



December 9, 2022

Paul McDougall and Sohab Mehmood
California Department of Housing and Community Development

RE: Comments on San Francisco's December 6, 2022 Housing Element Program Updates

EXECUTIVE SUMMARY

- Based on the City's December 6, 2022 housing element program updates, San Francisco YIMBY has taken a **support if amended** position on the certification of San Francisco's housing element. One key change to comply with state law is still required for us to take a **support** position, as outlined below.
- Key Issue: Cumulative Constraints. HCD instructed the city to follow state law by A) conducting a cumulative-constraints analysis and B) reducing constraints based on this analysis. The City did neither. Instead, it promises to conduct this analysis years later, and makes *no* promises to take action based on it. The City should:
 - For the purposes of calculating the necessary size of its mid-cycle adjustments, commit to updating its estimate of the additional capacity its RHNA shortfall rezoning has created based on the cumulative-constraints analysis.
 - If the cumulative constraints analysis shows that the City's RHNA shortfall rezoning creates less than 35,600 units of capacity (the target for this rezoning), commit to make up this potential shortfall with further constraint reduction and/or rezoning at the midpoint of the planning period.
 - Commit to providing the City Controller and HCD the opportunity to review and approve the sufficiency of its constraint reduction actions.
 - As a fallback, if the City fails to comply with these housing-element actions, it should commit to waive constraints that render individual projects infeasible.
- Suggested Clarifications: [The Appendix](#) also provides suggested clarifications to remove loopholes in certain important actions related to topics such as by-right approval processes and a "no net loss" policy for housing development feasibility. We strongly encourage HCD and the city to make these changes, but our support for the housing element is not conditioned on all of these changes being adopted.

Dear Mr. McDougall and Ms. Mehmood:

We write to comment on San Francisco's [December 6, 2022 draft](#) of its Housing Element implementing programs. This comment supersedes our previous comments.

We have taken a position of support if amended regarding HCD's certification of San Francisco's housing element. San Francisco's housing element contains many praiseworthy programs. Unfortunately, we believe there remains one key area where the housing element clearly fails to comply with state law and HCD's feedback.¹

Key Issue: Cumulative Constraints Reduction

State law requires housing elements to "address and, where appropriate and legally possible, remove constraints to the ... development of housing"² and "demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need."³ Consistent with state law, in August, HCD instructed the City to analyze the "cumulative impact of governmental constraints [upon] the feasibility of development," and then add "add or modify programs as appropriate to address constraints" based on this analysis.⁴

The City's draft makes no attempt to quantify the effect of "combinations of constraints" on housing feasibility, even as it acknowledges that projects suffer "deaths by a thousand cuts" (Appendix C, p. 9), that meeting its RHNA requires *tripling* its historical rate of housing production, that housing development has become economically infeasible, and that housing production has ground to a halt almost everywhere in the city. As a result, **although the housing element does commit to a number of constraint removal actions, it provides no analysis demonstrating that these actions will be sufficient to**

¹ In the appendix, we provide a few additional suggestions that would be valuable but which are not as mission-critical.

² Government Code § 65583(c)(3).

³ Government Code § 65583(a)(5).

⁴

<https://www.hcd.ca.gov/community-development/housing-element/docs/sfrsanfranciscodraftout080822.pdf>, p. 9

achieve the economic feasibility necessary for the city to “meet[] its share of the regional housing need.”

Action 8.1.8 does commit the city to “[c]onduct a pro-forma-based study of cumulative governmental constraints on housing development,” and sets a goal of “determin[ing] the amount of constraint reduction necessary to ensure that the majority of typical code-compliant housing projects are economically feasible.” But **it does not actually obligate the city to “add or modify programs” to achieve the goal of meeting its RHNA obligations.**

The only action in the housing element that provides for reductions in constraints informed by the City’s promised study is action 8.1.5, which makes a conditional commitment to limited constraint reduction in the context of the City’s mid-cycle pipeline shortfall rezoning.

Action 8.1.5 as written is inadequate for the purposes of satisfying state law and HCD’s requirements. It proposes to first calculate the results of the following formula:

*Calculated Unit Shortfall = 1.15 * (29407 - Building Issued Permits 2023 to 2027) - (Expected Capacity from RHNA Shortfall Rezoning - 35600).* If the Calculated Unit Shortfall is more than 0, the action then commits to “enact and implement additional rezoning and implement additional constraints reductions for existing projects in the development pipeline” to address the calculated Unit Shortfall. There are two flaws with this approach:

- **Even in a world in which the City is on track to build *far* less housing than it currently projects from its housing pipeline—indicating it has not reduced constraints on development nearly enough for its pipeline or RHNA shortfall rezoning to meet its RHNA goals—this formula would likely allow the City to escape conducting any mid-cycle constraint reduction.** For example, suppose the City permitted only 1,250 units per year from 2023 to 2027 (relative to a RHNA of over 10,000 per year), indicating its constraints on development continued to render development largely infeasible well into the planning period. Moreover, suppose the City enacts Rezoning Scenario C, which it estimates would net 63,912 units based on data from before the “work from home” shock. The formula would yield a Calculated Unit Shortfall of $1.15 * (29407 - 1250*4) - (63912 - 35600) = -244$ units, meaning the City would not be obligated to further reduce constraints.

Yet if the City is producing housing at a rate *eight times* less than its RHNA obligations (i.e., only 1,250 per year instead of the over 10,000 per year its RHNA requires), further constraint reduction would plainly be necessary to meet its RHNA—it would be absurd to expect a rate of 1,250 units per year would jump to over 19,000 units per year in the second half of the planning period without further constraint removal to complement the City’s rezoning. In this world, the City’s RHNA shortfall rezoning would fail to produce meaningful housing due to constraints—falling far short of accommodating the number of units the City’s formula would credit it for—and the City would be under no obligation to alter its policies to ensure that it did. This scenario is far from hypothetical: Supervisor Catherine Stefani, who represents much of the area proposed to be rezoned, said she anticipated exactly this scenario in a recent public hearing.⁵ **In summary, the City’s proposed formula currently fails to account for the possibility that constraints on development will result in its RHNA Shortfall Rezoning producing far less capacity for new housing during the planning period than the City currently projects.**

- **The mid-cycle constraint removal promised by action 8.1.5 would only apply to “existing projects,”** not potential projects that the City’s constraints may deter developers from proposing in the first instance. Notably, this means that the City has not made any commitment to ensure economic feasibility of projects expected to result from its RHNA-shortfall rezoning program (Action 7.1.1).

Proposed Solutions

- **First, the City must pledge to actually act on the results of its constraints study, just as it would have been obligated to do had the City performed the analysis on time and included it in its adopted housing element—as HCD**

⁵ In a November 15, 2022 Board of Supervisors hearing, she stated that the Housing Element’s rezoning program would result in “no housing” due to City-imposed constraints on development: “You could propose to rezone my district as is in all scenarios A, B, and C; but, in doing so, without removing all these barriers, no housing is going to get built.”
https://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=42482.

instructed. If the City's housing element receives certification when it makes no such pledge, San Francisco will be *rewarded* for failing to comply with state law.

Other cities would then have an incentive to do the same. More specifically:

- For the purposes of calculating the necessary size and impacts of its mid-cycle adjustments in action 8.1.5, **the City's estimate of the additional capacity its RHNA shortfall rezoning has created should be updated based on the results of the cumulative-constraints analysis.**
- Its mid-cycle adjustment formula should also account for the possibility the estimated capacity created by its RHNA shortfall rezoning will be *below* the floor of 35,600 based on the cumulative constraints analysis; **any projected deficit of the RHNA shortfall rezoning from its floor of 35,600 should be added to the size of the mid-cycle adjustment, too.**
- **This mid-cycle adjustment should also reduce constraints on all projects, including potential projects—not only “existing projects.”**
- Second, because no one yet knows what the cumulative-constraints analysis will show, and because that analysis was supposed to have been conducted as part of the housing element itself (enabling HCD to review the appropriateness of responsive actions), **the city must also commit to providing HCD with an opportunity to review future responsive actions and to accepting HCD's reasonable recommendations.** Since these responsive actions will be a central strategy for the city to meet its RHNA, HCD oversight is also crucial to ensure the City does not make implausible assumptions that allow it to evade its RHNA. This is the same approach the city has adopted for the Housing Policy and Practices Review (see actions 8.8.2 and 8.8.3). As a further safeguard against the politicization of this process, the City Controller should also certify that the City's responsive actions are sufficient to make up its mid-cycle shortfall.
- Finally, there must be a fallback mechanism to mitigate cumulative constraints if the city fails to meet HCD's reasonable expectations. The only practical alternative that would achieve the goal of economic feasibility is for the city to waive, administratively, any governmental constraints that render a proposed, zoning-compliant project economically infeasible (unless the constraint is needed for health or safety).

We suggest the following changes to program text to implement these changes:⁶

8.1.5. If the number of building permits issued between January 31, 2023 and January 31, 2027 is less than 50% of the existing capacity for housing in the Sites Inventory (i.e., 29,407 units, which is 50% of 58,813 units, see Appendix B, Fig. 3), the City shall enact and implement additional rezoning outside of Priority Equity Geographies and implement additional constraints reductions **for existing projects in the development pipeline** to accommodate 115% of the **projected** shortfall between the existing capacity for housing in the Sites Inventory (29,407 units) and the number of building permits issued for the 6th Cycle RHNA Planning period, **less minus** any additional capacity created by the rezoning(s) in Action 7.1.1 in excess of the RHNA shortfall identified in the Sites Inventory (i.e., 35,600). **Mathematically: Calculated Unit Shortfall = 1.15 * (29,407 - Building Permits Issued 2023 to 2027) - (Expected Capacity from RHNA Shortfall Rezoning in Action 7.1.1 - 35,600). For the purposes of this calculation, the Estimated Capacity from RHNA Shortfall Rezoning (the estimate of the capacity created by Action 7.1.1) shall be recalculated at the midpoint of the planning period using the information generated by the cumulative constraints analysis performed in Action 8.1.8, and any deficit between the additional capacity created by Action 7.1.1 and 35,600 shall further add to the size of the calculated shortfall.** The scope of the additional rezoning and constraint removal program shall also be informed by the cumulative constraints analysis described in Action 8.1.8, reasonably accounting for sites' likelihood of development during the planning period using an analytical model, and shall not add any new governmental constraints to the development of housing unless those constraints are offset by the repeal or mitigation of other constraints.

The City Controller shall certify that this program is sufficient to meet the City's aggregate RHNA and the program shall be submitted to HCD for review and approval no later than three months prior to the deadline for adoption. The adopted program shall incorporate HCD's priority recommendations, if any.

Complete this effort, if needed, by July 31, **2027 2028**.

8.1.8. Conduct a pro-forma-based study of cumulative governmental constraints on housing development. The study shall quantify the net number of economically feasible housing units that could be built in the City under the regulatory status quo and conduct a sensitivity analysis to determine the amount of constraint reduction necessary to ensure that the majority of typical code-compliant housing projects are economically feasible, including quantification of the hypothetical increase in the net number of economically feasible units that would be realized under a range of constraint-removal scenarios. The study shall consider the effects of economic cycles, considering feasibility under both current economic conditions as well as feasibility under average prevailing conditions over the preceding decade and a scenario in which market rents are at least 10% lower than then-current rents. The study shall be updated triennially in tandem with the required Controller's study of the Inclusionary Program required by Planning Code Section 415.10, with the first such study completed in tandem with the first Controller's study completed on or after January 31, 2025, but in no case later than January 31, 2027.

The results of the cumulative-constraints study shall also inform Action 8.1.5, with the goal of ensuring the economic feasibility of achieving the city's aggregate RHNA target of 82,069 new

⁶ Our suggested action text also contains two other suggestions: 1) The City proposes that its mid-cycle rezoning program be implemented 6 years into the planning period instead of at the cycle mid-point. It should be implemented at the cycle mid-point, which means relevant preparations (e.g., EIRs) would need to begin prior to the cycle mid-point. 2) Since the overarching goal of the housing element is to put the city on a glide path toward greater affordability, the pro-forma study should examine what would be needed to maintain housing production in a world of lower rents.

housing units during the planning period insofar as that outcome would be economically feasible in the absence of governmental constraints.

[new action]. If the City does not fulfill the requirements of Action 8.1.5 by July 31, 2027, then on all sites in the city zoned for residential or mixed uses, the city shall administratively waive all development standards, fees, exactions, obligations, programs, and other similar requirements as applied to approved projects or proposed projects whose height, bulk, and density are consistent with the height, bulk and density allowed on the site (as may be modified by the State Density Bonus Law or other state laws), insofar as the cumulative effect of such requirements would render a proposed project economically infeasible and the requirements from which the project proponent seeks a waiver are not necessary to protect public health or safety or a California Register Historical Resource on the site within the meaning of Government Code 65589.5(j)(1) and 65915(d)(1)(B). Developers may self-certify that these waivers are necessary, and the City will bear the burden of proof for contesting their necessity. In the event of a dispute about whether this provision of the housing element has been triggered, the city shall accept HCD's reasonable determination.

In summary, the City's Housing Element must commit to remove the constraints that hinder it from meeting its RHNA, as required by state law, or it is very likely it will not meet its RHNA. The cumulative constraints analysis it is conducting will allow it to identify that set of constraints, and so it must pledge to take action based on that analysis, as HCD asked.

The [Appendix](#) contains suggested program language and a summary of our concerns. It also contains several additional suggested clarifications to remove loopholes in other housing element programs.

We close by noting that San Francisco's latest draft makes great progress in addressing housing policy issues in San Francisco and reflects input from a variety of stakeholders. With the key issue we note in this letter resolved, San Francisco's housing element will be well-positioned to address its decades-long housing crisis. We hope HCD and the City will be able to reach an accord on the remaining issues so that the Planning Commission can approve the final changes needed for a compliant housing element at its December 15, 2022 meeting.

Sincerely,

Robert Fruchtman and David Broockman, San Francisco YIMBY
With assistance from Chris Elmendorf

CC:

Lisa Gluckstein, Office of San Francisco Mayor London Breed

Rich Hillis, San Francisco Planning Department

Maia Small, San Francisco Planning Department

James Pappas, San Francisco Planning Department

Commissioners, San Francisco Planning Commission

Gustavo Velasquez, California Department of Housing and Community Development

Megan Kirkeby, California Department of Housing and Community Development

Melinda Coy, California Department of Housing and Community Development

David Zisser, California Department of Housing and Community Development

Matthew Struhar, California Attorney General's Office Housing Strike Force

Keith Diggs and Sonja Trauss, YIMBY Law

Appendix

In this Appendix we describe several additional suggestions that would substantially improve the housing element but are not as mission-critical as changes related to cumulative constraints reduction.

Topic	Summary of Remaining Issues	Recommended Changes to Housing Element Text (relative to Dec. 7 draft)
RHNA Shortfall Rezoning	<p>The City relies on a rezoning program (action 7.1.1) to accommodate nearly half its RHNA. Action 7.1.1's text leaves open several loopholes that undermine the rezoning program:</p> <ul style="list-style-type: none">• Action 7.1.1 pledges that "the rezoning program... shall not add governmental constraints that reduce project financial feasibility," but the baseline from which the program cannot "reduce" feasibility is ambiguous. This action should be explicit that the baseline is the municipal status quo as of the housing element's final planning commission review (December 15, 2022).• The housing element does not acknowledge that	<p>7.1.1 Create a rezoning program with by-right pathway to meet the requirements of San Francisco's Regional Housing Needs Allocation across income levels and Affirmatively Furthering Fair Housing laws, relying on a combination of strategies in Actions 7.3.2 and 7.2.1 to accommodate the RHNA shortfall with a buffer (approximately 35600 new units) primarily in Well-resourced Neighborhoods, in proximity to transit and commercial corridors. The rezoning program shall reasonably account for sites' likelihood of development during the planning period using an analytical model, and shall not add government constraints that reduce project financial feasibility as determined by an analysis prior to the rezoning enactment. For purposes of this action, an "added constraint" is a city-imposed requirement that increases the cost of development and that was not in effect on Dec. 15, 2022. Seek to implement a rezoning program that exceeds the identified RHNA shortfall plus 15% buffer (i.e., 35,600 units) to provide more capacity sooner and that would reduce the</p>

	<p>California Government Code §§ 65583.2(c) and (h) provide by-right pathways for development, preempting discretionary review under the City Charter. Given the City's reluctance to acknowledge this, we ask HCD to instruct the City to do so. The by-right pathway for 20% BMR projects that the city provides through 65583.2(c) and (h) should be independent of any by-right pathway that may also be provided through Housing Sustainability Districts (action 8.4.3). HSDs come with new constraints, including labor requirements, public hearings, and possibly CEQA analysis and mitigation.</p>	<p>need for or size of any subsequent rezoning triggered by Action 8.1.5. In addition, make any conforming amendments to relevant area plans in the city's General Plan based on final rezoning actions. Complete this effort by January 31, 2026.</p> <p>As described in the Sites Inventory Rezoning Program, the rezoning will meet the requirements of Government Code Section 65583.2(h)-(i), including sites identified to meet the very and low-income RHNA unmet need will be on site zoned to:</p> <ul style="list-style-type: none"> - permit owner-occupied and rental multifamily uses by-right for developments in which 20 percent or more of the units are affordable to lower-income households. By-right means local government review must not require a conditional use permit, planned unit development permit, or other discretionary review or approval that would constitute a "project" for purposes of CEQA; - accommodate a minimum of 16 units per site; and - require a minimum density of 20 units per acre. <p>At least 50 percent of the lower-income rezoning need must be accommodated on sites designated for residential use only or on sites zoned for mixed uses that accommodate all of the very low- and low-income housing need, if those sites allow 100 percent residential use and require residential use to occupy 50 percent of the total floor area of a mixed-use project.</p> <p>8.4.2 Establish local non-discretionary ministerial approval F for housing applications in Well-resourced Medium Neighborhoods outside of areas vulnerable to displacement that net two or more housing units, do not demolish existing rent-controlled units, and meet tenant protection, relocation, and replacement standards as recognized in the Housing Crisis Act of 2019, by Board of Supervisors or voter approval of a City Charter amendment. At a minimum, the ministerial pathway shall authorize by-right development of 20% low-income projects on recycled sites pursuant to Government Code 65583.2(c), and by-right development of 20% low-income projects on sites rezoned to accommodate the lower-income RHNA (Actions 7.1.1 and 8.1.5) pursuant to Government Code 65583.2(h). The ministerial</p>
--	---	---

		<p>pathways provided pursuant to 65583.2(c) & (h) shall be independent of any pathways that may also be provided for the same sites through a Housing Sustainability District.</p>
No Net Loss of Economic Feasibility	<p>As described above, state law requires housing elements to “demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need.” San Francisco has an unfortunate history of constraining development, often in violation of state law. In light of this history, it seems likely that the City will add new constraints on development during the planning period that would hinder it from meeting its RHNA. Indeed, as we described in our previous public comment, City politicians have already alluded to the fact that they can blunt the impact of the City’s rezoning and constraint reduction programs by adding new constraints during the planning period. In action 8.1.6, the City partially addresses this issue by committing that it will not adopt “rezoning or development controls” which increase governmental constraints unless these are offset. However:</p> <ul style="list-style-type: none"> • The draft language only applies to rezoning and “development controls,” not to other actions which constrain development but that might not be categorized as “development controls”? (e.g., what about fees, exactions, taxes, labor standards?) • To avoid ambiguity about what is a new constraint, the city should also specify a baseline: a constraint is “new” if it does not exist at the time the housing element is expected to be adopted by the Planning 	<p>8.1.6. In alignment with the provisions and purpose of the Housing Crisis Act of 2019 (Government Short Code 66300 et seq.), any City-adopted rezoning or development controls shall not increase governmental the city shall not establish any new constraints to the development of housing unless those increased constraints are offset by the removal or mitigation of other constraints. A constraint for purposes of this Action is any requirement that increases the cost of housing development and that was not in effect on Dec. 15, 2022. An offset for purposes of this Action is a constraint removal or mitigation measure that the housing element or state law does not otherwise specifically require the city adopt.</p>

	<p>Commission and forwarded to the Board of Supervisors on December 15, 2022.</p> <ul style="list-style-type: none"> Finally, the housing element should make clear that the offset for a new constraint cannot be an action that is otherwise required by the housing element. If this proviso is not included, the Board of Supervisors will have free rein to negate housing-element actions by adopting new constraints that in effect restore the current, totally unacceptable status quo. 	
Designate key programs as legally enforceable	<p>As described in our last public comment (p. 11), state general plan law ensures that “fundamental, mandatory, and clear” commitments in a housing element are legally enforceable (<i>Spring Valley Lake Association v. Victorville</i> (2016)). The City must explicitly indicate that it considers key constraint-reduction programs in the housing element as such. The City currently lists certain actions as “key” actions, but this remains ambiguous. We suggest some text at right, which can be placed anywhere in the Housing Element and need not be made a formal “action”.</p>	<p>The city recognizes that the actions in Table X [Key Constraint Reduction Actions] are fundamental and mandatory provisions of the housing element.</p>
Remove the applicability of the Affordable Housing Fee to bonus units in projects which use the State Density Bonus Law (action 1.3.9)	<ul style="list-style-type: none"> Action 1.3.9 has been updated to say that the City will “consider” applying inclusionary housing requirements to base projects which invoke State Density Bonus Law. This language does not include concrete steps to address the issue. San Francisco should respond by committing to make this change, not just consider it. Action 1.3.9 also proposes language to “Study the applicability of the Affordable Housing Fee to bonus [units]” 	<p>1.3.9 Ensure that implementation of the City’s inclusionary requirements facilitate and expedite the production of affordable housing by affirming State Density Bonus Law.</p> <ul style="list-style-type: none"> For projects already providing affordable housing through State Density Bonus Law, consider applying apply the inclusionary tier and requirement to the base project only to increase the financial feasibility of smaller density bonus projects. Allow greater flexibility for projects that invoke State Density Bonus Law by allowing more deeply affordable units to be counted toward lower income affordable units required under the inclusionary ordinance.

	<p>and then “mitigate impacts of the Affordable Housing Fee program” based on an evaluation. Here, the City is acknowledging that this fee is a constraint to the production of housing; the only question is the magnitude of this constraint. State law explicitly identifies the State Density Bonus Law as one of several statutes which “facilitate and expedite the construction of affordable housing.”⁷ This means that applying the Affordable Housing Fee program to projects under the State Density Bonus Law is counterproductive as it constrains the production of affordable housing. Studying the issue only delays the inevitable conclusion and would continue to keep a constraint in place for longer than necessary. The obvious solution to the problem is to discontinue the practice of applying the fee to bonus units in State Density Bonus Law projects, as HCD has explicitly instructed.</p>	<ul style="list-style-type: none"> - Study the applicability of the Affordable Housing Fee to bonus projects, evaluating its impacts on project feasibility and affordable housing production. Based on the findings of this study, take action to mitigate impacts of the Affordable Housing Fee program. Discontinue the application of the Affordable Housing Fee to bonus units in projects which invoke State Density Bonus Law.
--	--	---

⁷ Government Code § 65582.1(f)