



COMMUNITY DEVELOPMENT

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
TELEPHONE: (408) 777-3403 • FAX: (408) 777-3366
CUPERTINO.GOV

CITY COUNCIL INFORMATIONAL MEMORANDUM

Date: January 30, 2026

To: Cupertino City Council
From: Benjamin Fu, Director of Community Development
Re: Housing Element No Net Loss Law Requirements

Background:

Housing Element Update and RHNA

The City Council approved Cupertino's 6th Cycle Housing Element update on May 14, 2024, and the California Department of Housing and Community Development (HCD) subsequently certified that the City's Housing Element was compliant with State housing law on September 2, 2024. HCD's certification essentially completed the City's Housing Element update process for the 6th Cycle planning period, which covers the years 2023-2031. The City's Regional Housing Needs Allocation (RHNA) for the 6th Cycle was 4,588, meaning the City was required to identify potential housing sites, referred to in the Housing Element as Priority Housing Sites, that could provide the capacity for at least 4,588 total residential units and ensure that the sites' land use designations (i.e., General Plan and zoning) would allow for this level of development. In its guidance for updating the Housing Element, HCD stipulates, but does not require, that cities include a "buffer" of 15-30% in excess of their RHNA in order to ensure adequate housing unit capacity is maintained should sites subsequently develop at lower densities or at lower levels of affordability than anticipated.

The City's Housing Element, certified by HCD in September 2024, provided a unit capacity of 5,881 units, exceeding its RHNA by 28%, or 1,293 units. The RHNA requirements, however, must be met by income levels—Very Low, Low, Moderate and Above Moderate (i.e., market rate)—not simply the total number of RHNA units. By income level, the City's RHNA of 4,588 breaks down as follows:

- 1,880 Very Low/Low (these income categories are combined in the Housing Element) units
- 755 Moderate units

- 1,953 market rate units

This means that 56.5% of the City's RHNA is in the "affordable" income categories of Very Low/Low and Moderate. While, at the time of its certification, the City's Housing Element had a buffer of 28% based on its total RHNA of 4,588, and its total housing unit capacity of 5,881, by income category, the majority of the buffer was in the market rate income category. Specifically, at the time of the Housing Element's certification the Very Low/Low category had a buffer of 8%, or 157 units; the Moderate category a buffer of 12%, or 92 units; and the market rate category a buffer of 53%, or 1,044 units. A factor that contributed to the marginal buffer in the affordable categories occurred immediately before the City's adoption of the Housing Element when the owner of four high-density Priority Housing Sites requested that their properties not be included in the Housing Element, resulting in a loss to the sites inventory of 141 Very/Low units, 62 Moderate units and 169 market rate units.

No Net Loss Law

In order to expand the supply of housing, particularly affordable housing, and to ensure that cities did not take actions to reduce the potential capacity of new residential development, the State Legislature adopted the No Net Loss Law in 2002. The No Net Loss Law ensures that cities maintain a sufficient supply of adequate sites in their Housing Element sites inventories (i.e., Priority Housing Sites) throughout the RHNA planning period. This law was amended in 2017 by Senate Bill 166, which requires that sufficient adequate housing sites are available *at all times* (emphasis added) to meet a city's remaining unmet housing needs *for each income category* (emphasis added). To comply with the No Net Loss Law, as cities make decisions regarding zoning and land use, or as development occurs, cities must assess their ability to accommodate new housing on the remaining Priority Housing Sites in their Housing Elements. If either land use decisions or the approval of development on Priority Housing Sites results in a shortfall of capacity to accommodate its remaining housing need for each income category a city must then add adequate sites or otherwise compensate for the capacity shortfall through the "upzoning" of existing Priority Housing Sites.

Prior to the certification of the City's Housing Element by HCD, several residential developers submitted SB 330 (i.e., Housing Crisis Act) preliminary applications to develop new townhome projects on Priority Housing Sites at densities (generally around 20 units/acre for townhomes) lower than required by the Housing Element; there are 58 Priority Housing Sites listed in the Housing Element, 80% of which have minimum residential densities of 50 units/per acre. The SB 330 preliminary application process allows applicants to "lock in" a property's development standards to those in place at the time their applications were submitted. Since these Priority Housing Sites were not yet "upzoned" when the SB 330 applications were submitted developers are able to proceed with their projects and cities are precluded from denying their applications on the basis that they do not comply with the residential density ranges or development standards in place post-Housing Element certification.

Between July 2025 and January 2026, the City approved three projects, all townhome developments, on Priority Housing Sites that used the SB 330 process to lock in lower densities.

In the Housing Element, all of these sites were projected to have far more total units and higher proportions of affordable units than were approved. For instance, the Housing Element forecasted two of the locations, the former Fontana's Restaurant/Pizza Hut and the United Furniture sites, to provide a total of 306 units, 59 of which would be Low income units and 117 Moderate income units. The approved developments, however, will only provide a total of 114 units, none being Low income and 23 Moderate income. The United Furniture site project, approved on December 16, 2025, created a No Net Loss shortfall of one unit in the Moderate income category. The approval of the Dividend Homes townhome project on Stevens Creek Boulevard on January 21, 2026 increased the shortfall by seven Moderate income units, such that the City is currently short eight Moderate income units.

The City currently maintains a slight surplus of 53 units in the Low income category, but this may be affected by the pending modification application for The Rise (former Vallco Mall site), currently under review, since The Rise is included in the Housing Element as a pipeline project (meaning it has been approved but not built) that was anticipated to provide a significant amount of Low income units.

Another factor in the No Net Loss shortfall in affordable units is the City's RHNA calling for 56.5% of the 6th Cycle Housing Element units to be affordable to Very Low, Low and Moderate income households, while the City's below market-rate (BMR) housing requirements are 15% Low income units (this includes Very Low income units as well) for new rental developments, such as apartments, and 20% Moderate income units (this includes Median and Moderate income units) for new owner-occupied developments, such as townhomes and condominiums. This disparity in affordability levels between the RHNA and the City's BMR requirements inevitably results in shortfalls as sites develop, unless projects on Priority Housing sites provide BMR units at percentages greater than required by the City. At present, the City has two applications for 100 percent affordable projects under review that are expected to go to hearings for approval in the next few months. Those projects are the City-owned Mary Avenue site and the County-sponsored Teacher Housing project (also known as the Simeon site) immediately north of the former Vallco Mall site.

In brief, No Net Loss requires that when a city approves a development on a parcel identified in its Housing Element sites inventory with fewer units than shown in its Housing Element, the city must either make findings that the Housing Element's remaining sites have sufficient capacity to accommodate the remaining unmet RHNA by each income level, or identify and make available sufficient sites to accommodate the remaining unmet RHNA for each income category to avoid remaining in a "no net loss" situation. Another option would be to upzone existing Priority Housing Sites to accommodate additional residential capacity, so long as that upzoning can be realistically developed. These actions represent a fundamental alteration to the Housing Element, thus the Housing Element sites inventory must be amended and, pursuant to Government Code section 65585(b), be submitted to the HCD for review to ensure compliance with State Housing Element law.

Sustainability Impact

No sustainability impact.

Fiscal Impact

This project will involve amending the Housing Element and will include consultant costs estimated between \$100,000 to \$300,000 depending on the extent of the environmental review and community outreach processes.

City Work Program (CWP) Item/Description

FY 25-26 - Housing Site Inventory: Options for expanding Housing Element Site inventory to address potential shortfall in zoned capacity

Council Goal:

Housing.

California Environmental Quality Act

Amending the Housing Element will be subject to the California Environmental Quality Act (CEQA), but the level of CEQA review has yet to be determined.

Prepared by: Luke Connolly, Assistant Director of Community Development

Reviewed by: Benjamin Fu, Director of Community Development

Floy Andrews, Interim City Attorney

Approved for Submission by: Tina Kapoor, City Manager

Attachments:

A – HCD Memo, dated October 2, 2019, regarding No Net Loss Law

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



October 2, 2019

MEMORANDUM FOR: Planning Directors and Interested Parties

FROM: Zachary Olmstead, Deputy Director
Division of Housing Policy Development

SUBJECT: **No Net Loss Law**
Government Code Section 65863

The purpose of Government Code Section 65863 (No Net Loss Law), is to ensure development opportunities remain available throughout the planning period to accommodate a jurisdiction's regional housing need allocation (RHNA), especially for lower- and moderate- income households. This memorandum provides guidance on the implementation of Government Code section 65863, including amendments pursuant to Chapter 367, Statutes of 2017 (Senate Bill 166).

Summary of No Net Loss Requirements

- A jurisdiction must maintain adequate sites to accommodate its remaining unmet RHNA by each income category at all times throughout the entire planning period.
- A jurisdiction may not take any action to reduce a parcel's residential density unless it makes findings that the remaining sites identified in its Housing Element sites inventory can accommodate the jurisdiction's remaining unmet RHNA by each income category, or if it identifies additional sites so that there is no net loss of residential unit capacity.
- If a jurisdiction approves a development of a parcel identified in its Housing Element sites inventory with fewer units than shown in the Housing Element, it must either make findings that the Housing Element's remaining sites have sufficient capacity to accommodate the remaining unmet RHNA by each income level, or identify and make available sufficient sites to accommodate the remaining unmet RHNA for each income category.
- A jurisdiction may not disapprove a housing project on the basis that approval of the development would trigger the identification or zoning of additional adequate sites to accommodate the remaining RHNA.

If you have any questions, or would like additional information or technical assistance, please contact the Division of Housing Policy Development at (916) 263-2911.

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Background

Since 1969, California has required that all jurisdictions (cities and counties) adequately plan to meet the housing needs of everyone in the community. California's local governments meet this requirement by adopting Housing Elements as part of their general plan. To demonstrate the availability of land to accommodate future housing development, a Housing Element is required to include an inventory of housing sites, or "adequate sites", with sufficient capacity by income level to accommodate a jurisdiction's RHNA by income category. (Gov. Code, § 65583, subd. (a)(3).)

Example: RHNA By Income Category	
Very Low Income	300 Units
Low Income	260 Units
Moderate Income	250 Units
Above Moderate Income	650 Units
Total RHNA	1,460 Units

To expand the supply of housing, including affordable housing, and to ensure jurisdictions do not take actions to reduce the potential capacity for new development, the Legislature adopted the No Net Loss Law in 2002. The No Net Loss Law ensures that a jurisdiction maintains a sufficient supply of adequate sites in the Housing Element sites inventory throughout the RHNA planning period. This law was amended by Chapter 367, Statutes of 2017 (Senate Bill 166), which requires sufficient adequate sites to be available at all times to meet a jurisdiction's remaining unmet housing needs for each income category. To comply with the No Net Loss Law, as jurisdictions make decisions regarding zoning and land use, or development occurs, jurisdictions must assess their ability to accommodate new housing on the remaining sites in their Housing Element site inventories. A jurisdiction must add adequate sites if land use decisions or development results in a shortfall of sufficient sites to accommodate its remaining housing need for each income category.

What is an adequate site?

Pursuant to Government Code section 65583.2, an adequate site must be available and suitable to accommodate development. Factors include:

- Have infrastructure available or planned to support a housing development.
- Be available to be developed in the planning period. For non-vacant sites, this means that the existing use is not an impediment to additional residential development.
- Be appropriately sized (larger than half an acre and smaller than 10 acres) to accommodate lower income housing.
- For sites accommodating lower income households, the sites must have appropriate zoning as demonstrated by analysis, or by meeting prescribed densities.
- Identify the number of units (capacity) that can be realistically accommodated on the site.

For more information, visit the Department's [Housing Element Building Block Webpage](#).

No Net Loss Law and Charter Cities

Pursuant to Chapter 856, Statutes of 2018 (Senate Bill 1333), the No Net Loss Law applies to all jurisdictions, including charter cities. This requirement was effective on January 1, 2019, and applies to the current and subsequent Housing Element planning periods.

Responsibilities and Requirements Under No Net Loss Law

No Net Loss Law can be divided into three statutory areas of responsibility for jurisdictions to consider when making land-use decisions related to sites and capacity identified in the Housing Element to accommodate the RHNA:

- Maintaining Sites (Government Code section 65863(a))
- Jurisdiction Actions Relating to Zoning (Government Code section 65863(b)(1))
- Approval of Development at a Lower Density (Government Code section 65863(b)(2))

Maintaining Sites

A jurisdiction must ensure their Housing Element sites inventory continues to have capacity at all times to accommodate the RHNA by income group throughout the planning period. This requires a careful accounting of development on the sites identified in the Housing Element and residential projects throughout the jurisdiction. Action by the jurisdiction to modify development standards in a way that would result in a lower density, limit or stop development on sites identified in the inventory, exchange sites in the inventory, or downzone sites would trigger No Net Loss unless the jurisdiction can make the required findings or identify alternative sites.

If, at any time during the planning period, the jurisdiction finds that there is a shortfall of sites to accommodate its remaining RHNA, the jurisdiction must take immediate action to correct the shortfall by amending its Housing Element sites inventory to either include sites previously unidentified with capacity to accommodate the shortfall, or sites that have been rezoned to correct for the shortfall. Failure to do so constitutes a violation of the No Net Loss law. Please note, Housing Element law requires the element to identify sufficient adequate sites to accommodate the RHNA for all income levels. However, many jurisdictions choose to include sites in their Housing Element inventory above and beyond what is required to accommodate RHNA, including sites that are not considered suitable to accommodate RHNA for lower-income households (e.g., sites less than one-half acre or larger than 10 acres). When making findings that the Housing Element continues to accommodate the remaining RHNA, jurisdictions should only consider capacity of sites in the inventory that was determined adequate. Jurisdictions should not consider inadequate or unsuitable sites as adequate or available to accommodate RHNA for the purposes of No Net Loss Law.

The lack of sites to accommodate the jurisdiction's RHNA represents a fundamental alteration to the jurisdiction's ability to meet Housing Element Law. Therefore, the amended inventory must (1) demonstrate sites to address the shortfall meet the adequate site requirements of Housing Element Law, pursuant to Government Code section 65585(b), and (2) be submitted to the California Department of Housing and Community Development (Department) for review to ensure compliance with state Housing Element Law. (Cal. Gov't Code §65580 et seq.) (Housing Element Law).

Helpful Hints



To ensure that sufficient capacity exists in the Housing Element to accommodate the RHNA throughout the planning period, create a buffer in the Housing Element inventory of at least 15 to 30 percent more capacity than required, especially for capacity to accommodate the lower-income RHNA. Jurisdictions can also create a buffer by projecting capacity less than what is allowed from the maximum density to allow for some reductions in density, or rezoning additional sites above what is needed to accommodate the RHNA.



Jurisdictions should keep an updated accounting of development on the sites in the inventory and throughout the jurisdiction to ascertain the impact that development has on accommodating the remaining RHNA. This can be done in any number of ways, but an example of one methodology can be found in the Resources section below, in addition to a program committing to such an update in the Housing Element.



Decisions to Carefully Consider – Development Limitations

No Net Loss Law explicitly states that at no time may a jurisdiction take an action to permit or cause the sites inventory to be insufficient to meet its remaining RHNA without triggering the statute. The only exception is the 180-day timeframe for replacing capacity from the approval of a development at a lower density that results in a shortfall of sites to accommodate the RHNA (see page 8.) Therefore, a jurisdiction should carefully consider the introduction or adoption of development limitations (e.g., development standard limitations, policies or ordinances that affect the development potential of a site, development moratorium). A jurisdiction should carefully examine the effect of these types of actions on development capacity and consult with their legal counsel prior to approval.

Zoning and Development Standard Modifications – Changes in development standards may affect the potential capacity of a site. For example, an increase in parking requirements, reductions in height limitations or lot coverage, new design requirements, or modifications to set-back requirements, all impact the buildable area of a site and could reduce the housing unit potential. Zoning and development standard modifications should be carefully considered to ensure that they do not impact the potential capacity of a site in a jurisdiction's inventory.

Growth Control Ordinances – If a jurisdiction considers adoption of an ordinance or other measure that limits growth or development potential through unit or population caps, or limits where development can occur through the use of buffers, or by phasing development, it must consider the statewide shortage of housing and the requirements of No Net Loss Law. The adoption of one or more of these types of ordinances could prevent a jurisdiction from accommodating its RHNA either by affecting a site in the inventory, or by limiting development as a whole. Proposed growth limiting ordinances should be prudently drafted so as not to impact the accommodation of the remaining RHNA throughout the planning period. Otherwise, implementation of the ordinance may violate No Net Loss Law.

How do growth control ordinances relate to the RHNA?

Government Code section 65302.8 requires findings be made to ensure that a jurisdiction can continue to fulfill requirements of Housing Element Law, including the accommodation of the RHNA. Findings include a description of the following:

- The jurisdiction's RHNA.
- The specific housing programs and activities being undertaken by the jurisdiction to achieve RHNA objectives.
- How the public health, safety, and welfare would be promoted.
- Fiscal and environmental resources available to the local jurisdiction.

Moratoriums – Pursuant to Government Code section 65858, jurisdictions may adopt a 45-day interim ordinance prohibiting any uses, including housing, that may be in conflict with a contemplated general plan, specific plan, or zoning proposal. This applies to a general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering, studying, or intends to study within a reasonable time. While the ordinance may be extended for other uses, a moratorium on the development of multifamily housing cannot be extended unless specific findings are made. In addition, regardless of its duration, a moratorium that affects sites in the Housing Element inventory may be in conflict with the No Net Loss Law, as the law requires a jurisdiction to maintain capacity at all times to accommodate the RHNA. A jurisdiction should consult counsel prior to enacting a moratorium on housing.

Jurisdiction Actions

Jurisdiction actions include downzoning or other actions taken by a jurisdiction to reduce a parcel's allowable residential density. This can be done through a change in zoning or an imposition of density limitations that preclude that ability to achieve densities assumed in the Housing Element sites inventory. If the parcel to be downzoned is identified in the Housing Element, a jurisdiction must make written findings, supported by substantial evidence, that:

- The reduction is consistent with the jurisdiction's adopted general plan, including the Housing Element. For example, this finding could be made if downzone does not change the land use and zoning designation.
- The remaining sites identified in the Housing Element are adequate to meet the requirements of Section 65583.2 and to accommodate the jurisdiction's remaining share of the RHNA for the planning period. The finding must include a quantification of the remaining unmet need for the jurisdiction's RHNA at each income level and the remaining capacity of sites identified in the Housing Element to accommodate that need by income level.

If a jurisdiction cannot make these findings, it may take action to reduce the residential density of a parcel only if it identifies or rezones additional sufficient adequate sites with an equal or greater residential density in the jurisdiction so that there is sufficient residential unit capacity appropriate to accommodate the RHNA by income level. Actions to identify additional sites or rezone must occur before or concurrently with any action or approval to reduce a parcel's density. Sites identified or rezoned must meet the following criteria:

- Must be considered an adequate site pursuant to the requirements of Government Code section 65583.2.
- If the capacity to be replaced was on a site that was zoned by-right pursuant to Government Code section 65863.2 (h) and (i), then the replacement site must also satisfy those requirements.

As these actions taken by the jurisdiction represent a fundamental alteration to the Housing Element, the Housing Element sites inventory must then be amended and, pursuant to Government Code section 65585(b), be submitted to the Department for review to ensure the compliance with state Housing Element Law, prior to, or concurrently with, any action or approval to reduce a parcel's density.

Helpful Hints



If unsure as to whether new sites identified or rezoned will meet Housing Element adequate sites requirements, contact the Department's Housing Policy Division for a Housing Element reviewer to provide technical guidance.



Rezoned sites may include sites previously identified in the sites inventory that are rezoned to a higher density zoning designation than identified in the sites inventory.



Decisions to Carefully Consider – Changes to Zoning

General Plan Updates – Sometimes land use inconsistencies arise during a general plan update when undertaken separately from the Housing Element. A jurisdiction updating the land use element of the general plan must consider the sites inventory of the Housing Element. If sites identified in the Housing Element site's inventory will be downzoned as part of the general plan update, other sites must be identified or rezoned to accommodate the resulting shortfall of capacity. Under state law, the land use element must be consistent with the Housing Element, and if the land use element does not permit the density in the Housing Element, the Housing Element or land use element must be amended to achieve consistency.

Approval of Development at a Lower Density

A jurisdiction must make written findings or identify additional site capacity if a development is allowed with a lower density than what was assumed in the sites inventory of the Housing Element. A lower residential density sometimes results from a jurisdiction either approving a development with residential units less than what was assumed for the site or affordable to a different income category than the site was assumed to accommodate. Lower residential density could also result from another use, such as commercial being approved on a site identified in the inventory for housing regardless of what the zoning allows.

What constitutes a “lower-density”?

For jurisdictions with an adopted Housing Element found in compliance with Housing Element Law:

- Fewer units will be developed on the site than projected in the sites inventory (capacity) or program of the Housing Element.

For jurisdictions out of compliance with Housing Element Law:

- A density that is lower than 80 percent of the maximum allowable residential density for that parcel, or 80 percent of the maximum density required by Government Code section 65583.2(c)(3), whichever is greater. For more information on default densities, please see the [Department’s Building Block website](#).

At the time of approval, the following written findings must be made, and supported by substantial evidence in the record:

- Remaining sites identified in the Housing Element are adequate to meet the jurisdiction’s remaining RHNA for the planning period by income category.
- The findings should include a quantification of the remaining unmet need for the jurisdiction’s RHNA at each income level and the remaining capacity of sites identified in the Housing Element, to accommodate that need by income level.

If the approval of a development at a lower residential density results in the remaining sites capacity becoming inadequate to accommodate the RHNA by income category, a jurisdiction has up to 180 days from the approval to identify, or rezone, “sufficient additional, adequate, and available sites” to accommodate the remaining RHNA for each income category. Sites identified or rezoned must meet the following criteria:

- Must be considered an adequate site pursuant to the requirements of Government Code section 65583.2.
- If the capacity to be replaced was on a site that was zoned by-right pursuant to Government Code section 65863.2 (h) and (i), then the replacement site must also satisfy those requirements.

A jurisdiction must report in the jurisdiction’s Annual Progress Report (APR) any sites that have been identified or rezoned to accommodate the resulting shortfall due to the approval of a development at a lower density. APRs are required to be sent to the Department by all jurisdictions by April 1, pursuant to Government Code section 65400. For more information on completing this section of the APR, see the [Department Webpage](#) and select “Annual Progress Reports.”



Who makes the findings?

The body that “takes action or approves” the jurisdiction action to reduce a parcel’s density or approve a development at a lower density would make the findings. For example, if a zoning administrator approves a development at a lower density, as part of the approval, the administrator would include the appropriate findings. For instance, if the development approval is ministerial under the Streamlined Ministerial Approval Process (SB 35, 2017), the findings should be included as part of the plan review and approval. If the City Council is approving a zone change, it must include the findings in the resolution adopting the zone change.

Helpful Hints



The jurisdiction has only 180 days to complete any rezoning needed to accommodate a shortfall of adequate sites to accommodate the RHNA due to the approval of a development at a lower density. To ensure the rezones can be completed on time, it is recommended that the jurisdiction begin the rezone process early in the development application approval process.



Jurisdictions may post the sites inventory on their website with the capacity estimates from the Housing Element for developers to reference when considering projects on sites identified in the Housing Element.



Decisions to Carefully Consider – Development Approval

Jurisdictions out of compliance with state Housing Element Law - No Net Loss Law provisions related to approving a lower density development applies to all jurisdictions regardless of Housing Element compliance status. A jurisdiction that has not adopted a Housing Element within 90 days of the due date, or has a Housing Element out of compliance, must still comply with No Net Loss requirements, even though they may not have a Housing Element Law compliant sites inventory. If the jurisdiction does not have a current sites inventory to compare the project unit count, the determination of lower density would be required for all new housing development.

Denying an application - A jurisdiction may not deny a housing development application on the basis that approval of the development would trigger the identification, or zoning, of additional adequate sites to accommodate the remaining RHNA.

However, since the term “housing development” is used in the statute, it does not prevent a jurisdiction from denying a non-residential development on an identified site if it would trigger the identification, or rezoning, of additional adequate sites.

Requests for developer assistance with complying with No Net Loss Law – While the jurisdiction is solely responsible for compliance with No Net Loss Law, under limited circumstances the statute does allow a jurisdiction the option to require the applicant to assist the jurisdiction in meeting these provisions. Specifically, requests can be made if an applicant’s initial development application requests a residential density that results in the remaining sites in the sites inventory being insufficient to accommodate it remaining RHNA. A jurisdiction cannot require developer assistance if the subsequent approval process results in a reduction of units.

Types of assistance required could include help with the identification of additional sites for potential rezones or community outreach. However, requests should be balanced with the potential impact on the overall viability of the project. Overly burdensome requirements may make a development project financially infeasible and could, in effect, constitute a denial of the project or may violate the Housing Accountability Act (Government Code section 65589.5.)

California Environment Quality Act (CEQA)

The act of identifying or making available additional adequate sites, in and of itself, to comply with the statutory requirements to accommodate the remaining unmet RHNA, does not trigger a CEQA review. However, if making available additional adequate sites requires an increase in density, a rezone, or other actions that constitute a “project” under CEQA, a CEQA analysis would be required.

When approving a site at a lower residential density, the possibility of a CEQA analysis should be considered since the CEQA review must be completed within the 180-day timeline to identify and rezone additional, adequate sites to accommodate the remaining RHNA by income category. The failure to complete a timely CEQA analysis would render the additional sites inadequate to accommodate the remaining unmet RHNA. This would be a violation of No Net Loss Law and could also render the Housing Element out of compliance with state Housing Element Law.

Failure to Comply with No Net Loss Law

In addition to violating of the No Net Loss Law, the failure to ensure that there are sufficient adequate sites to accommodate the unmet RHNA by income category throughout the entire planning period is also a violation of the Housing Element Law. This is because the Housing Element will also fail to identify adequate sites to accommodate the RHNA by income category. As a result, pursuant to Government Code section 65585 (i) and (j), the Department may revoke a jurisdiction’s Housing Element compliance and/or refer the violation to the Attorney General. In addition, a third party may file an action to challenge the jurisdiction in court.

Resources

Identifying Your Remaining RHNA and Maintaining Capacity

A jurisdiction should implement an ongoing, project-by-project evaluation of each approved residential development to ensure that sufficient adequate site capacity is available to accommodate the remaining RHNA by income category throughout the planning period. This evaluation could also be used to complete the APR required to be sent to the Department by April 1 of each year.

The evaluation procedure could utilize a spreadsheet or tool, such as the No Net Loss Capacity Calculation Tool below, to subtract the number of residential units in each approved development from the RHNA to determine the remaining unmet RHNA by income category. The total number of approved units by income category could then be subtracted from the Housing Element's sites inventory site capacity by income category to determine the remaining site capacity.

No Net Loss Capacity Calculation Tool Example

Step 1: Determine remaining RHNA

- Identify the reported RHNA from permitted projects as reported in the Housing Element Annual Progress Report (Table B of the Annual Progress Report). If the jurisdiction has not yet completed those reports for the planning period, please go to the [Departments Webpage](#) and select "Annual Progress Reports."
- Identify any projects from the planning period that have received their approvals/entitlements and are anticipated to pull their building permits.
- Identify the number of units permitted or that have been approved/entitled in the current reporting year (including accessory dwelling units and other alternatives under Government Code section 65583.1.)
- Calculate the remaining RHNA to date.
- If determining potential No Net Loss capacity of a proposed development, subtract the units from the proposed development to get the remaining RHNA resulting from the proposed project.

Example:

City A has an application for a market rate project for 75 high-end multifamily apartments. This project is being proposed on a site identified in the inventory as having the ability to accommodate a portion of its very low- and low-income RHNA.

Table A: Remaining RHNA

	Very Low-Income	Low-Income	Moderate-Income	Above Moderate-Income
RHNA	300	260	250	650
Year	Reported Progress			
2014	-5	-15	-2	-50
2015			-5	-100
2016	-25	-25	-20	-60
2017				-250
2018	-15	-60	-25	-75
Project Name/APN	Projects approved/entitled anticipated to pull permits			
Siempre Verde 001-256-2154, - 57				-4
Project Name/APN	Current Year Progress			
Hightop Condos 001-256-5574		-7		-75
Sunflower Apt 001-256-4475	-25	-50		
	Remaining RHNA To Date			
	230	103	198	36
Project Name/APN	Proposed Project RHNA			
Magnolia Luxury Apt 001-256-4472				-75
	Remaining RHNA with Proposed Development			
	230	103	198	0

Step 2: Determine remaining capacity from the Housing Element sites inventory*

- Identify the total site capacity from the Housing Element by income category.
- List the capacity estimated in the Housing Element for an accessory dwelling unit (ADU), or other alternative site capacity methodology.
- List the capacity by income category as identified in the Housing Element inventory for each site identified in the inventory that has an approved/entitled or permitted project in the planning period (identified in the previous table).

Some projects will be developed on sites not identified in the Housing Element. These sites should not be included in the table below, as their capacity was not anticipated to accommodate a portion of the RHNA. They are included in the previous calculation to determine the remaining RHNA. As a result, the additional capacity from these projects can help mitigate loss in capacity from other projects, depending on their affordability.

- For each site rezoned that was identified in the Housing Element (but does not include a project per above) identify the adjusted capacity by income as result of the zone change.
- Calculate the remaining available capacity.
- Subtract the capacity identified in the inventory for the proposed development or rezone to calculate the remaining capacity in the sites inventory by income level.

Example Continued:

Table B: Remaining Capacity*

	Very Low-Income	Low-Income	Moderate-Income	Above Moderate-Income
Capacity from sites	325	370	260	800
Capacity from ADU or other alternative site capacity methodology	15	10		
Project Name/APN	Sites Inventory RHNA from Approved/Entitled or Permitted Project			
001-256-4758- 868				-160
001-256-5631	-25	-25		
001-256-5270 - 330				-60
Dell Webb Master Plan				-250
002-40526-7785	-50	-75		
002 -526 -7788			-15	
001-256-5575	-25	-155		
APN	Capacity changes due to rezone			
003-578-7584 (downzone to open space)			-30	
	Remaining Sites Inventory Capacity to Date			
	240	125	215	330
APN	Sites Inventory Capacity from Development or Rezone			
Magnolia Luxury Apt 001-256-4472		-75		
	Remaining Sites Inventory Capacity with Proposed Development or Rezone			
	240	50	215	330

* Note: For most 5th cycle Housing Elements, jurisdictions will need to make assumptions on capacity by income category based on density and the analysis provided in the Housing Element, since the 5th cycle sites are not required to be identified by income category. However, for the 6th and subsequent cycles, sites will be required to identify capacity by income level. Some jurisdictions have chosen to combine low and very low- income RHNA for purposes of calculating site capacity, which should be reflected in supporting charts.

Step 3: Compare remaining RHNA with remaining sites inventory to determine if additional capacity will be needed.

- Input the remaining RHNA from Table A. (If this calculation is due to a proposed development, enter the remaining RHNA from the line “Remaining RHNA with Proposed Development”.)
- Input the remaining sites inventory capacity with a proposed development or rezone.
- Calculate the No Net Loss potential by subtracting the available capacity from the remaining RHNA. If the result is negative, there is a net loss in capacity, and the difference must be accommodated pursuant to No Net Loss Law.

Example:

Approval of the Magnolia Luxury Apartments would result in a net capacity loss of 53 units. City A would have to rezone or identify additional capacity for at least 53 low-income units.

Table C: No Net Loss Calculation

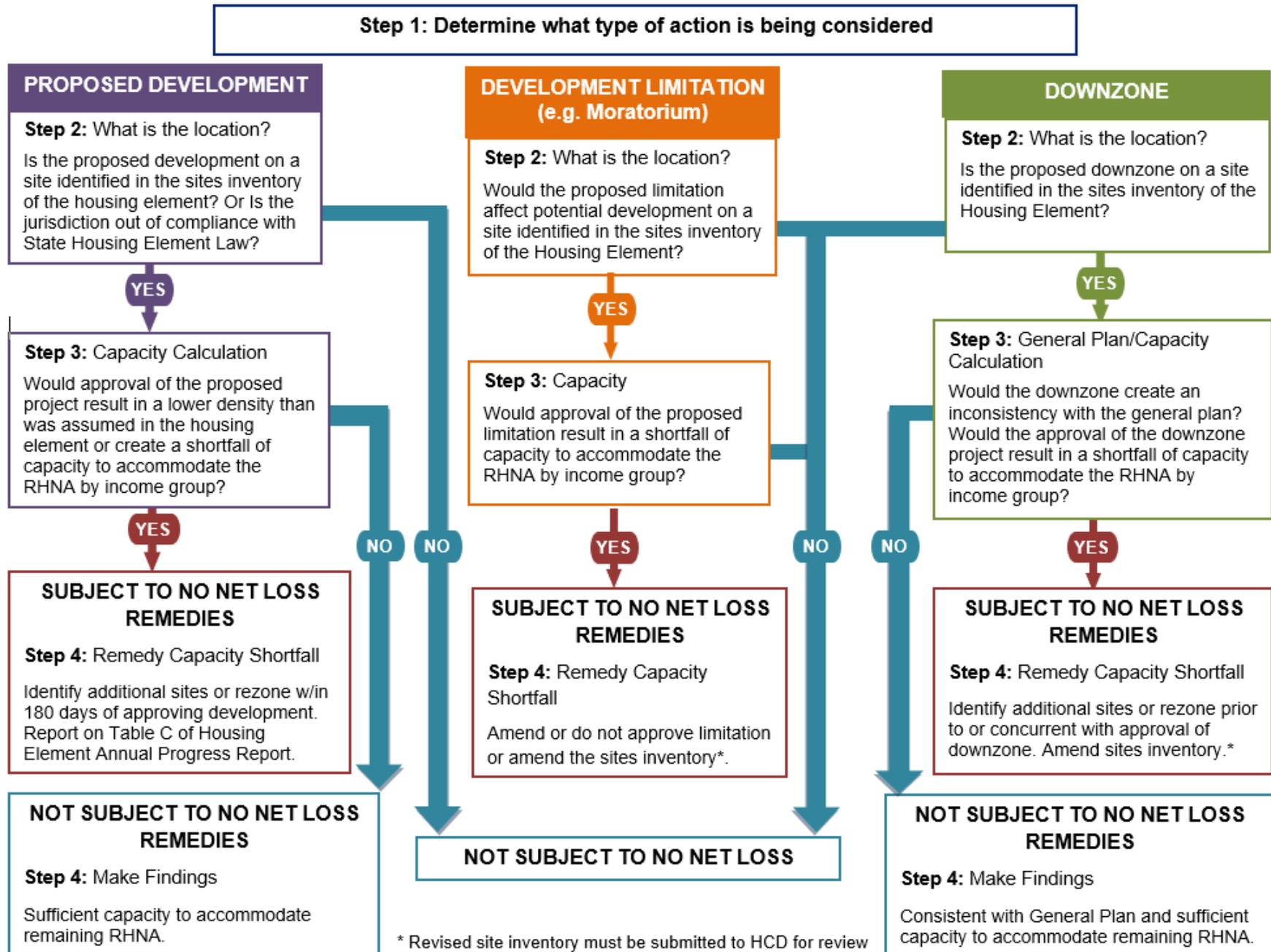
	Very Low-Income	Low-Income	Moderate-Income	Above Moderate-Income
Remaining Capacity (Table B)	240	50	215	330
Remaining RHNA (Table A)	230	103	198	0
No Net Loss Calculation	+10	-53	+17	+330

Please note: There may be many unique circumstances that do not fall neatly into the above example. This calculation tool is meant to be a framework to help jurisdictions think about the best way to identify potential No Net Loss situations.

No Net Loss Law Decision Flow Chart

The following flow chart is intended to help visualize how to determine if a project or a decision would be subject to No Net Loss Law and its remedies. Jurisdictions should consult with legal counsel prior to final determination on whether a project or decision triggers No Net Loss requirements.

No Net Loss Law Decision Flow Chart



Sample Housing Element Program

Sample Program: No Net Loss of Residential Capacity to Accommodate the RHNA by Income Category (Government Code section 65863)

To ensure sufficient residential capacity is maintained to accommodate the RHNA for each income category, within one year of adoption of the Housing Element, develop and implement a formal, ongoing (project-by-project) evaluation procedure pursuant to Government Code section 65863. The evaluation procedure will track the number of extremely low-, very low-, low-, moderate-, and above moderate-income units constructed to calculate the remaining unmet RHNA. The evaluation procedure will also track the number of units built on the identified sites to determine the remaining site capacity by income category and will be updated continuously as developments are approved.

No action can be taken to reduce the density or capacity of a site (e.g., downzone, moratorium), unless other additional adequate sites are identified prior to reducing site density or capacity.

If a development is being approved on an identified site at a lower density than what was assumed for that site identified in the Housing Element, additional adequate sites must be made available within 180 days of approving the development. A program to identify the replacement sites, and take the necessary actions to make the site(s) available and ensure they are adequate sites, will be adopted prior to, or at the time of, the approval of the development.

Time Frame: Within six months of adoption of the Housing Element, develop and implement a formal ongoing evaluation procedure pursuant to Government Code section 65863.

Subsequent to adopting an evaluation procedure, monitor rezones and development of residential units, and update Housing Element sites inventory. Housing Element sites inventory is posted on the Planning Department's website and will be updated at least once a year.

At least annually, update the sites inventory in conjunction with Housing Element Annual Reports pursuant to Government Code section 65400, as necessary.

Responsibility: Community Development Department

Funding Source: General Fund

No Net Loss Law Statute (Government Code Section 65863)

65863.

(a) Each city, county, or city and county shall ensure that its housing element inventory described in paragraph (3) of subdivision (a) of Section 65583 or its housing element program to make sites available pursuant to paragraph (1) of subdivision (c) of Section 65583 can accommodate, at all times throughout the planning period, its remaining unmet share of the regional housing need allocated pursuant to Section 65584, except as provided in paragraph (2) of subdivision (c). At no time, except as provided in paragraph (2) of subdivision (c), shall a city, county, or city and county by administrative, quasi-judicial, legislative, or other action permit or cause its inventory of sites identified in the housing element to be insufficient to meet its remaining unmet share of the regional housing need for lower and moderate-income households.

(b) (1) No city, county, or city and county shall, by administrative, quasi-judicial, legislative, or other action, reduce, or require or permit the reduction of, the residential density for any parcel to, or allow development of any parcel at, a lower residential density, as defined in paragraphs (1) and (2) of subdivision (g), unless the city, county, or city and county makes written findings supported by substantial evidence of both of the following:

(A) The reduction is consistent with the adopted general plan, including the housing element.

(B) The remaining sites identified in the housing element are adequate to meet the requirements of Section 65583.2 and to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584. The finding shall include a quantification of the remaining unmet need for the jurisdiction's share of the regional housing need at each income level and the remaining capacity of sites identified in the housing element to accommodate that need by income level.

(2) If a city, county, or city and county, by administrative, quasi-judicial, legislative, or other action, allows development of any parcel with fewer units by income category than identified in the jurisdiction's housing element for that parcel, the city, county, or city and county shall make a written finding supported by substantial evidence as to whether or not remaining sites identified in the housing element are adequate to meet the requirements of Section 65583.2 and to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584. The finding shall include a quantification of the remaining unmet need for the jurisdiction's share of the regional housing need at each income level and the remaining capacity of sites identified in the housing element to accommodate that need by income level.

(c) (1) If a reduction in residential density for any parcel would result in the remaining sites in the housing element not being adequate to meet the requirements of Section 65583.2 and to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584, the jurisdiction may reduce the density on that parcel if it identifies sufficient additional, adequate, and available sites with an equal or greater residential density in the jurisdiction so that there is no net loss of residential unit capacity.

(2) If the approval of a development project results in fewer units by income category than identified in the jurisdiction's housing element for that parcel and the jurisdiction does not find that the remaining sites in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need by income level, the jurisdiction shall within 180 days identify and make available additional adequate sites to accommodate the jurisdiction's share of the regional housing need by income level. Nothing in this section shall authorize a city, county, or city and county to disapprove a housing development project on the basis that approval of the housing project would require compliance with this paragraph.

(d) The requirements of this section shall be in addition to any other law that may restrict or limit the reduction of residential density.

(e) This section requires that a city, county, or city and county be solely responsible for compliance with this section, unless a project applicant requests in his or her initial application, as submitted, a density that would result in the remaining sites in the housing element not being adequate to accommodate the jurisdiction's share of the regional housing need pursuant to Section 65584. In that case, the city, county, or city and county may require the project applicant to comply with this section. The submission of an application for purposes of this subdivision does not depend on the application being deemed complete or being accepted by the city, county, or city and county.

(f) This section shall not be construed to apply to parcels that, prior to January 1, 2003, were either (1) subject to a development agreement, or (2) parcels for which an application for a subdivision map had been submitted.

(g) (1) If the local jurisdiction has adopted a housing element for the current planning period that is in substantial compliance with Article 10.6 (commencing with Section 65580) of Chapter 3, for purposes of this section, "lower residential density" means the following:

(A) For sites on which the zoning designation permits residential use and that are identified in the local jurisdiction's housing element inventory described in paragraph (3) of subdivision (a) of Section 65583, fewer units on the site than were projected by the jurisdiction to be accommodated on the site pursuant to subdivision (c) of Section 65583.2.

(B) For sites that have been or will be rezoned pursuant to the local jurisdiction's housing element program described in paragraph (1) of subdivision (c) of Section 65583, fewer units for the site than were projected to be developed on the site in the housing element program.

(2) (A) If the local jurisdiction has not adopted a housing element for the current planning period within 90 days of the deadline established by Section 65588 or the adopted housing element is not in substantial compliance with Article 10.6 (commencing with Section 65580) of Chapter 3 within 180 days of the deadline established by Section 65588, "lower residential density" means any of the following:

(i) For residentially zoned sites, a density that is lower than 80 percent of the maximum allowable residential density for that parcel or 80 percent of the maximum density required by paragraph (3) of subdivision (c) of Section 65583.2, whichever is greater.

(ii) For sites on which residential and nonresidential uses are permitted, a use that would result in the development of fewer than 80 percent of the number of residential units that would be allowed under the maximum residential density for the site parcel or 80 percent of the maximum density required by paragraph (3) of subdivision (c) of Section 65583.2, whichever is greater.

(B) If the council of governments fails to complete a final housing need allocation pursuant to the deadlines established by Section 65584.05, then for purposes of this paragraph, the deadline pursuant to Section 65588 shall be extended by a time period equal to the number of days of delay incurred by the council of governments in completing the final housing need allocation.

(h) An action that obligates a jurisdiction to identify and make available additional adequate sites for residential development pursuant to this section creates no obligation under the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) to identify, analyze, or mitigate the environmental impacts of that subsequent action to identify and make available additional adequate sites as a reasonably foreseeable consequence of that action. Nothing in this subdivision shall be construed as a determination as to whether or not the subsequent action by a city, county, or city and county to identify and make available additional

adequate sites is a “project” for purposes of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(i) Notwithstanding Section 65803, this section shall also apply to a charter city.