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“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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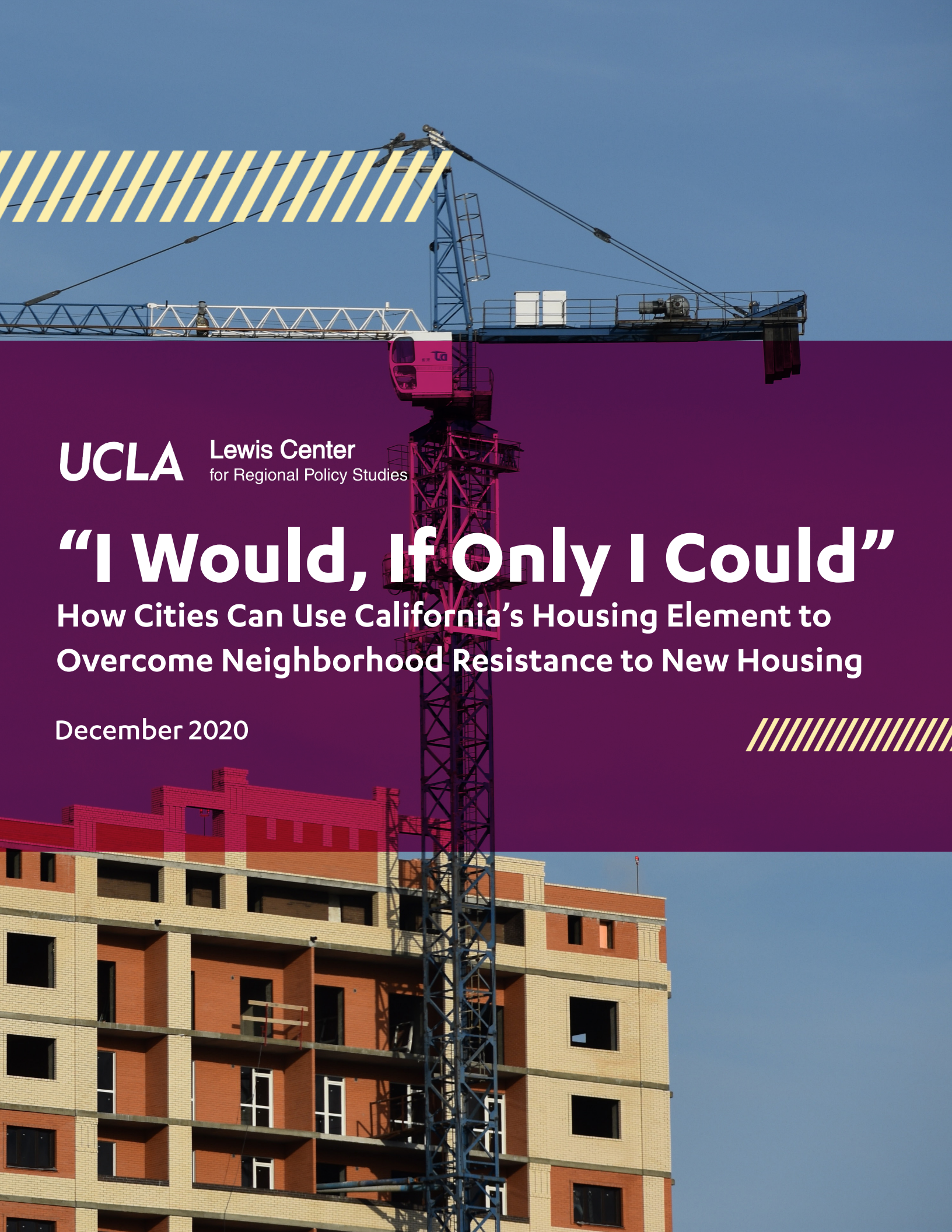

UCLA Lewis Center for Regional Policy Studies

"I Would, If Only I Could"

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

December 2020

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About the UCLA Lewis Center For Regional Policy Studies

The Ralph & Goldy Lewis Center for Regional Policy Studies is a research center in the UCLA Luskin School of Public Affairs. The Lewis Center advances research on how people live, move, and work in the Los Angeles region, with a focus on policies and interventions that provide paths out of poverty. Since 1989, Lewis Center scholars and staff have produced high-quality research on transportation access, housing affordability, labor, immigration, and many other topics, with a focus on the policy impact on vulnerable populations. The Center produced programs and events alongside accessible publications for policymakers, public officials, students, opinion leaders, and the public.

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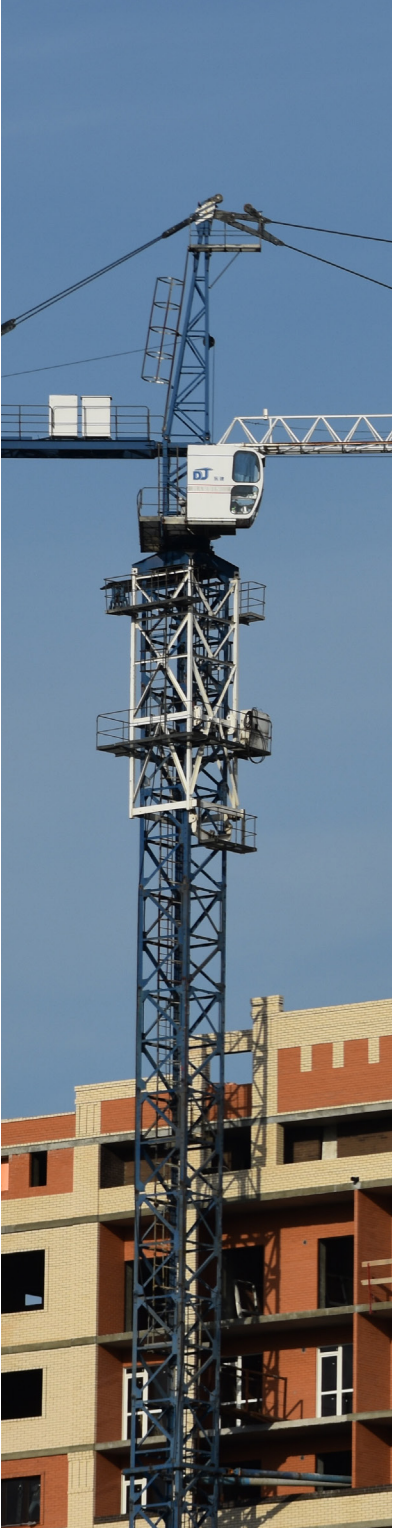

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Executive Summary

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.

Introduction

This report explains how California's Housing Element Law can be used by city councils and planning departments that understand the need to remove local barriers to housing supply and access to opportunity, but find themselves constrained by neighborhood-level opposition to change.

The Housing Element Law requires cities to periodically adopt a state-approved plan, called a housing element, to accommodate the city's share of regional housing need. We argue that housing elements have substantial and underexplored potential to help local officials overcome the pathologies of "normal" land use politics.

The normal municipal lawmaking process has a powerful bias toward the status quo. It's ridden with veto points that defenders of the status quo exploit. The normal procedures by which cities make land use policy also privilege neighborhood interests over citywide interests. Land use is usually hashed out piecemeal, on a project-by-project basis. The homeowners neighboring each project end up having the loudest voices — and they almost always resist change. Each denial or downsizing of a housing project affects the citywide supply of housing, but only slightly. So citywide and regional effects get short shrift, even as they cumulate over the years into crisis-level shortages.

The housing element update offers city officials a way to overcome these pathologies. Defenders of the status quo have an incentive compromise, because a city's failure to adopt a "substantially compliant" housing element on schedule triggers a pro-housing default rule, not perpetuation of the status quo. While the city remains out of compliance, it must approve almost any proposed development in which at least 20% of the units would be affordable to low-income households, regardless of whether the project complies with local zoning. Also, the California Environmental Quality Act, which provides the legal hook for many challenges to general plan amendments and rezonings, is somewhat less of a barrier when the land use reform in question just accommodates the city's share of regional housing need.

The housing element update also provides city councils with an occasion, and a mechanism, to switch from piecemeal policymaking to negotiation of citywide deals on a package of rezoning and constraint-removal reforms. Housing elements enable city officials to make credible commitments about municipal actions in the future. Without the ability to make such commitments, any

citywide deal would be at risk of unraveling under pressure from opponents of specific projects or defenders of specific neighborhoods. City officials can also finesse tough policy choices by converting them into contingent commitments in their housing element: policies that will take effect some years into the future, and only if a specified event occurs. Finally, the substantive and procedural requirements of the Housing Element Law, including the requirement for participation by "all economic segments of the community," encourage municipal officials to weigh long-term, citywide and even regional interests when hashing out the plan.

Our last point is that the housing element update provides a significant opportunity for conscientious city officials to alleviate local barriers to housing in partnership, as it were, with the HCD. HCD's review of housing elements is constrained by its lack of information about local conditions and practices. City councils can, in effect, put pressure on themselves to adopt strong housing element programs by asking their planning departments and consultants to gather data and honestly address local practices and problems in the housing element's analysis of constraints. While members of the city council might take some political flak for "aiding" HCD's review or airing the city's dirty laundry, they can defend their actions as conscientious efforts to comply with state law. And at the end of the day, adopting a housing element that complies with state law is the only way to avoid the pro-housing default. "You may not like the housing element," the city councilperson can say to her critics, "but would you prefer to see massively 'out of scale' apartment buildings going up helter-skelter in neighborhoods of single-family homes?" Working with HCD to remove constraints should be politically easier for many local officials than going it alone.

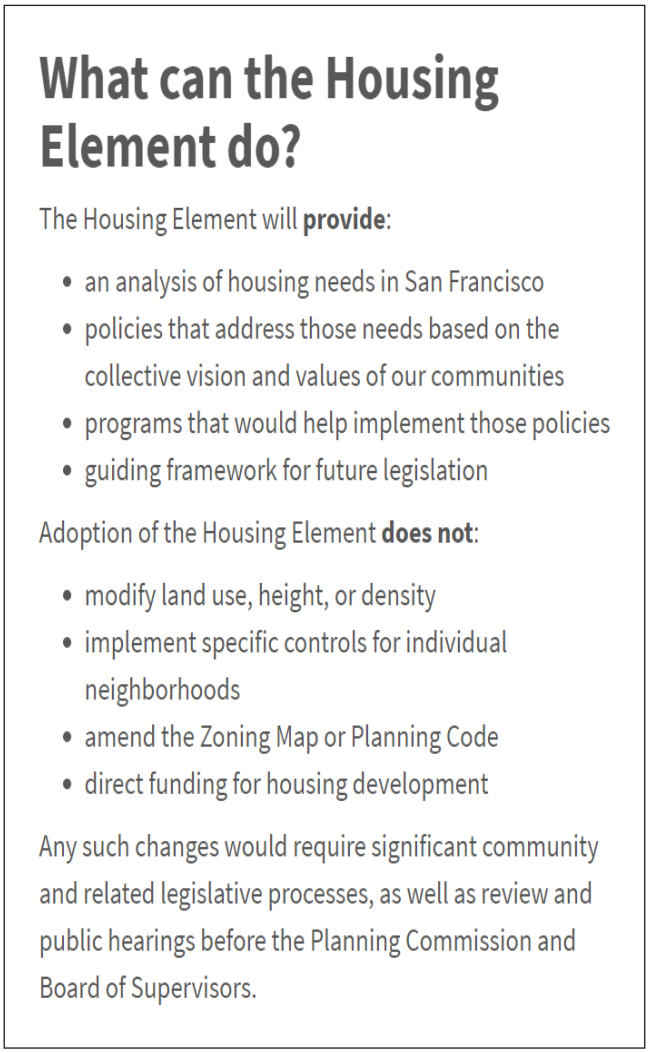
* * *

We proceed as follows. Part I explains the legal effect of housing elements. Part II recaps the local political dynamics at the root of California's housing crisis. Part III shows how local elected officials can use their housing elements, Houdini-like, to escape the trap of vocal anti-housing sentiment.

I. Foundations: Housing Elements with the Force of Law

That housing elements have the force and effect of law is not well understood, but it's essential to our argument so this is where we begin. Consider the explainer on San Francisco's housing element website, reproduced in Figure 1.

Figure 1.
Explainer from San Francisco's housing element website, https://www.sfhousingelement.org/about (Nov. 7, 2020). As detailed in the text, this explainer is misleading, probably inadvertently so.



What can the Housing Element do?

The Housing Element will **provide**:

- an analysis of housing needs in San Francisco
- policies that address those needs based on the collective vision and values of our communities
- programs that would help implement those policies
- guiding framework for future legislation

Adoption of the Housing Element **does not**:

- modify land use, height, or density
- implement specific controls for individual neighborhoods
- amend the Zoning Map or Planning Code
- direct funding for housing development

Any such changes would require significant community and related legislative processes, as well as review and public hearings before the Planning Commission and Board of Supervisors.

After reading this explainer, one naturally wonders: How can the "policies" or "programs" of San Francisco's Housing Element meaningfully "address the housing needs of San Francisco," yet without "modify[ing] land use, height, or density," or "amend[ing] the Zoning Map or Planning Code"? It seems like a contradiction in terms.

In point of fact, housing elements can and do have legal effect — even to the point of "modifying" zoning and planning codes — owing to several different branches of state law.

First, the Housing Accountability Act (HAA) prohibits local governments from denying or reducing the density of certain housing development projects if the project 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...."[1] This precept governs all parcels the housing element deems suitable for lower income housing. Cities must provide the parcel inventory on a standard-form spreadsheet, stipulating the number of units that may be developed on each site.[2] By making this representation to HCD and then voting to adopt the housing element, a city, through the HAA, obligates itself to waive any zoning or development standard that would preclude development of the sites to the density specified in the spreadsheet.

Second, California's Housing Element Law and its statutory companion, the No Net Loss Law, legally obligate city councils to upzone developable parcels, within specified periods of time, as may be necessary to accommodate the city's share of "regional housing need," called RHNA.[3] If the realistic capacity of still-available inventory sites drops below the remainder of the city's RHNA obligation at any point during the eight-year planning period, the city must make up the difference within six months by identifying additional sites or rezoning.[4] The mechanisms for enforcing these duties include decertification of the housing element by HCD, litigation by the Attorney

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[1]Gov't Code 65589.5(d)(5)(A).

[2]See Dep't of Hous. & Cmty. Dev., Memorandum: Housing Element Sites Inventory Guidebook (June 10, 2020), https://www.hcd.ca.gov/community-development/housing-element/docs/sites_inventory_memo_final06102020.pdf (hereinafter, "Sites Inventory Guidebook"); Dep't of Hous. & Cmty. Dev., Electronic Housing Element Inventory Form Instructions (draft, June 12, 2020), https://www.hcd.ca.gov/community-development/housing-element/docs/sites_inventory_instructions_0612020.pdf.

[3]The RHNA is determined through a complicated intergovernmental process. See Christopher S. Elmendorf, Eric Biber, Paavo Monkkonen & Moira O'Neill, *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 46 ECOLOGY L.Q. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500139 (manuscript at 10-11). The Housing Element Law requires local governments to rezone, if necessary to accommodate their RHNA share, within three years of adopting their housing element. Gov't Code 65583(c)(1)(a).

[4]Gov't Code 65863.

General or private parties, a court order suspending the city's authority to issue certain classes of building permits, and, in cases litigated by the Attorney General, escalating fines and even judicial appointment of a special master with "expertise in planning" to do the rezoning.[5]

Third, under background principles of state law, the housing element itself, as a component of a city's general plan, may create additional legal rights and duties. The general plan is akin to a constitution for land use; local ordinances and permitting decisions must be consistent with it.[6] Though this consistency requirement is weak in the main run of cases, courts will enforce "fundamental, mandatory, and clear" provisions of the plan.[7] Thus, if a housing element assigns to the city council additional clear-cut duties (in addition to the rezoning required by state law), or if a housing element declares a "fundamental, mandatory, and clear" policy to accommodate development proposals in specified ways (in addition to waiving development standards that preclude densities specified in the housing element's inventory), such provisions would be legally binding unless or until the housing element is duly amended to remove them. Amendments to a housing element must be submitted to HCD for pre-enactment review, and HCD may respond to improper amendments by decertifying the housing element. So while the provisions of a housing element aren't inalterably locked in, changing them is more time-consuming and risky for the city council than changing ordinary provisions of the municipal code.

Fourth, the Housing Accountability Act stipulates that if a city fails to adopt a timely, substantially compliant housing element, or has its housing element decertified, the city forfeits the prerogative to use its zoning and general plan to deny projects in which at least 20% of the units would be affordable to lower-income households.[8] Such projects may still be denied if they

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[5]Elmendorf et al., *Making It Work, supra* note 4, manuscript at 40-41.

[6]Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 540 (1990); CECILY TALBERT BARCLAY & MATTHEW S. GREY, CALIFORNIA LAND USE & PLANNING LAW 25-26, 46-47 (36th ed. 2018).

[7]See, e.g., Ideal Boat & Camper Storage v. Cnty of Alameda, 145 Cal. Rptr. 3d 417, 425 (Ct. App. 2012).

[8]Gov't Code 65589.5(d) (articulating exclusive grounds on which a local government may deny 20% BMR projects, and conditioning right to deny such projects on basis of local zoning or general plan on "the jurisdiction [adopting] a revised housing element in accordance with Section 65588 that is in substantial compliance with this article"). A city whose housing element has been found noncompliant by a court may also face an injunction suspending the city's authority to issue certain classes of building permits, zoning map amendments, and / or subdivision approvals. Gov't Code 65757. Though judges have broad discretion over the terms of such an injunction, it would be an abuse of discretion not to exempt the 20% BMR projects authorized in noncompliant jurisdictions by Gov't Code 65589.5(d)(5). It's foundational that the provisions of one statute ought not be read in derogation of another.

violate objective health or safety standards, but not for being too tall, too dense, too ugly, or too otherwise out of whack with the city's sensibilities.[9] Thus, not only do compliant housing elements have, in the above-mentioned respects, the force and effect of law, but so too does a city's foot-dragging on its housing element update. Such inaction suspends (by operation of state law) the city's zoning code and general plan vis-à -vis 20% Below Market Rate (BMR) projects.[10]

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[9]The exclusive grounds on which a city may deny such a project are (1) project violates an objective health or safety standard, (2) approval of the project would violate state or federal law, (3) project "is proposed on land zoned for agriculture or resource preservation ... or which does not have adequate water or wastewater facilities." Gov't Code 65589.5(d).

[10]It is also possible—though highly uncertain—that a city's noncompliance may operate to suspend its authority to deny even 100% market-rate projects whose density is at least 80% of the so-called "Mullin densities" (30 units / acre in urban areas). This is an arguable implication of a recent, strange amendment to the No Net Loss statute. See S.B. 166, 2017-2018 Leg. (Cal. 2017). As amended, the statute prohibits local governments from "allow[ing] development of any parcel at ... a lower residential density," unless (1) the project approval is consistent with the city's general plan, and (2) the city's housing element site inventory has adequate remaining capacity to accommodate the rest of the city's share of regional housing need. Gov't Code 65583(b)(1). For cities without a compliance housing element, the No Net Loss statute, as amended, defines "lower residential density" as "lower than 80 percent of the maximum allowable residential density for that parcel or 80 percent of the maximum density required by paragraph (3) of subdivision (c) of Section 65583.2, whichever is greater." Gov't Code 65583(g)(2).

The puzzle is that Gov't Code 65583.2(c)(3) does not "require" any "maximum density" on any parcel. Instead, it spells out minimum densities (the Mullin densities), which local governments have the option to adopt as a safe harbor that qualifies sites as adequately zoned for low-income housing. The legislative history does suggest, however, that the new definition of "lower density" was intended to require development at no less than 80% of the Mullin densities in noncompliant jurisdictions. See Bill Analysis, S.B. 166, Assemb. Comm. on Hous., July 12, 2017 (stating that "lower density" in noncompliant jurisdictions means "a density that is lower than 80% of the maximum allowable residential density for that parcel or 80% of the *maximum density required in housing element law*, whichever is greater") (italics in original, underline added); Bill Analysis, S.B. 166, Assemb. Floor, July 31, 2017 (same); Bill Analysis, S.B. 166, Sen. Floor, Sept. 15, 2017 (same). What remains unclear is whether the legislature intended to authorize such development where it's not otherwise allowed by local or state law, or just to block development on sites where 80% of Mullin density is not already authorized by local or state law.

II. The Local Politics of Housing

Twenty years ago, Paul Lewis and Max Neiman surveyed local government officials across the state of California, eliciting their views about housing and land-use issues.[11]

Lewis and Neiman found that most local officials had pro-housing or neutral preferences with respect to development in their city, but that many felt pressured by local activists to support anti-growth policies.[12]

We're pretty confident this finding would hold up if Lewis and Neiman's survey were replicated today. The policy arguments for a massive expansion of housing supply in California's expensive metropolitan regions are overwhelmingly strong. Equity, economic, and environmental arguments all line up.[13] Yet local officials face strong pressure from homeowners to block new development in existing residential neighborhoods. (Wealthy homeowners are vastly overrepresented in public hearings on housing projects.[14]) Meanwhile, in the commercial and industrial neighborhoods where mixed-use and dense residential development may be allowed, activists often insist that developers provide costly community benefits as a condition of project approval, such as additional money for schools, parks, and roads, and project-labor agreements.[15] The resources provided through community-benefit agreements often serve deep and pressing local needs, yet the effect of making developers bear these costs is that marginal sites, which would otherwise be profitable to redevelop for housing, no longer pencil out.

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[11]PAUL G. LEWIS & MAX NEIMAN, CITIES UNDER PRESSURE: LOCAL GROWTH CONTROLS AND RESIDENTIAL DEVELOPMENT POLICY (2002).

[12]*Id*. at 41-51.

[13]For a synopsis of the literature, see Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 70 HASTINGS L.J. 79, 92-94 (2019); Legislative Analyst's Office, California's High Housing Costs: Causes and Consequences, https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf (Mar. 16, 2015).

[14]KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS (2019); Jesse Yoder, *Does Property Ownership Lead to Participation in Local Politics? Evidence from Property Records and Meeting Minutes*, 114 AM. POL. SCI. REV. 113 (2020).

[15]Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme*, 77 U. CHI. L. REV. 5 (2010).

An underlying problem, as law professors Rick Hills and David Schleicher have explained,[16] is that municipal land-use policy tends to be made on a piecemeal, project-by-project basis. The city council members who run the show (in cities with district elections) usually represent small clusters of neighborhoods, and are chosen through formally or de facto nonpartisan elections.[17] Lacking partisan ties and agendas to organize around, members of the city council default to simple, low-cost decision rules like deferring to one another on projects in their respective districts (sometimes called aldermanic or member privilege).

Member privilege means that when housing projects come before the city council, the decision-maker (the representative of the district where the project is located) has a strong political incentive to consider neighborhood-level costs and benefits, but no incentive to weigh benefits for the city at large.

Moreover, the interests that stand to benefit from a large expansion of the housing stock — such as employers, whose workers' salaries are eaten up by the cost of housing — have little reason to get involved. Each project, considered in isolation, is just a raindrop on the sea of the regional supply of housing and the citywide tax base. Yet an individual project may be a very big deal for the neighbors whose views would be blocked, the trades union whose workers the builder could be made to hire with a project-labor agreement, or the community group that the developer might fund through a benefits agreement. What results is contentious and protracted haggling among the locally affected parties, orchestrated by the district's city council representative. A few large projects survive this process; others die or are never proposed in the first place because the developer anticipates that the uncertainties, concessions, and delays would be cost-prohibitive. The would-be projects most at risk are small-site developments, where "costs of process" cannot be amortized over a large number of dwelling units.

In principle, the political economy of piecemeal approvals could be redressed with a zoning code that allows development of zoning-compliant projects "as of right," without discretionary review or appeals to the city council. But the lawmaking process through which California cities update (or fail to update) their zoning codes has a powerful bias toward the status quo, owing to numerous veto and delay points. In cities with a "strong mayor," opponents of a zoning change that survives the city council may prevail on the mayor to block it. If the mayor lets it through, opponents can circulate signature petitions and trigger a referendum vote. Or they can go to the courts and

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[16]Roderick M. Hills, Jr. & David Schleicher, Balancing the "*Zoning Budget*," 62 CASE W. RES. L. REV. 81, 124–27 (2011).

[17]An election is de facto nonpartisan if one party so dominates the area that the only relevant election is the primary, in which there are no party labels to differentiate the candidates.

demand a do-over, arguing that the zoning change is not consistent with the city's general plan, or that the city did not sufficiently analyze environmental impacts and consider possible alternatives as required by the California Environmental Quality Act (CEQA).

Nor is there much bottom-up impetus for sweeping, pro-housing revisions of municipal zoning codes. The groups that tend to favor more housing (young people, renters, people of color, working families) are generally the least likely to be organized, to be active in local government, or to be taken seriously when they do speak up. The same often goes for faith and economic justice groups who advocate on their behalf.

The conventions of mutual deference and "development by agreement" reflect the political incentives of city councils elected from territorial districts: If nearby homeowners rally against a project, the district's representative can vote it down and win the neighbors' praise; if opposition is muted, the councilmember can hammer out a community-benefits package (or even shake down the developer[18]), scoring points from community groups who will turn out voters at the next election.

But from a citywide or regional perspective, the local political economy of housing is dysfunctional. Housing production in California is barely responsive to housing prices.[19] Neighborhood opposition, and the costs of negotiating for discretionary approvals even where that opposition can be overcome, have made infill development a boutique product that can be produced only in a few places and at very high cost. Yet what the state desperately needs is infill for the masses: a housing product that can be produced at scale, densifying existing residential neighborhoods throughout areas of socioeconomic opportunity.

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[18]Abundant Housing LA, Huizar Corruption Scandal Reveals Need for Reform in Housing Practices, July 6, 2020, https://abundanthousingla.org/huizar-corruption-scandal-reveals-need-for-reform-in-housing-practices/.

[19]Christopher S. Elmendorf, Eric Biber, Paavo Monkkonen & Moira O'Neill, Superintending Local Constraints on Housing Development: How California Can Do It Better (July 8, 2020), fig. 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3614085; Cecile Murray & Jenny Schuetz, Is California's Apartment Market Broken? (UC Berkeley Terner Ctr. for Hous. Innovation, July 2019), https://www.brookings.edu/research/is-californias-apartment-market-broken/.

Why Allow More Density in Residential Neighborhoods?

Most people like their neighborhoods the way they are, and it's natural to hope that California's housing crisis can be solved by building new housing "somewhere else" — perhaps on former industrial sites, or in downtown commercial districts, or by subdividing farms and ranches at the urban perimeter. Yet for California to successfully redress its interlocking environmental, equity, and economic problems, many neighborhoods now reserved for single-family homes will need to accommodate "gentle density," such as duplexes, townhomes, and small apartment and condo buildings. Because of climate change, we cannot just relegate new development to the exurban fringe. People displaced to the hinterlands by the high costs of city housing are both sources and victims of climate change: their long commutes pour greenhouse gases into the atmosphere, while the wildfires that climate change exacerbates threaten to immolate their homes. Nor will it work just to shoehorn new households into towers built downtown or on industrial sites. Towers are much more expensive to construct than smaller wood-framed buildings. Towers are terrific for absorbing the demand for luxury housing in superstar cities, but it's unrealistic to think they'll ever house the masses. The overwhelming majority of metropolitan land on which relatively affordable, middle-density housing could be built is now restricted to single-family use. (In the San Francisco Bay Area, for example, single-family homes are the only form of housing allowed on 82% of the residentially zoned land.) To solve the housing crisis without exacerbating the effects of climate change, single-family zones must be retrofitted to accommodate at least unobtrusive multifamily housing. This transition will enhance socioeconomic mobility as well, as there's compelling evidence that poor children who grow up in middle-class neighborhoods become more likely to achieve middle-class status as adults.

III. How Housing Elements Can Meliorate the Local Politics of Housing

The local political economy of housing is dysfunctional but not intractable. We argue in this section that an invaluable tool for dealing with the problem is already at hand. Local officials who would like to remove barriers to new housing but fear the neighborhood pushback just need to get creative with their housing elements.

Status-Quo Bias vs. Pro-Housing Defaults

We have seen that the normal procedures through which California cities update their land-use ordinances are biased toward the status quo. Housing elements are different. For one thing, they must be updated on a periodic schedule, as prescribed by state law.[20] But more important, if a city fails to adopt a new, substantially compliant housing element on schedule, that failure does not leave the status quo intact. Rather, the city forfeits its authority to rely on local zoning or the general plan as the basis for denying 20% BMR projects. This is a pro-housing default rule. When a city falls out of housing element compliance, its land use regulations are automatically revised, by operation of state law, to allow 20% BMR projects of any scale, on any site, unless the project would violate an objective health or safety standard.[21]

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[20]Gov't Code 65587 & 65588.

[21]The provision of the Housing Accountability Act that disallows local governments without a substantially compliant housing element from denying zoning-noncompliant projects has been on the books in essentially its present form since 2006. See S.B. 575, 2005–2006 Leg. (Cal. 2005) (clarifying that a project's "inconsistency with zoning" is not a basis for invoking the HAA's health and safety exception, and also that a city's housing element must be revised on schedule in order for a local government to use its zoning to deny a 20% BMR project). However, as best we can tell, this provision of the HAA has rarely if ever been used. Probably this is because only a small fraction of California local governments have been out of compliance with the housing element law since 2006. See DEP'T OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES (Feb. 2018), tbl. B.3 (showing that by 4th planning cycle, i.e., years 2005-2015, 90% of jurisdictions were compliant); Dep't of Hous & Cmty. Dev, Housing Element Implementation Tracker (June 28, 2019), available at https://www.hcd.ca.gov/community-development/housing-element/index.shtml (spreadsheet with current compliance status for every jurisdiction). Those which remain noncompliant tend to be small

The pro-housing default helps to solve the local politics of housing not only by upending status-quo bias, but also by giving members of the city council a political rationale to vote for strong housing elements. The housing element may be hated relative to the status quo, but if it's locally preferred to the pro-housing default, members of the city council will serve their constituents well by adopting it.

In cities with a "strong mayor" form of government, the pro-housing default also effects a *de facto* reallocation of power over land use from the city council to the mayor. (Mayors elected citywide are likely to be more pro-housing than councilmembers elected from territorial districts.[22]) The mayor has greater executive capacity than the city council to shape the housing element, and in some cities, the planning director or planning commissioners serve at her pleasure. The mayor through her agents is, in effect, the proposer of the housing element. If the city council tries to water it down, the mayor can respond by vetoing the council resolution adopting a weakened

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jurisdictions where housing prices are likely low too for 20% BMR projects to be profitable. For example, as of June 2019, only 42 of 539 jurisdictions were noncompliant, and only 4 of these 42 jurisdictions had fair-market rents in the upper tercile of the housing-element jurisdictions (ranked by rent). Of these 4 expensive, noncompliant jurisdictions, 2 are very small (Rolling Hills, with a housing stock of about 700 units, and Westlake Village, with about 3400), and as such are probably off the radar screen of most developers. The other two—Encinitas, and Huntington Beach—would seem to be plausible targets for zoning-noncompliant, 20% BMR projects. (Data available from authors upon request.)

Compliance rates in the 1990s and early 2000s were substantially lower than they are today, and we suspect that fear of the prohousing default explains much of the improvement since then. See HCD, California's Housing Future: Challenges and Opportunities (Feb. 2018), tbl. B.3.

Another factor that may explain lack of use of the HAA's prohousing default rule for noncompliant jurisdictions is uncertainty about how courts will interpret it. The HAA generally requires local governments to process development applications on the basis of the rules in place at the time the application is deemed complete, Gov't Code 65589.5(d)(5) & (j)(1), but it's not clear whether this anti-retroactivity norm also applies when lack of a compliant housing element has rendered local zoning and the general plan inapplicable to 20% BMR projects. If the local government can deny pending, zoning-noncompliant development applications the moment it adopts a compliant housing element, developers will probably be reluctant to propose such projects in the first place, since the local government may be able to use CEQA review to string along the project while the city gets its housing element into shape.

[22]See Elmendorf, *supra* note 12, at 135-36; cf. Michael Hankinson & Asya Magazinnik, How Electoral Institutions Shape the Efficiency and Equity of Distributive Policy (Sept. 17, 2019), http://mhankinson.com/assets/hankinson_magazinnik.pdf (finding that plausibly exogenous shifts from at-large to districted local elections induced by California Voting Rights Act caused 46% decline in multifamily housing production); Evan Mast, Why Do NIMBYs Win? Local Control and Housing Supply (Upjohn Institute, Dec. 2019), https://www.dropbox.com/s/76jq4x0x2yc2c54/mast_at_large_ward.pdf?dl=0 (finding similar effect from replacement of at-large with districted elections induced by national Voting Rights Act).

housing element, triggering the pro-housing default. Even if the council overrides the mayor's veto, the fact of the veto would probably embolden HCD to scrutinize the housing element closely and, if there are reasonable grounds for doing so, to deem it noncompliant, again triggering the pro-housing default.

One last point about status quo bias: While housing elements undergo CEQA review and may be delayed because of this, CEQA, properly understood, is less of a barrier to upzoning through the housing element than to normal upzoning.[23] For an ordinary zoning ordinance or general-plan amendment, the "CEQA baseline" — that is, the benchmark against which the proposal is compared to ascertain environmental effects — is the status quo. This means that if a rezoning could worsen local environmental conditions in any respect, relative to leaving the zoning map unchanged, those effects must be analyzed, mitigated, and possibly litigated — even if the rezoning would be a net win for the local or regional environment. By contrast, the baseline for environmental analysis of a housing element should presume expansion of the housing stock by the local government's RHNA share. This follows from the axiom that CEQA applies only to exercises of governmental discretion.[24] Local governments have a mandatory legal duty to accommodate their RHNA.[25] Thus, environmental "effects" that are just a function of expansion of the local housing stock by the RHNA — e.g., traffic, burdens on infrastructure, crowding of schools and parks — should not be deemed effects at all. They're baked into the baseline.

To be clear, this doesn't mean that a city could put its RHNAs in an old-growth forest, damn the consequences. Impacts associated with a local government's discretionary choices about *where* to channel development must be analyzed and mitigated. It's only effects that would arise in any location that may be disregarded.

The Prospect of Enforceable Citywide Deals

Hills and Schleicher posit that city councils could overcome the tricky politics of housing by adopting citywide deals to rezone and remove development constraints.[26] On Hills and Schleicher's telling, the prospect of a citywide deal will mobilize groups that have a lot at stake

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[23]For a fuller development of the argument of this paragraph, see Christopher Elmendorf, CEQA and Housing: Raising the Baseline, Carlaef Blog, May 18, 2020, https://carlaef.org/2020/05/18/ceqa-and-housing/.

[24]Public Res. Code 21080(a).

[25]Gov't Code 65583(c)(1)(A).

[26]Roderick M. Hills, Jr. & David Schleicher, Balancing the "*Zoning Budget*," 62 CASE W. RES. L. REV. 81 (2011); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015).

in the aggregate supply of housing but are little affected by discrete projects. Conversely, since the citywide deal wouldn't imminently result in development of any specific site, neighborhood interests will be less engaged. This inverts the pattern of participation one sees when land use decisions are made on an ad hoc, project-by-project basis.

But there's a fly in Hills and Schleicher's salve: In the usual course of things, city councils cannot credibly commit to abiding by the deal. It's axiomatic that legislative bodies may not bind their future selves through the normal lawmaking process. An ordinance enacted today may be amended tomorrow, in the same way it was enacted. Yet if a citywide zoning deal can be unwound on the back end, with site-specific downzonings, plan amendments, or discretionary denials of zoning-compliant projects, then the interests that would benefit from an enforceable citywide deal have little incentive to mobilize in the first place.

Also, as we explained above, the conventional piecemeal approach to land-use policymaking seems to suit the interests of city councilmembers. Something has to jolt them into a new way of thinking if they're going to forge a citywide deal. Housing elements can do the trick. The housing element's unusual legal status means that city councils can use them to make credible commitments, and the substantive content and participation required by the Housing Element Law can provide the impetus for a deal.

CREDIBLE COMMITMENT THROUGH "FUNDAMENTAL, MANDATORY AND CLEAR" HOUSING ELEMENT POLICIES

No city council can bind its future self with ordinary municipal ordinances, but as we've seen, commitments *become* credible if incorporated into the housing element and therein declared to be "fundamental, mandatory, and clear" components of the general plan. (To avoid ambiguity, a housing element should include a separate appendix or table listing the programs it deems to be fundamental, mandatory and clear.) Again, such provisions of the plan trump local ordinances and regulations, and while the plan itself can be amended, housing element amendments are subject to HCD's review and approval. This doesn't make the commitment failsafe, but it does substantially increase the cost to the city of reneging. Let's consider a few examples to illustrate the potential payoff.

Toward a "Zoning Budget"

A city council may commit through its housing element to what Hills and Schleicher call a "zoning budget." A zoning budget, as they use the term, is just an agreement to maintain a fixed amount of zoned capacity, and thus to offset future downzonings with commensurate upzonings. The basic idea of a zoning budget is already built into the law: Cities are assigned a number of units (the RHNA) which they must plan to accommodate over an eight-year period, and if the capacity of a city's remaining inventory sites falls below the remainder of its RHNA at any point during the

planning period, the city must rezone to provide additional capacity (No Net Loss). While No Net Loss was traditionally hard to enforce, recently enacted reporting requirements should make the zoning budget easier to monitor throughout the planning period.[27] The legislature in 2017 also gave HCD authority to decertify a housing element mid-cycle, including for "failure to implement any program actions included in the housing element."[28]

These state-law reforms make local commitments to a zoning budget substantially more credible. To maximize the odds that the deal will stick, cities should be sure (1) to include a "program" in their housing element to abide by No Net Loss, and (2) to stipulate in their housing element that no downzoning shall take effect until its impact on site capacity has been quantified in a public document and relayed to HCD. If these policies are declared in the housing element to be "fundamental, mandatory, and clear" components of the plan, they will supersede any subsequent municipal ordinance or regulation to the contrary. HCD and nonprofit housing organizations will then be very well positioned to enforce the zoning budget, either by decertifying the housing element, or by suing to enjoin (as plan-inconsistent) a downzoning for which no site-capacity analysis was prepared, noticed, and delivered to HCD.

It might seem redundant to commit in the housing element to abiding by No Net Loss, but this ensures that HCD can act in a timely way to decertify the housing element in the event of a No Net Loss violation, triggering the pro-housing default. Otherwise, the remedy for a No Net Loss violation may require judicial action, probably in the form of declaratory relief or an injunction ordering the city to identify and rezone additional parcels — unnecessary and costly litigation that can and should be avoided.[29] As for the second commitment (providing in the housing element that no downzoning shall take effect until the city quantifies its impact on site capacity and reports to HCD), this incentivizes neighborhood groups to support — rather than sap — the city's compliance with the statutory reporting obligation that's key to No Net Loss enforcement. They

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[27] A.B. 879, 2017-2018 Reg. Sess. (Cal. 2017); A.B. 1397, 2017-2018 Reg. Sess. (Cal. 2017); S.B. 6, 2019-2020 Reg. Sess. (Cal. 2019). These reforms empower HCD to make local governments provide housing element site inventories, and annual updates about development and rezoning, via standard electronic forms and unique parcel identifiers.

[28] A.B. 72, 2017-2018 Leg (Cal. 2017); Gov't Code 65585(i).

[29] HCD takes the position that a No Net Loss violation "is also a violation of the Housing Element Law," which may result in decertification of the housing element. See HCD, Memorandum for Planning Directors and Interested Parties, No Net Loss Law, at 10, Oct. 2, 2019, https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos.shtml. This is a very reasonable position, but we think HCD will be more likely to decertify housing elements for No Net Loss violations if the housing element itself declares No Net Loss to be a fundamental policy, thereby foreclosing any dispute over whether a No Net Loss violation justifies decertification.

won't get the benefit of a local downzoning until its impact on site capacity has been quantified and reported.

Contingent Commitments with Future Effect

The ability to make credible commitments can also help local officials navigate the political shoals by converting politically sensitive policy choices into what we call "contingent commitments with future effect." Instead of dodging the tough issue, or putting a controversial policy into effect right away, the city council can steer a middle course, committing to implement the policy at some time in the future if a specified event occurs.

Here are two examples:

- A city could provide in its housing element that specified provisions of the city's planning and zoning code, which significantly interfere with housing production, will "sunset" unless they are affirmatively revised to reduce their impacts on housing and readopted. Thus, in a city where housing projects are commonly delayed by fights over complex design standards, the city could pledge to revise its design standards, or the procedure for appealing determinations of consistency with the design standards, by a specified date. The housing element would stipulate that if the city fails to enact revised standards or procedures by that date, the city's design-review requirement would be waived.
- A city could provide in its housing element for automatic mid-cycle adjustments. The housing element would quantify "adequate progress" targets for housing production by the midpoint of the planning period. If the city falls short of the target, developers of inventory sites during the latter half of the planning period would receive, say, a density bonus proportional to the size of the adequate-progress deficit, or an exemption from costly requirements such as on-site parking minimums.

These are just examples. The question of whether a tough policy problem is best tackled using contingent future commitments is one for city councils to answer using their knowledge of local conditions. Our point is just that the housing element law opens up this possibility, empowering city councils with tools they would otherwise lack.

MOTIVATING THE DEAL: PERSPECTIVE AND PARTICIPATION IN HOUSING ELEMENT UPDATES

In addition to offering the legal glue needed to hold a citywide deal together, California's housing element framework brings together information and interests in a way that encourages city councils to approach land use from a citywide (or even regional), long-term perspective. This is in sharp contrast to the normal, piecemeal mode of land use decision-making, with its focus on neighborhood-level impacts.

The substantive requirements of the Housing Element Law necessitate a citywide perspective. A housing element must inventory developable parcels across the city and assess whether the sites have adequate capacity, under current zoning, to accommodate the city's share of regional housing need. A housing element must analyze local regulatory constraints on the development of housing, and undertake to mitigate or remove identified constraints. And housing elements must "affirmatively further fair housing," which means assessing racial and socioeconomic segregation in the city and adopting programs to ameliorate it.

The housing element "point of view" is long-term and regional. Housing elements are adopted on an eight-year planning cycle. A housing element's programs don't need to be implemented right away, but the housing element must provide specific dates for implementation.[30]

Within regions, local governments adopt their housing elements on the same schedule, which means there are opportunities for coordination and peer pressure. Normally cities don't have sway over their neighbors' policies, but because housing elements are subject to review and approval by a state agency, a good housing element can have lateral influence. For example, a housing element whose analysis of constraints reveals that the city is permitting a lot more housing than its neighbor, or processing development applications much faster than its neighbor, may induce the state housing agency to scrutinize the neighbor-city's housing element more closely. Similarly, a housing element with strong, innovative programs to mitigate constraints can serve a benchmark or exemplar of what's practicable, shaping HCD's assessment of the housing elements submitted by other cities in the region.

All of this provides an impetus for people and groups that care about the regional supply of housing to engage with the housing element update. State law also provides a measure of reinforcement for spontaneous pro-housing mobilization. The Housing Element Law 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."[31] The housing element's program "shall describe this effort."[32] This is an occasion for planning departments to make a concerted effort to achieve representative participation by the local polity.

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[30]Gov't Code 65583(c).

[31]Gov't Code § 65583(c)(9).

[32]Id.

As a general matter, homeowners and wealthy, whiter segments of the community are more likely to avail themselves of opportunities to participate in land-use decisions than renters and less affluent residents.[33] Statewide surveys also show that homeowners and whites are less supportive of new housing, on average, than renters and people of color.[34] It's therefore likely that a housing element which reflects the preferences of "all economic segments of the community" will accommodate more housing — and especially multifamily housing — than a housing element which reflects the preferences of white homeowners.

Achieving representative participation is no easy matter. Poor people and renters generally have more pressing concerns than attending interminable public hearings or reading draft housing elements that are hundreds of pages long. To elicit and incorporate their voices requires imagination and effort: framing key issues in an accessible way, providing information in translation, and taking account of residents' work and childcare constraints. But this is necessary work, lest the people who usually dominate planning processes masquerade as the true "voice of the community" when in reality they're just one small slice.

Cities updating their housing elements should commission surveys of local public opinion on major housing policy questions, including fair-housing priorities.[35] Respondents should be asked to provide basic demographic information, such as homeowner/renter status, race and ethnicity, and household income. Survey responses should be reweighted to match the city's demographics and reported in the housing element. To a first approximation, these results will depict "the city populace's" housing priorities, as opposed to the priorities of the usual suspects.

Local Knowledge and the Murky Substantive Requirements of State Law

The Housing Element Law can also shift local political dynamics by virtue of the murky substantive requirements it imposes on cities. In particular, it gives local officials a couple of little-understood levers to bring about upzoning and permit streamlining — while placing the responsibility on the state and its laws. These levers arise, first, from the requirement that housing elements translate nominal zoning into estimates of "realistic" site capacity,[36] and, second, from the requirement

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[33]See sources cited in note 15, *supra*.

[34]PPIC Statewide Survey, May 2019, at 10, https://www.ppic.org/wp-content/uploads/ppic-statewide-survey-californians-and-their-government-may-2019.pdf; *William Marble & Clayton Nall, Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Development, J. POL.* (forthcoming), https://www.journals.uchicago.edu/doi/pdf/10.1086/711717.

[35]Housing elements must "affirmatively further fair housing," but the statute gives local governments substantial leeway to set their own fair housing priorities. Gov't Code 65583(c)(10).

[36]Gov't Code 65583.2; Sites Inventory Guidebook, *supra* note 3.

that housing elements analyze "constraints" on housing development and mitigate or remove identified constraints.[37] The realistic-capacity assessment now entails (or appears to entail) some accounting for sites' probability of development during the planning period. As we explain below, a local government's reasonable assumptions about development probabilities can act as a force multiplier on the RHNA.

As for the analysis of constraints, it provides an occasion for cities to assess their own compliance with state statutes that require development applications to be processed within a brief window of time, on pain of the project being "deemed approved" or "deemed compliant" as a matter of law. In a city whose permitting process is very cumbersome, this self study is likely to warrant the enactment of permit-streamlining reforms, since local officials could defend the reforms as necessary to avoid an even more dreaded outcome: HCD's disapproval of the housing element, which would trigger the pro-housing default (curtailment of zoning authority).

Our overarching point is that what the Housing Element Law requires of cities as a practical matter is not just a consequence of the law as written, but also of what HCD can see. The department lacks good information about local land-use restrictions, and it has no in-house cadre of data scientists. It reacts to whatever information local government and community groups may provide. But this position of weakness is also an opportunity for local officials who want to do the right thing, nudging their planning departments and housing-element consultants to generate the information HCD would need for meaningful review.

REALISTIC CAPACITY AND THE FORCE MULTIPLIER OF DEVELOPMENT PROBABILITIES

One might suppose that the "zoning budget" required by the Housing Element Law is equal to a city's RHNA. That's incorrect. What the local government must provide — if not immediately, then through rezoning within three years of the housing element's adoption — is "realistic capacity" on identified sites to accommodate its RHNA.[38]

During previous planning cycles, cities would usually estimate site capacity by applying a small discount factor to the sites' nominal zoned density.[39] For example, residentially zoned sites might be counted at, say, 80% of the nominally allowed density, in recognition of the fact that design standards can prevent development of a site to its full zoned density. In a mixed-use zone where the commercial share of recent projects has averaged 40%, sites might be counted at 60% of nominal capacity. In short, the traditional adjustments reflect the typical or assumed "yield" of the site, in the event the site gets developed during the planning period.

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[37]Gov't Code 65583(a)(5)-(6); Gov't Code 65583(c)(3).

[38]Gov't Code 65583.2; Sites Inventory Guidebook, *supra* note 3.

[39]See Elmendorf et al., *Making It Work, supra* note 4, manuscript at 17-24.

But how likely is that event? Recent amendments to the Housing Element Law direct attention to this question.[40] As we have explained elsewhere, the amendments imply that "realistic capacity" assessments should also account for the probability of sites being developed at all during the planning period.[41] Mathematically:

Realistic Capacity=
*(Probability of site's development during period)**
(Net number of new units if site is developed)

Estimating a site's probability of development during the planning period requires a lot of guesswork, a fancy econometric model, or both. To put local governments at ease, HCD's Site Inventory Guidebook sensibly advises, "If no information about the rate of development of similar parcels is available, report the proportion of parcels in the previous housing element's site inventory that were developed during the previous planning period."[42]

By asking their housing-element consultants to estimate this proportion, city officials can ensure that HCD gets *some* information about development probabilities. This increases the odds that HCD will reject the city's housing element if it takes no account of sites' likelihood of development during the planning period. Local officials then may use the downside risk of HCD disapproval (the "pro-housing default") to justify to skeptical constituents their decision to commit to a zoning budget potentially several times larger than the RHNA.

Several times larger? Yes. A city's assumptions about development probabilities operate as a force multiplier on the RHNA. For example, if a city's RHNA is 1,000 units, and if the city assumes that two sites out of three will be developed during the planning period, the city would have to zone for at least 1,500 units (2/3 * 1,500 = 1,000). But if the city more conservatively assumes that only one site out of five will be developed, it would have to zone for at least 5,000 units (1/5 * 5,000 = 1,000).

CONSTRAINTS ANALYSIS AND PERMIT STREAMLINING UNDER STATE LAW

Reforming a city's discretionary permitting procedures is a Herculean undertaking. Interest groups that use discretionary review as leverage for community-benefits or prevailing-wage agreements will fiercely oppose any move toward the as-of-right zoning model. Homeowners who value their option to block nearby development proposals will be similarly opposed.

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[40] See *id*. at 46-58 (discussing AB 1397, and explaining how development-probability discounting coheres with SB 828, AB 72, AB 3194, AB 1515, and AB 167).

[41] *Id*.

[42] Sites Inventory Guidebook, *supra* note 3. at 20.

Local officials who propose to streamline the permitting process will be unfairly pilloried as sellouts. But housing elements can help them out.

Here's why: Buried in the fine print of the California Government Code are a host of provisions that set time limits on various stages of project-application review, and that require local governments to provide early written notices of noncompliance to developers. Under the Housing Accountability Act and SB 35, housing development projects are "deemed compliant" with standards of which the local government failed to provide proper notice.[43] Under the Permit Streamlining Act and the Accessory Dwelling Unit Law, projects are "deemed approved" if the local government fails to approve or deny the project by the statutory deadline.[44] Even CEQA sets time limits for environmental review.[45]

Yet there remain substantial barriers to enforcing these state-law requirements in the context of individual development applications. Developer-side attorneys have told us their clients are wary of invoking the deemed-compliant provisions of the Housing Accountability Act and SB 35, for fear that doing so would poison the well for negotiations with the city over future project applications. Another attorney, who specializes in accessory-dwelling units, told us the statutory requirement that ADU projects be deemed approved if the application is not processed within 60 days has had no effect whatsoever. Cities almost always miss the ADU deadline, yet for the project applicant, the cost and time required to get a judicial order directing the city to issue a deemed-approved ADU permit far outweigh the benefits.

The housing element review process offers another way to give these provisions their intended effect — which is just to ensure that cities process development applications in a reasonable, timely manner.

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[43]Gov't Code 65589.5(j)(2)(B); Gov't Code 65913.4(b)(2).

[44]Gov't Code 65950; Gov't Code 65852.2(b).

[45]Pub. Res. Code 21080.1, 21080.2 (requiring lead agency to make "final" determination of whether to prepare an environmental impact report, negative declaration, or mitigated negative declaration within 30 days of project application being determined to be or deemed complete); Pub. Res. Code 21151.5(a) (requiring local agencies to establish time limits not to exceed one year for completing an EIR, and not to exceed 180 days for completing a negative declaration); CEQA Guidelines 15107 ("the negative declaration [for a private project that requires public permits] must be completed and approved within 180 days from the date when the lead agency accepted the application as complete"); CEQA Guidelines 15108 ("the final EIR [for a private project that requires public permits shall be completed] within 180 days from the date when the lead agency accepted the application as complete"). While there is no express statutory time limit for making CEQA exemption determinations, the legislature's expectation that the lead agency decide within 30 days whether to prepare an EIR or negative declaration implies that 30 days is also long enough to determine that no environmental study is required.

A housing element must include an "analysis of constraints" on housing development, and a program to mitigate or remove any identified constraints. While the Housing Element Law leaves considerable ambiguity about what qualifies as a constraint that must be mitigated or removed,[46] surely this includes a city's persistent failure to comply with mandatory provisions of state law that are intended to streamline the processing of development applications. At a minimum, cities must mitigate such constraints by deeming development applications compliant or approved when state law so provides.

It follows that a city which frequently misses project-entitlement deadlines must establish *some* procedure within the building department to recognize "deemed approved" entitlements and issue the associated building permits. Similarly, a city which has a track record of denying or reducing the density of projects on grounds other than those included in the initial written notice (in violation of the Housing Accountability Act and/or SB 35) should, at a minimum, establish a protocol to incorporate and cross-reference the initial written notice in the final document memorializing the city's approval, conditional approval, or denial of the project. Finally, a city whose records are so poor as to preclude self-study of compliance with the Permit Streamlining Act, the Housing Accountability Act, SB 35, CEQA, and the ADU laws is a city whose housing element should include a "program" to improve the project-tracking system so that it records the critical state-law milestones.

The simple act of undertaking a self-study of compliance with state permitting laws as part of the housing element's analysis of constraints should disrupt the status-quo forces that ordinarily prevent local officials from reforming their city's permitting regime. By revealing its own noncompliance with state permitting law, a city invites HCD to reject its housing element — unless the housing element includes a serious program to achieve compliance. Anti-development interests will hate all of this. But they'll also hate the alternative of housing element decertification, which triggers the pro-housing default. Local officials who then make a push for as-of-right zoning, or for elimination of planning commission or city council review of project entitlements, are not selling out their constituents. They're merely avoiding the more drastic consequences that would otherwise be visited upon the city by state law.

[46]Elmendorf et al., *Making It Work*, *supra* note 4, manuscript at 60-62.

Conclusion

The local politics of housing are devilish, and the housing element law is at best a partial and imperfect remedy. Municipal officials who hope to improve the lives of their constituents by ensuring an ample supply of housing should consider other interventions too, such as electoral reforms that would reduce the overrepresentation of homeowners and neighborhood interests at the expense of renters and citywide interests.[47] But the next round of housing element updates is upon us. Cities across the state will be rewriting their housing elements over the next two years. It would be a shame if potential gains from these revisions were squandered because local officials did not see how they could use their housing element to pursue meaningful pro-housing policies, while securing for themselves a margin of political insulation from local defenders of the status quo. We hope this report helps chart the path forward.

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[47]Two electoral reforms are particularly worthy of consideration. The first is replacing single-member-district elections with at-large elections or a semi-proportional voting system, such as at-large elections with rank-choice voting. Political scientists have estimated that switching from at-large to districted elections causes housing production to fall by roughly 40%. See sources cited in note 20, supra. Although at-large elections with plurality- or majority-winner rules often fail to provide represent racial and other minorities with a fair chance to secure representation, this can be cured by adopting semi-proportional voting rules; it does not require switching to districted elections. See Campaign Legal Center, Designing State Voting Rights Acts: A Guide to Securing Equal Voting Rights for People of Color and a Model Bill (July 2020), https://campaignlegal.org/sites/default/files/2020-07/DesigningStateVotingRights_Report%20FINAL.pdf. It's doubtful that the conventions of aldermanic privilege with respect to land use would survive the adoption of at-large elections with semi-proportional voting rules, since there would no longer be an obvious correspondence between the location of projects and the "territory" represented by a councilmember. Instead, all councilmembers would compete for votes throughout the city.

The other electoral reform we'd prioritize is moving local elections "on cycle," so that they're held at the same time as congressional and presidential elections. The disproportionate representation of homeowners is much more acute in off-cycle local elections, and shifting to on-cycle elections has been estimated to cause a 200%-400% increase in housing development. See Joseph T. Ornstein, Election Timing and the Politics of Urban Growth (Aug. 14, 2019), https://joeornstein.github.io/papers/Ornstein-ElectionTiming.pdf.

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