



# Programs To Rezone

## Technical Memo

*\*Please note: This is a summary of the rules regarding programs to rezone. In some cases, details have been omitted for clarity. Please discuss with your City Attorney or County Counsel. Update 7/26/2023 to incorporate Clovis Court of Appeal decision (Martinez v. City of Clovis (2023) 90 Cal.App.5th 193.)*

### Adequate Sites Program

If a jurisdiction's Housing Element does not identify enough existing, properly zoned sites to accommodate its RHNA, the Housing Element must have a program to rezone properties for housing to make up for the shortfall. This program can be an overlay zone on specific sites. *The following rules apply to the sites that need to be rezoned (i.e., the zoning was not in place on January 31, 2023).*

### Program Requirements

#### Requirements that Apply to Sites Regardless of Income Level

- **Listed in sites inventory:** All sites that are proposed to be rezoned must be listed in the sites inventory.
- **Replacement requirements:** All sites, including those listed in the site inventory, must be subject to the lower income replacement housing requirements contained in density bonus law, even if they do not have any deed restricted housing.
- **Sufficient sites:** The jurisdiction must identify enough sites to rezone to cover any shortfall.
- **Rezoned in sufficient time:** The jurisdiction should also identify a timeline that matches state law (see below).

## Requirements that Apply to Low and Very Low Income Sites

The rules regarding very low and low income sites are more complicated. If the rezoning occurs after January 31, 2023, the rezoning program(s) must include the following components:

- **By right approval:** The zoning must allow for by-right approvals if at least 20% of the units in a project are affordable to lower income households and the project does not need a subdivision. See below for definition of “by right.”
- **Limits on small sites:** The site must be large enough for at least 16 units under the rezoning.
- **Minimum 20/30 units per acre:** The zoning must allow at least 20/30 units per acre, depending on the agency’s default density, unless adequate justification can be provided to HCD to support a lower density as suitable for lower income housing. If you don’t know your default density, [HCD provides guidance here](#).
- **Zoning must have a floor:** The zoning for the rezoned sites cannot permit residential developments with densities less than 20 units per acre (per Martinez v. City of Clovis). This applies to both the underlying zoning and any overlay zone.
- **Limits on mixed-use development:** There are limits on using mixed-use sites. Specifically, the jurisdiction must meet one of the two following conditions:
  1. At least half of the lower income units must be placed in zoning districts that are exclusively residential, or
  2. Mixed-use sites must allow for 100% residential development and must require that the proposed development be at least 50% residential by floor area.

### Definition of By Right

*Applies to lower income sites if 20% of units are affordable to lower income households and no subdivision is required.*

Jurisdictions may not require a conditional-use permit, a planned unit development permit, or any other discretionary permit. Any CEQA review must be done at the time of the rezoning approval. The housing project itself is not subject to CEQA.

Any subdivision of a site is subject to the Subdivision Map Act, CEQA, and all other local laws. Design review is acceptable as long as:

1. It does not trigger CEQA,
2. It is based on objective standards, and
3. It does not result in the project being rejected or the density reduced.

See the end of the memo for the statutory language regarding by right approvals.

## Timing

The rezoning program should be implemented as early as possible. The timing of the rezoning depends on when whether the Housing Element is certified by HCD within 120 days of the Housing Element deadline. (The deadline was January 31, 2023, and the 120-day deadline was May 31, 2023.)

1. If a Housing Element is certified by May 31, 2023, the rezoning must happen in approximately 3 years (2026). The exact date depends on how quickly the city adopted the Housing Element (See Government code 65583(c)(1) for more information).
2. If the Housing Element is *not* certified by May 31, 2023, the rezoning must be completed by January 31, 2024.
3. If rezoning is needed because the agency failed to complete all required rezoning in the fifth cycle, the “carryover” rezoning must be completed by January 31, 2024.

Please note: Of the 197 jurisdictions in the Southern California region, 2 were certified within 120 days of the deadline. *Note: This deadline was extended by the legislature.*

Under certain circumstances, if jurisdictions complete 75% of their rezoning on time, they may be eligible for an extension for the final 25%.

## Consequences of Not Rezoning on Time

If a local government fails to complete the rezoning by the deadline, HCD may decertify a Housing Element and may refer the jurisdiction to the Attorney General. Per the Housing Accountability Act, for housing development projects where at least 20% of the total units are affordable, a locality may not be able to reject a proposed development project on a site identified with the specified levels of affordable housing if it conforms with the density specified in the Housing Element, even if the zoning has not been completed.

## Sample Language

HCD offers the following sample language that could be included in a Housing Element, with edits in red.

### Sample Program 1:

*To accommodate the remaining lower-income RHNA of 89 units, the City of X will identify and rezone a minimum of 4.5 acres of vacant land to the R3 zoning district, allowing exclusively residential uses and a minimum of 20 units per acre to a maximum of 30 units per acre by January 31, 2024. Rezoned sites will permit owner-occupied and rental multifamily uses by right pursuant to Government Code section 65583.2(i) for developments in which 20 percent or more of the units are affordable to lower income households and do not require a subdivision and will be selected from sites 20 through 30 in the parcel listing (Appendix A). As reflected in Appendix A, each site has the capacity to accommodate at least 16 units and will be available for development in the planning period where water, sewer, and dry utilities can be provided.*

**Objective:** Create opportunity for at least 89 units of multifamily housing for lower income households

**Responsible Agency:** Community Development Department

**Timeline:** Sites rezoned by January 31, 2024

**Funding Source(s):** General fund

### **Sample Program 2: Rezone Program on Mixed-use Sites**

To accommodate the remaining lower-income RHNA of 150 units, the City will identify and rezone 8 acres of sites within the MU-30 zoning district, allowing owner-occupied and rental multifamily residential uses “by-right”, at a minimum of 20 units per acre by January 31, 2024. Sites will allow projects to be 100 percent residential by-right but shall require residential uses to occupy at least 50 percent of the total floor area of the mixed-use project. Rezoned sites will permit owner-occupied and rental multifamily uses by right pursuant to Government Code section 65583.2(i) for developments in which 20 percent or more of the units are affordable to lower income households and do not require a subdivision and will be selected from sites 15 through 30 in the parcel listing (Appendix A) and have the capacity for at least 16 units per site.

**Objective:** Create opportunity for at least 150 units of rental housing for lower income households

**Responsible Agency:** Community Development Department

**Timeline:** Sites rezoned by January 31, 2024

**Funding Source(s):** General fund

### **Statutory Language Regarding By Right**

For purposes of this section and Section 65583, the phrase “use by right” shall mean that the local government's review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a “project” for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code. Any subdivision of the sites shall be subject to all laws, including, but not limited to, the local government ordinance implementing the Subdivision Map Act. A local ordinance may provide that “use by right” does not exempt the use from design review. However, that design review shall not constitute a “project” for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code. Use by right for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5