

“I Would, If Only I Could”

How Cities Can Use California’s Housing Element to Overcome Neighborhood Resistance to New Housing

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City councils are on the front lines of California’s housing crisis. But local lawmakers who understand that California needs to accommodate a lot more housing are stuck in a political bind. Wherever they might put new housing, neighborhood groups spring up and oppose it. The same groups will have money to spend or voters to turn out at the next election. What’s a well-meaning city councilperson to do?

Our answer: California’s “housing element” process provides a way forward.

California requires cities to periodically adopt a state-approved plan, called a housing element, which accommodates the city’s share of regional housing need. These plans are reviewed and certified for compliance by the state Department of Housing and Community Development (HCD). Cities across the state will adopt new housing elements between 2020 and 2022, guiding development for the next eight years.

This process hasn’t always worked well in the past, but the legislature and HCD have recently strengthened the framework. There are now substantial political advantages for city officials to pursue pro-housing policies through their housing element, rather than through the normal municipal lawmaking channels. Here’s why:

1. The Alternative is Losing Local Control. Under state law, cities that fail to adopt a timely, substantially compliant housing element forfeit their authority to deny a broad class of housing projects on the basis of the city’s zoning code and general plan. This pro-housing default rule means that developers could erect apartment buildings of unlimited scale in the single-family neighborhoods that are most resistant to new housing. Because housing

elements are negotiated in the shadow of a pro-housing default, the neighborhood interests that normally oppose any upzoning or streamlined review of development applications have an incentive to hold their fire. Killing or delaying a housing element does not preserve the land-use status quo.

2. Credible Commitments, Citywide Deals, and Regional Perspective. Cities normally make land use policy on a piecemeal, project-by-project basis. This tends to privilege the neighbors who have the most at stake in each project. Cumulative and citywide impacts get short shrift. The housing element update lends itself to a different mode of land use policymaking: the hashing out of citywide deals, informed by long-term citywide and even regional perspectives.

Why is this? First, purely as a matter of legal mechanics, housing elements enable cities to make commitments that are tough to unravel. The “fundamental, mandatory, and clear” policies of a housing element preempt contrary municipal ordinances and practices. Housing element amendments are subject to pre-adoption review by HCD, which can respond to a bad amendment by decertifying the housing element. This makes the housing element an excellent instrument for implementing a citywide deal on rezoning and removal of other development constraints. It means that the city can bind itself to abide by the deal when it comes time to review development applications and neighbors turn out in droves. Tough policy choices can be finessed with contingent commitments in the housing element: provisions which take effect only some year down the road, and only if specified conditions occur.

The prospect of an enforceable citywide deal should motivate engagement by groups that have a lot at stake in the citywide supply of housing. Meanwhile, the analytical and procedural requirements of the Housing Element Law help make the deal responsive to long-term, citywide and regional needs. Housing elements must provide inventories of developable sites, assessments of zoned capacity, and analyses of constraints on housing development and of barriers to racial and socioeconomic integration. State law also requires “a diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element.” The people who usually go unheard — renters, poor people, and people of color — tend to favor more and denser housing, relative to the homeowners who speak up unbidden.

Finally, because housing elements are subject to review and approval by HCD, a city that wants neighboring cities to improve their land use practices can apply indirect pressure through its own housing element, either by adopting exemplary programs (which shape HCD’s sense of what’s reasonable to expect of other cities), or by contrasting its own good practices with its neighbor’s bad practices in the housing element’s analysis of constraints.

3. Local Knowledge and the Substantive Requirements of State Law. A paradox of the Housing Element Law is that it requires state bureaucrats who have little information about local conditions to evaluate a housing element’s claims about “realistic” zoned capacity, and about the existence and severity of other local constraints on housing development. But this also presents an opportunity for well-meaning city councilpersons, who can ask their planning departments or consultants to gather data and publicize local barriers. If the city is revealed to have problems, HCD may insist on bold programs for upzoning and constraint removal as a condition of housing element

certification. The city council can then point to the risk of decertification — and the dreaded pro-housing default rule — and take credit for enacting a robust housing element that avoids those consequences.

The Housing Element Law is not a panacea for California’s housing woes. But deployed conscientiously, it can help soften the political dilemmas now faced by local government officials who would like to do their part.

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