

**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



August 27, 2020

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' 6th cycle (2021-2029) Draft Housing Element

Thank you for submitting the City of Encinitas' (City) draft housing element received for review on June 30, 2020, along with revisions received on August 17 and 19, 2020. 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 August 11, 2020, with you and Encinitas' housing element team. In addition, HCD considered comments from Juliana Maxim pursuant to Government Code section 65585, subdivision (c).

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 effectively mitigate the Right to Vote Requirements (Prop. A) with regard to implementing State Housing Element Law and to demonstrate the City's efforts to affirmatively further fair housing. The enclosed Appendix describes these substantial changes as well as many other revisions needed to comply with State Housing Element Law.

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.

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. *Affirmatively further[ing] fair housing in accordance with Chapter 15 (commencing with Section 8899.50) of Division 1 of Title 2...shall include an assessment of fair housing in the jurisdiction (Gov. Code, § 65583, subd. (c)(10)(A).)*

Fair Housing Issues (Community Opposition): The element analyzes the effect of community opposition in Encinitas (pages B-68 through B-69) and concludes that there is no evidence that community opposition to upzoning of sites has hampered the City's efforts to affirmatively further fair housing. This analysis is incomplete. Community opposition is not limited to rezoning of sites, but also affects approval of housing development projects. In addition, community opposition of upzoning was a substantial impediment to the City's adoption of a housing element compliant with State Housing Element Law during the 5th cycle planning period. Community opposition manifested in Proposition A, but the problem seems to be much more pervasive.

The element should be revised to expand the analysis of community opposition beyond concluding that since no housing development projects with 100 percent of the units affordable to lower-income households have been developed on any sites zoned R-30, it is unknown whether these projects/sites would attract a more diverse population. Further, the element entirely equates affordability with affirmatively furthering fair housing. However, affirmatively furthering fair housing means taking meaningful actions to combat discrimination, segregation, and to foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics (Gov. Code, § 8899.50). Therefore, the analysis should not be tied exclusively to affordability.

Fair Housing Issues (Proposition A): The element analyzes the effect of the Voter's Right Initiative (Prop. A) in Encinitas (page B-76 through B-77). The Voter's Right Initiative requires an affirmative vote of the electorate prior to intensification of land use, including, but not limited to, increasing density. The element concludes that there is no evidence available that Prop. A has hampered the City's efforts to affirmatively further fair housing. This conclusion is based on analysis stating there have been no development projects on sites rezoned to R-30 (sites rezoned to higher density) that are 100 percent affordable. Therefore, there is no evidence that the housing would

attract a more diverse population to Encinitas. This analysis is incomplete. As stated above, the element entirely equates affordability with affirmatively furthering fair housing. However, affirmatively furthering fair housing means taking meaningful actions to combat discrimination, segregation, and to foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. (Gov. Code, § 8899.50). Therefore, analysis should not be tied exclusively to affordability.

The element describes ballot measures were required pursuant to Prop. A in order for the City to implement the upzoning required to obtain compliance with State Housing Element Law (upzoning sites to R-30). The voters rejected Measures T (2016) and U (2018) that would have approved upzoning to R-30. Subsequently, the court preempted Prop. A and ordered the City to adopt a compliant housing element. The 6th cycle submission fails to describe the court's preemption of Prop. A for the 5th cycle planning period. Preempting Prop. A was required so that the City could implement the upzoning required to obtain compliance with State Housing Element Law and fulfill the court's order. Such preemption does not extend to the 6th cycle.

The element should be revised to address the City's efforts to further fair housing more broadly as defined in Government Code section, 8899.50. The element should also be revised to analyze that a court order was needed to preempt Prop. A in order to obtain housing element compliance and the effects Prop. A continues to have on the City's ability to adhere to Government Code section 65863 (No Net Loss Law).

- 2. 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)*

The City has a regional housing need allocation (RHNA) of 1554 housing units, of which 838 are for lower-income households. To address this need, the element relies on sites rezoned during the 5th cycle planning period pursuant to Government Code section 65583.2, subdivisions (h) and (i). To demonstrate the adequacy of these sites to accommodate the City's 6th cycle RHNA, the element must include complete analyses of the following:

Site Inventory (Electronic Copy): 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. HCD acknowledges that as of the date of this letter, it is still finalizing the requirements. The City can reach out to HCD at sitesinventory@hcd.ca.gov for technical assistance.

Sites Inventory (Armstrong Parcels): HCD reminds the City that it does not consider the Armstrong Parcels, Sites 06, a and b, adequate to meet any portion of the RHNA for lower-income households. While the element acknowledges this on page C-5, Table C-2 continues to incorporate those 55 units within the subtotals and totals, and narrative throughout the element identifies the overstated estimate. The element must be revised to remove the Armstrong Parcels' units from capacity analyses and assumptions in the element.

Realistic Capacity: HCD cautions the City on its approach to estimating realistic capacity on sites identified to accommodate the City's lower-income RHNA. The element assumes 100 percent of the units developed (capacity) on all fifteen R-30 sites will accommodate lower-income RHNA. This assumption does not align with the proposals currently pending before the City. Pages C-8 and C-9 of the element describe capacity and affordability as represented in seven applications the City is currently processing and in four development projects currently in pre-development discussions with the City. The analysis describes a capacity reduction from 1,453 units to 227 units for the seven applications currently submitted to the City and a capacity reduction from 505 units to 87 units for the four projects in pre-development discussions. The element should include analysis establishing the estimates of capacity and affordability on R-30 sites is realistic. The analysis could include supporting data based on historically approved affordable housing in the City at the assigned density. If the current capacity and affordability assumptions cannot be supported, the element should revise its realistic capacity estimates on the R-30 sites.

HCD reminds the City of its obligations pursuant to Government Code section 65863 (No Net Loss Law). A jurisdiction must ensure its housing element sites inventory continues to have capacity at all times to accommodate the RHNA *by income group throughout the planning period*. This requires a careful accounting of development on the sites identified in the housing element and residential projects throughout the jurisdiction.

If the approval of a development project results in the remaining sites' capacity becoming inadequate to accommodate the RHNA by income category, a jurisdiction has up to 180 days from project approval to identify, or rezone, "sufficient additional, adequate, and available sites" to accommodate the remaining RHNA for each income category. Sites identified or rezoned must meet the following criteria:

- Must be considered an adequate site pursuant to the requirements of Government Code section 65583.2.
- If the capacity to be replaced was on a site that was zoned by-right pursuant to Government Code section 65863.2, subdivisions (h) and (i), *such as all of the R-30 sites*, then the replacement site(s) must also satisfy those requirements.

Failure to comply with these requirements constitutes a violation of the No Net Loss law. The lack of sites to accommodate the jurisdiction's RHNA represents a fundamental alteration to the jurisdiction's ability to meet housing Element law. Therefore, any amendments to the inventory must (1) demonstrate sites to address the shortfall meet the adequate site requirements of housing element law, pursuant to Government Code section

65585, subdivision (b), and (2) be submitted to HCD for review to ensure compliance with State Housing Element Law. (Gov. Code, § 65580 et seq.) (State Housing Element Law).

Additionally, HCD reminds the City that jurisdictions may not deny a housing development application on the basis that approval of the development would trigger the identification, or zoning, of additional adequate sites to accommodate the remaining RHNA. Additional information and technical assistance on No Net Loss Law can be found on HCD's website at: <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/SB-166-final.pdf>.

If the City is subject to No Net Loss Law, HCD recommends that it consider its goals to affirmatively further fair housing when it identifies sites to accommodate RHNA. In particular, HCD recommends consideration of the site previously identified as "L-7" and/or other sites that are located within block groups of non-white populations below 4 percent. Notably, none of the sites currently identified to accommodate lower-income RHNA are located within block groups with below 4 percent non-white population. Identification and or/rezoning of sites located in these areas will assist the City in meeting its mandate to affirmatively further fair housing.

3. *An analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the types of housing identified in paragraph (1) of subdivision (c), and for persons with disabilities as identified in the analysis pursuant to paragraph (7), including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures. The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need in accordance with Government Code section 65584 and from meeting the need for housing for persons with disabilities, supportive housing, transitional housing, and emergency shelters identified pursuant to paragraph (7). Transitional housing and supportive housing shall be considered a residential use of property and shall be subject only to those restrictions that apply to other residential dwellings of the same type in the same zone. (Gov. Code, § 65583, subd. (a)(5).)*

Design Review: Pages B-108 thru B-109 describe the City's design review process. The analysis includes a description of the City's traffic study requirements and states that they apply to projects on R-30 sites: "Projects on R-30 sites that require environmental review may tier off the Environmental Assessment and Measure T EIR analysis, if applicable. For projects on R-30 sites qualifying for by-right approval, the traffic study is limited to issues not considered in the Environmental Assessment, such as adequacy of emergency access and traffic safety issues, and conformance with the City's adopted standards."

The City's analysis is not consistent with Government Code sections 65583 and 65583.2. "Use by right" housing developments, including projects on R-30 sites, are not "projects" for the purposes of the California Environmental Quality Act (CEQA) (Pub.

Resources Code, § 21000 et seq.); moreover, local agencies cannot subject “use by right” housing developments to discretionary review. (Gov. Code, § 65583.2, subd. (i).)

Design review of such projects is allowed, but only in very limited circumstances. Where a local ordinance clearly provides for design review of a “use by right” use, a local agency may subject the housing development to a specifically tailored, non-discretionary design review process. (Gov. Code, § 65583.2, subd. (i), incorporating *id.* § 65589.5, subd. (f), which restricts review to objective, quantifiable standards.) It would have to provide for objective design review standards and conditions that would be applied without the use of discretion. Further, the Government Code authorizes this kind of review only where there is “local ordinance” that provides for this “use by right.” (Gov. Code, § 65583.2, subd. (i) [“A *local ordinance* may provide that “use by right” does not exempt the use from design review,” emphasis added]). Where the local ordinance does not provide for this “use by right,” design review is not permitted. Encinitas design review process does not specifically contemplate “use by right” and thus would not apply to the R-30 sites.

In addition, the City’s Municipal Code 23.06 requires Citizen Participation Plans. The City requires these plans for housing development projects, including projects on R-30 sites that must be allowed by-right pursuant to Government Code section 65583.2, subdivision (i). HCD reminds the City that it may only require housing development projects to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction’s share of the regional housing need. Additionally, pursuant to Government Code section 65589.5 (Housing Accountability Act), jurisdictions shall not condition approval of a housing development project in a manner that renders the housing development project infeasible, including through the use of design review standards, unless it makes specific written findings, based upon a preponderance of the evidence.

The City should take actions to ensure its Design Review requirements for by-right projects on R-30 sites comply with law and do not render development infeasible.

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-2, 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. *The Housing Element shall contain programs which assist in the development of adequate housing to meet the needs of extremely low-, very low-, low- and moderate-income households. (Gov. Code, § 65583, subd. (c)(2).)*

Program 1B: Monitor Sites Zoned to Accommodate Lower-Income Housing: The element (Pages C-8 and C-9) describes seven housing development project applications pending and another four projects in predevelopment consultation with the City. All of these projects are on R-30 sites identified to accommodate lower-income housing. In addition, HCD has awarded the City Senate Bill (SB) 2 Planning Grant funds for the purpose of providing an experienced and seasoned planner, as a single point-of-contact, dedicated to expediting project entitlements for projects proposed on the R-30 sites. Having a large number of applications pending and not deemed completed is a constraint to the development of housing. Program 1B should be revised to prioritize and expedite development applications received for the R-30 sites as well as providing timely responses to all communications received. Revise program actions, objectives, responsible parties, funding, and timeframes, as appropriate. The City should also anticipate HCD's close monitoring of the use of SB 2 Planning Grant funds for the agreed upon purpose – broadly, to accelerate the production of housing, and acutely, to expedite development applications in the City.

3. *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).)*

As noted in Finding A-3 the element requires a complete analysis of potential governmental constraints. Depending upon the results of that analysis, the City may need to revise or add programs and address and remove or mitigate any identified constraints.

Program 3C: Right to Vote Amendment: Program 3C commits to take action in advance of the next housing element due date. As the City is subject to 4-year housing element updates, the element provides the next-due date as April 2025. The Program provides no specific commitments (“actions may include”) and no specific deadlines for action. One possible action that is proposed, but not committed to, is to submit an amendment to Prop. A to the voters at some point to allow the City Council to adopt further housing elements with a simple majority vote. However, the City's 5th cycle housing element also committed to taking actions to ensure Prop. A was not a constraint to adopting a compliant housing element, or implementing housing element

programs, prior the April 2021 due date for the 6th cycle update. As of the date of this letter, the City has not effectively mitigated the effects of Prop. A.

As identified in Finding A-2, the provision of No Net Loss Law requiring rezoning of sites could be triggered by housing project approvals early in the planning period – well before April 2025. Under the City’s current procedures, rezoning actions require approval of the electorate since Prop. A has been preempted by the court for only the 5th cycle planning period, not for the 6th cycle. Program 3C is wholly inadequate to mitigate the effects of Prop. A on the City’s ability to comply with No Net Loss Law; therefore, the program must be revised.

For example, the program could commit to submitting a ballot measure to the voters to amend Prop. A on the March 2021 ballot – as is currently referenced in the 5th cycle program. The program should also be revised to include a contingency plan providing a waterfall of mandatory actions that would be triggered if the ballot measure fails, if the current litigation fails to remove Prop. A as an impediment, or if, at any time, Prop. A presents an impediment to compliance with No Net Loss Law.

Program 3F: Seek to Create Community Support for Housing at a Variety of Income Levels: Program 3F commits to ongoing efforts, in conjunction with Program 3C, to achieve community support for the development of housing. The program includes subjective language (“excellent design quality”) that should either be deleted or replaced with objective language (as has been revised under the bulleted objectives). In addition, the program should include specific, quantifiable implementation actions in addition to ongoing efforts. For example, the element could commit to creating an education program emphasizing the importance of affordable housing and promoting multifamily housing through outreach at community events, various public meetings, sending fliers to community members, and making information available on the City’s website and at libraries. Actions should be quantified and include specific implementation timeframes.

4. *Promote and affirmatively further fair housing opportunities and promote housing throughout the community or communities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability, and other characteristics protected by the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2), Section 65008, and any other state and federal fair housing and planning law. (Gov. Code, § 65583, subd. (c)(5).)*

As noted in Finding A-1 the element requires a complete analysis of affirmatively furthering fair housing in the City. Depending upon the results of that analysis, the City may need to add programs or revise programs to constraints or issues the City has with affirmatively further fair housing.

Program 3H: Examining and Mitigating Barriers to Racial Equity: Program 3H should be revised to include an additional objective. In addition to the objectives cited, the study should also examine and analyze the underlying causes for Encinitas being

dissimilar to the San Diego region and create access to opportunity based upon the results of the analysis.

Program 5A: Affirmatively Further Fair Housing: Program 5A should be revised to include additional actions such as providing fair housing training to staff, conducting credit counseling workshops for lower-income households, proactively reaching out to underrepresented populations to engage them in community decisions and place them on committees, and, as recommended in the regional Analysis of Impediments, reporting to the media on fair housing complaint resolutions and litigation. In addition, the program should limit fair housing education opportunities to targeted populations, but to also conduct public workshops for a broader audience.

Program 5C: Economic Displacement Risk Analysis: Program 5C should be revised to incorporate outreach and engagement with a legal aid provider, such as the Legal Aid Society of San Diego, that specializes in eviction-related activities as a partner in conducting the study.

C. Public Participation

Local governments shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the Housing Element, and the element shall describe this effort. (Gov. Code, § 65583, subd.(c)(8).)

While the element includes a summary of the public participation process (Appendix A), it must also demonstrate diligent efforts were made to involve all economic segments of the community in the development of the housing element. The element describes outreach through the City Manager's newsletter, the Housing Element Interested Party List, the Nextdoor Application, and Facebook and assumes sufficient outreach due to the number of subscribers to the various lists. The element should specifically describe the efforts to circulate the housing element among low- and moderate-income households and organizations that represent them and to involve such groups and persons in the element throughout the process. For example, the element could identify specific organizations invited to participate in the update process.

In addition, information regarding the housing element update was not made available in Spanish nor were translation services available. It is HCD's understanding that the City has engaged a translation services company and translations into Spanish are pending. HCD encourages the City to make the information, including surveys and questionnaires, available as soon as possible and conduct additional outreach specific to the Spanish-speaking community. For additional information regarding public participation, see the *Building Blocks* at <http://www.hcd.ca.gov/community-development/building-blocks/getting-started/public-participation.shtml>.

During the period between the date of this review letter and the adoption of the final housing element, the City should continue its diligent public participation efforts to include all economic segments of the community.

D. Consistency with General Plan

The housing element shall describe the means by which consistency will be achieved with other general plan elements and community goals. (Gov. Code, § 65583, subd. (c)(7).)

For your information, some general plan element updates are triggered by housing element adoption. HCD reminds the City to consider timing provisions and welcomes the opportunity to provide assistance. For information, please see the Technical Advisories issued by the Governor's Office of Planning and Research at:
http://opr.ca.gov/docs/OPR_Appendix_C_final.pdf and
http://opr.ca.gov/docs/Final_6.26.15.pdf.