

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-6220

DATE: May 21, 2018
TO: Honorable Councilmember Scott Sherman
FROM: City Attorney
SUBJECT: Legal Guidance Regarding Housing Production Goals

INTRODUCTION

This memorandum is in response to your request for legal guidance regarding the ability of the San Diego City Council (Council) to adopt and implement housing production goals for the City of San Diego (City). Specifically, you presented questions related to a wide variety of planning concepts that involve an array of methods that might achieve your objectives. This response is general in nature and provides preliminary input but does not recommend any particular approach.

QUESTIONS PRESENTED

1. Can the Council require mayoral staff to include in its reports to the Council a section that analyzes the item's effect on achieving housing production goals? If not, can the Council mandate that staff reports include such a section?
2. Can the Council adopt goals for the production of housing units within the City? If so, by what means?

SHORT ANSWERS

1. The Council may not require the Mayor to create housing production goals or require mayoral staff to include information regarding housing production goals in staff reports. Council may, however, request information from the Mayor, use its San Diego Charter (Charter) authority to obtain information from the Mayor, and take legislative action to require specific reporting from the Mayor, including information that the Council could use to create housing production goals.
2. Yes, consistent with the scope of its authority under the Charter, the Council may adopt goals for the production of housing units within the City. The means for adoption depends in part on the Council's objectives for adopting the goals.

ANALYSIS

I. THE CHARTER SPECIFIES A DIVISION OF RESPONSIBILITIES WITHIN CITY GOVERNMENT

The Charter establishes a division of governmental functions under which the Council sets, and the Mayor carries out, the policies of the City and oversees its administration. San Diego Charter §§ 11, 28, and 265(b)(2). The Council, as the City's legislative body, has the authority to establish policies of the City by way of legislation. San Diego Charter § 11. The Mayor is responsible for enforcing legislation and managing the administrative affairs of the City. San Diego Charter § 28. Thus, the Charter envisions a system of governance in which the Council's legislative authority and the Mayor's administrative power complement each other and function in tandem.¹

Accordingly, it is appropriate for the Council to enact legislation related to housing production goals by, for instance, establishing a policy that includes such goals or creating reporting obligations with respect to specific housing data. In such case, the Council should consider what specific information it expects the Mayor to provide and when or under what circumstances it expects the Mayor to provide it. For example, it should specify whether the Council expects the information to be provided in connection with all items brought forward for Council consideration or only a particular subset of items related to housing, and whether the Council expects the Mayor to provide this information with respect to items before Council Committees.

Although creating a reporting obligation is within the Council's jurisdiction, dictating the manner in which that information is presented rests with the Mayor. The Council may want to consider the cost of imposing a reporting requirement; this would include reviewing whether the data is readily available, the amount of staff time required to compile and update information, and whether such requests would require diverting staff from other projects.

The Council may employ the services of the Independent Budget Analyst as a resource in this effort, to assist in ascertaining costs or analyzing other policy implications. The Charter provides that the Independent Budget Analyst is authorized to perform policy analysis for the Council. San Diego Charter § 39.3.

We encourage the Council to inform the Mayor's Office of its objectives in creating and adopting housing production goals and for the Mayor to coordinate with Council staff to provide

¹ See also San Diego Charter section 32.1 (the Mayor must "inform the Council of all material facts or significant developments relating to all matters under the jurisdiction of the Council" and the Mayor and mayoral officers must "comply promptly with all lawful requests for information by the Council"); San Diego Charter section 270(h) (the Council or a Council Committee may summon "[a]ny City official or department head in the administrative service. . . to provide information or answer any question"); and San Diego Municipal Code (Municipal Code or SDMC) section 22.0101 (Rule 6.5.3) (Council Committees must inquire with the Mayor or an appropriate department before taking action on an item in order to ascertain its fiscal and operational impact, and the persons contacted for this purpose must cooperate fully with the Committee in providing such information).

the requested information. Our Office understands that the Mayor's staff is compiling a housing inventory, which may inform the Council's decision as to whether or what action to take with respect to establishing housing production goals. Such data could be helpful to the Council as it determines whether its policies and legislative initiatives have had a measurable effect on increasing the production of housing in the City. The Mayor's staff, such as those within the Development Services and Planning Departments, will likely have valuable insight and access to additional data that would be useful if the Council pursues the matter of setting housing production goals.

II. THE COUNCIL HAS AUTHORITY TO ADOPT HOUSING PRODUCTION GOALS

If the Council adopts goals for the production of housing units within the City, the action must be consistent with the scope of its legislative authority as described in the Charter. Neither the Council nor the Mayor may divest the other of the authority assigned to it by the Charter. As such, Council should base any action on its legislative authority to establish City policy and should not intrude on the administrative functions of the Mayor. Any action by the Council would be subject to mayoral veto unless it did not affect the Mayor's administrative authority. San Diego Charter § 280.

The Council should also consider the following issues.

A. Housing Production Goals Should Be Geared Toward Specific Results

The Council should consider the purpose of enacting housing production goals and how it expects the goals to be used. For example, the purpose of creating such goals could be to establish a metric for measuring the success of City efforts to address the housing crisis and reduce the deficit of units. The Council could use the information reported to guide its legislative decisions; for example, to determine whether, or the degree to which, amendments to the Municipal Code have increased the number of units built, and whether revisions to the Municipal Code are warranted to improve results.²

Assuming that the objective of establishing goals is to guide future legislative decisions, some questions for the Council to consider include: the data upon which the goals would be based, *e.g.*, housing starts, permits awarded for construction (and, if so, what type of permit), completion of final inspection required prior to occupancy, or some other metric; how housing type or affordability levels might be captured in the data; how and by whom this data would be compiled; and whether and how it would be updated.

The San Diego Housing Commission recently prepared a report on the topic of housing production entitled, "Addressing the Housing Affordability Crisis: San Diego Housing

² This Office does not, however, recommend using housing production goals to make decisions on quasi-judicial matters. Whether there is a means to apply goals to specific projects or sites may depend on whether substantial evidence demonstrates that a particular project's impact on achieving the goals relates closely to the Council's ability to make the required findings for that project. Such an approach would require further analysis.

Production Objectives 2018-2028.” That report may serve as the basis for housing production goals. The Council may also ask City staff or the Office of the Independent Budget Analyst to perform analysis to determine whether different or additional goals might be appropriate, depending on the Council’s objective.

The creation of housing production goals will not result in a mandate for the Mayor or any private entity to produce housing units. Whether the targeted number of units are ultimately constructed depends on various factors, some under government control and some not. They include demand and other market conditions, availability and flexibility of financing from commercial lending and other institutions, and the duration and complexity of the entitlement process, among other factors. The goals could, however, serve as a yardstick by which to measure how the City’s actions may affect the production of units.

B. The Council May Act by Resolution or Ordinance to Adopt Housing Production Goals

The Council may adopt housing production goals by resolution or ordinance. In most cases, resolutions are declarations of purpose: they provide a means for a legislature to state its policies, memorialize its decisions, and dispose of other matters within its power where the law does not require the formality of an ordinance. 5 McQuillin Mun. Corp. § 15.2 (3d ed. 2017). A resolution may be used to adopt a set of goals or to create a Council Policy that sets forth such goals. *See* Council Policy 000-01 for guidelines for the adoption of new policies.

Ordinances, on the other hand, typically prescribe prospective binding rules of conduct, whether commands or prohibitions, that apply within a jurisdiction. The California Municipal Law Handbook, § 1.230 (2018); 5 McQuillin Mun. Corp. § 15.2 (3d ed. 2017). Ordinances that contain codifying language are used to amend a jurisdiction’s code.³ Accordingly, the Council could adopt one or more ordinances related to housing production goals.

One function of ordinances is to impose regulations that would apply to new development projects. For example, the existing Land Development Code contains maximum densities but not minimum densities, and the Council could consider imposing the latter. *See* SDMC § 131.0431. Additional research would be required to determine if such a rule would meet the objective of reaching housing production goals and how it could be drafted in a legally enforceable manner.⁴

Council may also consider adopting an ordinance that requires the Mayor to provide reports containing data related to housing production. If the Council pursues adoption of an ordinance, it should establish a regular reporting interval, be it annual or some other period of time, and specify the data to be reported.

³ Ordinances may contain codified and uncodified sections. Codified sections amend the body of the City’s Municipal Code; uncodified sections have the same force of law but do not effect changes to the Municipal Code.

⁴ For example, due to practical obstacles, such as site constraints related to topography or lot configuration, it may not be possible for all developments to meet a density minimum. Any ordinance imposing one should include provisions that would account for and accommodate such circumstances, in order to minimize the likelihood of inverse condemnation (unconstitutional “takings”) challenges and observe other relevant property rights.

Alternatively or in addition to the options described above, the Council could consider a variety of land use ordinances to amend the Land Development Code in a manner that incentivizes housing production. For example, the Council recently adopted amendments to the Land Development Code regarding the City's density bonus program and accessory units, both of which actions provide incentives and remove obstacles for development of additional units beyond what is required under state law. The Council could consider additional amendments to incentivize development citywide or in targeted locations, such as transit priority areas. The Council could then compare data against the goals to analyze whether those ordinances perform successfully or if they warrant additional refinement.

Similar considerations would apply if the Council were to adopt housing production goals by resolution, enact a Council Policy, or adopt an ordinance to require reporting or incentivize production. Staff may need to analyze the action pursuant to the requirements of the California Environmental Quality Act. Cal. Pub. Res. Code §§ 21000 – 21189.57. The environmental analysis required by the adoption of goals or land use ordinances would depend on factors that include whether the action had been adequately analyzed as part of a previous project.

Regardless of whether an action is taken by resolution or ordinance, Council's action must be within the scope of its authority pursuant to the Charter.

C. The Council May Evaluate Existing and Anticipated Planning Efforts to Determine Whether They May Wholly or Partially Satisfy Its Purpose in Pursuing Housing Production Goals

The Council may also consider how to achieve its objective using existing and anticipated City planning efforts, such as through the Housing Element and comprehensive community plan update processes.

The Housing Element forms a chapter of the City's General Plan, but is updated separately and on a more frequent schedule than the General Plan. A primary purpose of the Housing Element, as required by state statute, is to ensure that cities identify adequate sites for housing and that they make adequate provision for the existing and projected needs of all economic segments of the community. Cal. Gov't Code § 65583. The City uses figures from the San Diego Association of Governments (SANDAG), called the Regional Housing Needs Allocation (RHNA), to update its Housing Element.

The City's Housing Element was updated most recently in 2013 and covers the time period of 2013 through 2020. At that time, SANDAG assigned the City a RHNA figure of 88,096 units, classified into specific income categories. The City prepared a Housing Element that demonstrated that there is sufficient vacant land with potential for redevelopment, zoned for residential use in various density categories, which could absorb that RHNA figure and meet that housing need. The City identified adequate sites to accommodate 126,259 potential units, and the Housing Element breaks down that figure by community planning area. *See* City of San Diego Housing Element HE-148. As part of this effort, the City prepared an addendum to the environmental impact report that had been certified at the time of adoption of the City's General

Plan. The Council adopted the Housing Element and the state determined that the City had complied with state law.

The City, through the Planning Department, could work with SANDAG to update the City's RHNA figure for the next Housing Element cycle, which process has already begun, and could determine what assumptions are appropriate to use in developing that RHNA calculation. However, adoption of a particular RHNA figure and incorporation of those units into the Housing Element does not require that the units be constructed or give cities a mechanism to mandate development. Making further amendments to the RHNA figure or the Housing Element is a manner to establish goals but will not, on its own, necessarily lead to additional production of units.

State efforts may also help the Council achieve its objectives. The state Legislature recently enacted statutes aimed at bringing jurisdictions closer to achieving their RHNA allotments and, in this legislative session, is considering enactment of additional statutes to spur residential development that better aligns with jurisdictions' Housing Elements. For example, effective January 1, 2018, the state requires cities to prepare an annual report with data that includes each city's progress in meeting its RHNA allocation, the number of housing development applications received and units proposed, the number of units approved and disapproved, and other detailed information. Cal. Gov't Code § 65400.⁵ This annual report, which the City's Planning Department is tasked with preparing, highlights the degree to which cities are addressing housing need. The Council could examine this report and obtain further information from the Planning Department to determine if this report might satisfy some or all of the objectives of enacting housing production goals.

The Council could also request additional information from the Mayor and the Planning Department about assumptions used by staff to estimate housing needs as part of related City planning processes; specifically, its community plan updates. Currently, as part of its scheduled comprehensive community plan updates, Planning Department staff works closely with the community to identify sites that can reasonably accommodate density, particularly in transit priority areas and in other locations that will help the City achieve its mode share goals pursuant to the City's Climate Action Plan. The number of units planned as part of a community plan update does not align precisely with the number of units identified in the RHNA process, however. When the City is able to identify increases to density beyond the minimum of what is needed to meet the current RHNA figure, the City is able to supplement its citywide adequate sites inventory. This places the City in a more favorable position for the next RHNA and Housing Element cycle, when the City receives an updated allotment.

The Council might request information from Planning Department staff to better understand how the City uses existing RHNA targets and how staff engages in a multi-year effort to prepare for

⁵ The requirement for collecting and reporting this data is new for charter cities. The City has some of this information available, but has just begun gathering it according to the parameters specified in the statute. Although the report was prepared this year, next year's report will contain more data and may be more informative. Data collected over time will also illuminate trends.

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upcoming RHNA obligations to help each community reach its housing goals and the City to reach its overall housing goal.

Each of these options – stating a policy position by way of resolution, creating a Council Policy, adopting ordinances, participating in state-mandated reporting, and tracking updates to the RHNA and community plan updates – provides an avenue by which the City can adopt housing production goals or otherwise affect production of additional units in the City.

CONCLUSION

The Council, as the City’s legislative body, may adopt goals for the production of housing. Should the Council pursue this concept, we recommend that the discussion include mayoral staff. Our Office will be able to provide full legal analysis and drafting of any required legal documents upon receipt of direction from the Council or a Council Committee. Our Office is available as a resource to provide additional assistance in the meantime.

MARA W. ELLIOTT, CITY ATTORNEY

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cc: Honorable Mayor and Councilmembers

Andrea Tevlin, Independent Budget Analyst