PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 2
Issue 3 *Land Use Planning Symposium*

Article 10

5-15-1975

The Housing Element: How Can Its Adequacy Be Measured?

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Related Articles

The Housing Element: How Can Its Adequacy Be Measured?

Housing is a topic of concern nationally and locally, with emphases encompassing provision for low and moderate income housing, environmentally attractive dwelling units, exclusionary and inclusionary zoning, financing, and problems in the construction industry. In recognition of this importance, the California Legislature changed the housing element of the general plan[1] required of

1. The general planning process, mandated by the Legislature, is a response to a recognized need for planning for land use in California. Each county and city is directed by California Government Code Sections 65300-65303 to prepare and adopt a comprehensive long-term plan for its physical development and that of any land outside its boundaries which the local planning agency deems relevant to its planning process. Required elements of the general plan are, in addition to the housing element: land use, circulation, conservation, open space, seismic safety, noise, and scenic highways. CAL. GOV'T CODE § 65302 (West Supp. 1974). A recent opinion by the California Attorney General noted the importance placed on the general plan by the Legislature:

> A study of the 1971 and subsequent statutory changes makes it clear that the Legislature intended that local government engage in the discipline of setting forth their development policies, objectives, and standards in a general plan composed of various elements of land use. [CAL. GOV'T CODE] §§ 65300, 65302, 65302.2. The general plans and their constituent elements are now the local constitutions to which all local development in its many and varied phases shall repair. [CAL. GOV'T CODE] §§ 65302, 65303. Thus, with this indication from the Legislature, the oft-quoted statement in *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 782 (1965), then

county and municipal jurisdictions from a permissive to a required element:

> ELEMENTS REQUIRED TO BE INCLUDED IN PLAN:
>
> . . . .
>
> (c) A housing element, to be developed pursuant to regulations established under Section 37041 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community.[2]

Just how specific the components of the housing element of the general plan must be in order to comply with the legislative mandate encompassed in Government Code Section 65302(c) is an issue now before the California Court of Appeal, First Appellate District, in *Leonard v. City of El Cerrito*.[3] This appears to be the first court test of the interpretation of a statute that is caught in the crossfire between Legislative intent, Legislative confusion, and revenue appropriations.

LEGISLATIVE INTENT

California Health and Safety Code Sections 37120 through 37125[4] clearly state that it is the policy of the State of California to "provide every Californian with a decent home and a satisfying environment."[5] The Code sections declare housing to be of vital importance to California in relation "to the health, safety, morals, and welfare" of the people and to the economy of the state.[6] Furthermore, there is recognition that such housing policy is consistent with the goals of the Congress of the United States, goals which the California Legislature adopts for the state:

> The Legislature . . . finds that the Congress of the United States

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prophetic, is now a guiding principle of construction. The court said: "It is apparent that the general plan is, in short, a constitution for all future development within the city. . . ." 58 Ops. Cal. Att'y Gen. 21, 23, No. CV 72/114(a), Jan. 15, 1975.

In addition to the required elements of the general plan, there is also an enumerated list of permissive elements, such as natural reservations, parks, and beaches, and a provision for whatever other elements the local planning body might wish to include. CAL. GOV'T CODE § 65303 (West Supp. 1974).

2. CAL. GOV'T CODE § 65302(c) *as amended* 1967 Stats. c. 1658, p. 4031, § 4, *effective* July 1, 1969 (West Supp. 1974). The amendment changing the word "guidelines" to "regulations" was effective March 4, 1972; 1971 Stats. c. 1803, p. 3902 1.5.

3. 1 Civil No. 34,762 (Court of Appeal, 1st Dist., Div. 1, *filed* March 26, 1974).

4. CAL. HEALTH & SAFETY CODE §§ 37120-37125 (West 1973).

5. CAL. HEALTH & SAFETY CODE § 37120 (West 1973).

6. CAL. HEALTH & SAFETY CODE § 37121 (West 1973). Because the stat-

> has established as a national goal the provision of "a decent home and a suitable living environment for every American family" and that the attainment of this goal is a priority of the highest order.[7]

So finding, it is further declared:

> The Legislature further finds that the national housing goal . . . is deserving of adoption by the Legislature, with the accompanying commitment to guide, encourage, and direct, where possible, the efforts of the private and public sections of the economy to cooperate and participate in the attainment of a decent home and a satisfying environment for every Californian.[8]

In a policy statement designed to further the goal of decent housing for every Californian, the Legislature recognized the need for coordinating state programs with federal, so as to be able to take advantage of federal fiscal programs, and directed the Department of Housing and Community Development to develop a Statewide Housing Element.[9] This Statewide Housing Element was intended to "provide a framework and serve as a guide for the preparation and implementation of local housing elements as required by Section 65302 of the Government Code."[10]

Government Code Section 65300[11] requires cities and counties to adopt general plans for the planning areas over which they have jurisdiction and in the discretion of local officials, for areas outside their boundaries which have a direct bearing on their planning

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ute specifically delineates the reasons the Legislature finds housing of such importance, it is included here in its entirety:

> The Legislature finds the subject of housing is of vital statewide importance to the health, safety, morals, and welfare of the residents of this state for the following reasons:
> (1) Decent housing is an essential motivating force in helping people achieve self-fulfillment in a free and democratic society.
> (2) Unsanitary, unsafe, overcrowded, or congested dwelling accommodations constitute conditions which cause an increase in, and spread of, disease and crime.
> (3) A healthy housing market is one in which residents of this state have a choice of housing opportunities and one in which the housing consumer may effectively choose within the free marketplace.
> (4) A healthy housing market is fundamentally related to a healthy state economy and can contribute significantly to the employment factor of California.

7. CAL. HEALTH & SAFETY CODE § 37122 (West 1973).
8. CAL. HEALTH & SAFETY CODE § 37123 (West 1973).
9. CAL. HEALTH & SAFETY CODE § 37133 (West 1973).
10. CAL. HEALTH & SAFETY CODE § 37134 (West 1973).
11. CAL. GOV'T CODE § 65300 (West Supp. 1974).

areas. Section 65700 of the same Code[12] makes the general plan mandate applicable to charter as well as general law cities. Government Code Section 65302(c),[13] likewise applicable to both charter and general law cities, is intended to be the statute that directs counties and cities to carry out Legislative intent regarding housing in their planning processes. An additional Government Code Section, 65860,[14] requires zoning ordinances and amendments to be consistent with the general plan.

With such clear Legislative intent to provide decent housing for all Californians and to incorporate planning for such housing into mandated general plans, one would think that the housing element would have to be specific enough to show plans for providing for the housing needs of "the community." Such specificity would seem to require a survey of existing housing and needed improvements, standards and plans for rehabilitation or redevelopment, a survey of the needs of all economic segments as relates to new housing, and sufficient site locations for various types of residential areas. These latter two would seem particularly important in light of the required consistency of zoning ordinances. However, as will be delineated below, there has been what can only be termed "legislative confusion" that has created a situation in which cities and counties may have only permissive guidelines rather than enforceable regulations to follow in planning their housing elements.

Legislative Confusion

As noted above, the Department of Housing and Community Development has been directed by the Legislature to formulate a Statewide Housing Element to guide local planning bodies in both the development and implementation of the housing elements of their general plans. However, although Sections 37133 and 37144 were added to the Health and Safety Code in 1970,[15] no Statewide Housing Element has yet been adopted. Phase I was completed in November, 1972, and, as of the time of this writing, Phases II and III are also finished, the latter having just been completed. After hearings and other citizen input, the Statewide Housing Element will be available to serve as a delineation of goals and recommendations to the Legislature and other branches of government. Its function regarding local governments will be purely advisory,

12. Cal. Gov't Code § 65700 (West Supp. 1974).
13. *See, supra,* note 2.
14. Cal. Gov't Code § 65860 (West Supp. 1974).
15. *See, supra,* notes 9 and 10.

however. The intent of the statute is clearly stated as one of guidance for both the preparation and implementation of local housing elements, but since its use will not be mandatory, what effect it will have remains to be seen.

To augment this lack of direction, the Legislature has used the words "regulations" and "guidelines" in Code sections that are supposed to be read together, thereby creating confusion as to whether rules with the force of law or advisory suggestions have been established. Government Code Section 65302(c) states that the standards and plans of the housing element are to be developed "pursuant to *regulations* established under Section 37041 of the Health and Safety Code." (Emphasis added.)[16] However, that latter Code section directs the Commission of Housing and Community Development, "in cooperation with the Council on Intergovernmental Relations and the State Office of Planning . . . [to] develop *guidelines* for the preparation of housing elements [as] required by Government Code Section 65302." (Emphasis added.)[17] Additionally, Government Code Section 34211.1 directs the Council on Intergovernmental Relations to develop and adopt no later than September 1, 1973, *guidelines* for the preparation of the mandatory elements of general plans. As to the relationship of this section to the two discussed immediately above, the statute reads:

> . . . . For purposes of this section the *guidelines* prepared pursuant to Section 37041 of the Health and Safety Code shall be the *guidelines* for the housing element required by [Government Code] Section 65302. . . .
>
> Upon adopting the *guidelines*, the council shall transmit copies thereof to every city and county. Such *guidelines shall be advisory* to each city and county in order to provide assistance in preparing and maintaining their respective general plans. . . . (Emphasis added.)[18]

For the convenience of the reader, the Housing Element Guidelines adopted pursuant to this section and Health and Safety Code Section 37041 are given in Appendix A.

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16. *See, supra*, note 2.

17. CAL. HEALTH & SAFETY CODE § 37041 (West 1973). This section was not amended to change guidelines to regulations at the time GOV'T CODE § 65302(c) was amended. S.B. 2213, introduced by Sen. Milton Marks, April 24, 1974, to accomplish this change, has not been passed by the Legislature. See Appendix B for the text of the bill.

18. CAL. GOV'T CODE § 34211.1 (West Supp. 1974).

Case law and common sense would lead one to believe that this is merely a semantic difficulty and that guidelines adopted by the Commission on Housing and Community Development on June 17, 1971, and edited for the Council on Intergovernmental Relations on September 20, 1973, should be followed by cities and counties in developing their housing elements.

> The Courts assume that in enacting a statute the Legislature was aware of existing related laws and intended to maintain a consistent body of statutes (Citations). . . . Also relevant when seeming inconsistencies appear in separate codes is the rule that the codes blend into each other and constitute a single statute for purposes of statutory construction (Citations). . . . [A statute] is to be construed with a view of promoting rather than defeating its general purpose.[19]

The court would seem to be saying here that one could read the statutes together and resolve the inconsistencies by simply considering the "guidelines" as the "regulations" pursuant to which housing elements were to be developed and, thereby, give effect to the statutory program, promote its general purpose, and carry out the clear intent of the Legislature. After all, as one court recently stated, ". . . in any litigation concerning statutory programs, legislative intent is of paramount concern."[20]

There appear to be two reasons why this seemingly simple solution has not been applied, and these two are intertwined. The Attorney General was asked by the Director of the Department of Housing and Community Development to render an opinion as to what was required of them in order to implement Government Code Section 65302. In Opinion No. CV 72-33, October 17, 1972, the Attorney General concluded that the guidelines must go through the formal statutory procedures to become "rules and regulations:"[21]

> We, therefore, conclude that the commission must follow the procedures required in Sections 11370 to 11427 of the Government Code regarding the adoption of rules and regulations, including notice, publication, and a hearing before any guideline is adopted. This conclusion makes the adoption by the commission of guidelines under Section 37041 consistent with its adoption of general rules and regulations under Section 37039 [which empowers the commission to adopt, repeal, and amend rules and regulations].[22]

Once again, it would seem to be a simple matter to go through the

19. American Friends Service Committee v. Procunier, 33 Cal. App. 3d 252, 260-61, 109 Cal. Rptr. 22, 28 (1973).

20. California Medical Assn. v. Brian, 30 Cal. App. 3d 637, 642, 106 Cal. Rptr. 555, 558 (1973).

21. 55 OPS. CAL. ATT'Y GEN. 380 (1972).

22. *Id.* at 383.

statutory procedures to convert the guidelines into regulations and, thus, give them the force of law. However, an obstacle in the form of Senate Bill 90,[23] now Revenue and Taxation Code Section 2231,[24] became effective in 1973. This section requires the state to appropriate money to reimburse the cities, counties, school districts, and other local agencies for expenditures made pursuant to new state mandated programs enacted after January 1, 1973, or required increased services in existing mandated programs where additional financial outlay is necessary. Thus, if the guidelines were to become regulations, so that cities and counties would be required to change their housing elements to bring them into conformity, the Legislature might have to appropriate funds to reimburse the local entities for the attendant expenditures. This the Legislature apparently has been unwilling to do, so the guidelines are still guidelines, and the housing element statute refers to regulations; until the Legislature passes legislation to clarify the situation or the courts read some consistency into the statutes, there's a confused stalemate.

Assuming that through legislation or court interpretation the regulations/guidelines dilemma could be resolved, there is an additional source of confusion: what does "community" encompass in the context of providing for the needs "of all economic segments of the community?"[25] "Community" is not defined in the Government Code, nor is it defined in the Health and Safety Code article that states Legislative intent as to housing policy. However, a different article of the Health and Safety Code, dealing with redevelopment, defines "community" as ". . . a city, county, city and county, Indian tribe, band, or group which is incorporated or which otherwise exercises some local governmental powers."[26] If this is the definition to be applied to Government Code Section 65302(c), it would include the jurisdictional boundaries of the local governmental body and, perhaps, its sphere of influence. The general plan, as mandated by Government Code Section 65300 is to be designed " . . . so that it may be adopted for all or part of the territory of the county or city and such other territory outside its

23. 1972 Stats. c. 1406, p. 2961 § 14.7.
24. CAL. REV. & TAX CODE § 2231 (West Supp. 1974), *effective* August 31, 1973.
25. CAL. GOV'T CODE § 65302(c) (West Supp. 1974).
26. CAL. HEALTH & SAFETY CODE § 33002 (West 1973).

boundaries which *in its* [*the local government's*] *judgment* bears relation to its planning." (Emphasis added.)[27] This area may be the same as that defined by Health and Safety Code Section 33002, but since the determination lies within the discretion of local planners and legislators, it could also be more or less extensive. Another view, and one recognized by the court in *Construction Industry Association of Sonoma County v. City of Petaluma*[28] is that housing is a regional issue that at least entails the reasonable commuting distance from areas in which industry and commerce are located.

The fact that "community" has not been defined as it specifically relates to Government Code Section 65302(c) presents an obstacle for local planning bodies in terms of assessing the range of economic needs and providing for them. What responsibility does a city have to provide for low and moderate income housing if its present residents are middle to upper middle class? The narrow view would look to those present residents and answer "none." The broader view would look to the work force of the area, the neighboring cities and unincorporated areas, and the future facts of life which foresee young people wishing to settle in the area and present adult residents aging and, perhaps, living on fixed incomes. Given the wide range of possibilities for defining "community," and the present provision in Government Code Section 65300 granting discretion to local officials in determining their planning areas, the present situation is chaotic and defeats the Legislative intent of having a coordinated effort throughout the state. When each planning or governmental body adopts its own definition, there is only potential for overlap, conflict, and omission.[29] Again, there needs to be legislative or judicial definition so that governmental bodies will be able to ascertain what the economic segments of the community are and make provision for them as mandated.

Judicial Treatment

As stated previously, the courts have not until now been called

27. *See, supra,* note 11.

28. 375 F. Supp. 574 (N.D. Cal. 1974), *appeal docketed,* No. 742100, 9th Cir. 1974.

29. In *Leonard v. City of El Cerrito,* Declarant City Planner, Dean Armstrong, stated in his declaration that "[s]taff interpreted the word 'community' used in *Government Code* Section 65302 to mean El Cerrito and the immediately surrounding areas of Richmond, Albany and Kensington (county). These areas together make up a logical and reasonable housing market area and comprise one 'community', because of their contiguous boundaries, and mutual and complementary characteristics." Answer of Respondent, No. R-22875 (Super. Ct., Contra Costa County, *filed* Feb. 9, 1973) at 3 and 4. This is quoted by way of example that local planning bodies and staffs do, in fact, need to define the term for themselves.

upon to consider what standards the required housing element of the general plan must meet in order to comply with the legislative mandate encompassed in Government Code Sections 65300 and 65302(c). There is precedent, however, for the court taking the view that needs of low income families in a city must be accommodated in the general planning process. In *Southern Alameda Span. Sp. Org. v. City of Union City*,[30] a case involving a challenge by referendum to a zoning variance passed by the city government to allow construction of a low income housing project. The referendum passed, and the zoning variance granted was thus overruled. Although upholding the validity of the referendum, the court expressed the opinion that a city had an obligation to plan in such a way that housing for low income families would not be excluded:

> Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan, as initiated, or as it develops, accommodates the needs of its' low income families. . . .[31]

Clearly, Government Code Section 65302(c) does require the local planning or governmental body to draft its housing element to consider the needs of low income citizens, as well as the needs of other economic segments of the planning area. However, that the city may not ignore any economic segment living within its boundaries may be all that is clear.

The question raised in *Leonard v. City of El Cerrito*[32] is how specific the housing element must be in dealing with the subjects it is mandated to treat. The petitioner (now, and hereinafter, appellant) sought a writ of mandamus to compel the city to comply

30. 424 F.2d 291 (9th Cir. 1970).

31. *Id.* at 295. The court ordered the city to take steps to accommodate the needs of its lower income citizens and stated that failure to do so might lead to a possible ruling that those citizens were being denied equal protection under the laws. The city was given until May 1, 1971, to do so, and, as of June, 1973, ground had been broken for the development that resulted from this court order. *See*, Lauber, *Recent Cases in Exclusionary Zoning*, AM. SOC'Y OF PLANNING OFFICIALS, REP. NO. 292, PLANNING ADVISORY SERVICE, 9 and n. 58 (June 1973).

32. *See, supra*, note 3.

with the provisions of Government Code Section 65302(c), contending that the element adopted by the city had failed to include "standards and plans for the improvement of housing" or "adequate sites for housing," as clearly stated in the Code.[33] Additionally, appellant contended that census data showed numerous examples of overcrowded and substandard dwelling units in El Cerrito that were not covered in the housing element.[34] The basic contention of appellant would seem to be that the housing element adopted by the City of El Cerrito did not contain data on economic segments, housing needs, site locations, standards, and plans as required by Government Code Section 65302(c) and the guidelines developed and adopted pursuant to Health and Safety Code 37041 and, therefore, was inadequate to serve as a housing element. Respondents are in apparent agreement that the issues, as framed by appellant at the trial level, were that the housing element:

> (1) makes no attempt to provide adequate sites for housing of all economic segments of the community;
> (2) does not recite currently available and official data regarding the economic status of members of the community without [sic] which current housing plans may be compared for adequacy required by law;
> (3) does not conform to the guidelines. . . .[35]

At the conclusion of appellant's case, respondents moved for judgment, which was granted by the trial judge. In his findings of fact and conclusions of law, the judge found that housing elements shall, in fact, consist of standards and plans and sites as set out in the statute, but he also found that the City of El Cerrito's housing element complied with the guidelines adopted pursuant to Health and Safety Code Section 37041.[36]

It is interesting to note that at the trial level, both parties treated the guidelines as if they had some efficacy: Leonard alleged the housing element did not comply; the City, via declarant City Planner, alleged that it did. The court found compliance. The argument as to the guidelines appeared to be over the fact of compliance rather than over whether they were mandatory or

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33. CAL. GOV'T CODE § 65302(c) (West Supp. 1974). *See also*, Opening Brief for Appellant, at 4.

34. Opening Brief for Appellant, at 2.

35. Brief for Respondents, at 14.

36. Leonard v. City of El Cerrito, No. R-22875 (Super. Ct., Contra Costa County, *decided* May 29, 1973). In his findings of fact and conclusions of law, number 10, the judge wrote:

> Said Housing Element does comply with the requirements of State of California Commission of Housing and Community Development "Housing Element Guidelines," pursuant to Section 37041 Health and Safety Code.

permissive. On appeal, however, appellant argues that:

> [w]hile it is unclear whether these "guidelines" are, or should have been "rules and regulations," they are, at the very least, persuasive evidence of what must be contained in the housing element. . . . Regardless of the fact that the guidelines may not have the same effect as formal regulations, they are an expression of statewide housing policy to which general law cities such as El Cerrito must conform.[37]

Respondents' position is that they are advisory only and, as such, are merely ideas or suggestions offered as assistance to local planning bodies; such bodies are free to pay heed to the guidelines or ignore them in their discretion.[38] There was testimony at the trial level that the guidelines were advisory, and, in fact, the cover letter from Clifford R. Anderson, Jr., Chairman of the Council on Intergovernmental Relations, that accompanied the guidelines, stressed that they were. (See Appendix A.)

The issue of the force, effect, and status of the Housing Element Guidelines is squarely before the court in this case, and the court is now caught in a dilemma. As noted earlier, the court will traditionally construe inconsistent statutes intended to be read together in such a way as to blend them together and carry out clear Legislative intent. On the other hand, there is a statutory procedure, encompassed in Government Code Sections 11370 through 11427, by which rules and regulations are to be promulgated. The Attorney General has concluded that these procedures must be followed in order to change the guidelines to regulations.[39] Promulgation of regulations is not within the province of the courts but rather is a procedure delegated by the Legislature to state agencies. If the court is not empowered to elevate the guidelines to regulations by judicial interpretation but, at the same time, must try to effect Legislative intent by reading some consistency into these statutes, then the court will have to resolve this conflict by something short of promulgating regulations that will still enable Legislative policy to be promoted.

RECOMMENDATIONS

Reading the various statutes that explain California housing

37. Opening Brief for Appellant, at 9.
38. Brief for Respondents, at 8, 9.
39. *See, supra,* note 21.

policy, direct the preparation of the Statewide Housing Element and guidelines for local governments, and mandate a required housing element, it is clear that the Legislature intended a coordinated effort to solve the housing problems in California. It is also clear that the effort was intended to include an evaluation of existing housing conditions; a survey of needs as related to various income groups in the state; a projection of future housing needs; and an outline of political, economic, social, or other constraints on the achievement of housing goals. Additionally, it was intended that there be recommendations for removing barriers to achieving the housing program; rehabilitation of existing substandard housing; and changes, if any, in housing and building codes to provide both for better enforcement and the flexibility needed to accommodate modern construction techniques.[40] If the Housing Element Guidelines and the Statewide Housing Element, when the latter is completed, were intended to be purely advisory, then the coordinated program envisioned by state housing policy would be defeated. Local planning bodies would be free to ignore the advice given in these documents and develop their housing elements in total disregard of public policy. There would be no standards against which a court could ascertain whether or not a local housing element complies with the state mandate. Since Government Code Section 65860[41] requires zoning ordinances to be consistent with general plans and grants standing to any resident or property owner to bring suit to enforce such consistency, it is necessary for the courts to be able to ascertain the sufficiency of the objectives, goals, policies, programs, and general land uses envisioned by the

40. CAL. HEALTH & SAFETY CODE §§ 37041, 37120-37135 (West 1973); CAL. GOV'T. CODE § 65302(c), 34211.1 (West Supp. 1974).

41. CAL. GOV'T CODE § 65860 (West Supp. 1974). It should be noted that the California Attorney General in Opinion Number CV 72/114(a), January 15, 1975, felt that this Section gave real enforcement power to the general plan:

> The recent legislation (§ 65860) achieves this objective [making the general plan a constitution for future development] by requiring that zoning ordinances (§ 65860 subd. (a)) and subdivision maps (Bus. & Prof. Code § 11526 subd. (c), § 11526.1, § 11549.5) must be consistent with the local general plan. 58 Ops. Cal. Att'y Gen. 21, 23 (1975).

This statement was part of the analysis contained in the Attorney General's answer to the question, submitted by the Director of the Office of Planning and Research: "Does Government Code section 65860(a) require that a city or county zoning ordinance be consistent with each of the elements of the general plan as set forth in Government Code section 65302?" *Id.* at 21. The Attorney General concluded:

> Government Code section 65860(a) requires a city or county zoning ordinance to be consistent with the adopted general plan and each adopted general plan element required by Government Code section 65302 and 65302.1, or enacted pursuant to Government Code section 65303. *Id.*

general plan. The zoning ordinance can only be consistent if the city or county has adopted a general plan,[42] and if the required elements are not in compliance with state mandate, the document would not seem to qualify as a general plan.

Unless the Legislature acts to clarify the confusion by changing Government Code Section 37041 to read "regulations" and either appropriating funds as may be required by Revenue and Taxation Code Section 2231 or declaring the change to be for purposes of clarification only so as to avoid the need for appropriation, the court will have to set its own standards. This can be done by interpreting Government Code Section 34211.1 as requiring local planning and governmental bodies to include in their housing elements all considerations in the guidelines that are appropriate to their situations. This statute clearly states that these guidelines are intended to be those referred to in Government Code Section 65302(c), and further states, in a rather curious but helpful phrase, that they *"shall be advisory."* (Emphasis added.)[43] "Shall" is a word used to make a direction mandatory rather than permissive; this is well settled. Thus, the court could elevate the guidelines to interim standards to which cities and counties must adhere, at least as to those applicable to their peculiar circumstances. Such an interpretation would bring consistency to the housing statutes, retain flexibility to meet local conditions, and give the courts standards against which to test the adequacy of the housing element vis-â-vis compliance with the state mandate. Such an interpretation need not run afoul of the appropriations requirements of Revenue and Taxation Code Section 2231. That section applies only to new state mandated programs *enacted* after January 1, 1973, and the change in Government Code Section 65302(c) from "guidelines" to "regulations" was effective March 4, 1972. Thus, the mandate that cities and counties follow the regulations occurred prior to the effective date of Revenue and Taxation Code Section 2231. Additionally, although Government Code Section 34211.1 was not effective until June 29, 1973, it was specifically designated as for clarification only and not subject to the reimbursement requirement.[44]

42. CAL. GOV'T CODE §§ 65860 subd.(a)(i) and (ii) (West Supp. 1974).
43. CAL. GOV'T CODE § 34211.1 (West Supp. 1974).
44. *Id.*

CONCLUSION

If the declared state housing policy is to be given effect rather than circumvented, the confusion and inconsistencies in the various applicable statutes must be clarified. The obvious solution would be for the Legislature to pass and the Governor to sign legislation such as Senate Bill 2213, introduced by Senator Milton Marks, April 24, 1974. (See Appendix B.) In the interim, the court should interpret Government Code Section 34211.1 to require cities and counties to include in their housing elements those parts of the Housing Element Guidelines that are relevant to their local situations. Only in this way will the courts have standards against which to test a local housing element for compliance with the state mandate of Government Code Section 65302(c), and only in this way will public policy in regard to housing begin to be implemented.

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APPENDIX A

A WORD ABOUT THE COUNCIL ON INTERGOVERNMENTAL RELATIONS AND THE GENERAL PLAN GUIDELINES

The Council is a State agency composed of representatives from cities, counties, school districts, special districts, regional organizations and State agencies. It is organized to promote cooperation and coordination between local, regional, State and Federal agencies. Within the State of California there are over 5,000 units of government. Each of these agencies has a particular function to perform in the State's system of governance.

The Council's statutory authority and responsibility is to advise, recommend and help institute the means whereby State and local government agencies are able to effectively and economically provide desired public services to the people of California.

As part of its ongoing responsibility to provide assistance to local governments, the Council has developed guidelines to assist local agencies in developing general plans and the required plan elements. It should be stressed that the guidelines are *advisory*. The guidelines are intended to be flexible enough to meet varying local conditions. Innovation is encouraged in developing a local planning process. No single planning methodology will work in all cases.

In formulating the guidelines, the views of local planners, interested people and organizations were sought. This process will continue so that problems in the application of the guidelines to local situations will be brought to light, and necessary modifications may be made. It will also be necessary to revise the guidelines to reflect changes in the planning law affecting the general plan. If new mandatory elements are added by the Legislature, CIR is required to prepare and adopt guidelines for such elements within six months of the effective date of the legislation.

In adopting the guidelines the Council indicated that an informal review will be made in six months, and it is hoped that jurisdictions will comment on its strengths, weaknesses and general usefulness in the interim. In addition, we will be interested in reviewing examples of innovative planning approaches that may have applicability to other jurisdictions.

We appreciate the assistance given to the Council in preparing this report by the consulting firms of William Spangle & Associates, Williams and Mocine, and Simon Eisner & Associates. We hope you will find this document useful.

Sincerely,

CLIFFORD R. ANDERSON, JR., Chairman
Council on Intergovernmental Relations

The Housing Element Guidelines only, follow:

*HOUSING ELEMENT**

1. *AUTHORITY*

Government Code Section 65302(c) requires a housing element of all city and county general plans, as follows:

> A housing element, to be developed pursuant to regulations established under Section 37041 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community.

2. *THE SCOPE AND NATURE OF THE HOUSING ELEMENT*

Goals

At least four broad goals of a housing element have been identified. The goals listed below may be expanded to include others of local concern and impact.

A. To promote and insure the provision of adequate housing for all persons regardless of income, age, race, or ethnic background.

B. To promote and insure the provision of housing selection by location, type, price, and tenure.

C. To promote and insure open and free choice of housing for all.

D. To act as a guide for municipal decisions and how these decisions affect the quality of the housing stock and inventory.

3. *METHODOLOGY*

A. *Problem*

The scope of the housing problem, although generally accepted as critical or severe, must be documented for each jurisdiction. The first four categories below each define a specific area of concern. The last category (5) identifies specific need and is used to further determine obstacles and to prepare the housing work program.

(1) *Inventory of Existing Units, For Example*

Unit Size	Number of Rooms
Unit Type	Single, Multiple
Density	Units per Acre

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* Adopted by the Commission of Housing and Community Development on June 17, 1971 and edited for CIR on September 20, 1973.

Ownership	Rental, Homeowner, Abandoned
Rent	Monthly Rent
Condition	Standard, Substandard
Location	Census District, Assessor Parcel
Neighborhood	Surrounding Area
Public Facilities	Water/sewer, Schools, Other Services

(2) *Inventory of Potential Units, For Example*

Rehabilitation	Code enforcement project and/or supply of units that can be conserved or rehabilitated
Special Projects	Funded projects under any financial method which will add to the housing stock or remove units
Housing Authority	Applications made for additional units and estimate of funding level
Redevelopment Agency	Units removed as a decrease, and replacement housing to be created as an increase in units

(3) *Inventory of Existing Sites, For Example*

Vacant Land	Suitable for single or multiple dwelling regardless of zoning
Potential Adequacy of Public Facilities	Water, Sewer, Drainage: availability, cost, nearness to employment, and shopping
Redevelopment	Land to be made available through the Redevelopment Agency
Environmental Considerations	Density, open space, air quality, wooded or recreation land, seismic quality, and noise pollution

(4) *Population Characteristics*

The 1970 Census provides much of the following data. It will then become a continuing process to keep it current by integrating new data.

Income	Household, using census definitions
Family Composition	Type of head of household, size, ages
Location of Employment	Travel from place of residence
Race	Census Classification

(5) *Need*

Current: by type, size, price, and location

Projected: by type, size, price, and location, using projections for several years

B. *Obstacles*

The following represent real or potential obstructions which impede attaining the objectives of the housing plan.

Political	Voter approval
	Local government approval
	Neighborhood opposition
	Schools
	Real estate and building industry opposition
	High-rise structure opposition
	Discrimination: race, sex, family size, and economic
Economic	Land cost
	Tax structures (property-income)
	Allocation of state and federal funds
	Risk vs. return on capital
	Seed money
	Increasing construction costs
	Interest rates
Employment Location	Distance traveled, permanent, temporary
Institutional or Governmental	Sponsor or developer interest
	Processing time - start to finish
	Building Codes outdated
	Union restrictions
	Zoning
Physical	Land availability
	Availability of public services

Much of the above, as well as others which may apply to your area, should be analyzed and approached in the housing plan to follow. An honest appraisal at this point can save time and effort when implementing the housing plan.

C. *Intergovernmental Coordination*

Involvement of all local jurisdictions in the housing element planning process is necessary. There should be an ongoing plan to continue intergovernmental coordination efforts.

(1) A housing element should be prepared by a planning entity whose jurisdiction incorporates a housing market.

(2) Major metropolitan areas require a regional or multi-

county approach. In some instances, a single county will cover a housing market. Cities that comprise part of a housing market should jointly prepare housing elements with the county.

(3) Counties that are situated in a multi-county housing market should prepare and adopt a housing element based upon and within the context of a regional housing element.

(4) In order to avoid irreconcilable differences between the regional and/or county housing plans, the cities and counties within a region should make significant inputs into the regional plan process.

(5) There is a need for "city to city" and "county to county" coordination and cooperation to share the responsibility for housing all segments of the population.

D. *Interagency Coordination*

Coordination of plans of local public and quasi public bodies, state and federal agencies which have a local impact, as well as regional regulatory bodies is essential.

E. *Citizen Participation*

This is one of the most important of all aspects in the development of a housing element: the direct involvement of a cross section of the citizenry in the planning process. The goals and plans must be generated through citizen advisers. A broadly based, communitywide consumer-producer committee or organization can provide positive input if free of political pressure and harassment. Upon acceptance of a draft of the proposed housing element, the planning body shall hold hearings to receive input and comment from those not a part of the advisory committee.

4. *DEFINITION OF TERMS*

Housing Market: A housing market is a geographical area within which housing activity in one area effects housing activity in another geographic area. In reality, the largest housing market area would be a series of smaller overlapping housing markets—small or large—there are trade definitions of submarkets (single family, multi-family, condominium market areas, etc.) and also economic definitions (low-moderate income housing markets). Consideration of these are necessary in housing element planning. Intergovernmental coordination of local jurisdictions in a housing

market is critical (see Page IV-11, 3-C Intergovernmental Coordination).

A study of a particular housing market involves detailed research on types of structures, i.e., single family, multifamily, mobilehomes, etc., occupancy characteristics, vacancy rates, area growth rates, tenure preferences and characteristics and other economic and demographic data.

5. *RELATIONSHIP TO OTHER PLAN ELEMENTS*

A housing element cannot advocate goals and plans that are foreign to the other general plan elements. A simple statement made in the form of an objective to be accomplished through the housing plan may well imply policy determination in other general plan elements. Housing implies people, and people require services; therefore, other general plan elements must be reviewed and any inconsistencies or incompatibilities resolved. Among the more important elements which need to be closely correlated with the housing element are:

Land Use	Open Space
Circulation	Conservation
Noise	Seismic Safety

6. *IMPLEMENTATION*

A. *The Housing Program*

The objectives recommended by the advisory committee should become the housing program. Long range and short range objectives should be stated in terms of identified need and obstacles to overcome. Each objective should be defined in three parts.

(1) *Objectives*:

a. Specific Item—What is to be accomplished by this objective.

b. Involvement—Who and/or what groups are to participate and, therefore, become jointly responsible for achievement of the objective.

c. Time Frame—Establish a time framework to reach the objective and identify landmarks to indicate progress.

(2) *Alternatives*:

It is obvious that there may be several paths to the achievement of the objective of a specific item within a specific time frame. The time available may be the reason for selecting one plan over another; however, as time passes alternates should be considered if the prior methods selected are not fully successful.

B. *Review and Update*

(1) *Continuing Housing Data*

Internal Departments. Within each city and county there is a building, housing, community development, or planning department responsible for issuing building permits, demolition permits, inspection, and other services. That department should be the central source of housing data relating to construction, demolition and rehabilitation. This data, along with information on proposed projects, can be used to update the housing element. We encourage accurate building activity records which can serve to assist the other levels of government to analyze housing needs.

City-County-Region-State-Federal. The data required for preparation of a housing element, once assembled, can be used for many purposes. The regional planning agency, the market analysis and forecasts are users of this data.

Consumers - Producers. The consumer as well as the producer has the right to know both the current status of housing conditions and programs and plans for the future. A county/city housing element which includes an ongoing information system should supply that need.

(2) *Annual Citizen Review - Biennial Update*

The citizen advisers that helped prepare the goals and programs should review on an annual basis the progress toward achieving the objectives, easing of obstacles, and select alternatives if necessary. In addition, a two-year printed update to document changes and progress and reflect new plans is necessary. This function is performed not only by the planning body, but by those affected by the resulting programs.

(3) *State Department of Housing and Community Development Comment on Housing Element and Update*

It is requested that the draft and final housing element, as adopted, be sent to the Department of Housing and Community Development for review and comment to insure compliance with the mandate contained in the law, and to further allow integration of the data into the State housing element as an ongoing function of the department.

The biennial update will be reviewed by the State Department of Housing and Community Development to determine progress toward achieving the objectives in the housing plan and, in addition, determine areas of needed legislation and provide a continuing source of housing information for the State.

APPENDIX B

SENATE BILL No. 2213

Introduced by Senator Marks and the Select Committee on Housing and Urban Affairs (Senators Petris (Chairman), Cusanovich, Dymally, Marks and Zenovich)

April 24, 1974

An act to amend Section 37041 of the Health and Safety Code, relating to housing.

LEGISLATIVE COUNSEL'S DIGEST

SB 2213, as introduced, Marks. Housing.

Requires the Commission of Housing and Community Development to adopt regulations, rather than guidelines, for the preparation of specified housing elements that conform as nearly as possible to the guidelines adopted for the preparation of housing elements by the commission on July 1, 1971. Requires such housing elements to comply with the adopted regulations.

Deletes obsolete provisions.

Provides that neither appropriation is made nor obligation created for the reimbursement of any local agency for any cost incurred by it pursuant to the act or regulations adopted under the act because of a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no state funding.

The people of the State of California do enact as follows:

SECTION 1. Section 37041 of the Health and Safety Code is amended to read:

37041. The Commission Housing and Community Development shall ~~,~~ ~~in cooperation with the Council on Intergovernmental Relations and the State Office of Planning, before July 1, 1971, develop guidelines~~ *adopt regulations* for the preparation of housing elements

required by Section 65302 of the Government Code. ~~Such criteria~~ *Housing elements required by Section 65302 of the Government Code shall comply with the requirements of the adopted regulations. The regulations* shall conform as nearly as possible to ~~those promulgated by the federal Department of Housing and Urban Development~~ *the guidelines adopted by the commission on June 17, 1971, and shall be adopted in accordance with*

the provisions of Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code.

SEC. 2. This act requires the adoption of regulations as a clarification, rather than an extension, of the obligation of cities and counties to adopt a housing element in conformity with established guidelines. Chapter 1803 of the Statutes of 1971, effective March 4, 1972, made it mandatory that the guidelines be followed. Therefore, no appropriation is made by this act, nor is any obligation created by this act, or the regulations to be adopted under this act, under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by this act or regulation adopted pursuant to this act.