

ZONING FOR AFFORDABLE AND SUSTAINABLE COMMUNITIES:

A CASE STUDY IN THE IMPLEMENTATION OF HOUSING ELEMENTS IN MARIN COUNTY



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Preface

Marin Community Foundation has been a strong proponent for many years of making more affordable housing available to individuals and families in Marin. The activities we have supported include pre-development efforts, the rehabilitation of existing rental units, and the construction of new housing.

Our overall goal has been to make Marin a more inclusive, affordable place to live. This is especially urgent given the high cost of living here and the unacceptably high percentage of their income that low-income families typically pay for housing.

We want to help people who work in Marin to be able to live here, to help multiple generations of families remain closely knit, and, overall, to help people to live more stable, dignified lives.

We also want to help our County live up to its ideals by protecting the environment while fostering a viable future.

As part of the Foundation's Strategic Initiative focusing on affordable housing, we are putting resources into another key aspect of this issue: helping Marin's municipalities have the tools and support they need to develop procedures and policies that can enable them to facilitate the development of affordable housing.

This report, funded by the Foundation, is one step in that process. The detailed analysis it provides will help those involved in this issue—affordable housing advocates and developers, concerned citizens, city and town officials, and others—advance the creation of affordable housing throughout Marin.

The Foundation is pleased to play a role in this important work, and we thank the authors of this report for their thoughtful contribution. We look forward to the ultimate impact it can have: helping our fellow residents live affordably and securely, and helping our communities develop sensitively and viably.

Thomas Peters, Ph.D.

President and CEO, Marin Community Foundation

Executive Summary

Under California law, a local government's General Plan must include an affordable housing action plan. That plan, called the "Housing Element," must detail a concrete "program of actions" that the local government commits to carry out so that its fair share of new housing affordable at all income levels can be built. These actions help ensure that low-income families are not excluded from opportunities in more affluent communities, while at the same time promoting economic and environmental sustainability throughout the region.

Each city and county in California was required to adopt a revised Housing Element by June 30, 2009. Unfortunately, in Marin County – as in other places across the Bay Area and the rest of the state – not a single local government met this deadline. The good news is that there is still time to examine what has occurred since the previous Housing Element updates came due in 2002, identify lessons learned, and encourage cities to incorporate these lessons into a stronger Housing Element. That is the purpose of this report.

The success of a city's affordable housing efforts typically is measured by how much affordable housing was built. This can be misleading. Local government does play a significant role in determining how much housing is built, and whether it will be affordable. Cities, however, are not required to *build* that housing, and only indirectly can they be held accountable for the lack of affordable housing that is produced. Housing production numbers alone therefore tell only part of the story of whether a local government is meeting its obligations to plan responsibly for affordable housing.

We chose to take a more direct and comprehensive approach, looking not just at the amount of housing built, but at the specific local actions required to pave the way for that housing. In particular, we examine *whether local governments have met their responsibility to adopt appropriate zoning regulations* that will promote, rather than stymie, affordable housing development. We also examine *whether they have rezoned enough sites suitable to meet the needs of very-low and low-income households* since last updating their Housing Elements. This focus on the precise actions for which local governments are directly responsible ensures that they can appropriately be held accountable when they succeed or fail in taking those actions.

Our inquiry focused on 179 sites throughout Marin County that had been identified as promising for affordable housing in the last round of Housing Element updates. Based on our detailed review of data provided by eleven of Marin County's twelve local governments, we found that:

- Seventy-five percent of the Housing Element sites about which we inquired did not develop at all.
- Less than 12% of the 179 sites produced any affordable units at all, mostly in small amounts, and only seven percent yielded five or more lower-income units.

- One third of the Housing Element sites about which we inquired were too small, and hence infeasible for affordable housing.
- Four of the local jurisdictions do not have an appropriate affordable housing zoning district on the books – a zone in which multifamily housing is permitted “by right” at appropriately high densities.
- Six of the local jurisdictions did not rezone any of their Housing Element sites for affordable housing, as they had committed to do.
- As many as six of the local jurisdictions may be subject to AB 1233, a new statute that requires unmet rezoning from the last Housing Element to be completed by June 30, 2010.
- None of the local jurisdictions implemented all of the site rezoning and other key actions in its last Housing Element

These are discouraging findings because they suggest that many local governments in Marin are not taking the decisive actions necessary to promote affordable housing.

We also found encouraging steps, however. Most significantly, one town’s innovative affordable housing zoning overlay has already enabled the development of 79 units of very-low and low-income housing in a 100% affordable complex known as San Clemente Place (pictured on the front cover of this report). This zoning approach holds great promise, not just for promoting affordable housing, but also for preserving valuable land resources from sprawl-inducing development. Emulation of this kind of approach throughout the county in the new planning period will be a major step forward.

We also are encouraged by the creation of a new county-wide affordable housing trust fund. This potentially-significant source of local funding for affordable housing, coupled with appropriately-zoned sites of adequate size, could make a major difference in the new period, particularly if local cities and towns join the County, the local community foundation and local businesses in financing the trust fund.

We believe this report will contribute to a shared understanding of why Marin met only 43% of its need for very-low income housing over the past eight years. More than that, as new Housing Elements are prepared in the face of a weak economy and climate change challenges, we hope this understanding will guide local jurisdictions in crafting more effective plans that will be implemented with success in the future.

Introduction

Affordable housing simultaneously meets three important objectives: it provides equitable housing opportunities for families of all income levels, promotes sustainable economic growth, and reduces carbon emissions and other environmental harms.

Over the past forty years, recognition of the critical need for affordable housing in California has spread dramatically. For a long time, it was primarily advocates for social equity and racial justice who supported the efforts of non-profit affordable housing developers with a goal of combating segregation and making suburban opportunities available to all. Beginning in the mid-1990s, the business community increasingly came to see the dramatic ill-effects on economic sustainability of inadequate workforce housing. And environmental advocates have begun emphasizing the important role that vibrant, mixed-income communities, along with revitalized public transit, will play in turning back the catastrophic impacts of auto-driven climate change.

Nearly 44,000 Marin workers commute each day from other counties. Conversely, a 2008 Marin County Affordable Housing Inventory report found that 91% of those who live in low-income homes in Marin work in Marin. Through meaningful planning to accommodate their share of the need for lower-income housing, Marin County and its cities can make it possible for working people to live in the communities they serve and spend more time with their families, rather than driving long distances to work. At the same time, they can strengthen the local economy by bringing workers closer to jobs, and do their part to reduce traffic, sprawl and greenhouse gas emissions.

Nearly every city and unincorporated area in Marin boasts attractive examples of affordable housing that support Marin's local economy by allowing workers to live near their jobs while opening up to lower-income families the opportunities Marin has to offer. This housing is not in the style of high-rise urban apartments but architecturally designed to fit in with the surrounding community. It was kept affordable to its residents because local governments allowed it to be built at higher densities than single family homes. Higher-density development makes more efficient use of Marin's limited land stock while at the same time reducing the amount of rent that hard-working families, seniors and people with disabilities must pay.

During the past ten years, unfortunately, a relatively small number of new non-profit housing developments have been approved in Marin. These are important contributions, but represent only a drip from the spigot of affordable housing production that could be taking place. It is largely local policies and actions that have restricted that flow.

As developers of affordable housing know, whether a proposed development will "pencil out" economically depends on a morass of details. By looking at some of those details in one county, we can begin finding answers to two key questions: What are the real obstacles to creating affordable housing? And what can we do to overcome them?

To create a healthy flow of affordable housing development in Marin, a number of changes are necessary at the local level. Zoning ordinances must be amended to create a residential zone that permits affordable rental housing at high enough densities “by right,” that is, without the need to navigate onerous discretionary approvals. Sites that are large enough to make non-profit housing development economically feasible must be identified. And those sites must be zoned for “by right” affordable housing development.

By making these changes, local governments can achieve a triple-bottom line: they can make housing opportunities available on an equitable basis to families of all income levels, contribute to the economic sustainability, locally and across the region, and do both those things within a smaller environmental footprint.

While our findings and recommendations are based on our analysis of Marin County, we believe many of them represent broader trends. Some of those trends are discussed in the concluding section of this report.

The Housing Element: A Primer

In 2002, each Bay Area city and county was required to update the “Housing Element” of its local General Plan. Under California law, the Housing Element must include a concrete plan, or “program of actions,” that the local government commits to carry out to promote the construction of its fair share of new housing affordable at all income levels.

This report focuses on the implementation of the 2002 Housing Element, with an eye toward lessons that can be incorporated into the 2009 round of Housing Element updates. (2009 updates were required by law to be adopted by June 30, but no Marin jurisdiction – and few in the entire Bay Area – have met this deadline.) This section contains an overview of the legal requirements and the purpose of those requirements.

In the 2002 Housing Element, Bay Area cities and counties were required to plan to accommodate their fair share of the nine-county region’s housing need from 1999 to mid-2007. (The planning period originally ran through June 30, 2006, but was extended by one year.) Based on the distribution of jobs, transportation, and existing housing, every city and county was assigned a specific number of units to plan for in each of four income brackets: very-low income, low income, moderate income, and above-moderate income (or market rate housing).

In Marin County, annual income limits for a very-low income family of four in each income category are as follows:

Income Limits, Marin County, 2008	
Very-low Income	\$0 to \$56,550
Low Income	\$56,551 to \$90,500
Moderate Income	\$90,501 to \$116,150
Above-moderate Income	Above \$116,550

In the 2002 Housing Element cycle, local jurisdictions in Marin County were responsible for planning and zoning to accommodate a total of 5,772 new housing units, broken down by income as follows:

Regional Housing Need Allocation (RHNA) Marin County, 1999-2007		
<i>Affordable Units</i>	Very-low Income	1,241
	Low Income	618
	Moderate Income	1,726
<i>Market- Rate Units</i>	Above-moderate Income	2,930

A new category of extremely-low income has been added for the 2009 Housing Element. In Marin, income for a family of four in this category ranges up to \$23,800. In terms of Regional Housing Need, the “extremely-low income” need is a subset of the “very-low income” need. Absent evidence to the contrary, it is assumed that the housing need at the extremely-low income level will amount to half the need at the very-low income level.

According to the Association of Bay Area Governments, Marin County and its cities and towns issued permits for only 43% of the needed very-low income housing.¹ As we discuss below, however, even this figure appears to be inflated because, in some cities, much of the claimed production at the very-low income level was attributed to second units that are not available to the public for rent at all. (In the Appendix to this report, the Regional Housing Need and local progress in each income category is broken down by jurisdiction at the head of each jurisdiction’s section.)

While disappointing, this 43% success rate in meeting the very-low income housing need represents significant progress over the success rate in the planning period that ran from 1989 to 1999. According to data that the Marin Housing Council compiled from each Marin jurisdiction in 2001, the countywide average came to only 14% of the very-low income housing need for the 1989-1999 period.

Credit for much of this improvement goes to the tireless work of affordable housing advocacy groups across Marin County. These include the Housing Leadership Alliance (formerly known as the Marin Housing Council), the Novato Housing Coalition, Marin Family Action, the Marin Tenants’ Union, Marin Grassroots Leadership Network, the Marin Environmental Housing Collaborative, the Marin League of Women Voters, the Workforce Housing Consortium, the Mill Valley Affordable Housing Committee, Legal Aid of Marin, Fair Housing of Marin, the Marin Continuum of Housing, the San Rafael Chamber of Commerce, and others.

The impact of these groups illustrates the importance of public engagement in decisions about planning, zoning and site identification to the successful development of affordable housing. Communities that come together to talk about the housing needs of local workers and residents often find a shared vision of community growth beneath the range of views. Indeed, when affordable housing is located near transit and lower-wage jobs, a triple-bottom line can be achieved that meets the needs of low-income families, local businesses and environmentalists. Not only does this make for a stronger and more responsive Housing Element, it lays a vital foundation of common understanding that will facilitate design and approval of individual affordable housing developments down the road. For this reason, meaningful public participation of all economic segments of the community in the development of Housing Element updates is also required by law.²

¹ Assoc. of Bay Area Governments, A PLACE TO CALL HOME: HOUSING IN THE SAN FRANCISCO BAY AREA (2007), p. 37. Available at: www.abag.org/planning/housingneeds/pdf/resources/A_Place_to_Call_Home_2007.pdf.

² Cal. Gov’t Code § 65583(c)(7).

Local governments are not responsible for building housing, nor for ensuring that housing is built. In the language of the statute, they are not held responsible for “meeting” their share of the Regional Housing Need, but for “accommodating” it. “Accommodating” the need for lower-income housing means that local government must remove regulatory barriers that stand in its way, while adopting policies that promote its development. Local policies and regulations are critical to the success or failure of efforts by non-profit developers and others to build housing for low income working families, seniors and people with disabilities.

Put another way, the development of affordable housing depends on three ingredients: money, suitable land (sites), and the permission of the local government to build a feasible project. California law addresses primarily the latter two ingredients, requiring localities to identify suitable sites and to do what is in their power to reduce barriers and encourage the development of affordable homes. (The provision of local funding is also important, and is discussed briefly in this report.)

Specifically, Housing Elements must **identify sites** to accommodate the local fair share of the Bay Area’s housing needs for lower-income families. They must identify governmental **constraints**, such as unreasonable zoning and approval requirements, and **resources**, such as public funding sources. And they must include – and then implement – a **program** of actions to rezone sites, remove constraints and promote the construction of affordable housing.

At the heart of the Housing Element is the local **inventory of sites**. California law requires each Housing Element to include a complete inventory of sites suitable for residential development, and to analyze those sites to determine which of them could meet some portion of the local share of new housing at each affordability level. If sufficient sites are not currently zoned to accommodate the city’s entire housing need at all income levels, a “shortfall” exists. The law requires a specific program action to rezone sites as needed to meet that shortfall by accommodating the entire lower-income share of the housing need.

A change in California law now requires sites to be rezoned at minimum densities for very-low and low-income housing needs when such a shortfall exists. In Marin, that means a minimum density of 30 units per acre for the unincorporated County and its two largest cities, San Rafael and Novato. Remaining cities and towns must zone sites at a minimum density of 20 units per acre to meet the shortfall in the lower-income portion of their regional housing need.³

Density is a critical factor in achieving affordability because the cost per unit of housing depends in significant part on the cost of the land, and hence on how many units can be built on a given parcel of land. In California’s Housing Element Law, “zoning and densities serve as a proxy for accommodating affordability. That is, sites for lower

³ Government Code § 65583.2 (c)(3)(B).

income households should be zoned at a density high enough to encourage and facilitate the development of housing affordable for lower income families.”⁴

As local governments prepare their 2009 Housing Element updates, another change in the law makes it particularly important to know whether they provided enough developable sites with high-density residential zoning to meet the lower-income portion of their Regional Housing Need in the previous cycle. AB 1233 (Jones) now requires cities and counties, “within the first year of the planning period of the new housing element, [to] zone or rezone adequate sites to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period.”⁵

One of the most troubling governmental constraints on affordable housing is the requirement that a developer obtain **discretionary approvals** in order to build multifamily housing at higher densities. Discretionary approvals can range from conditional use permits, development agreements, and master or precise plans, all the way up to zoning and General Plan amendments. These are decisions as to which the city council or board of supervisors reserves the power to deny or to approve only based on onerous conditions. Discretionary approvals can pose a significant disincentive to affordable housing development for several reasons: first, they create **uncertainty** about whether a development proposal that meets stated standards will be approved; second, they **delay** the processing of development applications; and third, they can add significant **cost**. Instead, zoning codes should set out clear and feasible criteria that, when met, entitle affordable housing developers to build.

Changes in State law now expressly define “**by right**” zoning to clarify that site rezoning programs must make sites available that do not require these discretionary approvals for development of affordable housing.⁶

Finally, in addition to site rezoning, **implementing programs** are required to address other important local actions to promote affordable housing development. In connection with the preparation of the last set of Housing Element updates, the Marin Housing Council and Legal Aid of Marin provided Marin’s local governments with a set of model programs that they urged be incorporated into the new housing plans. In addition to three

⁴ Assembly Committee on Local Government, Report on AB 2348 (Apr. 20, 2004), p. 3.

⁵ AB 1233 provides that “[f]or housing elements due pursuant to Section 65588 on or after January 1, 2006, if a city or county in the prior planning period failed to identify or make available adequate sites to accommodate that portion of the regional housing need allocated pursuant to Section 65584, then the city or county shall, within the first year of the planning period of the new housing element, zone or rezone adequate sites to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period.” (Cal. Gov’t Code § 65584.09.)

It goes on to state that these requirements “shall be in addition to any zoning or rezoning required to accommodate the jurisdiction’s share of the regional housing need pursuant to Section 65584 for the new planning period.” (Id.)

⁶ Cal. Gov’t Code §§ 65583 (c)(1)(B), 65583.2 (h) & (i).

programs relating to sites and rezoning, the ten model programs included three that related to funding and inclusionary housing.

The model **funding programs** proposed the adoption of a Jobs-Housing Nexus Fee as a means of promoting a better balance between jobs and housing and of funding a Housing Trust Fund. Program actions included conducting a “nexus study” in order to determine the job-creation impact of non-residential development; the adoption of a Linkage Development Fee Ordinance; the adoption of a Housing Trust Fund ordinance restricting the use of fees to the development or rehabilitation of units affordable to very-low and low-income households; and steps to explore other streams of financing to add to, or match, these funds.

Another model program recommended the adoption or amendment of **Inclusionary Zoning** requirements. Inclusionary Zoning refers to local requirements that residential developments of market-rate housing include a percentage of affordable units. The model program recommended that inclusionary ordinances apply to all developments of two or more units, require at least 15% of units in the development be affordable and provide incentives to the inclusion of more than 15%.

Implementing Affordable Housing Plans in Marin: Requirements, Best Practices and Key Findings

An affordable housing plan is only as good as its implementation. This year, as Bay Area jurisdictions prepare to adopt new Housing Elements, is the perfect time to ask whether cities and counties have done what they promised in the past. This report focuses on housing affordable to very-low and low-income households. It explores whether Marin's local jurisdictions have carried out the policies and programs of their last Housing Elements, and with what results.

In early 2009 we asked each of Marin's twelve local jurisdictions to provide information about the implementation of their last Housing Element. We requested information about the rezoning of sites that were designated in the last Housing Element; about changes to existing zoning standards; and about the implementation of selected Housing Element programs.

After receiving responses from all but one of Marin's local jurisdictions (the Town of Ross), we analyzed the extent to which local implementing actions made appropriate sites available and zoned to promote affordable housing development. We provided the jurisdictions with a draft of this report on June 15, 2009, and requested comments and corrections. We received and considered comments from the County of Marin, Belvedere, Larkspur, San Anselmo, San Rafael and Tiburon.

In this section, we report our findings and place them in the context of legal requirements and best practices. Details for each responding jurisdiction may be found in the Appendix.

A. Preliminary Matters: Housing Element Compliance and Affordable Housing Production

Even before we received responses from any of Marin's local governments, we had two pieces of information that are typically used as indicators of local success in meeting affordable housing needs: we knew whether the California Department of Housing and Community Development (HCD) had found Marin's Housing Elements in compliance with the law when adopted, and we knew the housing production data that local jurisdictions reported to the Association of Bay Area Governments (ABAG).

Both of these indicators are useful, as far as they go. However, information important to understanding the limitations of both of those indicators only came to light in response to our queries to the cities and county.

Housing Element Compliance

California law requires local jurisdictions to submit their Housing Elements to HCD for review of compliance with the statutory requirements.⁷

Ten of Marin's twelve jurisdictions adopted Housing Elements in the last cycle that met with HCD's approval, while two – Fairfax and Sausalito – did not. Of those ten approved Housing Elements, however, HCD certified five on a limited “conditional” basis. That means that HCD found that the Elements of these five jurisdictions – Belvedere, Corte Madera, Novato, San Rafael and Tiburon – would be in compliance only after they implemented specific program actions on a timely basis. Typically, the conditions of HCD approval included prompt site rezoning, a matter we discuss in detail in Part B, below.

Our inquiries revealed that three of those five did not timely meet some or all of the conditions of HCD's approval: Novato, San Rafael and Belvedere. (On July 15, 2008, after the planning period had ended, HCD certified San Rafael's compliance with the conditions of its approval.) These three jurisdictions were not alone in failing to implement one or more key program actions in the Housing Element. In fact, while some did better than others, **none of the eleven jurisdictions timely implemented each of the key programs in its last Housing Element.**

State law requires that local jurisdictions submit an annual report to HCD detailing progress made in implementing their Housing Element programs and in meeting their share of the regional housing need.⁸ These reports, due on April 1 of each year, are intended to provide the public with information crucial to understanding the degree of commitment to, and implementation of, promises made in the Housing Element. Jurisdictions now must allow public comment on the report and make the information provided in the report publicly available.

The importance of this annual reporting requirement is often overlooked. The information that must be reported – the number of approvals at each income level and the status of program implementation, among other things – includes some of the same information that we needed to prepare this report. (In fact, one Marin city used the grid we prepared to request information from it as the basis for its annual report to HCD.) Making that information public each year serves the purposes of transparency and accountability that are important whenever a question of progress toward publicly-adopted objectives is at stake. By measuring progress toward the Housing Element's specific goals and objectives, the annual report provides an opportunity for local governments to keep faith with their constituents, and to make mid-course corrections when plans are not working out as expected. At the same time, a public hearing on the annual report provides an opportunity each year to hold a community-wide discussion of the importance of affordable housing and the success of local implementation.

⁷ Cal. Gov't Code § 65585.

⁸ Cal. Gov't Code § 65400 (a)(2).

Marin jurisdictions have not made it a priority to comply with this requirement. This year, an especially important time to take stock, as new Housing Elements must be adopted, only two Marin jurisdictions – Larkspur and Novato – submitted timely annual progress reports to HCD. (Several others – Marin County, San Anselmo and Tiburon – submitted their reports later in April and May, and San Rafael states that its report is pending completion.) In the new planning period, jurisdictions should prioritize annual reporting as an integral part of carrying out their affordable housing plans, and the public should be encouraged to hold their elected officials and planning staff accountable.

In sum, the indicator of Housing Element compliance, standing alone, captures only half of the story. It looks at the *adoption* of the housing plan, but misses the critical question of *implementation*.

Production of Affordable Housing

In addition to HCD’s compliance certification, another typical indicator of success is how much of the Regional Housing Need Allocation (RHNA) was produced in a jurisdiction at each income level. Local governments are not legally responsible for *building* housing to meet their share of the region’s need at each income level. As the ultimate decision-maker in matters of local development, however, city and county governments play a central role in determining what is built, especially in the adoption and enforcement of zoning regulations. As a result, the amount of affordable housing built in a city is often treated as a measure of whether that city’s actions were effective in promoting affordable housing development.

We wanted to measure the success of local actions more directly. Nonetheless, the data that Marin’s local governments had reported to ABAG, as set forth in the chart below, offers a useful starting point. (In some instances, local governments gave us more up-to-date information, which is provided in the Appendix.)

Bay Area Affordable Housing, 1999 to 2006

	Very Low			Low			Moderate			Above Moderate			Total Permits Issued
	RHNA Allocation	Permits Issued	Percent of Allocation Permitted	RHNA Allocation	Permits Issued	Percent of Allocation Permitted	RHNA Allocation	Permits Issued	Percent of Allocation Permitted	RHNA Allocation	Permits Issued	Percent of Allocation Permitted	
Marin County													
Belvedere ^a	1	0	0%	1	0	0%	2	2	100%	6	7	117%	9
Corte Madera ^a	29	0	0%	17	0	0%	46	0	0%	87	99	114%	99
Fairfax ^a	12	0	0%	7	0	0%	19	0	0%	26	18	69%	18
Larkspur ^a	56	7	13%	29	6	21%	85	3	4%	133	37	28%	53
Mill Valley ^a	40	69	173%	21	28	133%	56	41	73%	108	32	30%	170
Novato ^a	476	297	62%	242	527	218%	734	496	68%	1,130	1,646	146%	2,966
Ross ^b	3	0	0%	2	0	0%	5	0	0%	11	22	200%	22
San Anselmo ^b	32	0	0%	13	0	0%	39	0	0%	65	70	108%	70
San Rafael ^a	445	25	6%	207	87	42%	562	388	69%	876	684	78%	1,184
Sausalito ^a	36	22	61%	17	0	0%	50	0	0%	104	51	49%	73
Tiburon ^a	26	4	15%	14	3	21%	32	0	0%	92	144	157%	151
Unincorporated ^a	85	104	122%	48	100	208%	96	110	115%	292	643	220%	957
Total	1,241	528	43%	618	751	122%	1,726	1040	60%	2930	3453	118%	5,772

Source: ABAG, *A Place to Call Home: Housing in the San Francisco Bay Area 2007*, available at http://www.abag.ca.gov/planning/housingneeds/pdf/resources/A_Place_to_Call_Home_2007.pdf.

While this ABAG data gives a rough picture of a jurisdiction's approval of affordable housing, it is subject to several caveats. In particular, the allocation to income levels is based on self-reporting by the local government. It has not been independently verified, and differing criteria can make comparisons misleading. Perhaps more important, this data does not provide any basis for holding local governments accountable for the steps that were within their power to take, and which they were responsible for accomplishing.

Even taken at face value, ABAG's data paints a disappointing picture of progress in the County. Overall, only 43% of the Regional Housing Need for very-low income families and 60% of the need for moderate-income families, was met countywide. The low-income need was much smaller in absolute terms, and more of it – 122% – was reportedly met on a percentage basis.

In light of the present state of the economy, it is worth noting that the Housing Element planning period, which ran through June 30, 2007,⁹ was already coming to a close before any significant fall in new housing starts affected Marin. According to data provided by HUD and the U.S. Department of Commerce, housing permits issued in the Western states peaked at 417,000 in February 2007. Permits began to decline in March 2007 – just a few months before the end of the planning period on June 30 – and hit a low of 101,000 only many months later, in February 2009.¹⁰ Any impact of the housing crash on the prior planning period was minimal, and we accordingly do not draw the conclusion that market forces bore primary responsibility for the shortfall in the production of lower-income housing units.

The most significant concern about ABAG's housing numbers that emerged from the data we received from cities is the counting of second units toward the very-low income Regional Housing Need. Second units (also known as accessory or "granny" units) are smaller buildings built on the same lot as a single-family home. While some jurisdictions have historically relied on second units to meet some of their RHNA share, amendments to the Housing Element Law in 2002 placed strict conditions on counting second units toward the RHNA need.¹¹ Among other restrictions, the law requires the projected **number** of new second units to be based on past experience, and the **affordability** of those new units to be determined by surveys of actual rents.¹² This analysis results in a determination of the housing need, by income group, that could be accommodated through second-unit development.¹³

⁹ *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1186.

¹⁰ See http://www.census.gov/const/newresconst_200707.pdf (issued July 2007); <http://www.census.gov/const/newresconst.pdf> (issued May 2009).

¹¹ AB 1866 (amending Gov't Code §§ 65852.2 and 65583.2, effective Jan. 1, 2003.)

¹² Cal. Gov't Code § 65583.1.

¹³ See www.hcd.ca.gov/hpd/housing_element2/SIA_secondunits.php.

Units that are not made available on the open rental housing market to very-low income households, while they may serve family members and live-in service providers, cannot be said to meet the housing need for those households. Accordingly, units for which no rent is charged, or that are not marketed through advertising that complies with the federal Fair Housing Act, should not be counted as affordable to very-low income residents. Units that are made available to the public for rent are appropriately counted, particularly if they are subject to deed restrictions that limit the rent charged and the income of occupants.

We found that a number of Marin jurisdictions relied heavily on second units as meeting a portion of their very-low income share of the Regional Housing Need. In particular, Mill Valley relied on second units for at least 36 of the 69 claimed very-low income units. The rationale given, however, was not that the actual rents of existing second units were affordable, but instead that no rent was charged at all. The City provided no evidence that the reported units were actually made available to very-low income renters. As a result, while the ABAG production data would indicate that Mill Valley produced 173% of its need for very-low income housing, the actual figure is likely to be far smaller. We found the same issue in other cities, including Belvedere, Larkspur and Sausalito.

To meet and exceed its production of affordable housing in the new planning period, Marin will face two challenges that it did not face in the prior period. The economic downturn is the first, and it will affect all of California. While any effect of the economy on the period covered by this report was minimal, the housing market will be a factor that planners will have to contend with in the future, at least in the near term.

At the same time, the need for affordable rental housing is greater today than ever, in part due to the foreclosure crisis which is flooding the rental market with both former homeowners and many renters of single family homes who find themselves in foreclosure-related eviction. In fact the lack of accessible housing options was a factor fueling the lending and borrowing practices that have caused the current crash.

Fortunately, new affordable housing development remains possible today, if the land, zoning, and community support are available. Because of the special financing options and regulations governing affordable housing development, including gap financing in the federal economic stimulus bill, there are still funding sources available to non-profit developers to build affordable housing. A particularly important development with regard to local funding for affordable housing – the recent creation of a countywide housing trust fund – is discussed in Section C.

The second challenge going forward, which is specific to Marin (and in particular to Novato), is the fact that hundreds of lower-income units counted in the last period were the result of the one-time opportunity afforded by the conversion of the former Hamilton Air Force Base, the culmination of a process that began some twenty years ago. Without those units, the proportion of Marin's lower-income RHNA that was met would have

been far lower. This highlights the importance of site identification and rezoning, particularly of larger sites, a matter we discuss in the next section.

As a result of these challenges, even to repeat the inadequate performance of the prior planning period will require significantly greater efforts.

Greater effort will also be required of an undetermined proportion of local communities all over California as a result of a change in the law. In the past, when a jurisdiction did not rezone sites to meet its share of the RHNA, its slate was wiped clean at the start of the new planning period. That is no longer true, due to AB 1233. This bill (discussed more fully below) requires cities that did not complete the rezoning required to accommodate their lower-income need in the prior planning period to do so immediately, on top of their new Regional Housing Need. As many as six Marin jurisdictions may be subject to AB 1233. These jurisdictions will face the challenge of immediately rezoning sites, and in some cases, of amending their zoning ordinances.

B. Identification of Sites, Zoning Regulations, and Rezoning of Sites

Local government regulation of the use of land within its jurisdiction plays a powerful role in shaping what gets built, both by for-profit housing developers and by non-profit developers of affordable housing. That role extends most notably to the land-use regulations that the local government adopts in its Housing Element (and other elements in its General Plan) and in its zoning ordinance. It also extends to *which* of those zoning regulations it chooses to apply to a particular developable parcel of land.

The data we obtained from the cities and the County shed light not only on the usual indicators of Housing Element compliance and affordable housing production, but also on specific sites that local jurisdictions designated for affordable housing and the steps they took to promote the development of affordable housing on those sites. Our analysis focuses on (1) the **identification of sites** for affordable housing development, (2) the creation of **zoning regulations**, and (3) **rezoning** – the application of those zoning districts to identified sites. We conclude that the details play an important role in the extent to which affordable housing development is encouraged or, all too often, retarded.

Identification of Sites: We selected from each Housing Element’s site inventory those sites that met certain minimal standards indicating their potential viability for affordable housing. We included all vacant sites, and all sites that were referred to as “housing opportunity sites” or otherwise mentioned as possible candidates for affordable housing. We also included sites allowing a mix of commercial and residential use. We prepared a chart of all these sites for each jurisdiction, and asked planning staff whether these sites had been rezoned; whether they had been developed; and if so at what density and how many affordable units, if any, were built. We also asked if any additional sites that were not included in the last Housing Element inventory had been made available for affordable housing.

The relevant question about identified sites is whether they were (apart from their zoning) appropriate for affordable housing. This appropriateness rests on a range of relevant considerations, such as size, existing use and location. Lacking data on some of those considerations, we focused primarily on the size of sites, an important constraint on the feasibility of affordable housing development.

Zoning Regulations: We also asked about the zoning districts in which multi-family housing (such as apartment dwellings) are a permitted use, what the maximum allowable density is in each district (units per acre), whether the jurisdiction had increased the allowable density since adopting its last Housing Element, and whether any conditions or discretionary approvals had to be secured to develop multi-family housing in each such zoning district.

We analyzed these zoning requirements with an eye both to their success in **promoting** affordable housing development and to their role in **preserving** scarce land resources from sprawl and other negative impacts of inefficient land use. Specifically, we asked whether each jurisdiction’s zoning code permits multifamily housing development, at high enough densities and “by right,” i.e., without burdensome discretionary approvals. (We sometimes refer to this configuration of zoning standards in shorthand as “by right” zoning. It is discussed in more detail below.) If the zoning ordinance did not already make provision for “by right” zoning, we asked whether the ordinance was amended to create such a zone. We also asked whether the zoning ordinance provided minimum densities and restrictions on non-residential development, to preserve appropriate sites from inefficient low-density development and other uses that “use up” developable land without providing affordable housing.

Rezoning Specific Sites: Finally, we analyzed the impact of zoning on specific affordable housing sites in each jurisdiction. This analysis sheds light on the success or shortcomings of government actions to promote affordable housing and remove regulatory barriers to its development.

Here, we asked whether high-density multifamily “by right” zoning was applied to appropriate sites. Our analysis also permitted us in some cases to reach conclusions about whether the local jurisdiction accomplished its site rezoning requirements during the past planning period, or whether they remain obligated to rezone sites to accommodate any of the unmet need in the first year of the new planning period under AB 1233.

Identification of Sites

State law requires each jurisdiction to include in its Housing Element “[a]n 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.”¹⁴

¹⁴ Cal. Gov’t Code § 65583(a)(3).

This requirement calls on jurisdictions to identify all sites that have the potential for residential development, and to then conduct an analysis that hones in on the sites that are feasible for housing development at each income level. This “adequate sites” analysis focuses on site characteristics of two broad kinds: first, the site must be “available for immediate development” of housing of the kind needed; and second, it must be a site on which that kind of housing (e.g., very-low income rental housing) can feasibly be built.

A site is not available for immediate development of lower-income housing if it is not appropriately zoned. (Site zoning is discussed in later sections of this report.) It is also not available if it already has a viable existing use.

Feasibility entails a number of considerations. Obvious ones are geographic and physical constraints that limit or preclude housing development, such as steep slopes or environmental issues. Less obvious, but no less important, are size and location.

Parcels that are too small pose difficulties for non-profit builders of affordable housing. In economic terms, very-low and low-income housing projects for families are at their most viable when they include between 50 and 80 units. (Special needs housing, by contrast, such as housing for people with disabilities, can sometimes succeed on a smaller scale.) At a density of 50 units per acre, this requires a site of at least an acre in size. While affordable housing can be built on smaller sites, these smaller projects are more difficult to fund, less efficient to operate, and benefit less from the economies of scale necessary to achieve the lower per-unit cost needed to keep housing affordable. As described below, we found that many Marin jurisdictions have placed undue reliance on sites too small to be economically feasible.

Location is another important consideration, especially in relation to transit, retail and public amenities, such as schools. A significant source of public funding for affordable housing development is the federal Low-Income Housing Tax Credit, a competitive grant program in which a proposed development’s proximity to these amenities is crucial to winning a tax credit allocation. While we did not analyze these factors in reviewing sites for this report, they are of great importance in determining site feasibility for lower-income housing, and should be carefully reviewed in the new Housing Elements.

In short, the sites identified as having a high potential for affordable housing development should be large enough, well-located, free of viable existing uses, and not subject to expensive or prohibitive physical constraints.

We asked the eleven Marin jurisdictions to report on the status of a total of 179 sites that were included in the site inventories in their previous Housing Elements. Seventy-five percent of the sites about which we inquired were not developed at all during the planning period. In four cities – Belvedere, Fairfax, San Anselmo, and Sausalito – none of the inventoried sites were developed.

The fact that any particular site does not develop during a planning period of six or seven years could be due to a variety of causes, ranging from the idiosyncratic to the systemic.

At the *idiosyncratic* level, a given site may have a viable existing use or otherwise be of value to its owner in its present state. It may be a poor site for development due to the presence of physical constraints that make development unduly costly, such as steep slope. It may be suitable for affordable housing development in the abstract, but owned by a party who has a different use in mind.

On the other hand, the reasons may be *systemic*. For instance, the zoning ordinance may present systemic hurdles, and sites may be zoned in a manner that presents obstacles to their development.

When a significant proportion of the sites designated for potential housing development in an entire county do not develop, and few sites yield any significant affordable housing, explanations of a systemic, rather an idiosyncratic, nature seem appropriate. We found such systemic explanations in the size of sites identified, and in the lack of sites zoned to permit multifamily high density housing “by right.”

Looking at all 179 sites about which we inquired, without regard to zoning, we found that more than a third were under an acre, and more than a fifth under half an acre.

The size of sites with appropriate “by right” zoning paints an even starker picture. (Again, we use “by right” zoning as short-hand for residential zoning that permits multifamily housing development at appropriately high density, without requiring onerous discretionary approvals.) Only one Marin jurisdiction provided a developable site of at least an acre with appropriate zoning: Corte Madera provided a 3.5 acre site with the Town’s “Affordable Housing Overlay” zoning, a model zoning practice we discuss in detail below.

By contrast, Larkspur provided only one site of about three-quarters of an acre with “by right” zoning, and allowed that site to develop at low-density; Novato and Belvedere provided no sites whatsoever with appropriate zoning; San Anselmo and Mill Valley provided one small site each, of about one-third acre. San Rafael provided four sites zoned for high-density multi-family residential use “by right”; the three about which the Housing Element provides information are all under an acre in size (0.2, 0.75 and 0.9 acres). San Rafael also rezoned 10 other sites, but none with “by right” zoning.

The provision of so few appropriately sized sites with zoning that allows residential development by right at higher densities goes far toward explaining the disappointing outcomes in the production of lower-income housing in many jurisdictions. Of the 179 sites, only 21 yielded any affordable housing at all, and only 13 (seven percent) produced five or more lower-income housing units.

To understand the impact of zoning more fully, we now discuss zoning regulations in the abstract; we then circle back to discuss the application of zoning to particular sites.

Zoning Regulations

In the Bay Area today, most housing affordable to very-low and low-income households is rental housing, and most rental housing is in multifamily developments, such as apartment buildings. The development of affordable multifamily rental housing depends in significant part on how local government regulates it through its zoning ordinance.

California law recognizes the importance of providing at least one district in the local zoning ordinance that promotes affordable housing by (a) allowing multi-family housing *by right* and (b) allowing *densities* of at least 20 or 30 units per acre. This is what we have referred to in shorthand as “by right” zoning. The law also recognizes the importance of preserving available sites for affordable housing by imposing restrictions that include (c) a *density floor*, to prevent lower-density development of high-density sites, and (d) a limitation to residential use, to prevent *non-residential development* of the site. The first two points are important in promoting affordable housing, and the last two in preventing inefficient use of scarce land resources. We discuss each in turn.

➤ Zoning that Promotes Affordable Housing

Under California law, “by right” means:

that the local government’s review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a ‘project’ for purposes of [CEQA]. . . .¹⁵

In other words, a use that is permitted “by right” is one that does not burden the developer with the cost, delay and uncertainty of requesting an approval that the local government retains the discretion to deny, or to grant only after imposing onerous conditions.

We have already seen that density is a critical factor in achieving affordability. State law now prescribes densities that are required for achieving affordable housing goals.¹⁶ Jurisdictions in predominately suburban areas (including most of Marin) must make sites to meet a shortfall for lower-income housing available with a minimum density of twenty units per acre, while in metropolitan areas (including the cities of San Rafael and Novato, and the unincorporated County) sites must be zoned to allow at least thirty units an acre.¹⁷

¹⁵ Gov’t Code § 65583.2 (i). The statute goes on to state that “[a] local ordinance may provide that ‘use by right’ does not exempt the use from design review. However, that design review shall not constitute a ‘project’ for purposes of [CEQA]. Use by right for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5.”

¹⁶ Cal. Gov’t Code § 65583.2 (c) (3) (B) (iii) - (iv).

¹⁷ Cal. Gov’t Code § 65583.2, as amended by AB 2348. See HCD memo at <http://www.hcd.ca.gov/hpd/hrc/plan/he/ab2348stat04ch724.pdf>.

We found that four Marin jurisdictions do not have even one zoning district on the books that allows multi-family housing at sufficiently high density, by right, subject only to design review. These are:

- The County of Marin, which only allows multi-family housing at high-densities in Planned Development (PD) districts, with the requirement of a discretionary approval to establish the allowable density;
- Fairfax;
- Corte Madera; and
- Tiburon.

A fifth, Belvedere, does have such a zone, but it only permits studio and one-bedroom units at sufficiently high-density.

The zoning ordinances of Corte Madera and Tiburon do not include a residential district that permits multi-family residential use by right at densities of at least twenty units per acre. However, both have enacted Affordable Housing Overlay (AHO) Zones, a “best practice” that we describe below. The Corte Madera ordinance has proven its worth in simultaneously promoting affordable housing and preserving sites from development for purposes that do not include affordable housing. Tiburon’s was not adopted until 2006, and has not yet proven its effectiveness; on its face, it appears weaker than Corte Madera’s.

➤ Zoning that Preserves Sites for Affordable Housing

Zoning can serve not only to promote affordability, but also to preserve available sites for affordable housing and to reduce the harmful effects of inefficient land use, such as sprawl. It can do so by imposing restrictions that include (a) a ***density floor***, to prevent lower-density development of the site, and (b) a limitation to residential use, to prevent ***non-residential development*** of the site.

Most zoning districts fix *maximum* densities, but fewer set *minimums*, known as density floors. Without imposing a required minimum density that will support lower-income housing, many sites identified for high-density development will foreseeably be developed at low densities, promoting sprawl while impeding affordability. State law currently does not require jurisdictions to impose density floors, but it does require that the “carrying capacity” of sites without density floors be realistically established:

If local law or regulations require the development of a site at a minimum density, [HCD] shall accept the planning agency’s calculation of the total housing unit capacity on that site based on the established minimum density. If the city or county does not adopt a law or regulations requiring the development of a site at a

minimum density, then it shall demonstrate how the number of units determined for that site pursuant to this subdivision will be accommodated.¹⁸

The law goes on to require that the number of units calculated in this manner “shall be adjusted as necessary, based on [constraints imposed by] land use controls and site improvements” requirements.¹⁹

We found that, of the jurisdictions with high-density multifamily “by-right” zoning districts on the books, none includes a density floor of twenty (or in the case of Novato and San Rafael, 30) units per acre. In some cases, such as Novato and San Anselmo, the “by right” zone permits a *maximum* density that coincides with the required *minimum* under state law, while also permitting lower-density development. Far better is San Rafael’s HR zones, which permit densities as high as 45 units per acre and set a floor of 24 units per acre. (While San Rafael’s minimum density should be 30 units per acre, it has a General Plan policy that development of multifamily sites should be at mid- to high-end of the density range.) The effect of zoning ordinances without density floors is illustrated by the experiences of the County, Larkspur and others, where sites zoned to permit higher-density residential use were instead developed at low-densities.

Another practice that tends to preserve sites for affordable housing is providing residential-only zoning. In certain circumstances housing development is allowed in non-residential zones, especially “planned development” (PD) zones, and commercial zones that permit a mix of commercial and residential uses. (PD and mixed-use zoning are discussed in greater detail below.) However, where adequate sites are not presently zoned to meet a jurisdiction’s entire Regional Housing Need at all income levels, State law limits the proportion of the lower-income need that can be accommodated in mixed-use and other non-residential zones. Specifically, the law now requires jurisdictions to accommodate at least half of their unmet need for very-low and low-income units on sites that allow *only* residential uses:

The program required by subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 shall accommodate 100% of the need for housing for very low and low-income households allocated pursuant to Section 65584 for which site capacity has not been identified in the inventory of sites pursuant to paragraph (3) of subdivision (a) on sites that shall be zoned to permit owner-occupied and rental multifamily residential use by right during the planning period. . . . At least 50% of the very low and low-income housing need shall be accommodated on sites designated for residential use and for which nonresidential uses or mixed-uses are not permitted.²⁰

We noted above that four Marin jurisdictions – the County, Corte Madera, Fairfax and Tiburon – do not have a zoning district on the books that provides for by-right

¹⁸ Cal. Gov’t Code § 65583.2(c)(1).

¹⁹ Cal. Gov’t Code § 65583.2 (c)(2).

²⁰ Cal. Gov’t Code § 65583.2(h).

multifamily housing of at least 20 units per acre (or 30, in the case of the County). As we discuss below, even those cities that do have such a district in their zoning ordinance have fared poorly in applying it to actual developable sites.

In the new Housing Elements, rezoning sites of appropriate size for high-density multifamily by-right use (and creating such zoning districts, where they do not yet exist) will be of the utmost importance.

➤ **A Best Practice: Corte Madera's Affordable Housing Overlay Zone**

While the Town of Corte Madera has no “by right” high-density district in its zoning ordinance, it provides increased density (known as a density bonus) through its Affordable Housing Overlay (AHO) zones to projects comprising 50 to 100% affordable units. The Town’s innovative AHO overlay zones serve to promote affordable housing by providing increased density and other benefits to developers of affordable housing. At the same time, it preserves sites for high-density affordable development by making them less attractive to other developers, from whom it withholds those benefits.

The Corte Madera AHO zoning overlay permits all uses allowed by the underlying zoning district, as well as all uses allowed in the R-2 (multifamily housing) district.²¹ A developer who builds a 100% affordable deed-restricted project (30% very-low, 20% low-, and 50% moderate-income) may take advantage of a density of 20 units per acre.²² This configuration of density and affordability can yield up to 31.5 units per acre under the State Density Bonus Law.²³ The AHO zone also provides other incentives, such as reduced parking, dispensing with preliminary and precise plans, clarified design review criteria, and fee waivers.²⁴

Several other Marin jurisdictions have taken tentative steps toward following the example of Corte Madera, but their efforts have not yet met with success. The County of Marin and the Town of Tiburon require discretionary approvals in order to receive the local density bonus. This increases uncertainty and can discourage development. Novato allows increased density in commercial zones for projects that include housing, but it does not condition that density increase on any level of affordability. These and other shortcomings are discussed more fully in the Appendix.

➤ **While Certain Non-Residential Zones Permit Housing, They Neither Promote, Nor Preserve Sites For, Lower-Income Housing**

Two kinds of zoning districts in Marin allow, but do not require, housing development: Planned Development (PD) zones, and commercial zones that permit a mix of uses,

²¹ Corte Madera Mun. Code, § 18.18.605.

²² Corte Madera Mun. Code, §§ 18.18.610, 18.18.620, 18.18.630.

²³ Cal. Gov't Code § 65915-18.

²⁴ Corte Madera Mun. Code, §§ 18.18.615; 18.18.645; 18.18.655; 18.18.660, 18.18.665; 18.18.70.

including housing. While PD and mixed-use zones are quite different in many respects, as adopted in Marin and in many other communities they both fall short on their potential to deliver lower-income housing.

Planned Development Zoning: PD zoning can provide useful flexibility, but has several shortcomings when relied on to deliver affordable housing. First and foremost, it requires burdensome discretionary approvals, and generally fails to provide clear standards under which denser development will be approved “by right.” While affordable housing is sometimes developed in PD zones, an excessive reliance on this zoning imposes the burdens of added cost, delay and uncertainty that create significant bottlenecks to the development of affordable housing. Density in PD zones is also often illusory, because it is limited by the General Plan. In practice, this means that some sites that are zoned PD cannot be developed at higher densities short of a General Plan amendment. These discretionary approvals, including zoning and General Plan amendments, erect barriers to the development of affordable housing by imposing cost, uncertainty and delay on those who would develop it.

Mixed-Use Zoning: Many today agree that residential development in commercial zones is something that cities should encourage. Such development can support walkable, “downtown”-style living near jobs and transit, and can help check sprawl and auto-dependency. However, our analysis found that efforts at residential development in commercial zones often face significant hurdles. In many cities, if mixed-use development is to be a source of any significant housing, zoning regulations will have to be overhauled, especially in terms of density, height and parking requirements, and requirements that limit the ground-floor to commercial uses. (Our detailed analysis is in the Appendix.) All of these regulations may impose obstacles on the ability of a non-profit developer to build subsidized affordable housing. Several Marin cities have taken steps in this direction, though few have produced any sizeable number of mixed-use units.

Even where housing development is encouraged in PD and mixed-use zones, however, *affordable* housing can still present challenges. Where jurisdictions do allow for PD and mixed-use development, clear standards for affordable housing and ministerial (as opposed to discretionary) approval for developments that meet standards should be provided. Toward the end of this report, we discuss inclusionary zoning programs. These programs can be an important tool in ensuring at least a moderate share of housing units in mixed-use developments. Absent strong inclusionary requirements, there may be little likelihood of achieving significant affordability in mixed-use development, given that land costs in downtown areas tend to be higher than in less desirable locations.

The difficulty in producing affordable units on non-residentially zoned sites has been particularly evident in jurisdictions that, like San Rafael and Novato, hoped to meet a significant portion of their very-low income housing need through mixed-use development. Ultimately, those hopes went largely unrealized, particularly in regard to very-low income units. (The Whole Foods site in Novato will include 125 housing units in a mixed-use project; only seven will be affordable, all at the very-low income level.

San Rafael reports approving 241 mixed-use units on six sites from 1999 to 2007, of which 33 were affordable to low-income households and 30 to moderate-income households, but none to very-low income households.)

Application of Zoning to Sites

We have emphasized the importance of adopting a high-density multi-family “by right” district in the zoning ordinance. The utility of such zoning, of course, depends not just on its existing in the zoning code, but on its application to appropriate sites through **site rezoning**. Our investigation reached its culmination at this point, where we asked whether jurisdictions (a) made sites available with “by right” zoning, (b) did so through a government-initiated process, rather than placing the burden and risk of a rezoning application on the would-be developer, and (c) completed the necessary rezoning early in the planning period.

The purpose of the Housing Element’s site inventory is to determine whether the sites in the inventory, as presently zoned, can feasibly accommodate the entire share of the Regional Housing Need, at each income level. If they cannot, the Housing Element must include a rezoning program, also known as an “adequate sites” program.

The Housing Element Law, and an important companion statute known as the Least Cost Zoning Law,²⁵ require not only the inclusion of an “adequate sites” program on paper, but the implementation of that program – that is, the actual rezoning of appropriate sites for higher-density residential use.

Until recently, the Least Cost Zoning Law was less than clear on the question of *when* the rezoning of sites was required to be completed. In 2007, the California Court of Appeal clarified that this rezoning must be completed “within the five-year planning period.”²⁶ This statute subjects a jurisdiction that has an unaccommodated rezoning need to legal liability. In addition, an amendment to the Housing Element Law, AB 1233, now requires jurisdictions, “within the first year of the planning period of the new housing element, [to] zone or rezone adequate sites to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period.”²⁷ Under AB 1233, a jurisdiction that did not complete the required rezoning during the period that ended in 2007 must complete it immediately in the new planning period, *in addition to* the rezoning required to accommodate its *new* Regional Housing Need Allocation.

²⁵ Cal. Gov’t Code § 65913.1.

²⁶ *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1180-81.

²⁷ AB 1233 (Jones) added Gov’t Code § 65584.09 (a), which provides that “if a city or county in the prior planning period failed to identify or make available adequate sites to accommodate that portion of the regional housing need allocated pursuant to Section 65584, then the city or county shall, within the first year of the planning period of the new housing element, zone or rezone adequate sites to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period.”

The rezoning that these statutes require must be initiated by local government. Contrary to this requirement, local jurisdictions often place that burden on the would-be developer. In the context of meeting the need for affordable housing, city-initiated rezoning is important because rezoning is a discretionary decision that requires a complex, costly, and potentially lengthy process, often entailing environmental review and rarely promising a certain outcome. When the cost, uncertainty and delay of that process must be shouldered by the developer, affordable housing is less likely to be proposed at all, and if eventually built, is likely to be less affordable, due to the greater cost incurred in its planning and construction. The whole purpose of having an “adequate sites” program in the Housing Element is to require city-initiated rezoning to be completed early in the planning period. As HCD notes, adequate sites to accommodate the entire Regional Housing Need “must be appropriately zoned *early enough in the planning period to provide realistic and viable development opportunities.*”²⁸

Accordingly, the best practice, and the one encouraged by HCD, is for local governments to complete the rezoning of sites to meet their lower-income share of the Regional Housing Needs Allocation *at the time they adopt their Housing Element.*²⁹ Cities that have not accommodated their 1999 – 2007 Regional Housing Need at each income level by rezoning adequate sites must do so no later than June 30, 2010. They have the opportunity to do so at the same time as they rezone to accommodate the 2007 – 2014 RHNA. Rezoning all needed sites at the same time can also reduce the costs of CEQA review.

When we asked Marin jurisdictions to report on the zoning and development status of 179 sites in their Housing Element inventories, most of those Housing Elements had been adopted more than five years earlier, allowing a significant period in which sites could have been rezoned. Since the vast majority of those sites were not originally zoned for “by right” multi-family residential use at high density, the question of rezoning is paramount. The critical question is whether Housing Element rezoning programs were implemented in a timely fashion, so that the entire lower-income share of the RHNA could be accommodated, and the housing built, within the 1999-2007 planning period.

Six of the eleven jurisdictions did not rezone any of these Housing Element sites to permit high-density, multi-family housing by right: Marin County, Belvedere, Fairfax, Mill Valley, San Anselmo, and Sausalito. The failure to conduct the needed rezoning blocked or delayed affordable housing development in many of these jurisdictions.

The five jurisdictions that did rezone sites, on the other hand, produced some affordable housing on those rezoned sites. However, in most cases, the rezoning did not provide sites with “by right” zoning.

- The most significant example is Corte Madera, which rezoned three sites to one of its new “affordable housing overlay” zoning districts, described above. One of those sites yielded 78 lower-income units.

²⁸ http://www.hcd.ca.gov/hpd/housing_element2/PRO_adqsites.php.

²⁹ See http://www.hcd.ca.gov/hpd/housing_element2/PRO_adqsites.php.

- San Rafael produced 2 very-low, 6 low- and 3 moderate-income units on three sites that had previously been zoned for by right high-density use (HR-1 zone), but did not rezone any sites to HR zoning. It rezoned three sites for medium-density housing and PD use, yielding a total of 21 affordable units. It also amended the non-residential zoning affecting four sites, which now list high-density housing among the permitted uses. These sites did not yield any affordable housing.
- Larkspur rezoned two sites to PD zoning, yielding 44 affordable units on portions of those sites, including 2 very-low and 20 low-income units. (Larkspur also amended its mixed-use zoning regulations, though no affordable units have resulted from those changes.)
- Novato rezoned two sites to PD zoning, yielding 39 very-low income units.
- Tiburon rezoned seven sites with a new “affordable housing overlay” zone, none of which developed; and rezoned one other site, that yielded 4 very-low income inclusionary units in a 25-unit market-rate development.

We did not obtain the information necessary to determine in every case which of the sites rezoned during the planning period were subject to zoning initiated by the jurisdiction, as opposed to placing the burden of obtaining rezoning on the would-be developer. Some jurisdictions evidently did take on the burden of initiating site rezoning, among them Corte Madera, which applied its Affordable Housing Overlay zones to several sites in 2003, meeting a condition of its HCD approval. While Corte Madera did not complete the rezoning at the same time it adopted its Housing Element, it did so soon afterward. San Rafael rezoned of seventeen small parcels on Brookdale Avenue to high-density residential use in 2004, though this rezoning was evidently sufficient to accommodate only a fraction of its unmet lower-income housing need.

Because they failed to provide adequately zoned sites to meet their lower-income share of the RHNA during the 1999 – 2007 period, a majority of Marin cities appear to be subject to AB 1233. These jurisdictions must rezone sites immediately to accommodate the affordable units for which they failed to rezone in the prior planning period. Among the cities that appear to be subject to this obligation are Belvedere, Fairfax, Mill Valley, Novato, San Anselmo, San Rafael and Sausalito. (Belvedere, San Anselmo and San Rafael assert that they are not subject to AB 1233. Belvedere claims that it accommodated its RHNA exclusively by means of second units, and therefore was not required to rezone sites; San Anselmo states that it accommodated its RHNA on commercial sites; and San Rafael asserts that it met all the conditions of its approval by 2008 and accommodated all of its lower-income housing share.)

C. Other Housing Element Programs

In addition to our focus on sites and on zoning of “adequate sites,” we reviewed the implementation status of two other types of Housing Element programs: those intended to (a) adopt or strengthen inclusionary housing ordinances, or (b) create sources of funding for subsidized housing development. For each of the selected programs, we asked whether the city or county had implemented it, and if so, the actions it had taken and the

key outcomes that resulted. We then analyzed both how well the programs in the Housing Element measured up against the model programs on paper, and the success with which they were actually carried out in practice.

Inclusionary Zoning

Inclusionary Zoning ordinances require that developers who build market-rate housing (and in some cases non-residential projects) include a proportion of affordable units. Several important policy decisions must be confronted in adopting an inclusionary ordinance, and how these decisions are made is of the greatest importance in the success or failure of the ordinance. Among the most important are (1) the percentage of inclusionary units required, (2) the level at which the inclusionary units are required to be affordable, and (3) whether alternatives to on-site construction of inclusionary units, such as paying an “in lieu” fee and dedication of land for affordable housing, are allowed and, (4) if payment of an in lieu fee is allowed, whether that fee is sufficient.³⁰

The strongest inclusionary ordinances are those that (1) require at least 20% inclusionary units, (2) target the creation of very-low and low income units, rather than allowing all units to be affordable at the moderate-income level, and (3) require developers to build the units in all but exceptional circumstances, and where payment of an in-lieu fee is allowed, ensure that the fee is set high enough to fund the development of the equivalent number of inclusionary units at the required income levels.

Many Marin jurisdictions have adopted inclusionary ordinances. The County now requires that 20% of units be affordable at 50% of Area Median Income (AMI) in all rental developments of two or more units,³¹ and that 20% of units be affordable at 60% AMI in ownership units. (A very-low income household has income under 50% AMI, while a low-income household has income ranging from 50% to under 80% of AMI.) The ordinance has a preference for on-site construction but allows the possibility of off-site construction, land dedication or in-lieu fees (as a last resort) only if the County Development Director finds the units cannot be provided on-site. Limitations on rents and/or deed restrictions are required in perpetuity unless a shorter restriction period is required by the project’s financing sources.

San Rafael’s ordinance similarly requires 20% very-low or low-income units in rental projects, and 20% low- and moderate-income units in ownership projects, but is stronger than the County’s, in that it requires both very-low *and* low-income units in rental developments. Unlike the County ordinance, which only requires affordability at 50% AMI, San Rafael’s statute requires that 50% of affordable units are available to very-low income households (less than 50% AMI) in rental units.³² San Rafael emphasizes its

³⁰ See California Coalition for Rural Housing & The Non-Profit Housing Ass’n of N. California, *Inclusionary Housing in California: 30 Years of Innovation*, available at http://www.nhc.org/pdf/pub_ahp_02_04.pdf.

³¹ Marin County Code § 22.22.030(A).

³² San Rafael Muni. Code, § 14.16.030(C), (D).

100% success rate in obtaining on-site units, rather than in-lieu fees, in developments of five or more units.

Tiburon successfully implemented a Housing Element policy that strengthened its pre-existing Inclusionary Zoning Ordinance.³³ The policy helps ensure that in-lieu fees collected from developers are high enough to create affordable units by comparing the “difference between the affordable purchase price of a dwelling unit . . . and the estimated cost of constructing a market rate unit of appropriate size.”³⁴ An example of the calculation given in the Town’s Municipal Code shows a fee of \$437,000 in lieu of the development of an affordable unit.

By comparison, other jurisdiction’s ordinances are not as strong. For example, Novato’s recently-amended inclusionary ordinance improved on the prior one by limiting developers’ right to pay in-lieu fees by requiring City Council approval before the developer is allowed to “fee-out.” The amount of in-lieu fees charged, however, ranges from \$14,000 to \$28,000 per market-rate unit, depending on the size of the market-rate unit, or about \$70,000 to \$140,000 per inclusionary unit, far less than the actual cost of building a subsidized unit.³⁵

Funding Affordable Housing

Many California jurisdictions have established local housing trust funds as a source of financing affordable housing development. Local funding sources are a critical supplement to state and federal sources of financing (which typically require a local match) and are particularly important in the risky pre-development phase. Local trust funds are most commonly funded through two sources: in-lieu fees from inclusionary zoning requirements, and jobs/housing linkage (or nexus) fees that require developers of commercial and other nonresidential projects to contribute to the cost of housing future workers. Other important local funding sources for affordable housing in Marin have been redevelopment agency Low and Moderate Income Housing Funds, Community Development Block Grants, and Marin Community Foundation.

All of the Housing Elements in Marin contained a program to establish or continue a housing trust fund, and six jurisdictions (the County, Corte Madera, Larkspur, Novato, San Rafael and Tiburon) had implemented this program as of 2009. Most are funded by inclusionary zoning programs. Jobs/housing linkage programs are a newer innovation, and only three jurisdictions (the County, Corte Madera and San Rafael) have implemented such a program, though four others included in their Housing Elements such a program that has yet to be implemented.

³³ Tiburon Muni. Code, § 16-6.8.

³⁴ Id.

³⁵ If a new court ruling stands, some existing ordinances may require amendment. *Palmer v. City of Los Angeles*, No. B206102 (2d Dist., July 22, 2009).

State law requires public disclosure and review of any fees collected in connection with the approval of a development project through an annual report and public meeting.³⁶ The annual report must include a description of the type of fee in the account, the amount of the fee, the beginning and end balance of the account, the amount of fees collected and the interest earned, and identification of any public improvement the fees went towards.³⁷ Some cities, like Tiburon, make their report available on-line, a practice we strongly recommend to ensure transparency.³⁸

We did not ask jurisdictions to provide copies of their annual reports, but Tiburon provided information showing a substantial trust fund balance (funds totaling \$1,340,551 as of July 2004, and expected to grow to about \$2 million by 2010). The size of this balance, while it reflects a variety of impact fees, appears to be attributable primarily to the significant in lieu fee that Tiburon collects under its inclusionary ordinance, as discussed above. These funds potentially allow Tiburon to leverage the production of much-needed affordable housing.

One jurisdiction, Fairfax, proposed the imposition of an affordable housing fee for all new single-family homes and major remodels or additions. (As proposed, in lieu of paying the fee, a deed-restricted affordable second unit could be provided as part of the new construction.) The Housing Element set the fee at \$10,000 for each new home. However, Fairfax did not implement this program.

The County states that 146 affordable units were “leveraged through in-lieu fees” in this period. The County did not provide dollar balances. However, it is a founding partner in a countywide housing trust fund, the Marin Workforce Housing Trust. Created as a joint effort among a number of major employers, Marin Community Foundation and the County of Marin, this non-profit organization has raised over \$3 million toward a \$6 million goal to help finance the creation of affordable housing. The Foundation and the County have agreed to match dollar for dollar the money raised through business and private donations.³⁹ (San Rafael contributes staff time, but not funding.)

More ambitious programs along the same lines have been created in Santa Clara and San Mateo Counties. The Housing Trust of Santa Clara raised \$20 million in its first two years, and has reportedly raised nearly twice that sum as of today. Significantly, all 15 Santa Clara County towns and cities are participants in the trust.⁴⁰

³⁶ Cal. Gov’t Code § 66006 (b).

³⁷ Cal. Gov’t Code § 6606 (b) (1).

³⁸ See [http://www.ci.tiburon.ca.us/Budget & Tax Info/Fee%20Related/development fees annual reporting FY 2005.pdf](http://www.ci.tiburon.ca.us/Budget%20&%20Tax%20Info/Fee%20Related/development%20fees%20annual%20reporting%20FY%202005.pdf).

³⁹ See <http://www.mwht.org/history.php>.

⁴⁰ See <http://www.housingtrustscc.org/ml.php#history>.

The Housing Endowment and Regional Trust (HEART) of San Mateo County has experienced similar success. HEART was formed in 2003 as a public/private partnership among the county, all 19 towns and cities, and the business, nonprofit, education, and labor communities of San Mateo County. In the past five years, HEART has raised over \$10 million, of which \$7.25 million has been invested in the building, renovation, or purchase of 662 homes.⁴¹

The creation of a countywide trust fund in Marin is a welcome development. The participation of local jurisdictions other than the County of Marin in contributing funding to the trust is a best practice suggested by the experience of Santa Clara and San Mateo Counties.

⁴¹ See <http://www.heartofsmc.org/pdfs/HEART%20annual%20report%202008.pdf>.

Across the Region

This report has focused on policies and practices in Marin, but many of its findings and recommendations apply more broadly. Indeed, all of the major trends we found in Marin are repeated throughout the Bay Area, particularly in suburban jurisdictions.

Other suburban communities, like those in Marin, often zone residential land for expensive single-family homes without providing enough opportunities for higher-density multi-family housing. Often, they cite concerns like “local character” and traffic. Low-income families, increasingly pushed out of urban centers because of rising housing costs, are excluded from job-rich suburban areas by policies of this kind. The result is increasing social isolation and long commutes to job centers. Improving the availability of affordable housing in these communities would promote all three of the objectives we spoke of at the outset: social equity, sustainable economic growth, and reduced carbon emissions.

These objectives, in fact, are intimately connected. As the physical distance between work and home increases, so does the environmental impact. Fifty percent of the Bay Area’s greenhouse gas emissions are from transportation, the vast majority created by on-road vehicles.⁴² Commute trips by workers living in developing parts of the Central Valley adjoining the Bay Area are expected to double or triple.⁴³

A telling illustration of the interconnection of these objectives can be seen in California Attorney General Jerry Brown’s recent intervention in *Urban Habitat v. City of Pleasanton*, a case brought by Public Advocates and others challenging exclusionary zoning measures and a failure to zone available land at appropriately high residential densities. In announcing his intervention, the Attorney General stated that Pleasanton’s restrictive zoning “forces people to commute long distances, adding to the bumper to bumper traffic along 580 and 680 and increasing dangerous air pollution.”⁴⁴

Many of the Bay Area’s employment centers – increasingly located in the suburbs – have insufficiently planned for housing to match their job growth.⁴⁵ The resulting unmet housing demand has increased the cost of housing and pushed housing production to the outlying areas of the region.⁴⁶ This trend persists despite the business community’s

⁴² ASS’N OF BAY AREA GOV’TS, A PLACE TO CALL HOME: HOUSING IN THE SAN FRANCISCO BAY AREA 6 (2007) available at http://www.abag.ca.gov/planning/housingneeds/pdf/resources/A_Place_to_Call_Home_2007.pdf.

⁴³ ASS’N OF BAY AREA GOV’TS, SAN FRANCISCO BAY AREA HOUSING NEEDS PLAN 2007-2014 at 8.

⁴⁴ Press Release, California State Attorney General, Brown Sues to Invalidate Pleasanton’s Illegal Housing Cap (June 24, 2009) available at <http://ag.ca.gov/newsalerts/release.php?id=1759&>.

⁴⁵ ASS’N OF BAY AREA GOV’TS, SAN FRANCISCO BAY AREA HOUSING NEEDS PLAN 2007-2014 26 (2008), available at <http://www.abag.ca.gov/planning/pdfs/SFHousingNeedsPlan.pdf>.

⁴⁶ *Id.*

recognition that the relocation of workers to places distant from job-centers has a negative impact on long-term economic prosperity.⁴⁷

In short, building more affordable housing near jobs simultaneously promotes three significant objectives. In Marin, as in the region as a whole, removing the major obstacles that stand in the way of affordable housing will bring us closer to meeting all three of these goals.

While most of the Bay Area's 103 local jurisdictions have some multifamily housing, the majority of multifamily units are concentrated in only 22 cities, with 45% in just three: San Francisco, Oakland and San Jose.⁴⁸ Yet housing affordable to very-low income families is being built at a snail's pace, not only in Marin but across the region. Marin's low success rate in meeting 43% of its very-low income housing need for the last planning period (a rate that, as we have noted, may be significantly overstated), mirrors the regional average of only 44%.⁴⁹ This trend is cause for special concern as we look ahead. The Bay Area region's new housing need includes an additional 48,840 very-low income units for the upcoming planning period. And proportionally more of those units are targeted to suburban jurisdictions than was the case in the last planning period.

June 30, 2009 marked the due date of Bay Area Housing Element updates for the new planning period. We noted that none of Marin's 12 jurisdictions submitted a Housing Element draft for HCD review by that date. Again, Marin was not alone. Throughout the Bay Area, HCD approved the new draft Housing Elements of only six jurisdictions, of which only three have been adopted (Sonoma County, Solano County and Millbrae).⁵⁰ In fact, by the June 30 deadline, only 33 of the Bay Area's 103 jurisdictions had even submitted draft Housing Elements to HCD to for review. (See chart on next page.)

HCD found that 27 of the drafts it reviewed did not comply with state law. Analyzing HCD's 27 non-compliance letters, we found a number of familiar common themes. Among them were (1) a failure to identify sites with sufficient density or feasibility for development; (2) zoning ordinances that do not encourage the development of affordable housing; (3) a failure to accommodate the rezoning required by AB 1233; and (4) an over-reliance on second units to fulfill housing needs obligation.

⁴⁷ BAY AREA COUNCIL, HOUSING AND LAND USE, (2009), available at http://www.bayareacouncil.org/bac_housing_land.php.

⁴⁸ ASS'N OF BAY AREA GOV'TS, SAN FRANCISCO BAY AREA HOUSING NEEDS PLAN 2007-2014 at 5.

⁴⁹ *Id.* at 43.

⁵⁰ See Letters from Cal. Dep't of Hous. & Cmty. Dev. to Jurisdictions on Review of Submitted Housing Elements, available at http://hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/heweb_date.pdf.

COUNTY	JURISDICTIONS IN COUNTY	JURISDICTIONS SUBMITTING DRAFT AS OF JUNE 30, 2009	
Alameda	15	5	Alameda; Fremont; Livermore; Oakland; Newark
Marin	12	0	
Napa	6	4	Yountville; St. Helena; Napa; Napa County
San Francisco	1	0	
Santa Clara	16	5	Saratoga; Campbell; Monte Sereno; Sunnyvale; San Jose
San Mateo	21	6	Woodside; Redwood City; Hillsborough; Burlingame; San Mateo; Millbrae
Sonoma	10	5	Cloverdale; Petaluma; Windsor; Santa Rosa; Sonoma County
Solano	8	6	Vacaville; Vallejo; Fairfield; Suisun City; Dixon; Solano County
Contra Costa	20	7	Walnut Creek; Concord; Oakley; Lafayette; Pittsburg; San Ramon; Contra Costa County

In its comment letters, HCD noted that the size and physical characteristics of sites directly relate to the feasibility of development. HCD expressed concern that several jurisdictions identified sites with existing uses, and stressed the need to analyze the extent to which these existing uses are likely to impede the development of affordable housing.⁵¹ HCD also echoed the concern that many jurisdictions are overly-dependent on small sites to develop affordable housing.⁵² The agency noted that, “while it may be possible to build housing on a very small parcel, the nature and conditions necessary to construct the units often render the provision of affordable housing infeasible.”⁵³ HCD advised that lots be large enough to accommodate 50 to 80 units, the average number of units for projects receiving state and federal financing.⁵⁴

The lack of appropriate zoning regulations that we found in Marin is also seen throughout the Bay Area. HCD’s comment letters found many jurisdictions’ Housing Elements out

⁵¹ See Letters from Cal. Dep’t of Hous. & Cmty. Dev. to Livermore, St. Helena, Sunnyvale, San Jose, Redwood City, San Mateo, Concord, Lafayette, Contra Costa County, Pittsburg, and San Ramon, available at http://hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/heweb_date.pdf.

⁵² See Letters from Cal. Dep’t of Hous. & Cmty. Dev. to Fremont, Livermore, Oakland, Suisun City, Burlingame, Concord, Lafayette, available at http://hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/heweb_date.pdf.

⁵³ Letter from Cal. Dep’t of Hous. & Cmty. Dev. to Livermore 3 (May 1, 2009), available at http://www.hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/alalivermore050109.pdf.

⁵⁴ *Id.*

of compliance for failing to provide one or more zoning districts that allow development at a sufficient density.⁵⁵ And in its recent Smart Growth Report Card, the Greenbelt Alliance states that “Bay Area cities are not doing well at encouraging density (with no or high density maximums) or requiring it (with density minimums), even in the most appropriate places: downtown and near transit.”⁵⁶ More specifically, the report found that

most cities have no density minimums, and only 21 cities have minimums of 15 [units per acre] or higher. Eight Bay Area cities set a high maximum at or above 70 [units per acre]; . . . Thirteen cities have no maximum density (though they may limit it in other ways.⁵⁷

Concerns related to appropriate zoning also extend to jurisdictions’ reliance on mixed-use developments to meet their RHNA. In over half of the comment letters, HCD required jurisdictions to demonstrate that projected densities for potential mixed-use developments are realistic.⁵⁸ Many of these jurisdictions relied on assumptions for determining densities that were not supported by trends showing success in recently constructed projects. For example, several cities assumed that lots with a mixed-use density would develop as a residential-only project, although all previous projects developed with ground floor commercial.

We concluded that as many as six of the 11 jurisdictions studied in Marin may be subject to rezoning requirements under AB 1233, which carries forward into the new planning period zoning obligations not met in the prior one. HCD noted that AB 1233 applies to at least three other jurisdictions: Alameda, Redwood City, and Concord.⁵⁹

HCD was also critical of an over-reliance on second units by several jurisdictions.⁶⁰ HCD found three jurisdictions’ Housing Elements insufficient because they failed to examine the likelihood that second units will be used for housing through an analysis of existing units’ affordability.

The Marin jurisdictions are ahead of the curve in the Bay Area when it comes to establishing inclusionary zoning ordinances. The Non-Profit Housing Association of

⁵⁵ HCD determined that eight Bay Area jurisdictions must amend their zoning ordinances to allow development of 20 units an acre (Letters from Cal. Dep’t of Hous. & Cmty. Dev. to Alameda, Fremont, Napa County, Windsor, Vallejo, Dixon, Saratoga, and Concord), and three others must provide zoning at 30 units an acre. (Letters from Cal. Dep’t of Hous. & Cmty. Dev. to Livermore, Oakland, and Walnut Creek.) Available at http://hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/heweb_date.pdf.

⁵⁶ GREENBELT ALLIANCE, BAY AREA SMARTH GROWTH REPORT CARD 15 (2006), available at <http://www.greenbelt.org/downloads/resources/smartgrowthscorecard/smartgrowthscorecard.pdf>.

⁵⁷ *Id.*

⁵⁸ *Id.*; see HCD Housing Element Comment Letters to Fremont, Livermore, Oakland, Newark, Vacaville, Suisun City, Dixon, Campbell, Sunnyvale, San Jose, Redwood City, Burlingame, San Mateo, Concord, Lafayette, Pittsburg, and San Ramon.

⁵⁹ *Id.*; see HCD Housing Element Comment Letters to Alameda, Redwood City, and Concord.

⁶⁰ *Id.*; see HCD Housing Element Comment Letters to Livermore, Oakland, and Suisun.

Northern California completed a comprehensive study that reported the best practices for inclusionary zoning.⁶¹ The Greenbelt Alliance also conducted a survey of Bay Area jurisdictions, and found that as of 2006, 60% had some form of inclusionary housing policy.⁶² However, many cities and counties do not require development of low income units and fewer require that very-low units are included in projects. The need for inclusionary zoning is crucial, especially in areas of the Bay Area that are experiencing rapid growth so that the entire community's housing needs are met during the construction of new, market-rate housing.⁶³

Our goal as a region should be to achieve equitable and sustainable development that protects low-income communities and communities of color from displacement, while dismantling barriers to housing near quality jobs, education, and services in affluent communities. Only by doing so will we promote equity, economy and environment. The opportunity to ensure that we move closer to these objectives is now.

⁶¹ NON-PROFIT HOUS. ASS'N OF N. CAL., INCLUSIONARY HOUSING ADVOCACY TOOLKIT (2003) http://www.greenbelt.org/downloads/resources/report_thrutheroof.pdf.

⁶² GREENBELT ALLIANCE, BAY AREA SMARTH GROWTH REPORT CARD 13.

⁶³ *See* Solano County, GREENBELT ALLIANCE, THROUGH THE ROOF: SOLANO COUNTY'S HOUSING CRISIS 13 (2005) *available at* http://www.greenbelt.org/downloads/resources/report_thrutheroof.pdf.

Appendix

County of Marin (unincorporated)

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006⁶⁴				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	85	48	96	292
Units Produced (1999-2006)	104 (122%)	100 (208%)	110 (115%)	643 (220%)

Housing Production

The County of Marin reported exceeding its Regional Housing Need for the 1999-2007 period in each income category. Market rate homes dominated, with 643 units, about twice the total of homes in all three affordable income ranges. (In the 1989-1999 period, the County also reported meeting all of its very-low and low-income RHNA need.)

During the 1999-2007 planning period, the County approved several 100% affordable developments, including the Fireside Motel (50 units), the Gates Cooperative (38 units) and the Ecumenical Association for Housing project at Point Reyes Station (34 units). These three yielded 90 very-low income units; another 14 were produced on two other sites. Several of these projects were in the works for extended periods of time, likely a reflection of the difficulties created by the County’s discretionary approval requirements, discussed below.

The County reported affordable second units, including 30 units at the very-low income level and 73 at the low-income level.⁶⁵ It was beyond the scope of this report to determine the affordability of those 103 second units. In its 2003 Housing Element, the County states that it periodically surveys “permitted second units to determine the rental market of second units.” (2003 Housing Element, p. 37.) Unlike some other Marin jurisdictions, however, the County did not rely on second units to meet its RHNA need at these income levels, and the figures in the chart above do not include any second units.

⁶⁴ Unless otherwise noted, the source of the data in the housing production table at the head of each jurisdiction’s discussion is ABAG’s report, “A Place to Call Home, 2007.”

⁶⁵ County of Marin, 2006/2007 Annual Report on Housing Element Progress (Dec. 2007), p. 4, Table 18.

Sites

The County reported that it had not rezoned any of the 14 sites about which we inquired, but that all 14 had been approved for development during the planning period. Five sites, comprising a total of 29.8 acres, were developed with a significant proportion (30% or more) of very-low income units.⁶⁶ On these five sites, a total of 88 very-low income units were approved, with densities generally ranging from 20 to 45 units per net acre.

As noted above, an amendment to the State Housing Element Law now provides a “default” minimum density for lower-income housing, which is 30 units per acre for the County of Marin.⁶⁷

Countywide Plan

The County adopted a new General Plan, the Marin Countywide Plan, after the close of the planning period in late 2007, and has begun to update its zoning regulations to conform to the new Countywide Plan. While these implementing actions came too late to promote the development of affordable housing during the planning period, they were the outgrowth of commitments the County made in its 2003 Housing Element, and will help determine whether its efforts in the new planning period are successful. In this section, we analyze key provisions in the Countywide Plan; in the next, we turn to the implementation of the Plan in the County’s zoning code.

The new Countywide Plan⁶⁸ established residential categories for single-family and multi-family housing at various densities. Of the five Multi-Family residential designations, only two – MF4 and MF4.5 – permit densities as high as 30 units per acre. (Countywide Plan, pp. 3-38 to 3-39.)⁶⁹ Both permit minimum densities of as low as 11 units per acre.

Land use designations in a General Plan, such as the Countywide Plan, are not self-executing, but simply set the limits of the possible range of permitted uses. Those uses are not actually permitted, however, until they are implemented in the zoning code. As implemented in the zoning code, the MF4 and MF5 designations are consistent with RMP zoning districts, the County’s version of “planned development” zoning, discussed in the following section.

⁶⁶ The five sites are Gibson House, Fireside Motel, Point Reyes Affordable Homes, Ross Hospital and Bolinas Gas Station. The Gates Cooperative, a floating home project on 45.2 acres, was also 100% affordable.

⁶⁷ Cal. Gov’t Code § 65583.2, as amended by AB 2348. See HCD memo at <http://www.hcd.ca.gov/hpd/hrc/plan/he/ab2348stat04ch724.pdf>.

⁶⁸ Accessed at http://www.co.marin.ca.us/depts/CD/main/fm/cwpdocs/CWP_CD2.pdf.

⁶⁹ The six Single Family designations (SF1 through SF 6), and the Planned Residential (PR) designation permit only low-density development (maximum of 7 units per acre). (Countywide Plan, pp. 3-37 to 3-39.)

The Countywide Plan also established mixed-use categories for housing in commercial developments. Residential use is required in all four commercial categories: General Commercial/Mixed Use (p. 3-41); Office Commercial/Mixed Use (3-41 to 3-42); Neighborhood Commercial/Mixed Use (3-42 to 3-43); and Recreational Commercial (3-43 to 3-44) and commercial development is limited to 50 to 75% of a project.

In each of these land-use categories, the Countywide Plan provides that density (as determined by Floor Area Ratio, or FAR)⁷⁰ “may be exceeded” to accommodate affordable housing:

For projects consisting of low income and very low-income affordable units, the FAR may be exceeded to accommodate additional units for those affordable categories. For projects consisting of moderate income housing, the FAR may only be exceeded in areas with acceptable traffic levels of service — but not to an amount sufficient to cause an LOS standard to be exceeded.

(Countywide Plan, p. 3-40.) Because this provision has not yet been implemented in the County’s Development Code, it is not clear whether it will give affordable housing developers the option to exceed the FAR, or give the County the discretion in this regard. The County reports that the former is the intent, and that it will include an implementing program in its new Housing Element.

The Countywide Plan also established a Housing Overlay Designation (or HOD):

The purpose of the HOD is to encourage construction of units to meet the need for workforce housing, especially for very low and low-income households, and for special needs housing, in the City-Centered Corridor close to transit, employment, and/or public services. Sites for the HOD include reuse of existing shopping centers or other underutilized sites. Development on sites designated as both mixed use and as suggested HOD sites shall be developed pursuant to the HOD Policy and Program and not per mixed-use land designation criteria. Each square foot of market-rate HOD housing shall be offset by an equal reduction in the square footage of the permissible commercial development. *Up to 658 housing units may be approved within the HOD, subject to a discretionary approval process.*

⁷⁰ A floor area ratio determines the amount of floor space that a building may have, as a multiplier of the size of the lot on which it is built. For instance, an FAR of 1.2 permits up to 12,000 square feet of floor space on a 10,000 square foot lot.

(Countywide Plan, pp. 3-15 to 3-16, emphasis added.)⁷¹ The HOD designation has not yet been implemented in the Development Code. The County reports that its new Housing Element will include an implementing program to this effect. Even when implemented, however, as the italicized language indicates, the total number of HOD units permitted by the Countywide Plan was limited to 658,⁷² and those units will require discretionary approvals. This does not bode well for the creation of a model similar to Corte Madera’s successful Affordable Housing Overlay zone.

Zoning Districts

As noted above, land use designations in the General Plan do not by themselves permit development; they must be implemented in the zoning code. While zoning regulations must be consistent with the General Plan, they are often far more restrictive than what the General Plan allows.

As noted above, the Countywide Plan includes two residential land-use categories, MF4 and MF4.5, that can accommodate multi-family housing at densities as high as 30 units per acre. The County, however, has not implemented zoning that permits high-density multifamily housing “by right.” Instead, the only zoning districts that are consistent with these General Plan categories are the RMP (Residential Multiple Planned) and RMPC (Residential/Commercial Multiple Planned), zones in which multifamily housing is permitted only “where authorized by [a] Master Plan” on a discretionary basis. (Marin Development Code, § 22.10, Tables 2-4, 2-6; see § 22.44.030 [master plan approval process].)

⁷¹ The HOD policy continues:
The criteria used in establishing the Housing Overlay Designation include the following:
Designated by the Countywide Plan as Multifamily (MF), General Commercial (GC), Neighborhood Commercial (NC), Office Commercial (OC), Recreation Commercial (RC), or Public Facility (PF). Located within

- the unincorporated portion of the City-Centered Corridor;
- one-half mile of a transit node or route with daily, regularly scheduled service; and
- one mile of a medical facility, library, post office, or commercial center.

The area to be developed

- does not exceed an average 20% slope and is not within the Ridge and Upland Greenbelt;
- is not within a Wetlands Conservation Area or Streamside Conservation Area;
- is not a park or public open space area; and
- is not primarily located within the 100-year flood plain.

The County will engage in discussions with cities and towns within Marin County regarding the possibility of locating residential units otherwise allocated to the HOD within these cities and towns, subject to the criteria described above.

(Countywide Plan, pp. 3-15 to 3-16.)

⁷² The County had considered a more robust affordable housing overlay designation, which would have allowed up to 1,648 high-density units, but pared that back considerably in the adopted Plan.

Affordable housing is a “permitted” use in the RMP zoning district⁷³ (Development Code, Tables 2-4, 2-6), meaning that it is

Allowed subject to compliance with all applicable provisions of this Development Code, including Master Plan, Precise Development Plan, or Design Review where required, and subject to first obtaining any Building Permit or other permit required by the County Code.

(Development Code, § 22.10.030 (A).) It is unclear whether affordable housing in the RMP district requires discretionary approval of a master plan – something that is not ordinarily associated with a “permitted” use, but which this ambiguity in the Development Code suggests. The County reports that a Master Plan is not required for a 100% affordable housing project in the RMP zone. If so, a clarifying amendment should be made to the Development Code, since uncertainty can be a significant obstacle to affordable development. In any case, another discretionary approval, a use permit, is unambiguously required to establish the density of an affordable housing development:

The maximum density in planned zoning districts and minimum lot size requirement in conventional zoning districts for deed-restricted housing developments that are affordable to very low or low income persons shall be determined through the Use Permit procedures of Chapter 22.48 (Use Permits) if the resulting density complies with the density range established by the Marin Countywide Plan. (Marin Development Code, § 22.22.015.)

Since 2003 the County has allowed affordable housing in all other zoning districts (subject to conformity with the Countywide Plan), but requires a conditional use permit. (Marin Development Code, § 22.22.020 (A).) This discretionary approval also determines the maximum density for affordable housing. (Marin Development Code, § 22.22.015.)

In sum, the County’s zoning regulations provide no clear, reliable permission that would allow a non-profit developer to build appropriately designed affordable housing on even those sites on which the County allows such housing. This is a significant constraint that the County must address and remove in its new Housing Element.

Of special concern is the absence in the County’s zoning ordinance of any district that permits only residential use, and that allows multifamily use by right at a density of at least 30 units per acre.

Other Programs

Funding programs

The County’s Housing Element Program H5.A updated a pre-existing Housing Trust Fund ordinance and developed funding sources for such a fund, including in-lieu fees under any inclusionary zoning program, voluntary donations and the transient occupancy

⁷³ It is also permitted in the VCR (Village Commercial Residential) district (Table 2-6), but only at densities up to about 20 units per acre. (Table 2-8.)

tax. The program has apparently been partially implemented. The County reports that it is now managing a trust fund in the amount of \$3,535,333.73, and (as further discussed below) has funded 157 new affordable units through the fund.

Program H3.B contemplated the creation of a linkage fee program whereby commercial developers would be required to provide affordable dwelling units “according to empirically based evidence” and to include affordable housing units within hotels, offices, and other commercial or industrial buildings. Affordable housing could be provided through, in order of priority: on-site construction, off-site construction, mortgage or rent subsidies and, as a last resort, in-lieu fees.

The County enacted this program in October of 2003. Updates to its Development Code established the number of low- and moderate-income jobs created by use type and require 25% of the total jobs created to equal the number of units to be provided. Off-site construction, dedication of real property and the payment of in-lieu fees are also permitted as necessary. The Strawberry Shopping Center, which included employee housing units in a demonstration program *prior* to the enactment of this ordinance, produced five residential units, with four for very-low income households and one unrestricted in affordability. Additionally, the Oakview project produced 21 very-low and low-income units, while the Sandcastle and Bar-or projects each produced one unit, all of them on-site. It is unclear whether the County has yet acquired dedicated land or been paid in-lieu fees pursuant to this ordinance.

Inclusionary zoning program

At the time it adopted its last Housing Element, the County already had an inclusionary zoning program in place. Program H3.X consisted of revisions to the ordinance which might establish an in-lieu fee for projects of one to four units, require 20% affordable units for all projects of five units or greater, and apply inclusionary requirements to licensed senior facilities with independent assisted living.

Revisions to the ordinance were in fact made in 2003 and 2006. The County now requires that 20% of units be affordable to very-low and low-income households at 50% of the Area Median Income (AMI) in all rental developments of two or more units,⁷⁴ and that 20% of units be affordable up to 60% AMI in ownership units,⁷⁵ with a preference for on-site construction and the possibility of off-site construction, land dedication, or in-lieu fees (as a last resort) only if the County Development Director finds that the units “cannot” be provided on-site. Limitations on rents and/or deed restrictions are required in perpetuity unless a shorter restriction period is required by the project’s financing sources.

The County reports that 146 units have been “leveraged through in-lieu fees” under this program. (It is not clear what relationship that number bears to the 157 units mentioned above.) The only housing project approved during the period under review with a mix of

⁷⁴ Marin County Code § 22.22.030(A).

⁷⁵ Id. § 22.22.040.

affordable and market-rate units, the Oakview project, produced 21 very-low and low-income units.

Affordable Housing Impact Fee

Though not a part of any Housing Element program, an Affordable Housing Impact Fee enacted by the County in October 2008 bears mentioning. Because the majority of homes in Marin County consist of custom built above-moderate income units, most residential development is not subject to the Inclusionary Housing requirement. The County established a fee on single-family home development to address the shortage of low-income homes in the community. A nexus study was conducted in 2008 to determine the appropriate amount for an affordable housing impact fee to be charged on new single family home development. The fee would mitigate the impact of an increase in demand for affordable housing due to employment growth associated with new single family development.

The Affordable Housing Impact Fee, adopted in October of 2008, applies to all new single family homes over 2,000 square feet. Tear-downs, and all remodels that result in more than 500 square feet of new space in a structure of 2,000 square feet or more. Fees are either waived or reduced when a second unit is included as part of the proposed project. From its inception in January 2009 through June 2009, the Affordable Housing Trust Fund has collected \$32,560 in Impact Fees. Fees are assessed per the table below⁷⁶:

Home Sizes (sq. ft.)	Housing Impact Fee	If project includes second unit
2,000	\$0	\$0
2,500	\$2,500	\$0
3,000	\$10,000	\$5,000
3,500	\$15,000	\$7,500
4,000	\$20,000	\$10,000

The County states that this fee represents an alternative means of funding affordable housing despite limited commercial and large-scale residential development within the jurisdiction. This innovative ordinance seems like a promising means of accomplishing that goal.

⁷⁶ See, Affordable Housing Fact Sheet, available at, http://www.co.marin.ca.us/depts/CD/Forms/Affordable_Housing_Fact_Sheet.pdf

City of Belvedere

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	1	1	2	6
Units Produced (1999-2006)	0 (0%)	0 (0%)	2 (100%)	7 (117%)

Housing Production

The City of Belvedere met none of its very-low and low-income housing need, and all of its need at the moderate and above-moderate income levels. This represented a worsening of its prior performance in the 1989-1999 period, when it reported producing 11 lower-income units (three very-low and eight low-income), exceeding its RHNA share for that period.

In granting the City’s 2005 Housing Element a limited “conditional certification,” HCD noted:

Second-unit development represents Belvedere’s sole strategy for accommodating its regional share housing need for all income groups during the 2001-2007 planning period. As a result, the Department’s finding of compliance is conditioned on the City ensuring the forthcoming amendments to its second-unit ordinance are consistent with Government Code Section 65852.2, and the revised design and development standards will effectively encourage and facilitate second-unit development. In addition, the finding of compliance is conditioned on the City’s second-unit moratorium being allowed to expire by no later than October 2005. Should the moratorium be extended, the element would no longer comply with State housing element law.⁷⁷

Belvedere states that it satisfied the requirements of HCD’s conditional certification. In October 2005, the City Council allowed the moratorium on second units to expire and

⁷⁷ HCD letter of June 30, 2005, accessed at http://www.hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/manbelvedere070105.pdf.

adopted Ordinance 2005-10, allowing ministerial approval of second units.⁷⁸ However, Belvedere’s current second unit policies still leave much to be desired. For example, the City currently requires owner occupancy of the main dwelling unit or the second unit.⁷⁹ The City’s new Draft Housing Element includes a program to remove the owner-occupancy requirement.⁸⁰

Belvedere states that the 2006 ordinance enabled the construction of six new second units during the planning period, but does not claim that any were affordable.

Sites

Belvedere did not rezone any sites since adopting its 2005 Housing Element. Its Housing Element inventory included eight vacant sites, all zoned R-15, a single family zoning district. None of those sites developed.

Zoning Districts

Belvedere allows multifamily developments in the R-3C zone (Mun. Code, § 19.32.010) and R-3 zone (Mun. Code, § 19.36.010). While these zones permit multifamily densities as high as 21 units per acre (provided the units are one-bedroom or smaller), they do not accommodate two- and three-bedroom units at appropriately high densities. (Mun. Code, § 19.32.040; § 19.36.040; Belvedere General Plan II(C)(9)(d)).

Moreover, no available sites in the city are zoned R-3C. All of Belvedere’s potential housing sites are zoned R-15. The R-15 zone is a single-family zone that does not permit multifamily housing – not even with a conditional use permit. (Mun. Code, § 19.26.010. Multifamily housing is allowed with a conditional use permit in the C-1 zone. (Mun. Code, § 19.40.020.)

Our analysis concludes that Belvedere may be subject to AB 1233, which requires it to rezone sites in the first year of the new Housing Element planning period to make up for the very-low and low-income housing need it failed to accommodate in the prior period. Belvedere’s R-15 sites did not permit multi-family housing, much less high-density housing. Instead, the City claimed to rely exclusively on second units to meet its need for lower-income housing. The City asserts that rezoning was not necessary because it relied entirely on second units. Its recent survey of second units, however, showed that none of

⁷⁸ Muni. Code § 19.78.050(B)(1) (“Notwithstanding any other provision of this Code, any Second Unit Permit application that meets all of the location and development standards contained in this Chapter shall be approved ministerially, without complying with the design review requirements of this Code, and without any other discretionary review or public hearing.”); Muni. Code § 19.78.070(B) (“If the Planning Director determines that the application does not comply with the development standards and location requirements of this Chapter, the Planning Director shall deny the Second Unit Permit application. If the Planning Director determines that the application complies with the development standards and location requirements of this Chapter, the application shall be approved by the Planning Director and the Second Unit Permit shall be issued, without design review or any public hearing.”)

⁷⁹ Muni. Code § 19.78.80(R), 19.78.90(A)(2).

⁸⁰ City of Belvedere, Draft Housing Element, 71.

the second units charged an affordable cash rent (see below). In its 2009 Housing Element, Belvedere should demonstrate that second units needed to meet its former RHNA are being made available to the public on the open rental market to meet its very-low income need.

Other Programs

Funding programs

Housing Element program H5.A called for Belvedere to “consider” adopting a housing trust fund ordinance that would establish a fund to develop or rehabilitate units affordable to very-low and low-income households. No further details were provided in the Housing Element regarding funding sources or deployment. City staff prepared a report on establishing an affordable housing impact fee that could have funded such a trust fund, but no further action was taken in this direction.

Inclusionary zoning program

Housing Element Program H3.B spelled out a somewhat vague proposal for an in-lieu fee program for new market-rate housing, remodeling and additions. The program did not contemplate a requirement that affordable units be built on-site. The only implementation action taken with respect to this program was to prepare a report.

Second/Accessory Units

At the time when its most recent Housing Element was drafted (2005), Belvedere had already amended (in 2003) its Municipal Code to lift a previous limit on the total number of second units in the City to 50, and to remove the requirement of a conditional use permit for construction of a second unit. The amended provisions limited second units to 750 square feet in size and provided waivers of certain development standards to property owners who provided affordable second units. In Program H3.D, the City resolved to undertake an annual survey of the rent assessed on second units to determine if these units were helping to meet affordable housing needs, and to further amend the second unit ordinance if it was determined that these needs were not being met by the current second units inventory. The program set forth concrete goals for production of new second units (10 by 2006, with one very-low, one low-, and two moderate-income units).

In 2009, the City completed a survey of second units. The City received 24 responses from the 61 property owners who have a registered second unit. Of the 24 responding units, 12 were occupied. Only 7 of those 12 collected rent (ranging from \$800 a month to \$2000).⁸¹ With a minority of second units being occupied by renters, the validity of second units as the jurisdiction’s sole means of meeting its housing need should be closely re-examined. In particular, the claim that 20% of second units are affordable at the very-low income level rests on inadequate grounds, namely, the fact that no rent is charged for those units at all.

⁸¹ One unit charged \$400 plus light help around the house.

Town of Corte Madera

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	29	17	46	87
Units Produced (1999-2006)	62 (207%)	18 (105%)	7 (15%)	110 (137%)

(Data provided by Town of Corte Madera. Figures encompass housing built or approved between 1999 and 2005.)

Housing Production

In 1998, Marin Family Action brought suit against the Town of Corte Madera for violation of the Housing Element Law.⁸² The suit alleged that, as of that time, the Town had not yet adopted the Housing Element that came due in 1990, and had twice denied Ecumenical Association for Housing (EAH), a Marin-based non-profit developer, the opportunity to develop affordable housing. In terms of housing production during the 1989 to 1999 period, the Town had reported producing only seven percent of its share of the Regional Housing Need for very-low, 27% for low-, and 17% for moderate-income families.

A 2002 judgment in the case required the Town to adopt a valid Housing Element, and to adopt ordinances to (a) establish Inclusionary Housing requirements targeted to the production of very-low income housing units, (b) prohibit discrimination against tenants with Section 8 housing vouchers, and (c) establish a commercial development fee for the facilitation of affordable housing.

The Town adopted its Housing Element in 2002, receiving conditional, rather than full, certification from HCD. The conditions of Corte Madera's approval were the adoption of Affordable Housing Overlay (AHO) zones and the rezoning of three sites (San Clemente, Wornum Drive Extension, and Old Corte Madera Square) with AHO zoning, as set forth in Programs H3.G, H, I. The Town completed rezoning by the March 2003 deadline.

The Town's efforts paid off: for the 1999-2007 period, Corte Madera exceeded its entire share of the lower-income Regional Housing Need. It produced more than double its very-low income need on a single site, the San Clemente site, developed by EAH.

⁸² *Marin Family Action v. Town of Corte Madera*, Case No. 174793 (Superior Court, County of Marin, filed Aug. 27, 1998, judgment entered April 16, 2002). Marin Family Action was represented in the suit by Legal Aid of Marin and the California Affordable Housing Law Project.

Sites

Of the six opportunity sites in its Housing Element, Corte Madera rezoned three in March 2003, soon after it adopted its Housing Element, as just noted: San Clemente, Wornum Drive Extension, and Old Corte Madera Square. The latter two were not developed. The San Clemente site is now home to 60 very-low income families, and 18 low-income families, in a solar-ready complex developed by the San Rafael-based non-profit Ecumenical Association for Housing.

The Town rezoned the San Clemente and Old Corte Madera Square sites with its innovative Affordable Housing Overlay (AHO) zoning. As described below, these AHO zones effectively allow residential densities of over 30 units to the acre for projects that include a substantial proportion of affordable housing.

Zoning Districts

Corte Madera's zoning code includes no residential districts that permit multifamily residential use by right at densities of at least 20 units per acre. The highest-density residential district is R-2, which permits multifamily housing with no discretionary approval other than design review, but fixes a maximum density of only 10.9 units per acre.

As part of the resolution of the *Marin Family Action* lawsuit, the Town adopted a series of new affordable housing overlay zones that permit densities of up to 31.5 units per acre – such as the AHMU zone that allowed the San Clemente development to achieve a net density of over 29 units per acre.

The Town adopted four different affordable housing overlay zoning districts: the Affordable Housing Optional Overlay District (AHO), two Affordable Housing Exclusive Overlay Districts (AHE-A and AHE-B), and the Affordable Housing Mixed Use Overlay District (AHMU).

By way of example, the AHO overlay permits all uses allowed by the underlying zoning district, as well as all uses allowed in the R-2 district. (Mun. Code, § 18.18.605.) A developer who builds a 100% affordable deed-restricted project (30% very low-, 20% low-, and 50% moderate-income) may take advantage of a density of 25 units per acre (Mun. Code, §§ 18.18.610, 18.18.620, 18.18.630), yielding up to 31.5 units per acre under the State Density Bonus Law.⁸³ The AHO overlay also provides other incentives, such as reduced parking (Mun. Code, § 18.18.615), dispensing with preliminary and precise plans (Mun. Code, § 18.18.645), clarified design review criteria (Mun. Code, § 18.18.655), and fee waivers. (Mun. Code, §§18.18.660, 18.18.665, 18.18.70.)⁸⁴

⁸³ The Density Bonus Law requires local governments to allow increased densities to developers of affordable housing who meet certain thresholds of affordability; for instance, a developer who includes five percent very-low or ten percent low-income units is entitled to a density bonus of 20%. (Cal. Gov't Code §§ 65915-65918.)

⁸⁴ The AHE-B zone provides similar incentives for 100% affordable developments, and provides that “The percentage of moderate-income housing may be decreased if the difference is matched or exceeded by an increase in the total number of very low-income and/or low-income housing. The percentage of low-

Ultimately, good zoning standards are only as useful as the sites to which they attach are feasible sites for development of affordable housing. In its new Housing Element, it will be important that Corte Madera apply its successful AHO zoning incentives to appropriate developable sites. This is particularly so given that the Corte Madera Zoning Code does not include any district that allows multi-family housing by right at sufficiently high densities.

Other Programs

Funding programs

Corte Madera had a jobs/housing linkage program in place as of the date of the most recent Housing Element. Program H3.A called for the completion of a Nexus Study, already in draft form when the Housing Element was drafted. Program H3.B called for a “review and update” of an existing jobs/housing ordinance, with consideration given to setting requirements according to empirically based evidence, including affordable housing within a number of different employer types and establishing the payment into a housing trust fund of in-lieu fees. The program has been implemented, and together with the housing trust fund ordinance described below, has generated \$88,000 in funds, \$84,000 of which was awarded as a grant for the San Clemente Place project. Because the inclusionary zoning program described below does not appear to have been applied to any residential projects, it appears that, pursuant to this program, money was generated entirely by commercial projects.

Program 5.A called for the adoption of a housing trust fund ordinance. Money paid into the fund is to be used to develop or rehabilitate units affordable to very-low or low-income households. The program was slated for implementation in 2006. Few specific details were provided as to sources of funding and likely uses of the funds. The Program has been implemented, according to the Town, in conjunction with the jobs/housing linkage program and the inclusionary zoning program.

Inclusionary zoning program

Program H3.W set out a plan to require in-lieu fees for all residential projects up to six units, and to provide affordable units in all larger projects (15 to 20% for up to 12 units, and 20 to 25% for projects of 12 or more units). The Program did not, however, provide a preference for on-site units over in-lieu fees; nor did it set out desired proportions of units at particular income levels.

The Town reports that these requirements were put into place with a zoning ordinance amendment of January 21, 2003. Apparently, the Town has received only one application for a multifamily development to which these requirements would be applicable, and that project has not been built.

income housing may be decreased if the difference is matched or exceeded by an increase in the total number of very low-income housing. (Mun. Code, § 18.18.820.) The AHE-A and AHMU zones provide similar incentives for developments comprising 50% affordable housing. (Mun. Code, § 18.18.720, 18.18.925.)

Town of Fairfax

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	12	7	19	26
Units Produced (1999-2006)	0 (0%)	0 (0%)	0 (0%)	18 (69%)

Housing Production

The Town of Fairfax is one of only two Marin cities that failed altogether to obtain State compliance certification for its Housing Element from the Department of Housing and Community Development (HCD), the other being Sausalito. Of the Marin jurisdictions that adopted a Housing Element for the 1999-2007 period, Fairfax was the last to do so, not adopting until mid-2006.

Fairfax produced none of its share of the Regional Housing Need at any of the three below-market rate categories: very-low, low or moderate-income. It also fell short of meeting its share of market rate (above-moderate income) housing. This represented a worsening of its prior performance in the 1989-1999 period, when it reported producing 80 lower-income units (19 very-low and 71 low-income), exceeding its RHNA share of low-income units for that period, though falling well short of its share at the very-low and moderate-income levels (35% and 23%, respectively).

Sites

The Town did not rezone any of the sites in the site inventory of its 2006 Housing Element. None of these six sites was developed with affordable housing during the period since 2003.

Five of these six sites are zoned Highway Commercial (CH), and the last Limited Commercial (CL). The Housing Element promised to rezone this latter site to CH, but that rezoning has yet to occur. (2006 Housing Element, p. 42.) In the CH zone, as described below, second floor residential units may be allowed, subject to the Town’s discretion. Residential density in the CH zone is also determined on a case-by-case discretionary basis. It is noteworthy that several of these sites are well suited to higher density residential development, including sites on Sir Francis Drake Boulevard.

Zoning Districts

Fairfax reports no residential districts in its zoning code that permit high-density multifamily use, whether by right or with discretionary approvals. Two of its three residential zones are single-family zones, and the third, the RD 5.5-7 zone, only allows single-family homes and duplexes, at a maximum density of 14 units per acre. (2006 Housing Element, p. 10; Mun. Code, § 17.084.020.) This omission will have to be cured in the new Housing Element.

Since no residential zone permits multifamily housing at densities of 20 units per acre and higher, Fairfax is left to rely on mixed-use development in commercial zones. In the Highway Commercial (CH) zone, Fairfax permits residential units on the second floor. (2006 Housing Element, pp. 10-11.) However, these uses require a conditional use permit.⁸⁵ Moreover, while a density of up to 20 units per acre is allowed, the actual density is “to be determined by the Planning Commission.” (Mun. Code, § 17.096.050 (B) (9).)

Only the Central Commercial (CC) zone permits residential units by right on the second floor. (Mun. Code, § 17.100.040 (A) (53).) However, none of the sites in the Housing Element inventory were zoned CC. (2006 Housing Element, p. 22.) Moreover, it is unclear how residential density is established in the CC district. In the Limited Commercial (CL) zone, on the other hand, residential units are not a permitted use, even with a conditional use permit. (Mun. Code, §§ 17.092.040, 17.092.050.) Evidently, Fairfax does not permit a third floor in mixed-use development, further limiting the possibility of increased density.

The 2006 Housing Element included Program H 4.A, which promised to review and revise its zoning ordinance. Specifically, this program provided that Town staff “will review, and if necessary, prepare a revised zoning ordinance for the entire Town, for consideration and action by the Planning Commission and Town Council,” including an inclusionary zoning ordinance and a mixed-use overlay in the CH zone to encourage affordable housing. The Town did not report to us whether this program was implemented in either respect, but we found no relevant major post-2006 changes in its zoning code.

Significant constraints to affordable, multifamily housing arise not only from the Town’s zoning and densities, but from its parking standards. The Town requires two parking spaces for a one-bedroom apartment, and an additional guest parking space to the extent that guest parking is not available “along the immediate frontage of the property.” (Mun. Code, § 17.052.030.) By comparison, a number of other Marin jurisdictions require as little as one off-street parking space for a one-bedroom unit. The Town’s Zoning Code does not appear to make any provision for reduced parking requirements in connection with mixed-use development.

⁸⁵ The Housing Element states (p. 22) that “The Town amended the Zoning Ordinance to include Residential Units on the second floor as a Permitted Use” in the CH zone. However, the Zoning Code as amended by Ord. 716 (adopted Sep. 6, 2006) continues to reflect a requirement for a conditional use permit.

Our analysis concludes that Fairfax is subject to AB 1233, which requires it to rezone sites in the first year of the new Housing Element planning period to make up for the very-low, low and moderate-income housing need it failed to accommodate in the prior period. Fairfax adopted a Housing Element that was found out of compliance by HCD. Moreover, none of the sites in the 2006 Housing Element inventory allow multifamily housing at appropriate densities, except pursuant to a conditional use permit. No standards are set forth under which a permit for a density of 20 units per acre will be issued. Fairfax must amend its zoning code to create one or more districts that permit high-density residential use (minimum density of 20 units per acre), and rezone adequate sites to accommodate the lower-income units that it failed to accommodate in the last period. These sites must accommodate 12 very-low and seven low-income units, on top of its new Regional Housing Need of 23 very-low and 12 low-income units, for a total of 35 very-low and 19 low-income units.

The Town must also rezone to accommodate 19 moderate-income units in the first year of the new Housing Element, on top of its new Regional Housing Need of 19 moderate-income units, for a total moderate-income need of 38 new units.

Other Programs

Funding programs

Housing Element Program H11.A contemplated an “affordable housing fee” that would be used to “encourage housing units” within the Town, but this program was very short on detail, and has not been implemented.

As part of its discussion of Program H8.B (second unit amnesty), the Housing Element also set forth a program to impose an affordable housing fee on all new single family homes and on major remodels and additions that result in a structure in excess of 2,000 square feet. As an alternative to paying the fee, homebuilders or homeowners would have the option of creating a new second unit, deed-restricted for affordability to low- or moderate-income households, as part of the construction. Funds generated from the fee would be deposited in a housing trust fund and used by the Town for conversion of single-family dwellings to duplexes, the construction of four to six unit cottage complexes built in cooperation with Habitat for Humanity, and/or the purchase of existing units for affordable housing use by the Town. While modest in its scope and goals, this program does represent an innovative approach to generating local funding for affordable housing. Unfortunately, this program has not been implemented.

Fairfax’s Housing Element did not provide for a jobs/housing linkage program.

Inclusionary zoning program

Fairfax’s Housing Element did not provide for a traditional inclusionary zoning program.

Second/accessory units

Fairfax’s Housing Element strongly emphasized second units as the primary method of meeting its affordable housing needs. Program H8.A set out an agenda for modification of development requirements that was detailed, but also somewhat inconsistent. For example, the program stated that second units up to 700 square feet would be established

as a “use by right” where the lot, primary structure and second unit otherwise met all development and zoning standards and adequate traffic safety and parking were available. However, the program also included a provision granting a variance, or special use permit, for second units that met specified criteria (including those set forth as requirements for by-right construction), and a provision that certain areas within the town where second units are permitted would be designated (which likewise should not be necessary if the use-by-right program were established). There was no mention in the program of loosening parking requirements, and in fact the program specified that second units would be subject to setback, architectural review, and historic preservation, as well as parking, requirements. The Town has not taken any action with respect to this program since adopting its Housing Element.

Program H8.B consisted of an amnesty program for existing second units. A detailed application from the property owner is required for the amnesty, as is a demonstration by the property owner that “adequate parking” (to be determined on a case-by-case basis) exists on the site. The Town reports that the amnesty program was enacted, with a one-year window. The enacted ordinance (available on the Town’s website) applies only to units between 320 and 700 square feet, requires one additional parking spot per second unit, and reduces application fees to 50% of what would be payable for approval of a new second unit. Separate utility metering requirements imposed by the Town are waived. In addition, during the amnesty window period, fees for new second unit permits were also reduced by 50%. The Town reports that two new units were approved pursuant to this program, and that applications are in process for permits for one additional new and two existing illegal units. It is unclear whether any of these units are or will be affordable.

City of Larkspur

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	56	29	85	133
Units Produced (1999-2006)	7 (13%)	6 (21%)	3 (4%)	37 (28%)

Source: ABAG, "A Place to Call Home, 2007."

SHARE OF REGIONAL HOUSING NEED MET, 1999-2007				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	56	29	85	133
Units Produced (1999-2006)	8 (14%)	6 (21%)	2 (2%)	28 (21%)

Source: Larkspur Annual Housing Element Progress Report to HCD, Table B (Apr. 1, 2009).

Housing Production

The City of Larkspur produced only 14% of its very-low income housing need, 21% of its low-income need, and two percent of its moderate-income need. The City produced only 28% of its market rate (above-moderate) need.

A significant share of the claimed very-low income units are second units, which account for at least six of the 16 affordable units (two very-low and four moderate-income).

For the planning period that ran from 1989 to 1999, Larkspur similarly had reported meeting only five percent of its very-low income, 40% of its low-income, and 17% of its moderate-income need.

Sites

The City reports four rezoned sites. The City has approved affordable units on two of these – the Central Larkspur Area Specific Plan and the Sanitary District Property.

The City rezoned portions of the Central Larkspur Area Specific Plan to Planned Development (PD) from Light Industrial in 2006, with Specific Plan approval for 19 affordable units (including two very-low and eight low-income units) in a low-density residential development totaling 85 units. This approval appears to be consistent with the Plan, which calls for a mix of single family homes, “cottage homes” and multi-family housing in Subarea 3, in which “not one type of housing appears to predominate.” It is unclear whether this development will be approved, or when, as no application has yet been submitted. Any application would also be subject to further discretionary approval under the PD process.

The PD zoning for the Sanitary District Property was revised in 2006 to increase the permissible density from 12 units per acre to 21. A portion of the site has been approved for a townhouse development of 126 units at a net density of 19.6 units per acre. That development would yield 25 affordable units under the City’s inclusionary ordinance, 12 at low-income and 13 at moderate-income.

Two other sites (identified as Various: North End of Magnolia Ave., and North of Corte Madera Creek) were not rezoned, although the City amended the underlying commercial zoning regulations governing their development, as described below.

Zoning Districts

Larkspur has one residential zoning district (R-3) that allows residential multi-family use at densities up to 21 units per acre. R-3 zoning requires no discretionary approvals other than design review. (Mun. Code, § 18.35.040; General Plan (Ch. 2 – High Density Residential)).

Of the 12 sites in the 2004 Housing Element inventory, only one – the Casitas de Larkspur site – is zoned R-3. That site developed with six market rate units, at the low density of 7.8 units per acre. A zoning district that set a higher minimum density, or “density floor,” could have preserved this site for affordable development at a higher density. In the Central Larkspur Area Plan, no parcels are zoned R-3.

The Central Larkspur Area Plan governs development in three Subareas, of 2.5, 2.7 and 16.8 acres, respectively. The Plan allows “up to 19 dwelling units” in Subarea 1 (Plan, Policy LU-7, p. 4-5), and up to 28 in Subarea 2 (Policy LU-19, p. 4-9), for a combined upper limit of 47 units. Subarea 3 is the only one that appears to hold the potential for any significant housing development. The development standards for multi-family housing in Subarea 3, however, appear quite restrictive, imposing a maximum floor area ratio (FAR) of 0.60, and limiting lot coverage to 50% of the lot area. (Plan, Standard LU-12, p. 4-12.) Moreover, while the Plan allows multifamily densities of up to 25 units per acre (Policy LU-28, p. 4-10), it requires “a minimum of 2,000 sq. ft. of lot area per [multifamily]

unit.” (Standard LU-12, p. 4-12.). Notably, none of the sites in the Plan Area are zoned R-3.⁸⁶

Rather, it appears that housing development in each of the Specific Plan subareas will depend on rezoning to Planned Development (PD), as has already occurred in subarea 3. In the PD district, housing may be approved on a discretionary basis. Approval of residential development requires a finding

[t]hat such development will constitute an environment of sustained desirability and stability; that it will be in harmony with the character of surrounding neighborhoods, and that it will result in an intensity of land utilization no higher than, and standards of open space at least as high as, those permitted or otherwise specified for such development in this chapter.

(Mun. Code, § 18.54.090 (4).) This provision appears to limit density, while providing little certainty for non-profit developers.

In the C-1 zone, residential units above first-story commercial are a permitted use. (Mun. Code, § 18.44.020 (B)(33)), although heights are restricted to two stories. (Mun. Code, § 18.44.040.) Two zoning code amendments in 2004 have the potential to allow higher residential densities in mixed-use developments. First, the code provides that “Second-story residential units over first-story commercial units are exempt from floor area ratio restrictions.” (Mun. Code, § 18.44.055 (A).) Second, parking requirements for mixed-use were amended to provide that “for residential units above first-story commercial the parking requirement shall be one parking space per dwelling unit” in C-1 zone. (Mun. Code, § 18.44.100.)

These are useful steps, but subject to two important caveats. First, the size of the site raises important feasibility issues. While these zoning changes may have some potential on larger sites,⁸⁷ available parcels in the Downtown District are quite small, only up to 4,000 square feet, or about a tenth of an acre. Sites of this size are unlikely to produce any significant number of high-density residential units, or to yield lower-income units, since they would produce only two units at a density of 20 units per acre.

Second, the limitation of first floor to commercial uses may impose obstacles on the ability of a non-profit developer to build subsidized affordable housing, even on sites of appropriate size.

In the C-2 zone, multifamily housing and residential units above first-story commercial are allowed only with a conditional use permit. (Mun. Code, § 18.48.022 (K).)

Further information and analysis will be necessary to determine whether Larkspur is subject to AB 1233.

⁸⁶ The Plan is available at <http://www.ci.larkspur.ca.us/CLASP-Contents.html>.

⁸⁷ The City reports that larger parcels are available for mixed-use in Subareas 1 and 2 of the Central Larkspur Area Specific Plan, the 20.5 acre Bon Air Center. Sites on the north end of Magnolia range from 6,000 to 19,000 sq. ft. (p. 38), and two parking areas north of Corte Madera Creek total about two acres.

Other Programs

Funding programs

Programs H11.A and H11.B consisted of the passage of a Housing Trust Fund ordinance and the development of funding sources for such a fund, including in-lieu fees under any inclusionary zoning program, voluntary donations and the transient occupancy tax. The Housing Trust Fund ordinance was passed as part of the inclusionary zoning program, as discussed below.

Program H5.B contemplated the creation of a linkage fee program that would require commercial developers to construct dwelling units or pay in-lieu fees “according to empirically based evidence.” Affordable housing units would be required within hotels, offices, other commercial or industrial buildings “if feasible”; otherwise, off-site construction, in-lieu fees or mortgage, or rent subsidies would be permitted. The program as set forth in the Housing Element was not particularly detailed and has not been implemented.

Inclusionary zoning program

In contrast, Program H7.F spelled out in some detail the terms of a proposed inclusionary zoning ordinance that would require below-market rate housing to be included in all residential projects in the following proportions:

- for rental projects of 5 to 14 units, 15% of units affordable to very-low and low-income households;
- for rental projects of 15 or more units, 20% of the units affordable to very-low and low-income households;
- for ownership projects of 5-14 units, 15% of units affordable to low- and moderate-income households; and
- for ownership projects of 15 or more units, 20% of units affordable to low- and moderate-income households.

The program states that in-lieu fees or dedication of land by developers could in “certain circumstances” substitute for on-site construction. It also states that the long-term affordability of the inclusionary units should be guaranteed. However, the program does not provide the means of achieving long-term affordability. It does provide for incentives (priority processing, reduced design standards, etc.) to help developers comply with the requirements.

The program was implemented with the adoption of an inclusionary ordinance on March 16, 2005. For rental projects, the ordinance requires that half the inclusionary units be affordable at the very-low income level, unless the City Council approves a hardship waiver for this requirement. Alternative equivalent actions to on-site development are permitted with the discretionary approval of the City Council, and developers must show that the alternative will further affordable housing opportunities in the City to an equal or greater extent than on-site construction. The City’s ordinance permits the transfer of inclusionary unit credits between developers with City Council approval. Mandatory incentives for developers subject to the requirements include fast-track preliminary

approval of a development proposal by City Council, deferral of City-required fees on affordable units, and priority processing for applications; other incentives may be granted at the discretion of City Council, such as additional density bonuses, waiver or modification of City standards, deferral of fees on market-rate units, and provision of direct financial assistance. Regulatory agreements or deed restrictions guaranteeing the affordability of affordable units in perpetuity must be recorded, unless the City Council agrees to a lesser period of restriction.

In-lieu fees under this program are to be deposited in a Housing Trust Fund that must be used “solely to increase and improve the supply of housing affordable to moderate, low- and very low-income households.” Through June of 2007, the only source of funds in the Housing Trust Fund were ground lease payments from City-owned land, in the amount, at that time, of \$200,000. \$100,000 from the Fund was granted to the Monahan/EAH project.

The City did not specifically report on the outcomes of this program. However, given the timing of its enactment, it would appear that the affordable units included in the CLASP, Sanitary District/Larkspur Landing, and Monahan/EAH developments are the result of the application of this generally robust ordinance.

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	40	21	56	108
Units Produced (1999-2006)	69 (173%)	28 (133%)	41 (73%)	32 (30%)

Housing Production

The City of Mill Valley claims it over-achieved its share of the Regional Housing Need at both the very-low and low-income levels. It appears to have relied on second units for at least 36 of its claimed 69 very-low income units, basing the assumption that these second units would be available to very-low income renters on the fact that “50% of second units rented at \$0.” (Housing Element, Table 26, p. 48.) The City offered no evidence that any of these units have ever, in fact, been occupied by, or made available to, any residents with very-low incomes. It is far more likely that a rent of \$0 equates to extra space for a family member. Notably, none of the second units on the market – units for which rent was actually being charged – rented at a level affordable to very-low income renters.

Subtracting these 36 units leaves the City having met no more than 33 very-low income units. It appears that most of these 33 may also be second units. As discussed below, the sites designated for affordable housing in the Housing Element yielded only two very-low income units.

At the low-income level, the Housing Element projects 61 new units on the designated sites, but the City reports having produced only one of those units. It is unclear on what basis the City reported to ABAG that it had added 28 new low-income units.

For the 1989-1990 planning period, the City reported achieving 43% and 23% of its RHNA need at the very-low and low-income levels, and none at the moderate-income level. It is not clear how much of the lower-income need was claimed to be met in that period by second units.

Sites

The 2003 Housing Element projected that nine very-low income units and 56 low-income units would be produced on six sites: Alto School, Old Mill, D'Angelo's Back Area, Redwoods Addition, Camino Alto/E. Blithedale, and the Miller Avenue Precise Plan Area. By the end of the period, only two of these sites had been developed, yielding one unit of unspecified affordability on the Old Mill Site and two low- and three moderate-income units on a parcel in the Miller Avenue Precise Plan Area.⁸⁸

In fact, most of these sites were never made available, with appropriate zoning and densities, during the planning period:

Alto School site

In order to accommodate the projected 20 low-income units, this site required rezoning. (Housing Element, p. 52.) The rezoning did not take place. Notably, the Housing Element states that “[t]he zoning change will be processed in conjunction with the project’s application.” (Id.) This is contrary to the Housing Element Law’s requirement that rezoning be initiated by the city, rather than leaving the developer to shoulder the cost, delay and uncertainty of a significant discretionary approval. Notably, the City failed to implement Program H3.K, in which it promised to rezone the Atlo School Site once it was declared a surplus site by the school district and, if that did not occur by June 2004, to substitute another site.

Old Mill Site

This site is comprised of two parcels, one of which required rezoning from RM-3.0 to RM-1.5. (Housing Element, p. 52.) (RM-1.5 permits a density of up to 29 units per acre.) It is not clear whether that rezoning took place. Instead of the projected ten affordable units, only one materialized.

D'Angelo's Back Area

One low-income unit was projected for this mixed-use site, over an existing parking lot. The site did not develop. The Housing Element notes (p. 53) that the project might require “some parking variances.”

Redwoods Addition

This site was appropriately zoned RM-1.5, but the projected 40 units of low- and moderate-income senior housing were not developed. Apparently, there was some question about the feasibility of the development, as a feasibility study was underway at the time of the Housing Element’s adoption. The City reports that financing is now being discussed for a project with 40 to 50 senior housing units. Notably, the City failed to implement Program H3.K, in which it promised to assist the developer with financing for this project.

⁸⁸ The City reports that two other parcels in the Precise Plan Area are in the planning phase, and expected to yield 20% affordable units.

Camino Alto/E. Blithedale

This vacant site was projected to yield two low-income units and one moderate-income unit, but according to the Housing Element might “require a general plan amendment.” It is not clear if that amendment was processed. The City reports that a residential project is now in the planning stages on this site.

Miller Avenue Precise Plan Area

The Housing Element promised that, as part of the Precise Plan, “an affordable housing zoning overlay will be prepared that . . . permit[s] densities of up to 29 units/acre for developments that meet an approved minimum percentage of affordable units.” (Housing Element, p. 54; see Program H3.N.) The City did not make the promised zoning amendments.

The City did rezone portions of the Miller Avenue Precise Plan Area from CN to CN-PD (RM 2.0 or 2.5). This appears to allow approval for housing at densities up to 21 units per acre (RM 2.0) and 17 units per acre (RM 2.5), subject to two discretionary approvals: approval of a site development plan and issuance of a special development permit. (Mun. Code, §§ 20.57.020, 20.57.060.)

However, the City did not fully implement Program 3.F, in which it promised to “[i]dentify specific sites and actions (rezoning, development standards, and other incentives for housing),” instead focusing on only a few sites. (See Housing Element, App. B, pp. B-1 to B-2.) This City action seems particularly important, given that most of these identified sites are likely to be quite small.

Zoning Districts

Two zoning districts allow multifamily residential use at densities above 20 units per acre with only design review: RM 1.5 (29 units per acre) and RM 2.0 (21 units per acre). (Mun. Code, § 20.24.010.) Neither zone sets a density floor. (Id.) As noted above, only two sites in the Housing Element inventory were zoned RM 1.5 or RM 2.0: Old Mill site, (a small site which developed at a density of 27 units per acre resulting in four units, one of them affordable); and the Redwoods Addition site (that is being discussed for a 40 to 50 unit senior housing development). Other zoning districts require conditional use permits. This appears to be the case, for instance, in PD sites in the Miller Avenue Precise Plan Area.

Our initial analysis concludes that Mill Valley is subject to AB 1233, which requires it to rezone sites in the first year of the new Housing Element planning period to make up for the very-low income housing need it failed to accommodate in the prior period. Of the sites it promised to make available for multifamily housing at high densities, it did not follow through on any. It did not provide sites with the promised zoning and General Plan amendments, and did not follow through on program actions with respect to the Redwoods site. Nor did it provide substitute sites as promised to make up for the two-acre Alto School parcel.

Other Programs

Funding programs

Housing Element Program H5.A spelled out an agenda for the adoption of a housing trust fund ordinance, under which funds in the trust would be used to develop or rehabilitate housing affordable to very-low and low-income households. Program H5.B set out some potential sources of funding for the trust fund, including in-lieu payments under inclusionary requirements (both for residential and non-residential developments), voluntary donations, and an increase in the transient occupancy tax.

Mill Valley did not implement these programs.

Program H5.B contemplated the creation of a linkage fee program whereby commercial developers would be required to construct dwelling units or pay in-lieu fees “according to empirically based evidence” and to include affordable housing units within hotels, offices, other commercial or industrial buildings, though only “if feasible,” with off-site construction, in-lieu fees, or mortgage or rent subsidies. The program, as set forth in the Housing Element, was not particularly detailed and has not been implemented.

Inclusionary zoning program

At the time of its last Housing Element’s adoption, Mill Valley appears to have already had an inclusionary zoning ordinance in place, meant to foster the development of very-low and low-income units in rental projects and low- and moderate-income units in ownership projects. Housing Element Program H3.P consisted amending the ordinance to potentially (a) extend its application to projects of under six units (apparently with in-lieu fees as the default option in such cases), (b) apply inclusionary requirements to licensed care facilities, (c) require 15-20% affordable units in projects of 7-12 units, and 20-25% affordable units in larger projects, (d) support flexibility in application, and (e) set in-lieu fees at an appropriate rate to create affordable units off-site.

This program, while modest in its aims, has not been implemented.

Second/accessory units

Mill Valley’s Housing Element contained both a program for modifying second unit development standards and permitting processes (H3.R) and an amnesty program for unpermitted second units (H3.S).

The former program provided for “by right” status for second units up to 700 square feet in single-family neighborhoods, so long as “adequate traffic safety and parking is available” and the lot and structure are otherwise in conformance with zoning requirements. It also provided for design review at the Zoning Administrator level; assurance of adequate noticing and early neighborhood involvement in the application process; the reduction of parking space requirements (in this case, from two spaces per unit to one, and consideration given to off-site, reduced or tandem parking within one quarter mile of a transit route).

The program also stated – in advance of any evidence – that one-third of new second units would be counted as very-low income units, and the remaining two-thirds would be counted as moderate-income units, based on “surveys of existing second units and prevailing market conditions.” The program also contained several more innovative and robust elements, such as requiring second units on 50% of parcels in excess of 7500 square feet as a condition of approval of a parcel or tentative map, and exempting both main and second units from any inclusionary requirements.

The City reports only that this program was partially implemented, and that 44 second units have been built or approved since 2004. It remains unclear which elements of the proposed ordinance revision were passed, and how many of the built or approved second units contributed to Mill Valley’s affordable housing stock. It does appear from the current Mill Valley Municipal Code that parking requirements were reduced to one off-street space for second units under 700 square feet (two are still required for larger units), while the promised exception to the off-street parking requirement for units near transit was not adopted. (Mill Valley Municipal Code, § 20.90.040.) Parking requirements would thus appear to remain a major obstacle to the effective use of second units to add appreciably to the City’s affordable housing options.

With respect to the amnesty program, the Housing Element program suggested that the amnesty might be conditioned upon the property owner taking measures to ensure the affordability of the unit, such as entering into an agreement with the City to accept Section 8 vouchers from tenants. An amnesty was in fact put into place in 2004, exceptions to square footage and parking requirements provided, but it does not appear to have been contingent on affordability restrictions. (Mill Valley Municipal Code, § 20.90.050.) The City reports that approximately 100 units participated in the amnesty.

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	476	242	734	1,130
Units Produced (1999-2006)	297 (62%)	527 (218%)	496 (68%)	1,646 (146%)

Housing Production

The City of Novato’s 2003 Housing Element received conditional, rather than full, certification from HCD. The conditions of approval were the timely implementation of Programs 6B (Modify Multi-Family Zoning Standards), 6D (rezone 2.5 acres for high-density residential use, by December 2004) and 8C (facilitate development at key housing opportunity sites through General Plan amendments, rezoning and CEQA exemptions). The City did not implement any of the rezoning required by these Programs.⁸⁹

Novato exceeded its share of the Regional Housing Need in two income categories (low-income and above-moderate income). In its 2003 Housing Element, the City counted 520 low-income units. Of these, 64 low-income units approved at the Buck Center for Research on Aging have not yet been built. All of the remaining units were approved as a part of the conversion of the former Hamilton Air Force Base. While this decades-long effort has added substantially to the affordable housing stock, it was a one-time event. In the five years since adopting its 2003 Housing Element, the City reports adding only seven additional low-income units.

The City fell short of its housing need at the very-low and moderate-income levels. In its 2003 Housing Element, Novato claimed 255 very-low income units, most of them at the Meadow Park development at Hamilton Air Force Base. Since then, the City claims an additional 42 very-low income units, most of them on the two sites it reported as having rezoned, as discussed in the following section.

⁸⁹ As for Program 6B, the City reports that “Standards were studied, but no across-the-board changes were made,” resulting in the allowance of higher FAR and densities only on a “case-by-case basis.” And in its 2009 Annual Report, the City’s discussion of Programs 6D and 8C do not reflect that any of the promised rezoning or General Plan amendments took place.

For the previous planning period that ran from 1989 to 1999, the City reported meeting none of its RHNA need at the very-low income level, and only eight percent at the low-income level, while achieving 99% at the moderate-income level.

Sites

We asked Novato to respond on the development status of approximately 50 sites from its Housing Element inventory. Of those, only one (the 2.95-acre Pini Mill/Depot/Whole Foods site) was rezoned, evidently on the initiative of the developer. Another site (Next Key, in the former Hamilton Air Force Base), not listed in the Housing Element, was also rezoned.

Both the rezoned sites yielded affordable housing – 32 very-low income transitional units at Hamilton’s “Next Key”, and seven inclusionary very-low income units in a 117-unit market rate project on the Pini/Whole Foods site. The latter was approved for development at 42 units per acre.

Both sites had been rezoned to “PD” (Planned Development), a zoning district that requires discretionary approval of a master plan.

Of the sites that were not rezoned, 17 were developed, but none included affordable housing (apparently not even inclusionary units). The approved densities on these sites ranged only as high as 6.3 units per acre. The remaining 34 sites were not developed at all.

Zoning Districts

As already noted, the statutory minimum density for lower-income housing development in Novato is 30 units per acre.⁹⁰ The City’s response to our requests for information identified only one residential by-right zoning district that allows this density: the high-density, multifamily residential (R20) zone, which allows densities ranging from 20.1-30 units/acre. The development of multifamily housing in the R20 zone is subject only to design review. However, the City has not rezoned any developable sites for R20 use during the period of its last Housing Element, nor did it include any R20 sites in its 2003 Housing Element site inventory. (Muni. Code § 19.10.050).

The potential exists to accommodate high-density housing on a case-by-case basis in four other zones in the Novato Zoning Code, but substantial discretionary approvals are required. These are the Planned Development (PD) zone, (Muni. Code § 19.14.020) and three commercial zones that permit housing: Mixed Use (MU); Downtown Core (CD); and Neighborhood Commercial (NC). (Muni. Code § 19.12.030).

In the PD zone, Novato, like many other Marin cities, requires discretionary approval of a master plan. PD zoning is also limited in another important respect: the permissible residential densities in that zone depend, for each site, on the General Plan land use designation for that site. In the Novato General Plan, only one land use designation

⁹⁰ Cal. Gov’t Code § 65583.2, as amended by AB 2348. See HCD memo at <http://www.hcd.ca.gov/hpd/hrc/plan/he/ab2348stat04ch724.pdf>.

permits residential densities above 20 units per acre: the High Density Multiple-Family Residential designation, permitting a density range of 20.1 to 30 units per acre.⁹¹ However, none of the sites on the inventory (Appendix B of the 2003 Housing Element) was designated High Density Multi-Family, hence none of the sites with PD zoning will allow development at that density, short of a General Plan amendment. Moreover, even PD-zoned sites that are coupled with a High Density Multi-Family land-use designation in the General Plan are not required to develop at a minimum density of 30 units per acre, as set forth in recent amendments to California law.⁹²

The difficulties of gaining PD approval no doubt contributed to the fact that affordable development was approved on only two PD sites over the last five years: the Pini/Whole Foods site and the Next Key transitional housing, both discussed above.

The Mixed-Use, CD and NC zones also provide the possibility for affordable housing on a case-by-case basis, but require discretionary approvals, such as a conditional use permit. (Mun Code, §§ Table 2-7; see § 19.34.100.) Since 2002, the City has permitted an increase in the maximum floor area ratio (FAR) in each of these zones for projects that include housing; however, it makes this incentive available without regard to affordability. Moreover, while the City's 2003 Housing Element provided a hypothetical example of a mixed-use development in which a 2.0 FAR equated to a residential density of 58 units to the acre, it is notable that the City reports only 7 affordable units built on one parcel (Whole Foods/Millworks) in one of these zones in the entire period of seven years since it provided a density incentive for housing development.

It should be noted that Novato's incentive differs significantly from the Affordable Housing Overlay that the Town of Corte Madera offers. In Corte Madera, the density incentive is provided only to proposals that include a minimum of 50% – and in two zones, 100% – affordable housing units, as described above. Corte Madera also ensures a range of affordability, including a significant share of very-low and low-income units. Novato, by contrast, provides the incentive regardless of whether any units are affordable, or at what level.

Novato's 2003 Housing Element cited two potential projects as "illustrating the effectiveness of these new regulations in creating housing": the Gateway Center and Novato Gateway South, a pair of adjacent sites on Redwood Blvd. (Housing Element, p. III-32.) Both sites were zone CG commercial, and both required General Plan amendments and rezoning to accommodate housing. This rezoning did not take place, and instead of mixed-use development with housing, these sites were developed with a big-box retail store. Novato's Housing Element had projected 120 potential housing units on these sites.

⁹¹ See Novato General Plan, Land Use Element, LU Table 2, at <http://www.ci.novato.ca.us/cd/gp/GPCHAPI.HTML>.

⁹² Cal. Gov't Code § 65583.2, as amended by AB 2348. See HCD memo at <http://www.hcd.ca.gov/hpd/hrc/plan/he/ab2348stat04ch724.pdf>. As noted above, in Marin County, a minimum "default" density of 30 units per acre applies to sites for lower-income housing for Novato, San Rafael and the County of Marin.

Our initial analysis concludes that Novato is subject to AB 1233, which requires it to rezone sites in the first year of the new Housing Element planning period to make up for the very-low income housing need it failed to accommodate in the prior period. Novato’s 2003 Housing Element asserted that, of its very-low income share of the Regional Housing Need of 476 units, 221 remained. (Table 14, p. III-33.) Novato failed to follow through on the key requirements of its rezoning program, including its promise in Program 6.D to rezone at least 2.5 acres for high-density residential use. This program was a condition of HCD’s conditional approval of its 2003 Housing Element.

The 2003 Element indicated that 49 additional units were expected to be met as follows:

Site	Units
Second Units (scattered sites)	14
Junior HS Site (San Marin/San Andreas)	10
Hamilton Senior Housing site	25
Total	49

Neither the Junior High site nor the Hamilton senior site developed. The Junior High site was zoned PD, a zone in which the permissible density range is limited by the General Plan, in this case, to a range of 10.1 to 20 units per acre (Medium Density Multiple Family Residential). The 1.5- acre Hamilton site was subject to an adopted Master Plan that limited development on the site to 25 units, or under 17 units per acre. Discretionary approval of a Master Plan amendment would have been required to increase that density to a feasible one. In either case, the necessary density of 30 units per acre was not provided.⁹³ The 2003 Housing Element does not support the claim that 14 second units would be affordable to very-low income households. Accordingly, we conclude that none of these 49 units were accommodated on adequate sites.

The 2003 Housing Element asserted that the remaining very-low income portion of its housing need could be met on sites that were currently zoned; yet all but 18 of the very-low income units projected for those sites were in potential re-use sites on which “[d]ensity [was to be] [e]stablished through FAR.”⁹⁴ (Table 14, p. III-33.) Table 14 refers to 389 potential reuse sites, of which 249 units are in the downtown specific plan area and another 140 are on four other sites (Pini Mill/Depot, Inn Marin, Atherton Ranch Commercial, and Flynn/Van den Toorn sites). (Housing Element, App. B, p. IIIB-5.)

Of these sites, only one was approved for development during the planning period, the Pini/Whole Foods site. That site was projected to produce 25 units, and was actually approved for 125, seven of which were to be affordable at the very-low income level.

⁹³ The 2003 Housing Element asserts that “a minimum density of about 25 units/acre is needed to create opportunities for very-low income housing to be built.” (p. III-31.) Under this standard, these sites were also not adequate.

⁹⁴ The Housing Element leaves it unclear what sites were expected to accommodate these 18 units.

As noted, Novato requires discretionary approvals on all of these mixed-use sites, a discretionary approval that in fact determines the ultimate density.

Novato did not accommodate any of its very-low income need on PD-zoned sites. General Plan densities limit density in the PD district, and none of the PD sites permit development at high density due to its General Plan designation.⁹⁵

We conclude that in the new planning period, Novato must rezone sites to accommodate approximately 200 very-low income units that it failed to accommodate in the last period, on top of its new Regional Housing Need of 275 very-low income units.

Other Programs

Funding programs

Novato's Housing Element Programs 5.A and 5.B set out a full and robust agenda for adoption of a job/housing linkage fee program. Program 5.A described the completion of a nexus study that already existed in draft form when the Housing Element was drafted. Program 5.B described the adoption of a jobs/housing linkage ordinance requiring payment into a Housing Trust Fund of in-lieu fees based on the square footage of new office, commercial, and industrial development, with exaction requirements to be based on empirical evidence in order to accommodate any legal proportionality requirements, and potentially requiring the integration of affordable units into new non-residential development.

Program 5.A was implemented; the study was completed and reviewed by the Planning Commission and City Council. No steps were taken toward implementing Program 5.B, however, and the City now reports that it is not pursuing the adoption of this fee in light of the current economic climate.

Program 13.A proposed to maintain and develop local sources of funding for affordable housing, including updated in-lieu fees under Novato's inclusionary zoning ordinance, as described below.

⁹⁵ Two PD sites in the inventory were slated to have their General Plan land use designation amended to R10 (medium density), which permits up to 20 units per acre (Old Community Hospital site, a 7.37 acre site which developed at 3.3 units per acre; and Barragan Property, a vacant 1.31 acre site). Apart from the inadequate density, it appears that the General Plan density for neither site was amended to R10. As a result, the Hospital site developed at a very low density. The Barragan Property, while a very attractive potential site for high-density multi-family housing, will require a General Plan amendment, and likely require rezoning, as well.

Another site, the Bayside Community Church site, was slated to have its General Plan land-use designation amended from low density (R1) to high density (R20). This apparently did not take place.

All three of these sites, in addition to six others, were among the sites on which the City promised, in Program 6.D, to rezone at least 2.5 acres for high-density residential use. Implementation of that Program by December 2004 was a condition of HCD's approval of the Housing Element. The City neither met that deadline nor rezoned any of these sites since then.

Inclusionary zoning program

When its Housing Element was adopted in 2003, Novato had a weak inclusionary zoning ordinance on the books. Program 9.A promised, by December 2003, to strengthen that ordinance. In particular, the Program proposed to revise the ordinance to increase in-lieu fees and the percentage of units required (though to what level was not specified), to establish lower income targets for inclusionary units (but no commitment was made to ensure that inclusionary units would be made available to very-low and low-income households), to allow for a sliding scale for inclusionary requirements with the option of providing fewer units but at very low-income affordability levels; and to establish the City's authority in deciding to accept fees in-lieu (but with no statement that the City would limit the use of fees in-lieu). The Program also makes no mention of the use of deed restrictions on affordable units created pursuant to the inclusionary zoning ordinance.

Program 9.A was fully implemented, though not until late 2007. The City did increase the percentage of required affordable units in a development, targeted the affordability requirements toward lower-incomes and eliminated an earlier provision allowing developers to pay in-lieu fees by right.⁹⁶ Where permitted, however, in-lieu fees range from \$14,000 to \$28,000 per market-rate unit, not nearly enough to subsidize the creation of an affordable unit. The ordinance requires rental developments to provide half of the affordable units at 50% Area Median Income (AMI) and half at 60% AMI. In for-sale developments half of the affordable units are affordable at 65% AMI and half at 90% AMI.

The Pini Mill/Depot/Whole Foods development discussed above contained only seven affordable units, well below the 15 to 20% typically required under inclusionary ordinances, because it was approved before the amendments to the ordinance. Had the City acted promptly to amend its ordinance, as many as 25 of the 125 units it approved might have been affordable, instead of seven.

⁹⁶ Muni. Code, § 19.24.030.

Town of Ross

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	3	2	5	11
Units Produced (1999-2006)	0 (0%)	0 (0%)	0 (0%)	22 (200%)

Alone among Marin’s local jurisdictions, the Town of Ross – which produced no affordable units at all – refused to provide the information we requested about site zoning and Housing Element program implementation, requiring us to seek that information under the California Public Records Act.

Ross produced 22 market-rate homes, twice as many as its RHNA share.

Town of San Anselmo

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	32	13	39	65
Units Produced (1999-2006)	0 (0%)	0 (0%)	0 (0%)	70 (108%)

Housing Production

As of the end of 2006, the Town of San Anselmo had produced none of its Regional Housing Need for affordable units. Since then, the Town reports two moderate income and four low-income units developed as well as 11 second units available to low-income residents. Additionally, the Town approved ten very-low income units of shared housing for seniors, in a project developed by Ross Valley Ecumenical Housing.) The Town exceeded its share of market rate (above-moderate income) housing.

For the 1989-1999 period, the Town did not report to the Marin Housing Council whether it met any its very-low income RHNA need, but reported well exceeding its low-income need. It met only 11% of its moderate-income need for that period.

Sites

Only one of the 16 inventoried sites about which the Town provided data was zoned “R-3,” the residential zone that permits densities in the range of 13 to 20 units per acre. This is the site at 54/60 Mariposa Ave., of about one-third acre, which never developed.

Another five sites⁹⁷ are zoned C-2 and C-3, commercial zones that permit mixed-use development. The Town states that residential density in these zones is subject to the General Plan, which allows a maximum of 20 units per acre. (General Plan p. 19).

Only one of the 16 sites developed with affordable housing during the period since 2003: 1535 Sir Francis Drake Blvd developed ten units, two of which were moderate income.

⁹⁷ These five sites are 20 and 70 Greenfield Ave, 305 San Anselmo Ave, and 400 and 500 Redhill Ave.

Zoning Districts

The Town identified two residential zones, R-2 (six to 12 units per acre) and R-3 (13 to 20 units per acre), that permit multifamily housing by right, subject only to design review. (Muni. Code § 10-3.201(e)). The R-2 zone does not provide for the minimum density of 20 units per acre that State law now requires. The R-3 zone permits a *maximum* of 20 units per acre. Only one site in San Anselmo is zoned R-3, the small (one-third acre) underutilized parcel at 60 Mariposa. The Town has no residential zoning district that sets a minimum density at 20 units per acre.

San Anselmo also has two commercial zones, C-2 and C-3, that it reports allow maximum residential densities of 20 units per acre, but only with a conditional use permit. (Muni. Code § 10-3.201(i)). Residential density for these zones is based on floor area ratios (FARs), which are set at 2.0 for the C-2 zone and 1.0 for the C-3 zones. (Muni. Code § 10-3.411 Table 4-A)

Our analysis concludes that San Anselmo may be subject to AB 1233, which would require it to rezone sites in the first year of the new Housing Element planning period to make up for the very-low, low and moderate-income housing need it failed to accommodate in the prior period. Only the one-third acre site at 60 Mariposa was provided with appropriate “by right” zoning; that site was, in theory, available to accommodate seven high-density units at most. San Anselmo asserts that it accommodated its remaining need on commercially-zoned sites that permit mixed-use development, but none of the five mixed-use sites in the prior Housing Element’s inventory produced any housing. In fact, the only mixed use site to develop with housing during the last planning period was 7/9 Mariposa Avenue, but the resulting project yielded only four units, under 60% of its maximum density. (Another site with mixed use zoning, 412 Redhill, developed but did not produce any housing.)

It appears that these commercial sites were not adequately zoned for affordable housing. If so, San Anselmo will be required to rezone sites for high-density residential use (minimum density of 20 units per acre) to accommodate the balance of the 32 very-low and 13 low-income units that it failed to accommodate in the last period, on top of its new Regional Housing Need of 26 very-low and 19 low-income units, for a total of 58 very-low and 32 low-income units.

It may also be required to zone to accommodate 39 moderate-income units in the first year of the new Housing Element, on top of its new Regional Housing Need of 21 moderate-income units, for a total moderate-income need of 60 new units.

Other Programs

Funding programs

San Anselmo’s Programs H4.F and G called for the passage of a Housing Trust Fund ordinance, to be funded by in-lieu fees, voluntary donations, and an increase in the Transit Occupancy Tax. The Town reported that this Program was not implemented due to staffing shortages.

San Anselmo’s Housing Element did not provide for a jobs/housing linkage program.

Inclusionary zoning program

At the time it adopted its 2004 Housing Element, San Anselmo had in place an inclusionary zoning program that applied to residential developments of ten or more units. It had little impact because of the scarcity of developments of that size. Housing Element Program H2.E revised that ordinance to require the provision of affordable units by all projects of seven or more units, and to provide for in-lieu fees on a sliding scale for projects of six and fewer units. The Town reports that a revised ordinance was scheduled for hearing on May 4, 2009, and the outcome of this program remains to be determined.

Second Units

In June 2003, San Anselmo passed an ordinance restricting the rent charged for second units. The ordinance limits rent paid for second units, not allowing the total rent paid to exceed 30% of the total income of a low-income household. (Muni. Code § 10-6.401). However, the Ordinance does not appear to require these units to be rented to low-income households. Moreover, the City states that it does not monitor compliance.

City of San Rafael

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	445	207	562	876
Units Produced (1999-2006)	25 (6%)	87 (42%)	388 (69%)	684 (78%)

Source: ABAG, A Place to Call Home, 2007

SHARE OF REGIONAL HOUSING NEED MET, 1999-2007				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	445	207	562	876
Units Produced (1999-2007)	26 (6%)	89 (43%)	382 (68%)	689 (79%)
Potential Units (Units Approved, Under Review or in Preliminary Consultation) (2007)	2	28	46	376

Source: General Plan 2020: San Rafael Annual Progress Report, 2007

Housing Production

The City of San Rafael was among those Marin jurisdictions that received a finding of conditional compliance from HCD. HCD noted that its certification of San Rafael’s 2004 Housing Element was

conditioned on the successful implementation of strategies (H9a, H18, H22 and H23) to facilitate housing development on identified sites in the

land inventory. This is particularly critical because according to our records, as of the end of the year, the City has met only 36% of its total share of the regional housing need. Aggressive and effective implementation of strategies to promote housing development, *particularly in commercial zones*, is necessary to ensure San Rafael can meet its projected housing needs. If the City's next and future general plan implementation reports, required pursuant to Government Code Section 65400 (due annually in October [now, April 1]), do not demonstrate significant progress in approving housing developments, *the element will require amendment to provide additional incentives or alternative sites.*⁹⁸

In its April 2008 progress report to HCD, the City indicated that it had met these conditions. HCD issued a letter, dated July 15, 2008, stating that “the City has satisfied the requirements of [HCD's] conditional compliance.” It is not clear, however, whether these conditions were met timely, or whether they were met at all before June 30, 2007, when the planning period ended. (At least one of these programs, H18g, regarding parking standards, was not fully implemented during the planning period.⁹⁹) Moreover, as noted below, the City did “not demonstrate significant progress in approving housing developments” – particularly at the very-low income level – yet apparently did not amend its Housing Element to provide the additional incentives and alternative sites that HCD required.

San Rafael achieved less of its Regional Housing Need at lower-income levels, and progressively more at each higher-income category. It met only six percent of its very-low income need, over 40% of its low-income need, and nearly 70% of its moderate-income need. At the above-moderate (market rate) level, San Rafael achieved nearly 80% of its need.

San Rafael's achievement of only 26 very-low income units, out of a Regional Housing Need of 445, may also be viewed against the fact that, in 2003, 24 of those units had already been built. (2004 Housing Element, Exhibit Z, p. 369.) In other words, only two new very-low income units were approved between 2003 and 2007.

San Rafael also provided information on “potential units” as of 2007. Those units fall into a similar pattern, showing only two potential units at the very-low income level, 28 at the low-income level, and 46 at the moderate-income level, compared to 376 potential market units.

For the prior planning period, that ran from 1989 to 1999, the City reported meeting only ten percent of its very-low income RHNA need, and 46% at both the low- and moderate-income levels, according to figures compiled by the Marin Housing Council.

⁹⁸ HCD letter of Dec. 29, 2004 (emphasis added), accessed at http://www.hcd.ca.gov/hpd/hrc/plan/he/he_review_letters/mansan_rafael.pdf.

⁹⁹ According to the City's 2007 annual report to HCD, the actions that have been taken to revise parking standards are to permit tandem parking in Downtown residential projects and for second units, and to permit “compact parking and shared parking for mixed use.” As described below, however, the Zoning Code's permission of “shared parking for mixed use” continues to be severely constrained.

Sites

San Rafael provided information concerning 38 potential housing sites. Nine of those sites produced some affordable units, most of them apparently “inclusionary” units in market-rate developments.

Ten of the 38 sites were rezoned since the adoption of the 2004 Housing Element.¹⁰⁰ Of those ten sites, only three resulted in the approval of any affordable housing. The Lomond Marina site created eight low-income and nine moderate-income inclusionary units in an 81-unit project. The other two sites (Chapel Cove and 524 Mission Avenue) accounted for four below-market rate units of unspecified affordability level.

Six of the sites that were not rezoned yielded a share of affordable units. One of those sites (345 Catalina) produced 24 affordable units (half very-low and half low-income) in a 29-unit project. The other five sites yielded inclusionary units ranging from about 17 to 30% of total units, as follows: three low- and three moderate-income units in a 36-unit development at 1203 Lincoln; three low-income units out of 24 total units at 1515 Lincoln Avenue; 19 low- and 19 moderate-income units out of 113 total units at Rafael Town Center; two very-low income units out of 16 total units at 1867 Lincoln Avenue; and three low-income units out of 40 total units at 724 Fourth Street. Significantly, three of these sites were already zoned HR, San Rafael’s high-density multifamily by right zone, described below.

Zoning Districts

The City reports that multifamily housing at a density of 30 units per acre is permitted, subject to design review, in two zones: the HR (Multifamily High Density) zone and in the R/O (Residential/Office) zone. Density in the HR zone can range from 24 to 45 units per acre.¹⁰¹ At the mid-to-high end of this density range, the City can accommodate its required minimum density of 30 units per acre, and the City reports a General Plan policy that multifamily sites be developed at the mid- to high-range of the zoning density. The projects on Lincoln Avenue (1203, 1515, and 1867) described above were zoned HR-1. Together, these projects produced 11 units of affordable housing. A fourth site (Shaver at Latham Streets) was also zoned HR-1. The latter is 0.9 acres, while the 1203 and 1867 Lincoln sites are 0.2 and 0.75 acres, respectively. No information was provided about the size of the 1515 Lincoln site.

Residential development in mixed-use zones allows higher residential densities, such as 45 units per acre in the R/O zone. Most mixed-use zones, however, require conditional use permits or administrative use permits.

The “administrative use permit,” while evidently intended to pose less of a hurdle than the more traditional conditional use permit, nevertheless appears to pose a significant

¹⁰⁰ A series of 21 adjoining small lots on Brookdale Avenue were also rezoned from duplex to high density residential (HR1) in 2004.

¹⁰¹ The City has three HR zones, HR-1, HR-1.5 and HR-1.8. The highest-density is permitted in HR-1, which allows up to about 42 units per acre. Muni. Code, § 14.04.010 (K).

constraint that could help explain the relatively small amount of mixed-use development of housing in commercial zones, despite the large number of sites.¹⁰² If certain findings are met, the planning director “may issue” an administrative use permit, without the need for public notice or hearing, and in most cases without referral to the Planning Commission. (Mun. Code §§ 14.21.040, 14.21.060.) Among the required findings is that “[t]he proposed use as conditioned conforms to the performance standards for the proposed use as outlined in Chapter 14.17, Performance Standards.” (Mun. Code § 14.21.080 (B).)

“Performance standards” of two kinds appear to be problematic in the context of mixed-use housing development in commercial zones. First, while “[i]n the 4SRC and WEV districts, residential units may be located above the ground floor, and on rear portions of the ground,” the “[l]ocation of residential units in the 2/3 MUE and MUW, GC, FBWC, HO, C/O, CSMU and NC districts *shall be determined through project review.*” (Mun. Code, § 14.17.100 (C) (1) (emphasis added).) This regulation leaves room for uncertainty, rather than establishing a clear standard for the location of residential units in mixed-use developments.

The second problematic “performance standard” relates to parking. “Residential parking [in mixed use zones] shall comply with Chapter 14.18, Parking Standards, of this title.” (Mun. Code, § 14.17.100 (C) (3).) Chapter 14.18, in turn, requires off-street parking for most residential uses (Mun. Code, § 14.18.040 (A) & chart),¹⁰³ and appropriately makes allowances for reduced parking requirements in the downtown commercial district. Specifically, downtown parking need not be provided in “covered spaces” (Mun. Code, § 14.18.040 (E)), and the number of parking spaces per unit is somewhat reduced (for one-bedroom units from 1.5 spaces per unit to one space; and for two bedroom units from two spaces per unit to 1.5).¹⁰⁴ (Mun. Code, § 14.18.040 (A) & chart.)

However, “[w]here there is more than one use in a single structure or on a site, or two (2) or more separate instances of the same use, off-street parking requirements shall be the sum of the requirements for the various uses.” (Mun. Code, § 14.18.070 (A).) In other words, mixed-use development must meet the requirements for residential parking *plus* those for commercial parking. While exceptions can be made “when a significant and complementing variation in period of daily demands occurs (i.e., exclusive day and night uses),” those exceptions seem quite narrow, and require a discretionary use permit. (Mun. Code, § 14.18.080.) Full implementation of Program H18g could have addressed this problem.

We found an additional constraint relating to San Rafael’s mixed-use sites: their small size. Of the inventoried sites with mixed-use zoning on which we asked San Rafael to

¹⁰² “Performance standards for residential uses in commercial districts shall be applied through an administrative use permit in the 4SRC, HO, 2/3 MUE and MUW, CSMU, WEV, NC, GC, O, FBWC, C/O, and M districts or through a use permit in the NC district.” (Mun. Code § 14.17.100 (B).)

¹⁰³ The City points out that all developments of five or more units that are subject to its inclusionary ordinance qualify for parking incentives under the State Density Bonus Law, since the City’s practice is to require on-site units, rather than in lieu fees.

¹⁰⁴ In the Downtown parking assessment district, two-bedroom parking for smaller units is reduced to one space. (Mun. Code, § 14.18.060.)

report, more than two-thirds (68%) were under an acre in size, while 58% were under half an acre.

The City was required to make adequately zoned high-density sites available to accommodate 585 very-low and low-income units (the unmet portion as of 2004 of its total lower-income Regional Housing Need of 652 very-low and low-income units). The City's 2004 Housing Element asserted that 90 of these units could be accommodated on sites zoned for high-density residential use and another 350 on mixed-use sites. (Housing Element, Exhibit AA, p. 369.)

In fact, the City produced no very-low income units in mixed-use development, and only 36 low-income units.¹⁰⁵ In other words, it fell short of its plan to achieve 350 lower-income mixed-use units by 314 units.

The Housing Element identified five "vacant sites large enough to accommodate new medium and high density residential developments" (2004 Housing Element, pp. 372-73), of which two were zoned for medium density development at densities below the 30 units per acre needed to make very-low and low-income development feasible. Of the three remaining sites, only one (referred to as the Lincoln Ave. Site) was zoned HR (Multifamily High Density), allowing approximately 18 units. The other two (Elk's Club and San Rafael City School's Corp Yard sites) were zoned PD (Planned Development).

PD zoning requires discretionary approval of a development plan. None of the three PD sites among the 34 (Elks Club, San Rafael City School's Corp Yard, and 750 Lindaro sites) produced housing during this period.

As for the 350 units that were to be accommodated on mixed-use sites, 300 were in the Downtown and another 50 by way of air rights development of downtown public parking lots. (Housing Element, Exhibit AA, p. 369; see Exhibit BB, pp.375-76.)

At the time it gave its conditional approval of the Housing Element in 2004, HCD noted that the City had met only 36% of its RHNA need. By the end of the period, it had met only 42% of its affordable share of the RHNA. HCD's conditional approval letter expressly stated that, "[i]f the City's next and future general plan implementation reports . . . do not demonstrate significant progress in approving housing developments, the element will require amendment to provide additional incentives or alternative sites."

While the City ultimately implemented the actions, as promised, and HCD found its Housing Element in compliance on July 15, 2008, HCD's initial skepticism about San Rafael's emphasis on housing in commercial zones proved accurate. As described above, the City's actions were not adequate to feasibly accommodate its lower-income share of the Regional Housing Need through mixed-use development in commercial zones. The City's Housing Element planned to achieve 350 lower-income units (54% of its Regional Housing Need for lower-income units) on mixed-use sites, yet fell short of that goal by nearly 90% overall, and by 100% at the very-low income level. Yet, despite the lack of

¹⁰⁵ The City reports five mixed-use developments built or approved between 1999 and 2007: Rafael Town Center (113 total units, including 19 low- and 19 moderate-income); 729 Fourth Street "Clocktower" (30 total, 3 low- and 2 moderate-income); 110 Loch Lomond (82 total, 9 low- and 9 moderate-income); 522 Third Street (3 total); and 820 D Street (13 total, 2 low-income). It is considering two others, at 901 Tamalpais/700 Third St. (30 units) and 809 B St. (4 units).

progress – the City approved only two new very-low income units since HCD’s letter – the City did not amend the Housing Element to provide alternative sites and additional incentives.

As HCD notes, adequate sites to accommodate the entire Regional Housing Need “must be appropriately zoned early enough in the planning period to provide realistic and viable development opportunities.”¹⁰⁶ Notwithstanding San Rafael’s belated compliance, it does not appear to have provided those opportunities with respect to at least some of its lower-income RHNA share. We conclude that it may be subject to AB 1233, which would require it to make additional sites available in the first year of the new planning period to accommodate the share of lower-income units that it failed to accommodate in the prior period.

Other Programs

Funding programs

San Rafael’s Housing Element Program 24a promised to establish a jobs/housing linkage ordinance requiring commercial developers to build or fund affordable housing, with a preference given to on- or off-site construction of housing but with in-lieu fees also an option. The program, as outlined in the Housing Element, was potentially robust but short on detail.

The linkage ordinance was adopted in 2004.¹⁰⁷ It places an affordable housing requirement on all non-residential development, with certain exceptions. Developments to which the ordinance applies are required to provide 20% of the total number of residential units needed to provide housing for the project’s employers in very-low, low-, and moderate income levels. The City reported that, so far, no funds have been collected from the ordinance. The City also reports that, because of the economy, there are no qualifying projects currently under development.

Program H9c consists of the use of in-lieu fees to fund affordable housing programs, presumably in conjunction with the inclusionary housing ordinance described below (H19a).

Inclusionary zoning

Housing Element Program 19a set out a detailed program for adoption of inclusionary housing requirements including the following: (a) a requirement that residential projects set aside 10 to 20% of housing units as affordable, depending on the size of the project, (b) a requirement that at least 50% of affordable units be available to very-low income households and the rest affordable to low-income households in rental projects, and that at least 50% of affordable units be affordable to low-income households and the remainder to moderate-income households in ownership projects, (c) a requirement that affordable units be held affordable for at least 55 years, and (d) a preference for on-site construction over in-lieu fees.

¹⁰⁶ http://www.hcd.ca.gov/hpd/housing_element2/PRO_adqsites.php.

¹⁰⁷ See San Rafael Muni. Code § 14.16.030(I).

The City reports that these requirements were enacted in 2004. Section 14.16.030 of the San Rafael Municipal Code requires all residential developments of more than four units to provide housing affordable to very-low, low- and moderate-income households in perpetuity (though the City Council may reduce the time frame to not less than 40 years) in the percentages set forth above. The City Council may allow a developer to pay in-lieu fees instead of building units in its sole discretion, and the City may, also in its sole discretion, allow a developer to undertake an “alternative equivalent action” instead.

City of Sausalito

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	36	17	50	104
Units Produced (1999-2006)	22 (61%)	0 (0%)	0 (0%)	51 (49%)

Housing Production

The City of Sausalito was alone among Marin jurisdictions in not adopting a Housing Element at all during the 1999-2007 planning period. It submitted a draft to HCD, which HCD disapproved in 2005, and evidently the City took no further action to adopt or implement any of the programs in its draft Element. This is particularly disappointing, as the City’s draft Element included a program to adopt an affordable housing overlay zone along the lines of Corte Madera’s successful model.

Sausalito claims it has met 61% of its very-low income need. Since none of the sites listed in its draft Housing Element developed, it appears likely that all of the 22 units it has counted toward its very-low income need are second units. The City met none of its low- and moderate-income need. It met about half of its market-rate (above-moderate) need.

For the planning period that ran from 1989 to 1999, Sausalito reported meeting five percent of its very-low income RHNA need, 17% of its low-income need, and ten percent of its moderate-income need.

Sites

Sausalito conducted no site rezoning since issuing its draft Housing Element in May 2005. (As noted above, Sausalito’s Housing Element, along with that of Fairfax, was one of the two in Marin that did not receive state compliance certification.)

Only two sites, both characterized as “underutilized,” are zoned R-3, permitting multi-family residential development at a density of up to 22 units per acre, subject to design review. Neither of those sites developed, possibly due to viable existing uses – for instance, one, the 83 Princess site, already included market-rate housing. In the new Housing Element, amendments to State law require the local government, with respect to sites with existing uses, to “specify the additional development potential for each site

within the planning period and [to] provide an explanation of the methodology used to determine the development potential. The methodology shall consider factors including the extent to which existing uses may constitute an impediment to additional residential development, development trends, market conditions, and regulatory or other incentives or standards to encourage additional residential development on these sites.”¹⁰⁸

Nor did any other site listed in the inventory of the draft Housing Element develop during this period.

Zoning Districts

Only one zoning district, R-3, permits multi-family residential development at a density of 22 units per acre, subject to design review. (Mun. Code, § 10.22.0202 (D).) The R-3 zone does not appear to impose any density floor.

It appears from the City’s responses that multifamily housing is not permitted under any circumstance in any other zone, apart from lower-density residential zones such as R-2.5 (two family housing).

Our analysis concludes that the City is subject to the requirements of AB 1233, which requires it to rezone sites in the first year of the new Housing Element planning period to make up for the very-low, low-, and moderate-income housing need it failed to accommodate in the prior period. AB 1233 applies because the City failed to adopt a Housing Element at all, and because the sites it designated were not adequate. The only two sites that were zoned to permit multifamily housing at a maximum density of 22 units per acre were “underutilized” sites, that in the aggregate amounted to only 1.15 acres, which appear to have had viable existing uses and thus were not truly available for development.

Sausalito must rezone sites for high-density residential use (minimum density of 20 units per acre) to accommodate the 36 very-low and 17 low-income units that it failed to accommodate in the last period, on top of its new Regional Housing Need of 45 very-low and 30 low-income units, for a total of 81 very-low and 47 low-income units.

Other Programs

Sausalito has not implemented any affordable housing funding, inclusionary zoning, or jobs/housing linkage fee programs in this Housing Element period.

¹⁰⁸ Gov’t Code § 65583.2 (g).

Town of Tiburon

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	26	14	32	92
Units Produced (1999-2006)	4 (15%)	3 (21%)	0 (0%)	144 (157%)

Source: ABAG, A Place to Call Home (2007)

SHARE OF REGIONAL HOUSING NEED MET, 1999-2006				
	Very-low Income	Low-Income	Moderate- Income	Above- Moderate Income
RHNA Share	26	14	32	92
Units Produced (1999-2006)	4 (15%)	3 (21%)	0 (0%)	85 (92%)

Source: Town of Tiburon (June 2009)

Housing Production

The Town of Tiburon’s 2005 Housing Element was conditionally approved by HCD, which found that “[b]ecause the Town was not able to meet the current implementation schedule for Programs H-19A through H-19D, the Department’s finding of compliance is conditioned on the Town successfully implementing [those Programs] by April 2006.”

The Town reports that it implemented Programs H-19A through D in 2006, including the adoption of an affordable housing overlay zone.

Nonetheless, Tiburon met only 15% of its very-low income need, 21% of its low-income need, and none of its moderate-income need. This demonstrates the importance of taking action early in the planning period; Tiburon’s delay in adopting and implementing its Housing Element until close to the end of the period left little time for development to follow from its actions.

For the planning period that ran from 1989 to 1999, the Town reported meeting only 25% of its very-low income RHNA need, six percent of low-income need, and none of its moderate-income need.

Sites

Only one inventoried site developed with low-income housing at a net density of 16.6 units to the acre: the Chandler's Gate site, which yielded 25 units, including four very-low income units.

Tiburon did not rezone any sites in its inventory, although it did create a new zoning overlay that it applied to sites with existing zoning that remained in place. The City applied one of its two new "AHO" zones that it created in 2006, the NC-AHO and RMP-AHO zones, to seven sites. None of those sites have developed in the two years since then, possibly due in part to a variety of respects (discussed below) in which Tiburon's AHO zones leave uncertainty and discretion with respect to key standards included density, parking and setbacks.

Of the remaining ten sites in Tiburon's 2005 Housing Element inventory, none developed with affordable housing.

Zoning Districts

Tiburon's R-3 zone, its highest-density residential zone, does not allow densities above 12.4 units per acre. In its new Housing Element, it must include a program action to promptly amend its Zoning Code to create a district that allows multifamily residential use by right at a minimum density of 20 units per acre.

As noted above, the Town now incentivizes developments that include 60% deed-restricted affordable units (20% at each level: very-low, low-, and moderate-income) with increased density in its new NC-AHO and RMP-AHO zones. These overlay zones, while a step in the right direction, suffer from significant shortcomings.

The RMP-AHO zone allows a density of between 12.4 and 24.8 units per acre and a maximum height of three stories. (Mun. Code, § 16-2.8.5.2 (a) & (b).) The determination of density is subject to General Plan limitations. It also appears to rest in the Town's discretion, and in particular appears to favor smaller units over the two- and three-bedroom units that low-income families find in particularly short supply. (Mun. Code, § 16-2.8.5.3 (a) ("Densities toward the top of the range may be appropriate where units are significantly smaller and would have fewer impacts than the market norm.").)

Moreover, other development standards, such as lot coverage limits and required setbacks are subject to discretionary determination "through site plan and architectural review approval." (Mun. Code, § 16-2.8.5.2 (c) & (d).) Other incentives are largely in the discretion of the Town, as well, such as parking standards, which "shall be reduced within reason by the town depending on project characteristics and availability of on-street parking," and the waiver or reduction of "certain town application and development fees" in an unspecified amount. (Mun. Code, § 16-2.8.5.3 (c) & (e).)

The Town also promises to “give qualifying projects the highest processing priority,” and to make other “efforts” to assist the development. (Mun. Code, § 16-2.8.5.3 (f).)

None of the incentives described in the previous two paragraphs, however, are available to an applicant who requests a density bonus under *State* law. The only exception is for multi-family units. (*Id.* § 16-2.11.5(b)). The base density for these projects is 15.3 units per acre. The State density bonus provides for an additional bonus of 20%,¹⁰⁹ 3.02 units in this instance, allowing a maximum density of 18.32 units per acre. The NC/AHO zone has a maximum density of 20.7 units per acre. (Muni. Code § 16-2.11.5.2). If projects were allowed to take advantage of both the Town and State density bonuses a maximum density of 24.84 units per acre would be allowed.

Except as provided in the NC-AHO overlay zone, which permits an exception for affordable housing, housing is not allowed in the NC without a conditional use permit. (Mun. Code, §§ 16-2.11.1, 16-2.11.2, 16-2.11.5.1).

In sum, Tiburon’s affordable housing overlay falls short of Corte Madera’s model in several respects, including requirements for substantial discretion over the incentives provided.

Other Programs

Funding programs

Tiburon already had a housing trust fund, funded by in-lieu fees from its inclusionary program, at the time of its last Housing Element. Housing Element Policy H-3 called for the continuation and strengthening (including seeking additional sources of funding) of that program. In the Housing Element, the Town reported that the fund contained \$1,340,551 as of July 2004 and was expected to grow to about \$2 million by 2010. The Town anticipated spending most of the funds on the creation of new affordable housing in the sites identified in the Housing Element or the Town’s Housing Plan. Given the Town’s failure to meet the majority of its RHNA in this period and the very limited number of affordable units that are developed or under construction (the four very-low income units at Chandler’s Gate), it appears unlikely that much of the money in the trust fund was utilized in this period.

It should be noted in connection with the Town’s relatively large affordable housing trust fund balance that its inclusionary ordinance calculates in-lieu fees “on the basis of the difference between the affordable purchase price of a dwelling unit for which a moderate-income four-person family earning 80% of median income can qualify, and the estimated cost of constructing a market rate unit of appropriate size, to be determined by the town.” (Mun. Code, § 16-6.8.) By way of illustration, the Code gives an example of a calculation that yields an in lieu fee per affordable unit of \$437,000.

Policy H-23 called for a jobs/housing linkage fee program much like that promised by other jurisdictions (based on empirical evidence and in compliance with legal tests; and with a preference for inclusion of housing within the commercial development, with off-site construction, subsidized mortgages or rents or in-lieu fees as alternatives). From a

¹⁰⁹ Gov’t Code §§ 65915-18.

review of the Town's zoning code, it appears that this program has not been implemented.

Inclusionary zoning program

Tiburon already had an inclusionary zoning ordinance in place at the time of the most recent Housing Element, and Policy H-22 called for the strengthening of that ordinance through the following changes: applying in-lieu fees only to projects of six units or less (as opposed to nine or less under the then-current version), requiring 15% affordable units to be provided by projects of seven to 12 units (as opposed to the then-current requirement of ten percent affordable units for all projects of ten units or more), requiring 20% affordability for projects of 12 units or more, and requiring that ten percent of units be designed for special needs. The Town implemented these amendments to the ordinance. Muni. Code § 16-6.3.

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