

Anthony Tordillos
San José Planning Commission, District 3¹
Planningcom1@sanjoseca.gov

June 16, 2023

RE: Concerns regarding the 2023–2031 Draft Housing Element

Dear Mayor and City Council,

I am writing to express severe concerns around the adequacy of the draft Housing Element scheduled to come before the Council in the coming days. While I am writing in my personal capacity, I hope this letter will expand upon the concerns I voiced during the Commission’s discussion of the draft Housing Element on May 24th. I would also like to endorse the procedural concerns raised by my fellow Commissioners Lardinois, Cantrell, Casey, and Rosario regarding the Commission’s consideration of the Element, particularly the limited time afforded to review the updated draft, absence of public engagement, lack of clear explanation as to how the updated draft addressed previous comments from HCD, and undue pressure from staff to approve the draft in spite of the concerns voiced during the session. Rather than reiterating those concerns here, I will instead focus this letter on outlining the areas where I believe the current draft fails to meet the requirements set out by HCD and enshrined in State law.

My primary feedback is centered around shortcomings of the draft Site Inventory. After reviewing the inventory, I identified several areas of concern, including methodological issues resulting in the inflation of capacity estimates for many Opportunity Sites in District 3 and District 6, failure to analyze the realistic development potential of non-vacant sites and sites with non-residential zoning, and shortcomings in the City’s analysis of the “Pipeline Projects” credited towards San José’s RHNA allocation. **Taken together, I believe there is substantial evidence that the current draft overstates the realistic residential development capacity of the Site Inventory by at least 20,000 units.** Inflation of residential capacity projections on this scale directly impacts the compliance of the draft Element, and I believe addressing these concerns will require the City to update the Site Inventory with additional Opportunity Sites or include a program to rezone additional sites to satisfy the City’s RHNA allocation. I expand upon these concerns in the proceeding sections of this letter, and I have made my underlying sources and analyses available for review in the footnotes.

¹ Title used for identification purposes only, in accordance with *Council Policy 0-36*. Comments contained in this letter are made in my personal capacity and not on behalf of the Planning Commission.

Capacity Analysis

Government Code § 65583.2(c) affords jurisdictions two options for calculating the realistic residential development capacity of sites in the Site Inventory—minimum densities or use of adjustment factors—with San José opting for the latter. AB 1397, passed in 2017, strengthened the standard for “adequate sites” and introduced additional factors to be considered when calculating realistic residential development capacity including: the typical densities of existing residential developments at comparable affordability levels and the realistic residential development capacity of non-vacant or non-residential sites. The current draft Element does not sufficiently analyze either of these factors as required by *Government Code § 65583.2(c)(2)*.

Analysis of Typical Residential Densities

HCD’s Site Inventory Guidebook notes that while typically built densities have long been used to determine realistic capacity, with the passage of AB 1397 jurisdictions are now required to base this analysis on comparable developments *at a similar affordability level*². **This analysis appears to be missing from the draft element, and the list of comparable sites referenced in the Tolemi Site Explorer makes no reference to the affordability level of site comparables.** Further inspection of site comparables in the Site Explorer reveals many instances of “Above moderate income” residential developments being used as comparables when calculating the projected capacity of sites intended to accommodate “Moderate income” and even “Low income” units, seemingly in direct contradiction to HCD guidance and the requirements codified in AB 1397.

Methodological Shortcomings of ‘Typical Densities’ Analysis

In addition to the shortcomings mentioned above, my review of the Site Inventory revealed significant issues with the draft Element’s methodology for calculating “typical densities” of site comparables. Specifically, the draft Element’s reliance on mean density of selected site comparables makes its projected density calculations sensitive to outliers² that can significantly skew the projected capacity. *Figure 1* shows one such example, where a single “capacity estimate comparable” at *605 S 2nd St* is nearly 5x denser than the next highest-density comparable. **The inclusion of this single property in the set of comparables single-handedly increases the site’s projected density by 94%.** Furthermore, the development at *605 S 2nd St* has only been *entitled*, but not constructed, and comes from a developer with no track record of actually constructing projects within the City. In other words, the projected capacity of this Opportunity Site was nearly doubled by the inclusion of a single outlier comparable that *hasn’t actually been constructed and therefore does not speak to the feasibility of residential development at this density.*

² HCD Site Inventory Guidebook, pp. 21

	Address	Units Added	Units Added per Acre	General Plan	Year Developed	Link
	39 E St James St	214	161.62	Downtown	2018	Link
	5 E Reed St Ste 10	105	182.50	Downtown	2017	Link
	181 E Santa Clara St	326	227.75	Downtown	2018	Link
	156 E St John St	102	232.28	Downtown	2016	Link
	605 S 2nd St	345	1,150	Downtown	2020	Link

Figure 1. A screenshot of the *Capacity Estimate Comparables* for Opportunity Site [146 N 4th St](#). The draft element projects a density of 400 dwelling units per acre (DU/AC), higher than the maximum zoned density of 350 DU/AC and substantially higher than the density of any of the comparables constructed within the previous planning cycle. A single outlying comparable, highlighted in red, is responsible for inflating the projected capacity of the Opportunity Site by 94%.

As *605 S 2nd St* is included as a capacity estimate comparable for many sites in the Inventory, this outlier effect can have a significant impact in artificially inflating the projected capacity of the Site Inventory. This effect is most pronounced amongst the Opportunity Sites with the highest projected densities, many of which are located in District 3 which encompasses Downtown and Central San José.

The cumulative inflationary impact of this effect is explored in *Figure 2*, which compares the projected densities of 46 Opportunity Sites in District 3 according to three different capacity projection heuristics. The delta between the blue dots (representing the draft Element’s projected densities) and the orange and gray dots reveals substantial inflation of capacity projections for at least 24 sites within District 3. **This result overstates the realistic capacity of these sites relative to typical built densities by approximately 1,200 units in District 3 alone³.** Based on these results for District 3, a follow-up analysis was performed for Opportunity Sites in District 6, which includes the portion of Downtown west of SR 87⁴. This analysis showed that the same capacity inflation issue observed in District 3 was also widespread amongst District 6 Opportunity Sites. Of the 49 Opportunity Sites in District 6 with projected densities above 200 DU/AC, 44 showed evidence of significant capacity inflation (see *Figure 3*). **Between District 3 and District 6 sites, this analysis suggests the draft Element is overstating the realistic development capacity of the analyzed Opportunity Sites by 2,500-2,800 units relative to typical built densities.**

³ Sites Inventory Supplementary Analysis, ‘District 3 Sites Analysis’; https://docs.google.com/spreadsheets/d/10aHbz4X9zllrAuB_J7sAcMoZPZF-ksbH/edit#gid=1611834302

⁴ Sites Inventory Supplementary Analysis, ‘District 6 Sites Analysis > 200 DU/AC’; https://docs.google.com/spreadsheets/d/10aHbz4X9zllrAuB_J7sAcMoZPZF-ksbH/edit#gid=1090815607

District 3 - Comparison of Density Projection Heuristics



Figure 2. A chart that compares the projected densities of the 46 Opportunity Sites in District 3 with the highest projected densities in the draft Element. The blue dots reflect the City’s draft capacity methodology: the mean density of ‘Capacity Estimate Comparables’. The orange and gray dots reflect potential alternative density projection heuristics: the median density of site comparables and the mean density of site comparables *successfully constructed during the previous planning cycle*, respectively.

District 6 - Comparison of Density Projection Heuristics

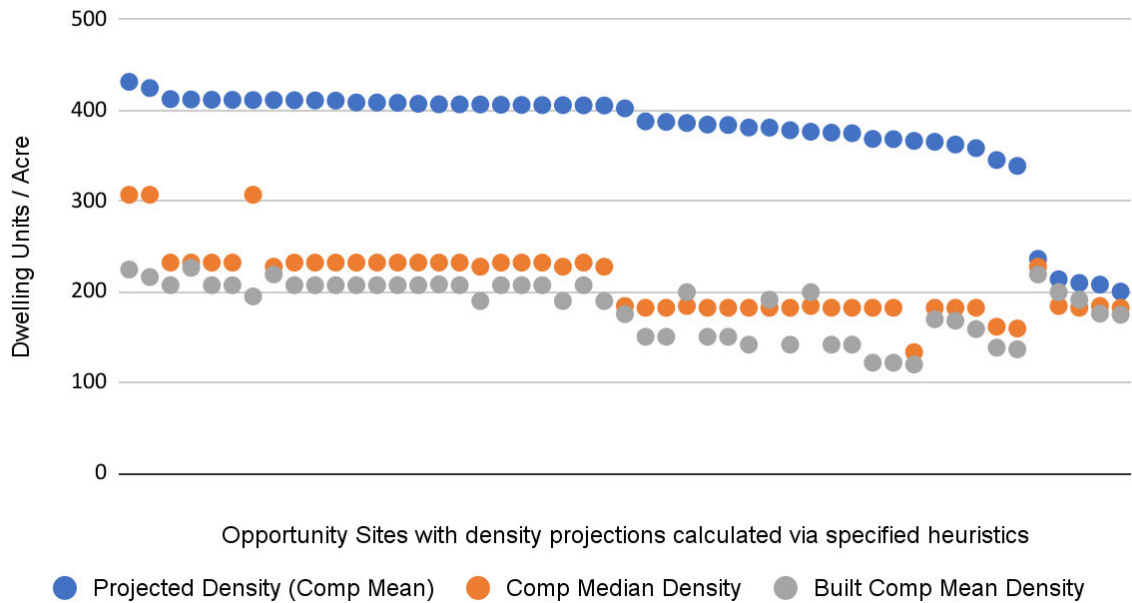


Figure 3. A chart that compares the projected densities of the 49 Opportunity Sites in District 6 with projected densities greater than 200 DU/AC.

To address the inflationary impact of outlying site comparables, the City should, at a minimum, consider removing *605 S 2nd St* from the Capacity Estimate Comparables of all Opportunity Sites. More holistically, I'd encourage the City to consider either constraining their Capacity Estimate Comparables analysis to residential developments that have been successfully constructed during the previous planning cycle or, alternatively, switch to a median-based density projection in order to make their analysis more robust to the effects of significant outliers.

Realistic Development Capacity for Non-Residential or Non-Vacant Sites

When evaluating sites that are non-vacant or that are zoned to allow non-residential uses, the Site Inventory Guidebook is clear that the City's capacity calculations "must be adjusted to reflect the realistic potential for residential development"⁵. Appropriate adjustment factors cited in the Guidebook include:

- Local track records, production trends, or net unit yields for site redevelopment
- Local residential development trends in the same nonresidential zoning district

More specifically, the Guidebook directs jurisdictions to base these estimates on either:

1. The rate at which similar parcels were developed during the previous planning period, or, if that data is unavailable
2. The proportion of parcels in the previous housing element's Site Inventory that were developed during the previous planning period

The draft Housing Element does not appear to apply any adjustment factors to non-vacant & non-residential sites, nor does it include relevant data on past development trends that could be used to estimate the appropriate adjustment factor. As a result, the realistic residential development capacities of the Site Inventory are artificially inflated in direct contradiction to HCD guidance. Absent additional data from the City, it is impossible to ascertain the degree of capacity inflation caused by this omission, but given the large proportion of sites in the Inventory that are either non-vacant (375 of 474 sites) or in zoning districts that allow non-residential development, **the net impact could result in an inflation of realistic residential development capacity by thousands or tens-of-thousands of units.**

While the Element does include some discussion of the redevelopment of non-vacant sites in the previous planning cycle⁶, it does not address the central question of the **rate of residential redevelopment of non-vacant sites nor the proportion of parcels developed during the previous cycle**. In effect, the draft appears to assume, without basis, that all Opportunity Sites in non-residential zoning districts will be developed with residential use and that none of the non-vacant sites identified have existing uses that could pose impediments to redevelopment

⁵ HCD Site Inventory Guidebook, pp. 20-21

⁶ Chapter 5: Adequate Sites for Housing, Section 5.4 Non-Vacant Sites

within the planning cycle. **These shortcomings were previously identified by HCD in their formal Letter of Review of the City’s initial draft Element⁷, but do not appear to have been addressed in subsequent revisions.**

Non-Vacant Sites Analysis

In order to demonstrate the potential for residential redevelopment of non-vacant sites within the planning period, *Government Code § 65583.2(g)(1)* requires jurisdictions to document the specific existing uses of non-vacant sites and the degree to which those uses may impede redevelopment. Additionally, AB 1397 introduced additional requirements for the analysis of non-vacant sites, including a requirement that jurisdictions analyze existing leases or contracts that would perpetuate existing uses or prevent site redevelopment⁸. **This analysis appears to be missing from the current draft.**

Reliance on Non-Vacant Sites to Accommodate Lower Income RHNA

As noted in HCD’s Letter of Review from December 2022, the draft Element relies on non-vacant sites to accommodate more than 50% of the RHNA allocation for lower-income households, and therefore is subject to additional requirements pursuant to *Government Code § 65583.2(g)(2)*⁹.

Specifically, the statute specifies that non-vacant sites’ existing uses will be presumed to impede residential development, absent specific findings “based on substantial evidence that the use will likely be discontinued during the planning period”¹⁰. The Site Inventory Guidebook provides several examples of appropriate evidence to support such findings, including:

- The existence of a development agreement to redevelop the site within the planning period
- A letter from the property owner stating an intention to redevelop the site with residential use during the planning period
- The existence of a demolition permit for the existing use, or other evidence that the structure is likely to be removed early enough in the planning period to accommodate redevelopment

This analysis appears to be missing from the current draft. **Until such findings can be incorporated into the draft Element, these non-vacant sites may not be utilized to demonstrate adequate sites to accommodate the City’s lower income RHNA.**

⁷ HCD Letter of Review, December 15, 2022, Appendix A, pp. 3-4

⁸ HCD Site Inventory Guidebook, pp. 25

⁹ HCD Letter of Review, December 15, 2022, Appendix A, pp. 4

¹⁰ HCD Site Inventory Guidebook, pp. 27

Pipeline Projects

Pipeline Project Discount Factors

In addition to the Opportunity Sites documented in the Site Inventory, the draft Element relies on approximately 20,000 pending and approved residential units in the development pipeline to meet the City’s RHNA allocation. With regards to pending & approved projects, the Site Inventory Guidebook provides clear direction stating that “For projects yet to receive their certificate of occupancy or final permit, the element must demonstrate that the project is expected to be built within the planning period.”¹¹ To its credit, the City has applied a discount factor of 40% to the total unit count for Pipeline Projects.¹² The city derived this discount factor from a 2019 analysis that found that 60% of residential units entitled between April 2014 and April 2019 were under construction by September 2019. **However, the same study also reported significant disparities in the likelihood of construction across different construction types, with only 25% of approved high-rise projects proceeding to construction compared to 70% of mid-rise projects and 50% of low-rise projects¹³ (see Figure 4).** The study went on to note that because entitlement costs constitute only a small fraction of overall development costs for high-rise projects, such projects proceed from entitlement to construction at significantly lower rates than other building forms.

Building Type	Construction Type	Percentage of Projects That Began Construction
Low-Rise	Type IV/V	50%
Mid-Rise	Type II/III	70%
High-Rise	Type I	25%

Figure 4. A table taken from the City’s 2019 *Housing Crisis Workplan Update*, showing the percentage of approved projects that successfully moved from entitlement to construction, according to construction type.

In order to discern a more realistic estimate of the number of units from approved and pending projects likely to be constructed within the planning period, I reviewed the proposals listed in the City’s Pipeline Projects and categorized them according to construction type. I then applied the construction-type specific discount factors cited in the 2019 study to come to a more realistic estimate¹⁴. **This fine-grained analysis suggests that, at most, approximately 16,570 pending and approved units are likely to be completed in the planning period, about 3,500 fewer units than in the draft Element’s analysis.**

¹¹ HCD Site Inventory Guidebook, pp. 5

¹² Chapter 5: Adequate Sites for Housing, Section 5.3.1 Pipeline Approved Units, pp. 5-6

¹³ City Council Agenda, Sept. 24, 2019, Item 4.2, [Housing Crisis Workplan Update](#)

¹⁴ Pipeline Projects Analysis;

https://docs.google.com/spreadsheets/d/1KsyMqW4CTfdX-uVap3ynWAZF4MciwFbSGgdzw38Vx_s/edit

In addition to considering construction type when applying discounts to units in the development pipeline, the City should also consider applying additional discounts to reflect the substantial changes to market conditions that have occurred since the 2019 *Housing Crisis Workplan* study. Specifically, the Element should reflect the fact that the Federal interest rate is over 2x higher than it was in 2019, severely limiting the availability of construction financing and impacting the feasibility of many projects in the development pipeline. Likewise, the City should factor in the significant increases to construction costs over the last 4 years, and the degree to which such increases impact the likelihood of completion of pending and approved units.

Project-specific Discounts

In addition to the generic discount factors outlined above, a closer review of the City's Pipeline Projects reveals a number of project-specific circumstances that warrant additional discounts to the number of units that can reasonably be expected to be constructed within the planning period:

1. **PD18-016 - 121 units:** The developer of this proposal (SiliconSage) declared bankruptcy in 2021 & was subsequently under federal investigation for defrauding investors. This project is therefore highly unlikely to be delivered within the planning period & should be removed from the draft Element.
2. **SPA17-023-01 - 501 units:** The developer of this proposal (Starcity) is defunct, and the site has been foreclosed upon & seized by the lender. This project is therefore highly unlikely to be delivered within the planning period & should be removed from the draft Element.
3. **PD17-014 - 582 units:** This proposal was subsumed by a revised proposal from the same developer, PD20-012. The draft element includes both proposals, effectively double counting these 582 units. This proposal should be removed from the draft Element.
4. **H20-040 - 220 units:** This project is a duplicate of SP21-044. The draft element includes both proposals, effectively double counting these 220 units. This proposal should be removed from the draft Element.
5. **H20-026 - 192 units:** VTA is in the process of seizing this site via eminent domain as part of the construction of the Downtown BART station. In a statement to the press, VTA Director of TOD Ron Golem said, "Either there can be a downtown San Jose BART station, or there can be an Eterna Tower. There cannot be both."¹⁵ As such, the City should remove this project from the draft Element.

15

6. **SP18-033 - 40 units:** The City has previously reported that this proposal has stalled. It should be removed from the draft Element.
7. **SP19-065 - 27 units:** The site in question was sold to KT Urban, and the new owner is abandoning the previously-approved residential development in favor of a hotel proposal (SP23-005). As such, this project should be removed from the draft Element.
8. **PD19-029 - 5,000 units:** This project encompasses the residential units planned as part of Google's *Downtown West* campus. However, the claimed unit count (5,000 units) is higher than what Google has publicly forecasted (4,000 units). More importantly, the draft Element does not include any evidence supporting the assertion that all of these units are likely to be completed within the planning period. Google's development agreement with the City extends 30 years, and Google has not made any public commitments to deliver a specific number of units within the planning period, so it is not appropriate to count all 5,000 units towards the City's RHNA allocation. A conservative estimate that half of the planned units will be completed within the planning cycle would result in a discount of 2,500 units.

Projected ADUs

The draft Element relies on projected ADU production to satisfy 2,888 units of the City's RHNA allocation. However, the Site Inventory Guidebook specifically directs jurisdictions to consider "the availability of ADUs and JADUs for occupancy, rather than used as offices or guest houses"¹⁶. **This factor appears to be absent from the City's ADU analysis, resulting in an inflation of the realistic number of ADUs that should be credited against the RHNA allocation.**

Conclusion

In summary, this letter provides substantial evidence that the current draft Element does not satisfy the requirements laid out in State law and is not likely to be certified by HCD. Concretely, I have provided evidence demonstrating that the realistic residential development capacity of the Site Inventory is inflated by at least 10,000 units (2,500+ units from unrealistic capacity projections for District 3 and District 6 opportunity sites, and approximately 7,500 units from shortcomings in the analysis of pending and approved Pipeline Projects). Furthermore, the draft Element's failure to analyze and apply adjustment factors to non-residential and non-vacant sites in accordance with AB 1397 suggests further overestimation of the realistic capacity of the Site Inventory by potentially tens-of-thousands of units. **Taken together, these shortcomings result in an overstatement of the realistic capacity of the draft Site Inventory by upwards of 20,000 units.**

¹⁶ HCD Site Inventory Guidebook, pp. 30

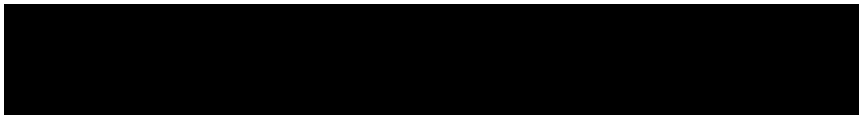
I want to be clear that my critiques of the draft Housing Element are in no way intended to assail or invalidate the years of hard work from City Staff required to get to this point. I recognize that planning for 62,200 units of new housing would be a herculean task under any circumstances, and has been made all the more difficult due to recent changes to State law, the ongoing impacts of the COVID-19 pandemic, and persistent resource constraints for our Planning Department staff. It is with a spirit of respect and deference to City Staff that I believe we owe it to them to provide the appropriate time and resources to continue to iterate on the current draft and bring it into full compliance with the requirements laid out by HCD.

To Mayor Mahan & City Council, I hope you will take these concerns seriously and direct staff to continue to improve the draft Element prior to voting on its adoption. I understand that the City is concerned about the potential consequences of continued non-compliance, but voting to adopt a flawed plan is not the solution. Critically, adopting the draft Element will not, in itself, bring the City into compliance. If the City proceeds to adopt the current draft and HCD review ultimately finds the current draft to *not* be substantially compliant, then the City will find itself in the unenviable position of having an adopted Housing Element that cannot be certified by HCD, while also having wasted precious weeks or months that could have been spent addressing the concerns raised here and in HCD's December review letter.

Finally, and most importantly, I believe the residents of San José, present and future, deserve better than this current draft is able to provide. As Mayor Mahan has said on numerous occasions, the status quo is simply not good enough. We deserve a Housing Element that directly addresses the historic crisis we face, that seriously reckons with the consequences wrought from decades of underproduction, and that recognizes that continued inaction will further the patterns of displacement and despair that have seen the City's population contract for three consecutive years. We deserve a Housing Element that gives the City its absolute best shot at meeting our housing needs over the next 8-years. The current draft is not that document, but with Council's support and Staff's continued efforts I believe that it can be.

Thank you for your time and consideration.

Sincerely,



Anthony Tordillos
San José Planning Commission, District 3