

RETHINKING THE HOUSING ELEMENT APPROACH

Missing the Target

Housing Elements in and of themselves rarely cause new housing to be built; in a market economy, private developers (or nonprofit builders of affordable housing) construct nearly all new housing units. The numbers of needed units identified are simply goals, not mandated acts. In other words, a local Housing Element is hardly a self-enforcing policy and does not, in itself, create or mandate new housing.¹

Using Census data on the number of housing units in each city, no detectable relationship is found between housing element compliance and the percentage increase in housing across these communities during the 1990s. Thus, for all the potential merits and benefits of housing element compliance, one must look to other factors to explain why some cities experience rapid housing development and other cities experience little. The analysis suggests that a city's demographic characteristics, its position in the urban hierarchy, and its physical capacity to accommodate new buildings are better predictors of housing growth.²

Local governments tend to miss their housing unit goals, often by a wide margin. In particular, the low and moderate income segments of housing needs are typically unmet—not surprisingly given the frequent need for deep subsidies to fund such projects. A 2002 study of 40 fast-growing Bay Area jurisdictions found that only 34 percent of affordable housing goals were met in those communities with certified housing elements; only 9 percent of affordably housing goals were met in noncompliant jurisdictions.³

Thus, the preparation of Housing Elements, whether compliant or not, is no guarantee that needed housing units will be built. Many fewer units may be approved, or even proposed, whether due to shifting demand, homebuilder preferences to build fewer and more expensive units, land prices in excess of what builders wish to pay, or government actions that reduce project size for reasons not contemplated in the Housing Element.⁴

Rather, the housing element process is intended to focus the attention of city policymakers on policy actions that they might take to make it easier or less expensive for additional housing units to be built. For example, local plans may call for reducing or eliminating fees on affordable housing construction, rewarding developers of certain types of projects by allowing them to build at higher densities than would otherwise be permitted, or requiring that all housing developments above a certain size reserve a portion of units for low or moderate income households.⁵

Housing Element Reform

Most people involved in the housing element process agree that the law is ineffective: it is overly bureaucratic and exacting, has too many loopholes, and even a good Housing Element is no guarantee that affordable housing will actually be built in any given community. One of the political tensions involved in housing element policy is standoff between housing interests (both for-profit developers and antipoverty nonprofits), who are prominent and influential at the state level, and local governments, who often see the housing element law as unwarranted and clumsy meddling by state government in home rule, since land use policy has long been the almost exclusive purview of local governments.⁶

¹ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

² *ibid*

³ *ibid*

⁴ *ibid*

⁵ *ibid*

⁶ Fulton, William. *Guide to California Planning*, 2nd ed., Solano Press Books, 1999

Two major legislative hearings were held, with many voices criticizing the existing policy regime (Senate Committee on Local Government, 1993; Senate Committee on Housing and Land Use, 1995). Reform discussions were geared at streamlining the planning process for Housing Elements and making the regional housing need allocation (RHNA) process more attuned to local government concerns and capacity for growth. These discussions also emphasized *performance* in accommodating housing rather than the *process* of housing element planning.⁷ In 2003, HCD established the Housing Element Working Group in response to concerns regarding the implementation and effectiveness of housing law. The Group identified six basic areas for reform. Stakeholders included in the Group were local governments, COGs, planners, builders, and affordable housing advocates.

More Penalties and Prescriptions for Local Governments

One approach sees the problem as a lack of serious consequences for local governments that fail to meet the requirements of existing housing element law. The state needs to place greater weight on localities' production of total housing construction, including a share of multifamily housing, and that emphasis needs to be backed with stronger teeth than at present. Thus, for example, it has been suggested (as in SB 910) that financial penalties be levied against noncompliant local governments, or that their eligibility for certain state or federal grants be rescinded. The attorney general could bring legal action against communities that persistently fail to comply.⁸

Another approach of this type seeks to prescribe local land use regulation, under the assumption that localities, left to their own devices, will fail to provide housing opportunity. Thus, the state could impose "Inclusionary zoning" requirements on all communities, under which all housing developments of a certain size must reserve a share of units for low or moderate income households.⁹ Other suggestions have included requiring minimum zoning densities in certain areas (such as that near public transit), or a blanket exemption of affordable housing projects from local zoning or growth controls.¹⁰

Innovative approaches to promoting affordable housing need not be state-prescribed, however. Some cities, for example, have developed an "affordable housing overlay" as part of their zoning ordinance that allows a developer to claim a density bonus if his or her proposed project meets affordability standards.¹¹

Self-Certification Based on Performance

Self-certification is the idea of granting authority to local governments to approve their own housing plans without state oversight if they meet certain criteria involving demonstrated housing production.¹² Communities which show a record of success in providing their fair share of housing should be exempt from outside scrutiny of their Housing Element.¹³ In 2002, SB 1432 (Alpert) made San Diego County local governments that self-certify their housing elements eligible for proposed Prop 46 programs that require HCD approval of a housing element. This will sunset in 2009 unless the legislature acts to continue it.

Some have cautioned that basing self-certification on strict measures of prior performance may make such an approach somewhat inflexible. During an economic recession of the type that state experienced in the early 1990s, for example, housing production slumped because of the

⁷ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

⁸ *ibid*

⁹ *ibid*

¹⁰ Senate Committee on Local Government, *Housing Element Law: A Summary Report*, December 1993

¹¹ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

¹² *ibid*

¹³ McBride, Janet. Senate Committee on Local Government, December 1993

economy, and few jurisdictions would have been able to meet even 75 percent of their assigned housing goals.¹⁴ Alternative suggestions for measuring performance include assessing whether the jurisdiction has issued a share of permits above the regional average or has approved a certain share (say, 90 percent) of proposed housing projects that are consistent with the local General Plan.¹⁵

Subregional Allocations and Joint Housing Elements

A number of commentators have suggested that jurisdictions in a subregion should decide collectively how to divide up that area's housing allocations. This approach has been advocated specifically for smaller counties in large metropolitan regions, and some have suggested setting up joint-powers authorities as an intergovernmental arrangement to adopt joint Housing Elements and suballocate fair shares. The aim would then be for jobs/housing balance within each subregion—probably a more tractable approach than seeking balance within each jurisdiction.¹⁶ Subregional allocation has already occurred in some cases; for example, in the decision by SCAG to allow Orange County governments to formulate allocations within that county.

It is quite possible, however, that making subregional allocation more widespread would not solve the political problem of how to divide an unwanted responsibility among jurisdictions. Rather, it may merely create a new political arena to haggle over the issue at a smaller geographic level. A provision allowing for greater allocation to subregions was inserted into SB 910.¹⁷

Encouraging Transfers of Housing Allocations among Jurisdictions

A number of local government representatives have sought the ability for localities to “trade” or transfer their allocations with each other, presumably in exchange for payments or other considerations. The argument is that housing may be accommodated more easily or economically in some jurisdictions than others, and allowing transfers would enable more flexibility for localities in meeting their housing obligations.¹⁸

Law passed in 1994 enables transfers among jurisdictions under certain circumstances. This legislation followed two years of debate over the topic, during which various stakeholder groups agreed on a compromise. Nevertheless, the provisions for transfer are quite strict and constrained. The entities engaged in the transfer must both have compliant Housing Elements, and the “donor” entity must have met at least 15 percent of its housing goals. The transfer agreement must include plans to construct the units within three years (or else the units revert to the donor community), and the council of government (COG) must review it. The percentage of a community's housing goals to be transferred may not exceed the percentage of its goals that the community has already satisfied.¹⁹

It is likely that many of the controversies over housing element development are rooted in the desire of some localities to preserve their existing characters, while their COG and HCD attempt to move them toward a mix of residents more representative of the entire region. At issue is whether transfers violate the spirit of fair-share housing policy, which aims at an equitable distribution of responsibilities across jurisdictions. Opponents, including some housing advocate groups, argue that wealthy communities that eschew low-cost housing will be allowed to buy their way out of their responsibilities to their region if widespread transfers are permitted.²⁰

¹⁴ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

¹⁵ Senate Committee on Housing and Land Use, *Housing Element Law: A Summary Report*, March 1995

¹⁶ *ibid*

¹⁷ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

¹⁸ *ibid*

¹⁹ Curtin, Daniel. *California Land Use and Planning Law*, 20th ed., Solano Press Books, 2000

²⁰ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

Rewards for Performance

Some argue that the state's system for financing local governments does not encourage planning for balanced land use development—that is, attention to residential as well as commercial development, since cities' dependence on local sales tax revenues, and lack of control over property tax allocation, may cause local policymakers to favor retail development over housing. Enticing communities to accommodate housing would not be such an uphill battle if they perceived that doing so would be in their financial self-interest.²¹

Thus, creating a component of the state fiscal system that rewards local governments for the addition of housing units, particularly affordable units, may result in less conflict and more cooperation. It is often thought that cities with a larger share of local property tax revenues will be more accommodating to residential development, because such development will come closer to paying its way. However, the percentage share of local property tax revenues is greater in noncompliant cities, despite frequently expressed arguments that a greater share of the property tax base would make cities more accommodating of housing.²²

The Jobs/Housing Balance Incentive Program, passed in 2000, has elements of such a "rewards for performance" approach. Until it was defunded when the state went into deficit, the program authorized devoting \$100 million in grants to local governments that demonstrate increased issuance of building permits, if they have adopted Housing Elements that are in compliance with state law. The housing bond passed by voters in November 2002 earmarks \$100 million to continue funding this program. SB 423, enacted in late 2002, provides some specific instructions on how the funds are to be allocated.²³

To provide certainty for local governments, a continuing rather than one-time source of funds for such an approach may be necessary. For example, a regional fund could be established for such purposes as transportation improvements and open space protection, with funds awarded to cities and counties that clearly demonstrate that they are taking actions (beyond planning) to accommodate their fair share of units, particularly affordable units. The fund could be financed through a regional impact fee on commercial development in job-heavy, housing-poor areas.²⁴

Revenue sources that are distributed to localities on a population basis, such as the Vehicle License Fee subvention, create indirect incentives for cities and counties to accommodate housing. Some have suggested recalibrating the local fiscal system so that localities would be rewarded directly for increases in population or housing units. For example, there have been discussions of distributing a portion of local sales tax revenues to cities and counties on the basis of local populations, rather than the "point of sale" of retail transactions. AB 680 (Steinberg), which failed to emerge from the state legislature in 2002, took such an approach. Of course, such a wide-ranging reform of local finance raises many concerns and conflicts unrelated to housing policy, and thus far such efforts have not succeeded.²⁵

²¹ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003

²² *ibid*

²³ *ibid*

²⁴ Lewis, Paul. "Creating a 'Home' for Good Housing Policy," *Western City*, Vol. 78, No. 8, August 2002

²⁵ Lewis, Paul. *California's Housing Element Law: The Issue of Local Noncompliance*, PPIC, 2003