STATE OF CALIFORNIA - BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY GAVIN NEWSOM, *Governor*

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

March 25, 2021

Pamela Antil, City Manager
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA 92024

RE: City of Encinitas Notice of Violation, Ordinance No. 2020-16 (Group Homes, including Sober Living Homes)

Dear Pamela Antil:

The California Department of Housing and Community Development (HCD) has reviewed the City of Encinitas' Ordinance No. 2020-16 under its authority pursuant to Government Code section 65585, which extends to statutory prohibitions on discrimination in land use (Gov. Code, § 65008). HCD must notify the City and may notify the Office of the Attorney General when a city takes actions that are in violation of Government Code section 65008. (Gov. Code, § 65585, subd. (j).)

On December 16, 2020, the City adopted Ordinance No. 2020-16, amending the Municipal Code to regulate Group Homes and, as a subset of Group Homes, Sober Living Facilities. Described in greater detail below, HCD finds that the City's ordinance is in violation of statutory prohibitions on discrimination in land use (Gov. Code, § 65008) by imposing separate requirements on housing for a protected class (based on familial status and disability), limiting the use and enjoyment of their home, and jeopardizing the financial feasibility of group and sober living homes. The City must take immediate steps to repeal Ordinance No. 2020-16.

California's Planning and Zoning Law Prohibits Discrimination

California's Planning and Zoning Law (Gov. Code, § 65000 et al.) prohibits jurisdictions from engaging in discriminatory land use and planning activities.[1] Specifically, Government Code section 65008, subdivision (a), deems any action taken by a city or

[1] While not the subject of this letter per se, HCD also reminds the City of its related obligation under state law to affirmatively further fair housing. (Gov. Code, § 8899.50.) Under that statute, the city has a duty to "administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and take no action that is materially inconsistent with its obligation to affirmatively further fair housing." (Gov. Code, § 8899.50, subd. (b).)

county to be null and void if such action denies to an individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in the State due to illegal discrimination. Under the law, it is illegal to discriminate based on protected class such as race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability (including individuals in recovery for drug or alcohol abuse, whether or not they are actively seeking recovery assistance), veteran or military status, or genetic information. (See, e.g., Gov. Code, §§ 65008, subd. (1)(a), 12926, 12926.1, 12955, 12955.2; 42 U.S.C. § 3602(h); see also *Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1156-1157 [persons recovering from alcohol or drug addiction are disabled under both the Fair Housing Act (FHA) and the Americans with Disabilities Act (ADA)]; Jennifer Gates, City of Encinitas, Agenda Report Item #10B, November 18, 2020, p. 3 [acknowledging same].)[2]

The law further recites multiple categories of actions that are determined to be discriminatory, including:

- Enactment or administration of ordinances pursuant to any law that prohibit or discriminate against a protected class (Gov. Code, § 65008, subd. (b)(1)(B));

- Enactment or administration of ordinances pursuant to any law that prohibits or discriminates against residential developments because they are “intended for occupancy by persons and families of very low, low, or moderate income, … or persons and families of middle income” (*id*., § 65008, subds. (a)(3), (b)(1)(C); *Bruce v. City of Alameda* (1985) 166 Cal.App.3d 18, 20-21 [general moratorium on government subsidized rental housing violated section 65008’s prohibition on discrimination in residential development due to income]); and

- Imposition of different requirements on a residential use by a protected class or by persons of very low, low, moderate, or middle income, other than those generally imposed upon other residential uses. (Gov. Code, § 65008, subd. (d)(2)(A).)

Ordinance No. 2020-16 Impermissibly Discriminates

HCD is very concerned about Ordinance No. 2020-16. Although this ordinance ostensibly seeks to address the “adverse impacts” of Group Homes, these kinds of

[2] It is important to recognize that addiction recovery is a recognized disability without regard to attendance at an established recovery program. (See *Hernandez v. Hughes Missile System Co.* (9th Cir. 2004) 362 F.3d 564 [ADA protections can encompass individuals are not only participating in recovery programs but also those who have completed them or who are “erroneously regarded as using drugs when in fact they are not”].)

The City appears to take significant comfort from certain court opinions, several unpublished, appearing to reject specific, largely different and distinguishable challenges to a different group home ordinance in Costa Mesa, which were brought by private parties rather than the State of California. Those decisions are neither on point nor binding here.

ordinances—calling out protected classes for specific regulatory action based on concerns of this nature—can result in significant barriers to housing for persons with disabilities in a way that a more generalized regulatory response, targeting actions or impacts rather than persons, would not.[3]

(1) *Ordinance No. 2020-16 creates a new onerous and discriminatory permit process for Group Homes: a burdensome "ministerial" process on group homes for 6 persons or fewer, and a much more burdensome conditional use permit on "group homes" of 7 or more persons.*

Municipal Code section 9.39.030 creates a new Group Home permit requirement, and section 9.39.040 provides that permitted homes may be occupied only by "Handicapped individuals (other than a house manager)." Handicapped is defined in Chapter 30.04 as "more specifically defined under the Fair Housing Laws, a person who has a physical or mental impairment that limits one or more major life activities, a person who is regarded as having that type of impairment, or a person who has a record of that type of impairment, not including the current, illegal use of a controlled substance." In doing so, Ordinance No. 2020-16 targets a protected class with the intent of creating constraints and barriers to residential uses.

Under this ordinance, Municipal Code Chapter 30.04 (Zoning – Definitions) defines "limited" and "general" group and sober living homes as follows:

> GROUP HOME shall mean a facility that is being used as a supportive living environment for persons who are considered Handicapped, as that term is defined by this Chapter, under State or Federal law. …. For purposes of this definition, a "Group Home, Limited" serves six (6) or fewer persons, and a "Group Home, General" serves seven (7) or more persons. …
>
> SOBER LIVING HOME shall mean a Group Home for persons who are recovering from a drug and/or alcohol addiction and who are considered Handicapped under State or Federal law. … For purposes of this definition,

[3] See, e.g., Brian J. Connolly and Dwight H. Merriam, Planning and Zoning for Group Homes: Local Government Obligations *and Liability Under the Fair Housing Amendments Act* (2015) 47 Urb. Law. 225, 227:

> [P]ersistent fears and a palpable antipathy toward people with disabilities are a … common feature of debates in neighborhoods and localities when housing facilities for this population are under consideration. Whether justified by concerns about maintenance of community character, preservation of property values, or concern for personal and property protection, these arguments effectively deny persons with disabilities fair and equal access to housing and give voice to bias, prejudice, stigma, and discrimination.

> a "Sober Living Home, Limited" serves six (6) or fewer persons, and a "Sober Living Home, General" serves seven (7) or more persons.

"Limited" homes, with 6 or fewer persons, are subject to ministerial permit, while "general" homes, with 7 or more, are subject to a conditional use permit. The requirements for a ministerial permit are onerous under the ordinance; the requirements for a conditional use permit (major) are unstated and presumably much more so. (*Id.*, § 9.39.050.)

There appears to be little justification for these occupancy restrictions, and they seem to be imposed without regard to the size of the structure, the number of bedrooms, or occupancy limits under State law. Further, they are not imposed in a non-discriminatory manner. Although the ordinance is ostensibly designed to address the concerns of overcrowding—too many cars, too much noise, and other similar considerations—presented by Group Homes, the ordinance places no similar restrictions on non-disabled persons in similar circumstances. (See, e.g., United States Department of Justice and United States Department of Housing and Urban Development, Joint Statement: Local Land Use Laws and Practices and the Application of the Fair Housing Act (November 10, 2016) ("Joint Statement"), p. 4 ["A land use or zoning practice may be discriminatory on its face. For example, a law that requires persons with disabilities to *request permits* to live in single-family zones while not requiring persons without disabilities to request such permits violates the Fair Housing Act because it treats persons with disabilities differently based on their disability", emphasis added].)

The City's asserted interest in "preserv[ing] the residential character of neighborhoods," "prevent[ing] an overconcentration of [Group Homes] in neighborhoods with single-family residences," and "limiting the secondary impacts of Group Homes, including, but not limited to reducing noise and traffic, preserving safety, and providing adequate on-street parking" (Jennifer Gates, City of Encinitas, Agenda Report Item #08A, December 16, 2020, p. 2), appear pretextual when these issues could be addressed directly through the City's existing laws as noted below. The City, further, has no evidence of current overconcentration, and indeed most group homes in the City appear to blend readily into residential neighborhoods. (Jennifer Gates, City Council Meeting, November 18, 2020, Agenda Item 10B (recording at 2:21) [the City is aware of 5 such homes in the entire city, but suspects there may be more].)

The City should treat Group Homes as comparable to any other residence to satisfy the goal to accommodate and integrate persons with disabilities in all communities. (*Oconomowoc Residential Programs, Inc. v. City of Milwaukee* (7th Cir. 2002) 300 F.3d 775, 783 [the FHA "prohibits the enforcement of zoning ordinances and local housing

policies in a manner that denies people with disabilities access to housing on par with that of those who are not disabled."]; see also Gov. Code, § 65008, subd. (d)(2)(A) [prohibits imposition of different requirements on a residence intended for occupancy by a protected class or by persons of very low, low, moderate, or middle income, other than those generally imposed upon other residences].) Any identified concerns can be addressed by the same occupancy limits and zoning enforcement tools that are used with non-disabled residents in the community.

There are existing non-discriminatory means to address these concerns. The Supreme Court in *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 133, explained: "Population density can be regulated by reference to floor space and facilities. Noise and morality can be dealt with by enforcement of police power ordinances and criminal statutes. Traffic and parking can be handled by limitations on the number of cars (applied evenly to all households) and by off-street parking requirements. *In general, zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users*." (*College Area Renters & Landlord Assn. v. City of San Diego* (1996) 43 Cal.App.4th 677, 687–688, citing *Adamson*, emphasis added.) In fact, Mayor Blakespear expressly recognized that the City has effective, existing mechanisms in place to address any neighborhood spillover concerns. (City Council Meeting, November 18, 2020, Agenda Item 10B (recording at 2:23) ["this is a way for us to make sure that there aren't any neighborhood concerns that are spilling over, and there shouldn't be already, but this allows us to regulate that"].) Thus, the City has expressed no justifiable basis for burdening this protected class of persons in this manner.

(2) *Ordinance No. 2020-16 mandates that both existing and future Group Homes obtain a permit*.

Ordinance No. 2020-16 purports to apply to not only *new* Group Homes (including Sober Living Homes), but also to *existing* ones. Section 9.39.070 requires existing Group Homes to seek a permit within 90 days after the effective date of the Ordinance.[4] It is questionable whether the retroactive application of the ordinance in this manner is constitutional. As the courts have instructed: "If the law effects an unreasonable, oppressive, or unwarranted interference with an existing use, or a planned use for which a substantial investment in development costs has been made, the ordinance may be invalid as applied to that property unless compensation is paid." (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 551–552; see also *Edmonds v. Los Angeles County* (1953) 40 Cal.2d

[4] The Ordinance was adopted on December 16, 2020. Ordinarily, the ordinance would go into effect 31 days thereafter, on January 16, 2021. However, by its terms this ordinance will not go into effect until approved by the Coastal Commission.

642, 651 ["the rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected."].) For this reason, zoning ordinances typically exempt existing uses from new zoning regulations. (*Hansen Brothers, supra,*12 Cal.4th at 552 ["a provision which exempts existing nonconforming uses 'is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses'"].) Indeed, the City's own Municipal Code acknowledges the City's limited authority to regulate established non-conforming uses except in instances of actual nuisance or where the use is proposed for expansion. (See, e.g., Mun. Code, §§ 30.76.020, 30.09.010 (fn. 28).) It is unclear why these principles were not observed in the context of Group Homes; the City expressed no justification for burdening this protected class of persons in this manner.

(3) Ordinance No. 2020-16 limits occupancy to those individuals actively enrolled in a recovery program (for Sober Living Homes).

Section 9.39.040 expressly excludes "persons who are not handicapped" from living in Group Homes. Section 9.39.050 mandates that residents of Sober Living Homes must "be actively participating in an established recovery program, including, but not limited to, Alcoholics Anonymous or Narcotics Anonymous," records of attendance must be kept, and those who fail to attend must be evicted.

In limiting the Group Homes and Sober Living Homes in this way, the ordinance impermissibly discriminates based on familial status. (See Gov. Code, § 12955, subd. (*l*).) The ordinance prohibits any residents that are not "handicapped," which means that Group Homes and Sober Living Homes designed for families are effectively prohibited in the City because these requirements would prevent families, including non-disabled spouses and small children, from residing in the same Group Home. In the context of a Sober Living Home, this prohibition would also effectively preclude sober living arrangements for nursing mothers, mothers of infants or small children, and parents endeavoring to reunify with children after recovery. (Joint Statement, p. 6 ["State and local governments may not impose restrictions on where families with children may reside unless the restrictions are consistent with the "housing for older persons" exemption of the Act."].) This restriction effectively mandates an "institutional" arrangement that is not "on par with" housing policies for those who are not disabled in conflict with the FHA. (*Oconomowoc Residential Programs, supra,* 300 F.3d at p. 783.) This is not only discriminatory, it conflicts with a stated purpose of the ordinance namely to avoid "clustering of these homes [which] can have the effect of altering the residential character of neighborhoods so that it appears more institutional and business-oriented in nature." (Jennifer Gates, City of Encinitas, Agenda Report Item #10B, November 18, 2020, p. 2.)

For Sober Living Homes, this ordinance discriminates on the basis of disability. Section 9.39.050 mandates active participation in established recovery programs. Persons in recovery are not necessarily currently participating in established recovery programs and may in fact not need or want to actively attend an established recovery program. Disability rights laws apply not only to individuals with histories of drug addiction or alcoholism who are currently participating in recovery programs, but also those who have completed those programs or who are "erroneously regarded as using drugs when in fact they are not." (*Hernandez*, *supra*, 362 F.3d at p. 568.) By precluding persons who are not currently participating in established recovery programs, this ordinance discriminates based on disability. The City has also expressed a legitimate, nondiscriminatory justification for imposing these burdens on this protected class of persons in this manner. Further, the enforcement of such a provision may unconstitutionally intrude into the privacy interests (see, e.g., Cal. Const. art. 1, § 1) of disabled persons if it forces residents to provide records to the City of Encinitas as part of its land-use enforcement efforts. The City expressed no justifiable basis for burdening this protected class of persons in this manner.

(4) *Ordinance No. 2020-16 requires a 24-hour house manager for all Group Homes.*

Section 9.39.050 requires that Group Homes employ a house manager or managers who must reside in or be present at the Group Home on a 24-hour basis. Group home residents are frequently persons of very low- or low-income and are frequently disabled. A requirement for an on-site manager 24-hours per day creates a financial hardship on the residents as the additional costs create an additional expense for the residents. It is also hugely intrusive in that it interferes with the residents' freedom to live with persons of their choice, and adds significant additional expense, both problematic under notions of fair housing. (Gov. Code, § 65008.)

The requirement to have a "house manager" effectively mandates an "institutional" arrangement that is not "on par with" housing policies for those who are not disabled in conflict with the FHA (*Oconomowoc Residential Programs, supra,* 300 F.3d at p. 783; *Bangerter v. Orem City Corp*. (10th Cir. 1995) 46 F.3d 1491, 1498) and is inconsistent with the stated purposes of the ordinance to avoid institutional inholdings in residential neighborhoods. The additional expense will render any new or existing Group Homes infeasible or at the very least would place unjustified barriers to the provision of housing for those with disabilities. Ultimately, lower income and disabled persons may be displaced due to the requirement. Therefore, the ordinance also has the potential to increase the City's homeless population and undermine other activities to address persons experiencing homelessness. This is very concerning to HCD. HCD reminds the City that California is experiencing a severe housing crisis

and the availability of housing affordable to all income levels is of vital statewide importance. (Gov. Code, § 65580.)

(5) *Group Homes permit regulations impose many other different requirements on Group Homes than other residential uses, including a troubling "notification" provision*.

The permit application process and operating requirements are different for Group Homes than for other residential uses. The notification provisions are particularly troubling: "…At least fourteen (14) days prior to issuing a Group Home Permit, the Director shall cause written notice of application to be mailed to the owner of record and residents of all properties within five hundred (500) feet of the location of the Group Home…" (Mun. Code, § 9.39.040.) This requirement to notify the neighbors applies even to ministerial permits where the permit *must* be issued if certain conditions are present. The notice will create the erroneous impression that the neighbors have a "say" in the issuance of the permit, raise the specter that a situation of concern is developing in their neighborhood, or—most likely—both. Thus, the notice provisions are burdensome, costly, and are likely, in themselves, to create a hostile reception for these homes that provide essential housing to persons living with disabilities. Courts have held that this kind of notice may be stigmatizing of protected classes and is facially invalid. (*Potomac Group Home Corp. v. Montgomery County, Md.* (D. Md. 1993) 823 F.Supp. 1285, 1296.)

Other burdensome requirements apply to Group Homes under the ordinance that do not restrict other residential uses.

- All garage and driveway spaces associated with the dwelling unit shall, at all times, be available for the parking of vehicles. Residents and the house manager may each only park a single vehicle at the dwelling unit or on any street within 500 feet of the dwelling unit. All vehicles must be operable and currently used as a primary form of transportation for a resident and house manager of the Group Home. (Mun. Code, § 9.39.050.)

- A Group Home shall not be located in an accessory dwelling unit or junior accessory dwelling unit, unless the primary dwelling unit is used for the same purpose. Residents of all units will be combined to determine the total number of residents of the Group Home. (Mun. Code, § 30.17.020.)

- A Group Home or Sober Living Home shall not be located within six hundred fifty (650) feet of any other Group Home, Sober Living Home, Residential Care Facility, or a State-licensed Alcoholism or Drug Abuse Recovery or Treatment Facility, as measured in a straight line, without regard to intervening structures, from property line to property line. (Mun. Code, § 30.17.020.)

Sober Living Homes operating within the jurisdiction of the City are subject to even more requirements that are different from other residential uses, including the following requirements:

- A Sober Living Home's rules and regulations must prohibit the use and/or possession of any alcohol, cannabis, or any non-prescription drugs.
- A Sober Living Home shall have a written visitation policy that shall preclude any visitors who are under the influence of or in possession of any drug, cannabis, or alcohol.
- A Sober Living Home shall have, and provide the City with a copy of, a good neighbor policy that shall direct residents to be considerate of neighbors, including refraining from engaging in excessively loud, nuisance, profane or obnoxious behavior that would unduly interfere with a neighbor's use and enjoyment of the dwelling unit.

(Mun. Code, § 9.39.050.)

None of the requirements outlined above apply universally to all residential uses in the City. The requirements were crafted explicitly to target a specific population—persons with disabilities and most likely persons with low-incomes. These populations are legally protected from such actions.

Conclusion

In sum, HCD has reviewed the City's Ordinance No. 2020-16 under its authority pursuant to Government Code section 65585, which extends to statutory prohibitions on discrimination in land use (Gov. Code, § 65008). HCD has found that by adopting Ordinance No. 2020-16, the City has violated Government Code section 65008 by denying persons in a protected class their right to use and enjoy their residence, and further by imposing burdens and requirements on such persons which are not generally imposed upon other residential uses. (Gov. Code, § 65008, subd. (d)(2)(A).)[5] Accordingly, the City must take immediate steps to repeal Ordinance No. 2020-16. As noted above, HCD must (and hereby does) notify the City and may notify the Office of

[5] These sorts of facially discriminatory provisions do not appear to be subject to cure by the City's reasonable accommodation ordinance, as the ordinance and the residential uses here are fundamentally at odds. (See, e.g., Mun. Code, § 30.86.050 [necessary finding: "The requested accommodation would not require a fundamental alteration in the nature of the City's land use and zoning and building regulations, policies, practices, and procedures, and for housing in the coastal zone, the City's local coastal program."].)

the Attorney General when a City takes actions that are in violation of Government Code section 65008. (Gov. Code, § 65585, subd. (j).)

If you have any questions, or would like to discuss the content of this letter, please contact Robin Huntley of our staff at Robin.Huntley@hcd.ca.gov.

Sincerely,

Megan Kirkeby
Deputy Director

CC: California Coastal Commission, San Diego Coast District