c)(1)(a)).

112. A.B. 1233, 2005–2006 Reg., Leg. Sess. (Cal. 2005) (adding CAL. GOV'T CODE § 65584.09).

113. *Leshner Commc'ns, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 540 (1990).

114. CECILY TALBERT BARCLAY & MATTHEW S. GRAY, *CALIFORNIA LAND USE & PLANNING LAW* 25–26, 46–47 (36th ed. 2018).

115. *See, e.g., Ideal Boat & Camper Storage v. County of Alameda*, 145 Cal. Rptr. 3d 417, 425 (Cal. Ct. App. 2012).

116. A search on Westlaw (advanced: "housing element" & (fundament! /3 (mandat! clear)) turned up no such cases. Emblematic of the deference afforded to local governments is *Collins v. City of Alameda*, No. A116758, 2008 WL 224867, at *4–7 (Cal. Ct. App., Jan. 29, 2008) (unpublished opinion) (holding that city had no duty to rezone developer's site to accommodate residential uses, notwithstanding that site was part of larger tract designated in the housing element for 250–300 units of housing, because it was possible that city would later rezone other portions of the tract to accommodate the targeted number of units). *See also* *Shea Homes Ltd. P'ship v. County of Alameda*, 2 Cal. Rptr. 3d 739, 755 (Cal. Ct. App. 2003) (rejecting preemption claim because it was *possible* that the voter-adopted measure challenged as inconsistent would not conflict with housing element, at least if voters approved certain other measures in the future).

117. *See* *Bldg. Indus. Ass'n of San Diego, Inc. v. City of Oceanside*, 33 Cal. Rptr. 2d 137, 155 (Cal. Ct. App. 1994); *Urban Habitat Program v. City of Pleasanton*, No. RG06-293831 (Cal. Super. Ct. Mar. 12, 2010). *Cf. Kennedy Comm'n v. City of Huntington Beach*, 224 Cal. Rptr. 3d 665 (Cal. Ct. App. 2017) (vacating trial court finding that downzoning violated housing element, holding that consistency requirements do not apply to charter cities).

ordinances to be brought within ninety days of the ordinance's enactment.¹¹⁸ Moreover, charter cities were traditionally exempt from the state's consistency requirements.¹¹⁹ A great number of California's expensive coastal jurisdictions are incorporated as charter municipalities.¹²⁰

The consistency requirement is nominally backstopped by a "no net loss" proviso, which requires rezoning of additional parcels within 180 days if a downzoning¹²¹ or low-density project causes the inventory sites' capacity to fall below what is needed to accommodate the remainder of the local government's RHNA.¹²² But, for decades, the no-net-loss mandate was essentially unenforced because HCD had no tools for monitoring and sanctioning no-net-loss violations.¹²³

Because local ordinances that impede multifamily housing development have been so hard to attack as contrary to the housing element, the state's HAA did not provide much accountability. Again, the HAA prevents local governments from denying or reducing the density of a qualifying project unless the local government shows that the project would have a specific adverse effect on public health or safety.¹²⁴ But to qualify for the HAA's protections, the project must comply with objective development standards and criteria, such as local zoning requirements.¹²⁵ Illustrating the significance of this limitation, University of California, Berkeley researchers have found that a large share of recent multifamily housing projects in San Jose and Los Angeles required a

118. CAL. GOV'T CODE § 65860(b) (West 2020).

119. See *Kennedy Comm'n v. City of Huntington Beach*, 224 Cal. Rptr. 3d 665 (Cal. Ct. App. 2017). A charter city is a city whose electorate has voted to incorporate as a charter city, which entitles the city to a degree of autonomy under the California Constitution. See *Charter Cities*, LEAGUE OF CALIFORNIA CITIES, <https://www.cacities.org/Resources/Charter-Cities> (last visited Feb. 22, 2021). In 2018, the legislature subjected charter cities to the consistency requirement in relation to housing elements. S.B. 1333, 2017–2018 Reg., Leg. Sess. (Cal. 2018).

120. For a list of charter cities, see *Charter Cities List*, LEAGUE OF CALIFORNIA CITIES, https://www.cacities.org/Resources-Documents/Resources-Section/Charter-Cities/Charter_Cities-List (last updated in 2007).

121. A "downzoning" is a change in zoning which reduces the allowable intensity of development within the zone (conversely, an "upzoning" increases the allowable intensity of development). See *Downzone*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/downzone> (last visited Feb. 22, 2021); *Upzoning*, HOUSING WIKI, <https://housing.wiki/wiki/Upzoning> (last visited Feb. 22, 2021).

122. CAL. GOV'T CODE § 65863 (West 2020).

123. There were no requirements that local governments report zoning changes or the development of inventory sites at less than the density anticipated in the housing element. This changed in 2017 with Assembly Bill 879, which requires reporting of the tax-parcel number of each project approved and constructed thus far in the cycle and the number of units that that project contributes by income band, and Assembly Bill 1397, which requires tax-parcel numbers for the site inventory. See *supra* note 99. Assembly Bill 879 also authorized HCD to issue "standards, forms, and definitions" covering the annual reports, which HCD could use to require reporting on downzoning. See CAL. GOV'T CODE § 65400(a)(2)(B) (West 2020).

124. *Id.* § 65589.5.

125. *Id.* § 65589.5(d), (j).

variance or rezoning,¹²⁶ putting the projects outside of the HAA's traditional ambit.

The bottom line is that housing-element programs were little more than plans on paper. Developers had little recourse if a local government failed to implement its rezoning and constraint-removal programs.

3. HCD-Authority Problems

One might suppose that HCD could solve the problem of lackadaisical implementation by announcing that a housing element's program will be deemed inadequate unless the *housing element itself* prescribes or incorporates by reference all the details of the new (unconstraining) zoning code and development-permitting protocol. If the new code were contained in the housing element, there would be no need for a separate rezoning, and it would also become easier for developers to challenge any subsequent downzoning as contrary to the housing element.¹²⁷

Something like this administrative strategy may be viable today.¹²⁸ But, until very recently, it was a nonstarter. Because the consequences for being deemed out of compliance by HCD were insubstantial, a local government could credibly refuse to conform its housing element to any tough demands.¹²⁹ Local governments did face serious consequences if a *court* found their housing element noncompliant—a court could suspend the local government's authority

126. See Moira 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 ENV'T L.J. 1, 51 fig.5 (2019) (reporting that forty-six of sixty-five (71 percent) multifamily projects in San Jose during the study period required a rezoning); Moira O'Neill et al., *Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* fig.5 (Berkeley Law Ctr. for Law, Energy & the Env't, Berkeley Inst. of Urban & Reg'l Dev., Columbia Graduate Sch. of Architecture, Planning & Pres., Working Paper No. 2, 2018) (reporting that 84 of 759 (11 percent) of multifamily projects in Los Angeles required a rezoning, and that 113 of 759 (15 percent) required a variance).

127. For example, if the housing element prescribes a *minimum* density of fifty units per acre for certain areas, "no reasonable person" could conclude that a zoning ordinance allowing a *maximum* of fifteen units per acre is consistent.

128. See *infra* Subpart II.E.2 (arguing that the legislature has tacitly ratified HCD's functional gloss on "substantial compliance" and explaining how HCD could use advisory safe harbors to induce local governments to make strong programmatic commitments through their housing element).

129. The share of local governments with HCD-certified housing elements has been increasing over time, see Ramsey-Musolf, *supra* note 73, at fig.4, but the important point for present purposes is that if the consequences of not being certified by HCD are insubstantial, HCD has no leverage to insist on a strong housing element as a condition of certification.

to issue development permits¹³⁰—but the judicial standard for compliance¹³¹ had no teeth. All a local government had to show was that its housing element “contain[ed] the elements mandated by the statute.”¹³² Whether the housing element would actually enable construction of the local government’s RHNA was said by courts to be a question of “workability” or “merits” and *irrelevant as a matter of law* to the housing element’s validity.¹³³ Compliance was just a matter of checking off the boxes. Courts gave practically no weight to HCD’s findings of noncompliance.¹³⁴

4. Information Problems

Even if the agency-authority problems were solved, California’s housing framework might still founder due to the extraordinary informational demands it places on planners and state regulators. The framework assumes that a state agency can realistically forecast regional housing need; that regional councils of governments can sensibly divvy up the regional housing target among local jurisdictions; that local planners can figure out which parcels in their territory are plausibly developable or redevelopable and at what density; and, most critically, that the state regulators charged with reviewing local plans can distinguish realistic from disingenuous assessments of site capacity and figure out whether

130. See Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 43–44, 47–50 (1993) (discussing cases). This remedy would not have much bite against local governments that don’t want new development of *any* type, but courts have discretion to tailor the remedy so as to target forms of development that the local government might favor. See CAL. GOV’T CODE § 65755(a) (West 2020) (authorizing court to suspend “any or all [of the enumerated] types or classes of developments” for “any or all geographic segments of the city, county, or city and county”); see also Field, *supra* note 130, at 55–57, (describing court order against Alameda that “had a pervasive effect not only on developers but also on homeowners who wanted to substantially remodel their homes, widen their driveways, or make other improvements that required city approval”).

131. The reviewing court is to determine whether the housing element “substantially complies with the requirements of [the housing-element] article” of the government code. CAL. GOV’T CODE § 65587(b) (West 2020).

132. *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174, 1192 (2007).

133. See, e.g., *id.* at 1185 (“[j]udicial review of a housing element for substantial compliance with the statutory requirements does not involve an examination of the merits of the element or’ . . . whether the programs adopted are adequate to meet their objectives”) (emphasis added) (citations omitted) (quoting *Black Prop. Owners Ass’n v. City of Berkeley*, 28 Cal. Rptr. 2d 305 (Cal. Ct. App. 1994)); *Buena Vista Gardens Apartments Ass’n v. City of San Diego Plan. Dep’t*, 175 Cal. App. 3d 289, 298 (1985) (treating agency’s view of workability of housing element as a “merits” question not for courts to consider in judging plan’s validity).

134. See, e.g., *Fonseca*, 148 Cal. App. 4th at 1191 (restating and applying doctrine that housing element is a legislative enactment subject to strong presumption of validity, notwithstanding agency disapproval); *Buena Vista Gardens Apartments Ass’n*, 175 Cal. App. 3d at 298–99, 300–02 (1985) (stating that “the appropriate standard of appellate review is whether the [local government] has acted arbitrarily, capriciously, or without evidentiary basis” and upholding housing element notwithstanding state agency’s rejection of it for want of, *inter alia*, a “comprehensive five-year schedule of actions”) (citations omitted) (internal quotation marks omitted). For a review of other cases to similar effect, see Field, *supra* note 130, at 54–61.

local programs to remove or mitigate development constraints are likely to work.¹³⁵

One way that state lawmakers could respond to these information problems would be to jettison the planning framework altogether, perhaps replacing it with a system of fiscal sticks and carrots tied to housing outcomes.¹³⁶ Local governments that permit little new housing would lose big chunks of transportation or other funding; local governments that permit a lot would win big fiscal rewards. This approach would not require a state agency to predict which local housing plans will work or to monitor their implementation. But it would come with other difficulties. For example, the state's assertion that it will cut poor performers' access to funding on which they've come to rely may not be credible. When the time comes to impose the cuts, poor performers will no doubt argue that their lack of housing production was due to factors beyond their control—market cycles, consumer tastes, environmental problems, you name it—putting the state in the very difficult position of allocating large sums on the basis of contestable judgments about local governments' culpability for the decisions of private developers.¹³⁷ It is perhaps telling that while a number of states have regulatory regimes that provide for *ex ante* review of local housing plans,¹³⁸ no state, to our knowledge, has tied transportation or other important sources of local funding to achievement of housing targets.¹³⁹

Another way of responding to the information problems would be to tinker with the planning framework so as to generate better information, economize on available information, or find ways around the most informationally taxing stages of the process. For example, instead of trying to second-guess local judgments about which sites are imminently developable and so belong in a housing element's site inventory, the reviewing agency could try to reduce unnecessary barriers to the intensification of residential land use throughout the jurisdiction, not just on inventory sites.¹⁴⁰ The burden of figuring out whether a local fix will work could also be mitigated with evidentiary presumptions or safe harbors, as suggested in the Introduction. For example, the state could tell poorly performing local governments that if they adopt off-the-shelf, "least cost" zoning codes and permitting protocols, the state will presume that the local governments

135. In practice, HCD relies heavily on input and complaints from community groups.

136. See SCHUETZ & MURRAY, *supra* note 2, at 13 (arguing that "[i]f state policymakers want more apartments to be built, they should attach financial incentives directly to housing production, not merely to zoning revisions on paper").

137. A related difficulty is that annualized housing production is much more volatile in unconstrained than constrained markets, so a point-in-time picture of production may be quite misleading about which jurisdictions are relatively more constrained. See Glaeser & Gyourko, *supra* note 66.

138. See Elmendorf, *supra* note 45, at 95.

139. Soon after taking office, Governor Newsom proposed linking transportation funding to housing production, but the idea was shot down by lawmakers in his own party. See Liam Dillon, *Newsom Delays Threat to Block Transportation Funds to Cities that Flunk Housing Goals*, L.A. TIMES (Mar. 11, 2019), <https://www.latimes.com/politics/la-pol-ca-gavin-newsom-housing-plan-201903011-story.html>.

140. Much of the multifamily housing constructed in California appears not to have been built on housing-element inventory sites. See TAYLOR, *supra* notes 101–102 and accompanying text.

have adequately mitigated constraints. Poor performers that elect to design their own remedies would face a much higher burden of persuasion and would have to collect and release a lot more data about their practices.

We shall argue in the next Part that these strategies for generating better information and economizing on available information are available to HCD today.¹⁴¹

II. UNDERSTANDING THE NEW LEGAL LANDSCAPE (ESPECIALLY THE HCD PROMONTORY)

Beginning about a decade ago and accelerating over the past three years, the California legislature has enacted a series of bills that offer at least partial answers to the critiques outlined above. While RHNA allocations are still formally obtuse to housing markets, the state housing department has acquired important new authority to boost housing targets above projected household growth, and there are several new points of leverage for getting local governments to permit more and denser housing, not just to go through the motions of planning for it. This Part of the Article provides a narrative description of these legislative changes and explains the associated openings for further administrative reform; the Appendix boils it all down to a summary table and flowchart.

A. RHNA Reform

HCD's ability to control local barriers to multifamily housing through housing-element oversight depends, at least to some extent, on local governments' RHNA allocations. A local government's overall RHNA allocation determines the amount of capacity it must provide through the site inventory and associated programs, and the local government's low-income RHNA determines how much of that capacity must take the form of sites zoned for statutory minimum densities (thirty units per acre in urban counties).¹⁴²

RHNA-reform bills were enacted in 2016 and 2017.¹⁴³ They retain projected household growth as the core of the RHNA, while authorizing HCD to adjust baseline estimates so as to account for overcrowding and the share of households who spend more than 30 percent of their income on housing.¹⁴⁴ This represents a substantial departure from the manner in which housing needs were assessed during the previous planning cycle.

141. However, any evidentiary presumption about whether a housing element's program will work would have to be tacit, as HCD still lacks *de jure* standard-setting authority for the programmatic side of the housing element. See *infra* Subpart II.E.

142. See CAL. GOV'T CODE § 65583.2 (West 2020).

143. S.B. 828, 2017–2018 Reg., Leg. Sess. (Cal. 2018) (authorizing or refining adjustments for vacancy rates, overcrowding rates, and cost-burden rates); A.B. 1086, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (authorizing adjustment for percentage of renter households that are overcrowded).

144. See A.B. 1233, 2005–2006 Reg., Leg. Sess. (Cal. 2005).

Prior to 2017, the assessment of need was effectively partitioned into a future-oriented component, the RHNA, which was controlled by HCD and the council of governments, and a present-oriented component, which the local government contributed through its housing element's analysis of local housing conditions.¹⁴⁵ The present-oriented component was an oddity, because while the statute prescribes a long list of present conditions that the housing element must analyze—everything from prices and rents; to vacancy, overcrowding, and cost burden; to housing stock conditions; to energy efficiency; to subsidized units whose deed restrictions may soon expire; to housing options for various “special needs” populations¹⁴⁶—the statutory requirement to make sites available and remove constraints wasn't (expressly) tied to any of these indicia of present need. The required program to make sites available only obligated local governments to furnish enough sites and density to accommodate their RHNAs not the RHNAs supplemented by present local need.¹⁴⁷

It should not come as a surprise, then, that each of the fifteen housing elements we reviewed discussed cost burden, vacancy rates, and overcrowding as part of its assessment of present conditions and needs, but without referencing any indicia of present need in connection with the local government's assessment of site-inventory capacity or its program to make sites available.¹⁴⁸

The recent statutory reforms directing HCD to make overcrowding and cost-burden adjustments fold much of the present-oriented analysis of need into the RHND itself. It is a fair hope that this will lead to bigger RHNDs and, by extension, more capacious site inventories and more aggressive programs to remove constraints. The potential payoff is well illustrated by the sixth-cycle RHNA for the Southern California Association of Governments. In August 2019,

145. The assessment of present needs is governed by sections 65583(a)(2)–(9) of the California Government Code. The assessment of future needs is the RHNA. *See* CAL. GOV'T CODE §§ 65583(a)(1), 65583.2 (West 2020); *see also* Building Blocks, CAL. DEP'T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/community-development/building-blocks/index.shtml> (last visited Oct. 28, 2019) (providing guidance about analysis of “[e]xisting” needs, “[p]rojected” needs, and “[s]pecial” needs).

146. CAL. GOV'T CODE § 65583(a)(2)–(9) (West 2020).

147. *See id.* § 65583.2(a) (“A city's or county's inventory of land suitable for residential development . . . shall be used to identify sites throughout the community . . . that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels . . .”) (emphasis added); *id.* § 65583(c)(1) (stating that housing element shall “[i]dentify actions that will be taken to make sites available during the planning period with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city's or county's share of the regional housing need for each income level that could not be accommodated on sites identified in the inventory . . . without rezoning”) (emphasis added).

To be sure, the provisions of the housing-element article governing the program side of the housing element do require some actions targeting special needs identified in the analysis of current conditions, *see, e.g.*, § 65583.2(c)(6) (requiring program addressed to assisted housing developments whose deed restrictions will soon expire), but there is no requirement that the local government accommodate *more new housing units* than the local government's RHNA, notwithstanding the findings of the “present need” analysis of vacancy rates, overcrowding, cost burden, and the like.

148. *See supra* note 9 for a list of the cities whose housing elements we reviewed.

applying the new statutory factors, HCD announced a RHNA of more than 1.3 million units for Southern California, which is two to three times bigger than the region's target from the last two cycles.¹⁴⁹

But there is ample reason to doubt whether the new RHNA-setting process will reliably yield targets that are large enough. Low rates of vacancy, and high rates of cost burden and overcrowding, tend to occur following positive shocks to the demand for housing.¹⁵⁰ In supply-constrained regions, low- and middle-income households eventually respond to the shock by leaving the region.¹⁵¹ As this occurs, vacancy and cost-burden rates gradually revert to normal—while prices, and selective in-migration of affluent households, remain high.¹⁵² This is the story of the San Francisco Bay Area¹⁵³ and, to a lesser extent, of California as a whole.¹⁵⁴ Over the long run, the shortage of housing manifests in *high prices*—which are not an RHNA-adjustment factor—rather than in vacancy and cost-burden rates.¹⁵⁵

As for intraregional allocations of the RHNA, a statute enacted in 2018 adds new fair-housing and equity criteria that could be used to assign a bigger portion of a region's low-income housing targets to jurisdictions that have relatively high housing prices or small shares of the region's low-income population.¹⁵⁶ The

149. See Liam Dillon, *Southern California Must Plan for 1.3 Million New Homes in the Next Decade*, *Newsom Says*, L.A. TIMES (Aug. 22, 2019), <https://www.latimes.com/california/story/2019-08-22/southern-california-housing-growth>. The fifth-cycle RHNA for the region was 409,060–438,030 units. See Letter from Glen A. Campora, Asst. Deputy Director, Cal. Dep't of Hous. & Cmty. Dev., to Mr. Hasan Ikhata, Exec. Dir., S. Cal. Ass'n of Gov'ts (Aug. 17, 2011), https://www.hcd.ca.gov/community-development/housing-element/docs/scag_5rhana081711.pdf. The fourth-cycle RHNA for the region was 696,348. See CALIFORNIA'S HOUSING FUTURE, *supra* note 74, at 76.

150. On disequilibrium dynamics in the housing market, see generally Jeffrey Zabel, *A Dynamic Model of the Housing Market: The Role of Vacancies*, 53 J. REAL EST. FIN. & ECON. 368 (2016); Mary Riddel, *Housing-Market Disequilibrium: An Examination of Housing-Market Price and Stock Dynamics 1967–1998*, 13 J. HOUS. ECON. 120 (2004); Min Hwang & John M. Quigley, *Economic Fundamentals in Local Housing Markets: Evidence from U.S. Metropolitan Regions*, 46 J. REG'L SCI. 425 (2006).

151. See generally Joseph Gyourko et al., *Superstar Cities*, 5 AM. ECON. J.: ECON. POL'Y 167 (2013).

152. In economic models with costless mobility, an interregional disparity in the percentage of household income spent on housing will persist only if certain regions offer locational amenities not found elsewhere. See Albouy & Erlich, *supra* note 38.

153. See ISSI ROMEM & ELIZABETH KNEEBONE, U.C. BERKELEY TERNER CTR. FOR HOUS. INNOVATION, *DISPARITY IN DEPARTURE: WHO LEAVES THE BAY AREA AND WHERE DO THEY GO?* 2 (2018), <https://turnercenter.berkeley.edu/dispairty-in-departure>.

154. See Hans Johnson, *California's Brain Gain Continues*, PPIC BLOG (July 10, 2019), <https://www.ppic.org/blog/californias-brain-gain-continues/> (observing that “[t]his interstate migration pattern — gaining large numbers of college graduates while losing large numbers of less educated adults — doesn't happen anywhere else in the country”).

155. Tellingly, application of the new statutory factors resulted in a smaller relative increase in the RHND for the San Francisco Bay Area than for the Southern California Association of Governments, even though the Bay Area has higher prices. A key difference is that the Bay Area is physical smaller and thus includes fewer of the poor and overcrowded households who have been displaced from expensive coastal markets to distant inland locations. See CHRISTOPHER S. ELMENDORF ET AL., UCLA LEWIS CTR. FOR REG'L POL'Y STUD., *REGIONAL HOUSING NEED IN CALIFORNIA: THE SAN FRANCISCO BAY AREA 3* (2020), <https://www.lewis.ucla.edu/research/regional-housing-need-san-francisco-bay-area/>.

156. A.B. 1771, 2017–2018 Reg., Leg. Sess. (Cal. 2018). For an explanation of how Assembly Bill 1771's new fair-housing and equity criteria may boost low-income RHNA allocations for high-price

same statute also requires councils of governments to submit their proposed RHNA-allocation “methodology” to HCD for comment.¹⁵⁷ If a council decides not to follow HCD’s recommendations, the council must justify its decision with findings supported by substantial evidence.¹⁵⁸ This is the legislature’s first incursion on the councils’ traditional authority to allocate their RHNDs however they wish. But the incursion is quite modest. The “substantial evidence” test is deferential,¹⁵⁹ and the statutory factors that nominally guide intraregional allocations cut in opposite directions.¹⁶⁰ It’s worth noting, though, that the Southern California Association of Governments recently voted to adopt an allocation methodology for the upcoming cycle that will shift much of the region’s housing burden to high-cost coastal communities.¹⁶¹ This is a major achievement, but it’s not clear to what extent the decision resulted from top-down pressure from HCD and state law, as opposed to bottom-up leadership from the City of Los Angeles plus “YIMBY” activism.¹⁶²

To recap: The recent RHNA reforms have some potential to encourage planning for multifamily housing in expensive areas, but it’s an open question whether the reforms will consistently result in substantially higher housing targets for high-price locales.

suburbs, see BARBARA KAUTZ & DIANA VARAT, LEAGUE OF CAL. CITIES, NAVIGATING HOUSING DEVELOPMENT IN THE NEW ERA pt. II.B (2019), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/Spring-2019/5-2019-Spring;-Varat-Kautz-Navigating-Housing-Deve.aspx>.

157. CAL. GOV’T CODE § 65584.04(h) (West 2020).

158. See *id.* § 65584.04(i).

159. See BARCLAY & GRAY, *supra* note 114, at 538. Moreover, it’s not clear that the council’s decision on intra-regional allocation methodology is subject to judicial review. The relevant methodology section of the government code says nothing about judicial review, see CAL. GOV’T CODE § 65584.04, and the related provision about the actual allocation among member jurisdictions (that is, application of the methodology) has been interpreted by the courts to *foreclose* judicial review at the behest of local governments. See *City of Irvine v. S. Cal. Ass’n of Gov’ts*, 96 Cal. Rptr. 3d 78, 79 (Cal. Ct. App. 2009).

160. For example, the councils are to consider both “existing and projected jobs” (which could be used to justify higher allocations for dense cities) and “the availability of underutilized land” (which could be used to justify higher allocations for far-flung, lightly populated exurbs). See CAL. GOV’T CODE § 65584.04 (West 2020).

161. The Southern California Association of Governments recently voted to adopt an allocation methodology for the sixth cycle that will shift much of the housing burden to high-cost coastal communities. This is a major achievement, but it probably owes as much or more to political organizing by “YIMBYs,” see *infra* note 162, and the Los Angeles city government as to new state-law criteria. See Liam Dillon, *Coastal Cities Give In to Growth. Southern California Favors Less Housing in Inland Empire*, L.A. TIMES (Nov. 7, 2019), <https://www.latimes.com/california/story/2019-11-07/housing-building-density-zoning-coastal-inland-empire-southern-california-scag>.

162. YIMBY is a colloquial acronym; it stands for “Yes In My Backyard” and describes pro-housing activists who generally favor denser development in urban areas. *YIMBY*, WIKIPEDIA, <https://en.wikipedia.org/wiki/YIMBY> (last visited Feb. 19, 2021).

B. Site-Inventory Reform

Recall that it is through the housing element's site inventory that HCD assesses a local government's capacity to accommodate its RHNA.¹⁶³ If the local government fails to show that it can accommodate its RHNA on the inventory parcels with current zoning, it must provide additional capacity through housing-element programs.¹⁶⁴

In 2017, the legislature substantially tightened requirements for the inventory.¹⁶⁵ Thus:

- For nonvacant sites, the inventory must now include an estimate of the parcel's "realistic and demonstrated potential for redevelopment during the planning period,"¹⁶⁶ accounting for a host of factors, including "any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site"¹⁶⁷
- If a local government assigns more than 50 percent of its low-income RHNA to nonvacant parcels, it must make findings supported by substantial evidence that the existing use of each such parcel "is likely to be discontinued" during the planning period.¹⁶⁸
- Special findings are also required if the local government claims that a site smaller than 0.5 acres or larger than ten acres can accommodate a portion of the low-income RHNA.¹⁶⁹
- If a nonvacant parcel in the inventory goes undeveloped over the planning period, or if a vacant parcel goes undeveloped over two successive planning periods, the nominal capacity of that parcel may not be counted toward the local government's low-income RHNA in the next cycle unless the parcel is rezoned for by-right development¹⁷⁰ of projects in which 20 percent of the units will be sold or rented at below-market rates.¹⁷¹

163. CAL. GOV'T CODE § 65583.2 (West 2020); *Analysis of Sites and Zoning*, *supra* note 82.

164. CAL. GOV'T CODE § 65583(c)(1) (West 2020).

165. A.B. 1397, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

166. CAL. GOV'T CODE § 65583(a)(3) (West 2020).

167. CAL. GOV'T CODE § 65583.2(g)(1) (West 2020). Except for leases, most of these factors were already part of the required analysis, though the requirements were couched in slightly different language. *See id.* § 65583.2(g) (West 2017) (amended 2017) ("The methodology shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites.").

168. CAL. GOV'T CODE § 65583.2(g)(2) (West 2020).

169. Specifically, the local government must demonstrate "that sites of equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units as projected for the site," or "provide[] other evidence . . . that the site is adequate to accommodate lower income housing." *Id.* § 65583.2(c)(2)(A)—(B).

170. A site is developable "by right" or "as of right" if projects that conform to the zoning code are subject to nondiscretionary administrative review and approval. *Glossary of Zoning Terms*, NYC PLANNING, <https://www1.nyc.gov/site/planning/zoning/glossary.page> (last visited Feb. 19, 2021).

171. CAL. GOV'T CODE § 65583.2(c) (West 2020).

- If a local government approves for an inventory site a project that has fewer units *by income category* than the housing element said the site could accommodate, then the local government must make findings that it has adequate remaining capacity to accommodate its RHNA by income category, or else rezone additional sites within 180 days to accommodate the unmet need within the relevant income band.¹⁷²

All of this is designed to keep local governments from assigning their RHNAs to sites that would be uneconomic to develop at housing-element-contemplated densities during the planning period.¹⁷³ While the 2017 reforms don't overtly address the fundamental failure of housing elements to weight a site's capacity by its probability of redevelopment over the planning period, they arguably create a hook for HCD to demand as much. We return to this question in Subpart II.E.1.

For all the legislature's good intentions, the 2017 site inventory reforms may have side effects that work against multifamily housing. For example, the "likely to be discontinued" findings requirement gives high-price jurisdictions a great argument to use in lobbying their council of governments for a tiny RHNA:

We lack vacant parcels.¹⁷⁴ It's not feasible for us to figure out which existing uses HCD would accept as "likely to be discontinued" over the next eight years, and we're barred from assigning more than half our low-income RHNA to nonvacant sites whose uses aren't "likely to be discontinued" during the period. The lion's share of the RHND should therefore be assigned to exurban jurisdictions, where there's still lots of vacant land and the local governments wouldn't have to fight HCD over predictions that uses will be discontinued.¹⁷⁵

The new site-inventory requirements could also backfire by inducing local governments to slow-walk or kill market-rate projects on sites that the housing element categorizes as appropriate for low-income housing (about 40 percent of

172. *Id.* § 65863(b).

173. See *infra* note 290 and accompanying text (discussing anti-circumvention objectives of Assembly Bill 1497, as stated in bill summaries).

174. Jurisdictions with very expensive housing tend to have few vacant parcels, owing to the big returns to building whatever the local government has allowed.

175. These kinds of arguments are now being made in submissions regarding the draft allocation of Southern California's sixth-cycle RHNA. For example, the City of Aliso Viejo asserts, "[V]acant land is critical to housing production, and almost no vacant developable land now remains [in our community.]" Comment Letter from David Doyle, City Manager, City of Aliso Viejo, to Hon. Peggy Huang, Chair, RHNA Subcommittee, S. Cal. Ass'n of Gov'ts (Sept. 12, 2019), <http://www.scag.ca.gov/programs/Pages/RHNA-comments.aspx>. Similar arguments were also made—successfully—in opposition to the first draft of Senate Bill 828 (2018), which would have required local governments to zone for 200 percent of their RHNA. The California chapter of the American Planning Association said this requirement would "set up communities for failure," since the site-inventory requirements of Assembly Bill 1397 had drastically limited the sites that may be counted toward a local government's RHNA. See Bill Analysis, S.B. 828, Senate Comm. on Transp. & Hous. 7–8 (Apr. 24, 2018), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB828.

the RHNA).¹⁷⁶ Approval of market-rate projects on these sites would obligate the local government to make findings about whether the still-available inventory sites are sufficient to accommodate the remaining RHNA in each income bin.¹⁷⁷ If not, the local government must identify and upzone additional low-income-suitable sites within 180 days.¹⁷⁸

Finally, the new rezoning requirement for nonvacant sites that go undeveloped over a planning cycle will probably disincentive local governments from assigning even the permitted “half” of their low-income RHNA to low-probability-of-development sites (which is where most redevelopment potential in already-developed jurisdictions will be found).¹⁷⁹ Any such sites that are *not* developed over the planning period—meaning the vast majority of them, as they’re low-probability sites—could not be used to accommodate the low-income RHNA in the next cycle unless rezoned for by-right development.¹⁸⁰

In 2018, the legislature added that housing elements must “affirmatively further fair housing.”¹⁸¹ This may put pressure on local governments to assign more of their low-income RHNA to nonvacant sites, as vacant sites are likely to be rare in affluent, high-opportunity neighborhoods.¹⁸² However, the findings required when sites smaller than 0.5 acres are used to accommodate the low-

176. This would not be *lawful* behavior by the local government, *see* CAL. GOV’T CODE § 65863(c)(2) (stating that obligation to rezone does not authorize a local government to disapprove a project), but the rezoning duty may induce it nonetheless. This would hardly be a bad outcome if killing the market-rate project resulted in a subsidized project getting built on the site instead. The problem is that it’s infeasible to achieve lower and moderate-income housing targets entirely through the production of new subsidized units, *see supra* text accompanying notes 48–59, so to exclude market-rate projects from sites that a housing element deems suitable for low-income housing may result in many such sites contributing no housing at all.

177. CAL. GOV’T CODE § 65863(b) (West 2020). Prior to 2017, the no-net-loss rule required local governments to rezone additional sites if the *total* capacity of their remaining inventory fell below their *total* remaining RHNA, but the law did not distinguish among the income bins for this purpose. *See* CAL. GOV’T CODE § 65863(b) (West 2008) (amended 2017).

178. CAL. GOV’T CODE § 65863(b) (West 2020).

179. This assumes that parcels with single-family homes tend to be low-probability sites for redevelopment, even if rezoned for substantially higher densities. The vast majority of developable land in many and probably most U.S. cities is now zoned single-family homes. *See* Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html>.

180. CAL. GOV’T CODE § 65583.2(c) (West 2020).

181. A.B. 686, 2017–2018 Reg., Leg. Sess. (Cal. 2018); CAL. GOV’T CODE §§ 65583, 65583(c)(5), (10) (West 2020). The core of this requirement takes effect starting in 2021. *See* CAL. GOV’T CODE § 65583, 65583(c)(10)(A) (West 2020).

182. The new fair-housing provision encourages but does not require rezoning for high density housing in high-opportunity neighborhoods. A local government’s “strategies and actions” to affirmatively further fair housing “may include, but are not limited to, enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, and protecting existing residents from displacement.” CAL. GOV’T CODE § 65583(c)(10)(A)(v) (West 2020).

income RHNA cut in the other direction because affluent neighborhoods of single-family homes tend to have uniform lots smaller than the 0.5-acre cutoff.¹⁸³

In sum, the new site inventory requirements will definitely raise the paperwork burden on local governments, in that cities will have to spend more effort justifying their choice of sites, but it's not clear whether they'll actually bring about more housing. The answer may depend on how HCD decides to implement the requirements.¹⁸⁴

C. Rezoning Bypasses

Better site inventories are not the only way that the legislature has undertaken to strengthen the conveyor belt from RHNA to housing element to rezoning to project entitlement. Recent reforms have also made it harder for local governments to disapprove projects that comply with local land-use standards, and, going a step further, the legislature has started to erect bypasses around the rezoning step in the conveyor belt.¹⁸⁵

At the center of these efforts is the HAA.¹⁸⁶ Enacted in 1982, the HAA disallows local governments from denying housing projects that comply with the land-use standards in effect when the developer's application was determined to be complete, subject to a health-or-safety exception.¹⁸⁷ The HAA has been gradually strengthened over the years, and in 2017 the legislature undertook to strip away nearly all local discretion to determine whether a project complies with land-use standards or jeopardizes public health or safety. Assembly Bill (AB) 1515 *requires* local governments to deem a housing project compliant with applicable standards if a reasonable person *could* deem the project compliant; the bill inverts the traditional rule whereby courts defer to local governments if a reasonable person could have reached the same conclusion as the municipal decision maker.¹⁸⁸ A companion measure, Senate Bill (SB) 167, narrows the health and safety exception to cases in which the local government makes written findings "supported by a preponderance of the evidence in the record" that the project would have a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards . . . as they existed on the date the application was deemed complete."¹⁸⁹

183. See *supra* note 169.

184. See *infra* Subpart II.E.1.

185. We know of several cases in which developers are using the arguments advanced in this section in their negotiations with local governments over proposed projects, and the arguments have helped to move these projects forward.

186. CAL. GOV'T CODE § 65589.5 (West 2020).

187. *Id.* § 65589.5(j); Cal. Stats. 1982 ch. 1438 § 2.

188. A.B. 1515, 2017–2018 Reg., Leg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65589.5(f)(4) (West 2020).

189. S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65589.5(j)(1) (West 2020).

But what if the local government's zoning standards are unnecessarily restrictive? Does the HAA offer a way to get around them? The legislature has approached this question gingerly. The first HAA amendments, adopted in 1990, allow developers to challenge conditions of approval, "which render [a] project infeasible . . . for the use of low and moderate-income households."¹⁹⁰ Yet the same amendments expressly protect local authority to apply "development standards and policies appropriate to and consistent with meeting the quantified objectives [of the housing element]."¹⁹¹ In short, if the policy on which the local government bases its condition of approval is acknowledged in an HCD-approved housing element, a feasibility-based challenge will probably fail.

In 2004, the legislature took another step, amending the HAA to disallow local governments from denying or reducing the density of certain projects that are "consistent with the density specified in the housing element, *even though [the project] is inconsistent with both the jurisdiction's zoning ordinance and general plan land-use designation.*"¹⁹² The reach of this "rezoning bypass" was modest. The project had to be located on a site designated by the housing element for low- or moderate-income housing, and at least 20 percent of the units had to be reserved for low-income housing.¹⁹³ But the *idea* was revolutionary: using a state statute to make a component of the local government's general plan (the housing element) the basis for development permitting, in circumstances where local zoning is more restrictive than the general plan.

As we explained earlier, the traditional rule is that if the zoned density of a site is within the range authorized by the general plan, then the zoning ordinance is consistent with the plan as a matter of law and developers must abide by it.¹⁹⁴ To illustrate, if the applicable zoning ordinance allows "up to 10" units per acre on a site but the general plan classifies the site for "up to 50," the local government has no obligation to approve a project whose density exceeds 10 units per acre.¹⁹⁵ Indeed, if local officials did approve the project, disgruntled neighbors could sue the local government for violating its zoning ordinance.

In 2008 and again in 2017, the legislature created additional pathways for developers to get permits (for narrow classes of projects) on the basis of a

190. S.B. 2011, 1989–1990 Reg., Leg. Sess. (Cal. 1990).

191. *Id.*

192. A.B. 2348, 2003–2004 Reg., Leg. Sess. (Cal. 2004) (amending CAL. GOV'T CODE § 65589.5(d)(5)) (emphasis added).

193. *Id.* In 2008, the legislature added that if at least 49 percent of the units in the project would be sold or rented at below-market units, and if the project is on a site that the local government was required to rezone for by-right development, then the local government may not (after the rezoning deadline has passed) apply any discretionary review conditions to the project. *See* S.B. 375, 2007–2008 Reg., Leg. Sess. (Cal. 2008) (adding CAL. GOV'T CODE § 65583.2(g)).

194. *See supra* Subpart I.B.2.

195. *See, e.g.,* *Marracci v. City of Scappoose*, 552 P.2d 552, 553 (Or. Ct. App. 1976) (rejecting developer's argument that project that complied with plan could not be denied on basis of more restrictive zoning ordinance, on ground that it was local government's prerogative to decide when and how to "evolve" "more restrictive zoning ordinances [] toward conformity with more permissive provisions of the plan").

generous general plan, notwithstanding more restrictive zoning.¹⁹⁶ But on neither occasion did the legislature elaborate on what it *means* for zoning to be inconsistent with the plan. The 2008 statute amends the Density Bonus Law¹⁹⁷ to define the base density (on which the bonus is computed) as the “*maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project.*”¹⁹⁸ “Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail.”¹⁹⁹ The 2017 measure, SB 35, requires local governments that are not on track to meet their RHNA targets to process certain development applications ministerially.²⁰⁰ Echoing the Density Bonus Law, SB 35 provides that the project “shall be deemed consistent with objective zoning standards” if the applicable zoning, general plan, and design standards are “mutually inconsistent” and “the development is consistent with the standards set forth in the general plan.”²⁰¹

It was not until 2018 that the legislature began to wrestle overtly with the meaning of plan/zoning consistency. The vehicle was AB 3194, a bill which amends the HAA to disallow local governments from denying or reducing the density of a housing project if the “project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan.”²⁰² Importantly, the legislature added that zoning standards and criteria “shall be applied *to facilitate and accommodate development at the density allowed on the site by the general plan.*”²⁰³ It is also declared “policy of the state that [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.”²⁰⁴

Reading these provisions together, it is a fair inference that the traditional rule of deference to local governments on questions of consistency has been qualified such that, pursuant to the HAA, a local government must accommodate housing projects whose size and density are anywhere within the range

196. A.B. 2280, 2007–2008 Reg., Leg. Sess. (Cal. 2008); S.B. 35, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

197. Density bonus laws authorize developers to build more units or larger structures than base zoning allows if the developer agrees to make a certain percentage of the units affordable, or to provide other public benefits. For an overview of the state Density Bonus Law in California, see JON GOETZ & TOM SAKAI, GUIDE TO THE CALIFORNIA DENSITY BONUS LAW (rev. ed. Jan. 2020), https://www.meyersnave.com/wp-content/uploads/California-Density-Bonus-Law_2020.pdf.

198. A.B. 2280 (emphasis added). Previously, the base density had been the zoned density of the site, but this new language gave developers a toehold for arguing that the relevant density is that of the land-use element of the plan (if it’s more generous than the density permitted under the zoning ordinance).

199. *Id.*

200. S.B. 35 (2017).

201. CAL. GOV’T CODE § 65913.4(a)(5)(B) (West 2020).

202. A.B. 3194, 2017–2018 Reg., Leg. Sess. (Cal. 2018) (adding CAL. GOV’T CODE § 65589.5(j)(4)).

203. *Id.*

204. S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV’T CODE § 65589.5(a)(2)(L)).

contemplated by the general plan, notwithstanding more restrictive zoning. The legislative history of AB 3194 strongly supports this interpretation. According to the official bill analyses, plan consistency is to be assessed using the HAA’s “gamechanger” evidentiary standard, adopted the previous year.²⁰⁵ That is, a housing project is consistent with the plan and must be approved (unless it violates objective health or safety standards) if a reasonable person *could* deem the project consistent with the plan.²⁰⁶

205. The bill was a direct response to research conducted by two of the authors of this paper, finding that “of 152 housing projects processed in two of California’s largest jurisdictions over the last three years, the jurisdiction required a rezoning or a variance in 78 cases—yet in only six instances did projects need a general plan amendment.” Bill Analysis, A.B. 3194, Sen. Gov’t & Finance (June 25, 2018), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3194. The official bill analyses explain that in the view of AB 3194’s author and supporters,

local agencies [were] intentionally maintain[ing] . . . low densities or height limits . . . [to] ensure that they maintain discretionary approval over projects [that are] consistent with housing density and other objective standards contained in the city or county’s general plan. Locals sometimes exploit this loophole to evade compliance with the HAA.

Id.; see also Bill Analysis, A.B. 3194, Assemb. Hous. & Cmty. Dev. (Apr. 23, 2018); Bill Analysis, A.B. 3194, Assemb. Local Gov’t (May 8, 2018); Bill Analysis, A.B. 3194, Sen. Gov’t & Finance (June 25, 2018); Bill Analysis, A.B. 3194, Sen. Floor (Aug. 8, 2018) (all available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3194); see also Background Information Request, A.B. 3194, Assemb. Comm. on Hous. & Cmty. Dev. (on file with authors).

The purpose of AB 3194 was to put an end to such shenanigans. The bill went through several rounds of wordsmithing before the Senate Committee on Housing and Transportation came up with the formulation requiring approval “if the . . . project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan,” adding for good measure that zoning criteria “shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan.” CAL. GOV’T CODE § 65589.5(j)(4) (West 2020). The official Senate bill summaries explain that while the traditional standards for consistency were very deferential to local governments, AB 3194 “builds on” the “gamechanger” HAA amendment of the previous year, which reversed the norm of deference to local governments on questions about consistency. Bill Analysis, A.B. 3194, Sen. Gov’t & Finance (June 25, 2018); Bill Analysis, A.B. 3194, Sen. Floor (Aug. 8, 2018). The bill summaries for AB 3194 then quote the evidentiary standard of that “gamechanger” amendment:

[A] housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable *plan*, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, or in conformity.

Bill Analysis, A.B. 3194, Sen. Comm. on Hous. & Transp. (June 14, 2018) (emphasis added) (quoting A.B. 1515 (Daly, 2017)); *Accord* Bill Analysis, A.B. 3194, Sen. Gov’t & Finance (June 25, 2018); Bill Analysis, A.B. 3194, Sen. Floor (Aug. 8, 2018).

In short, “plan consistency” for purposes of AB 3194 is not the feeble consistency requirement of traditional land use law, but the new consistency standard of the reinvigorated HAA: a developer may claim the zoning bypass if a reasonable person *could* deem her project consistent with the general plan, notwithstanding zoning to the contrary. This new conception of general-plan consistency is reinforced by another 2017 statute, AB 72. See *infra* text accompanying note 207. It is this version of consistency, not the traditional standard, that achieves the bill sponsors’ objective of preventing Los Angeles, San Jose, and other cities from using discretionary variance and rezoning procedures to deny or reduce the density of plan-compliant projects. And, to return to our earlier example, it is this version of consistency that will usually require local governments to approve fifty-unit-per-acre projects on sites designated by the plan for “up to 50 units per acre,” notwithstanding a zoning ordinance that caps density at ten units per acre.

206. CAL. GOV’T CODE § 65589.5(f)(4) (West 2020).

Even purely prospective commitments in the housing element, such as a promise to upzone or relax parking requirements by some date in the future, may now be enforceable by dint of the HAA's requirement that local governments approve projects that are consistent with the general plan, notwithstanding zoning to the contrary. This is so because another 2017 statute uses the term "inconsistency" in reference to "*any* failure to implement *any* program actions included in the housing element."²⁰⁷ A local government's failure to upzone on schedule has apparently become an inconsistency within the meaning of housing-element law, even though it almost surely would not count as inconsistent under traditional land-use law.²⁰⁸

We acknowledge that some courts may read AB 3194 narrowly, straining not to disrupt familiar legal norms about what it means for zoning to be consistent with the general plan.²⁰⁹ If this occurs, the new rezoning bypass provision of the HAA will provide developers with a plan-based trump against more restrictive zoning only in cases where the general plan policy in question is "fundamental, mandatory, and clear."²¹⁰ Some general-plan policies should be deemed "fundamental" by dint of state law. For example, because state law requires local governments to "ensure" that their housing element's site inventory and associated programs "can accommodate, at all times throughout the planning period, [the locality's] remaining unmet share of the regional housing need,"²¹¹ a court should view a housing-element policy to comply with this mandate as fundamental, and at the very least vindicate zoning-bypass claims if the zoned capacity of available inventory sites has dropped below the remaining-RHNA threshold.²¹²

207. A.B. 72, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV'T CODE § 65585(i)). This statute authorizes HCD to decertify a local government's housing element midcycle for failures of implementation. The legislative history of AB 3194 also draws a distinction between "legitimate" and "illegitimate" denials of projects whose density comports with the plan, illustrating the former with an example of a project that is denied during a reasonable period for bringing zoning into conformity with the plan. *See* Bill Analysis, A.B. 3194, Sen. Gov't & Finance (June 25, 2018) ("[T]here may be a period between an amendment to portions of a general plan, such as the housing element, and when the local government updates its zoning ordinances to match the general plan.").

208. *See supra* note 114 and accompanying text.

209. While a narrow reading would be inconsistent with the legislative history and declared purpose of AB 3194, *see supra* notes 203–207 and accompanying text, it may appeal to judges who have a strong preference for legal continuity and incrementalism and also to judges who want to avoid wrestling with state-constitutional "home rule" challenges to state laws that disrupt the traditional relationship between local governments' general plan and zoning.

210. *See supra* notes 113–116 and accompanying text.

211. California's "no net loss" statute requires every local government to "ensure that its housing element inventory . . . can accommodate, at all times throughout the planning period, its remaining unmet share of the regional housing need . . ." CAL. GOV'T CODE § 65863(a) (West 2020).

212. Under the older zoning bypass provision of the HAA, CAL. GOV'T CODE § 65589.5(d)(5), the court quite clearly has to vindicate bypass claims if the site in question is part of the housing element's inventory for low-income housing, the project would include at least 20 percent low-income units, and the project's density is no greater than the density specified in the housing element for the site. The question we are addressing in the text concerns bypasses on other sites and for other types of projects.

It should be acknowledged, however, that requiring local governments to approve housing projects that comport with the general plan but violate more restrictive zoning could backfire. If cities are barred from reducing the density of any project that's within the range contemplated by the general plan, they may respond by writing much more restrictive density maximums into their plans, shrink-wrapping the general plan to existing zoning. This would give NIMBYs plan-based ammunition to challenge projects that the local government would actually like to approve.²¹³ Or, a local government may manage to evade the manifest intent of AB 3194 by declaring a “fundamental, mandatory, and clear” general-plan policy that all housing projects comply with locally enacted development standards that are more restrictive than the maximum density allowed by the plan.²¹⁴ Time will tell.

D. HCD Oversight of Housing-Element Implementation

In addition to bolstering site-inventory requirements and the HAA, the legislature has tried to accelerate the RHNA-to-production conveyor belt by giving HCD new powers to supervise housing-element implementation. To this end, the legislature has: (1) authorized HCD to decertify housing elements midcycle for failures of implementation, referring the matter to the attorney general for enforcement;²¹⁵ (2) authorized courts to impose progressive monthly fines of up to \$600,000 on jurisdictions with noncompliant housing elements²¹⁶ and to appoint someone with “expertise in planning” to “bring the jurisdiction’s housing element into substantial compliance”;²¹⁷ and (3) authorized HCD to promulgate “standards, forms, and definitions” concerning local governments’ reporting duties under housing-element law.²¹⁸

213. SB 330 (2019), which establishes a five-year ban on downzoning, may bar this in the near term. *See* CAL. GOV’T CODE § 66300(b)(1)(A) (West 2020) (prohibiting “[c]hanging the general plan land use designation, specific plan land use designation, or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing general plan land use designation, specific plan land use designation, or zoning district below what was allowed under the land use designation and zoning ordinances . . . in effect on January 1, 2018,” unless the local government offsets the downzone with an equivalent upzone).

214. Once this policy is written into a general plan, it could then be argued that no reasonable person could deem a project exceeding applicable zoning standards to be consistent with the plan.

215. A.B. 72, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV’T CODE § 65585(i)(1)(a) (West 2020)).

216. A.B. 101, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (adding CAL. GOV’T CODE §§ 65585(k)-(n)); *see also* Liam Dillon & Taryn Luna, *California Leaders Strike Deal to Give Cities and Counties Hundreds of Millions to Fight Homelessness*, L.A. TIMES (June 29, 2019, 3:39 PM), <https://www.latimes.com/politics/la-pol-ca-homeless-housing-money-state-budget-20190627-story.html>.

217. CAL. GOV’T CODE § 65585(l)(3) (West 2020).

218. A.B. 879, 2017–2018 Reg., Leg. Sess. (Cal. 2017). HCD had long had authority to issue “forms and definitions” but not “standards” for the annual reports; the earlier authorization also required HCD to follow the cumbersome procedural requirements of the California Administrative Procedures Act when issuing forms and definitions. *See* A.B. 51, 1993–1994 Reg., Leg. Sess. (Cal. 1994). The new law exempts HCD from Administrative Procedure Act requirements and adds standard-setting authority (which suggests that HCD may now set the criteria for whether an annual report is legally adequate).

These reforms are mutually reinforcing. HCD's new authority over local governments' annual reports should help the Department to obtain the information it would need to make sensible decertification decisions. Meanwhile, the new fiscal penalties for housing-element noncompliance, and the prospect of a housing element being rewritten by a court, should make the risk of decertification more worrisome for local governments. This in turn should prod local governments to actually implement the rezoning and constraint-removal programs that their housing elements promise.

The reporting obligations that HCD may now impose on local governments are potentially far-reaching. The legislature has directed local governments to report certain project-level milestones, identified by assessor parcel number,²¹⁹ but the Department's new "standards, forms, and definitions" authority with respect to the annual reports can also be used for broader purposes. Annual reports shall document "[t]he status of the plan and progress in its implementation," as well as "progress in meeting [the local government's] share of regional housing needs . . . and local efforts to remove governmental constraint."²²⁰ In 2019, the legislature added that the annual reports should "[p]rovide[] an understanding of the process, certainty, cost, and time to approve housing," and "a better understanding of housing project appeals."²²¹ But it's up to HCD to figure out what data collection and reporting protocols would best serve these objectives.

There is one notable omission from the emerging framework for HCD oversight of housing-element implementation: a statutory penalty for violating the reporting standards.²²² However, if a local government's violations were sufficiently serious, HCD could probably decertify the housing element itself, reasoning that substantial failures to properly document housing-element implementation are tantamount to a failure of implementation as such.²²³

219. These include (1) the number of applications received for housing developments over the preceding year; (2) the total number of units in those projects as proposed; (3) the number of units actually approved; (4) the tax-parcel number of each project approved and constructed thus far in the cycle and the number of units that that project contributes by income band; and (5) any sites rezoned to accommodate the local government's RHNA. *See* A.B. 879, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV'T CODE § 65400(a)(2)(C)–(G); S.B. 35, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV'T CODE § 65400(a)(2)(H)).

220. CAL. GOV'T CODE § 65400(a)(2) (West 2020).

221. A.B. 1483, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (adding CAL. GOV'T CODE § 50452(a)(6)(D), which characterizes "[i]nformation that must be reported under [§ 65400(a)(2)]").

222. The only reporting requirement backed by a penalty is the requirement that local governments periodically report progress toward their RHNA by income category. If this report is not filed on time, the local government enters the SB 35 remedial regime, under which certain plan-compliant projects must be permitted as of right under a quick timeframe. *See* CAL. DEP'T HOUS. & CMTY. DEV., STREAMLINED MINISTERIAL APPROVAL PROCESS GUIDELINES § 200(d) (Nov. 29, 2018), <http://www.hcd.ca.gov/policy-research/docs/SB-35-Guidelines-final.pdf>.

223. The statute authorizing decertification provides, in relevant part, "The department shall review any action *or failure to act* by the city, county, or city and county that it determines is inconsistent with an adopted housing element or Section 65583, including any failure to implement any program actions included in the housing element pursuant to Section 65583." *See* A.B. 72, 2017–2018 Reg., Leg. Sess.

E. Standards for the Legal Adequacy of a Housing Element

Backstopping every other feature of the new landscape of housing-element law are changes to HCD's authority over the housing element itself. As this Subpart will explain, the legislature has authorized HCD to issue "standards, forms, and definitions" covering the entire analytic side of the housing element, including the site inventory and analysis of constraints. The legislature has also, we think, effectively ratified HCD's gloss on whether a housing element substantially complies with state law. ("Substantial compliance," not perfect compliance, is the statutory test for the validity of a housing element.²²⁴) Whereas the courts traditionally said that substantial compliance was just a matter of whether the housing element "contain[s] the elements mandated by the statute,"²²⁵ HCD has more recently evaluated housing elements for their "adequacy . . . to meet statutory goals and objectives."²²⁶ Legislative ratification of HCD's gloss on substantial compliance means that courts should now defer to HCD's judgment about what program actions in a housing element are reasonably necessary to achieve the state's housing goals.

1. Definitions, Forms, and Standards for the Analytic Side of the Housing Element

SB 6, passed in 2019, authorizes HCD to issue "standards, forms, and definitions" for the housing-element site inventory and the rest of section 65583(a) of the California Code.²²⁷ Section 65583(a) governs the analytic side of the housing element, principally the housing needs assessment and analysis of constraints, as well as the inventory. The grant of authority in SB 6 is important because the analysis under section 65583(a) shapes what the program side of the housing element must aim to achieve.²²⁸ Below, we sketch several ways in which

(Cal. 2017) (adding CAL. GOV'T CODE § 65585(i)) (emphasis added). Decertification for failures of reporting would be legally straightforward to justify if the housing element itself commits the local government to comply with HCD's reporting requirements, since then the failure of reporting would clearly violate the housing element itself and not just reporting requirements of section 65400.

224. See CAL. GOV'T CODE §§ 65585(i), (l) (West 2020).

225. See *supra* notes 132–134 and accompanying text.

226. See Barbara E. Kautz, Housing Elements: Beware of What You Promise (Sept. 19, 2013) (unpublished working paper), <https://www.cacities.org/UploadedFiles/LeagueInternet/28/288f671f-501d-4ce4-9099-557bd10ef7f0.pdf> (criticizing a 2012 letter from HCD to the Association of Bay Area Governments, in which the agency wrote: "While a court may review a housing element to find whether it contains the elements mandated by the statute, the Department's review considers the adequacy of information, program commitments, and timeframes to meet various statutory goals and objectives").

227. See S.B. 6, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (adding CAL. GOV'T CODE § 65583.3(b)) ("The department may review, adopt, amend, and repeal the standards, forms, or definitions to implement this subdivision and subdivision (a) of Section 65583"); CAL. GOV'T CODE § 65583(a) (West 2020) (stating that the housing element shall contain, among other things, "[a]n assessment of housing needs" and "[a]n analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels").

228. In particular, the housing element's program must make sites available with suitable zoning "to accommodate that portion of the city's or county's share of the regional housing need for each income

this authority could be used to break down barriers to the supply of multifamily housing.

a. The Scope of HCD's Interpretive Authority

Before getting into specifics, we need to explain the scope of HCD's interpretive authority, which follows from general principles about judicial deference—and nondeference—to administrative agency rules. Questions about the “legal meaning” of a California statute “[i]n the constitutional domain of the courts.”²²⁹ If the legislature has charged an agency with implementing the statute, courts are expected to consider the agency's views and to give “weight” to the agency's position insofar as “the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.”²³⁰ But, for an agency to get its preferred interpretation ratified by the courts, the agency must ultimately persuade the courts that that interpretation is, under the circumstances, the best possible reading of the statute.²³¹ This is so because, after considering the agency's views, courts are supposed to exercise “independent judgment” and decide what the statute means.²³²

That's the general rule. There is an exception, however, if the legislature has conferred on the agency the power to “make law,” typically through rulemaking.²³³ When an agency exercises such delegated, “quasi-legislative” power, “the judicial function is limited to determining whether the regulation is (1) within the scope of the authority conferred, and (2) reasonably necessary to effectuate the purpose of the statute.”²³⁴ The first question calls for independent judgment by the courts, just like normal statutory interpretation.²³⁵ The second

level that could not be accommodated on sites identified in the inventory completed pursuant to paragraph (3) of subdivision (a) without rezoning,” and must also “[a]ddress and, where appropriate and legally possible, remove governmental and nongovernmental constraints to the maintenance, improvement, and development of housing.” CAL. GOV'T CODE § 65583(c) (West 2020). Thus, the analysis of the realistic capacity of the inventory sites pursuant to sections 65583(a)(1) and 65583.2 shapes what the program to make sites available must aim to achieve, and the analysis of governmental and nongovernmental constraints to new housing pursuant to sections 65583(a)(5) and (6) shapes what the program to remove constraints must cover. *See id.*; *see also Address and Remove (or Mitigate) Constraints*, CAL. DEP'T HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/community-development/building-blocks/program-requirements/address-remove-mitigate-constraints.shtml> (last visited Dec. 21, 2020) (“For each policy, procedure, or requirement identified as a governmental constraint, the housing element must include programs to address and remove or mitigate the constraint.”).

229. *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031, 1036 (Cal. 1998).

230. *W. States Petrol. Ass'n v. Bd. of Equalization*, 304 P.3d 188, 196 (Cal. 2013) (quoting *Am. Coatings Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 278 P.3d 838, 848 (Cal. 2012)).

231. *See id.* at 192–99 (discussing factors that may make an agency's interpretation more or less persuasive).

232. *Id.* at 196.

233. *Ramirez v. Yosemite Water Co.*, 978 P.2d 2, 11 (Cal. 1999).

234. *Id.* at 12 (quoting *Yamaha*, 960 P.2d at 1036).

235. *W. States Petrol. Ass'n*, 304 P.3d at 196 (“[W]hen an implementing regulation is challenged on the ground that it is ‘in conflict with the statute’ (Gov. Code, § 11342.2) or does not ‘lay within the lawmaking authority delegated by the Legislature,’ the issue of statutory construction is a question of law

question is answered differently. If the rule is within the agency’s authority, courts must accept it unless it is “arbitrary or capricious.”²³⁶ The rule, being quasi-legislative, has “the dignity of statutes”²³⁷ and “binds . . . courts as firmly as statutes themselves.”²³⁸

Matters become more complicated when an agency exercises delegated rule-making authority to *interpret* a statutory provision, rather than to *implement* a provision whose meaning is not disputed. Rules that interpret provisions of a statute have “both quasi-legislative and interpretive characteristics,”²³⁹ and the California courts have not settled on a doctrinal framework for reviewing them.²⁴⁰ Typically, the courts perform a two-track analysis, first viewing the rule as quasi-legislative and asking whether it is within the agency’s authority and nonarbitrary, then viewing the rule as interpretive and asking, in light of the agency’s expertise and experience, whether the agency’s argument for its interpretation is more persuasive than the arguments of the parties opposed to it.²⁴¹ If both analyses lead to the same result—that the rule is permissible or that it is not—then the court can finesse the difficult threshold question about whether the legislature really intended to assign to an administrative agency the courts’ usual prerogative to answer pure questions of law.²⁴²

In this light, consider SB 6’s delegation to HCD of authority to issue “standards, forms, and definitions” with respect to the analytic side of the housing element. It’s possible that courts would review an HCD “definition” using the two-track approach (first treating the definition as quasi-legislative, then treating it as an interpretation and considering whether it is persuasive). Yet the cases in which courts have used the two-track approach generally involve broad delegations, where there may be some uncertainty about whether the

on which a court exercises independent judgment.”) (internal citation omitted); *Yamaha*, 960 P.2d at 1039–40 (Mosk, J., concurring in the judgment).

236. *Yamaha*, 960 P.2d 1039–41 (Mosk, J., concurring in the judgment).

237. *Id.* at 1036.

238. *Id.* at 1033.

239. *Ramirez v. Yosemite Water Co.*, 978 P.2d 2, 11 (Cal. 1999).

240. *W. States Petrol. Ass’n v. Bd. of Equalization*, 304 P.3d 188, 210 (Cal. 2013) (Kennard, J., concurring in part and dissenting in part) (stating “[t]his court has not resolved what standard of review applies to such hybrid cases”—that is, where the agency uses its rulemaking authority to interpret statutory terms).

241. The California Supreme Court took this approach in *Ramirez*, 978 P.2d 2. It has since been followed by the intermediate courts of appeal in a number of cases, *see, e.g., New Cingular Wireless PCS, LLC v. Pub. Utils. Comm’n*, 201 Cal. Rptr. 3d 652 (Cal. Ct. App. 2016); *Megrabian v. Saenz*, 30 Cal. Rptr. 3d 262 (Cal. Ct. App. 2005); *People v. Superior Ct. (Sharkey)*, 107 Cal. Rptr. 3d 201 (Cal. Ct. App. 2010), review granted and opinion superseded sub nom. *People v. S.C.*, 232 P.3d 625 (Cal. 2010), *aff’d sub nom. In re Lucas*, 269 P.3d 1160 (Cal. 2012), and by the California Supreme Court itself, *see Ass’n of Cal. Ins. Cos. v. Jones*, 386 P.3d 1188, 1201–02 (Cal. 2017).

242. *Cf. Ass’n of Cal. Ins. Cos.*, 386 P.3d at 1201 (“[W]e need not decide whether the Regulation’s interpretation . . . is best characterized as quasi-legislative or merely an interpretive rule[, for e]ven if the Regulation were considered purely interpretive, we would conclude that the Commissioner has reasonably and properly interpreted the statutory mandate.”) (citation omitted).

legislature really wanted the agency to resolve pure questions of law.²⁴³ By contrast, under SB 6, the matter seems clear: The legislature has told HCD to issue “definitions,” not just standards and forms, and the legislature enumerated the specific provisions of the government code for which HCD may issue these definitions.²⁴⁴ The standards-and-forms authority covers the usual work of statutory implementation,²⁴⁵ so what is added by the word *definitions*? Taken at face value (and we see no reason to take it otherwise), it adds the authority to resolve abstract questions about the meaning of statutory terms, just as a legislature might do in a definitions section of a statute or as a court would do when it adjudicates a dispute about a pure question of law.²⁴⁶

243. *Ramirez v. Yosemite Water Co.*, the case that launched the two-track approach, provides a good illustration. At issue was the meaning of a statutory exemption for “outside salespersons” under state labor law. An agency had been delegated authority “to promulgate wage orders setting ‘minimum wages, maximum hours and standard conditions of labor for all employees.’” *Ramirez*, 978 P.2d at 11–12 (quoting CAL. LABOR CODE § 1185). The Supreme Court initially asserted, without explanation, that the authority to issue wage orders “includes the power to elaborate the meaning of key statutory terms.” *Id.* at 12. But it’s also conceivable that the legislature wanted the agency to issue wage orders while adhering to *judicial* constructions of the meaning of key statutory terms, such as “employee” and “outside salesperson.” In *Martinez v. Combs*, 231 P.3d 259 (Cal. 2010), the California Supreme Court finally explained, with an in-depth look at legislative history and the evolution of the statute, why the delegation to issue “wage orders” encompasses the power to define key statutory terms such as “employee.”

For other examples of courts hedging on the proper standard of review where an agency relies on a broad delegation of rulemaking authority to interpret specific statutory provisions, see *Ass’n of Cal. Insurance Companies*, 386 P.3d at 1201 (“[W]e need not decide whether the [rule] . . . is best characterized as quasi-legislative or merely an interpretive rule devoid of any quasi-legislative authority [, for e]ven if [it] were considered purely interpretive, we would conclude that the Commissioner has reasonably and properly interpreted the statutory mandate.”) (citation omitted); *Diageo-Guinness USA, Inc. v. Bd. of Equalization*, 140 Cal. Rptr. 3d 358, 366 (Cal. Ct. App. 2012) (finding regulatory power under a statute providing “[t]he board shall enforce the provisions of this part and may prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this part”).

244. CAL. GOV’T CODE § 65583.3(b) (West 2020).

245. That is, HCD could establish standards for the site-capacity and constraints analysis by issuing “standards,” and HCD could elicit relevant information by issuing “forms.”

246. It is true that the arguments for and against SB 6 in the official bill summaries are focused not on the grant of authority to HCD with respect to section 65583(a) of the housing-element law, but rather on the value of creating an electronic, searchable inventory of surplus state lands that could accommodate housing (the focus of the bill). *See, e.g.*, Bill Analysis, S.B. 6, Sen. Appropriations (Apr. 29, 2019) (the first bill analysis postdating the bill’s amendment on April 23, 2019, wherein the provision conferring “standards, forms, and definitions” authority on HCD was added). However, the meaning of the statutory text is plain and indisputable:

Notwithstanding subdivision (a) of Section 65301, [which states that a local government’s general plan “may be adopted in any format deemed appropriate or convenient by the (local) legislative body,”] each local government shall prepare the inventory required under paragraph (3) of subdivision (a) of Section 65583 using standards, forms, and definitions adopted by the department. The department may review, adopt, amend, and repeal the standards, forms, or definitions to implement this subdivision and subdivision (a) of Section 65583.

S.B. 6, § 2, 2019–2020 Reg., Leg. Sess. (Cal. 2019). Thus, although the legislative debate over SB 6 may have focused on the creation of a surplus lands inventory, there is no textually colorable way to construe the statute’s grant of authority to HCD as authorization *only* to issue “standards, forms, and definitions” in relation to the creation of a surplus state-lands database or electronic version of the housing-element site inventories. Moreover, the Legislative Counsel’s Digest, printed atop the bill, gave clear notice to

In short, there is a strong argument that HCD's choice among competing, more or less plausible definitions for key terms in section 65583(a) of the housing-element law would be binding on the courts.²⁴⁷ Of course, HCD may not issue definitions that are "in conflict with the statute," a question as to which the California courts always exercise independent judgment.²⁴⁸ In order to bind the courts, HCD would have to establish that its definition fills a real gap or resolves a real ambiguity in the statute.

One other rule of thumb bears mentioning: Courts are more likely to accept an HCD definition (or standard) if the agency has developed a technical, evidentiary record to justify it and has considered a range of views and alternatives. The California Supreme Court recently indicated that an agency's reliance on an evidentiary record is an important, perhaps decisive, factor for distinguishing quasi-legislative from purely interpretive rules.²⁴⁹ Moreover, when an agency rule is being evaluated under the independent-judgment standard, it is well settled that courts should give more weight to the agency's position if it is grounded in considerations "indicating that the agency has a

legislators about the scope of authority that the bill confers on HCD. The third paragraph of the Digest states:

This bill would authorize the Department of Housing and Community Development to review, adopt, amend, and repeal the standards, forms, or definitions to implement provisions regarding the inventory of land suitable and available for residential development. The bill would require a local government to prepare the inventory pursuant to those standards, forms, and definitions.

Id. Nothing in the legislative history suggests that HCD could only use these powers in relation to the creation of a surplus state-lands database or a searchable version of the housing elements' site inventory. The question of how HCD might use its new powers just wasn't debated—or if it was debated, the debate was too minor to recap in the official bill summaries.

247. See *PacifiCare Life & Health Ins. Co. v. Jones*, 238 Cal. Rptr. 3d 150, 158 (Cal. Ct. App. 2018), review denied (Jan. 2, 2019) ("The fact the Legislature may at times legitimately delegate to administrative agencies the power 'to interpret key statutory terms' proves fatal to PacifiCare's claim that all regulations which 'define particular words' in a statute are necessarily 'interpretive,' and thus not entitled to deference.") (quoting *Ass'n of Cal. Ins. Cos. v. Jones*, 386 P.3d 1188, 1198, 1201 (Cal. 2017)).

On the other hand, some lower courts have applied the two-track approach in cases where the agency's broadly worded delegation included the word "interpret." See, e.g., *Megrabian v. Saenz*, 30 Cal. Rptr. 3d 262, 269 (Cal. Ct. App. 2005) (addressing regulation issued pursuant to delegation of authority to "adopt regulations, orders, or standards of general application to implement, interpret, or make specific the law enforced by" the California Department of Social Services). We think such cases are probably wrongly decided, but in any event, a delegation of authority to "implement, interpret, or make specific" "the law enforced by" a given agency is much less specific and clear-cut than a delegation of authority to issue "standards, definitions, and forms" concerning a specifically enumerated section of the government code.

248. See *W. States Petrol. Ass'n v. Bd. of Equalization*, 304 P.3d 188, 196 (Cal. 2013); *Samantha C. v. State Dep't of Developmental Servs.*, 112 Cal. Rptr. 3d 415, 428 (Cal. Ct. App. 2010) ("The question is whether the regulation alters or amends the governing statute . . . or enlarges or impairs its scope. . . . This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency.").

249. See *W. States Petroleum Ass'n*, 304 P.3d at 195 (arguing, against the dissenting Justice, that the rule in question was quasi-legislative because the agency "in promulgating [the rule] was required not only to interpret the relevant statute but also to evaluate whether the evidence presented to it was sufficient to warrant a special rule governing petroleum refinery property").

comparative interpretive advantage over the courts.”²⁵⁰ The agency interpretation also gets more weight if there are procedural indicia of the interpretation’s probable correctness, such as “careful consideration by senior agency officials . . . after public notice and comment.”²⁵¹ Thus, although SB 6 exempts HCD from the usual formalities of the California Administrative Procedures Act,²⁵² the agency should take care to build an evidentiary record, and to solicit and consider public comments, before using its “standards, forms, and definitions” authority in novel or aggressive ways.

With these principles of administrative statutory construction in hand, let us now consider how HCD might use its new authority to bolster the supply of housing in California.

b. Accounting for Development Probabilities

Earlier, we explained that housing elements’ capacity assessments have been unrealistic, as they failed to account for sites’ probability of development during the planning period.²⁵³ Now that HCD has authority to issue “standards, forms, and definitions” for the site inventory, may the Department make local governments account for development probabilities? Here we consider two ways of doing this: a simple reporting requirement and a new definition of site capacity (expected yield during the planning period).

i. A Reporting Requirement

The Department clearly has authority to make local governments estimate and report development probabilities for each inventory site and to prescribe standards for the calculation of those probabilities. The site inventory shall consist of “vacant sites and sites having realistic and *demonstrated* potential for redevelopment *during the planning period*.”²⁵⁴ Surely it is reasonable for HCD to require local governments to report site-specific development probabilities as a means of “demonstrat[ing]” the redevelopment potential of nonvacant sites.²⁵⁵

250. *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031, 1037 (Cal. 1998).

251. *Id.* at 1037.

252. S.B. 6, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (adding CAL. GOV’T CODE § 65583.3(b)).

253. *See supra* Subpart II.B.1.

254. CAL. GOV’T CODE § 65583(a)(3) (West 2020) (emphasis added).

255. This is the sort of agency regulation that courts would probably categorize as quasi-legislative and therefore treat as binding so long as it’s nonarbitrary and within the Department’s authority. SB 6 provides the requisite grant of authority, and nothing in the fine print of the government code suggests that the legislature intended to allow only qualitative, not quantitative, assessments of the feasibility of developing inventory sites during the planning period.

The site-inventory fine print is in section 65583.2 of the government code. That section lists various factors that are to be considered in gauging the “availability” of a site, but it doesn’t prescribe a methodology for how to synthesize those factors into an overall judgment of whether a site is sufficiently available for inclusion in the inventory. *See, e.g.*, CAL. GOV’T CODE § 65583.2(a)(5)(B) (West 2020) (“Parcels included in the inventory must have sufficient water, sewer, and dry utilities supply available and accessible to support housing development or be included in [a] mandatory program or plan . . . to

A new requirement that local governments estimate and report site-specific development probabilities could be extended to vacant sites as well and justified as a means of advancing the legislature's objective that "reasonable actions [] be taken by local and regional governments to ensure that future housing production meets, at a minimum, the regional housing need established for planning purposes."²⁵⁶ Quantifying what "future housing production" is likely to occur over the planning period—an exercise which requires forecasts of development probabilities, not just of unit counts conditional on development—is the prelude to figuring out whether additional "reasonable actions" may be necessary to reach the targets.²⁵⁷

A requirement that local governments separately estimate the probability of development and the number of units conditional on development for each inventory site would not create insuperable analytical demands. HCD could invite local governments to use simple rules of thumb for the probability-of-development term, much like the rules of thumb traditionally used for ballparking the capacity of a site. In the sample of fifteen housing elements we studied, local governments typically accounted for barriers to developing sites to their zoned capacity by applying a standard discount factor, such as 20 percent, to the site's nominal capacity.²⁵⁸ Sites zoned for mixed use are further discounted since a portion of the new building might be used for commercial rather than residential purposes.²⁵⁹ These discount factors are set using data from recently approved projects in the jurisdiction.²⁶⁰ The analyst simply calculates the average percentage of zoned capacity that was realized in the sample of projects, as well as the average proportion of mixed-use projects given over to residential use.

secure sufficient water, sewer, and dry utilities."); *id.* § 65583.2(c)(2) ("The number of units calculated [for a site] shall be adjusted as necessary, based on the land use controls and site improvements requirement[s] . . . , the realistic development capacity for the site, typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction, and on the current or planned availability and accessibility of sufficient water, sewer, and dry utilities."); *id.* § 65583.2(g)(1) ("For [nonvacant sites] the city or county shall specify the additional development potential for each site within the planning period[, using a methodology that] shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, the city's or county's past experience with converting existing uses to higher density residential development, the current market demand for the existing use, an analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites.").

256. *Id.* § 65584(a)(2).

257. *Cf.* *W. States Petrol. Ass'n v. Bd. of Equalization*, 304 P.3d 188, 196 (Cal. 2013) (holding that "[once a court is] satisfied that the [quasi-legislative] rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end") (quoting *Yamaha Corp. of Am. v. State Bd. of Equalization*, 960 P.2d 1031, 1036 (Cal. 1998)).

258. *See supra* note 83.

259. *See id.*

260. *See id.*

In much the same way, a local government could estimate the probability-of-development term using outcomes on the previous housing element's site inventory. If 40 percent of those sites were developed over the previous period, the local government could assume a 40 percent probability of development for sites in the new housing element,²⁶¹ perhaps subject to a business-cycle adjustment for unusually strong or weak economic growth during the previous period.²⁶² HCD might permit local governments to use fancier methods if they wish, such as statistical models for the probability of a parcel's development conditional on prices, zoning, current uses, and other parcel characteristics. The Department could also create flexible safe harbors, such as allowing local governments to assign probabilities to parcels however they wish so long as the local government outperformed its own predictions over the previous planning period. This would incentivize local governments not to overstate development probabilities. It would also encourage local governments to facilitate development of the inventory sites during the planning period. The important point for present purposes is that fancy methods aren't necessary. Even a very simple rule of thumb, tied to the local government's actual permitting behavior over the previous planning cycle, would generate a much more "realistic" picture of how much housing is likely to be produced on inventory sites over the next period in the planning cycle.

ii. Defining "Realistic Capacity" as "Expected Yield"

While it is clear that HCD may require local governments to estimate and report sites' development probabilities, there is a further, more difficult, and more consequential question: Could HCD also *define* the "realistic housing-unit capacity" of a site as the site's "expected housing-unit yield" during the planning period?²⁶³ That is, could HCD make a local government expand the inventory or rezone so that the local government will, in expectation, meet its RHNA-share target?

261. See Table 1 in Subpart I.B.1 for summary statistics regarding local governments' production relative to nominal site capacity in fifth-cycle housing elements.

262. The "percent developed" calculation should be weighted by the site's relative capacity (number of units permitted on site divided by total number of units permitting on all sites), so that local governments don't try to game the system by assigning high probabilities to high-capacity sites on the basis of successful development of low-capacity sites.

The business-cycle adjustment could be as simple as dividing "percent developed" by (*average annual California GDP growth during planning period*) / (*average annual California GDP growth during last few decades*). Housing production is strongly cyclical, *see* CALIFORNIA'S HOUSING FUTURE, *supra* note 74, fig.1.2, so the percentage of sites developed during a period of unusually strong economic growth is likely to overstate the percentage that probably would have been developed during a period of normal economic growth. It's the normal percentage that should be used for planning purposes.

263. The realistic housing-unit capacity of a site is the portion of the local government's RHNA allocation that the site is deemed adequate to accommodate. *See* CAL. GOV'T CODE § 65583.2(c) (West 2020).

This question implicates two competing visions of housing-element law. One vision holds that local governments need only “set the table” for possible development, identifying sites whose usable zoned capacity sums to the local government’s RHNA and inviting the sites’ owners to submit development applications.²⁶⁴ The other vision holds that local governments must plan the party so that the locality will, in expectation, actually “serve the number of meals” equal to its RHNA, at least if this can be done without “[e]xpend[ing] local revenues for the construction of housing, housing subsidies, or land acquisition.”²⁶⁵ Under the second vision, local governments must account for the likelihood that some of the invited guests will not come; that is, they must discount sites’ capacity by the probability of development.

The stakes are high. If HCD adopts the second vision, the Department would, in one simple blow, probably triple the amount of zoned capacity that typical local governments would have to provide through their site inventory and associated program actions.²⁶⁶ Though some local governments would continue to miss their targets, housing elements in the aggregate would finally be realistic for achieving the RHNAs.

Moreover, HCD’s promulgation of the expected-yield definition of realistic capacity would put significant pressure on the councils of governments to allocate the bulk of their region’s quota to high-demand, high-opportunity cities, rather than assigning most new growth to exurban jurisdictions with ample vacant land. During intraregional battles over allocation of the RHNA, local governments in low-demand areas would no doubt argue (correctly) that their development probabilities are intrinsically too low to accommodate more than a very small RHNA. Removal of regulatory barriers to development in these locations would barely budge the development probabilities. HCD, which may reject a final allocation that is not “consistent with the existing and projected housing need for the region,”²⁶⁷ would also have a stronger basis for blocking an allocation that is skewed toward jurisdictions with low demand.²⁶⁸ The combination of these bottom-up and top-down pressures would powerfully advance California’s climate-change and fair-housing goals, which depend on

264. To be sure, even under this vision the local government must make some effort to remove “constraints” that may discourage developers from applying to develop the suitably zoned parcels. *See* CAL. GOV’T CODE §§ 65583(a), (c) (West 2020).

265. CAL. GOV’T CODE § 65589(a) (West 2020).

266. *See supra* Subpart I.B.1 tbl.1 (showing that the median California jurisdiction is on track to permit, during the fifth planning cycle, a number of housing units equal to roughly one-third of the site inventory’s claimed capacity).

267. CAL. GOV’T CODE § 65584.05 (West 2020).

268. Under the expected-yield definition of site capacity, an intraregional allocation that assigns big RHNAs to localities that *cannot* provide enough sites or density to meet their targets, owing to very low development probabilities, is an allocation that is not “consistent with the existing and projected housing need for the region.” *Id.* § 65584.05.

getting a lot more infill housing built in already developed areas near jobs and transit.²⁶⁹

Yet legally speaking, the question of whether HCD may require discounting of inventory sites' capacity by their probability of development is not straightforward.²⁷⁰ Curiously, the answer might depend on whether the site in question is vacant. For *nonvacant* sites, the statutory argument for the expected-yield definition of capacity is very strong: The government code requires cities and counties to "specify," for each nonvacant site, the site's "additional development potential . . . within the planning period."²⁷¹ Elaborating on this idea, the legislature in 2017 told local governments to account for "past experience with converting existing uses to higher density residential development," "development trends," and "market conditions."²⁷² What we are calling the probability of development for a site is just a quantification of such "past experience," with adjustments to reflect "market conditions" such as unusually strong or weak economic growth.²⁷³

But for *vacant* sites, the picture is hazy. In 2003, HCD convened a working group to revise the housing-element law, aiming to provide greater certainty to local governments and developers alike.²⁷⁴ The bill that enacted the working group's recommendations, AB 2348,²⁷⁵ prescribed a four-step recipe for calculating housing-unit capacity:

- *First*, "[i]f local law or regulations require the development of a site at a minimum density, [HCD] shall accept the [local government]'s calculation of the total housing unit capacity on that site based on the established minimum density."²⁷⁶ If there is no minimum density, then the housing element "shall demonstrate," in some other, unspecified way, "how the number of units determined for that site . . . will be accommodated."²⁷⁷

269. Regarding climate change, land use, and transportation, see Stephen M. Wheeler et al., *Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities*, 3 URB. PLAN. 35 (2018). As for fair housing, the new "affirmatively furthering fair housing" provisions of the housing-element law call for "enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity." CAL. GOV'T CODE § 65583(c)(10) (West 2020).

270. See CAL. GOV'T CODE § 65583.2(c) (West 2020).

271. *Id.* § 65583.2(g) (emphasis added).

272. A.B. 1397, 2017–2018 Reg., Leg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65583.2(g)(1) (West 2020).

273. See CAL. GOV'T CODE § 65583.2(g)(1) (West 2020).

274. HOUSING ELEMENT WORKING GROUP, FINAL REPORT TO THE ASSEMBLY AND SENATE HOUSING COMMITTEES (Apr. 2004) (on file with author); see also Bill Analysis, A.B. 2348, Assemb. Comm. on Local Gov't (Apr. 21, 2004), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040AB2348.

275. The requirements described above for nonvacant sites, see *supra* note 273 and accompanying text, also originated with this bill.

276. CAL. GOV'T CODE § 65583.2(c)(1) (West 2005) (amended 2017).

277. *Id.*

- *Second*, the number of units established in the first step “shall be adjusted as necessary, based on the land use controls and site improvement[] requirement[s].”²⁷⁸
- *Third*, sites zoned at certain statutory minimum densities “shall be deemed appropriate to accommodate housing for lower income households.”²⁷⁹
- *Fourth*, for nonvacant sites, “the city or county shall specify the additional development potential for each site within the planning period.”²⁸⁰

The third step in this recipe (which remains good law) clearly forecloses a definition of site capacity as “expected yield *in each affordability bin* over the cycle.”²⁸¹ If a site’s zoning satisfies the statutory minimum density (thirty units per acre in urban counties), every potential unit on the site is countable toward the low-income RHNA, regardless of whether market-rate housing is more likely to be produced on the site than low-income housing. As we explained earlier, this odd presumption is a way of accommodating the unreality of the lower-income RHNA targets to the political reality that the state’s housing framework would go up in flames if the state tried to make local governments pay for the amount of subsidized housing needed to reach those targets.²⁸²

It is also pretty clear that the step-one option of using “established minimum densities” was supposed to provide a safe harbor for local governments²⁸³—although calculations based on those densities may be subject to adjustment at step two. A 2017 bill, AB 1397, expanded the step-two adjustment, telling local

278. *Id.* § 65583.2(c)(2) (West 2005) (amended 2017).

279. *Id.* § 65583.2(c)(3) (West 2005) (amended 2014).

280. *Id.* § 65583.2(g) (West 2005) (amended 2017).

281. While the statute rules this out as a method for assessing compliance with the local governments’ duty to make adequate sites available vis-à-vis the RHNA, it may still be advisable (and defensible) for HCD to require local governments to include expected production by income bin numbers in their site inventories, as a way of fostering debate about whether, and, if so, how the state’s objectives for low- and moderate-income housing might practically be achieved. *See supra* text accompanying notes 178–179; *cf. supra* Subpart II.A (discussing presuppositions of the California housing framework about how housing units affordable to low- and moderate-income households are made available).

282. *See supra* notes 85–86 and accompanying text. Note also that if sites zoned for the statutory minimum densities are adequate for low-income housing as a matter of law, it would seem to follow that they should also be deemed adequate for moderate-income housing. Units that low-income households could afford would also be affordable to moderate-income households. There is not, however, an express presumption to this effect nor any other direction in the statute about how to determine whether a site counts for moderate-income housing.

283. Note the mandatory phrasing: HCD “shall accept” “the planning agency’s calculation . . . based on the established minimum density.” CAL. GOV’T CODE § 65583.2(c)(1) (West 2020); *see also* Bill Analysis, A.B. 2348, Assemb. Comm. on Local Gov’t 1, 3 (Apr. 21, 2004) (noting that the bill “[m]akes numerous changes to the provisions of the housing element law . . . based on the work of the Housing Element Working Group (HEWG)” and that “HEWG proposed changes to the land inventory and adequate sites requirement to provide greater certainty in the development process and provide local governments with greater clarity and certainty about the statutory requirements”); HOUSING ELEMENT WORKING GROUP, FINAL REPORT TO THE ASSEMBLY AND SENATE HOUSING COMMITTEES 7–8 (Apr. 2004) (on file with first author) (characterizing adequate-sites reforms as “providing local government with certainty regarding state review of the land inventory of the housing element”).

governments to account for “the realistic development capacity for the site, typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction, and [] the current or planned availability and accessibility of sufficient water, sewer, and dry utilities.”²⁸⁴

Whether HCD may now require discounting of vacant sites’ capacity by their probability of development probably boils down to two questions. First, is the safe harbor (minimum zoned density) measure of capacity at step one actually subject to adjustment at step two, or is the safe harbor absolute? If it’s absolute, the game is up. If it’s not, then does AB 1397’s addition of “realistic development capacity” to the step-two adjustment factors, read together with SB 6’s grant of “definitions, standards, and forms” authority to HCD, authorize HCD to require, at step two, the discounting of step-one capacity by sites’ probabilities of development?

As to the first question, one *might* suppose that the drafters of AB 2348 intended the step-two adjustment to apply only if a local government declined the step-one safe harbor.²⁸⁵ That would advance one of the goals expressed by the legislature in 2004: certainty for local governments.²⁸⁶ But it would run afoul of the statutory text, which requires “the number of units calculated pursuant to [step (1)]” to be adjusted,²⁸⁷ without regard to *how* those units were calculated at step (1).²⁸⁸ The narrow reading would also lead to absurd results: HCD would have to credit the nominal zoned capacity of vacant sites even if the sites in question had no access to water, power, or other utilities, and even if the local government’s own land-use regulations (such as height limits or open-space requirements) actually precluded development of the site at the minimum zoned density.

It is much more plausible to read the statute, especially after AB 1397, as requiring the step-two adjustment regardless of which step-one method the local government used for the initial capacity calculation.²⁸⁹ The thrust of AB 1397 was to combat local efforts to “circumvent” state housing policy by “relying on sites that aren’t truly available or feasible for residential development.”²⁹⁰ For

284. A.B. 1397, Stats. 2017, ch. 375 § 4 (Cal. 2017) (amending CAL. GOV’T CODE § 65583.2).

285. Recall that a local government has two options at step one: use established minimum densities or come up with some alternative explanation for what the site can accommodate. *See* CAL. GOV’T CODE § 65583.2(c)(1) (West 2020).

286. *See supra* note 283.

287. CAL. GOV’T CODE § 65583.2(c)(2) (West 2020).

288. *Id.*

289. A note on specific legislative intent: Neither the report of the Housing Element Working Group that generated AB 2348 nor the official bill summaries of AB 2348 nor the official bill summaries of AB 1397 say anything about whether the step-two adjustment factors are supposed to be used if the local government elects the minimum densities safe harbor at step one.

290. Bill Analysis, A.B. 1397, Assemb. Comm. on Hous. & Cmty. Dev. (Apr. 20, 2017); *see also* Bill Analysis, A.B. 1397, Assemb. Floor (May 25, 2017) (restating anti-circumvention objective); Bill Analysis, A.B. 1397, Sen. Comm. on Transp. & Hous. (July 6, 2017) (citing examples of jurisdictions which assigned low-income RHNA’s to sites that would be difficult to assemble for redevelopment, or that

vacant sites, that overarching purpose is served by the new step-two adjustments for “the realistic development capacity for the site, typical densities of existing or approved residential developments at a similar affordability level in that jurisdiction, and [] the current or planned availability and accessibility of sufficient water, sewer, and dry utilities.”²⁹¹ For *nonvacant sites*, it is advanced by the new adjustments for

past experience . . . converting existing uses to higher density residential development, the current market demand for the existing use, an analysis of any existing leases or other contracts that would perpetuate the existing use . . . , development trends, market conditions, and . . . incentives or standards to encourage additional residential development. . . .²⁹²

Now let’s turn to the second question: May HCD require development-probability adjustments at step two? The step-two factor that arguably provides a hook for this is “realistic development capacity,”²⁹³ which was added to the statute by AB 1397. “Realistic development capacity” is not defined in the statute or in the bill summaries, but both the bill and the statute use “realistic” in reference to what is practically achievable during the planning period. For example, a site inventory shall consist of “vacant sites and sites having *realistic and demonstrated* potential for redevelopment *during the planning period* to meet the locality’s housing need”²⁹⁴

Interpreting “realistic development capacity” to mean or to approximate “expected yield during the planning period” would also cohere with the evolution

were already occupied by high-value uses); Bill Analysis, A.B. 1397, Sen. Floor (Aug. 21, 2017) (restating anti-circumvention rationale).

291. CAL. GOV’T CODE § 65583.2(c)(2) (West 2020).

292. *Id.* § 65583.2(g)(1).

293. *Id.* § 65583.2(c)(2).

294. AB 1397 amended the general instruction for the site inventory requirement as follows (new text is underlined):

(3) An inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality’s housing need for a designated income level, and an analysis of the relationship of zoning and public facilities and services to these sites.”

A.B. 1397, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (amending CAL. GOV’T CODE § 65583(a)(3)). The bill made similar amendments to the recipe for calculating a site’s capacity (new text underlined):

[A] city or county shall determine whether each site in the inventory can accommodate the development of some portion of its share of the regional housing need by income level during the planning period, as determined pursuant to Section 65584. The inventory shall specify for each site the number of units that can realistically be accommodated on that state

Id. (amending CAL. GOV’T CODE § 65583.2(c)).

The one other place where the word “realistic” is used in the housing-element article is section 65583.2(c)(2)(C) (“A site may be presumed to be realistic for development to accommodate lower income housing need if, at the time of the adoption of the housing element, a development affordable to lower income households has been proposed and approved for development on the site.”) The fact that a project has been proposed and approved is obviously a pretty good indication that those potential units are likely to be achieved (realized) during the planning period.

of California housing policy as a whole.²⁹⁵ From 2017 onward, the legislature has enacted a number of important bills designed to bring about *achievement* of the housing targets. These include (1) SB 35, which requires local governments that are lagging vis-à-vis their targets to process certain projects ministerially and under quick timeframes;²⁹⁶ (2) SB 828, which instructs local governments to ensure that “future housing production meets, at a minimum, the regional housing need established for planning purposes”;²⁹⁷ (3) AB 72, which authorizes HCD to decertify housing elements midcycle for failures of implementation;²⁹⁸ (4) AB 3194, which allows developers to bypass local zoning and development regulations when necessary to build plan-authorized projects;²⁹⁹ (5) AB 1515, which terminates judicial deference to local governments on the question of whether a project complies with applicable zoning and development regulations;³⁰⁰ (6) SB 167, which provides for fee-shifting and penalties if a local government unlawfully denies or reduces the density of market-rate as well as affordable projects;³⁰¹ and, of course, (7) AB 1397, which establishes the “realistic capacity” norm for the site inventory.³⁰²

Finally, if “realistic development capacity” were not understood to license development-probability discounting of vacant sites, we would end up in a strange world where local governments must discount the capacity of nonvacant sites on the basis of “development trends” and “market conditions,” yet vacant sites get counted for their nominal zoned capacity. That would undermine the strong state policies that favor concentrating development in high-opportunity areas near jobs and transit.³⁰³ Local governments would try to pile their RHNA onto vacant sites, which, for obvious reasons, tend to be found in outlying areas where there is little demand for housing. The vacant sites that do exist in high-opportunity areas are likely to have hidden barriers to development, such as warring owners or environmental contamination (otherwise the sites would have been sold and developed already). They are not sites to which the RHNA should be assigned if one cares about results.

295. We think the “approximation” gloss is better, not just because estimating development probabilities requires some guesswork, but also because the second term in the expected-yield equation, units conditional on development, may be supplied at step one by the minimum-densities safe harbor (if the local government elected to use the safe harbor).

296. S.B. 35, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

297. S.B. 828, 2017–2018 Reg., Leg. Sess. (Cal. 2018).

298. A.B. 72, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

299. A.B. 3194, 2017–2018 Reg., Leg. Sess. (Cal. 2018).

300. A.B. 1515, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

301. S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

302. See *supra* note 294.

303. See S.B. 375, 2007–2008 Reg., Leg. Sess. (Cal. 2008); CAL. GOV'T CODE § 65583(c)(9) (West 2020).

iii. Counterarguments

We acknowledge that one could make a textual argument against the expected-yield gloss on “realistic development capacity.” The adjustment factors added by AB 1397 that most strongly connote “development probability” are found only on the special list for nonvacant sites (“development trends,” “market conditions,” and “past experience . . . converting existing uses to higher density residential development”).³⁰⁴ If the legislature had wanted vacant sites’ nominal capacity to be discounted by some approximation of their probability of development, wouldn’t the legislature have prescribed consideration of “development trends” and “market conditions” at step two?

Or consider how another section of the statute deals with accessory dwelling units. In 2002, the legislature expressly authorized HCD

to allow a city or county to identify [i.e., count] sites for second units based on the number of second units developed in the prior housing-element planning period, the need for these units in the community, the resources or incentives available for their development, and any other relevant factors, as determined by the department.³⁰⁵

This clearly permits an expected-yield approach to the calculation of ADU capacity.³⁰⁶ If the authors of AB 1397 had wanted to authorize an expected-yield approach to vacant sites’ capacity, wouldn’t they have just borrowed the ADU language, telling HCD to count vacant sites based on, *inter alia*, “the number of such sites that were developed in the prior . . . planning period . . .”?

These are, in form, classic textualist arguments. But that doesn’t make them winners. They butt up against textualist arguments going the other way—after all, what does the term “realistic development capacity” add to step two, if not authorization for some version of development-probability discounting?³⁰⁷ More

304. For example, there is no express mention of “utilities,” “land use controls,” or “site improvement requirements” in the subsection addressed to nonvacant sites, CAL. GOV’T CODE § 65583.2(g), whereas there is no express mention of “development trends,” “market conditions,” and “incentives or standards to encourage residential development” in the subsection addressed to vacant sites, CAL. GOV’T CODE § 65583.2(c). However, the requirements in subsection (c) arguably apply to nonvacant as well as vacant sites, with (g) simply enumerating *additional* factors that must be considered in the context of vacant sites.

305. A.B. 1866, 2001–2002 Reg., Leg. Sess. (Cal. 2002).

306. See *supra* notes 93–94 and accompanying text.

307. It is an axiom of textualism, codified in California, that each term in a statute has some independent meaning and that one provision of a statute should not be read in derogation of another. See CAL. CODE CIV. PROC. § 1858 (West 2019) (“In the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.”). So, the textualist must answer this question: If “realistic development capacity” does not authorize development-probability adjustments at step two, what does it authorize instead? One possibility is an adjustment to account for the likely number of units *if the site were developed*, that is, the second term in the realistic-capacity formula. But this interpretation would vitiate the safe harbor in step one for the calculation of capacity based on minimum zoned densities: those densities would always be subject to adjustment if development at a different density was more likely. By contrast, if the “realistic development capacity” factor in step two merely permits HCD to weight zoned capacity by a site’s probability of development during the planning

fundamentally, these arguments presuppose a level of sophistication and intentionality on the part of the legislature that is, well, unrealistic. Nothing we have found in the legislative history of AB 1397 suggests that the legislature was even aware of the circa-2002 ADU model for counting site capacity or that it was mulling the pros and cons of development-probability discounting or even weighing possible definitions of “realistic capacity.” The statute’s proliferating lists of adjustment factors for the capacity of vacant and nonvacant sites are best understood not as a finely tuned scheme in which each factor has a distinct meaning and imposes a distinct analytic duty, but as expression of the legislature’s frustration with local governments’ flaunting of the state’s housing goals. The adjustment factors represent an inchoate, loose, and somewhat redundant groping toward a better way, a way that might actually lead to achievement of the RHNA targets.³⁰⁸

period, the safe harbor would still have some force, supplying the second term in the expected-yield equation. In most cases, HCD would not be allowed to look behind the minimum zoned density to assess what would probably get built if the site were developed during the planning period (the exception is where the minimum zoned densities are incongruent with the typical densities of projects at the designated affordability level in the jurisdiction).

Another possibility is to interpret “realistic capacity” as, in effect, a development-probability classifier. If a vacant site’s development probability is above some threshold, it has “realistic capacity” and may be included in the inventory, and once included, it gets counted *as if* it had a development probability of one. If the site’s development probability is below the threshold, it may not be counted at all; it must be dropped from the inventory. This would be roughly similar to HCD’s traditional approach to nonvacant sites. *See supra* Subpart I.B.1. But, relative to development-probability discounting, this approach would both constrain local governments unnecessarily in their efforts to comply with state law (because sites with individually small development probabilities may have lots of “expected yield” capacity in the aggregate) and result in housing elements that are less effective for achieving the state’s housing goals. So, in the absence of specific legislative directive to implement the new “realistic development capacity” requirement using the threshold approach rather than development-probability discounting, the threshold approach may be vulnerable to attack on the ground that it is arbitrary and capricious.

Our textualist interlocutor, though struggling to come up with a tenable account of what “realistic development capacity” means in the context of step two, might argue that our development-probability-discounting gloss effectively negates AB 1397’s other additions to the step-two adjustment list. Why *also* consider “the current or planned availability and accessibility of sufficient water, sewer, and dry utilities,” or “land use controls and site improvement requirements”? Such factors should already be accounted for in the development-probability estimate. However, the step-two factors can also be understood as a checklist of reminders vis-à-vis the ultimate goal of determining what “portion” of the local government’s “share of regional housing need” each site can reasonably be expected to yield “the development of . . . during the planning period.” CAL. GOV’T CODE 65583.2(c) (West 2020). On this reading, if utilities, land-use controls, and site-improvement requirements are already reflected in the “realistic development capacity” calculation, then there’s no need to separately consider them, but if “realistic development capacity” were gauged in a manner that failed to account for these other factors, then the local government must weigh them separately before treating the realistic capacity estimate as the site’s “housing unit capacity.”

308. The goal, for vacant and nonvacant sites alike, is to figure out “whether each site in the inventory can accommodate the development of some portion of its share of the regional housing need by income level during the planning period.” CAL. GOV’T CODE § 65583.2(c) (West 2020). The first underlined phrase was added to the code by AB 1397. It expresses the new understanding that “accommodating” housing need is not just a matter of providing zoned capacity on paper but of creating a framework that will actually foster the development of that much new housing during the eight-year period. Indeed, it

Seen in this light, the legislature's subsequent delegation through SB 6 of "standards, forms, and definitions" authority to HCD takes on a double importance. It expresses the same sensibility—come on, let's make it work!—and, as a formal matter, it authorizes HCD to resolve ambiguities about the statute's meaning.³⁰⁹ Thus, insofar as it remains uncertain whether the addition of "realistic development capacity" to the step-two adjustment factors licenses probability-of-development discounting for vacant sites (and we think this is uncertain), HCD should be able to use its SB 6 definitions authority to adopt this interpretation.³¹⁰ If a tiebreaker were needed, the fact that probability-of-

expresses the goal of achieving the RHNA's development "by income level" during the planning period. However, because of the "Mullin densities" safe harbor, *see supra* notes 85–87 and accompanying text, and because the statute excuses local governments from spending their own revenues on affordable housing, CAL. GOV'T CODE § 65589(a) (West 2020), it would be untenable for HCD to define "housing unit capacity" as the site's expected yield *by income bin* during the planning period.

309. *See supra* text accompanying notes 242–249.

310. One other legislative history argument bears mentioning. In 2018, Senator Scott Wiener introduced a bill that would have required local governments to "accommodate," through their housing element, "200 percent of the city's or county's share of the regional housing need for each income level." *See* S.B. 828, § 1, as introduced Jan. 3, 2018, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB828&cversion=20170SB82899INT. Senator Wiener argued that "by requiring localities to zone for 100% of their housing obligation, existing housing element law 'sets up communities for failure' since not every newly zoned parcel will have development approved and project constructed to full capacity within that period." Bill Analysis, S.B. 828, Sen. Hous. & Transp., at 7 (Apr. 20, 2018). Opponents, including the California League of Cities and the California chapter of the American Planning Association, argued that 200 percent would be infeasible for many local governments, given all the restrictions that AB 1397 had put on which sites may be included in the inventory. *See id.* at 7–8. Over the course of several committee markups, the 200 percent requirement was scaled back to 125 percent and then dropped entirely. *See* S.B. 828, § 1 as amended in Senate, May 25, 2018, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB828&cversion=20170SB82895AMD; S.B. 828 as amended in Assembly, July 2, 2018, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB828&cversion=20170SB82893AMD. This was a concession to opponents who argued that AB 1397 and SB 166 (requiring local governments to maintain capacity to accommodate remaining portion of RHNA, by income bin, at all times during the planning cycle) should be "given . . . a chance to be implemented" before additional inventory or rezoning requirements are imposed, given that those bills "already promote the same outcome that the corresponding provision of SB 828 seems designed to achieve." Bill Analysis, S.B. 828, Assemb. Local Gov't, at 5–6 (June 26, 2018).

Based on this history, one might infer that (1) everyone who was involved in the debate assumed that the existing statutory requirement to accommodate the RHNA did not compel local governments to discount zoned capacity by the probability of redevelopment (for if it did, the problem that Senator Wiener targeted would not exist); and (2) the legislature agreed to excuse local governments from accounting for development probabilities. We think the first inference is probably correct, but it doesn't undermine our position. Our claim is not that AB 1394 *requires* discounting by development probability but rather that it *creates significant ambiguity* about whether development probabilities must be accounted for, such that HCD, exercising its SB 6 authority—authority that was conferred a year *after* the debates on SB 828—may now impose the requirement. As for the second inference, it is, like most arguments about what a legislature "intended" by not doing something, not creditable. That the legislature agreed in the summer of 2018 not to require a 25 percent or 100 percent across-the-board adjustment hardly establishes that the legislature intended not to allow HCD, exercising authority that did not exist at the time of the SB 828 debates, to impose a subtler type of adjustment. Again, opponents of Senator Wiener's across-the-board adjustment said AB 1394 should be "given . . . a chance to be implemented." *See* Bill Analysis, S.B. 828, Assemb. Local Gov't, at 5–6 (June 26, 2018). We agree. We are simply pointing out that the possibilities for implementation have been expanded by the legislature's decision in 2019 to bestow on HCD

development discounting would put political and administrative pressure on the councils of governments to assign more of the RHNA to high-opportunity, high-demand, and job-accessible communities, in keeping with the state's fair housing and climate goals, ought to suffice.³¹¹

The strongest argument against the expected-yield definition of site capacity is probably pragmatic rather than legal: No one was thinking about it when RHNA's for the sixth planning cycle were set and allocated, and some local governments, particularly in low-demand exurbs far from metropolitan centers, no doubt received RHNA's that are unworkable under the "expected yield" conception of site capacity. No amount of upzoning will generate expected yield equal to a local government's RHNA if the basic labor-and-materials cost of building that housing exceeds what people are willing to pay for it. A local government may thus find it impossible (under the expected-yield definition of site capacity) to comply with the statutory requirement that its inventory sites, after rezoning, accommodate "100% of the need" for low-income households.³¹² The "no net loss" duty to "ensure that [the] housing element inventory . . . can accommodate, at all times throughout the planning period, [the local government's] remaining unmet share of the regional housing need,"³¹³ would be equally beyond reach.

There is a possible escape hatch in the longstanding provision of the housing-element law that allows local governments to set "quantified objectives" below "housing need" if the need "exceed[s] available resources and the community's ability to satisfy [it]."³¹⁴ A low-demand exurb might point to lack of demand as justification for setting "quantified objectives" for total production below its total RHNA, then argue that the law's "no net loss" and "accommodate 100%" precepts should be cashed out with reference to "quantified objectives" rather than the RHNA.³¹⁵

Alternatively, the Department could delay implementation of development-probability discounting until the seventh planning cycle and for the sixth cycle impose a more modest discounting requirement tied to the capacity factors for nonvacant sites. For example, the Department could build on AB 1397's demand that the assessment of nonvacant sites' capacity account for "existing leases or

"standards, forms, and definitions" authority with respect to the analytic side of the housing element, including the site inventory.

311. See Wheeler et al., *supra* note 269. We recognize that there is a possible transition problem for purposes of the sixth cycle, in that many of the RHNA's have been distributed by the councils of government without consideration of the possibility that local governments may have to discount site capacity by sites' probability of development. This may well have resulted in some low-demand jurisdictions getting RHNA's that were too big, relative to their development probabilities, and in many cases, it may be too late to adjust the distribution. Under these circumstances, it may be sensible for HCD to waive the development-probability discounting requirement for low-demand jurisdictions.

312. CAL. GOV'T CODE § 65583.2(h) (West 2020).

313. *Id.* § 65863(a).

314. *Id.* § 65583(b)(2).

315. Assuming of course that the local government has a legitimate basis, accepted by HCD, for setting its quantified objectives below its RHNA.

other contracts that would perpetuate the existing use or prevent redevelopment of the site.”³¹⁶ It’s clearly infeasible for a city with thousands or tens of thousands of potential nonvacant inventory sites to pin down the terms of every lease on every site. But the city, or better yet the regional council of governments, could define categories of parcels and then survey the owners of a random sample of parcels in each category. The survey would ask whether the respondent’s parcel is currently subject to a lease and, if so, how many years remain on the lease. Survey responses would be converted into a score of zero to eight, corresponding to the number of years out of the next eight in which the parcel is not lease encumbered (the housing-element planning period is eight years). The average score for parcels in each category would provide a “lease encumbrance” discount factor for the category, reflecting the share of the planning period for which parcels in the category are expected to be unencumbered.

To illustrate, if the average score for a class of parcels is five, parcels in the category would be expected to be available (lease-unencumbered) for only five years out of the eight-year planning cycle. Such sites would be counted as accommodating $5/8 = 62.5$ percent of their “capacity if developed.” Thus, if similar sites are typically developed at a density of fifty units per acre, and if there are ten acres of such sites in a housing element’s inventory, those sites would count as accommodating $0.625 * 10 \text{ acres} * 50 \text{ units/acre} = 312.5$ dwelling units, rather than the 500 units for which they would count under the traditional approach.³¹⁷

This would be a useful step in the direction of development-probability discounting, and it would not place extraordinary rezoning demands on low-demand locales. On the contrary, since low-demand places are likely to have lots of vacant sites, they would not have to discount their sites’ “capacity if developed” at all.

To sum up, there is a very strong case that HCD may now require inventory sites to be counted at their expected yield during the planning period, with the *possible* exception of vacant sites zoned for minimum residential densities that

316. CAL. GOV’T CODE § 65583.2(g)(1) (West 2020). Except for leases, most of these factors were already part of the required analysis, though the requirements were couched in slightly different language. See CAL. GOV’T CODE § 65583.2(g) (West 2005) (amended 2017) (“The methodology shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites.”).

317. The same surveys could also be used to implement the new requirement that local governments that assign more than 50 percent of their low-income RHNA to nonvacant sites make “findings based on substantial evidence that the [site’s existing] use is likely to be discontinued during the planning period.” CAL. GOV’T CODE § 65583.2(g)(2) (West 2020). The survey would ask, in addition to the lease-years question, whether the owner expects to discontinue the current use and redevelop or sell the property within the next eight years. Averaged across the parcels in a category, this indicator variable (one for “yes,” zero for “no”) would yield a “discontinuation of existing use” probability for the category. HCD could require local governments to discount by this factor rather than the “lease-unencumbrance” factor if the former is more conservative (smaller) and the local government assigned more than 50 percent of its low-income RHNA to nonvacant sites.

the local government elects to count at the minimum zoned density. The Department may also establish standards for estimating development probabilities and require reporting of the estimates for inventory parcels. Alternatively, the Department may adopt a softer approach, such as discounting site capacity based on the typical number of years remaining on existing leases.³¹⁸

c. Generating Data about Governmental Constraints

Whether a housing element's analytic side is legally adequate depends not only on whether the housing element properly judged the capacity of the inventory parcels, but also on whether the housing element provided sufficient analysis of governmental (and nongovernmental) constraints on housing development in the jurisdiction.³¹⁹ We will have more to say about constraints in the next white papers in this series, where we dig into the practice of constraints analysis in fifth-cycle housing elements. Suffice it to say for now that none of the fifteen housing elements we studied grounded its analysis of constraints on actual, reported data, let alone data reported in a standard format that would allow for easy comparison of one jurisdiction to the next.³²⁰

Moreover, while the government code provides benchmarks for certain steps in the development entitlement process, including timeframes under the California Environmental Quality Act (CEQA) for completing environmental review³²¹ and timeframes under the Permit Streamlining Act (PSA) for a final decision following environmental review,³²² none of the housing elements in our sample assessed the local government's compliance with these statutory standards. Most likely this is because the local governments just aren't tracking the information one would need to assess compliance. Two of the authors of this paper were part of a research team that recently studied the development entitlement process in sixteen California cities.³²³ The research team found that

318. After the authors posted a draft of this paper to SSRN and shared it with HCD, HCD issued a new guidance memorandum about site capacity. The guidance memo tells local governments to discount the capacity of most sites by the site's probability of development during the planning period, but it allows vacant sites zoned at minimum residential densities to be counted at the minimum density (without regard to development probability), provided that the general plan commits the local government to allowing the minimum zoned density on the site. See Memorandum from Megan Kirkeby, Acting Deputy Dir., Div. of Hous. Policy Dev., to Planning Directors and Interested Parties, at 19–26 (June 10, 2020) https://www.hcd.ca.gov/community-development/housing-element/docs/Sites_inventory_memo_final06102020.pdf.

319. CAL. GOV'T CODE § 65583(a)(5) (West 2020).

320. See *supra* note 9 for a list of the cities whose housing elements we studied.

321. CAL. PUB. RES. CODE §§ 21080.1, 21080.2 (West 2020); *id.* § 21151.5(a); CEQA GUIDELINES, 14 CAL. CODE REG. § 15107 (West 2020); *id.* § 15108.

322. CAL. GOV'T CODE § 65950 (West 2020).

323. See Moira O'Neil, Giulia Gualco-Nelson & Eric Biber, *Examining California Land Use Entitlements*, BERKELEY LAW, <https://www.law.berkeley.edu/research/clee/research/land-use/getting-it-right/> (last visited Feb. 22, 2021) (providing information about the team and its work).

it was impossible to identify key PSA and CEQA milestones for most projects that were approved during the study period.³²⁴

There is no question that HCD could require local governments to track these milestones on a project-by-project basis and to include them in annual progress reports on housing-element implementation. AB 879 gave the Department “standards, forms, and definitions” authority with respect to annual reporting,³²⁵ and the legislature has specifically directed HCD both to require reporting of project-level data identified by assessor parcel number³²⁶ and to design the reporting protocol so that it illuminates “the process, certainty, cost, and time to approve housing.”³²⁷ CEQA and PSA compliance are mine-run matters.

Complementing the Department’s “standards, forms, and definitions” authority for annual progress reports is a similar grant of authority under SB 6, covering everything under section 65583(a) of the California Government Code. That section lays out requirements for the analytic side of the housing element, including the “analysis of potential and actual governmental constraints.” It follows that HCD may now establish additional, binding requirements for data collection and analysis specific to the analysis of constraints. In a companion paper, we propose that this authority be used to launch a new kind of constraints analysis, based on a random sample of sites from the local government’s territory.³²⁸

d. Benchmarking Governmental Constraints

Because SB 6 delegates to HCD standard-setting authority under section 65583(a),³²⁹ the Department may reshape the analysis of constraints not only by requiring local governments to generate new sources of data, but also by establishing quantitative benchmarks for whether a local government has substantially constrained the supply of housing in its territory. Any such standard must, of course, be consistent with the statute. A key question, then, is the meaning of the term “governmental constraint.”³³⁰

324. See GIULIA GUALCO-NELSON, MOIRA O’NEILL & ERIC BIBER, ENHANCING LOCAL LAND USE DATA 6–9 (June 2019), <https://www.law.berkeley.edu/research/clee/research/land-use/policy-brief-enhancing-local-land-use-data/>. The identified problems include: (1) that application file dates (which, under the PSA, start the clock for an application being “deemed complete,” CAL. GOV’T CODE § 65943(a)), were impossible to locate in some cities, and often missing in others; (2) that only one of the sixteen cities, Los Angeles, tracked “deemed complete” dates (the date that starts the running of the CEQA clock); (3) that data on projects subject to staff-level rather than planning commission or city council approval were “almost universally unavailable”; (4) that two large cities “kept no centralized list” of ministerial projects; and (5) that few cities tracked project appeals, and even those that did so failed to record the basis for the appeal, the appellant, or the outcome. See *id.* at 7–9.

325. See *supra* note 218 and accompanying text.

326. See *id.* and accompanying text.

327. See *supra* note 221 and accompanying text.

328. See Elmendorf et al., *supra* note 19.

329. See *supra* Subpart II.E.1.a.

330. CAL. GOV’T CODE § 65583(c)(3) (West 2020).

Here the statute admits of two possible interpretations. On one reading, “governmental constraint” means *economic constraint*: anything done by the government that has a not-too-convoluted adverse effect on housing supply or the cost of housing production, relative to something else that the government might do instead. On another reading, the concept includes only those barriers (if any) that are likely to result in a local government falling short of its RHNA-share targets or failing to meet the needs of certain special-needs populations. We’ll call this the *RHNA/special-needs* conception of constraint.

How this ambiguity is ultimately resolved will shape the nature and use of any metrics of constraint that the Department may develop. Since housing-element law presumes that the RHNA will be accommodated through the inventory sites, it’s at least arguable that under the RHNA/special-needs conception of constraint, a local government may disregard constraints that only affect noninventory sites.³³¹ The RHNA/special-needs definition of constraint would also tend to excuse local governments from addressing local rules and practices that generically increase the cost and reduce the supply of housing, provided that the inventory sites’ expected yield equals or exceeds the local government’s RHNA.³³²

Conversely, under the economic conception of constraint, the Department clearly could require local governments to analyze potential constraints that affect development anywhere in the jurisdiction. Barriers to the development of market-rate housing that serve no substantial purpose beyond the preservation of home values would have to be ameliorated, even if the local government is likely to blow past its “above moderate income” RHNA. The economic conception of constraint also provides a stronger foundation for outcome-based presumptions about governmental constraints, as there is an established body of economic theory and evidence about the hallmarks of a constrained housing market.³³³

So, which conception of constraint is more plausible, given the housing-element law as it stands today? The short answer is, we’re not sure. Section 65583(a) says initially that a housing element’s analysis of “potential and actual governmental constraints” shall include “land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, local processing and permit procedures, and any locally adopted ordinances that *directly impact the cost and supply* of residential

331. On the other hand, because California counts development on noninventory sites when determining whether a local government has made adequate progress toward its RHNA-share targets, and so is exempt from project-streamlining sanctions under SB 35 (see sources cited in note 48, *supra*), one could argue that even the RHNA/special-needs conception of constraint requires attention to constraints beyond the inventory sites. Recall too the Legislative Analyst’s conclusion that a substantial portion of the multifamily housing production that does occur in California is not on inventory sites. See TAYLOR, *supra* note 101.

332. However, the local government would still have to address any constraints that make below-market-rate housing particularly difficult to develop.

333. See generally Glaeser & Gyourko, *supra* note 66.

development.”³³⁴ That cost-and-supply phrase, illuminated by the examples, supports the economic definition of constraint. However, section 65583(a) goes on to say that the constraints analysis “shall also demonstrate local efforts to remove . . . constraints that hinder the locality from meeting its share of the regional housing need . . . and from meeting the need for housing for persons with disabilities, supportive housing, transitional housing, and emergency shelters.”³³⁵ This arguably implies that the only governmental constraints of normative concern—that is, the only constraints that, if inadequately redressed, could justify a determination that the housing element is noncompliant—are those likely to result in a local government falling short of its RHNA-share targets or failing to meet the needs of the named special-needs populations.

One can make plausible legal arguments for either the economic or the RHNA/special-needs definition of constraint or even for a hybrid.³³⁶ And because section 65583(a), read in context, leaves the meaning of “governmental constraint” up for grabs, we think HCD may exercise its new “definitions” authority under SB 6 to choose between these competing conceptions of constraint. On the other hand, some judges may see this as a pure question of law and thus one to be resolved in the “independent judgment” of the courts, notwithstanding the express delegation of definition-making authority to HCD.³³⁷

The delegation under SB 6 does not cover the section of the statute where the hedgy obligation to remove constraints—“where appropriate and legally feasible”—is articulated.³³⁸ Any HCD-promulgated definition of “appropriate”

334. CAL. GOV'T CODE § 65583(a)(5) (West 2020). This language was added in 2017. *See* A.B. 1397, 2017–2018 Reg., Leg. Sess. (Cal. 2017).

335. CAL. GOV'T CODE § 65583(a)(5) (West 2020).

336. Support for the economic conception of constraint comes from several recent legislative findings, including (1) that California has the “most expensive housing in the nation” owing in part to “activities and policies of many local governments that limit the approval of housing . . . and require that high fees and exactions be paid by producers of housing,” *id.* § 65589.5(a)(1)(B); (2) that “the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor,” *id.* § 65589.5(a)(2)(B); and (3) that California has an accrued production deficit of roughly 2 million homes, *id.* § 65589.5(a)(2)(D). The third finding ratifies a McKinsey study, which compares the ratio of population to housing stock in California and comparator states. *See* JONATHAN WOETZEL ET AL., *supra* note 40. These findings all treat California’s housing crisis as rooted in a cumulative lack of housing units relative to demand, not just a failure to meet the RHNA targets in each income band or a failure to meet the needs of named special-needs populations.

Support for the economic conception of “government constraint” is arguably provided as well by negative implication of section 65583(a)(6), which requires analysis of *nongovernmental constraints* “that hinder the construction of a locality’s share of the regional housing need” (whereas, by contrast, the analysis of *governmental constraints* concerns those “that directly impact the cost and supply of housing,” CAL. GOV'T CODE § 65583(a)(5) (West 2020)). On the other hand, why would the housing element use a different definition for governmental and nongovernmental constraints? If there is no basis for distinguishing the two types, then maybe the difference in phrasing is just an oversight, and the RHNA-share conception of nongovernmental constraint should be applied to governmental constraints as well.

337. *See supra* Subpart II.E.1.a.

338. CAL. GOV'T CODE § 65583(c) (West 2020).

in this context would be advisory only. Yet the authority to set standards for whether a local government has constrained the supply of housing, either generically or with particular offending regulations, is still very consequential. It positions the Department to make local governments explain *why* they are not removing constraints. Notably, most of the fifth-cycle housing elements we reviewed admitted to no governmental constraints at all.³³⁹ The housing element would provide a desultory description of local land-use practices and then conclude that none were actual governmental constraints—notwithstanding sky high prices and without regard to whether the local government had permitted less housing than its peers.³⁴⁰

2. “*Substantial Compliance, Safe Harbors, and the Adequacy of a Housing Element’s Programs*”

The apex question about HCD’s authority concerns the program side of the housing element. It’s through the programs that local governments make specific commitments for rezoning, constraint removal, and other actions to align local land-use practices with state policy.³⁴¹ A housing element with a fabulous

339. CITY OF PASADENA, CAL., GENERAL PLAN, HOUSING ELEMENT 2013-2021 B7–B30 (adopted Feb. 3, 2014) (summarizing various local practices without making any finding about whether the regulations operate as constraints); CITY OF PALO ALTO, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 97–126 (adopted Nov. 10, 2014) (describing various local regulations of land use while acknowledging none as constraints except as to subsidized housing and possibly ADUs); FRESNO, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 4–18 (adopted Apr. 13, 2017) (noting that “[i]n general terms, the City’s residential development standards do not act as a constraint to the development of new housing and affordable housing”); CITY OF SANTA MONICA, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 94–113 (adopted Dec. 10, 2013) (describing local regulations and acknowledging none as constraints); CITY OF SACRAMENTO, CAL., GENERAL PLAN, 2013-2021 HOUSING ELEMENT H1 & H8 (adopted Dec. 17, 2013) (describing regulations while acknowledging none as constraints); CITY OF REDONDO BEACH, CAL., GENERAL PLAN, HOUSING ELEMENT 2013-2021 65–80 (Apr. 2014) (describing local regulations and either saying nothing about whether they’re constraints or summarily characterizing the regulation in question as non-constraining or as justified); CITY OF MOUNTAIN VIEW, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 121 (adopted Oct. 14, 2014) (concluding that “[o]verall, Mountain View’s Zoning Ordinance generally does not act as a constraint to new housing production,” while acknowledging that “local developers have indicated that the design review process . . . can occasionally be time consuming and labor intensive”); CITY OF LONG BEACH, CAL., GENERAL PLAN, 2013-2021 HOUSING ELEMENT 59 (“Overall, the City’s development standards (citywide and in the coastal zone) do not constrain housing development”); CITY OF OAKLAND, CAL., GENERAL PLAN, 2015-2023 HOUSING ELEMENT 16–17 (adopted Dec. 9, 2014) (stating that “[t]he City has not identified any specific constraints to the approval of housing resulting from the application of the General Plan policies or current zoning,” and that “[t]he City does not consider the development standards in the Planning Code to be a constraint to the production or rehabilitation of housing”); CITY OF LOS ANGELES, CAL., GENERAL PLAN, 2013-2021 HOUSING ELEMENT 2-5 (adopted Dec. 3, 2013) (reviewing various potential governmental constraints and making no de jure findings about whether any of them are constraints, but noting in passing that some of them “could be considered” or “sometimes have been perceived as” constraints); CITY OF SAN JOSE, CAL., GENERAL PLAN, HOUSING ELEMENT 2014-2023 IV-1–IV-27 (adopted Jan. 27, 2015) (reviewing various potential governmental constraints while acknowledging none as constraints except as to ADUs).

340. *Id.*

341. CAL. GOV’T CODE § 65583(c) (West 2020).

analysis of constraints and assessment of inventory sites' capacity is not going to bring about more production if its programs are fatuous.

a. Illustrations

Consider three examples, which will motivate the discussion that follows. Each example involves a hypothetical city whose RHNA target is 1,000 units. During the previous planning period, the city grew its housing stock by one-third of the nominal "capacity if developed" of its inventory sites. Let's assume that HCD treats this development rate as the default development probability for sites in the new housing element's inventory.

i. City A

City A's draft housing element provides an inventory whose capacity-if-developed is 1,500 units. The inventory's "realistic housing unit capacity" is therefore $1500 / 3 = 500$ units, only half of the city's RHNA. The housing element acknowledges this shortfall but addresses it with perfunctory process reforms: reorganizing some offices within the planning department, appointing in-house project facilitators for certain priority developments, and consolidating local development standards into a single document which will be posted on the planning department's website.

City A's housing element asserts that these reforms are expected to double the rate at which sites are developed. If that is right, the site inventory (1,500 potential units) would have an expected yield of 1,000 units, equal to the city's RHNA. HCD staffers are skeptical that the proposed program will have much impact, but they lack data either way. Must HCD approve City A's housing element, or may the Department deny approval on the ground that the payoff from the constraint-removal program is too speculative?

ii. City B

City B submits a draft housing element whose site inventory has a capacity-if-developed of 3,000 units. The expected yield using the default development-probability assumption is equal to the city's RHNA of 1,000 units. However, City B allocates nearly all of its low-income RHNA to census tracts with poor schools and very few affluent families. City B acknowledges that under AB 686, housing elements must include a program to "affirmatively further fair housing," but the city says its fair-housing priority is "encourag[ing] community revitalization, including preservation of existing affordable housing, and protecting existing residents from displacement."³⁴² The city says that by locating new low-income housing near existing poor residents, it is protecting them from displacement while maximizing affordable housing production

342. *Id.* § 65583(c)(10)(A)(v).

because land costs are cheaper in these areas. HCD acknowledges that the housing-element law describes “protecting existing residents from displacement” as a fair-housing strategy³⁴³ but argues that the primary or co-equal goal must be to provide opportunities for low-income people to live in neighborhoods with good schools and access to employment. Must HCD approve City B’s housing element, or may HCD reject it for inadequately furthering fair housing?

iii. City C

Like City B, City C submits a draft housing element whose inventory has a capacity-if-developed of 3,000 units and thus an expected yield equal to the city’s RHNA. City C’s housing prices are extremely high, however, and among California local governments where the price of new housing substantially exceeds the labor-and-materials cost of construction, City C is in the bottom 25 percent by its rate of housing stock growth. Let us assume that HCD has adopted the economic conception of constraint and associated outcome-based presumptions about cumulative constraints.³⁴⁴ According to these criteria, City C is presumptively constrained. City C is also among the worst performers in California according to a metric of the average waiting time from project submission to final approval. This signifies that the city has process constraints, under applicable HCD standards. The city’s draft housing element acknowledges that the city is presumptively constrained, both overall and according to the permitting-process metric. On the program side, the housing element promises the same doubtfully effective actions to which City A had committed: online publication of a consolidated-standards document, appointment of in-house expeditors for a vaguely specified class of priority projects, and some reshuffling of positions and roles within the planning department. May HCD reject City C’s housing element on the ground that the payoff from the program actions is speculative at best?

* * *

Despite the importance of these questions, the recent spate of statutory reforms has barely addressed the program side of the housing element.³⁴⁵ Whereas HCD now enjoys “standards, forms, and definitions” authority with respect to the analytic side,³⁴⁶ on the program side, the old 1980 compromise limiting HCD to “guidelines” that local governments need only “consider” remains in force.³⁴⁷ Also in force is a circa-1980 codification of legislative intent, “recogniz[ing] that each locality is best capable of determining what efforts are

343. *Id.*

344. *See supra* Subpart II.E.1.d.

345. The only express change to the program side in the last few years is a new but vague requirement that the program include actions to “affirmatively further fair housing.” CAL. GOV’T CODE §§ 65583(c)(5), (9) (West 2020).

346. *See supra* Subpart II.E.1.

347. CAL. GOV’T CODE § 65585(a) (West 2020).

required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs.”³⁴⁸ Nor has the legislature revisited the “substantial compliance” standard for whether a housing element as a whole complies with state law.³⁴⁹ As we noted earlier, several courts in the 1990s and 2000s adopted a formalistic, box-checking gloss on substantial compliance, under which a housing element complies so long as it “contain[s] the elements mandated by the statute.”³⁵⁰ Whether the housing element is likely to work was said to be a “merits” question irrelevant to legal compliance.³⁵¹

Our central contention in this Subpart is that HCD now has substantially more leverage over housing-element programs than it used to, notwithstanding the legislature’s relative lack of attention to the program side. We will argue that the legislature has tacitly ratified HCD’s preferred, functional test for substantial compliance, at the expense of the court’s box-checking approach. It follows that courts should now defer to HCD’s “merits” judgments about compliance. This will put pressure on local governments to accede to the Department’s programmatic demands, especially in view of the increasingly severe consequences for falling out of compliance: the legislature has tied several new streams of grant funding to housing-element compliance³⁵² and has authorized courts to impose financial penalties on noncompliant local governments and even to rewrite noncompliant housing elements.³⁵³

In Subpart II.E.2.a below, we explain the tacit-ratification argument. In Subparts II.E.2.b and II.E.2.c, we show how HCD could use its new authority to extract meaningful program-side commitments from local governments which have performed poorly.

b. Legislative Ratification of HCD’s Functional Gloss on Substantial Compliance

At least since 2012, HCD has been telling local governments that it reviews housing elements for function, not form, openly rejecting the courts’ approach.³⁵⁴ What matters for HCD is the “adequacy of [the housing element’s]

348. CAL. GOV’T CODE § 65581(c), added by Stats. 1980, c. 1143, p. 3697, § 3.

349. *Id.* §§ 65587(b), 65585(l).

350. *See supra* notes 130–134 and accompanying text.

351. *See supra* note 133.

352. *See* S.B. 2, § 4, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (creating a “Building Homes and Jobs Trust Fund,” funded with real estate transfer tax, and tying eligibility for funds to having a substantially compliant housing element); A.B. 101, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (creating “pro-housing policy” bonus criteria for various grant programs, one precondition for which is that the jurisdictions have adopted a substantially compliant housing element).

353. A.B. 101, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (adding Cal. Gov’t Code §§ 65585(k)–(n)).

354. *See* Kautz, *supra* note 226, at 15–16 (discussing a 2012 letter from HCD to the Association of Bay Area Governments, in which the agency wrote: “While a court may review a housing element to find whether it contains the elements mandated by the statute, *the Department’s review considers the adequacy of information, program commitments, and timeframes to meet various statutory goals and objectives*”).

information, program commitments, and timeframes to meet . . . statutory goals and objectives.”³⁵⁵

Against this backdrop of administrative practice, the legislature in 2017 authorized HCD to decertify housing elements midcycle for failures of implementation. The bill that delivered this authority, AB 72, provides:

The department shall review any action or failure to act by [a local government] *that it determines is inconsistent* with an adopted housing element or Section 65583, including any failure to implement any program actions included in the housing element The department shall issue written findings to the [local government] as to whether the action or failure to act substantially complies with this article³⁵⁶

The bill then authorizes HCD to revoke its previous finding of substantial compliance if the local government fails to cure the problem identified by the Department within thirty days.³⁵⁷

Notably, AB 72 does not ask HCD to predict whether *a court* would find the jurisdiction out of compliance; rather, the bill calls on the Department to exercise its own judgment (“determines is inconsistent”). The bill’s sponsors argued that judicial enforcement of California’s housing framework through private litigation had proven inadequate and that by authorizing HCD to decertify housing elements and refer matters to the attorney general, the bill “provides greater accountability and enforcement to ensure there continues to be development for new housing.”³⁵⁸

The main argument in opposition to the bill, highlighted repeatedly in the official bill analyses, was that AB 72 would give HCD too much discretion to determine what actions or inactions by local governments warrant decertification of a housing element.³⁵⁹ The California chapter of the American Planning Association urged that HCD be permitted to decertify a previously approved housing element only if the local government had failed to make adequate sites available and complete required rezonings by the statutory three-year deadline.³⁶⁰ But this suggestion was not adopted. Rather, the legislature accepted the sponsors’ argument that a broad decertification power was necessary—at this “crucial time for California, when decisions at the state and local level have

355. *Id.*

356. A.B. 72, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV’T CODE § 65585(i)) (emphasis added).

357. *Id.*

358. Bill Analysis, A.B. 72, Sen. Comm. on Transp. & Hous. (July 6, 2017). The legislature’s discussion of the inadequacy of judicial enforcement focused on the costs of private litigation and the reluctance of developers to sue cities with whom they have an ongoing relationship. *See id.* The official committee reports do not mention the courts’ gloss on substantial compliance.

359. *See* Bill Analysis, A.B. 72, Assemb. Comm. on Hous. (Apr. 24, 2017); Bill Analysis, A.B. 72, Assemb. Appropriations (May 10, 2017); Bill Analysis, A.B. 72, Sen. Comm. on Transp. & Hous. (July 3, 2017); Bill Analysis, A.B. 72, Sen. Floor (July 17, 2017).

360. *See* Bill Analysis, A.B. 72, Assemb. Comm. on Hous. (Apr. 24, 2017).

created barriers in place of building affordable homes, worsening the unprecedented housing affordability crisis in our state.”³⁶¹

If the courts’ formalistic test for substantial compliance were still good law, AB 72’s broad decertification authority would have been of little use: Why would HCD ever bother to decertify a housing element for failure to adequately implement the program if the local government could defeat decertification by having a court declare that the efficacy of a housing element’s programs is a “merits” question irrelevant to “substantial compliance”?

Consider also that AB 72 was adopted as part of a fifteen-bill housing package, including a beefed-up Housing Accountability Act and the site-inventory reforms discussed above.³⁶² Much like AB 72, the site inventory bill, AB 1397, would have been pointless if the old test for substantial compliance were still good law. Why bother requiring local governments to go through the motions of specifying “additional development potential . . . within the planning period” for each nonvacant site, taking account of “current market demand” and “past experience . . . converting existing uses to higher density residential development,”³⁶³ unless HCD may review both the merits of the housing element’s assessment of site capacity and the probable efficacy of any housing-element program to provide additional capacity? And how could HCD and the courts possibly honor the legislature’s finding that “maintaining a supply of land and adequate sites suitable, feasible, and available for the development of housing sufficient to meet the locality’s housing need . . . is *essential to . . . the purposes of this article*,”³⁶⁴ unless the reviewing body takes a hard, pragmatic look at both the housing element’s site inventory and the associated program to make sites available and remove constraints? Certainly, the legislature expected that HCD would take this hard, pragmatic look. The report of the Senate Appropriations Committee states that passage of the bill would require HCD “to conduct a more detailed review of housing elements to ensure compliance . . . , including additional site-specific reviews of land suitable for residential development.”³⁶⁵

The overriding purpose of AB 1397 was to keep local governments from “circumvent[ing]” the housing-element law by “relying on sites that aren’t truly available or feasible for residential development, especially multifamily development.”³⁶⁶ This anticircumvention objective is at war with the traditional

361. Bill Analysis, A.B. 72, Sen. Comm. on Transp. & Hous. (July 6, 2017).

362. Liam Dillon, *Gov. Brown Just Signed 15 Housing Bills. Here’s How They’re Supposed to Help the Affordability Crisis*, L.A. TIMES (Sept. 29, 2017, 12:00 PM), <https://www.latimes.com/politics/la-pol-ca-housing-legislation-signed-20170929-htmllstory.html>; see also *supra* Subparts III.B–III.C.

363. CAL. GOV’T CODE § 65583.2(c) (West 2020).

364. *Id.* § 65580(f).

365. Bill Analysis, A.B. 1397, Sen. Appropriations (July 17, 2017), at 3. The same report anticipates that HCD would hire three person-years of new staffing for this review. *Id.* at 1.

366. Bill Analysis, A.B. 1397, Assemb. Comm. on Hous. (Apr. 19, 2017), at 5–6; Bill Analysis, A.B. 1397, Sen. Floor Analysis (Aug. 22, 2017), at 6; Bill Analysis, A.B. 1397, Assemb. Floor Analysis (Sept. 15, 2017), at 6.

judicial test for substantial compliance, which gives unstinting deference to the local government so long as the housing element “contain[s] the elements mandated by the statute.”³⁶⁷ HCD’s version of substantial compliance—whether the housing element’s “information, program commitments, and timeframes [are adequate] to meet . . . statutory goals and objectives”³⁶⁸—is clearly more in tune with AB 72 and AB 1397 alike.

Further support for HCD’s gloss on substantial compliance comes from a 2018 update to the codified declaration of legislative intent found in the housing-element law. Previously, the legislature had “recognized” “that future housing production may not equal the regional housing need established for planning purposes.”³⁶⁹ In 2018, the legislature lined out this proviso, codifying in its place an intent to “ensure that future housing production meets, *at a minimum*, the regional housing need established [by HCD] for planning purposes.”³⁷⁰ Cities and counties are expected to “undertake all necessary actions to encourage, promote, and facilitate the development of housing to accommodate the entire regional housing need.”³⁷¹

Insofar as HCD’s gloss on substantial compliance is now the legal test,³⁷² courts in reviewing housing elements for compliance ought to (and probably

367. See *supra* text accompanying notes 132, 134.

368. See Kautz, *supra* note 226.

369. CAL. GOV’T CODE § 65584(a)(2) (West 2005) (amended 2018).

370. S.B. 828, 2017–2018 Reg., Leg. Sess. (Cal. 2018) (amending CAL. GOV’T CODE § 65584(a)(2)) (emphasis added).

371. *Id.* To similar effect, when the legislature bulked up the Housing Accountability Act in 2017, it added that the Act should be “interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017) (adding CAL. GOV’T CODE § 65589.5(a)(2)(L)). Note that the HAA is codified as part of the housing-element article of the government code and has long been understood as a central component of the RHNA-to-housing conveyor belt.

372. We do acknowledge two possible rejoinders to our thesis that the legislature has ratified HCD’s gloss on substantial compliance. One is that the legislature ratified HCD’s gloss on substantial compliance only for purposes of HCD review of housing elements and not for purposes of judicial review of housing elements. While HCD has in its own statements distinguished administrative from judicial review, see Kautz, *supra* note 226, this distinction has no foundation in the statute, which uses exactly the same term (“substantial compliance”) in the context of administrative and judicial review. Compare CAL. GOV’T CODE § 65585(d)–(i) (West 2020) (administrative review), with *id.* § 65587(b) (judicial review). In 2019, the legislature clarified that a judicial determination of substantial compliance “shall have the same force and effect, for all purposes, as the department’s determination that the housing element substantially complies with this article.” A.B. 101, 2019–2020 Reg., Leg. Sess. (Cal. 2019) (amending CAL. GOV’T CODE § 65585(l)). It would also be bizarre for one set of standards to apply to local governments that have the resources for challenging HCD determinations in court and a different set of standards to apply to jurisdictions with weaker or less well-funded litigation teams. The weaker standards would end up applying to the better-resourced jurisdictions, which is also where housing is more desperately needed.

The other rejoinder is that the Department’s version of substantial compliance is so intolerably open-ended that an intent to ratify it ought not be inferred in the absence of an unequivocally clear statement from the legislature. The contradictions built into the statute mean that the Department’s standard—“adequacy relative to statutory objectives”—could, in application, mean almost anything. The statute’s main objective is “the development of housing to accommodate the entire regional housing need,” CAL. GOV’T CODE § 65584(a)(2) (West 2020), but without requiring local governments to spend general-fund revenues on affordable housing, see *id.* § 65589(a), and while allowing local governments to count

will) give broad deference to the Department's judgments. Generalist courts are poorly equipped to gauge whether a housing element will "ensure that future housing production meets, at a minimum, the [locality's share of] regional housing need."³⁷³ Indeed, it was probably their lack of expertise that made the courts unwilling to engage with the "merits" of a housing element in the old substantial-compliance cases.³⁷⁴ As a practical matter, the only way that courts can honor the new legislative intent is to defer to HCD's judgments about whether a housing element is likely to work.

c. Advisory Safe Harbors for the Program Side

The prospect of judicial deference to HCD's judgment about the adequacy of a housing element certainly gives HCD more leverage over the program side (particularly given the new consequences for falling out of compliance), yet the Department must walk a delicate line in policing housing-element programs. For illustration, let's return to the example of "City C," above, which is presumptively constrained according to housing-outcome and permitting-time benchmarks.

any parcel zoned at statutory minimum densities toward their low-income RHNA regardless of the expected distribution of units across income bins if the parcel is developed, *see id.* § 65583.2(c)(3). These objectives are at war with one another, and the conflict will become even more intense if RHNA reforms lead, as they should, to larger aggregate housing targets, and to intraregional RHNA allocations that are more heavily weighted toward high-price locales. If the legislature had given HCD standards-and-definitions authority with respect to the program side of the housing element, or with respect to "substantial compliance" as such, the Department could work through these contradictions transparently, issuing rules that translate "adequacy relative to objectives" into something more concrete and self-constraining, and that provide notice to local governments of what the Department expects of them. But so far, the legislative grant of standards-and-definitions authority extends only to the analytic side of the housing element, not the program side.

We think this rejoinder to our tacit-ratification thesis is halfway correct—but only halfway correct. Because HCD lacks interpretive authority with respect to the program side of the housing element, it is up to the courts to settle the meaning of key statutory terms governing housing elements' programs. For example, the courts, not HCD, get to decide what "appropriate" means in the context of the statutory requirement to "address and, where appropriate and legally feasible, remove constraints." CAL. GOV'T CODE § 65583(c) (West 2020). (Are constraints inappropriate if they fail a cost-benefit test? Or only if they are unusual as well as economically inefficient? Or only if they are likely to prevent the local government from meeting its RHNA-share target, whether in a particular bin or overall?) But judicial authority to flesh out the normative content of statutory standards governing a housing element's program is fully compatible with the HCD's functional gloss on substantial compliance. HCD can and should apply its "adequacy relative to statutory objectives" standard while respecting any answers that the courts may provide about how to reconcile the statute's various objectives concerning housing-element programs.

If HCD rejects or decertifies a housing element on the basis of what a court deems to be a mistaken idea about what the statute's programmatic objectives are or how they should be reconciled, then the court should vacate the Department's decision. But so long as HCD adheres to the courts' interpretation of statutory purpose, and respects the courts' interpretation of the statute's fiscal and other protections for local prerogatives, courts should defer to HCD's decisions, on particular records, about whether a given housing element's program is functionally adequate.

373. CAL. GOV'T CODE § 65584(a)(2) (West 2020).

374. *See, e.g., Hernandez v. City of Encinitas*, 28 Cal. App. 4th 1048, 1068 (1994) (refusing to follow plaintiffs' expert witness into the weeds of will-it-work prognostications).

One way that HCD might deal with cities whose permitting processes are unduly longwinded is to announce that the Department will only certify their housing elements if the housing element provides for ministerial review of zoning-compliant projects.³⁷⁵ But that announcement would invite serious legal challenges. For starters, it could be attacked on the ground that it establishes a generally applicable and binding criterion for housing-element programs and thus exceeds the Department's authority to issue "advisory" guidelines that local governments need only "consider."³⁷⁶ Even if HCD avoided making a statement of general applicability, merely insisting that a particular city adopt ministerial review to cure its permitting-process constraints, that insistence would arguably run afoul of the legislature's "recogni[tion]" in section 65581 of the California Government Code, "that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs."³⁷⁷ The import of section 65581, City C would say, is that HCD must allow local governments to decide for themselves how to fix identified constraints, provided that the fix is meaningful. If City C would prefer to fix its production logjam in some other, reasonable way that does not entail ministerial review, the city is entitled to its choice.

These arguments aren't risible. Yet it serves no one's interests for HCD to be in the position of reviewing housing elements on the merits while being muzzled from providing substantive, forward-looking guidance about what cities must do to achieve compliance. Eyeing the consequences of noncompliance, neither overall-constrained jurisdictions (City C), nor jurisdictions with insufficient housing-unit capacity in their site inventory (City A), nor jurisdictions with fair-housing shortcomings (City B) will want to play guessing games with HCD.³⁷⁸ But their problems are genuinely different, and they need guidance about what sort of attack on their respective problems will be deemed sufficient by HCD.

Meanwhile, HCD, with limited staff and resources, could probably accomplish a lot more if it were possible to create, by rule, compliance safe harbors for classes of local governments (defined by housing problems) that

375. We thank Dan Golub for suggesting that housing-element review might be used to induce local governments to move toward by-right development permitting.

376. CAL. GOV'T CODE § 65585(a) (West 2020) ("In the preparation of its housing element, each city and county shall consider the guidelines adopted by the department Those guidelines shall be advisory to each city or county in the preparation of its housing element.").

377. CAL. GOV'T CODE § 65581(c) (West 2020).

378. They will not want to play guessing games because the timeframes for adopting a housing element are extremely tight. In theory, there is a two-year window between the establishment of the regional housing target and the deadline for adopting a new, substantially compliant housing element, but the elaborate process for allocating the RHNA among governments in the region and settling the intraregional allocation through various appeals may consume nearly three-quarters of that window, leaving local governments with barely half a year to write their housing element, complete the review of it required by CEQA, and get it approved by HCD. *See* CAL. GOV'T CODE §§ 65584.04, 65584.05 (West 2020).

make substantial pro-housing commitments in their housing elements. Not only would this exchange—a certification guarantee, in return for pro-housing policies—lead to better policies in the cities that accept the offer, it would also allow HCD to put more resources into reviewing the housing elements of bad actors (because review of other housing elements would be streamlined). It would also generate information about who the bad actors probably are, as they are the ones likely to pass on the safe harbor.

We think HCD could achieve the substance of this exchange by using its guidelines authority to issue *advisory safe harbors*.

An advisory safe harbor, as we use the term, is just a public announcement that HCD generally intends to approve the housing elements of local governments (within some defined class of local governments) if the housing element adopts pro-housing or constraint-mitigation strategies from an HCD-issued menu. Local governments within the target class would not be obligated to adopt any of the menu items, and HCD would not be bound to approve a housing element even if it adopts every policy on the menu. The menu would be advisory only, consistent with HCD's limited authority to issue guidelines (not definitions and standards) for the program side of the housing element. Yet if HCD and the governor communicate that local governments that adhere to the menu are very likely to get their housing elements quickly approved, even as other housing elements undergo demanding review, plenty of risk-averse localities would fall in line.

To see how this might work in practice, consider our model cities again. City A, whose housing-unit capacity using the default development probabilities is only half of its RHNA, hopes to achieve compliance by increasing development probabilities rather than by rezoning inventory sites for greater density. No doubt many other cities hope to do the same. This serves up an important policy question for HCD: Should the Department encourage this compliance strategy, in the hopes of securing meaningful process reforms and meaningful limits on the costly conditions that local governments heap on new development? Or should the Department push for upzoning, reasoning that the payoff from any other compliance strategy is too speculative? Whichever path the Department chooses, it could be implemented with advisory safe harbors.

For example, if HCD decides to push upzoning, the Department could discourage alternative compliance strategies by announcing that housing elements' claims about programs to increase development probabilities should be accompanied by a thorough evidentiary justification and programmatic reinforcements. The Department could ask for (1) empirical studies corroborating that similar reforms have had similar effects on development probabilities in similar jurisdictions, (2) an explanation of why the reforms would plausibly work in the target jurisdiction even if planning commissioners or city council members face political pressure to undermine them, and (3) commitments through the housing element not to adopt other policies that could increase regulatory costs or uncertainty and thereby reduce the development

probability of inventory sites. Such an announcement would not prevent local governments from trying to achieve compliance with a program to boost development probabilities, but it would signal that there is no safety in this strategy and that local governments that pursue it should expect their housing element to receive a very skeptical review unless they discover and adopt a strategy for boosting development probabilities that has been demonstrably effective elsewhere.

Concurrently, HCD could announce that, as a general matter, it will analyze upzoning programs for compliance on the assumption that new or newly designated-for-higher-density inventory sites have development probabilities equal to the default.³⁷⁹ This would give local governments a straightforward, easily computed way to achieve housing-unit-capacity compliance. The Department might reasonably insist, however, that the local government meaningfully commit to making the increased density available for all or nearly all of planning period. To this end, the Department could advise (without requiring) that local governments declare that it is a “fundamental, mandatory and clear” policy of their housing elements to allow the specified density on the sites in question.³⁸⁰ Under background principles of state law, any fundamental, mandatory, and clear policy of the general plan supersedes ordinances and local practices that conflict with it.³⁸¹

By combining an advisory safe harbor for the upzoning compliance strategy with a warning about development-probability strategies, HCD would tilt risk-averse local governments toward the upzoning approach.

Conversely, if the Department wants to use local governments’ interest in alternative compliance strategies as an occasion to push for meaningful reductions in project entitlement times or regulatory compliance costs, the Department could release a schedule of safe-harbor “development probability increments” for specified pro-housing reforms, such as ministerial review of zoning-compliant projects. Local governments that adopt these reforms through their housing element would be invited to presume, without further evidence, that the reforms will increase sites’ development probabilities by the amount listed on the schedule.³⁸²

Or, the Department could choose a middle path, announcing that it will, as a general matter, treat the schedule of “development probability increments” as a safe harbor only for local governments whose housing elements include a fallback rezoning plan. The rezoning would kick in halfway through the planning

379. That is, the default inferred from the local government’s performance over the previous cycle. *See supra* Subpart II.E.1.a.

380. The Department might also suggest that local governments commit to allowing a defined floor-to-area ratio on these sites as well.

381. *See supra* notes 115–116 and accompanying text.

382. To avoid being attacked for arbitrariness, HCD would be well advised to ground the schedule on empirical research about site development probabilities, or at least a survey of developers and housing policy experts.

period, if the local government has not by then issued building permits for at least 50 percent of its overall RHNA target. Again, this arrangement would not be mandatory. A local government would have the option of trying to convince HCD, in light of particular local policies and circumstances, that its program to boost development probabilities is so sure to be a winner that the housing element will be “adequate relative to the statute’s objectives” even without a fallback rezoning plan. But if HCD indicates that housing elements without the fallback must be accompanied by convincing empirical evidence and strong programmatic commitments to justify the development probabilities, many local governments will probably choose the safe harbor.

The advisory safe harbor strategy is flexible. It can be calibrated to deal with various other types of constrained local governments, including cities with sufficient housing-unit capacity but regulatory barriers to the construction of affordable housing in high-opportunity neighborhoods (“City B”) and jurisdictions which are presumptively constrained per outcome metrics notwithstanding sufficient capacity in their inventory (“City C”). As to the former, the Department might craft “AFFH safe harbors”³⁸³ using the same census-tract opportunity maps that the Department already uses to score applications for affordable housing subsidies.³⁸⁴ HCD might venture that if the proportion of a city’s low-income RHNA assigned to high-opportunity tracts equals or exceeds the proportion of the city’s population that already lives in such tracts, the plan will be deemed presumptively compliant. Or the Department could use an even simpler rule of thumb, like “try to assign 50 percent of your low-income share to high-opportunity tracts where feasible.”

For cities, like City C, that are poor performers per outcome-based metrics of presumptive constraint, HCD might ask for concurrent progress on the three principal facets of land-use regulation that may constrain production: zoned capacity, development standards and fees, and the permitting process (unless the city rebuts the presumption that it’s subpar in each area). HCD would offer a menu of recommendations.³⁸⁵ Under the auspices of zoned capacity, HCD might recommend that the local government commit through its housing element to allowing a designated floor-to-area ratio and number of units on each inventory site, waiving local regulations that would prevent development at that scale. The Department might also encourage rezoning to accommodate production deficits from previous planning periods or rezoning to keep abreast of a zoned-capacity

383. AFFH is an acronym for “affirmatively furthering fair housing,” a duty added to the housing-element law in 2018. *See supra* note 181.

384. *See TCAC/HCD Opportunity Area Maps*, CAL. TAX CREDIT ALLOCATION COMM., <https://www.treasurer.ca.gov/ctcac/opportunity.asp> (last visited Dec. 21, 2020).

385. *Cf. DEP’T OF HOUS. & CMTY. DEV., PROHOUSING POLICIES FRAMEWORK PAPER AND SURVEY* (Oct. 2019), <https://files.constantcontact.com/4d29178d401/964e9b77-5215-4e2f-9720-8c46592830c4.pdf> (proposing that local governments seeking “pro-housing” certification demonstrate favorable policies in the areas of “land use and zoning,” “decreasing production timeframes,” and “reducing construction and development costs”).

benchmark derived from peer jurisdictions. Under the auspices of development standards and fees, HCD might recommend an economic feasibility guarantee, entitling developers to a waiver of otherwise-applicable fees, exactions, or regulations if it is shown that the cumulative effect of such requirements is to cause the price a developer could afford to pay for a housing-element site (while earning a normal rate of return) to fall below the value of the site in its current or next-best use. And with respect to the permitting process, HCD might advise a poorly performing local government to create a fallback, ministerial permitting pathway for developers who have waited more than a given number of months (inclusive of internal appeals) for a final decision on their project. After that period, a developer could withdraw and resubmit the project for ministerial processing, and the project would be deemed approved as a matter of law if the local government did not make a final decision on the resubmitted project within a brief window of time.³⁸⁶

Again, local governments that are poor performers would not be *required* to adopt any of these constraint-mitigation strategies. But by doing so, they could be pretty sure of getting their housing element approved. Conversely, cities that did not use the menu would face a high burden of persuading HCD either that they do not have significant governmental constraints in each area or that their alternative constraint removal-and-mitigation strategy is likely work.

The safe harbors sketched in this Subpart are meant to be illustrative only, just as cities A, B, and C are ideal types rather than actual jurisdictions. Our point in this Subpart is not to say what facets of the housing-supply problem the Department should prioritize or what safe harbors the Department should craft in response. Our goal is simply to explain and illustrate a general strategy with which HCD may shape the behavior of local governments without overstepping the bounds of its program-side authority.

The main barrier to implementing the advisory-safe-harbor strategy is probably not the housing-element law but rather the California Administrative Procedure Act (APA).³⁸⁷ Unlike its federal sibling, California's APA generally requires notice-and-comment rulemaking even for nonbinding guidance documents, and the California rulemaking process is notoriously demanding.³⁸⁸ HCD *might* be able to adopt advisory safe harbors on a temporary basis using the APA's emergency exception³⁸⁹ or by seeking shelter in the ambiguous exception

386. HCD might also establish regional field offices that could issue building permits if a local government spent too much time processing an already-approved project's application for building permits. Local governments could decide through their housing elements whether to recognize HCD-issued permits.

387. CAL. GOV'T CODE §§ 11340–11361 (West 2020).

388. See generally Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992).

389. See *About the Emergency Rulemaking Process*, Cal. Office of Admin. Law, https://oal.ca.gov/emergency_regulations/Emergency_Regulation_Process/ (last visited Dec. 21, 2020).

for “steps in the performance of a statutory duty.”³⁹⁰ But unless or until the legislature exempts HCD’s program-side guidelines from the APA (as the legislature has already done for “standards, forms, and definitions” under section 65583(a)), the APA may well dissuade an already overburdened Department from embracing our advisory safe harbor strategy.

d. Waiving Analysis and Data Collection in Exchange for Stronger Programs

HCD has one more tool at its disposal for reinforcing program-side safe harbors: data collection and reporting waivers. As we have seen, the Department’s “standards, forms, and definitions” authority with respect to housing-element analysis and annual reporting is very broad.³⁹¹ The Department could use this authority to create special data-collection and reporting duties for local governments that are poor performers and then waive or relax the new requirements for any poor performers that opt into the program-side safe harbors.

What might the new duties entail? Here is one possibility: For each site in a random sample of sites, local governments could be required to calculate (1) the site’s actual building envelope, considering all zoning overlays and development standards; (2) the cost of building a no-frills project on the site, including all exactions and fees, in compliance with applicable development standards, relative to the cost of building such a project if the local government had adopted a model least-cost zoning code; (3) whether a no-frills project that conforms to the housing element’s density for the site would likely “pencil” if the developer had to pay for the site (say) 125 percent of its value in its next-best use;³⁹² (4) whether the no-frills project would pencil if the local government had adopted a least-cost zoning code; and (5) the expected permitting time for the no-frills project, from submission of a completed project application to final approval and issuance of building permits.

HCD could vary the minimum number of sites in the sample depending on the local government’s performance. The sample size would be very small for local governments in low-cost markets and for local governments that are top performers according to their rate of housing stock growth over the previous planning period. Local governments with high housing prices and low rates of

390. *Faulkner v. Toll Bridge Auth.*, 253 P.2d 659, 664 (Cal. 1953). A treatise describes this exception thus:

The case law is conflicting and precedents are of little assistance. The decisions appear to be influenced by whether APA proceedings would be useful to the agency, the private parties or the courts in reviewing the actions in question. Sometimes, courts appear to be influenced by the merits of the underlying dispute—i.e., whether the particular determination is in fact legally valid.

THE RUTTER GROUP, CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW Ch. 25-C(5)(a).

391. *See supra* Subparts II.D, II.E.1.

392. “Pencil” is a shorthand for “pencil out,” meaning that the expected revenue from a development project, less its costs, is sufficient to justify private investment in the project.

growth would have to sample more sites, as these local governments are likely to have the severest constraints. Collecting these data for more than a few sites would require a lot of effort. An exemption might be just the nudge that is needed to get some local governments to opt into program-side safe harbors.

CONCLUSIONS

California's old planning-for-housing regime had some problems. The failures of multifamily housing supply within the state's major metropolitan areas attest to this.³⁹³ Perhaps these failures were to be expected, given the economically backwards criteria by which the state has set regional housing targets, given the lack of state oversight of intraregional allocations of the targets, and given the judicial decisions holding that whether a housing plan will work is irrelevant for gauging its compliance with state law.

The major takeaway from this study of recent legislative reforms to the California housing framework is that the framework's future need not resemble its past—largely because of the new legal and practical authority conferred on HCD. The most noteworthy developments are these:

- By authorizing HCD to enact “standards, forms, and definitions” for the site inventory of the housing element, and by establishing additional requirements for inventory sites, the legislature has given HCD the authority and tools it would need to make local governments discount the claimed capacity of sites in their housing-element inventory by the sites' probability of development over the planning period. If HCD imposes this discounting requirement, it would trigger a cascade of rezoning that can be expected to more than double the capacity of inventory sites statewide.
- By authorizing HCD to define terms and set standards for the housing element's analysis of “governmental constraints,” the legislature has given HCD an opportunity to reveal the need for—and then to press for—programmatically actions that would lead to denser housing on redevelopable parcels throughout the jurisdiction.
- By authorizing HCD to promulgate standards, forms, and definitions concerning local governments' annual reporting requirements, the legislature has positioned HCD to generate much-needed information about supply constraints and whether housing-element programs are working as intended.
- By (tacitly) ratifying HCD's functional gloss on what is required for a housing element to comply with state law, authorizing HCD to decertify housing elements midcycle, and enacting a schedule of penalties for local governments that are out of compliance, the legislature has ramped up the pressure on local governments to

393. See SCHUETZ & MURRAY, *supra* note 2, at 10.

enact, and to implement, a housing element that HCD expects to work.

- Finally, although the legislature has not given HCD authority to set binding standards for the program side of housing elements, the Department should be able to use advisory safe harbors, exemptions from analytic and data-collection requirements, and the threat of decertification to induce many poorly performing local governments to adopt recommended programs for mitigating or removing constraints. These programs may include (for example) building-envelope and density guarantees for housing-element inventory sites; economic-feasibility exemptions from otherwise applicable fees, exactions, and development standards; and fallback permitting procedures for projects that get stuck in entitlement limbo. The same strategies could also be used to induce local governments to rezone high-opportunity neighborhoods for multifamily housing development.

This is not to say that all is well with the California housing framework. For one thing, some of the summary points above rest on contestable interpretations of the statutes. We have tried to present a fair-minded assessment of what the legislature has wrought, but it's certainly possible that the courts will take a less expansive view.³⁹⁴ And even assuming that the courts cooperate, what comes of HCD's new authority will depend on strong leadership from the governor and pressure from housing advocates. The cities and counties that have spent the last forty years finding ways to "comply" with housing-element law without permitting nearly enough new housing are sure to put up a fight if HCD undertakes the initiatives we have sketched. The Department is not likely to prevail in this fight unless the governor has its back. When he was running for

394. There are also some issues that clearly demand further legislative attention. The process for setting and allocating RHNA's ought to be revamped to better account for the demand for housing and to give HCD more authority over the "methodology" by which councils of government allocate their RHNA among member jurisdictions. The criteria for assessing whether a local government has adequately planned for, or achieved, its housing targets ought to account for affordable units freed up via chains-of-moves induced by the construction of new market-rate units. The site-inventory strictures should be relaxed to allow local governments to claim capacity for infill sites with a low probability of redevelopment, so long as the housing element reasonably assesses the probability of development. And the legislature should give HCD standards-and-definitions authority with respect to the entire housing-element article of the government code, so that the agency may use clear rules of general application to work out what it means for a housing element's program to be "adequate relative to the statute's objectives." Finally, there is a strong argument for repealing the proviso that "[n]othing in [housing-element law] shall be construed to be a grant of authority . . . with respect to measures that may be undertaken . . . to implement the housing element." See CAL. GOV'T CODE § 65589(c) (West 2020). If a housing element's analysis identifies an unjustified local constraint "to the cost and supply of housing," the city council should be able to use an HCD-approved housing element to suspend that constraint for the planning period, even if it was adopted by the voters and so would normally be beyond the power of the city council to alter. Cf. Elmendorf, *supra* note 45, at 146–49 (arguing for reforms to housing-element framework that would have effect of shifting political power at the local level toward more housing-tolerant actors).

office, Governor Newsom boldly announced that he would quadruple California's rate of housing production.³⁹⁵ Now the ball is in his court.

395. See Liam Dillon, *Q&A Gov. Newsom Claims Success in First Year of Addressing California's Housing Crisis*, L.A. TIMES (Oct. 21, 2019, 3:00 AM), <https://www.latimes.com/california/story/2019-10-21/newsom-gavin-affordable-housing-homeless-q-a>.

APPENDIX: SUMMARY TABLE AND FLOWCHART

Table A-1: Overview of Recent Legislative Changes to Housing-Element Law and Potential Administrative (HCD) Reforms.

The list of potential administrative reforms is limited to ideas discussed in this Article; it is not meant to be comprehensive.

Step of Planning Process	Recent Legislative Changes	Potential Administrative Reforms
<i>RHNA: Assessment of regional need</i>	HCD in setting RHNA must account for overcrowding and rent burden, relative to normal rates for “healthy housing market.” Cal Gov’t Code § 65583(c)(2).	(beyond scope of Article)
<i>RHNA: Intraregional allocation</i>	Councils of governments in allocating RHNA must account for equity and fair-housing principles. <i>Id.</i> § 65584.04.	(beyond scope of Article)
<i>Housing element: Site inventory</i>	<p>Housing elements must include more information about sites’ “realistic capacity” for development, “during the planning period,” to meet RHNA. <i>Id.</i> § 65583(c)(1).</p> <p>HCD authorized to promulgate “standards, forms and definitions” concerning site inventory. <i>Id.</i> § 65583.3(b).</p> <p>Housing element may assign more than 50 percent of low-income RHNA to nonvacant parcels only if existing use “is likely to be discontinued” during</p>	<p>Define “realistic housing-unit capacity” as sites’ expected yield in new units during the planning period, accounting for probability of development, rather than as likely number of units conditional on the site being developed.</p> <p>Use SB 6 “standards” authority to create rules of thumb for the probability-of-development term in the expected-yield equation, such as</p>

	<p>planning period. <i>Id.</i> § 65583.2(c).</p> <p>Housing element must include special findings if it assigns low-income RHNA to small- or large-lot parcels. <i>Id.</i> § 65583.2(c).</p> <p>Local government must rezone (for by-right development) inventoried site parcels that remain undeveloped over one to two planning periods. <i>Id.</i> § 65583.2(c).</p> <p>“No net loss” within affordability bands—if inventory of parcels suitable for development at a given affordability level falls below remaining RHNA for that affordability level, local government must promptly rezone to make up the difference. <i>Id.</i> § 65863(b).</p>	<p>proportion of previous housing element’s sites that were developed during previous planning cycle, subject to business-cycle adjustment.</p> <p>Alternatively, or as transitional step: Require discounting of nonvacant sites’ capacity in proportion to share of planning period that they are expected to be lease encumbered. Issue standards and forms for collecting lease data through surveys of randomly sampled parcel owners.</p>
<p><i>Housing element: Analysis of constraints</i></p>	<p>HCD authorized to issue “standards, forms, and definitions” governing the analysis of constraints. <i>Id.</i> § 65583.3(a).</p>	<p>Adopt economic definition of constraint, so that local governments must address substantial barriers to housing supply even if locality is likely to meet its RHNA-share target.</p> <p>Promulgate objective, outcome-based metrics and standards for whether a jurisdiction is</p>

		<p>housing-supply constrained.</p> <p>Create additional data collection and reporting requirements (as appropriate) for jurisdictions which are overall-constrained per normal-production standard. Consider waiving or softening these requirements for local governments that commit to serious pro-housing reforms.</p>
<i>Housing element: Programs</i>	<p>Housing element must affirmatively further fair housing. <i>Id.</i> § 65583(c)(10).</p>	<p>Issue advisory safe harbors to encourage upzoning of high-opportunity neighborhoods for low-income housing at the “Mullin densities” (densities deemed appropriate by statute for lower-income housing).</p>
<i>Administrative approval of housing element</i>	<p>Tacit legislative ratification of HCD’s functional test for “substantial compliance,” instead of courts’ formalistic, box-checking test. <i>Id.</i> § 65585(i).</p> <p>Courts authorized to impose monetary penalties for prolonged noncompliance and, if necessary, rewrite housing element. <i>Id.</i> §§ 65585(k)-(n), 65585(l)(3).</p>	<p>Use advisory safe harbors to create easily understood pathways to compliance for poorly performing (objectively constrained) jurisdictions. Require jurisdictions that choose not to use the safe harbors to provide empirical justification for</p>

		<p>alternative compliance strategy.</p> <p>Refer noncompliant jurisdictions to attorney general for enforcement.</p>
<p><i>Permitting of development projects</i></p>	<p>No backdoor downzoning: Local government may not deny or reduce density of any project that “a reasonable person” could deem consistent with “objective general plan standards and criteria,” notwithstanding local zoning or development standards that are more restrictive, absent proof of unusual health or safety impact. <i>Id.</i> § 65589.5(j)(4). <i>See also id.</i> § 65589.5(d)(5)(A) (must allow 20 percent below-market rate projects whose density is “consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation”).</p> <p>Charter cities subjected to general-plan consistency requirements and all provisions of housing-element article of California Government Code. <i>Id.</i> §§ 65700(b), 65860(d).</p> <p>Housing organizations and potential residents (not</p>	<p>Use advisory safe harbors to encourage local governments to commit, through their housing element, to “fundamental, mandatory, and clear” policies of providing regulatory accommodations or waivers to developers, in cases where local processes or regulations hinder development of a housing-element inventory site.</p>

	<p>just developers) have standing to bring HAA lawsuits. <i>Id.</i> § 65589.5(k)(1)(A).</p> <p>Fee-shifting for HAA claims, covering market-rate as well as affordable projects. <i>Id.</i> § 65589.5(k)(1)(A).</p>	
<p><i>Oversight of housing element implementation</i></p>	<p>Local governments’ annual reports must include project proposals, approvals and disapprovals, and permitting times, indexed by tax-parcel ID for each site-inventory parcel; reports must also address rezoning, “no net loss” compliance, and provide other information sought by HCD. <i>Id.</i> § 65400(a).</p> <p>HCD authorized to promulgate “standards, forms, and definitions” for annual reports. <i>Id.</i> § 65400(a)(2).</p> <p>HCD authorized to decertify housing elements midcycle for failures of implementation and refer to attorney general for enforcement. <i>Id.</i> § 65585(i).</p>	<p>Require submission through annual reports of any project-level information that may be necessary for calculating metrics of “constraint,” per metrics and standards issued pursuant to SB 6.</p>

Figure A-1: How California Housing-Element Law Now Works**1. RHNA Set**

HCD makes determination of regional housing need (Cal. Gov't Code §§ 65584.01-.06)

**2. RHNA Allocated**

Council of governments allocates RHNA among member local governments within region (Cal Gov't Code §§ 65584.04-.05)

**3. Housing Element**

Local government revises housing element of general plan and submits it to for HCD review and approval (Cal Gov't Code §§ 65585, 65587, 65588)

Provide inventory of sites that can accommodate RHNA share (§§ 65583(a), 65582.2)

Provide analysis of constraints to housing (§ 65583(a))

Provide schedule of actions to accommodate RHNA and remove constraints, including rezoning (§ 65583(c))

**4. Implementation**

Local government may not deny plan-compliant housing project notwithstanding more restrictive zoning ("any reasonable person" standard, Cal Gov't Code § 65589.5(j)(4))

Local government must report annually on progress (§ 65400)

Rezoning of inventory sites must be completed within three years (§ 65583(c)(1)(a))

"No net loss," now enforced through annual reporting (§ 65863)

HCD may decertify housing element at any time for implementation failures (§ 65585(i))

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