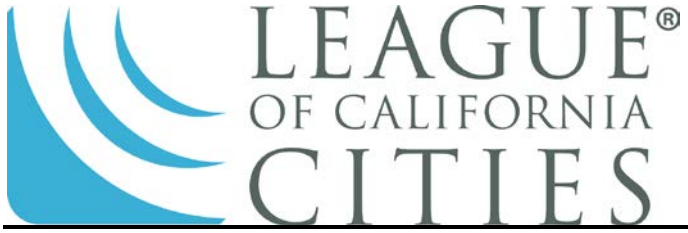

Housing Elements: Beware of What You Promise

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Housing Elements: Beware of What You Promise

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I. Introduction

Each city in California is mandated to adopt a comprehensive general plan, which must include a housing element. Requirements for the content of the housing element (Article 10.6 of Chapter 3 of Planning and Zoning Law, commencing with Government Code Section 65580; "Housing Element Law") are by far the most complex of any of the general plan elements, and the housing element is the only element of the general plan that is required to be completely updated on a fixed schedule.[1] These requirements for regular updates and prescriptive statutory provisions, coupled with mandated review by the California Department of Housing and Community Development ("HCD" or the "Department") and scrutiny by housing advocates, all make housing element adoption politically, technically, and legally difficult.

All jurisdictions in the State are currently required to have adopted a housing element in the fourth housing element cycle, and many have embarked on the fifth housing element cycle. The next update is due in all jurisdictions by January 31, 2016, with those in San Diego County already due on April 30, 2013. Most housing elements must be updated between October 16, 2013 (Southern California Association of Governments) and January 31, 2015 (Association of Bay Area Governments).[2]

This paper focuses on the actions that city attorneys can take during the adoption of their community's housing element to protect their communities against potential litigation. In particular, it will discuss the standard for adequacy of housing elements, new statutory requirements for implementation, claims being made in recent "failure to implement" lawsuits, the rise of fair housing claims, and possible defenses. City attorneys can be proactive in ensuring that their housing elements can survive a legal challenge, preventing consultants and staff from making promises that the city will not be able fulfill, and forestalling a fair housing claim.

II. The Importance of Adopting on Time.

In previous housing element cycles communities continued to adopt housing elements throughout the five- to seven-year period until the next housing element was due. (Some communities are *still* working on fourth cycle housing elements.) Failure to revise a housing element on time does not, by itself, render a housing element inadequate (*see San Mateo Coastal Landowners Ass'n v. County of San Mateo* (1995) 38 Cal.App.4th 523, 544-45 [holding that deadlines for adoption of a housing element are directory, not mandatory, and that inadequacy must be shown by actual, substantive noncompliance with Housing Element Law].)

[1] Government Code Section 65588. All further references are to the Government Code unless otherwise indicated.

[2] *See* California Department of Housing and Community Development, *Housing Element Update Schedule for Regional Housing Need Assessment (RHNA), available at* http://www.hcd.ca.gov/hpd/hrc/plan/he/web_he_duedate%207-15-2013.pdf.

However, one of the compromises that led to the 2008 adoption of SB 375 (primarily concerned with reductions in greenhouse gas emissions) attached a penalty to failure to adopt on time. While cities were successful in extending the period between housing element updates to eight years from five (except for 56 cities in 23 counties[3]), housing advocates insisted on attaching a penalty to failure to adopt fifth cycle housing elements on time. A city on an eight-year cycle that does not adopt its housing element **within 120 days after the due date** will be required to revise its housing element *every four years on time*, rather than every eight for at least the next two consecutive revisions.[4] This may require *three* consecutive four-year plans for the city to catch up to the next eight-year cycle.[5] Communities that have not yet adopted a housing element in the current cycle can also not disapprove an affordable housing development that does *not* comply with the general plan and zoning.[6]

Adopting a housing element requires significant lead time. HCD has 60 days to review draft housing elements, and communities often submit multiple drafts. Environmental review needs to be accomplished before the housing element can be adopted. Both the planning agency (usually the Planning Commission) and the City Council must review the final draft. Communities with October 2013 deadlines should ideally have already submitted draft housing elements to HCD.

III. Housing Element Adequacy.

A. Statute of Limitations for Challenges to Housing Elements.

Any person may bring a facial challenge to the adoption of a housing element within 90 days of adoption as provided by Section 65009(c)(1)(A) or within 60 days following the date that HCD reports its findings on the adopted housing element. (Section 65009(c)(2).) Since HCD has up to 90 days to report its findings on the adopted element,[7] communities may be exposed to a facial challenge from any person for up to 150 days after adoption.

However, because approximately 70 percent of housing element cases are brought by low-income persons represented by public interest law organizations such as California Rural Legal Assistance, the Public Interest Law Project, and Legal Aid groups, many housing element lawsuits utilize the provisions of Section 65009(d), which extends the limitations period even further. For a claim that is made to facilitate the development of affordable housing, notice must

[3] The following counties and any cities in those counties: Alpine, Amador, Calaveras, Colusa, Del Norte, Glenn, Humboldt, Inyo, Lake, Lassen, Mariposa, Mendocino, Modoc, Mono, Nevada, Plumas, San Luis Obispo, Shasta, Sierra, Siskiyou, Tehama, Trinity, and Tuolumne.
[4] Section 65588(e)(4).
[5] Section 65588(e)(4)(B).
[6] Section 65589.5(d)(5).
[7] Section 65588(h).

be given to the legislative body specifying the alleged deficiencies. A cause of action accrues either 60 days later or whenever the agency responds, whichever occurs first. The plaintiffs then have one year to bring suit from the accrual date.

The holding in *Urban Habitat Program v. City of Pleasanton,* (2008) 164 Cal.App.4th 1561, 1573-74, was very helpful to cities, because the Court of Appeal (without textual support) agreed that the initial notice to the legislative body would need to be provided within 90 days after *some* action by the local government. Advocates were outraged that the effectively unlimited statute of limitations provided by the statute was now severely limited. Two bills extending the notice period to three years passed the Legislature but were vetoed by Governors Schwarzenegger and Brown. However, this year a compromise proposal will probably be passed and signed by the Governor; we will provide an update at the conference.

Ironically, communities are most likely to be exposed to a facial challenge if they have recently adopted a housing element. If they have failed to adopt a housing element for several cycles or are very late in adopting, the limitations period has passed for a challenge to the element itself,[8] and *Coastal Landowners* held that mere failure to adopt on time does not, by itself, render a housing element inadequate. Advocates will instead challenge the approval of desired projects by alleging that no finding of consistency with the General Plan can be made if the General Plan does not conform with State law.[9]

B. Standard of Review for Housing Elements.

The standard for judicial review of housing elements is deferential to the decisions of local policy-makers, but strict regarding inclusion in the housing element of every provision required by Housing Element Law. "Substantial compliance . . . means actual compliance in respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form." (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1185 [internal quotations and citation omitted].) The court's review is limited to "independently determining whether the housing element at issue is in substantial compliance with applicable statutory requirements, *i.e., does it contain the elements mandated by the statute*." (*Id.* at 1191-92 [emphasis added].) A housing element that includes the analysis and the plans required by Housing Element Law fails to be in substantial compliance only if that analysis or those plans are "arbitrary, capricious, or entirely lacking in evidentiary support." (*Id.* at 1191.)

Once the court decides that the locality's housing element "contains the elements mandated by the statute" and that its conclusions are not arbitrary, it does not judge whether

[8] *See Urban Habitat,* 164 Cal.App.4th at 1578-79.
[9] *See, e.g., Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal. App. 3d 800, 806-07.

those policies are likely to achieve their goals. (*See id.* ["Nor do we judge whether the programs adopted by the locality are adequate to meet their stated objectives."].) Nor is the city required to ensure that housing is actually built. Nothing in the housing element law "shall require" any local government to "[e]xpend local revenues for the construction of housing, housing subsidies, or land acquisition." (Section 65589(a)(1); *see also Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 884 (rejecting argument that housing element law requires city to produce or acquire housing)).

Communities do not lose housing element cases because no affordable housing has been built but rather because their housing elements do not contain a provision specifically required by Housing Element Law. (*See, e.g., Buena Vista Gardens Apartments Ass'n v. City of San Diego* (1985) 175 Cal.App.3d 289, 303-04 [finding the housing element inadequate because it did not contain programs for the *conservation* of housing]). In one rare instance, the court determined that the city's conclusions were not supported by substantial evidence (*see, e.g., Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1117-18 [holding that zoning restrictions in fact rendered emergency shelters infeasible][10]. In a database that we have maintained of 46 housing element lawsuits involving 38 jurisdictions, most plaintiffs challenged housing elements that had not been updated for many years and were clearly inadequate, and the cases settled in the trial court. However, where the Court of Appeal has actually analyzed the content of a housing element (as opposed to ruling on remedies for a clearly inadequate housing element), in only three instances has the Court found a housing element to be inadequate.[11] In the last three cases to reach the Court of Appeal, all of the housing elements were found to substantially comply with State law.[12]

Therefore, in ensuring the legal adequacy of housing elements, the key issues for city attorneys are:

1. Does the housing element contain *every provision* required by Housing Element Law?

[10] *Hoffmaster* is plaintiffs' favorite case because it gives deference to HCD and applies more searching scrutiny to the city's conclusions than is typical in housing element cases. However, several of the cases relied on by the *Hoffmaster* court in giving deference to HCD were disapproved by the California Supreme Court in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 15.

[11] *See Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098; *Buena Vista Gardens Apartments Ass'n v. City of San Diego* (1985) 175 Cal.App.3d 289; *Camp v. County of Mendocino* (1981) 123 Cal.App.3d 334.

[12] *See Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160 (note that the housing element portion of the case is unpublished); *St. Vincent's School for Boys v. City of San Rafael* (2008) 161 Cal.App.4th 989; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174. The California Department of Housing and Community Development had determined that the Gilroy and Napa County housing elements did not substantially comply with State law.

2. Is there substantial evidence in the record for the city's conclusions and proposed policies? If the public has criticized these conclusions and policies, does evidence in the record support the city's policies and respond to the criticisms?

C. Role of the California Department of Housing and Community Development.

Cities must submit all draft housing elements to HCD for review to determine whether the draft element "substantially complies" with Housing Element Law.[13] If HCD finds that the draft element does not substantially comply, the city may either amend the draft element so it will "substantially comply" as recommended by HCD, or it may adopt the element without changes and adopt written findings explaining why the housing element substantially complies despite HCD's objections.[14] HCD similarly reviews the adopted housing element and within 90 days must "report its findings" to the locality.[15] While a housing element that has been found in compliance by HCD is entitled to a rebuttable presumption of validity (*see* Section 65589.3), "there is no presumption of invalidity" if HCD has not found the housing element to be in compliance. (*Fonseca*, 148 Cal.App.4th at 1184.)

Communities typically find HCD's review to be far more rigorous than that of the courts, with HCD questioning adopted policies and demanding proof that they will accomplish their goals. The focus of its review is on the adequacy of sites designated for lower income housing. With relatively limited success in the courts, affordable housing advocates have focused much of their effort on lobbying HCD to require more and more justification for local policies and often provide detailed criticisms of local sites and policies, sometimes without first expressing those concerns to the city. Although HCD's adopted guidelines are only "advisory,"[16] and the courts have given little deference to its conclusions,[17] eligibility for several grants[18] requires an HCD finding that the housing element substantially complies with State law (often called "certification" of the housing element), and HCD has recently taken the position that its standard for "substantial compliance" can be more rigorous than that adopted by the courts (see discussion below). In providing budget justification for more housing element reviewers, HCD reported to

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[13] Section 65585(d).
[14] Section 65585(f).
[15] Section 65585(h); *see also* Health and Safety Code Section 50459(b) ("The department shall review housing elements and amendments for substantial compliance with Article 10.6 …")
[16] Section 65585(a). HCD's guidelines, *Building Blocks for Effective Housing Elements*, are currently available online at http://www.hcd.ca.gov/hpd/housing_element2/index.php.
[17] The *Fonseca* court stated that it would respect HCD's interpretation of the Housing Element Law only "in accordance with our view of the substantive merits of the Department's statutory interpretation." (*Fonseca*, 148 Cal.App.4th at 1194.)
[18] *See, e.g.*, California Department of Housing and Community Development, *Incentives for Housing Element Compliance* (January 2009), *available at:* http://www.hcd.ca.gov/hpd/hrc/plan/he/loan_grant_hecompl011708.pdf. The One Bay Area Plan restricts certain grants to communities with HCD-approved housing elements.

the Legislature that it typically reviewed a local housing element three times and that each review took 40 hours.

Nonetheless, in the fourth housing element cycle, approximately 80 percent of communities managed to adopt an HCD-approved housing element. HCD also has new leadership which has attempted to routinize HCD's review through the adoption in December 2012 of the *Housing Element Update Guidance*.[19] The *Update Guidance* has two parts: a 'Completeness Checklist,' which requires communities to show how their draft element complies with all the statutory mandates; and a 'Streamlined Update Template' for communities that had an HCD-approved housing element in the last cycle, have adopted certain required ordinances, and are making relatively minor changes. However, the level of review tends to be determined by the extent to which HCD is lobbied by housing advocates.

Despite our view that HCD's review goes beyond "substantial compliance," lack of HCD certification can attract public interest litigation, and we urge clients to obtain HCD approval if possible. Attorneys should encourage city staff and consultants to complete the 'Checklist' and may wish to review it themselves to ensure that the housing element includes all the mandated sections; it is a good guide to the statutory requirements. If time allows, local agencies should resubmit their draft housing elements to HCD until it has agreed in writing that the draft is "in compliance," to avoid the situation where the locality makes changes in response to HCD's comments, but HCD finds the changes inadequate. In most cases, providing additional information and analysis to HCD (painful as this may be) results in a certified housing element. However, as discussed further in the next section, communities need to take care not to promise to adopt policies and programs "just to make HCD happy" if they are unlikely to able to implement the programs, or where HCD requests programs that go beyond the statutory requirements.

IV. New Times, New Claims

Given the limited success of direct attacks on housing elements, public interest lawyers and others have changed their tactics. They were successful in inserting provisions into SB 375 that mandate rezoning within three years. Recent lawsuits have been filed that may be characterized as 'failure to implement' or 'changed conditions': either communities have not completed a rezoning or other implementation measure called for in their housing element, or some condition has changed that renders a formerly adequate housing element inadequate. Another avenue for claims is provided when cities fail to file required housing element annual

[19] *Available at:* http://www.hcd.ca.gov/hpd/HE%20Guidance%20Complete%20package.pdf.

reports. Finally, while fair housing claims were formerly added *pro forma* to housing element lawsuits, some plaintiffs have begun to prosecute them vigorously.

A. SB 375: Required Rezoning and Plan Implementation.

1, Required Rezoning. Housing advocates have long desired to require cities to adopt the rezonings proposed in their housing elements. Under SB 375, communities preparing an eight-year housing element (but not those with five-year housing elements) *must* complete all required rezonings *if the inventory of available housing sites does not identify adequate sites* to accommodate the RHNA, within three years after the *earlier* of:

- 90 days after receipt of comments from HCD on the draft housing element;[20] *or*
- Adoption of the housing element following receipt of comments from HCD on the draft element finding that the element does not substantially comply with State law. (Since this date will *always* occur after the first date, this provision is nonsensical.)[21]

If a city fails to adopt a housing element within 120 days of the statutory deadline, all the rezonings must be completed no later than three years and 120 days from the statutory deadline.

The deadline for completing the required rezonings may be extended for up to one year but only if the city has already completed 75 percent of the rezoning for lower income housing sites and if the city council, after a public hearing, makes one of three findings[22] and submits the findings, a detailed budget, and schedule to HCD.[23] HCD does not have approval authority over the extension, however.

2. Court May Compel Required Rezoning. If a court finds that the rezonings are not completed by the deadline (including any adopted one-year extension), the court "shall" compel the city to complete the rezoning within 60 days or the earliest time consistent with public notice requirements. If the city fails to comply, the court "shall" issue further orders requiring additional actions to carry out the rezonings and may impose sanctions on the city.[24]

3, Affordable Housing Must be Approved if Rezoning Incomplete. *If* a city does not complete the rezoning of sites within the three-year period (plus any adopted one-year extension), then the city may be required to approve certain affordable housing projects. This provision applies to affordable housing projects meeting the following conditions:

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[20] Sections 65583(c)(1)(A); 65585(b). State law requires submission of the draft housing element to HCD.
[21] Sections 65583(c)(1)(A); 65585(f).
[22] Section 65583(f).
[23] *Id.*
[24] Section 65587(d)(1).

- At least 49 percent of the residences in the project must be affordable to very low, low, or moderate-income households, and the developer must provide "sufficient legal commitments . . . to ensure the continued availability and use" of the units for affordable housing "for the period required by the applicable financing."[25]

- The project must be proposed on a site that was required to be rezoned.[26]

- The project must comply with "applicable, objective general plan and zoning standards and criteria, including design review standards" that are described in the rezoning program.[27]

If all of these conditions apply, then the city cannot require any discretionary approval except compliance with the Map Act, and cannot require CEQA review unless a subdivision map application is required.[28] In addition, the project may be denied or approved at a lower density only if it would have a specific, adverse effect on public health or safety, and there is no feasible method to mitigate the impact except disapproval or approval at a lower density.[29]

Although apparently onerous, *this section is applicable only to cities with eight-year housing elements that have not carried out a rezoning program included in the housing element 3 or 4 years after the housing element is adopted.*

4. <u>Courts May be Able to Require Implementation of Housing Element Programs</u>. SB 375 added a provision allowing any interested person to bring an action to compel compliance with any "deadlines and requirements" imposed by Sections 65583(c)(1), (2), and (3).[30] These three sections require housing elements to include a "schedule of actions. . .each with a timeline for implementation,. . .such that there will be beneficial impacts of the programs within the planning period."[31]

- (c)(1): Requires programs to make sites available during the planning period to accommodate that portion of the regional housing need that cannot be accommodated on available sites. It also requires that sites be identified to accommodate multifamily rental housing, factory-built housing, mobilehomes, SROs, farmworker housing, emergency shelters, and supportive and transitional housing.

[25] Section 65583(g)(4). Note that in some housing markets, it may be possible for a developer to build moderate-income, or even low-income, housing without any governmental subsidies. In that situation, no financing would require affordability for any particular period of time, and a project could qualify for this provision without any legal commitments to ensure continued affordability.
[26] Section 65583(g)(1).
[27] *Id.*
[28] *Id.*
[29] Section 65583(g)(2).
[30] Section 65587(d)(2).
[31] Section 65583(c).

- (c)(2): Requires programs to "assist in the development of adequate housing" to meet the needs of extremely low, very low, low, and moderate-income households.

- (c)(3): Requires programs to remove governmental constraints to affordable housing and housing for persons with disabilities, including provisions for a reasonable accommodation ordinance.

The requirement for timelines, coupled with the new authority to bring suit regarding "deadlines and requirements" *may* to allow a party to sue to compel compliance with the timelines established in the city's own housing element, although this depends on assuming that the "deadlines and requirements" referred to in Section 65587(d)(2) are the same as the "timelines" in Section 65583(c)). It is the view of housing advocates that this provision provides express authorization to sue to enforce the implementation of the programs contained in the housing element. In defending such an action, the burden of proof lies with the city.[32]

Policies in local general plans and their housing elements have not been viewed as establishing ministerial, non-discretionary legal duties enforceable by mandate. Rather, they have been viewed as broad statements of policy with goals for implementation. The general plan is by its very nature "merely tentative and subject to change." (*Selby Realty Co. v. San Buenaventura* (1973) 10 Cal.3d 110, 111.) The same is true for housing elements. (*See Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197**,** 1204 [**"**The housing needs identified in the general plan are simply goals, not mandated acts."].) Moreover, many policies in housing elements are written in vague, general language ("Review sites suitable for mixed-use development") that does not describe a ministerial duty leaving no room for discretion. (*See, e.g., Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 996 [terms "properly," "essential," "orderly," and "adequacy" do not impose mandatory duties].)

Although litigation has recently been brought to compel cities to implement their housing element programs, we are aware of no case that has cited Section 65587(d)(2). Rather, claims have been brought as 'changed conditions' cases, discussed below, or based on asserted violations of Section 65888, which states that local agencies "shall" review their housing elements as frequently "as appropriate"[33] and "shall" revise the housing element "as appropriate" to reflect this periodic review. We are aware of no court that has found Section 65888 to impose a mandatory duty.

Regardless, cities should ensure that programs included in the housing element are completely within the city's control and that the city has adequate resources to implement the

[32] *Id.*
[33] Section 65888(a).

program. Programs depending on state and federal funds or on the action of private developers should be avoided, except, perhaps, to support applications for funding if available or to review applications if submitted. Programs suggested by HCD which are not required by Housing Element Law and/or which the city may not be able to accomplish should be vigorously resisted.

B. *Urban Habitat:* Changed Conditions.

In *Urban Habitat Program v. City of Pleasanton, supra,* the claim was made that Pleasanton could no longer accommodate its Regional Housing Need Allocation ("RHNA") obligations because the City's growth management cap limited the number of units that could be built below those required by the RHNA. The Court of Appeal held that where the claim arose out of a city's *failure to act* in accordance with State law, and not out of any action or decision by the City, the usual statute of limitations in Section 65009(d) did not apply, and the claim was instead subject to the three-year statute of limitations in Code of Civil Procedure Section 338, accruing when the City Manager wrote a memorandum to the City Council stating that the remaining units that could be built were fewer than required to meet the City's RHNA.[34]

Since failure to meet housing element timelines or implement housing element programs would normally arise from failure to act rather than from action, it can be expected that plaintiffs will normally rely on CCP Section 338, potentially exposing cities to litigation for failure to meet housing element timelines for at least three years after the date for action has passed or, given uncertainty in how an accrual date is to be established, perhaps an almost indefinite period.

C. Failure to Adopt Annual Report.

All general law cities (and charter cities, if required by charter or if applying for certain housing funds) must, by April 1 of each year, prepare an annual report on implementation of the general plan.[35] SB 375 requires the housing element portion of this report to include a section describing the city's actions toward completing programs and meeting the timelines contained in its housing element. The report must be considered at an annual public hearing before the city council.[36]

On March 27, 2010 HCD formally adopted forms and definitions for the annual report through the Administrative Procedures Act, as authorized by State law.[37] Claims may now be brought for failure to "substantially comply" with HCD's requirements for the Annual Report, dating back to the 2010 annual report. The claim is likely subject to the three-year statute of

[34] *See Urban Habitat,* 164 Cal.App.4th at 1568, 1574-79.
[35] Section 65400(a).
[36] Section 65400(a)(2)(B).
[37] *See id.*

limitations in Code of Civil Procedure Section 338 and provides an easy win for litigants if cities fail to prepare and submit the report.

D. Fair Housing and Related Claims.

The federal Fair Housing Act (the "FHA"), the California Fair Employment and Housing Act ("FEHA"), and California Planning and Zoning Law all forbid cities from enacting or enforcing land-use laws that operate to make housing "unavailable" to classes of persons listed in the statutes. (42 U.S.C. § 3604(a), (f); Govt. Code § 12955(*l*) [prohibiting "land use practices" that "make housing opportunities unavailable" on the basis of specified factors]; Govt. Code § 65008(a)(1) [invalidating planning actions that "den[y] to any individual or group of individuals the enjoyment of residence . . . because of" specified factors]). Planning and Zoning Law, unlike the FHA and FEHA, specifically forbids discrimination against affordable housing[38] and even multifamily housing conforming with the general plan and zoning ordinance.[39]

Fair housing violations may be proven by evidence of either *intentional* discrimination or disparate impacts of apparently neutral policies. In the context of housing elements and other planning and zoning challenges, plaintiffs usually allege that a city's decision, although neutral on its face, causes segregation or has a discriminatory effect on housing availability for a racial, ethnic, religious, or other protected group (and may also allege that this effect is due to discriminatory *intent* if the record supports such a claim). The three statutes in question govern essentially the same activities in the same way. (*Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467, 485 [holding that a "disparate impact" violating the FHA also violates Government Code section 65008]; *Sisemore v. Master Financial Inc.* (2007) 151 Cal.App.4th 1386, 1420 [noting Legislature's intention that FEHA and FHA operate similarly]).[40]

In older litigation, litigants often added fair housing claims to housing element litigation but rarely prosecuted these claims vigorously unless there was evidence of intentional discrimination. However, in recent claims involving the County of Napa and the City of St. Helena, litigants have demanded extensive discovery, retained expert witnesses, deposed staff, and demanded a trial. In fair housing litigation, there is no exhaustion requirement and no

[38] Section 65008(b)(1) [forbidding cities to "prohibit or discriminate against any residential development or emergency shelter . . . [b]ecause the development or shelter is intended for occupancy by persons and families of very low, low, or moderate income"].

[39] Section 65008(b)(1)(D).

[40] While the federal Department of Housing and Urban Development issued a final rule on February 8, 2013 regarding the analysis of disparate impact, the United States Supreme Court appears poised to find that disparate impact is not cognizable under the FHA. For the second time, the Court has granted review to decide whether FHA creates a cause of action for housing discrimination on a disparate impact theory. (*Mt. Holly Gardens Citizens in Action Inc. v. Twp. of Mt. Holly* (3d Cir. 2011) 658 F.3d 375.) Since FEHA expressly recognizes disparate impact theory, however (Section 12955.8(b)), the Supreme Court's decision will have little impact in California except to confine these claims to state court.

reliance on a record; the allegations are difficult to defeat on summary judgment, and plaintiffs will receive a large fee award if they are successful while there is next to no chance for defendant city to recover. While the statute of limitations is two years for a specific action, if the violation is alleged to be ongoing (such as a community's entire planning and zoning scheme), there is essentially no statute of limitations.

Fortunately, in the context of fair housing challenges to housing elements, the relation between the designation of 'lower income sites' and the actual effects on the availability of housing is so attenuated that the courts have been properly skeptical that a disparate impact is shown. Successful cases have relied on a specific city *action* shown to have a disparate impact, not vague assertions based on broad zoning policies. (*See, e.g.*, *Huntington Branch NAACP v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, 938 [analyzing effect of city's denial of permission to build an affordable apartment complex]; *United States of America v. City of Parma* (6th Cir. 1981) 661 F.2d 562, 567-68 [noting trial court's findings that the actual effects of several city decisions were to prevent affordable housing construction and to perpetuate segregation]; *Dews v. Town of Sunnyvale* (N.D. Tex. 2000) 109 F.Supp.2d 526, 562 ["It is clear that it is Sunnyvale's one-acre zoning, not its location, that has kept apartment and high density housing out of the Town."].)

However, because of the advantages to litigants, it is possible to anticipate more challenges to housing elements based on fair housing claims. In relation to housing element adoption, some of the key preventive steps include the following:

- **Avoid a discriminatory intent claim by challenging discriminatory remarks regarding protected groups (racial and ethnic groups, religion, families with children, persons with disabilities) and affordable housing.** Where an ordinance or plan arguably has a harsher or more restrictive effect on protected groups or affordable housing, comments made by audience members at public hearings can be used as evidence of the discriminatory intent of the decision-makers. "In regard to the neighborhood opposition, the law is quite clear that 'even where individual members of government are found not to be biased themselves,' plaintiffs may demonstrate a violation of the FHAA if they can show that 'discriminatory governmental actions are taken in response to significant community bias.' [citations omitted] Accordingly, 'a decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision-makers personally have no strong views on the matter.'" [citations omitted.] (*Cmty. Hous. Trust v. Dep't of Consumer & Regulatory Affairs*, 257 F. Supp. 2d 208, 227 (D.D.C. 2003).)

While derogatory remarks directed toward other races and ethnicities may be uncommon, members of the public may not be aware that a city can also not discriminate against affordable housing, persons with disabilities, or families with children.[41] Opposition to affordable housing as such is common. School districts often complain about overcrowding and request that cities permit senior housing only. Residents may not be aware that recovering substance abusers are considered to be disabled. To show that neutral planning criteria were not adopted with the *intent* of harming any of these groups, City Councils and Planning Commissions (and city attorneys) need to disclaim speakers' motivations when they are based on discriminatory criteria and explain to the public that these groups are protected by fair housing laws.

- **Avoid designating lower income sites that will reinforce or perpetuate segregated housing patterns.** Disparate impact regulations issued on February 8, 2013 by the Department of Housing and Urban Development ("HUD") define a "discriminatory effect" as including any practice that "creates, increases, reinforces, or perpetuates segregated housing patterns." (24 CFR Section 100.500.) If lower income households are primarily comprised of one or more protected group, cities need to avoid designating all of their lower income sites within neighborhoods disproportionately occupied by the same group

- **Ensure that the housing element is consistent with any 'Analysis of Impediments to Fair Housing' ("AI") and any commitment to 'affirmatively further fair housing' ("AFFH").** As a condition to the receipt of most HUD grants (especially Community Development Block Grants ("CDBG") and HOME funds), entitlement jurisdictions that receive funds directly from HUD must certify that they will 'affirmatively further fair housing' and must prepare an 'Analysis of Impediments to Fair Housing' stating how they will implement that goal. Similarly, smaller cities receiving state CDBG or HOME funds must agree to follow the state's AI plan and also certify that they will 'affirmatively further fair housing.'

  Unlike a passive requirement not to discriminate, the AI and the AFFH certification require the community to be proactive in combatting discrimination. HUD has recently focused on AFFH requirements and on July 19, 2013 issued new proposed AFFH regulations. (78 FR 43710.) It may not be sufficient for a

[41] The discriminatory intent claim in the County of Napa case was based entirely on supposed intentional discrimination against affordable housing.

community to show that it does not discriminate if it has not taken affirmative actions to 'further fair housing.' Since a successful False Claims Act case was brought against Westchester County, New York for failing to 'affirmatively further fair housing' (because it did not consider race in its AI), litigants have looked to add these claims to their housing element lawsuits. (See *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty*., 668 F. Supp. 2d 548, 562-65 (S.D.N.Y. 2009).)

- **If it appears your housing element will be challenged, consider the viability of an added fair housing claim.** Review the objections to the housing element to see if the decisions being made may have a disparate impact on any protected group, and review the record regarding any statements that could be considered to show discriminatory *intent*, which may make a fair housing claim viable. Note, however, that in bringing a fair housing claim under the FHA, there is no exhaustion requirement, and evidence may be introduced outside the record.

V. Outstanding Issues.

For communities involved in housing element litigation, two procedural issues are not resolved.

A. Can Housing Element Litigation Be Limited to the Record?

The courts have not decided what evidence may be introduced to review the adequacy of a housing element. In our recently litigated case regarding the County of Napa,[42] the County, with amicus support from the League of Cities and the California State Association of Counties, argued that, consistent with *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, not only is a complete record of the proceedings needed to determine if the jurisdiction's decisions were "arbitrary, capricious, or entirely lacking in evidentiary support," but also that information outside the record should be excluded, because the locality cannot have acted arbitrarily or capriciously by failing to consider evidence that no one presented to it. (*Id.* at 570-76.)[43]

[42] *Latinos Unidos del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160 (note that the housing element portion of the case is unpublished).

[43] An additional issue is whether material submitted to HCD by outside parties but not provided to the city before adoption of its housing element should be included in the record. Housing Element Law specifically requires HCD to consider material provided by anyone whether it is in the record or not. (Section 65585(c).) In Napa County, attorneys for a developer sent a letter to HCD three days after the County had adopted its housing element, making claims that had never been made to the County, HCD did not provide the letter to the County until it made its decision on the County's adopted housing element. HCD reports that its policy is now to provide copies of

Plaintiffs argued that no record was needed, and at oral argument noted the cost to low-income plaintiffs of requiring a record. Their amici took what seemed an untenable intermediate position: that a record was required to determine if the decision-makers had evidentiary support for their decision, but that information outside the record (with apparently no limitations on purpose, source, or date) could be submitted to determine "substantial compliance" with Housing Element Law. Allowing evidence outside the record to determine if the Housing Element actually "contains the elements mandated by the statute" seems wholly inconsistent with the standard of review established for housing elements.

Nonetheless, in the unpublished portion of its decision, the Court of Appeal, without discussion, adopted the position of plaintiffs' amici, stating that a record is needed to determine if the decision-makers have acted arbitrarily or without evidentiary support, but that evidence outside the record may be submitted to determine "substantial compliance." Thus the issue is left for another day.

B. Does HCD Have a Different Standard for 'Substantial Compliance' Than the Courts?

In a 2012 letter to the Association of Bay Area Governments,[44] HCD asserted that it may use a different standard for 'substantial compliance' than that established by the courts. HCD stated:

> The review and approval of a housing element by a jurisdiction or court is not equivalent to the review and finding of compliance by the Department. The Department does not make or change its compliance determination based on the findings of a jurisdiction or court, nor do such findings override HCD's findings. In the case of the Department's funding programs for which housing element status is an eligibility or rating factor, a jurisdiction's housing element must be approved by the Department regardless of the findings of a jurisdiction or court.
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> . . .
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> [C]ourt decisions interpreting housing element status distinguish the different role and approach of a court from that of the Department. While a court may review a housing element to find whether it contains the elements mandated by the statute, *the Department's review considers the adequacy of information, program commitments, and timeframes to meet various statutory goals and objectives.* (emphasis added)

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correspondence to the city or county, but nothing in the statute requires this. We sometimes make a Public Records Act request to ensure the local agency has all material submitted to HCD.

[44] Letter dated May 3, 2012 from Glen A. Campora, Acting Deputy Director, Housing Policy Division, HCD, to Mr. Doug Kimsey and Mr. Alix Bockelman, Metropolitan Transportation Commission.

Even when the courts have disagreed with HCD's specific findings, as in *Fonseca* and our County of Napa case, HCD has not agreed to find the community's housing element in compliance with Housing Element Law based only on the court's decisoin.

HCD's position relies on dicta repeated in several published cases stating that HCD's role is different from that of the courts, and that the Department reviews housing elements "not only to ensure the requirements of 65583 are met, but also to make suggestions for improvements." (*Buena Vista Gardens Apartments Ass'n v. City of San Diego, supra*, 175 Cal.App.3d at 306.) The courts have not, however, stated that HCD may use another standard for determining "substantial compliance;" rather, the courts have recognized that HCD's review may go beyond this standard.

Section 65585 only authorizes the Department to determine whether housing elements are in "substantial compliance" with housing element law. A housing element does not fail to "substantially comply" with housing element law because it does not incorporate "suggestions for improvements." Once a court has determined that a housing element substantially complies with State law, and in particular when it disagrees with each of HCD's findings, it is our view that HCD does not have the authority to establish a different standard for "substantial compliance" and to continue to find a housing element to be out of compliance.

However, until or unless a court issues a writ to HCD, it will continue to assert this position.

VI. <u>An Ounce of Prevention Is Worth a Pound of Cure</u>.

City attorneys typically get involved in housing elements only when there is a threat of litigation. In working with your city's planners and decision-makers to protect your city from attacks on your housing element or its implementation, here are the key elements that will help to make the best record for your city:

- **Adopt the housing element within 120 days of the due date.** If the housing element is not adopted on time, it must be updated every four years rather than every eight years in the 90 percent of cities now included in an eight-year housing element cycle. The schedule for adoption should ideally allow sufficient time for at least two reviews by HCD (60 days each plus time to amend the draft element).

- **Insist that staff and consultants complete HCD's 'Housing Element Completeness Checklist.**' The ‘Checklist’ is a gift to city attorneys; it helps to ensure that every housing element at least "substantially complies" with the statutory requirements for housing elements.

- **Ensure that the City can actually accomplish the programs listed within the timelines promised.** City staff needs to understand that programs listed in the housing element may provide an avenue for future litigation. HCD staff often ask for programs that go beyond what is needed for an adequate housing element, and city staff often acquiesce to make HCD happy. Cities should resist these requests if they cannot accomplish the programs or if they go beyond the requirements of Housing Element Law.

- **If possible, do not adopt the housing element without written HCD approval of the draft.** Cities have perceived that they had oral agreement from HCD reviewers regarding minor changes needed to satisfy the Department; have adopted their housing element without submitting another draft; and then have received a letter stating that their housing element does *not* substantially comply with State law. An element found by HCD to be out of compliance attracts litigation. However, if your city is running out of time to adopt within 120 days of the due date, adopt the housing element and make amendments later to satisfy HCD (if possible).

- **Have staff and consultants maintain documents for preparation of a record if necessary.**

- **Adopt any needed rezonings within the SB 375 deadlines.** If the rezonings will not be completed within three years after housing element adoption, make the necessary findings to give your city one more year.

- **Submit housing element annual reports every year and implement promised programs.** A city attorney's review of annual reports can reveal if your city is not accomplishing programs promised in its housing element.

- **Review the housing element for consistency with HUD's 'Affirmatively Furthering Fair Housing' requirements.** If your city is receiving federal housing funds, it needs to ensure that any 'Analysis of Impediments to Fair Housing' ("AI") submitted to HUD is consistent with the city's housing element; that the housing element is not inconsistent with the AI; and that the city is taking *affirmative* steps to further fair housing.

- **Do not allow any racially charged remarks, comments about protected groups, or opposition to affordable housing to go unchallenged.** All decision-makers (City Councils, Planning Commissioners, and advisory committees) need

to be advised that remarks made by the public may be ascribed to the city if they appear to be a factor in the city's decision. In particular, decision-makers often do not understand that Section 65008 in the context of planning and zoning decisions does not allow decisions to be made based on opposition to affordable housing or emergency shelters, and that communities cannot discriminate against families with children (because of fear of school overcrowding, for instance) or recovering substance abusers.

- **If it is clear the HCD will not certify your city's housing element, or if litigation is threatened:**

    - **Review the housing element yourself** (or hire outside counsel to do so) to ensure that it contains *every* provision required by state law *and* that there is substantial evidence in the record to support each of the conclusions reached.

    - **Examine the record and the housing element to see if a viable fair housing claim may be made.**

    - **If HCD refuses to certify, make the written findings contained in Section 65585(f)** explaining why the housing element substantially conforms with State law despite HCD's findings.

VII. Conclusion.

Housing advocates are convinced that local planning and zoning regulations account for the high cost and lack of affordability of housing in much of California, and they view housing elements as their chief mechanism for removing "exclusionary" zoning and planning policies. They have been highly successful in advancing State legislation consistent with these views. In recent years the Obama administration has also given high priority to fair housing issues. Consequently, local governments can expect to encounter continuing pressure and potential litigation from advocates regarding the adoption and implementation of their housing elements.