

Who Decides Whether California Misjudged the Bay Area’s Housing Needs? (And Why It Matters)

Christopher S. Elmendorf
Martin Luther King, Jr. Professor of Law
UC Davis School of Law

Housing advocates YIMBY Law and YIMBY Action sued the state of California today, arguing the Department of Housing and Community Development (HCD) badly misjudged the housing need of the San Francisco Bay Area.¹ The suit raises important questions at the intersection of transportation, climate, and housing policy. This comment argues that while the activists’ complaint has merit, the dispute should be resolved by the Legislature, not the courts.

Here’s what’s at stake. Every eight years, California cities must adopt a plan, called a housing element, for accommodating their share of regional housing need, including the need for multifamily housing.² Regional housing need determinations (RHNDs) are the state’s principal lever for making cities zone for dense, relatively affordable housing.³

Senate Bill 828, enacted in 2018, substantially revised and improved the process by which HCD determines regional need.⁴ Previously, the state had relied almost exclusively on forecasted household growth.⁵ The obvious problem with this approach is that household-growth trends are the byproduct of land-use policy. Restrictive zoning retards population growth. And as housing prices rise, young adults shack up with roommates or move back with their parents rather than forming new households. Using the forecasted number of households to judge the adequacy of a region’s land-use plans gets things exactly backwards.

SB 828 tells HCD to top off the baseline, household-forecast RHND with adjustments for cost-burdened and overcrowded households. These adjustments, along with an updated adjustment for vacancy rates, are supposed to better align the supply of housing in California with “healthy housing markets” in other regions of the nation.

¹ Benjamin Schneider, *YIMBYs Sue for Even More Housing Via RHNA*, SF WEEKLY, Feb. 4, 2021, <https://www.sfweekly.com/news/yimbys-sue-for-even-more-housing-via-rhna/>; Yes In My Backyard et al. v. Cal. Dep’t of Hous. & Cmty. Dev., Petition for Writ of Mandate (CCP § 1085), Complaint for Declaratory Relief (CCP § 1060), Case No. ___, <https://drive.google.com/file/d/1a0OePSwb93UaccuG0ZguNhJn1YC4JzOf/view>.

² See generally Christopher S. Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California’s Housing Framework*, 46 ECOLOGY L.Q. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3500139.

³ This is so because about 40% of the regional housing need is for low-income housing (as defined by statute) and there is a statutory presumption about suitable zoned density for low-income housing which creates a strong incentive for cities to zone at that density. See Elmendorf et al., *supra* note 2, manuscript at 19-20.

⁴ S.B. 828, 2017-2018 Reg. Sess. (Cal. 2018).

⁵ The problem and the reform described in this paragraph and the next is explained in more depth, with citations, in Elmendorf et al., *supra* note 2, manuscript at 11-16, 30-32.

Taking its new charge to heart, HCD delivered housing targets for the Bay Area and Southern California that are 2-3 times larger than what these regions had to plan for in previous cycles.⁶

So why are the housing activists suing instead of celebrating? Because HCD appears to have overlooked an older adjustment factor, one which the Legislature added with a [landmark climate change bill](#) back in 2008: jobs-housing imbalance.⁷

Escalating home prices have [displaced much of the Bay Area's working class](#) to the Central Valley.⁸ As a result, the Bay Area now has the dubious distinction of being a national leader in ["supercommuters"](#)—people for whom a one-way trip from home to workplace takes more than 90 minutes.⁹ Although there is no settled methodology for adjusting a region's housing target on account of such imbalances, I and colleagues have explored a couple of different approaches, which suggest that making the jobs-housing adjustment would probably increase the Bay Area's RHND by roughly 25%.¹⁰

YIMBY Law's legal argument looks iron-tight at first glance. The statute says that HCD "shall make determinations in writing" on each of the adjustment factors, Gov't Code 65584.01(b)(2), and as best I can tell, no jobs-housing determination was ever made. An agency's failure to make an assessment the law requires is normally reversible error.¹¹

But this is not a normal case.

There is a strong argument from the structure of the statute that the courts [have no jurisdiction to review](#) HCD's regional need determinations. The RHND is the linchpin of a very complicated, multi-stage process that unfolds on a tight timeline prescribed by statute. See figure 1.

⁶ The Bay Area's RHND went from 187,990 units (5th cycle, see https://abag.ca.gov/sites/default/files/hcd_rhnd_letter_2.pdf) to 441,175 (6th cycle, see [https://www.hcd.ca.gov/community-development/housing-element/docs/abagrhna-final060920\(r\).pdf](https://www.hcd.ca.gov/community-development/housing-element/docs/abagrhna-final060920(r).pdf)); the RHND for the Southern California Association of Governments went from 412,137 units (5th cycle, see <https://scag.ca.gov/sites/main/files/file-attachments/scagrhna2012.pdf?1604178517>) to 1,341,827 (6th cycle, see https://www.hcd.ca.gov/community-development/housing-element/docs/southern_california_association_of_governments_regional_housing_need_determination_for_the_sixth_housing_element_update_1.pdf).

⁷ S.B. 375, 2017-2018 Reg. Sess. (Cal. 2018).

⁸ ISSI ROMEM & ELIZABETH KNEEBONE, U.C. BERKELEY TERNER CTR. FOR HOUS. INNOVATION, DISPARITY IN DEPARTURE: WHO LEAVES THE BAY AREA AND WHERE DO THEY GO? (Oct. 2018), <https://turnercenter.berkeley.edu/disparity-in-departure>.

⁹ See Igor Popov & Chris Salviati, Traffic, Trains, or Teleconferences: The Changing American Commute (Mar. 14, 2019), <https://www.apartmentlist.com/research/traffic-trains-or-teleconference-the-changing-american-commute>.

¹⁰ See Christopher S. Elmendorf et al., Regional Housing Need in California: The San Francisco Bay Area 10-14 (UCLA Lewis Center for Regional Policy Studies, July 2020), <https://www.lewis.ucla.edu/research/regional-housing-need-san-francisco-bay-area/>. We calculated the adjustment in two ways; one is based on supercommuters, the other on net-inflow commuters. The midpoint of the two estimates is 111,607, or 25.3% of the state's official determination of Bay Area housing need (441,176).

¹¹ See, e.g., *Ass'n of Irrigated Residents v. San Joaquin Valley Unified Air Pollution Control Dist.*, 168 Cal. App. 4th 535, 543-47 (Cal. Ct. App. 2008) (invalidating rule because district did not perform an assessment of a factor the statute required it to assess).

Consider what must get done. “At least 26 months” before the housing elements of cities in a region come due, HCD “shall meet and consult” with the region’s council of governments “regarding the assumptions and methodology to be used to determine the region’s housing needs.”¹² After reviewing the council’s data and arguments, “the department shall make determinations in writing” regarding methodology.¹³ Next, HCD applies the methodology and cranks out the RHND, which shall achieve “a feasible balance between jobs and housing”¹⁴

The council of governments then has 30 days to raise objections, and HCD is given 45 days to resolve objections.¹⁵ The statute says nothing about appeals by any other person or entity, or appeals to any authority other than HCD.

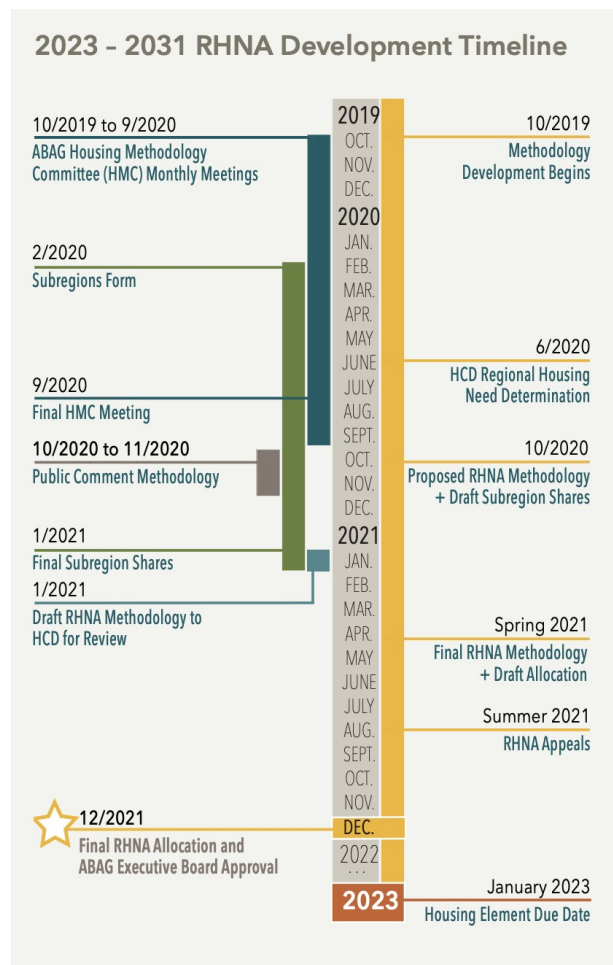


Figure 1. Housing needs and housing element timeline for the Association of Bay Area Governments. Source: <https://abag.ca.gov/our-work/housing/rhna-regional-housing-needs-allocation>.

¹² Cal. Gov’t Code 65584.01(b)(1).

¹³ Cal. Gov’t Code 65584.01(b)(2).

¹⁴ Cal. Gov’t Code 65584.01(b)(2).

¹⁵ Cal. Gov’t Code 65584.01(c).

One way or another, the RHND must be finalized quickly, because “at least 18 months prior” to the due date for housing elements, the region’s council of governments must distribute a “draft allocation” of the RHND to cities and counties.¹⁶ (The localities’ shares of the RHND are called their “RHNA.”¹⁷) A rapid-fire sequence then unfolds: cities may appeal the draft allocation to the council of governments, the council holds public hearings on appeals, the council adopts a final allocation following additional hearings, and HCD reviews the final allocation for consistency with the RHND, revising it if necessary.¹⁸ Each step has tight timeframe for completion, usually 45 or 60 days.¹⁹

The timeframes must be tight because cities need to know their RHNA well in advance of the date their housing element comes due. Cities that lack sufficient capacity under current zoning to accommodate their RHNA must include a site-specific rezoning plan in their housing element.²⁰ Using an HCD-issued spreadsheet, they must identify which parcels will be rezoned and the densities that will be allowed following rezoning.²¹

A state law called the Housing Accountability Act requires cities to approve projects on such sites if the project’s density is “consistent with the density specified in the housing element,” even if the project is “inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation.”²²

Because a city’s housing element controls its development in this and other ways, a city may not adopt a housing element without completing environmental reviews required by the California Environmental Quality Act (CEQA). This takes time. Yet if it takes too much time—such that the city fails to adopt a housing element on schedule—the city is likely to be found out of compliance. And a city without a compliant housing element apparently [forfeits its authority](#) to use its zoning code or general plan as the basis for denying *any* project with at least 20% low-income or 100% moderate-income units.²³ Hence the need for speed.

¹⁶ Cal. Gov’t Code 65584.05(a).

¹⁷ See Dep’t of Hous. & Cmty. Dev., Regional Housing Needs Allocation and Housing Elements, <https://www.hcd.ca.gov/community-development/housing-element/index.shtml> (last visited Feb. 3, 2021).

¹⁸ Cal. Gov’t Code 65584.05(b)-(g).

¹⁹ Cal. Gov’t Code 65584.05(b)-(g).

²⁰ See Dep’t of Hous. & Cmty. Dev., Housing Element Site Inventory Guidebook, Government Code Section 65583.2, June 10, 2020, https://www.hcd.ca.gov/community-development/housing-element/docs/sites_inventory_memo_final06102020.pdf (“Sites Inventory Guidebook”).

²¹ Dep’t of Hous. & Cmty. Dev., Electronic Housing Element Site Inventory Form Instructions (Dec. 10, 2020), https://www.hcd.ca.gov/community-development/housing-element/docs/site_inventory_instructions.pdf.

²² Cal. Gov’t Code 65589.5(d)(5)(A). To qualify, 20% of the project’s units must be affordable to low-income households, or 100% to moderate-income households. See Dep’t of Hous & Cmty. Dev., Housing Accountability Act Technical Assistance Advisory (Government Code Section 65589.5) 14-15 (Sept. 15, 2020), <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf>.

²³ See Cal. Gov’t Code 65589.5(d) (enumerating the permissible grounds for denying a 20% low-income or 100% moderate income project, the last of which allows the city to deny the project on the basis of the city’s zoning code and general plan but only if the city is in substantial compliance with the housing element law.) For further explanation, see Christopher S. Elmendorf et al., “I Would, If Only I Could”: How Cities Can Use California’s Housing Element Law to Overcome Neighborhood Resistance to New Housing 8-12, 16-18 (UCLA Lewis Center, Dec. 2020).

The Legislature recognized the need for speed when it exempted regional housing need determinations and allocations from CEQA.²⁴

If every city, YIMBY, or NIMBY dissatisfied with an RHND or RHNA could litigate the question in court, it's doubtful that any city in the housing-constrained and disputatious regions of our state would be able to adopt a housing element on time. HCD and the courts would then face enormous pressure to ad lib waivers of the statutory deadlines—waivers which the statute does not authorize.

A decade ago, the Court of Appeal wrestled with these issues in a case brought by the City of Irvine.²⁵ Irvine challenged not the RHND, but the very large share of the target that had been allocated to the city. The Court of Appeal concluded that Legislature must have intended to preclude judicial review of RHNAs, because the “the length and intricacy of the process created to determine a municipality's RHNA allocation” did not leave space for plodding, deliberative judicial proceedings.²⁶

The same goes for challenges to the regional determination of need (RHND). However, it's not clear that *City of Irvine* will control YIMBY Law's case. Generally speaking, judicial review is available by default in California unless the Legislature has “clearly” withdrawn it,²⁷ and the housing statutes are silent on judicial review of the RHND. Moreover, the decision in *City of Irvine* seems to rest in part on the court's belief that large RHNAs have no material consequences for cities, owing to provision of state law that allows cities to set less ambitious “quantified objectives.”²⁸ That line of thinking, shaky at the time, has been totally undermined by developments in the years since. To give just one example, Senate Bill 35 (2017) tied a city's obligation to permit certain projects ministerially to the city's progress toward its RHNA, not some lesser quantified objective.²⁹

So what's to be done? YIMBY Law's suit necessitates a one-time legislative fix. While the job-housing adjustment is pretty inconsequential for most California regions (because the region encompasses the “commute sheds” of its major cities), this factor cannot be ignored for the Bay Area. Making the adjustment would also bring the Bay Area's RHND close to parity with Southern California's. (Whereas Southern California's RHND for the upcoming cycle is more than three times larger than its last one, the Bay Area's new target is only about 2.3 times as large, notwithstanding the Bay Area's higher housing prices and rents.³⁰)

²⁴ Cal. Gov't Code 65584(g).

²⁵ *City of Irvine v. S. California Assn. of Gov'ts*, 175 Cal. App. 4th 506 (2009).

²⁶ *Id.* at 517.

²⁷ *Cty. of San Diego v. State of California*, 15 Cal. 4th 68, 87 (1997).

²⁸ *City of Irvine*, 175 Cal. App. 4th at 520-21.

²⁹ S.B. 35, 2017-2018 Reg. Sess. (Cal. 2018); Cal. Gov't Code 65913.4(a)(4).

³⁰ See *supra* note 6

It would be simple enough for the Legislature to pass a bill raising the Bay Area's RHND by 25% (the midpoint of my estimates of the jobs-housing adjustment³¹), while ratifying HCD's determination in all other respects. If it wished, the Legislature could also extend Bay Area cities' deadline for submitting housing elements by a few months, though this seems unnecessary.³² And to avoid any confusion, the legislature could provide that the 25% jobs-housing increment shall be distributed pro-rata to all cities and income categories. This is an easy rule to apply, and it respects the intraregional allocation chosen by the council of governments. Each Bay Area city's target for each type of housing (very-low income, low-income, moderate-income, and above-moderate income) would increase by exactly the same percentage.

It is odd to think of the Legislature as a pseudo-appellate body sitting in judgment of a state agency or department.³³ But given the process California has chosen for determining and allocating regional housing need, this is as it must be, at least for now. A few years hence, we'll be able to look back and see how the RHND -> RHNA -> housing element process played out during this cycle, and debate procedural and substantive reforms for the next cycle. Perhaps some will argue that expedited judicial review in a designated court should be part of the process. In the meantime, responsibility for supervising HCD's determinations of housing need belongs to the Legislature, not the courts.

A version of this piece was published in the California Planning & Development Report February 8, 2021:

<https://www.cp-dr.com/articles/who-decides-whether-california-misjudged-the-bay-areas>

³¹ See *supra* note 10.

³² The bill would put cities on notice of their new obligations the moment it's introduced, well before the December 2021 deadline for finalizing RHNAs. See Fig. 1, *supra*.

³³ If the case in question concerned an individual's liability for past acts, the Legislature's "appellate" judgment might well violate due process and the separation of powers. However, as *City of Irvine* recognized, determinations of housing need are quasi-legislative in nature, and do not implicate due process rights. 175 Cal.App.4th at 519-20.