Authority of the Department of Housing and Community Development to Conditionally Approve Housing Elements

League of California Cities  
City Attorneys Department  
City Attorneys Conference  

Monterey, California  
May 4, 2007  

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I. Introduction

In recent years, the California Department of Housing and Community Development ("HCD") has frequently found local housing elements to be in compliance with state housing element law under certain conditions. These conditions most frequently require local agencies to implement promised rezonings but on occasion require actual construction of promised affordable housing projects or a record of project approvals. In at least one instance, a locality whose housing element had been found to be in compliance with housing element law was told 18 months later that HCD was adding conditions to its finding of compliance.

These conditional approvals (commonly called “conditional certifications”) have added complications to litigation over the adequacy of housing elements. Plaintiffs have argued that a conditionally approved housing element is not in compliance with State law. HCD letters asserting that conditions have not been complied with, or, in at least two instances, "de-certifying" housing elements when conditions were not complied with (i.e., finding that the element no longer complies with State law), have been alleged to cause the accrual of a cause of action and a new statutory limitations period.

The purpose of this paper is to explore HCD's authority to attach conditions when it reviews housing elements for compliance with State law and the legal effect of such "conditional certification."

II. HCD's Statutory Authority to Review Housing Elements

Each city and county in California is mandated to adopt a comprehensive general plan, which must include a housing element. Detailed requirements for the content of the housing element are included in Article 10.6 of Chapter 3 of Division 1 of Title 7 of the Government Code, commencing with Section 65580. The housing element is the only part of the general plan that must be reviewed and updated according to a fixed schedule.

HCD may adopt "guidelines" for preparation of housing elements. While each city and county must "consider" the guidelines in preparing its housing element, the

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1 Article 10.6, commencing with Section 65580, of Chapter 3 of Division 1 of Title 7 of the Government Code.
2 Government Code Section 65302(c).
3 All references are to the Government Code unless stated otherwise.
4 Section 65588.
5 Health & Safety Code Section 50459(a)(1).
guidelines "shall be advisory" (emphasis added). HCD's current guidelines for preparing housing elements are contained in an HCD publication entitled, Housing Element Questions and Answers: A Guide to the Preparation of Housing Elements, Division of Housing Policy Development (October 2006).

At least 90 days before the adoption of a housing element, or at least 60 days before the adoption of an amendment to the housing element, the planning agency of the city or county must submit the draft element or draft amendment to HCD for review. After reviewing the draft, HCD must "report its written findings" within 90 days of receipt in the case of new elements, or within 60 days of receipt of amendments. In its written findings, HCD "shall determine whether the draft element or draft amendment substantially complies" with Article 10.6. If HCD finds that the draft element or draft amendment does not substantially comply with Article 10.6, the City Council or Board of Supervisors may either change the draft element or amendment so it will "substantially comply" as recommended by HCD, or it may adopt the element or amendment without changes and adopt written findings explaining why the housing element substantially complies despite HCD's objections.

The adopted housing element or amendment must again be submitted to HCD, and Section 65585(h) requires that the department again review the adopted element and within 90 days "report its findings" to the locality. The required "findings" are not described further in Section 65585(h). The only description of "findings" in Section 65585 is contained in previously cited Section 65585(d), which in relation to draft elements and draft amendments requires HCD to determine if the element substantially complies with Article 10.6. Health and Safety Code Section 50459(b), which provides the statutory basis for HCD's policy activities, also states that:

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6 Section 65585(a). When housing elements were initially required, it was not clear whether the guidelines authorized in Health & Safety Code Section 50459(a) were advisory or mandatory. According to an Opinion of Legislative Counsel issued July 01, 1979, “The [D]epartment . . . has the authority to adopt housing element guidelines as regulations. However, the guidelines are advisory only to each city and county, in order to provide assistance in preparing and maintaining their respective general plans.” Op. Leg. Counsel, 1979 A.J. 8174; 1979 S.J. Journal 6006 (emphasis added). These conclusions were later incorporated into Section 65585.

7 Available at: [http://www.hcd.ca.gov/hpd/hrc/plan/he/](http://www.hcd.ca.gov/hpd/hrc/plan/he/).

8 Section 65585(b). Note that this section has the effect of requiring local agencies to submit the plans substantially more than 90 or 60 days in advance of adoption, if the agency wishes to have the opportunity to respond to HCD's comments before adoption as required by Section 65585(f).

9 Section 65585(d).

10 Section 65585(f). In practice, local agencies usually resubmit their draft housing elements to HCD until it has found the draft to be "in compliance." This avoids the situation where HCD may find the changes made by the locality to be inadequate.

11 Section 65585(g).
The department shall review housing elements and amendments for substantial compliance with Article 10.6 (commencing with Section 65580) of Chapter 3 of Division 1 of Title 7 of the Government Code and report its findings pursuant to Section 65585 of the Government Code.

Presumably, then, HCD should make one of the following findings: 1) The adopted element/amendment substantially complies with housing element law; or 2) the adopted element/amendment fails to substantially comply with housing element law. HCD in its review of adopted housing elements and amendments does in fact make one of these findings. (An HCD finding that a housing element substantially complies with state law is commonly referred to as HCD “certification” of the housing element.) All but two HCD review letters since November 2004, including those that impose conditions, contain language that either specifically finds the housing element in compliance: "The Department is pleased to find the adopted element in compliance with State housing element law;" or states: “The following revisions are still needed to bring the adopted element into compliance with housing element law. .”

HCD's own reporting recognizes this either-or choice and lists housing elements as being either IN or OUT of compliance. HCD is required to make an annual report to the Legislature on the status of housing elements and "the extent to which they comply with Article 10.6." HCD's web site and its annual report show all adopted housing elements that have been reviewed by HCD as either IN compliance (if the letter included the first statement) or OUT of compliance (if the letter included the second). A housing element found IN compliance is defined as one that "the Department found in compliance with State housing element law." Housing elements with conditions are included in this category.

In practice, the first HCD review of a proposed housing element rarely finds a proposed housing element to be in substantial compliance and typically contains a long list of minor and major changes that must be made. Communities usually resubmit their housing elements to HCD for a second, third, or even fourth review.

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12 The two letters that do not contain this language state instead that the element "addresses the statutory requirements." However, the absence of the specific language finding compliance appears to be a drafting error. At other places in both letters, HCD refers to its "finding of compliance."
13 Health & Safety Code Section 50459(c).
15 Other categories are: Under HCD Review; Self-Certified (for certain localities in San Diego County); Under Local Process; or DUE (meaning overdue per Section 65588). See id. at 13.
16 See id. at 21.
and do not adopt their housing elements until HCD has approved the draft housing element.

After this lengthy series of reviews, HCD has often formed strong views of the critical issues in the community, particularly around rezonings needed to achieve adequate sites and where the locality may be resisting actions that HCD believes are necessary to bring its housing element into compliance with state law. When HCD places conditions on its certification of the housing element, the conditions (with only one exception, Napa County) do not require changes in the housing element itself, but rather require that certain implementing actions be taken, usually the rezoning of sites to densities suitable for low-income housing. A typical condition is worded as follows: "The finding of compliance is conditioned on successful completion of the following program implementation actions: . . ." The conditions therefore are not based not on the housing element’s content, which is adequate on its face, but rather on HCD’s concern that the locality will not carry out the promised implementing actions.

Attached to this paper is a matrix setting forth cities and counties which have received conditional certifications from HCD, the conditions that HCD imposed, and (when we were able to ascertain this information) the current status of the conditional certification.

III. Legal Effect of an HCD Conditional Approval

There are several consequences if HCD finds that a local housing element is not in compliance with State law. It may be easiest to understand the potential effects of an HCD conditional certification by examining the effects of non-certification.

A. Legal Effect of an HCD Finding of Non-Compliance

There are few direct legal consequences of an HCD finding that a housing element is not in substantial compliance with state law. These relate primarily to the burden of proof in a lawsuit challenging the validity of a housing element and to eligibility and preferences for certain funds.

Rebuttable Presumption of Validity. If a housing element receives a finding of substantial compliance from HCD, in any subsequent legal challenge, the housing element is entitled to a rebuttable presumption of validity.17 The effect is that the local entity’s decisions receive a higher degree of judicial deference. HCD’s

17 Section 65589.3.
position is not determinative, however. The ultimate arbiters of whether housing elements substantially comply with housing element law are the state courts. 18

In published opinions, the Court of Appeal has found an HCD-approved housing element to not conform to housing element law, 19 and has found HCD-disapproved elements to be in compliance. 20 While the presumption of validity (or lack thereof) was cited in all of the cases, in none of the cases did the presumption appear to play a major role in the outcome. One court noted that there is no presumption of invalidity based on the Department's findings. 21 Nonetheless, in a housing element challenge, evidence that the state's housing agency has found the element to be in compliance with state law could be persuasive.

Eligibility for Funding. An HCD-approved housing element is also a pre-condition for a few state grants. The most important is the Workforce Housing Reward Program, funded with Proposition 46 bonds. 22 The Workforce Housing Program provides grants for capital facilities in communities where new lower income housing has been built; the grants are awarded automatically on a formula basis if lower income housing is constructed. 23

Trailer bills are currently being considered for Prop. 1C funds, and it is possible that some could require an HCD-approved housing element as a precondition for funding.

Loss of Preferences for Some State Grants. Some state funding programs give points, or priority, to jurisdictions that have an HCD-approved housing element. For instance, the BEGIN program, originally funded with Proposition 46 bonds but with $125 million added from Prop. 1C, gives additional points to communities with a certified housing element. 24 BEGIN (Building Equity & Growth in Neighborhoods) provides grants for downpayment and other assistance to lower and moderate-income homeowners. The state’s Infrastructure Revolving Fund Program grants 10 points (out of 200 possible) to communities that have an HCD-

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21 See Fonseca, slip op. at 8.
23 An HCD-approved housing element was also required in the past for the Jobs-Housing Balance Improvement Program (Health & Safety Code Sections 50543 & 50544) and Local Housing Trust Fund Matching Grants (Health & Safety Code Sections 50843 & 50843.5), but these programs have run out of money.
24 Health & Safety Code Section 50864
approved housing element. Housing programs, such as state-controlled HOME funds, also give priority to communities with certified housing elements.\textsuperscript{25}

\textbf{Redevelopment Activities}. Some special legislation also requires an HCD-approved housing element, such as the authority for Orange County to spend redevelopment housing set-aside funds for lower income housing within the boundaries of cities in the County\textsuperscript{26} and the ability of the San Francisco Redevelopment Agency to incur indebtedness for housing activities until 2014.\textsuperscript{27} If redevelopment agencies that adopted redevelopment plans before December 31, 1993 wish to extend their plan for more than 40 years, they must have adopted an HCD-certified housing element.\textsuperscript{28} Communities that wish to set aside less than 20 percent of their tax increment for housing must also have an approved housing element.\textsuperscript{29}

Other statutes require that communities have a housing element that substantially complies with Article 10.6 but do not require HCD approval.\textsuperscript{30} Most of these relate to the activities of redevelopment agencies. For instance, a compliant housing element is a prerequisite to adoption of a redevelopment plan.\textsuperscript{31} An HCD finding of non-compliance could encourage a challenge to a redevelopment plan based on failure to adopt a housing element conforming to state law.

There have also been frequent efforts in the Legislature in the past few years to place penalties on communities that do not have an approved housing element which have generally been successfully resisted by the League of Cities.\textsuperscript{32}

\textbf{B. Legal Effect of Conditional Approval}

Is a housing element approved with conditions substantially in compliance with housing element law, or not? Does it qualify for the rebuttable presumption that it

\textsuperscript{25} It is somewhat ironic that the primary penalty for a community without an approved housing element is the loss of funds for the affordable housing they are considered to be making insufficient efforts to provide.
\textsuperscript{26} Health & Safety Code Section 33334.2a(a)(1).
\textsuperscript{27} Health & Safety Code Section 33333.7.
\textsuperscript{28} Health & Safety Code Section 33333.10(h)(1). It is difficult to make the findings for these extensions, and few communities have done so to date. However, as redevelopment plans are due to expire, attempts to extend the plans are likely to become more frequent.
\textsuperscript{29} Health & Safety Code Section 33334.2a(2)(C). See \textit{also} Health & Safety Code Sections 33334.25(c)(1) (transfer of housing set-aside funds to a joint powers agency); 33334.30(c)(1) (housing set-aside pool in San Mateo County); 33492.20(a)(2) (military base conversion redevelopment agencies).
\textsuperscript{30} See, \textit{e.g.}, Health & Safety Code Sections; 33334.27(f)(10) (joint powers agency for housing in Solano County);
\textsuperscript{31} See Health & Safety Code section 33302 and 33367(d)(4).
\textsuperscript{32} For instance, S.B. 910 proposed in 2001 and introduced by Senator Dunn would have penalized local agencies that HCD found to be not in compliance with housing element law.
is in substantial compliance, or not? Are communities with conditionally certified housing elements eligible for workforce housing grants?

HCD’s view is apparently that housing elements approved with conditions are “substantially in compliance.” HCD’s letters attaching conditions to its finding of substantial compliance usually contain language congratulating the local agency on being eligible for workforce housing grants, and HCD has in fact provided grants to those cities. HCD could not approve these grants if it had not found the housing elements to substantially comply with state law. HCD’s annual report to the Legislature on housing element compliance and its web site also show housing elements only as being “IN” or “OUT” of compliance with housing element law (unless the elements are under review). We have been unable to find any HCD publication discussing conditional approvals in any way, except for the letters themselves.

However, plaintiffs challenging housing elements may use HCD’s conditional approval as evidence that the locality’s housing element does not qualify for the rebuttable presumption that it is in substantial compliance with housing element law. At least one Superior Court in a pre-trial motion held that the local housing element was not entitled to the rebuttable presumption because of HCD’s conditional approval, stating:

"The finding by the California Department of Housing and Community Development (HCD) that the housing element complies with statutory requirements was conditional. Defendant acknowledges that those conditions have not been met. Therefore, the presumption of validity does not apply until an unconditional finding is made by HCD."

(Note that the condition that had not been met demanded regular reporting of the City's progress in actually approving housing developments and so could not be met by any unilateral action of the City, which had completed all rezonings and other implementation measures promised in the housing element.)

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33 Typical language reads: "Because the City's adopted housing element is in compliance, [City] has met one of the threshold requirements for ... the Workforce Housing Program."

34 Neither the Questions and Answers nor HCD's annual report to the Legislature on the status of housing elements discuss conditional certification.

35 At trial, the court found the locality’s housing element substantially conformed to housing element law. It did not discuss whether or not the locality was entitled to the rebuttable presumption of validity. The plaintiffs have appealed the judgment.
We are not aware of any formal HCD statement that a conditionally approved housing element is entitled to the rebuttable presumption of validity. Consequently, HCD’s practice creates an aura of uncertainty regarding whether a conditionally certified housing element substantially complies with state law.

IV. Authority to Impose Conditions

Nothing in the statutes giving HCD the authority to review housing elements grants the agency the express authority to impose conditions on a finding that a housing element is in compliance with state law. Attachment of conditions also implies the ability to reverse the finding of substantial compliance if the conditions are not met. No provision of the relevant statutes gives HCD the ability to find the identical housing element to be not in substantial compliance with state law after it has found the same element to “substantially comply.”

A. HCD's View of Its Authority to Impose Conditions

HCD has issued no written document explaining its authority to conditionally approve housing elements. HCD's Division of Housing Policy Development (the division that reviews housing elements) has simply stated that the agency’s attorneys believe that HCD has the authority both to conditionally approve housing elements and to de-certify them (without citing any particular legal theory). When cities have challenged the practice, HCD has implied that it would not find the housing element to be in substantial compliance if it could not attach conditions to its finding. Housing advocates also have expressed concern that HCD has used conditional approvals to find that inadequate housing elements comply with state law.

However, the conditions attached by HCD (with the one exception noted previously) do not require changes in the housing element itself. HCD lists changes needed in the housing element only when it fails to certify housing elements. Instead, HCD's conditions require that the local agency implement programs in its housing element, usually by rezoning sites to densities suitable for low-income housing. In a few cases, HCD has even added conditions requiring that the locality approve housing or construct planned low-income housing. HCD's theory appears to be that there is some question about whether the agency's inventory of housing sites (particularly its inventory of sites suitable for low-income housing) is adequate. HCD will know that there are enough sites only if the local agency actually rezones the sites, approves proposed housing at the densities promised, or

36 HCD staff have stated that conditionally approved elements are entitled to the presumption of validity but this is not reflected in review letters or in policy documents.
constructs low-income housing. If the agency does not carry out the promised actions, then HCD will have evidence that the housing element was never adequate and hence may "de-certify" it. Typical language in a letter with conditional approvals reads as follows and supports this analysis:

"If [City] does not implement these conditions, [City's] housing element would no longer identify adequate sites and would require immediate amendment to provide alternative appropriately zoned sites."

Since HCD has issued no written document explaining its authority to conditionally approve housing elements, the legal theory supporting the Department's position can only be inferred.

**B. Possible Challenges to HCD's Conditional Approval Authority**

There are two theories under which HCD's conditional approval policy could be challenged. First, HCD may lack the authority to impose conditions and de-certify housing elements. Second, if viewed as an interpretation of housing element law, HCD's interpretation may be incorrect.

1. **HCD Authority to Impose Conditions on Housing Elements.**

The powers of the Department of Housing and Community Development are contained in Part 2 of Division 31 of the Health & Safety Code (commencing with Section 50500). The specific duties of the Division of Housing Policy Development, which is responsible for the review of housing elements, are specified in Health & Safety Code Sections 50450 – 50464.

"[I]t is well settled that administrative agencies have only the powers conferred on them, *either expressly or by implication*, by Constitution or statute."\(^{37}\) "An administrative agency must act within the powers conferred upon it by law and may not act in excess of those powers. Actions exceeding those powers are void."\(^{38}\)

HCD and, in particular, the Division of Housing Policy Development, was created and empowered by statute and so has only the powers conferred by the Legislature. In relation to its review of housing elements, HCD is authorized only to "review housing elements and amendments for substantial compliance with Article 10.6 . . . and report its findings pursuant to Section 65585 of the Government Code."\(^{39}\)


\(^{39}\) Health & Safety Code Section 50459(b).
No Express Power. The statute does not expressly authorize HCD to place conditions on a finding of substantial compliance. Other statutes do expressly authorize agencies to place conditions on a finding of substantial compliance. For instance, the Education Audit Appeals Panel (which hears appeals from school district audits) is expressly authorized to establish "conditions for finding substantial compliance." Similarly, the California Law School Accreditation Committee may establish conditions for full compliance with the standards of accreditation established by the Committee. Had the Legislature intended to give HCD the express authority to place conditions on a finding of substantial compliance, it could have drafted the statute accordingly.

Implied Power to Impose Conditions. HCD's power to place conditions on a finding of substantial compliance implies a power to revoke the finding of substantial compliance. This appears inconsistent with the statutory scheme established in Article 10.6.

Inconsistency with 90-Day Reporting Requirement. HCD's review of housing elements is to be reported "pursuant to Section 65585." Section 65585 requires HCD to report its findings regarding substantial compliance "within 90 days" after adopted elements are submitted to HCD. HCD's "de-certifications" of housing elements have occurred years after adoption, well outside the 90-day period required by the Legislature. In addition, with these "de-certifications," HCD has placed itself in the somewhat untenable position of finding the identical document first to be in substantial compliance with housing element law, and then not to be in substantial compliance with housing element law. Nothing authorizes HCD to change its mind about the adequacy of a housing element more than 90 days after the adopted element has been submitted for review.

"Administrative action must be consistent with the enabling statute." Here the enabling statute requires HCD to report its findings consistent with Section 65585. Section 65585 requires that HCD report its findings within 90 days. Reporting non-compliance years after the housing element has been submitted for review is directly inconsistent with Section 65585's mandate that HCD's findings be reported within 90 days.

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40 Education Code Section 41344.1(d)(1).
41 Cal. St. Bar Law Sch. Accreditation, Rule Five, Section 5.06.
42 Health & Safety Code Section 50459(b).
43 Section 65585(h).
44 Ass'n for Retarded Citizens v. Dep't of Developmental Servs., 38 Cal. 3d, 384, 392 (1985) (citations omitted).
Uncertainty Regarding Rebuttable Presumption of Validity. HCD’s determination of substantial compliance entitles agencies with HCD-approved housing elements to be given the benefits of a rebuttable presumption of validity in any litigation. The Legislature appears to have intended to encourage localities to go through the effort of obtaining HCD approval in exchange for greater deference by the court in the event of a legal challenge.

HCD’s practices have created uncertainty regarding the status of conditionally approved housing elements, as described earlier. A court could interpret all conditional certifications as the equivalent of a finding of substantial compliance, as shown in HCD’s publications. If so, the city would be entitled to the rebuttable presumption of validity. If, however, a court demanded “unconditional certification” (as occurred in the case discussed earlier), then local governments would not be entitled to the presumption of validity. Finally, a court would also have to contend with the validity of any subsequent decertification of the agency’s housing element.

In providing a rebuttable presumption of validity, the Legislature created only two classes of housing elements – those found by HCD to be in substantial compliance, and those found by HCD to not be in substantial compliance. If HCD believes that it is entitled to create a category of "conditionally certified" housing elements, it would seem that category would be reflected in HCD's required annual report to the Legislature on the "extent to which [housing elements] comply with the requirements of Article 10.6." HCD, however, only reports housing elements as being IN or OUT of compliance. Yet, HCD's letters purporting to attach conditions to its finding of substantial compliance create uncertainty that was not intended by the Legislature nor reflected in any adopted HCD policies.

Nature of Conditions Imposed by HCD. It would seem that an HCD finding that a housing element must be changed in specific ways to substantially comply with housing element law implies that the housing element does not, as adopted, comply with housing element law. As to Napa County, however, when HCD found that specific changes needed to be made in the housing element, it nevertheless found the element to be in substantial compliance. HCD's conditions, however, usually require local implementation of the programs contained in the housing element.

But an adequate housing element need only contain a program that sets forth a schedule of actions that the local government "intends to undertake." The

45 Section 65589.3.
46 Health & Safety Code Section 50459(c).
47 Section 65583(c).
program identifies actions that "will be taken" to make adequate sites available and must identify sites for a variety of housing types. When the inventory of sites is inadequate, the program "shall provide for sufficient sites to meet the need" for farmworker housing and also identify sites that "shall be zoned" to permit residences during the planning period. \(^49\) Even if there is a mandate for cities to rezone in accordance with their housing element (and this is debatable), the housing element only adopts the "intended" actions and does not implement them.

HCD recognizes that sites are not required to be zoned as promised at the same time as the Housing Element is adopted. While HCD's *Housing Element Questions and Answers* encourages localities to accomplish rezoning at the same time as housing element adoption, it states that "rezoning actions should be completed within the first year to two years." \(^50\) This is well outside the 90-day period for HCD to report its findings on whether the *housing element* conforms to state law.

HCD's actions in imposing these conditions are clearly intended to support the Legislature's strong interest in housing production and in affordable housing in particular. \(^51\) However, the Legislature has not delegated to HCD the authority to monitor local agency implementation of policies contained in their housing elements, and conditions that purport to require implementation are likely in excess of HCD's authority.

*B.C. Cotton v. Voss* \(^52\) is illustrative of the limitations imposed on state agencies when they adopt requirements that support the agency's purpose but exceed its authority. In *B.C. Cotton*, the Department of Food and Agriculture issued regulations requiring growers to apply for a license for certain types of cotton which could damage the cotton industry in the Central Valley. Although these requirements protected the cotton industry, the court found that the statutory scheme did not give licensing authority to the Department. \(^53\) Similarly, an attempt by the California Table Grape Commission to enlarge the powers granted to it by filing charges of unfair labor practices was rejected because the benefit to growers was "insufficient to legitimize the agency's conduct" without Legislative authorization. \(^54\)

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\(^{48}\) Section 65583(c)(1)(B).

\(^{49}\) Section 65583.2(h).

\(^{50}\) State of California, Department of Housing and Community Development, Division of Housing Policy Development, *Housing Element Questions and Answers: A Guide to the Preparation of Housing Elements* 44 (October 2006).

\(^{51}\) See, e.g., Health & Safety Code Sections 50000 – 50010; Government Code Section 65589.5.


\(^{53}\) Id. at 955-58.

As in the *B.C. Cotton* and Table Grape cases, the Legislature has not granted HCD the authority to monitor implementation of local housing elements. The potential benefit to housing production resulting from the conditions does not legitimize actions in excess of HCD's authority. This may be particularly the case because the Legislature has adopted alternative means to require localities to implement their housing elements. These include:

- Amendments to Section 65589.5 (the former Anti-NIMBY Act, now the Housing Accountability Act) that do not permit denial of an affordable housing project if the site is identified as suitable for affordable housing in the housing element, even if the agency has not amended the land use element and zoning to permit development as shown in the housing element.\(^{55}\)

- Requirements that local agencies cannot take actions that would result in a lower density than shown in the housing element, unless adequate sites remain to meet the locality's "fair share."\(^{56}\)

- A requirement that cities and counties zone adequate sites to accommodate the unaccommodated portion of their regional housing need in the first year of the next housing element planning period if they failed to complete needed rezonings in the former planning period.\(^ {57}\) In this provision, the Legislature has recognized that some communities have not implemented the rezonings promised in their housing elements and has specified the appropriate remedy: a mandate to rezone in the first year of the next planning period. "De-certification" of the housing element is *not* the remedy imposed.\(^ {58}\)

The lack of express authority; the conflict with Section 65585; the uncertainty created regarding the rebuttable presumption of validity; and the Legislature's specification of alternative means to deal with the same problem all suggest that HCD's imposition of conditions requiring certification was not authorized by the Legislature and exceeds HCD's authority.

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\(^{55}\) Section 65589.5(d)(5)(A).

\(^{56}\) Section 65863.

\(^{57}\) Section 65584.09(a).

\(^{58}\) In *Fonseco v. City of Gilroy*, 2007 Cal. App. Lexis 418, the Court of Appeal also held that the Least Cost Zoning Law (Government Code Section 65913.1), which requires local agencies to "zone sufficient vacant land for residential use" to meet housing element requirements, contains no express requirement that a locality immediate rezone sites to residential uses after adopting a revised housing element and that housing element law also does not require immediate action to rezone and "permits a locality to act within the planning period to meet regional housing needs." Slip op. at 42.
2. HCD Conditions as Interpretations of Housing Element Law

HCD's practice of attaching conditions to a finding of substantial compliance could be viewed as the agency's interpretation of housing element law, although it has no written guidelines or procedures explaining the practice or citing a legal justification.

In *Hoffmaster v. City of San Diego*, the Court of Appeal "substantially rel[ied]" on HCD's published guidelines regarding identification of adequate sites for homeless shelters and transitional housing. The court noted that "consistent administrative interpretation of a statute over a reasonable period of time, particularly by the agency charged with enforcing, implementing and interpreting the statutory scheme, is entitled to great weight." However, in *Yamaha Corp. of America v. State Bd. of Equalization*, the California Supreme Court disapproved several of the cases relied on in *Hoffmaster* relating to agency authority and established a new framework for judicial deference to agency interpretations of state law. Based on *Yamaha*, the Court of Appeal in *Fonseco v. City of Gilroy* specifically disagreed with the *Hoffmaster* court's deference to HCD's guidelines.

*Yamaha* established one category of "quasi-legislative rules" where the Legislature has delegated its lawmaking power to a State agency. In this case, judicial review is limited. It established a second category of administrative rules interpreting a statute. Here, the degree of judicial deference is "fundamentally situational."

The Legislature has not delegated lawmaking power to HCD to develop quasi-legislative rules for substantial compliance. While the statute authorizes HCD to review housing elements and report its findings regarding substantial compliance, the Legislature has given HCD no express authority to adopt regulations regarding substantial compliance. Rather, the Legislature has indicated that HCD's guidelines for housing element preparation are only "advisory." Where the Legislature desires to delegate lawmaking power regarding findings of substantial compliance, it has specifically done so. For instance, the Education Audit Appeals Panel is expressly authorized to define "'substantial compliance' by issuing regulations or through adjudicative opinions or both." No such authority has been given to HCD, nor has HCD adopted rules in any formal sense. HCD's current practice of

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60 *Id.* at 1113 n.13.
63 *Id.* at 10–12.
64 Section 65585(a).
65 Education Code Section 41344.1(c).
attaching conditions to compliance findings are very unlikely to be considered as quasi-legislative rules.

The degree of deference to be given to HCD's view is thus "situational" and dependent on a wide variety of factors. In *Yamaha*, the Supreme Court listed two categories of factors to be considered. First is HCD's expertise and technical knowledge, including the technical complexity of the text to be interpreted and whether the agency is interpreting its own regulation (which it is assumed to be particularly familiar with) or a statute (where it is entitled to less deference). Second are factors "suggesting the agency's interpretation is likely to be correct," including opportunities for public notice and comment before the interpretation was adopted; evidence that the agency has consistently maintained the interpretation, rather than taking a vacillating position; adoption of the interpretation at the same time as adoption of the statute; and adoption of the interpretation in accordance with the Administrative Procedures Act.66

HCD has a high degree of expertise and technical knowledge in the interpretation of housing element law, which is quite complex. However, the other factors would tend toward less deference: HCD is interpreting a statute, not its own regulation; HCD began the practice without any public notice or comment; the practice has not been documented in a written policy; HCD has provided no discussion of its justification for the policy; HCD did not issue letters with conditional findings until, we believe, the early 2000s, over 20 years after HCD was given the authority to review housing elements in 1980; and the practice was not adopted in accordance with the Administrative Procedures Act. It appears that this interpretation of HCD (to the extent it can be considered an administrative rule) would be entitled to little deference.

This interpretation is supported by the Court of Appeal's discussion of the deference to be given to HCD's housing element guidelines (*Housing Element Questions and Answers*) in a recent housing element case, *Fonseco v. City of Gilroy*. After discussing many of the factors listed above (and in the case of housing element guidelines, HCD at least has express statutory authority to prepare the guidelines), the court concludes that, "the weight we afford here to [HCD's] Qs & As is in accordance with our view of the substantive merits of [HCD's] statutory interpretation."67 Rephrased, the court gives deference to HCD to the extent it agrees with HCD.

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Given the little deference to be accorded to HCD's views, the lack of express or implied authority to attach conditions to approval of housing elements and to decertify them, and the conflicts between HCD's practice and the statutory scheme, there are strong arguments that HCD's interpretation of the statute is incorrect, and HCD is exceeding its authority in finding local housing elements to comply with state law "subject to" implementation of housing element programs.

**Conclusion**

Although HCD may be exceeding its authority in attaching conditions to housing element certifications, it is unclear what is the appropriate action to take when HCD does so. Complaining to HCD that it is exceeding its authority could simply result in an HCD finding that the housing element in question does not substantially comply with state law. A conditionally approved housing element listed as IN compliance in HCD's annual report to the Legislature is clearly a more desirable option for a locality than a housing element labeled OUT of compliance.

Conditional approvals, however, are playing mischief with litigation and, when they result in a decertification, potentially create the accrual of a new cause of action. The League of Cities may wish to write HCD and ask the basis for HCD's view that this practice is within the scope of its authority, citing the concerns raised above. This may have the effect of exposing HCD's practice of requiring implementation – something it likely has no authority to do.

However, such a request could result in giving the practice a stronger legal basis. If the League disagreed with HCD's interpretation, it would have no clear course of action to change the policy.

Another option is to support legislation that would remove HCD's ability to attach conditions to its approval of housing elements. This may be supported by housing advocates, who believe that conditional approvals allow inferior plans to be approved by HCD. This change in the law could, however, result in more rigid review of housing elements by HCD and fewer findings of substantial compliance.

Finally, cities could wait for the appropriate case to arise and submit amicus briefs at the appropriate time. Since most housing element lawsuits are settled in the trial court, however, this allows HCD's current practice to continue to create confusion and uncertainty in litigation.
## CITIES AND COUNTIES WITH “CONDITIONALLY” CERTIFIED HOUSING ELEMENTS

<table>
<thead>
<tr>
<th>CITY</th>
<th>CONDITION</th>
<th>STATUS</th>
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<tbody>
<tr>
<td>Belvedere</td>
<td>Second unit ordinance amendments; moratorium on 2nd units allowed to expire (6/30/05)</td>
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<tr>
<td>Brentwood</td>
<td>Rezoning 20 acres to allow 30 units per acre by right with water and sewer available (7/19/05 and 4/19/05)</td>
<td>Conditions Satisfied</td>
</tr>
<tr>
<td>Buellton</td>
<td>Establish an Affordable Housing Ordinance Overlay Zone (AHOZ) and designate specific amount of land for permissive or restrictive AHOZ (12/22/04)</td>
<td>Conditions Satisfied</td>
</tr>
<tr>
<td>Claremont</td>
<td>Rezoning of institutional properties identified in the element by June 30, 2007, and monitor development of 45 units for lower-income households in Base Line Road project (10/17/06)</td>
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<tr>
<td>Clayton</td>
<td>Rezoning per Program 2 by July 2008 and Program 3 (Redevelopment set aside funds) (12/27/05)</td>
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<tr>
<td>Grand Terrace</td>
<td>Rezoning Mt. Vernon, Grant Terrace Road Senior Housing Specific Plan and one additional site to R-3+ (6/10/05)</td>
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<tr>
<td>La Quinta</td>
<td>Completion of financially assisted projects by dates identified in Table H-45 (12/30/04)</td>
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<tr>
<td>Martinez</td>
<td>Rezoning 15 acres to R-1.5 by June 30, 2006 (8/24/05)</td>
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<tr>
<td>Newport Beach</td>
<td>Ensuring supply of appropriately zoned sites to accommodate regional housing need for lower-income households (6/20/05)</td>
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<tr>
<td>Oakley</td>
<td>Rezonings and affordable housing overlay (AHO) (6/10/05)</td>
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<tr>
<td>Pittsburg</td>
<td>Implement Policy 13-P-1.1 and Programs I, J &amp; K by Dec. 2005, allow increased densities, and identify alternative sites by Dec. 2005 (1/21/05)</td>
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<tr>
<td>Pleasanton</td>
<td>Rezone property to allow higher density projects</td>
<td>Conditional Certification Revoked</td>
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<tr>
<td>San Rafael</td>
<td>Implementation of strategies to facilitate housing on sites identified in the inventory and &quot;significant progress in approving housing developments.&quot; (12/29/04)</td>
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<tr>
<td>Sausalito</td>
<td>Establishing affordable housing overlay zone (AHOZ), rezoning specific sites and working with non-profits (7/26/05)</td>
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<tr>
<td>Scotts Valley</td>
<td>Rezonings and code amendments to allow residential at four commercial sites (10/27/06)</td>
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<tr>
<td>Solana Beach</td>
<td>Approval of 131 unit development with 13 affordable units, and establishing mixed-use development standards (1/10/07)</td>
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<tr>
<td>Solvang</td>
<td>Rezone parcels to accommodate high density projects</td>
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<tr>
<td>Tiburon</td>
<td>Implementing Programs H-19A through H-19D by April 2006 (12/9/05)</td>
<td>Conditions Satisfied</td>
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<tr>
<td>West Hollywood</td>
<td>Analyze its Inclusionary housing program (as to constraints on new housing and compliance with state bonus density law)</td>
<td>Conditions Satisfied</td>
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<tr>
<td>Winters</td>
<td>Removing conditional use permit requirement for multifamily projects in multifamily zones and adopting flood control project and financing plan (3/23/05)</td>
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<tr>
<td>COUNTY</td>
<td>CONDITION</td>
<td>STATUS</td>
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<tr>
<td>Humboldt</td>
<td>Maintenance of sites to accommodate higher density projects (NOTE that this condition was applied 18 months after HCD had found the County's housing element to be in compliance and had attached no conditions to its finding.) (12/30/04 and 6/5/06)</td>
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<tr>
<td>Lake</td>
<td>Rezone 50 acres to allow higher density projects (3/25/05)</td>
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<tr>
<td>Mendocino</td>
<td>Rezone 50 acres allowing 29 units per acre by-right where water and sewer capacity will be available by 7/1/07 (12/27/04)</td>
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<tr>
<td>Merced</td>
<td>Rezone property to allow higher density projects and community plan initiated (12/14/04)</td>
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<tr>
<td>Napa</td>
<td>Housing Element to be amended to reflect that a supply of suitably zoned properties available to meet regional need and adoption of Affordable Housing Overlay Zone (12/14/04)</td>
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<tr>
<td>Sacramento</td>
<td>Complete rezonings to accommodate 3400 multiple family units (12/28/04)</td>
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<tr>
<td>San Benito</td>
<td>Rezone property to accommodate higher density projects and amend growth management ordinance (6/1/05)</td>
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<tr>
<td>San Joaquin</td>
<td>Completion of specific plan to establish adequate supply of high density zoned sites (11/24/04)</td>
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<tr>
<td>Santa Barbara</td>
<td>Rezone 62 acres to accommodate lower income need of regional housing share (8/2/06)</td>
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<tr>
<td>Santa Cruz</td>
<td>Rezone 30 acres to allow higher density projects by right (12/12/06)</td>
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<tr>
<td>Tehama</td>
<td>Rezone 30 acres (with adequate water/sewer) to high density residential (12/6/05)</td>
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<tr>
<td>Yuba</td>
<td>Identify sites for migrant farmworkers (12/30/04)</td>
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