

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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February 4, 2021

Lillian Doherty, Director
Development Services
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA 92024

Dear Lillian Doherty:

RE: Review of the City of Encinitas' Revised 6th Cycle (2021-2029) Draft Housing Element

Thank you for submitting the City of Encinitas' (City) draft housing element received for review on December 7, 2020, along with revisions received on January 18, 2021. Pursuant to Government Code section 65585, subdivision (b), the California Department of Housing and Community Development (HCD) is reporting the results of its review. Our review was facilitated by a telephone conversation on January 11, 2021, with you and Encinitas' housing element team.

The draft element addresses many statutory requirements; however, revisions will be necessary to comply with State Housing Element Law (Article 10.6 of the Gov. Code). Among other things, the element must be revised to include programs with firm commitments to effectively eliminate inconsistencies with State Density Bonus Law (SDBL) and discrimination against persons with disabilities, including actions inconsistent with the provisions of Government Code section 65008. The enclosed Appendix describes these as well as other revisions needed to comply with State Housing Element Law.

Pursuant to Government Code section 65583.3, the City must submit an electronic, true-and-correct copy of the housing element site inventory when it submits its adopted housing element to HCD for review. The City must utilize standards, forms, and definitions adopted by HCD. The City can reach out to HCD at sitesinventory@hcd.ca.gov for technical assistance.

Government Code section 65588, subdivision (e)(4), requires a jurisdiction that failed to adopt its housing element within 120 calendar days from the statutory due date to revise its element every four years until adopting at least two consecutive revisions by the applicable due dates. The City is subject to this four-year revision requirement. Provided the City adopts its housing element on or before April 15, 2021, it will meet its first four-year update requirement.

Public participation in the development, adoption and implementation of the housing element is essential to effective housing planning. Throughout the housing element process, the City should continue to engage the community, including organizations that represent lower-income and special-needs households, by making information regularly available and considering and incorporating comments where appropriate.

Several federal, state, and regional funding programs consider housing element compliance as an eligibility or ranking criteria. For example, the CalTrans Senate Bill (SB) 1 Sustainable Communities grant; the Strategic Growth Council and HCD's Affordable Housing and Sustainable Communities program; and SB 2 Planning Grants as well as ongoing SB 2 funding (Permanent Local Housing Allocation) consider housing element compliance and/or annual reporting requirements pursuant to Government Code section 65400. With a compliant housing element, the City would meet housing element requirements for these and other funding sources.

As a reminder, Chapter 370 Statutes of 2017, Assembly Bill (AB) 72, expands and clarifies HCD's enforcement authority. HCD is charged with the review of a local government's compliance with Article 10.6 of the Government Code to determine whether the city's action or failure to act is inconsistent with state housing laws. If HCD makes findings that the city's failure to act is inconsistent with Article 10.6 of the Government Code or that the city has taken an action in violation of Government Code sections 65589.5 (Housing Accountability Act), 65863 (No-Net Loss Law), 65915 (Density Bonus Law) and/or 65008 (Anti-Discrimination in Land Use), HCD may refer such violations to the California State Attorney General's Office.

HCD appreciates the assistance Encinitas' housing element team provided during the course of our review. We are committed to assisting the City in addressing all statutory requirements of State Housing Element Law. If you have any questions or need additional technical assistance, please contact Robin Huntley at (916) 263-7422.

Sincerely,

A handwritten signature in black ink that reads "Shannan West". The signature is written in a cursive, flowing style.

Shannan West
Land Use & Planning Unit Chief

Enclosure

APPENDIX CITY OF ENCINITAS

The following changes are necessary to bring the City's draft housing element into compliance with Article 10.6 of the Government Code. Accompanying each recommended change, we cite the supporting section of the Government Code.

Housing element technical assistance information is available on HCD's website at <http://www.hcd.ca.gov/community-development/housing-element/housing-element-memos.shtml>. Among other resources, the housing element section contains HCD's latest technical assistance tool, *Building Blocks for Effective Housing Elements (Building Blocks)*, available at <http://www.hcd.ca.gov/community-development/building-blocks/index.shtml> and includes the Government Code addressing State Housing Element Law and other resources.

A. Housing Needs, Resources, and Constraints

1. *An inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level, and an analysis of the relationship of zoning and public facilities and services to these sites. (Gov. Code, § 65583, subd. (a)(3).) Submit to the department an electronic copy of its inventory of land suitable for residential development. (Gov. Code § 65583.3)*

Realistic Capacity: Site 09 - Echter Property/Fox Point Farms: Encinitas' City Council took action at its January 27, 2021 meeting to deny the appeal from Encinitas Community Trust and approve the Fox Point Farms development application. As such, capacity estimates in the housing element for Site 09 should be revised to reflect the number and affordability level of the housing project as approved for the site.

B. Housing Programs

1. *Identify actions that will be taken to make sites available during the planning period with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city's or county's share of the regional housing need for each income level that could not be accommodated on sites identified in the inventory completed pursuant to paragraph (3) of subdivision (a) without rezoning, and to comply with the requirements of Government Code section 65584.09. Sites shall be identified as needed to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing, factory-built housing, mobilehomes, housing for agricultural employees, supportive housing, single-room occupancy units, emergency shelters, and transitional housing. (Gov. Code, § 65583, subd. (c)(1).)*

As noted in Finding A-1, the element does not include a complete site analysis; therefore, the adequacy of sites and zoning cannot be established. Based on the results of a complete sites inventory and analysis, the City may need to add or revise programs to address a shortfall of sites or zoning available to encourage a variety of housing types.

2. *Address and, where appropriate and legally possible, remove governmental and nongovernmental constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities. The program shall remove constraints to, and provide reasonable accommodations for housing designed for, intended for occupancy by, or with supportive services for, persons with disabilities. (Gov. Code, § 65583, subd. (c)(3).)*

Program 2D: Ensure that the Density Bonus Ordinance Continues to be Consistent with State Law

In order to meet the requirements of Assembly Bill (AB) 2345 (Chapter 197, Statutes of 2020), the City adopted Ordinance No. 2020-09 with the intent of satisfying the law's requirements pursuant to the course of action allowed in Government Code 65915, subdivision (s). HCD has reviewed Ordinance No. 2020-09 and finds multiple provisions are inconsistent with SDBL.

Ordinance No. 2020-09 does not “incentivize the development of affordable housing that allows for density bonuses that exceed the density bonuses required by the version of this section effective through December 31, 2020” as required by subdivision (s). Alternatively, it disincentivizes density bonus by including provisions that limit the number of housing units that can be developed (use of net acreage); requires documentation in excess of the “reasonable documentation” allowed when requesting concessions/incentives and waivers, thus shifting the burden of proof from the City to the developer; includes arbitrary requirements not allowed in State Density Bonus Law (e.g., square footage requirements for density bonus units), and does not include any grandfathering provisions. Please see the Department’s December 16, 2020 correspondence for additional areas that do not comply with statutory requirements.

As you are aware, a local government may not adopt ordinances that conflict with the State Planning and Zoning Law. (Gov. Code, § 65000 et seq.) Program 2D acknowledges this by stating, “Government Code section 65915 requires that a jurisdiction adopt a local Density Bonus Ordinance consistent with State law.”

Accordingly, Program 2D must be revised to commit the City to immediately remove or suspend Ordinance No. 2020-09 and apply current State Density Bonus Law until the City’s density bonus ordinance is appropriately amended to be in compliance with the requirements of AB 2345 and Government Code section 65915, including as noted in the Department’s December 16, 2020 correspondence.

Program 2E: Accommodate Specialized Housing Types to Assist Persons with Special Needs

The City adopted Ordinance No. 2020-16 with the intent of regulating group homes, including sober living homes, which are not required to be licensed by the State of California. HCD has reviewed Ordinance No. 2020-16 and finds multiple provisions

that discriminate against persons with disabilities and are inconsistent with the requirements of Government Code section 65008, including the following:

- It explicitly targets persons with disabilities and imposes different requirements on a protected class than those requirements generally imposed upon other uses.
- It creates an onerous permitting requirement that jeopardizes the financial feasibility of group homes and sober living homes by requirements including, but not limited to, 24-hour on-site management.
- It requires written notice to neighbors within 500 feet, thus stigmatizing the tenants and additionally requiring a Good Neighbor Policy, which assumes the tenants – persons with disabilities – will be bad neighbors.
- It limits the use and enjoyment of the home by including additional limitations including, but not limited to, use of the garage, and driveway, use of ADUs, limiting the number of cars, and more.

None of these requirements apply to other residential uses. Program 2E must be revised to commit the City to immediately remove or suspend Ordinance No. 2020-16 and uphold current State laws regarding the fair and equal treatment of persons with disabilities without discrimination in land use.

Program 3D: Improve the Efficiency of the Development Review Process for Housing Projects

Program 3D states, “In conformance with Government Code section 65940.1 (SB 1483), the City has posted on its website a current schedule of fees, application forms, zoning ordinances, and other information, and updates the information with 30 days of any changes.” In addition, Section 9.1.7 of the housing element (Cultural/Natural Resources Overlay Zone) states, “The Final Environmental Assessment (EA)...identifies the R-30 sites that potentially may have ecologically sensitive plant and animal habitats or could contain archaeological and tribal cultural resources...project staff will inform the applicant if a site specific analysis is required for archaeology or biology *when a project is proposed*...Because the EA is incorporated into the General Plan, the City is required to ensure that developments on R-30 sites comply with its requirements.” [Emphasis added.]

Program 3D should be revised to include a commitment to post the additional analysis required by the EA on the City’s website along with the detailed, objective standards required of the studies and the mitigation measures identified should a significant impact be identified for each of the R-30 sites within 6 months.

HCD reminds the City that it adopted both the Environmental Impact Report and the EA with overriding considerations regarding inmitigable traffic impacts. Thus, the City has declared the provision of housing takes precedence over any potential significant and inmitigable impacts development may have on traffic.

Program 3F: Seek to Create Community Support for Housing at a Variety of Income Levels:

Program 3F describes the Citizen Participation Process (CPP) as, “not used as a basis to approve or deny a project but as a means for the developer to explain the project to the community, to involve the community in the application review, and to provide an opportunity to reduce public opposition to project.” As such, the City requires a CPP for most housing development projects in the City, including projects qualifying for a by-right process (without any discretionary action) such as R-30 sites with development projects including 20 percent or more of the units affordable to lower-income households.

However, the City’s Municipal Code Chapter 30.09 acknowledges both the City’s Design Review and CPP are discretionary actions. For example, Emergency Shelters, which must be allowed by-right, are explicitly exempt from both design review and the provisions of Chapter 23.06 (CPP process).

Program 3F further states that, “Comments received during the CPP are provided to the decision-making bodies in the staff report. Staff provides an analysis of comments received that are relevant to objective standards applicable to the proposed project for the decision-making body to consider in making the required findings.”

Any process that involves a public meeting or public hearing implies discretion is allowed. However, discretionary processes and standards are not allowed for by-right projects. Program 3F should be revised to provide certainty that decision-making bodies only consider objective standards and use objective processes during the deliberation of projects qualifying for a by-right review. Subjective processes and subjective standards cannot be imposed. Citizens’ comments that are subjective in nature or do not address objective standards may not be considered or influence decision-making. The City should consider that by inviting the public’s input on by-right projects, citizens who engage in the process by providing subjective comments that cannot be considered by the City’s decision makers could become frustrated and disenfranchised.

As an alternative, the City may consider amending its approval process for projects that are allowed by right so that they are exempt from the CPP or other public hearings, and that the Director of Development Services (or other staff designee) has decision-making authority for by-right design review.

In addition, Program 3F or other programs should include a commitment to continually monitor both the CPP and design review processes as applied to by-right projects to ensure only objective processes or standards are used. In addition, due to the cumulative impact of a variety of potential constraints, Program 3F or other programs must monitor the City’s overall regulatory framework annually and make changes as appropriate. Monitoring should be done in collaboration with HCD, the development community, and/or housing advocates. If any process is found to include discretion or subjectivity for by-right development or generally act as a constraint on development, the requirement should be removed or suspended until the process can be amended. Amendments should be completed within one year of identification of the constraint.