



## AB 1397

### HOUSING ELEMENT LAW SITE IDENTIFICATION STRENGTHENED

#### OVERVIEW

The 2017 California legislative session yielded a “housing package” of 15 bills that significantly increased both the available financing of affordable housing development and the obligation of local governments to plan, zone and approve affordable housing developments. This memorandum focuses on [AB 1397](#) (Low) which substantially strengthens the obligations in Housing Element Law<sup>1</sup> that housing elements identify and zone sufficient sites to address the community’s share of need for lower income housing and make those sites available early in the housing element planning period with access to public infrastructure.

AB 1397 tightens and adds long needed specificity to the obligation in Housing Element Law that housing elements identify and make available sites for the community’s Regional Housing Needs Allocation (RHNA) for lower income households. There are now stricter requirements for the adequacy of sites, including non-vacant sites, and sites that were identified in previous elements. As well as requirements that sites have sufficient available infrastructure.

The bill applies to housing element updates/revisions and amendments and development approvals beginning January 1, 2018. The Department of Housing and Community Development (“HCD”) will be publishing technical assistance and eventually guidance memoranda interpreting the bill and explaining how the department will implement the requirements some time in 2018. See [HCD's California's 2017 Housing Package](#). Below is a summary, description and identification of possible implementation issues.

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<sup>1</sup> Government Code §§ 65580 – 65589.8.

## SUMMARY

AB 1397 amends the Housing Element Law, specifically Government Code §§ 65580, 65583 and 65583.2.<sup>2</sup> Its purpose is to strengthen the obligation of local governments to identify a supply of adequate sites available to meet their housing needs for all income levels in their housing elements. (§65580(g)) Generally, the legislation provides:

- ***Land Inventory Sites Must Be “Available” and May Only Include Non-Vacant Sites with Realistic Development Potential.*** Now, sites must not only be suitable for housing, but be available and either vacant or have a “realistic and demonstrated potential for redevelopment during the planning period” for the designated income level.
- ***Presumption of Impediment for “Non-Vacant” Sites.*** Besides demonstrating a realistic potential for redevelopment, there is now a presumption that an existing use on a non-vacant site will impede development if more than 50% of the sites identified as available to accommodate the lower income RHNA are non-vacant.
- ***Stronger Infrastructure Requirements.*** Sites identified to accommodate the lower income RHNA must be served by water, sewer and “dry” utilities.
- ***Re-identification of Sites from Prior Elements Allowed Only if 20% Lower Income Inclusionary & By-Right Development Required.*** Sites identified in prior housing elements may only be included in a new element as available to accommodate the lower income RHNA if they are rezoned for by-right development and require at least 20% of the housing on those sites be affordable to lower income households.
- ***Stricter Requirements for Sites Smaller than ½ Acre or Greater than 10 Acres.*** To identify these sites as available to accommodate lower income housing the analysis must demonstrate a history of affordable housing development on sites of these sizes.
- ***Limitations on Assigning Unit Capacity to Sites.*** Calculating the unit capacity for sites must be realistic based on analysis demonstrating a history of development of affordable housing at the assigned density. A site cannot be presumed to accommodate the maximum density permitted.

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<sup>2</sup> All citations are to the Government Code unless otherwise indicated.

## DETAILS

### **Adds a Finding & Declaration that Maintaining Sites to Meet the RHNA is Essential.**

The bill first added subsection (f) to § 65580, the provision of the Housing Element Law setting out California’s statewide housing goal and the purpose of the Housing Element Law:

(f) Designating and maintaining a supply of land and adequate sites suitable, feasible, and available for the development of housing sufficient to meet the locality’s housing need for all income levels is essential to achieving the state’s housing goals and the purposes of this article.

[Stats. 2017, ch. 375, § 1.]

### **Sites in the Land Inventory Must Have Demonstrated Potential for Development.**

Next the legislation amended the land inventory requirement adding that, in addition to being suitable, the sites included in the inventory must be “available” and non-vacant sites must have a “realistic and demonstrated potential for redevelopment during the [housing element] planning period to meet the locality’s housing need for a designated income level.” (§ 65583(a)(3))

### **Analysis of Governmental & Nongovernmental Constraints—Adds NIMBY Opposition.**

*Governmental Constraints.* The analysis of governmental constraints must now include “any locally adopted ordinances that directly impact the cost and supply of residential development.” (§65583(a)(5)) This clarification was likely added as part of the negotiations over passage of AB 1505<sup>3</sup> which authorized application of inclusionary housing laws to rental housing development. However, HCD has always required communities to analyze local inclusionary zoning laws as a possible constraint to housing development as part of the required housing element constraints analysis. None of the analyses done over the years has found that inclusionary laws present a constraint to accommodating the community’s RHNA. The additional language clarifies the substantive requirement rather than adding one.

*Nongovernmental Constraints.* The analysis of nongovernmental constraints now includes helpful language requiring review of:

[R]equests to develop housing at densities below those anticipated in the analysis required by subdivision (c) of Section 65583.2 [detailed site analysis], and the length of time between receiving approval for a housing development and submittal of an application for building permits for that housing development that hinder the

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<sup>3</sup> See PILP’s Summary of [AB 1505](#).

construction of a locality’s share of the regional housing need . . . . The analysis shall also demonstrate local efforts to remove nongovernmental constraints that create a gap between the locality’s planning for the development of housing for all income levels and the construction of that housing.

(§ 65583(a)(6)) The addition of this language will compel jurisdictions to expressly address NIMBY opposition to housing development, especially affordable housing development.

**Adds Specific Limitations and Requirements for Sites in the Land Inventory. (§65583.2)**

***Assessor Parcel Number Mandatory***

- AB 1397 limits the site specific identification required of sites in the inventory exclusively to the assessor parcel number (APN). The prior language had allowed “or other unique reference.”

***Nonresidential Sites***

- Inclusion of non-residentially zoned sites is permitted only if the sites can be redeveloped for residential use “and for which the housing element includes a program to rezone the site . . . to permit residential use. . . .” These non-residential sites must include “sites owned or leased by a city, county, or city and county.” (§65583.2(a)(4))

***Realistic Site Capacity for Accommodation of the RHNA***

- For all sites in the inventory, the jurisdiction must determine the number of units “that can realistically be accommodated” for lower, moderate or above moderate-income housing. (§65583.2(c)) The number of units that can be accommodated in addition to being based on land use controls and site improvement requirements, must now consider:
  1. The realistic development capacity of the site.
  2. Typical densities of existing or approved developments at a similar affordability level.
  3. The “current or planned availability and accessibility of sufficient water, sewer and dry utilities.” (§65583.2(c)(2))

***Including Sites Identified in Prior Elements That Remain Available***

- *Neither on-vacant Sites* identified in a prior housing element nor *vacant sites* identified in the last two housing elements may not be counted towards the lower income RHNA need unless:

1. The sites are zoned at the “default” densities presumed adequate in §65583.2(c)(3),
  2. The “site is subject to a program in the housing element requiring rezoning within three years of the beginning of the planning period to allow residential use *by right* for housing developments”<sup>4</sup> and
  3. “[A]t least 20 percent of the units are affordable to lower income households.” (§65583.2(c))
- A site *approved* for development of housing affordable to lower income households at the time of the adoption of the housing element “may be presumed to be realistic for development to accommodate lower income housing need.” (§65583.2(c)(2)(C))

#### ***Sites for a “Variety of Types of Housing”***

- *Adds Supportive Housing and Single Room Occupancy Units* to the list of housing types that are included in the jurisdiction’s analysis determining whether the inventory can provide a variety of types of housing. The other housing types that were already listed are multifamily rental housing, factory-built housing, mobilehomes, housing for agricultural employees, supportive housing, single room occupancy units, emergency shelters, and transitional housing.

#### ***Site Size***

- Sites Smaller than ½ Acre. These small sites may not be attributed to accommodating the community’s RHNA for lower income housing unless the housing element demonstrates “that sites of equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units” or unless the locality provides HCD with evidence that the site is otherwise adequate to accommodate lower income housing. (§65583.2(c)(2)(A))
- Sites Greater than 10 Acres. These large sites are not “available” for the lower income need unless the community demonstrates “that sites of equivalent size were successfully developed during the prior planning period for an equivalent number of lower income housing units” or unless the locality provides HCD other evidence that the site can be developed as lower income housing. (§65583.2(c)(2)(B))

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<sup>4</sup> The by-right development requirement does *not* apply to a city in an unincorporated area in a nonmetropolitan county as defined in §65583.2(c)(3)(B)(ii). (65583.2(c))

## **Requirements for Including Non-vacant Sites; Presumption of Impediment to New Development.**

Jurisdictions increasingly rely on non-vacant sites when identifying parcels available for lower income housing development in their housing elements. AB 1397 adds specific criteria for assessment of the realistic availability of non-vacant sites during the planning period and creates a *presumption* that an existing use will “impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period.” (§65583.2(g)(2)) This requirement is very important because it is the staying power of existing *use* of a non-vacant site that determines whether a site is actually likely to be available during the planning period.

Prior to AB 1397’s amendments, communities relying on sites with existing uses to accommodate the RHNA need had to identify the specific development potential of the site and provide an explanation of the methodology used, considering the extent to which an existing use was an impediment to additional residential development, development trends, market conditions and regulatory incentives. (§65583.2(g)(1)) Under the amendments, the methodology now must *also* consider:

- The jurisdiction’s “past experience with converting existing uses to higher density residential development.”
- The “current market demand for the existing use.”
- “An analysis of any existing leases or other contracts that would perpetuate the existing use or prevent redevelopment of the site for additional residential development.” (§65583.2(g)(1))

And when a community relies on non-vacant sites to accommodate 50% or more of its lower income RHNA, its analysis must also overcome the presumption that the existing use constitutes an impediment to residential development. (§65583.2(g)(2))

## **Replacement Housing Requirements Apply to Inventoried Sites Where Affordable Housing Was Demolished or Vacated Within the Last 5 Years. (§65583.2(g)(3))**

Sites that have or have had residential units, but where the units were vacated or demolished within the last five years, do not qualify as sites available to accommodate the RHNA unless replacement housing has been developed and the units are or were:

- Subject to recorded covenants restricting rents to lower income households;
- Subject to rent control; *or*
- Occupied by very low or low income households

Replacement housing requirements must meet the same requirements as those in Density Bonus Law (§ 65915(c)(3), which apply to developers seeking a density bonus, incentives or concession after vacating or demolishing affordable or rent controlled units.

### **SOME IMPLEMENTATION ISSUES**

- **Applicability.** The AB 1397 amendments became effective January 1, 2018. Consequently, any amendments, revisions or updates to a local housing element after January 1, 2018 must comply with the legislation. If a jurisdiction amends a housing element to add additional sites to the land inventory or to amend the program of actions section to include a program to rezone additional sites, the sites must be identified, analyzed and zone in conformance with the requirements of AB 1397.
- **AB 1397 Requirements and the Requirements of the No-Net-Loss Law.** If the impetus for the new identification or rezoning is the requirements of the No-Net-Loss Law (Gov. Code §65863), including the amendments to that law made by [SB 166](#) (see below), the additional sites must also comply with the requirements AB 1397. Under the §65863 as amended by SB 166, jurisdictions must ensure that “at all times” the land inventory and site identification program are sufficient to accommodate the unmet RHNA for lower and moderate income households. Consequently, because SB 166 in some cases will require amendments to the land inventory or site program in the housing element, the AB 1397 requirements will apply.
- **“Realistic Development Capacity.”** Now, in addition assessing site capacity based on land use controls and site improvement requirements, the locality must also analyze the typical densities of existing and approved developments at the affordability level attributed to the site in the housing element. In some cases it may not be realistic to assume that a site will be developed at the density to which it is zoned.
- **Availability of Infrastructure.** The site capacity must also be based on “current or planned availability and accessibility of sufficient water, sewer and dry utilities.” A site identified to accommodate some of the lower income housing RHNA may not have utilities available that are realistically accessible if they are not proximate to the site and if there is no program to make the utilities accessible.
- **Non-Vacant Sites—Existing Use an Impediment to New Development?** There is a presumption that an existing use creates an impediment if more than 50% of the sites relied on to meet the lower income RHNA are non-vacant. So, a first question will be whether a site relied on is non-vacant. And the answer will turn first on the particular use. All sites are zoned for some use, but may not be *in use*.

For example, HCD sometimes has deemed a non-vacant site in use as a parking lot but subject to a program to rezone it for multifamily residential development as a site that, though in use, is available for development. With the amendments of AB 1397, the existing use as a parking lot should be analyzed as a possible impediment to new development.

And if more than 50% of the lower income need is accommodated on sites in use, before the site could be identified as one available for housing, the jurisdiction must overcome the presumption by showing: 1) past experience with converting parking lots to higher density residential development, 2) the current market demand for the parking lot will not impede redevelopment, and 3) existing leases or contracts would not legally prevent redevelopment of the site. This requires real analysis and outreach to determine whether the site is actually available.

- **“Recycled” Sites from Prior Elements.** In addition to ensuring that these “recycled” sites will be subject to a 20% lower income inclusionary requirement and developable by-right, a question could arise as to whether these requirements apply to sites in jurisdictions that have not adopted housing elements for one or more prior planning periods. This requirement is akin to the application of the “carryover” statute (Gov. Code §65584.09) to jurisdictions that did adopt housing element for the prior planning periods and therefore did not identify adequate sites to meet the RHNA. The resolution of the issue seems fairly straightforward—if the jurisdiction wishes to rely on sites that were not developed during the last planning period, whether it adopted a housing element or not, those sites must carry a 20% inclusionary and a by-right requirement to include them in its housing element inventory for lower income housing need.
- **Replacement Housing Requirements.** Because the site inventory may not include sites where affordable housing units or housing covered by rent control or other rent restrictions was demolished or vacated within the last five years, questions will arise about historical use of the site. The updated or amended housing element should include an analysis of any prior use to ensure that the housing element properly analyzes all replacement requirements.

**Contact PILP!** The Public Interest Law Project provides technical assistance and advocacy support to local legal services organizations engaging in housing element advocacy. Address: 449 15<sup>th</sup> Street, Suite 301, Oakland, CA 94612; Telephone: 510-891-9794; Email: [admin@pilpca.org](mailto:admin@pilpca.org); Website: [www.pilpca.org](http://www.pilpca.org).