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BUILDING HOUSING FROM THE GROUND UP: STRENGTHENING CALIFORNIA LAW TO ENSURE ADEQUATE LOCATIONS FOR AFFORDABLE HOUSING

I. INTRODUCTION

Since the 1970s, low and moderate income households in the United States have faced an ever worsening housing crisis.1 California has been especially hard-hit by this growing affordability gap.2 According to one recent study, nearly half of all renters in the state could not afford the fair market rent for a two-bedroom apartment.3 Increasing the supply of affordable housing4 is critical to the well-being of hundreds of thousands of low-income families in California.5

In response, numerous non-profit housing developers statewide are working to increase the supply.6 Financing is one significant obstacle to the development of affordable housing.7 However, even if adequate resources were avail-

2. See id.
3. See Lori Weisberg, Low-Paid Workers Just Can't Make the Rent, Study Reports, San Diego Union-Tribune, Sept. 28, 1997, at H1. The fair market rent is a figure set by the Federal Department of Housing and Urban Development (HUD). Id. HUD sets as a standard that households should pay no more than 30% of their total income for housing. Id.
4. As used in this comment, "affordable housing" refers to housing which is affordable to households making less than 80% of the median income for the area in which they live. Households in that range typically face the most difficulty in finding housing which they can afford. See infra Part II.A.
6. See id.
7. Telephone Interview with Rachel Iskow, Executive Director, Sacra-
able to produce enough housing to meet the demand, housing developers would still face formidable odds without the cooperation of local government. Developers are dependent on local government to provide properly zoned land, and to approve plans and issue permits required for construction. Local government land-use policies, therefore, have a significant effect on the development of housing, particularly affordable housing. Through design or neglect, a local government's zoning and other land-use controls can virtually exclude decent housing affordable to low-income households.

The California Legislature has intervened to ensure that local governments plan for housing needs, including housing for lower-income families. Toward this goal, the State mandates that each local government adopt a housing plan known as a "housing element." This plan must demonstrate that the community can provide enough sites for future housing development to accommodate its share of the statewide demand for housing. This comment explores whether the statute implementing this mandate, and judicial enforcement of it, are effective in compelling local governments to make available sufficient land for the development of affordable housing.

This comment begins by examining the housing element requirements. It discusses the required contents of the element, administrative and judicial review of the element's compliance with state law, and the role of private enforcement of the housing element mandate. It also examines the requirements for demonstrating that a community has sufficient land for housing, and what is required for that land to

8. See Housing Element Manual, supra note 5.
9. See id.
10. See Jeff Goldman, The Dream of Fair Housing, 5 LAND USE & Env'T F. 3 (1996).
12. See infra Part II.B.
13. See infra Part II.B.
14. See infra Part II.B.
15. See infra Part II.B.
be adequate for the development of affordable housing. Part IV analyzes the effectiveness of current state law in increasing the supply of land for affordable housing. Through a hypothetical example and a brief case study, this comment demonstrates that current law does not accomplish the goal of ensuring that local governments plan for affordable housing. It also concludes that this shortcoming hinders effective enforcement of the housing element statute. Finally, Part V proposes changes to state law to ensure that housing elements adopted by local governments identify specific sites where housing may be developed to meet its demand for housing.

II. BACKGROUND

A. California’s Housing Crisis

1. The Lack of Affordable Housing

Housing affordability has, by some estimations, reached crisis proportions in California. Since 1970, a gap has formed nationwide between the number of low-income households and the number of housing units affordable to such households. Today, there are almost twice as many low-income households as affordable units. In the western states there are nearly three low-income renters for every one low-cost unit. California has fared the worst, where an estimated eighty percent of very-low income households are “over-paying” for housing. According to one recent study,
nearly half of all renters in the state could not afford the fair market rent for a two-bedroom apartment.27

One way in which the California Legislature has reacted to this crisis has been to compel local governments to plan for housing demand and reduce governmental constraints on housing development, such as exclusionary land use policies.28 The chief mechanism for this planning is a required component of each community's General Plan known as the housing element.29

2. The Role of Zoning and Development Controls on Housing Affordability

The housing element statute, California Government Code section 65580-89.8,30 was created in part to combat exclusionary land use policies and their impact on the development of affordable housing.31 Such policies discourage the development of affordable housing, either by making it infeasible or impossible to develop multifamily rental housing and other forms of housing affordable to lower-income households.32 Local development standards such as minimum lot-widths, minimum interior floor areas, and prohibitions on units with identical exterior appearances are considered "exclusionary" because they have the effect of increasing the costs of developing housing.33 The result is that housing affordable to low-income people is shut out of a community or an area because it is too costly to build.

Zoning also plays a significant role in determining what type of housing is developed in a community and its location. Through zoning and land use designations, local governments

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27. See Weisberg, supra note 3. The fair market rent is a figure set by the Federal Department of Housing and Urban Development, reflecting the Department's determination of the average cost of rent in a particular area. See id.

28. See Goldman, supra note 10, at 12.


30. CAL. GOV'T CODE § 65580-89.8 (West 1996).

31. Id.

32. See 2 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 64.01, at 844 (2d ed. 1987).

determine what uses will occur on a given parcel (such as commercial, industrial, or residential) and the intensity of the use.\textsuperscript{34} Residential zoning is typically stratified into categories representing the allowable density of development; that is, the number of units permitted per acre.\textsuperscript{35} Thus a typical zoning code will contain one residential zoning designation for land that is to be primarily single-family housing, another zoning designation for "medium density" multifamily housing, such as duplexes, and one or more higher density designations for apartments.\textsuperscript{36}

The amount of land that a community zones for residential use and the density of housing units per acre that is permitted can limit affordable housing development.\textsuperscript{37} If a local government chooses to zone a limited proportion of its land for residential use or allow development only at lower densities, affordable housing may not be feasible.\textsuperscript{38} One study shows that such restrictions can increase housing costs by ten percent, which, when combined with other cost-increasing development restrictions can substantially increase the cost of development.\textsuperscript{39} Likewise, an absence of vacant residually zoned land can also create a barrier to affordable housing. In such a community, a developer would be forced to choose a vacant (or redevelopable) parcel that is zoned for some other use and then make a request to the local governing board that the parcel be rezoned to residential use. Local governments can thereby often prevent affordable housing from being built by refusing rezoning applications when the developer-applicant intends to build affordable housing on the parcel.\textsuperscript{40}

\begin{itemize}
  \item \textsuperscript{34} See generally 1 NORMAN WILLIAMS JR. \& JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 16.01-16.13, at 32 (2d ed. 1988).
  \item \textsuperscript{35} See 2 WILLIAMS \& TAYLOR, supra note 32, § 42.01.
  \item \textsuperscript{36} See, e.g., SUNNYVALE, CAL., ORDINANCES § 20.40.15-25 (1991).
  \item \textsuperscript{37} See U.S. DEPT OF HOUS. AND URBAN DEV., NOT IN MY BACK YARD 2-5 (1991).
  \item \textsuperscript{38} See id.
  \item \textsuperscript{39} See id.
  \item \textsuperscript{40} See, e.g., Karen Kucher, Complex Blocked in El Cajon, Council Rejects Zoning Exemption, SAN DIEGO UNION-TRIBUNE, Aug. 12, 1987, at B1 (discussing city council's refusal to grant an exception to a blanket prohibition on rezoning for multifamily housing); Enrique Rivero, Commission's Split Puts Senior Housing Proposal in Jeopardy, L.A. DAILY NEWS, April 11, 1997, at T02 (discussing planning commission's failure to approve a rezoning application for
B. The Housing Element of the General Plan

1. Overview

Each "locality" in California is required by state law to develop a long-range plan known as the General Plan. The General Plan is the "constitution" of future development in the locality. It must contain seven elements, each planning for a different aspect of a city's or county's development: land use, housing, safety, circulation, conservation, noise and open space. Each of these required planning documents are referred to as an "element." For instance, the required housing plan is known as the "housing element."

In enacting the housing element requirement, the legislature sought to ensure that local governments plan for future housing needs, including the needs of low-income households. The legislature has declared that it is the goal of the State of California to foster "the early attainment of decent housing and a suitable living environment for every California family." In furtherance of this goal, the legislature proclaimed that each municipality has the obligation to use its powers to "facilitate the improvement and development of housing . . . [for] all economic segments of the community." The housing element requirement is the most substantial statutory scheme for enforcing this obligation.

affordable housing for seniors). Some protection is provided by the state Anti-NIMBY statute. CAL. GOV'T CODE § 65589.5 (West 1997). Under this statute local governments may only deny a housing development affordable to low and/or moderate income people if it makes certain findings. Id. However, the statute only applies if the proposed development is consistent with the General Plan and local development standards. Id. Thus, the statute does not protect a developer in a locality where the only vacant or redevelopable parcels are designated in the general plan for non-residential use. A proposal for a housing development on such a parcel would be inconsistent with the General Plan and thus would not fall under the ambit of § 65589.5. As a result, the statute does not help a developer who can find no vacant residentially-zoned parcels.

41. For purposes of this comment the term "locality" refers to city and county governments.
42. See CAL. GOV'T CODE § 65300 (West 1997).
43. See O'Loane v. O'Rourke, 231 Cal. Rptr. 282, 288 (Ct. App. 1965).
44. CAL. GOV'T CODE § 65302 (West 1997).
45. Throughout this comment the term "housing element" or "element" refers to this document unless otherwise indicated.
46. See CAL. GOV'T CODE § 65580 (West 1997).
47. Id.
48. Id.
California Government Code section 65580-89.8\(^{49}\) set out the requirements for a housing element. As the blueprint for local development of housing, the element must contain several components:

(1) an identification of the need for new housing;

(2) an assessment of the resources available to assist in its creation and the constraints that discourage its development;

(3) an inventory of sites where new housing can be located;

(4) the community's goals and policies for the development of housing;

(5) a five-year program of action detailing how the community will achieve its housing goals.\(^{50}\)

Every five years, each local government in California must update its element, setting forth its plan for housing for the upcoming five-year period.\(^{51}\) Once completed, the locality submits the plan to the state Department of Housing and Community Development (HCD), which reviews each adopted element for compliance with the statute.\(^{52}\) To assist communities in creating an element, HCD has developed an informal guide in a questions-and-answers format. This guide (or "Qs & As") are not formal guidelines.\(^{53}\)

2. **Required Content of the Housing Element**

a. **The Needs Assessment**

California Government Code section 65583(a) requires that the housing element contain an assessment of the locality's housing need, which is a numerical figure representing the number of housing units\(^{54}\) needed to meet the commu-

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49. CAL. GOV'T CODE § 65580-89.8 (West 1997).
50. Id. § 65583.
51. Id. § 65588.
52. Id. § 65585.
53. Memorandum from the State Department of Housing and Community Development to Interested Persons 1 (June 1988) [hereinafter Questions and Answers] (on file with author).
54. For purposes of this comment a "housing unit" is an individual residence, whether an apartment, single-family home, mobile home or other living space.
A locality's housing need is calculated on a regional basis by either a regional Council of Government (COG) or by HCD in those areas where a COG does not exist. Determination of the regional housing need takes into account employment trends, commute patterns, current demand for housing, and the availability of sites for residential development. The COG then allocates this regional need among each jurisdiction in its region. This allocation is the locality's fair share of the regional housing need and forms a quantitative basis for the remaining components of the locality's housing element. The formulation indicates the number of new housing units needed to meet the housing demand of each of four income categories: (1) very-low income (less than 50% of the median income for the locality); (2) low-income (between 50% and 80% of median income); (3) moderate income (between 80%-120% of median income); and (4) above moderate income (over 120% of median income).

With its COG-identified housing need at hand, the locality must next determine whether sufficient resources exist to meet this need. Toward this end, section 65583(a) requires the housing element to contain an inventory of land suitable for residential development, including vacant and redevelopable sites for housing. The element must also analyze the resources available in the community to assist housing development and the extent of governmental constraints on the development of housing.

b. Goals, Quantified Objectives, and Policies

After documenting the locality's projected need based on the COG figures and analyzing resources and constraints, the element must set forth the community's "goals, quantified

55. CAL. GOV'T CODE § 65583(a).
56. See id. § 65583.
58. See id.
59. See infra Part II.B.2.a-II.B.2.c. Throughout this comment where reference is made to a community's housing need, this refers to the COG formulated housing need, unless otherwise indicated.
60. See Questions and Answers, supra note 53, at 4.
61. CAL. GOV'T CODE § 65583(a) (West 1997).
62. See id.
AFFORDABLE HOUSING

objectives, and policies relative to the maintenance, preservation, improvement, and development of housing. A community's "goals" are its general statement of purpose—the general direction that a locality intends to take in addressing its housing needs. Its "policies" should "provide a link between housing goals and programs." The "quantified objectives" are the number of housing units the community predicts may be constructed, rehabilitated, and conserved during the five years covered by the housing element.

c. The Action Program and the Adequate Sites Requirement

Finally, the community must adopt a program describing its five-year schedule of actions to achieve the goals, policies, and quantified objectives set forth in its element. Most importantly, the program must include an identification of adequate sites to meet the jurisdiction's housing goals.

The requirement to identify adequate sites for housing is the heart of the housing element requirement. As discussed earlier, California Government Code section 65583(a)(3) calls for each adopted element to contain an inventory of land suitable for residential development. In addition, section 65583(c)(1) requires that the element:

[i]dentify adequate sites which will be made available through appropriate zoning and development standards

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63. CAL. GOV'T CODE § 65583(b)(1) (West 1997).
64. See Questions and Answers, supra note 53, at 15.
65. Id.
66. CAL. GOV'T CODE § 65583(b)(2) (West 1997). In recognition of the fact that the identified need may exceed the ability of the community to meet that need, the statute provides that the quantified objectives may be less than the identified need. See id. It is important to note that the obligations of housing element law do not require that a local government build any housing. Housing Element Manual, supra note 5, at 2.
67. See CAL. GOV'T CODE § 65583(c) (West 1997). This program must also address several other specified issues, including the community's plans for conserving and improving existing affordable housing, promoting fair housing, and identifying and removing governmental constraints to housing development. See id. at § 65583(c)(4).
68. See id.
70. CAL. GOV'T CODE § 65583(a)(3) (West 1997).
71. Id.
72. Id. § 65583(c)(1).
and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing, factory-built housing, mobile homes, emergency shelters, and transitional housing in order to meet the community's housing goals . . . .

HCD's Qs & As indicate that subsections (a)(3) and (c)(1) play a related role. According to the Department, subsection (a)(3), the inventory requirement, provides a locality with the analysis necessary to determine if further government action must be taken to identify additional sites for housing to meet the locality's housing goals as required by subsection (c)(1). It is important to note here that, while section (c)(1) provides that the adequate sites analysis must demonstrate that the community has or will work to create sufficient sites to meet the community's housing goals, there is a further requirement. Where the community's inventory does not demonstrate sufficient sites to meet its entire COG-identified need for all income groups, it must identify sufficient sites to meet the community's low and very low-income housing need. Thus, a community's inventory must at a minimum indicate a sufficient number of sites to meet the

73. Id.
74. Questions and Answers, supra note 53, at 8.
75. Id. See also CAL. GOVT CODE § 65583(c)(1) (West 1997).
76. See CAL. GOVT CODE § 65583(c)(1) (West 1997). Section 65583(c)(1) provides in the relevant portion:

[w]here the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, the program shall provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low and low-income households.

Id. (emphasis added). In other words, where the inventory falls short of meeting the need for all income groups, the program must provide sufficient sites to allow the development of housing for very low and low-income households. Although the statute is not well-worded, it is clear that the legislature intended this provision to require sufficient sites to meet the housing need figures for low and very low-income households. If such an intent is not imported, the provision makes little sense: "sufficient" for what? Certainly the provision does not mean sufficient sites to meet the housing goals, as that is already required by the section. Perhaps most significantly, this is the interpretation given the statute by HCD. See infra text accompanying note 77.
community's goals, but if this inventory does not demonstrate enough sites to meet the entire projected housing need, it must show sufficient sites to meet the projected housing need for low and very low income households. HCD's Qs & As support this interpretation.77

d. Review by HCD

Once a locality has completed a document containing each of the required components,78 it must submit a draft of the element to HCD for review prior to adoption by the local government.79 HCD reviews the draft and provides written findings as to whether the element substantially complies with the law.80 During this period community groups and other interested members of the public have an opportunity to submit comments to the agency.81 HCD must take these comments into consideration when making its findings.82 If found to be out of compliance, the local government may adopt the element despite HCD's conclusion, if it makes findings that state why it believes the element is in compliance.83 Otherwise it must change the draft to conform to HCD's comments before adopting it in its final form.84 Once a final element is adopted, it too must be submitted to HCD for its review, which issues a written determination within 120 days as to whether the adopted element is in compliance.85

e. Enforcement

The Department has no power to enforce the housing element statute.86 Rather, the legislature has provided for private enforcement—any interested party may bring an action to force compliance with the statute.87 This private right

77. Questions and Answers, supra note 53, at 20.
78. See supra Part II.B.2.a-c.
79. See CAL. GOV'T CODE § 65585 (West 1997).
80. See id. HCD must complete this review within 90 days if the document submitted is a new housing element or within 45 days if it is an amendment to an existing element. See id. § 65585(e).
81. See id. § 65583(c).
82. See id.
83. See id. § 65583(f)(2).
84. See id.
86. See id. § 65583.
87. See CAL GOV'T CODE § 65587.
of action can be a powerful tool for those seeking to compel localities to adequately plan for and encourage development of affordable housing. 88

While California Government Code section 65580-89.8 provides that HCD's opinion is essentially advisory, this does not mean that HCD's determination as to a locality's compliance with the statute is of no force. It is well-settled that the consistent construction of a statute by the agency charged with its administration is entitled to great weight. 89 As the agency charged with interpreting the statute under section 65585, HCD's determination as to whether a housing element complies with the statute must be given great weight, unless clearly erroneous or unauthorized. 90

Plaintiffs challenging the adequacy of a housing element must seek a writ of mandate pursuant to California Code of Civil Procedure section 1085, 91 a writ that requires the locality to meet its obligations under the statute. 92 If a court finds that the element does not comply with the housing element law, the court may order compliance within 120 days. 93 In addition, the court's ruling must include an order for one or more of the following: 1) suspending the locality's authority to grant zoning changes and variances or issue building permits; 2) mandating the approval of residential development proposals; or 3) mandating the approval of subdivision maps. 94 Such an order can severely restrict the types of development that may occur. 95 This gives a powerful enforcement tool to the private plaintiffs to whom enforcement of the housing element statute falls. 96 However, there are limits to

89. See Hoffmaster v. City of San Diego, 64 Cal. Rptr. 2d 684, 693 n.13 (Ct. App. 1997).
90. See id.
91. CAL. GOV'T CODE § 65751 (West 1997). California Code of Civil Procedure § 1085 provides that the writ "may be issued by any court... to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station..." CAL. CODE OF CIV. PROC. § 1085 (West 1980).
92. CAL. CODE OF CIV. PROC. § 1085 (West 1980).
93. See CAL. GOV'T CODE § 65754(a) (West 1997).
94. Id.
96. See Housing Element Manual, supra note 5, at 6 (noting that "[j]ust the threat of this remedy often provides a powerful incentive for the local government [to] negotiate adoption of an adequate element.").
a court's power in reviewing a challenged element.

f. Judicial Review

In reviewing a locality's compliance, a court is not to examine the merits or wisdom of the element. Rather its task is to determine if there is "substantial compliance" with the statute. "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." The courts will typically not consider any evidence that constitutes an attack on the merits.

As a result, plaintiffs challenging the adequacy of a housing element will often rely on HCD's written findings concerning a locality's housing element in order to convince a court that one or more aspects of the element are inadequate. Courts generally view HCD's comments as directed not at the merits of the element, but instead reflect HCD's interpretation of the statute and the community's compliance with it. Numerous cases have established the rule that consistent administrative interpretation of a statute by the agency charged with enforcing and interpreting the statute is

98. Id.
99. Id. (quoting Stasher v. Harger-Haldeman, 22 Cal. Rptr. 657 (1962)).
100. See, e.g., Hernandez v. City of Encinitas, 33 Cal. Rptr. 2d 875 (Cal. Ct. App. 1994). Just what constitutes an attack on the merits and what is permissible consideration of substantial compliance with the statute has been a matter of some confusion by both commentators and the court. See, e.g., Hernandez v. City of Encinitas, 33 Cal. Rptr. 2d 875, 886(Cal. Ct. App. 1994) (finding that the challenged housing element complied with the statute in that it appeared to contain each required element, and rejecting as an attack on the merits, plaintiff's argument that the sites for housing identified in the element were inadequate.); Ben Field, Why Our Fair Share Housing Laws Fail, 34 SANTA CLARA L. REV. 35, 54 (1993) (stating that the standard is one of facial compliance). This comment presents the argument that the standard of review is more rigorous than this: mere facial compliance does not necessarily demonstrate substantial compliance with the statute. See infra Part IV. An examination by the court of the adequacy of the facts and figures presented is not an examination of the merits, but is necessary to determine that the element actually complies with the statute. Id.
102. See CAL. GOV'T CODE § 65585(d) (West 1997).
entitled to great weight. By this standard, if HCD's review of a draft or final element concludes that the locality has not complied with a given requirement of the statute, the court should give this great weight in deciding a plaintiff's claim that the element is not in compliance. Conversely, if HCD finds that a locality's housing element substantially complies with the statute, there is a rebuttable presumption that the element is valid.

C. The Adequate Sites Requirement

California Government Code section 65583(c)(1) requires that the action program of the housing element identify "adequate sites" to meet the locality's COG-identified housing need. The purpose of this identification is to determine whether a locality has enough land, appropriately zoned, to realistically support development of enough units to meet its projected housing need. While this obligation is perhaps the most important component of the housing element statute, as we shall soon see, just what is required for a site to be "adequate" is not entirely clear.

One expert on litigating housing element compliance has called this requirement "a potent weapon" in increasing the supply of affordable housing. In litigation by low-income residents challenging a community's compliance with housing element law, the "adequacy" of the identified sites is frequently a disputed issue. This is true in part because of the importance of the adequate sites requirement to facilitating the development of affordable housing. By compelling local governments to eliminate "exclusionary" land use policies, which make affordable housing either infeasible or impossible to develop, the requirement helps encourage housing for

104. See id.
105. See CAL. GOV'T CODE § 65589.3 (West 1997).
106. See infra Part II.B.2.c.
108. See infra text accompanying note 69.
110. Telephone Interview with Michael Rawson, supra note 101.
111. See id.
AFFORDABLE HOUSING

1999]

low-income residents. 112

1. Adequate Sites Requirement Developed to Ensure Planning for Housing

   a. Statutory Requirements

   In order to overcome the barriers presented by exclusionary land use policies and other constraints upon development, 113 the legislature has mandated that each locality identify sites in its housing element where housing can be built to meet the locality's projected need. 114 The statute requires that the identified sites be currently zoned for residential use or planned for a residential zoning. 115 They must also be subject to development standards "appropriate" for the development of housing for all income levels, including very low-income households. 116 The statute states that the quantity of sites identified must be adequate to meet the locality's housing goals. 117 However, where the element fails to identify sufficient sites to meet the locality's COG-identified housing need, the locality must identify sites where low and moderate income housing will be allowed "by right." 118 "By right" means that a conditional use permit is not required. 119

   However, beyond a zoning designation that will allow residential development and development standards, which are "appropriate" for the development of housing affordable to all incomes, the statute does not further illuminate the requirements for a site to be "adequate." We must look to other sources—case law and HCD’s Qs & As—to determine if they illuminate the statute further.

   b. HCD's Qs & As

   HCD's Qs & As define an adequate site as one that has sufficient "holding capacity at appropriate densities and de-

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113. See supra Part II.A.2.
114. See CAL. GOV'T CODE § 65583(c)(1) (West 1997).
115. See id.
116. Id.
117. Id.
118. Id.
119. See id. The ability to develop by right is of significant value to affordable housing developers. See infra text accompanying notes 121-122.
velopment standards to permit development... of housing... to accommodate projected construction need... for all income levels." 120

c. Affordable Housing Developers' Requirements

Yet, some developers of affordable housing say that other factors are also important to making a site adequate for the development of affordable housing. 121 Chief among these is the size of available parcels; economy of scale plays an important role in the cost-effectiveness and thus the affordability of the resulting units. 122 The cost per unit decreases as the number of units increase. To keep the units affordable, yet still earn enough rental income to make the project feasible, developers of affordable housing must have a parcel that is sufficiently large to allow enough units that the per unit cost falls to a point that the relatively low rents that are charged, combined with subsidies, provide enough income to make the project feasible. In order to achieve this, developers typically require a site that is four to five acres in size. 123

The site must also be free of physical constraints. 124 This means that the site should be one that is suitable for residential development, and not, for instance one that is on marsh land or a steep, undevelopable slope. 125 Parcels of land with these characteristics are not realistic sites for housing development, because it is prohibitively expensive (if not physically impossible) to develop housing on such a site.

Finally, a readily developable site is preferably one on which multi-family housing is developable by right. 126 "By right" means that the owner of the land may develop on the parcel without first obtaining a conditional use permit.

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120. Questions and Answers, supra note 53, at 22.
121. Telephone Interview with Rachel Iskow, supra note 7. Ms. Iskow has held her present position for five years. Id. Prior to that she was the Director of Rental Housing Development for Rural California Housing Corporation. Id. We discussed the requirements for developing affordable rental housing from the perspective of both Sacramento Mutual Housing and Rural California Housing Corporation. Id.
122. See id.
123. See id.
124. See id.
125. See id. See also Questions and Answers, supra note 53, at 8.
126. Telephone Interview with Rachel Iskow, supra note 7.
(CUP). The granting of a CUP is a discretionary function of the local governing body, and thus is subject to the political pressures of elected officials' constituents. When NIMBY pressure builds against a project, the power to grant or deny a CUP provides a means to deny a project. The ability to develop by right avoids this political battle. Thus from a practical standpoint, an adequate site is four to five acres in size and free of physical constraints, on which multi-family housing can be developed by right.

d. Case Law

Only three published decisions to date have shed additional light on the meaning of "adequate sites" in California Government Code section 65583(c)(1), and the requirements for compliance with the section. The first two in this series, Buena Vista Gardens Apartment Ass'n v. City of San Diego Planning Dep't, and Hernandez v. City of Encinitas, indicate a very cautious approach by the court to probing the

127. See CAL. GOV'T CODE § 65583(c)(1) (West 1997). The text of the zoning code will indicate which uses are permitted in a given zone. The code will indicate that some uses are permitted without a CUP, and will indicate others that are allowed with a CUP. Thus, in a low-density residential zone, the code may provide that single-family uses are permitted by right, and that duplexes are allowed with a CUP. Some zoning codes may not allow multi-family housing in any zone without a CUP as a means of excluding such housing. See DAVID L. CALLIES, ET AL., CASES AND MATERIALS ON LAND USE 77 (2nd ed. 1994).

128. See generally 2 WILLIAMS & TAYLOR, supra note 32, § 64.01.

129. "NIMBY" is an acronym for Not In My Back Yard. It is commonly used, derisively, to denote community opposition that is considered unreasonable or parochial. Kristine Nelson Fuge, Exclusionary Zoning: Keeping People in Their Wrongful Places or a Valid Exercise of Local Control?, 18 HAMLINE J. PUB. L. & POLY 148, 168 n.7 (1996).

130. See Ward Connerly, The Impact of SB 1019, 1 LAND USE F. 284 (1992). Housing element law addresses this problem only in cases in which the locality's identified need is greater than the identified sites. In that situation, the sites identified in a community's inventory must allow owner-occupied and multi-family rental housing by right. See CAL. GOV'T CODE § 65583(c)(1) (West 1997).

131. Telephone Interview with Rachel Iskow, supra note 7.


adequacy of the sites for residential development. However, in Hoffmaster v. City of San Diego the court appears to have charted a new direction, demonstrating a willingness to assess whether the sites identified will in fact result in housing.

In the first case to construe the statute, the California Court of Appeal for the Fourth District signaled a deferential standard of review of the adequate sites requirement. In its 1985 decision in Buena Vista Gardens Apartment Ass’n v. City of San Diego Planning Dep’t, the court held that the City of San Diego had substantially complied with section 65583(c)(1) even though the City did not identify in the element sites for rental housing, mobile homes or factory-built housing, as explicitly required by the statute.

The plaintiffs in Buena Vista charged that San Diego’s housing element did not substantially comply with housing element law because, among other things, it did not identify adequate sites to meet the City’s housing goals. According to the court, the only program in the housing element that addressed the requirements of section 65583(c)(1) was a statement that the City “may” offer surplus City land to non-profit and public housing developers. The court observed that HCD, in reviewing the element, had found that this statement did not “evidence a firm commitment” to doing so. HCD had further noted that “there is no indication of how much land will be made available, [or] its zoning, or dwelling-unit capacity.”

Despite HCD’s conclusion that the housing element did not meet the requirements of the law, the court found the

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135. See infra text accompanying notes 138-153.
137. See infra text accompanying notes 157-185.
139. Id. at 744.
140. See CAL. GOV’T CODE § 65583(c)(1) (West 1997).
141. Buena Vista, 220 Cal. Rptr. at 736.
142. Id. at 738.
144. Buena Vista, 220 Cal. Rptr. at 738.
City in compliance. The court noted that the element stated that San Diego was divided into forty sub-areas, which each had its own community plan. The element described the capacity remaining for further residential development in each of the areas. The court was not concerned that the element did not actually spell out sites for rental housing, mobile homes or factory-built housing, as required by section 65583(c)(1). “[I]t appears,” wrote the court, “these designations may be in the detailed community plans which are referred to in City’s housing element.” Since the plaintiffs had not shown that the community plans did not contain this information, the court concluded that as the record stood, the City was in compliance. Thus, after Buena Vista, a city is not required to identify adequate sites within its housing element, if such an analysis could be found in other planning documents. In addition, the court appeared to give little weight to the opinion of HCD as to the adequacy of the element, substituting instead its evaluation.

In 1994, the Fourth District again considered the adequate sites requirement and again gave very little scrutiny to the challenged element’s compliance with the adequate sites requirement. In Hernandez v. City of Encinitas, the plaintiffs claimed that the inventory provided failed to identify suitable sites for low and moderate income housing, presenting expert testimony to this effect. The court held that the plaintiffs’ attack on the adequacy of the sites identified in the element was a “pure attack on the merits.” Therefore, the trial court was not required to consider the merits of the plan, and could find that the City substantially complied with the adequate sites requirement without determining whether the sites identified would actually allow for low and moderate

145. Id. at 738-39.
146. Id. at 738.
147. Id.
148. Id. at 739.
150. Id.
151. Id. at 738-39.
153. Id. at 886.
154. Id.
income housing. Thus, under Hernandez, parties challenging the adequate sites requirement may be unable to obtain judicial review of the sufficiency of the sites identified, beyond a determination that an inventory is in fact included.

Twelve years after deciding Buena Vista, the Fourth District again considered the validity of San Diego's housing element, and the requirements of section 65583(c)(1), in Hoffmaster v. City of San Diego. The City of San Diego had failed to adopt a valid update of its housing element by the statutory deadline of July 1, 1991. Kevin Hoffmaster and other members of a class of homeless residents of San Diego sued, seeking a writ of mandate. On November 18, 1994, the City was ordered to adopt a valid element within 120 days. The City adopted a housing element on March 21, 1995, and Hoffmaster filed an amended petition for peremptory writ of mandate.

The petitioners based their challenge on, among other issues, the City's alleged failure to identify adequate sites that would be made available for homeless emergency shelters and transitional housing as required by section 65583(c)(1). The trial court found that the housing element did not identify adequate sites for shelter and transitional housing or provide a plan for making those sites available. The City amended its plan, providing maps and a table to demonstrate that adequate sites were available. The table showed all vacant, infill and redevelopment land in the city where emergency shelters could be located. Also included

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155. Id. In fact, given the court's conclusion that an attack on the workability of the element's facts and figures was an attack on the merits, the appropriate standard of review prohibits such an examination. See supra text accompanying notes 97-105.
157. Id. at 686.
158. Id.
159. Id.
160. Id. at 687.
161. Plaintiffs also claimed that the element failed to contain a five-year action plan. Id.
163. Id.
164. Id. at 692-93.
165. Id. at 692.
were two maps, one showing vacant parcels where homeless shelters and housing could be located and one showing potential redevelopment sites.\textsuperscript{166}

The trial court interpreted section 65583(c)(1) to require that the City's action plan demonstrate that it will provide enough sites to meet the entire need of the homeless population within five years.\textsuperscript{167} Finding that the City had failed to do so, the court granted the writ of mandate and ordered the City to approve all conditional use permits until it had complied with section 65583(c)(1).\textsuperscript{168} The City appealed.

The Fourth District Court of Appeal stated that section 65583(c)(1) did not require the City to identify sufficient sites to meet all of the shelter needs of the identified homeless population within five years.\textsuperscript{169} Rather, the court held that section 65583(c)(1) requires that the City identify adequate sites that will be made available to meet its quantified housing objectives for homeless people.\textsuperscript{170} The quantified objectives are the number of housing units the city projects will be constructed over the five-year period covered by the plan.

The court further noted that for "identification [of adequate sites] to be meaningful, it must necessarily be specific."\textsuperscript{171} The element must catalog sites available for development that are not subject to "restrictive zoning burdens," which combined with community opposition can delay or kill a project or make it financially infeasible.\textsuperscript{172} Further, the court held that the identified sites should be officially designated and publicized.\textsuperscript{173} Yet, the court did not entirely abandon the court's holding in Buena Vista, that compliance with the adequate sites requirement does not mandate that an inventory of sites appear within the element, saying that the

\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Hoffmaster v. City of San Diego, 64 Cal. Rptr. 2d 684, 688 (Cal. Ct. App. 1997).
\textsuperscript{169} Id. at 690-91.
\textsuperscript{170} Id. However, note that this is distinct from the requirement, discussed above, that the locality identify adequate sites to meet the need for low and very low income housing, where the element's inventory fails to identify enough sites to meet the total projected need for housing. See supra, text accompanying notes 76-77.
\textsuperscript{171} Hoffmaster, 64 Cal. Rptr. 2d at 694.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
official designation would be “preferably in the housing element.” Finally, the court held that the City must show that its action program actually encourages the creation of shelter and transitional housing.

In applying these standards, the court ruled that the City's tables and maps that made up its inventory of sites did not identify adequate locations for homeless shelters and transitional housing because the sites identified were not "available." The court regarded the City's inventory as "simply that which is generally required under section 65583, subdivision (a)(3)." However, section 65583(c)(1) requires more: a showing of availability to meet the element's quantified objectives.

The court held that the sites were not available, because the City had an ordinance in effect that required a conditional use permit for many types of residential care facilities. The court concluded that this ordinance would require a use permit for nearly any residential facility that would serve homeless people. In addition, the ordinance prohibited such facilities from being located within a quarter mile of

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174. Hoffmaster, 64 Cal. Rptr. 2d at 694.
176. Id. at 697.
177. Id. at 693. Section 65583 provides in relevant part:

The element shall contain all of the following:

(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following:

(3) An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.

CAL. GOV'T CODE § 65583(a)(3) (West 1997).
178. CAL. GOV'T CODE § 65583(c)(1) (West 1997).
179. Hoffmaster, 64 Cal. Rptr. 2d at 694.
180. Id. State law requires municipalities to allow residential care facilities with six or fewer beds to be developable by right in residential areas. See CAL. HEALTH & SAFETY CODE § 1566.3 (West 1990). San Diego's ordinance would have required a conditional use permit for any facility with greater than six beds which provided sleeping accommodations for mentally disabled persons and those in substance abuse programs, as well as any facility that provides counseling or receives government funding. Hoffmaster, 64 Cal. Rptr. 2d at 694.
The court held that these restrictions constrained the development of shelters and transitional housing on all of the identified sites, because when combined with community opposition, development on those sites became difficult. Thus the sites identified were not adequate because—absent some feature of the City's housing element program that would "offset" these restrictions—the identified sites were not available to meet the City's quantified objectives. To be available, the court held, the City must show "zoning development controls, meaningful regulatory concessions and incentives that will permit and encourage such development." The court found none of these in the City's housing element.

III. IDENTIFICATION OF THE PROBLEM

The Housing Element statute was designed to ensure that localities plan for affordable housing by analyzing potential sites for such housing and, if necessary, taking steps to make more available. This obligation is critical to overcoming exclusionary land use planning by local governments, which can prevent the development of affordable housing.

The chief method for enforcement of this requirement is by private litigants who must rely in large measure on the findings of the state agency charged with reviewing local housing elements to prove that the sites are not adequate. If the information provided to HCD does not include an analysis of all of the factors that may affect the suitability of land for development of affordable housing, low-income people and advocates of affordable housing may have difficulty challenging the adequacy of the sites in court. Therefore, it

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182. Id.
183. Id. at 697.
184. Id.
185. Id. The appellate court stayed for 60 days the trial court's order to approve CPU applications to give the city an opportunity to comply with the higher court's interpretation of section 65583(c)(1). Id.
186. CAL. GOV'T CODE § 65580-89.8 (West 1997).
187. See supra Part II.C.1.
188. See supra Part II.C.1.
189. See supra Part II.B.2.e.
190. See infra Part IV.B.2.
is necessary to analyze whether the current adequate sites requirement obligates localities to provide sufficient information regarding their sites for housing to allow adequate appraisal of whether the sites will actually allow development of affordable housing.

IV. ANALYSIS

A. Quantified Objectives Must be Correlated to Projected Housing Need

Before discussing the shortcomings of the current housing element process, it is important to analyze the requirements of the adequate sites analysis according to the statute, case law, and HCD. Each appears to require a different standard for determining whether sufficient sites have been identified, making it unclear whether the housing element should identify adequate sites to meet a community's goals, quantified objectives, or projected need.

California Government Code section 65583(b) requires the housing element to indicate the maximum number of housing units the community projects may be built or rehabilitated during the housing element's five-year planning period. In Buena Vista the court held that compliance with this provision requires that the community show that its quantified objectives are "equated" with the projected housing need established by the local COG.

The statute, HCD, and case law each provide a different standard regarding the relationship between the adequate sites inventory and the other required elements of the housing element. California Government Code section 65583(c)(1) states that the community should identify adequate sites to meet the community's housing goals. In Hoffmaster, the

191. CAL. GOV'T CODE § 65583(b)(2) (West 1997).
192. Id.
193. Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dep't, 220 Cal. Rptr. 732, 741 (Cal. Ct. App. 1985). The court did not elaborate on this point further. However, the court had noted that the statute allows that a city's quantified objectives may be less than its identified need. Id. Thus, it is not entirely clear what the court meant when it said "equate."
194. CAL. GOV'T CODE § 65583(c)(1) (West 1997).
court held that the inventory of adequate sites required by section 65583(c)(1) must be sites that will be available to meet the locality's quantified objectives.\textsuperscript{196} HCD's Qs & As define adequate sites as those capable of accommodating the community's new construction need.\textsuperscript{196} Thus, it is unclear whether the housing element should identify adequate sites to meet a community's goals, quantified objectives, or projected need.

Reading Hoffmaster and Buena Vista together supports the conclusion that the appropriate standard is for the inventory to identify adequate sites to meet the community's need. If the inventory of sites must match the objectives (Hoffmaster)\textsuperscript{197} and the objectives must match the need (Buena Vista),\textsuperscript{198} then it follows that the inventory of sites should match the need.

Requiring the inventory to demonstrate whether there are sufficient sites to meet the locality's need is consistent with HCD's interpretation.\textsuperscript{199} This line of reasoning is also supported by examining the additional provisions of section 65583(c)(1). The second sentence of this section provides for the situation in which a community is unable to provide adequate sites to meet all of its identified regional share needs for all income groups.\textsuperscript{200} In such a situation, the community must identify in its element sufficient sites where housing for low and very-low income households may be developed "by right," that is without a conditional use permit.\textsuperscript{201} In order to determine whether a community must allow development by right, it is necessary that a community demonstrate whether or not it has sufficient sites to meet all of its identified need. If a correlation between sites and need is not required, this provision is rendered meaningless, for it is impossible to determine whether a community must comply with it.

Requiring the sites to be sufficient to meet the commu-

\textsuperscript{195} Hoffmaster v. City of San Diego, 64 Cal. Rptr. 2d 684, 691 (Cal. Ct. App. 1997).
\textsuperscript{196} Questions and Answers, supra note 53, at 20
\textsuperscript{197} See supra text accompanying note 170.
\textsuperscript{198} See supra text accompanying note 193.
\textsuperscript{199} See supra text accompanying note 196.
\textsuperscript{200} CAL. GOV'T CODE § 65583(c)(1) (West 1997).
\textsuperscript{201} See id. See discussion of "by right" supra text accompanying notes 118-119.
nity's housing need is also consistent with another section of state planning law, California Government Code section 65913.1. This section requires local governments to "designate and zone sufficient vacant land for residential use...to meet housing needs as identified in the general plan."202 Thus, this section mandates that communities provide sufficient vacant residential land to meet its needs. Given the courts' interpretations in Buena Vista and Hoffmaster,203 and the requirements of section 65913.1, section 65583(c)(1) should be rewritten to make it clear that communities must identify adequate sites to meet the community's identified housing needs.

B. Housing Element Should Provide Specific Information Regarding Identified Sites

1. The Current Standard

As the preceding section demonstrates, an element should contain an analysis of whether the locality has adequate sites to meet the community's identified need.204 However, merely cataloging all vacant sites that could be used for housing may give a misleading picture as to a community's ability to meet its projected need. HCD's Qs & As provide the agency's interpretation as to whether a site is suitable for residential development,205 but they do not indicate that proof of these characteristics must be provided.206 Instead, as to the inventory required under section 65583(b)(2), the Qs & As suggest a matrix such as the following:207

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202. Id. § 65913.1 (emphasis added).
203. See supra text accompanying notes 197-198.
204. See supra Part IV.A.
206. Id.
207. Id. at 9. "Maximum Units Per Acre" refers to the maximum number of units allowed under the local zoning code for each density. "Total Potential Units" refers to the product of units per acre and vacant acres.
<table>
<thead>
<tr>
<th>Density</th>
<th>Maximum Units per Acre</th>
<th>Vacant Acres</th>
<th>Total Potential Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very Low</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Low</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Moderate</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The sites used to create this inventory should be either vacant land or land that is developed but could be redeveloped or "recycled" during the element's five year period.208 This inventory provides the foundation for the community's determination of whether it has adequate sites to meet its projected housing need.209

A problem with this approach is that while it looks good on paper, the land provided may not actually be capable of producing the number of units it projects.210 Yet, an inventory employing this approach is consistent with HCD's Qs & As and therefore would likely be found by the department to comply with the statute.211 Unless a community group or other third party can demonstrate to HCD within the time it has to comment on the element212 that the sites are not adequate to meet the need, HCD would likely approve it and a presumption of validity would attach to the adopted housing element.213 Yet it is possible that the land may never be capable of supporting housing affordable to low or very low-income people.214 More detailed information is needed if the

208. Id. at 8. The Department provides the following as examples of land suitable for redevelopment or recycling: underutilized residential land, publicly owned surplus parcels, and nonresidential uses that are "aging" and could be changed to a residential use. Id.

209. Id. at 8-9.

210. See infra Part IV.B.2.

211. See infra Part IV.B.2.

212. HCD must issue its comments on a draft element within 90 days, or within 45 days if the document is a draft amendment to an existing plan. See CAL. GOV'T CODE § 65585(b) (West 1997). Once a community adopts the element, HCD must issue a determination within 120 days as to whether the city is in compliance. See id. § 65585(h). Public comments on the element are to be considered by HCD in making its determination. See id. § 65585(c).

213. See CAL. GOV'T CODE § 65589.3 (West 1997). See also discussion supra Part II.B.2.f.

214. See infra Part IV.B.2.
2. A Hypothetical Example

Consider a hypothetical example to illustrate this point. Californiaville has an identified new construction need of 400 units, 100 units in each of the four income categories of very low, low, moderate, and above moderate. To meet its new construction need for very low and low-income households, Californiaville would need sufficient land at “appropriate densities” to permit development of rental housing, mobile-homes, and factory-built housing. The rental housing should be multi-family and thus an appropriate density would be land zoned for at least twenty units per acre. After analyzing its vacant land, Californiaville discovers that there are four half-acre vacant parcels zoned for high-density residential development scattered throughout the City. Additionally, Californiaville contains eight quarter-acre high-density parcels throughout the community. It also evaluates its remaining land zoned at various lower densities and creates an inventory.

Californiaville prepares its matrix, and it looks like this:

<table>
<thead>
<tr>
<th>Density</th>
<th>Maximum Units per Acre</th>
<th>Vacant Acres</th>
<th>Total Potential Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very Low</td>
<td>4</td>
<td>25</td>
<td>100</td>
</tr>
<tr>
<td>Low</td>
<td>10</td>
<td>10</td>
<td>100</td>
</tr>
<tr>
<td>Moderate</td>
<td>18</td>
<td>5.5</td>
<td>100</td>
</tr>
<tr>
<td>High</td>
<td>25</td>
<td>8</td>
<td>200</td>
</tr>
</tbody>
</table>

The chart appears to demonstrate that Californiaville has enough acres of high-density land (eight acres) to meet its identified very-low and low-income need (200 units, combined). However, this is not an entirely accurate picture of

215. For an explanation of these categories see supra text accompanying note 60.  
216. CAL. GOV'T CODE § 65583(c)(1) (West 1997).  
217. See supra Part II.  
218. See Connerly, supra note 11.  
219. For simplicity, assume that all of the land inventoried is vacant.
California's development capacity.

The chart, while probably acceptable to HCD and thus likely to a reviewing court, says nothing about the character of these sites. In fact, it does not provide any detail as to their location, a critical problem for any community group or attorney representing low-income people. Without the cooperation of the local agency preparing the element, members of the community would have no means of providing HCD, or the locality, with any additional information about the sufficiency of the sites. The chart is merely an aggregation of vacant land, it does not reveal that the land is not likely sufficient for the development of any multi-family housing due to the small size (one half to one quarter acre) of the parcels.

As noted earlier, developers of affordable housing typically require a parcel of at least four to five acres in size in order to make the development feasible. More specific information about the parcels that make up the inventory would provide a more accurate picture of a community's capacity to accommodate its projected housing need. This would require a more detailed list than currently required under the statute or HCD's Qs & As. While the Hoffmaster court's statement that "for identification to be meaningful, it must necessarily be specific" seems to mandate more detail, it is not entirely clear what level of specificity the court was looking for. Nonetheless, it seems that merely cataloging sites by zoning category (as in the Californiaville example) would not satisfy the Hoffmaster court's standard.

Arguably, the court sought a level of specificity that would assure not merely that the land could be developed, but that it would; that the identified sites are parcels on

220. A similar chart appears in the Agency's Qs & As as a model for localities. See Questions and Answers, supra note 53 at 9.
221. See supra Part II.B.2.f.
222. Telephone Interview with Lynn Martinez, Staff Attorney, Legal Services of Northern California (Jan. 12, 1998).
223. See supra text accompanying note 108.
224. See supra text accompanying notes 121-123.
225. Hoffmaster v. City of San Diego, 64 Cal. Rptr. 2d 684, 694 (Cal. Ct. App. 1997). It is also arguably dictum. The court's opinion did not rest upon the identity of the sites (the city had provided detailed maps showing their precise location) but their availability for development. Id.
226. See id. at 693.
which the City intended to allow development of transitional housing and emergency shelter and that are capable of supporting this housing.\textsuperscript{227} Thus in that case, the court required the element to show that the City had in place programs that would mitigate the constraint upon the identified sites posed by the CUP requirement.\textsuperscript{228}

The statutory language construed by the \textit{Hoffmaster} court applies equally to all income groups, of which homeless people are but one.\textsuperscript{229} It follows that the court’s rationale may be applied more generally to cover all income groups, including lower-income households. Thus, under \textit{Hoffmaster}, meeting the adequate sites mandate should require that the community identify specific sites on which the local government intends to allow development of housing for lower income households. Furthermore, these sites should be capable of supporting housing appropriate to this group. If this is to be the standard, then a parcel by parcel analysis would seem to be appropriate, as opposed to an aggregation of all sites as currently permitted by HCD. Moreover, this analysis should indicate the size of the parcel and whether it may be developed by right. Only then would a court, HCD, or the locality be able to determine whether the sites are adequate, as that term has been construed in \textit{Hoffmaster}.\textsuperscript{230} This appears to have been what the court had in mind when it stated that the sites “should be officially designated and publicized, preferably in the housing element, for this use.”\textsuperscript{231}

While the requirement to officially designate parcels seems to solve one problem, it presents another. By stating

\begin{itemize}
\item \textsuperscript{227} See \textit{id.} at 694.
\item \textsuperscript{228} \textit{Id.} at 695.
\item \textsuperscript{229} \textit{See} \textit{CAL. GOV'T CODE § 65583(c)(1) (West 1997).} The statute requires that the locality identify adequate sites to allow a “variety of types of housing for all income levels, including multifamily rental housing, factory-built housing, mobile homes, emergency shelters, and transitional housing.” \textit{Id.} at § 65583(c)(1). Given that the subsection construed in \textit{Hoffmaster} provides that the adequate sites requirement applies to both transitional housing and multifamily housing, the court’s rationale should apply equally to both types of housing. Likewise, the statute does not specifically mention homeless people, but rather “all income levels” and thus the court’s rationale should logically apply to all income levels. \textit{Id.}
\item \textsuperscript{230} \textit{See supra} Part II.C.2.d & text accompanying notes 179-185.
\item \textsuperscript{231} \textit{Hoffmaster v. City of San Diego}, 64 Cal. Rptr. 2d 684, 694 (Cal. Ct. App. 1997).
\end{itemize}
that the official designation would "preferably [be] in the housing element," the court indicated that this designation might be made in a document other than the housing element, and therefore, not one reviewed by HCD. This presents an enforcement problem. Read together with its decision in Buena Vista the Hoffmaster court seems to indicate that satisfaction of the adequate sites requirement does not necessarily require an inventory of sites in the housing element.

The problem with this approach is that, as noted earlier, enforcement of the housing element statute by private parties often relies on the findings made by HCD as to the adequacy of the community's housing element. This reliance is necessitated by the fact that courts will typically not consider any evidence that constitutes an attack on the merits, such as an expert's opinion as to the adequacy of the sites. However, HCD's comments are directed not at the merits of the element, but instead reflect HCD's interpretation of the statute and the community's compliance with it and thus are admissible.

If the officially designated sites suggested by Hoffmaster appear in a document other than the housing element, that document might not be considered by HCD in its evaluation. As a result, evidence that the officially designated sites are insufficient would not be included in HCD's written findings and might not be admissible to challenge the adequacy of the element.

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232. Id.
233. Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dep't, 220 Cal. Rptr. 732, 738 (Cal. Ct. App. 1985) (stating that the inventory of adequate sites need not appear in the housing element if it may be found in other planning documents).
234. See supra text accompanying notes 101-105.
236. CAL. GOVT CODE § 65585 (West 1997).
237. See supra text accompanying notes 101-105.
238. See supra text accompanying notes 75-80. The statute requires that a housing element include an inventory. CAL. GOVT CODE § 65583(a)(3). As a result, the element should at a minimum incorporate the inventory by reference.
3. The Benecia Experience

Litigation over the City of Benecia’s housing element illustrates the importance of requiring detailed information about a city’s land inventory. In October 1992, Benecia adopted a housing element that was subsequently approved by HCD. Unlike the Californiaville example, Benecia’s element contained a parcel by parcel analysis of the sites that could be utilized to meet its identified housing need. None of these sites were zoned at densities sufficient to allow multi-family housing, but the element indicated that sites would be rezoned to an appropriate higher density. In turn, the inventory indicated the number of units that could be built once rezoning had occurred.

The Solano County office of Legal Services of Northern California (LSNC), on behalf of low-income residents of Benecia, carefully investigated each of the sites listed in the inventory. It discovered that few of the listed sites were actually available to meet the community’s need. One-half to one-third of the sites identified had already been approved for development of single-family housing. Some of the purported vacant parcels were actually City-owned parks. Others were under water, or were centered in single-family neighborhoods where development of multi-family housing was not likely to occur.

LSNC provided documentation of its findings to HCD. The Department was moved to revoke its finding of compliance in the spring of 1993, on the basis that Benecia had not complied with the adequate sites requirement. Benecia prepared a new housing element in June 1994 but it was never adopted by the city council. In December 1995, LSNC

239. Telephone Interview with Lynn Martinez, supra note 222.
240. Id. This is unusual for a city’s element to contain such detail. Id. See, e.g., City of Sunnyvale, Housing Sub-Element of the General Plan (1991). This level of detail is not currently required by HCD guidelines or the statute.
241. Telephone Interview with Lynn Martinez, supra note 222.
242. Id.
243. Id.
244. Id.
245. Id.
246. Id.
247. Telephone Interview with Lynn Martinez, supra note 222.
248. Id.
filed suit. In settlement, the City agreed to re-zone adequate land to meet the City's COG-identified need, as well as to strengthen its support of affordable housing.

The Benecia case illustrates the importance of requiring detailed information in the vacant land inventory. With specific information, both HCD and the community can provide more effective implementation of the housing element law. The sufficiency of HCD's review depends of course on the good faith of the locality to identify sites that are in fact vacant. Assuming this is done, the more information provided to HCD the better able it is to evaluate whether a community has adequate sites to meet its need. An aggregation of sites by zoning category does not provide sufficient information. However, a parcel by parcel analysis, if accurate, can provide HCD (and the locality) with the information it needs to make an informed assessment.

Unless the assessment by the locality is inaccurate, a detailed inventory allows interested third parties to provide the private enforcement envisioned by the legislature, in a meaningful way. Members of the community may examine the sites or otherwise independently analyze their adequacy. Providing this information to HCD allows the agency to go behind the paper record and make a more realistic evaluation of the adequacy of the identified sites.

In summary, the housing element statute, case law and HCD's Qs & As provide conflicting standards regarding the relationship between the adequate sites inventory and other required components of a housing element. Further, the current statute and HCD's interpretation of it do not clearly mandate sufficient information to ensure that the sites identified are in fact adequate to allow for the development of affordable housing. A change in the statutory language could

249. Id.
250. Id. The city agreed to help finance a specific affordable housing development and to strengthen its inclusionary housing ordinance, which requires that all housing developments larger than 10 units include a certain number of units affordable to low and very low income households. Id.
251. Telephone Interview with Michael Rawson, supra note 101.
252. See supra Part IV.B.2.
253. See supra Part IV.B.3.
254. See supra Part IV.A.
255. See supra Part IV.B.
remedy these shortcomings.

C. The Proper Standard of Judicial Review

Even where a city has failed to include detailed information regarding the sites that were used to develop its analysis of adequate sites, a court is not powerless to probe the adequacy of the city's housing sites. Nor should a court refuse to consider evidence that the sites are not adequate, on the basis that it is an impermissible examination of the merits.

The Hernandez court presents perhaps an overly technical application of the prohibition on examining the merits of a housing element. It is true that adoption of a housing element is a legislative act, and as result it is not within the purview of the court to examine the wisdom of the plan. However, determining substantial compliance may involve more than simply determining that something purporting to satisfy each statutory requirement actually appears in the element. The proper analysis seems to require a two step process. First, a reviewing court examines the element to determine whether each required component is included. This is the facial compliance step.

Even where the element satisfies this step, the court must go further to establish substantial compliance—it must determine that each component complies with the substance of the statute. Anything less would reduce the substantial compliance standard to one that is concerned only with form, not substance. This second step is necessary in order for a reviewing court to determine whether each component of the housing element contains sufficient information to meet the objective of the statutory requirement it purports to satisfy.

To illustrate the two step analysis: if a housing element fails to identify sufficient sites for housing to meet the local-


257. This approach was first suggested to the author by Michael Rawson. Telephone Interview with Michael Rawson, Co-director of the Public Interest Law Project (Sept. 1, 1998). See, e.g., Camp v. Mendicino County Bd. of Supervisors, 176 Cal. Rptr. 620, 631 (Cal. Ct. App. 1981) (finding that the challenged housing element was inadequate because it failed to include discussion of particular topics required by the statute).

ity’s COG identified housing needs, it fails the facial compliance test. On its face, the element does not meet the statutory requirement that each element “identify adequate sites . . . to meet the community’s housing goals.” However, an element may satisfy this component facially by presenting a sufficient number of sites and still be out of compliance, under the second step of the analysis. For instance, the housing element statute requires that the sites identified for housing support a variety of housing types including multifamily units and that the sites have the proper zoning to facilitate such development. If all the sites identified are zoned for single-family housing, the element does not substantially comply with the statute because the sites do not support a variety of housing types, even though facially it appears to be in compliance.

Consider another example, a little closer to the margin between permissible and impermissible review. The statute requires that the identified sites for housing have appropriate development standards to “facilitate and encourage” housing for all income levels. As discussed previously, development standards, such as minimum lot size, setback requirements and allowable densities, can have a significant impact on the feasibility of affordable housing development. In addition to eliminating restrictive development standards, a locality may choose to adopt development standards that act as incentives to the creation of affordable housing. Returning to the Californiaville example, a plaintiff may wish to argue that the hypothetical element there does not comply with the statute because the sites will not actually support the development of affordable housing (because the allowable densities on appropriately-sized parcels are too low). At first blush, some might believe that the plaintiff is asking the

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259. *See supra* Part II.B.2.a for a discussion of this requirement.
260. CAL. GOV’T CODE § 65583(c)(1) (West 1997).
261. CAL. GOV’T CODE § 65583(c)(1) (West 1997).
262. *Id.*
263. *See supra* Part II.A.2.
264. These may include density bonuses (whereby a developer is allowed to exceed the maximum allowable density under the zoning code, in exchange for building some units affordable to lower-income households), or providing for reduced setback requirements and other relaxed development standards. *See Questions and Answers, supra* note 53, at 23.
court to "probe the merits" of the plan. After all, the plaintiff appears to be faulting the wisdom of the plan, arguing that the city could produce more housing if it just adopted less restrictive development standards favored by the plaintiff. This is not the case.

In the context of housing element compliance review, an attack on a locality's development standards might involve an impermissible probing of the merits. But determining whether those development standards constrain the development of the sites identified in a housing element is not. The issue in the latter instance is whether the sites offer appropriate zoning and development standards to "facilitate and encourage" the development of affordable housing, as required by the statute. To determine compliance with this statutory requirement, the court must necessarily examine how the application of zoning and development standards to the sites affects the potential for development of housing on those sites. The Hoffmaster court recognized this. The Hernandez court, unfortunately, did not.

Indeed, a less-searching inquiry would be the appropriate standard only if the statute mandated nothing more than an inventory showing sufficient holding capacity to support the COG-identified housing need. The statute, however, requires much more: a program that demonstrates that the zoning and development standards on those sites are appropriate to meeting the housing needs of all economic segments of the community. Thus, to demonstrate substantial compliance, a locality must show that its inventory of sites will actually support a range of housing development, including housing for low-income households. To make this determination a court must necessarily consider the affect of local development controls.

The Hoffmaster court applied such an analysis. The court first noted that "mathematically," the city's inventory of sites was more than enough to meet the City's quantified

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265. See CAL GOV'T CODE § 65583 (West 1997).
266. See supra text accompanying notes 230-232 and text accompanying notes 182-188.
268. CAL. GOV'T CODE § 65583(c)(1) (West 1997).
269. See supra text accompanying notes 180-185.
objectives. But, as noted earlier, that was not enough, for this inventory was "simply that which is generally required under section 65583, subdivision (a)(3)." Compliance with section 65583(c)(1) required more. "[S]ubstantial compliance with the legislative mandate requires more than merely designating every unoccupied mote within City’s boundaries, each of which is subject to City-imposed ‘developmental and separation restrictions.’" Substantial compliance required a showing of availability.

The Hoffmaster court found that the sites in San Diego’s inventory were not “available” as required under the statute. Why not? Because the element did not demonstrate that there was a “program of zoning development controls, meaningful regulatory concessions and incentives” that would encourage development of housing on the sites. In other words, the court found that the development standards so constrained the potential for development on the identified sites that the sites were not adequate under the statute. In so concluding, the court expressly acknowledged the governing standard of review prohibits a consideration of the merits of the plan, indicating that the decision had applied this standard. In short, the court found that substantial compliance with 65583(c)(1) requires more than just a numerically sufficient inventory of sites and that examining the adequacy of the sites is not, contrary to the approach of the Hernandez court, an impermissible probing of the merits. Most importantly, determining substantial compliance requires an examination of local zoning and development standards or other particulars that may make development of the sites infeasible. As the Hoffmaster court recognized, such an examination is well within the purview of the court.

271. Id. at 692 (emphasis added).
272. Id. at 694-97.
273. Id. at 697
274. Id. at 697.
V. PROPOSAL

A. The Identification of Sites Should Match Housing Need

California Government Code section 65583(c)(1) provides that localities must identify adequate sites to meet the community's housing goals. However, case law and HCD both articulate different standards, making it unclear if a housing element should identify adequate sites to meet a community's goals, quantified objectives or projected need. Further, the statutory language is inconsistent with other provisions of subsection (c)(1), and with another section of state planning law. Altering the language of section 65583(c)(1) to require a locality to match sites to its specific housing need, rather than its more general goals would resolve these inconsistencies. Presently, the relevant portion of section 65583(c)(1) states that communities must "[i]dentify adequate sites . . . to meet the community's housing goals as identified in subdivision (b)." A simple alteration of this section would correct the conflicting standards.

The legislature should alter subsection (c)(1) to read: "Identify adequate sites . . . to meet the community's housing need as identified in subdivision (a)(1)." Changing "housing goals" to "housing need" is consistent with HCD's Qs & As and other related statutory provisions. Altering the statute to read "as identified in subdivision (a)(1)" rather than subdivision (b) is necessary to provide an accurate cross-reference in keeping with the change from "goals" to "need."

B. Creating a More Accurate Picture of Sites Available for Development

The legislature should also increase the amount of specificity required in each community's inventory of sites. The statute should be modified to require a parcel by parcel list of each site available to meet the community's new construction

275. Id.
276. See supra text accompanying notes 199-201.
277. See CAL. GOV'T CODE § 65913.1 (West 1997). See also supra text accompanying note 48.
278. See supra text accompanying note 202.
279. CAL. GOV'T CODE § 65583(c)(1) (West 1997) (emphasis added).
280. See supra text accompanying notes 199-203.
need. For each site, the list should include the acreage of the parcel and the maximum allowable density under current zoning. 281 Redrafting the statute would also incorporate and clarify current judicial standards for compliance with the adequate sites inventory. 282

The following proposed language, if inserted after the first sentence of current California Government Code section 65583(c)(1), could achieve these objectives.

For purposes of this section "identify adequate sites" shall mean that the housing program shall identify by parcel number or other similar means specific sites on which the locality will allow development of housing to meet the needs of all income groups as identified pursuant to subsection (a)(1). Identified sites shall indicate for each parcel its acreage, its maximum allowable density expressed as units per acre and the uses, if any, which are allowable by right.

The requirement to identify sites by parcel numbers incorporates the holding in Hoffmaster that sites must be specific, and clarifies what level of specificity is required. 283 Requiring information regarding allowable uses by right embodies Hoffmaster's holding that compliance with the adequate sites requirement mandates that the sites identified be ones on which the local government intends to allow development. 284 Although the court in Hoffmaster held that the identified sites need not allow development by right, 285 it did conclude that a CUP requirement may necessitate other actions by the local government to compensate for this restriction. 286 An indication as to whether the sites require a CUP for housing development will allow HCD or a court to better assess whether additional actions are needed by the locality to make the sites "available." 287

A parcel by parcel list, and an indication of the acreage and allowable density would correct the ambiguous language
in the statute as currently constituted. This ambiguity can result in an inventory of sites that complies with the statute, yet gives a misleading picture as to a community's capacity to accommodate new affordable housing construction.\textsuperscript{288} Mandating this information would also allow for more effective enforcement of the statute by allowing interested third parties to ascertain which sites a community has used as the basis for its inventory and to analyze those sites.\textsuperscript{289} Finally, the language requiring the list to appear in the housing element is necessary to clarify case law, which suggests that something less would be appropriate.\textsuperscript{290}

These suggested changes to the housing element statute will help to achieve the purpose of the adequate sites analysis: ensuring an adequate supply of land suitable for the development of housing to meet the state's growing demand.\textsuperscript{291} It will also help realize the broader goal of encouraging the development of desperately needed affordable housing for low-income Californians.

VI. CONCLUSION

Ending California's affordable housing crisis will require diverse efforts. Yet, even if this country committed abundant funding and an unbending determination to build more housing, these efforts would be futile without adequate provision of suitable sites on which this housing could be built.\textsuperscript{292} The responsibility for zoning adequate land falls solely on the shoulders of local government. To ensure that it undertakes this important task, the California Legislature mandates that each locality develop a plan—a housing element—which includes an inventory of land suitable for housing to meet the community's demand.

However, the statute as currently drafted and as interpreted by HCD and the courts, falls short of this goal. The required inventory does not mandate sufficient information to ascertain whether the community has adequate land that is actually capable of supporting housing for lower-income

\textsuperscript{288} See supra Part IV.B.1-2.
\textsuperscript{289} See supra Part IV.B.3.
\textsuperscript{290} See supra Part IV.B.2.
\textsuperscript{291} See supra text accompanying note 28.
\textsuperscript{292} See Housing Element Manual, supra note 5, at 1.
people. The acreage, allowable density, and permit requirements also determine whether a site is "adequate" to support affordable housing. Yet, this information is not required to appear in the element by the statute or HCD. As a result, a locality may be found in compliance, although there are no sites that will support the development of housing for low-income people. In addition, interested third parties, such as low-income residents and affordable housing advocates, cannot determine whether the sites in the inventory are suitable.

This comment has argued that the adequate sites requirement should mandate a parcel by parcel analysis, and that this analysis should be contained within the housing element. It has also argued that the inventory should set forth sites sufficient to meet the community's COG identified housing need. Revised statutory language has been proposed to accomplish this. If implemented, these changes to the housing element statute could help to ensure that each community in California can accommodate its fair share of severely needed affordable housing.

Brian Augusta