

City of Encinitas

Development Services Department

505 S. Vulcan Avenue, Encinitas, California 92024-3633

May 25, 2018

VIA EMAIL

Department of Housing and Community Development
Division of Housing Policy Development
Attn: Ms. Robin Huntley
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833

RE: Public Comments Submitted by Public Interest Law Project on the City of Encinitas Draft Housing Element Submittal

Dear Ms. Huntley:

The following is the response of the City of Encinitas to the comments submitted to the City and HCD on May 4 and May 24, 2018 by the Public Interest Law Project (PILP) and the San Diego Volunteer Lawyer Program (the Joint Letter) in reference to the City's Draft Housing Element submittals. These comments were submitted to the City as well as HCD and have been considered in drafting the City's Housing Element. Comments are responded to in the order discussed in the May 24 letter.

A. RHNA

- 1. Carryover Calculation from the Last Planning Period.** The City's carryover obligation under Government Code Section 65584.09 was determined by HCD in 2016 to be 253 units as part of HCD's review of the Measure T Housing Element. The City has used the same carryover calculation of 253 units in the Draft Element submitted to HCD. No changes in state law relating to the carryover, and no changes in HCD's guidelines for calculating the carryover, have been made since HCD's 2016 determination.

Section 65584.09(a) requires rezoning "to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period." Sites zoned DCM-1 were capable of accommodating at least 342 units at a density of 30 units per acre or more from 2005 through April 30, 2013 and were available for lower income housing, the Joint Letter argues that they did not "accommodate" the lower income housing need because: (1) they were not identified in a housing element; and (2) they were not analyzed.

HCD does not demand that sites be identified in a prior housing element to reduce a community's carryover. HCD's AB 1233 memo updated June 3, 2010 (misquoted in the Joint Letter) provides credit for sites rezoned for residential development *independent of* sites listed in a housing element. In Encinitas, the sites were available for the *entire* planning period, without the need to rezone to create adequate sites.

Attached is the list of sites used to reduce the carryover and additional analysis contained in the Measure T Housing Element. Because the sites were in mixed use zones, the City and HCD have provided carryover credit for only one-half the capacity of these sites.

As HCD is aware, this issue, among others, is the subject of current litigation entitled *San Diego Tenants United v. City of Encinitas*. The case has been stayed pending the vote planned for November 6, 2018. The Court has scheduled a hearing to take place on November 13, 2018. If the Housing Element update is not passed by the voters, the Court has indicated that it intends to issue a ruling in the case by December 13, 2018.

A similar carryover claim was made in litigation entitled *Albany Housing Advocates v. City of Albany*. The Alameda County Superior Court denied the request for a writ of mandate and upheld the City's and HCD's calculation of the carryover. The same methodology was used in calculating the City of Albany's carryover as has been used for Encinitas. (See attached judgment.¹)

If the Housing Element update is passed by the voters, the carryover issue will likely be moot. With the additional lower income sites added by the Encinitas City Council on May 9, 2018, the City will have designated sites capable of accommodating 1,760 lower income units. The Joint Letter asserts that the carryover should be increased by 342 units (from 253 to 595 units), thereby increasing the City's remaining lower income RHNA from 1,141 units to 1,483 units. The City has designated more than enough sites to accommodate 1,483 lower income units.

2. RHNA Credit for Very Low and Low Income Units in the Current Planning Period.

In the Housing Element revisions submitted to HCD on May 9, 2018 (dated May 8, 2018), footnote 2 to Table 2-5 was expanded to support the asserted affordability of the 66 lower income units constructed or approved. All but two units are either deed-restricted or required to be deed-restricted. The affordability of the two unrestricted units is supported by a survey of actual rents.

In April 2018 the City completed a survey of ADUs constructed in the current planning period. This found that 24.6% of permitted ADUs were currently affordable to lower income households and 17% of permitted ADUs were currently affordable to moderate income households based on affordable rents by bedroom size calculated as required by Health & Safety Code Section 50052.5 (shown in Table B-34 in Appendix B). Based on the expected construction of 320 ADUs during the planning period, 79 are expected to be affordable to lower income households, and 55 are expected to be affordable to moderate-income households. A copy of the survey has been added to Section 11.3 in Appendix B. The survey results are as described in this paragraph.

B. Adequate Sites

1. Number of Lower Income Units to be Accommodated. Based on a carryover of 253 units, construction or approval of 66 lower income units, and 79 affordable ADUs, the

¹ The Court of Appeal found the issue to be moot after the plaintiffs appealed. (Unpublished decision filed May 31, 2016.)

City's remaining RHNA obligation for lower income units equals 1,141 units, as described in Table 2-5, Program 1A. Please also see above discussion.

- 2. Insufficient Site Inventory.** The expanded site inventory approved by the City Council on May 9, 2018 will accommodate 1,760 lower income units, providing a surplus of 619 units, or 54 percent. This is intended to ensure that the City will not be in violation of the 'no net loss' statute during the remainder of the planning period if sites are not able to be developed as affordable housing, given lack of adequate housing subsidies.²

The City entirely disputes that the draft Housing Element does not contain the legally required analysis. In particular, the Housing Element contains substantial evidence demonstrating that each site has a "realistic and demonstrated potential to develop" during the planning period to accommodate 1,760 units.

It is disheartening that the authors of the Joint Letter, who state that they represent low income families and individuals, have asserted the same arguments as those opposed to zoning of sites at densities of 30 units per acre, the density deemed by statute to be appropriate for lower income housing, rather than embracing the strong interest shown by the development community in providing both affordable and market-rate housing on the sites required to be upzoned. The City has received strong letters of interest from owners and representatives of almost all of the designated sites. If the sites are rezoned are proposed, additional housing is likely to be constructed at densities of at least 25 to 30 units per acre. We would expect that the Joint Letter's authors would embrace this expected development, rather than seeking to eliminate these sites from consideration for multifamily and affordable housing development.

- 3. Sites without Common Ownership.** The Joint Letter suggests on page 7 that a lot consolidation program should be added for sites not in common ownership.³ Typically such a lot consolidation program is needed where a Housing Element designates many small, separately owned sites for lower income housing. Only three of the proposed 19 sites are not in common ownership. To encourage lot consolidation for these 3 sites, Program 1B contains a lot consolidation policy, stating that, "the rezoning [to permit 30 units per acre] will apply only to projects containing at least 16 units to ensure that lots are consolidated as needed."
- 4. Vacant v. Non-Vacant Sites.** HCD has provided direction to the City regarding which parcels it has determined may qualify as 'vacant.' In particular, HCD has stated that vacant parcels must be unimproved. Sites containing abandoned, non-habitable, or vacant structures or powerlines are considered to be non-vacant by HCD unless the owner has applied for, and been issued, a demolition permit. Similarly, vacant portions of parcels designated for housing development are considered by HCD to be non-vacant unless the vacant portion of a parcel has been subdivided from the non-vacant portion.

The designation of vacant and non-vacant parcels in the revised draft Housing Element submitted to HCD on May 25, 2018 has been modified to conform to HCD's direction.

² The Joint Letter demands in various places that sites be removed from the inventory unless their owners state that they intend to develop affordable housing. Since there are not adequate subsidies to provide 1,141 units of affordable housing in Encinitas within the planning period, the City would not be able to meet its rezoning obligation if this is required.

³ The May 4 letter contained a more extensive discussion of the need for lot consolidation programs on pages 4 and 5. This section responds to both the May 4 letter and the abbreviated discussion in the May 24 letter.

(See Appendix C and Table 2-6 in Chapter 1.) The capacity of vacant sites is 673 units, or 59 percent of the remaining RHNA need of 1,141 units. Therefore, existing uses on non-vacant sites are not presumed to be impediments to residential development. Nonetheless, the City has provided substantial evidence that, on each of the non-vacant sites, existing uses are likely to be discontinued during the planning period

- 5. Comments Regarding Traffic Congestion.** For a number of sites (02, Cannon Property; 05, Encinitas Blvd. & Quail Garden Drive; 07, Jackel Properties; AD2, Baldwin & Sons; 08, Rancho Santa Fe (Gaffney/Goodsen); 12, Sunshine Gardens), the Joint Letter notes community opposition due to traffic congestion. This section responds to this issue for all of the sites.

The Joint Letter suggests that the City *reduce* the capacity of the sites in response to this opposition if it does not have funds immediately available to mitigate any traffic impacts, because site capacity is likely to be reduced due to community opposition. Community opposition is not a factor to be considered in determining site capacity. (Government Code Section 65583.2(c)(2).) Moreover, this comment ignores the extensive 2017 amendments to state law which in most cases do not allow the City to reduce density that conforms to the general plan. In particular:

- A rental housing project containing 20 percent low income housing and located on one of the sites will be exempt from CEQA and must be approved 'by right,' with only design review allowed. (Government Code Section 65583.2(h),(i).) This provision provides no opportunity for community opposition to reduce density.
- The density of any housing development conforming to 'objective' standards cannot be reduced unless a finding is made that the project violates a specific health and safety standard that cannot be mitigated. (Government Code Section 65589.5(j).) If the project contains 20 percent low income units, additional findings need to be made under Section 65589.5(d) to reduce the density or attach any condition making the project infeasible. In adopting amendments to Section 65589.5, the Legislature stated specifically that its intent was to "[curb] the capacity of local governments to ...reduce the density for...housing development projects." Section 65589.5(a)(2)(L).

The City recognizes that traffic congestion is a serious issue that may affect quality of life and create opposition to new development of all kinds. For that reason, it has a significant capital improvement program. However, state law requires that the City zone to accommodate at least 1,141 housing units at densities of 30 units per acre or higher. This will increase the development capacity of the City and may increase traffic congestion. Traffic issues are likely to be significant no matter which sites are rezoned.

- 6. Coastal Commission Approval.** For several sites, the Joint Letter expresses concern regarding the need for Coastal Commission approval.

Most developable areas in the City are located in the coastal zone, and the rezoning proposed in the Housing Element must be approved by the Coastal Commission. The City has consulted with Coastal Commission staff to ensure that the rezonings will be supported by the Commission. Once these standards are approved by the City's voters, the City will submit its request to the Coastal Commission for approval. To streamline the entitlement process, applicants may elect to apply to the City and be processed

concurrent with the Coastal Commission's review. The City's final approval will be contingent on Coastal Commission action. Concurrent processing will allow development to occur within the planning period.

7. Comments on Specific Sites. Below we have responded to the comments made on specific sites.

As noted in footnote 5 on page 7 of the Joint Letter, *a discussion of environmental constraints is not required on a site-specific basis.* (Gov't Code § 65583.2(b).) The letter, however, immediately demands detailed environmental information *on a site-specific basis* at a level of detail that would be appropriate for review of a development application but is not required by housing element law. Nonetheless, the City has attempted to provide such information where available.

- a. Site 01, Greek Church.** The portion of the site designated for development has been re-designated as 'non-vacant' because the vacant portion has not been subdivided from the developed portion. As noted in Appendix C and shown in the photograph, the two-acre developable portion of the site is flat, and there are no structures on that part of the site except a concrete pad. There are no known constraints to development of this portion of the site. Given that the owner may wish to develop 50 units on the site, the City does not wish to reduce the capacity of the site.

The existing housing is not restricted to church members nor to members of any faith, nor will this housing be so restricted. (See additional letter in Appendix C.) The Church intends to develop affordable senior housing.

- b. Site 02, Cannon Property.** As stated in Appendix C, there are no known environmental issues on this site, nor is area deducted due to steep slopes. There is no evidence for the statement in the Joint Letter regarding habitat preservation.

See item 5 above regarding traffic congestion.

- c. Site 05, Encinitas Blvd. & Quail Gardens.** A description of how net acreage is calculated per City code is contained on page C-5. Page C-14 describes how the net acreage was determined for this site based on steep slopes, and Page C-15 shows the constrained portions of the site. No evidence is provided for the statement that the capacity will be reduced further due to slope issues.

There are no environmental issues applicable to this site related to easements, powerlines, and wetlands. Comments cited from the April 4 meeting were likely related to Site AD2.

See item 5 above regarding traffic congestion.

- d. Site 07, Jackel Properties.** As stated in Appendix C, the planned multimodal improvements on Highway 101 will not impact the area of this sites. As can be seen from the photographs in Appendix C, the site is largely flat. Although net acreage totals nearly 3 acres, the capacity of the site is shown as only 33 units to reflect the owner's interest in mixed use development.

See item 5 above regarding traffic congestion. See item 6 above regarding Coastal Commission approval.

- e. **Site AD1, Sage Canyon.** Sage Canyon is a vacant site which will be "suitable and available" (Gov't Code § 65583(a)(3)) for lower income housing if rezoned as intended. The City has received a letter requesting that the site be considered for rezoning from Mr. Keith Harrison, who has entered into a purchase contract for the site. A person with a purchase contract may represent that the site is available for development: that person has site control, has an equitable interest in the property, may enforce the contract in equity, may apply for planning approvals, and, for instance, may enter into a development agreement with the City (see Gov't Code § 65865(a)).

The topographic and environmental constraints studies that reduced the net acreage from 5.23 to 2.40 acres are available in the City's records for an approved tentative map. As stated in Appendix C, the site has already been approved for housing development but the purchaser desires to increase the density if the site is rezoned as proposed. Issues regarding the blue-line stream and environmental remediation were considered in the map approval, and the net acreage was substantially reduced due to environmental concerns. If the rezoning occurs, multifamily housing would be permitted on the portions of the site where single-family homes have already been approved. Given the existing approval after extensive review, there is no evidence that development at higher densities on the developable portions of the site would be infeasible.

- f. **Site AD2, Baldwin & Sons Properties.** The vice-president of Baldwin & Sons, Mr. Nick Lee, has not requested removal of the site from the inventory and has not withdrawn his letter requesting that his site be upzoned. He has attended numerous stakeholder, community, and City Council meetings to discuss development standards and his continued interest in development at the permitted density of 25 to 30 units per acre. The development standards to be included in the upzoning are described in Appendix B.

The figure in Appendix C shows the areas constrained by the presence of wetlands, steep slopes, and the existing powerline easement and demonstrates that the site contains substantial contiguous developable areas. The owner has represented that drainage, sewer, and stormwater issues can be resolved at site development. Constrained areas have been deducted from the net site acreage.

See item 5 above regarding traffic congestion.

- g. **Site 08, Rancho Santa Fe (Gaffney/Goodson).** One property included in this site is in separate ownership. The letter attached to Appendix C from both property owners dated November 8, 2017 states that they have an agreement to develop their properties together. No further site consolidation program is required.

As described in the November 8 letter, the site contains three single-family homes over 40 years old. The owners state that they can "redevelop the property immediately upon approval of the zoning necessary." The owners also state that

any slope issues are modest, which has been confirmed by only a minor 0.6-acre deduction in net acreage.

Note that any homes rented to lower income tenants in the five years prior to any development application must be replaced as part of any development of the site.

See item 5 above regarding traffic congestion.

- h. Site 09, Echter Property.** The owner of Fox Point Farms, Robert Echter, has appeared at several public meetings to support the development of his property as an agrihood, described in Appendix C.

The Development Agreement which required the use of the property for agriculture (sent by PILF to HCD) had a term of 20 years and expired on December 5, 2014. (See Section 4.1, Effective Date, and Section 4.2, Term.) Any surviving obligations regarding the exclusive use of the property for agriculture may be modified through an amendment to the Encinitas Ranch Specific Plan, which will be included in the November 2018 ballot measure. Coastal Commission approval will be required for the rezoning of the site, as for all properties in the coastal zone.

Appendix C adequately describes the existing uses. Conceptual plans have been provided demonstrating how the site could be developed for 250 residences while maintaining agricultural uses, so the existing uses would not prevent redevelopment.

- i. Site 10, Strawberry Fields.** This site has been removed from the inventory.
- j. Site 12, Sunshine Gardens.** Page C-32 and the photos on page C-33 describe the existing uses. The site owner has stated to the City that the leases will expire prior to the completion of the entitlement process, that the structures are largely temporary and will not impede residential development, and that they will begin the entitlement process immediately upon a successful rezone. Much of the site is occupied by a large parking lot. The marginal value of the improvements is borne out by current assessment figures, which show a land value of \$3,448,000 and improvement value of only \$127,000. No evidence is provided in the Joint Letter that the costs of mitigating drainage and sewage issues are prohibitive. The City's proposed development standards will permit three-story buildings.

See item 5 above regarding traffic congestion.

- k. Site AD8, Vulcan & La Costa.** Pages C-34 and C-35 adequately describe the existing uses. The owner of the property, Mr. Craig Ronholm, has submitted a letter to the City dated May 8, 2018 regarding his interest in redevelopment the site for housing and demolishing the existing structures.

See item 5 above regarding traffic congestion.

C. Governmental Constraints

1. **Proposition A.** The City is taking action *now* to eliminate any constraints posed by Proposition A by developing a Housing Element that will receive approval from the majority of the voters in Encinitas. As HCD is aware, three lawsuits have been filed, all of which asked the San Diego Superior Court to order the City to adopt a Housing Element without allowing the planned November 2018 vote. The Court instead stayed the litigation until one week after the November 2018 election.

The City has added to Program 3C more specific actions that it will take to ensure that Proposition A does not pose a constraint to the adoption of future housing elements by the City.

2. **Coastal Commission Approval.** The City has estimated the time needed for Coastal Commission approval based on past experience. Please see further discussion in item B.5.
3. **Development Standards.** The combined effect of all of the City's development standards on actual projects does not reduced permitted density below that allowed by the City's zoning ordinances. Rather, as described in Sections 8.1.9 and 8.2.8 of Appendix B, as a result of the City's mid-range zoning policy, two-thirds of all residential units in the City between 2003 and 2013 were approved under density bonus provisions, resulting in average density higher than permitted by the General Plan and more affordable units than would have been required by the City's inclusionary ordinance.

The two-story height limit imposed by Proposition A allows the development of garden apartments at densities of at least 15 to 20 units per acre,⁴ a density and product type normally appropriate for moderate income housing, and so does not create a constraint specific to moderate-income housing.

4. **Minimum Density.** It is suggested that the City impose a minimum development density on sites designated for moderate-income housing to prevent the development of single-family homes on these residentially zoned sites.

As discussed in the section above, most projects in the City are density bonus projects constructed above the maximum density permitted by the General Plan. Therefore the lack of a required minimum density on moderate-income sites has not been a constraint to moderate-income housing. Many moderate-income sites are in mixed use areas where single-family home development is not permitted. Also, because many of the moderate-income sites in residentially zoned areas contain existing uses, redevelopment is not feasible unless somewhat higher densities can be obtained.

The City has modified Program 2B to include actions that it believes will be more effective in creating moderate-income housing.

5. **SB 2 Sites.** In response to the SB 2 comments, additional analysis of the adequacy of proposed sites for emergency shelters is contained in Section 8.3.6 of Appendix B.

⁴ See County of San Diego, *General Plan Housing Element Background Report* (April 2013), p. 5. Also note that land value/unit in the San Diego region was found to be lowest in the 15 to 20 units per acre range. (*Id.* p. 52.)

Program 2C commits the City to adopting an emergency shelter ordinance consistent with SB 2 by November 2018.

- 6. Unit Limitations on Multifamily Sites.** The unit limitations on the Greek Orthodox Church site and on the Echter site reflect the desires of the property owners. They were not imposed in response to neighborhood concerns. In both cases, the existing owners desire to develop the housing on the site. However, should the owners desire to sell only the developable portion of their properties for housing, the property could be subdivided, and a developer would need to purchase only the developable portion.

D. Nongovernmental Constraints

- 1. Vacancy Rates.** Vacancy rates are discussed in Section 5.4 of Appendix B. No more recent accurate data is available. Vacancy rates have actually increased since 2010, according to the State Department of Finance. While this may be due to purchase of additional vacation homes in Encinitas, the vacancy information does not allow the City to determine the cause of the vacancies. In 2010, rental vacancies represented over five percent of the rental housing stock, indicating an adequate supply.

The City's condominium conversion ordinance does not permit a conversion to be approved that would displace low and moderate income tenants unless adequate provision is made for relocation of those tenants. (Encinitas Municipal Code Section 24.40.100.)

- 2. Community Opposition.** A new Program 3G has been added regarding increasing community support for housing at all income levels.

E. Need for Additional Programs.

Comments regarding Proposition A and SB2 sites were addressed in Section C.

- 1. Density Bonus Law Requirements.** It is incorrect that there is no need to demonstrate that incentives are needed to provide the affordable units. The definition of an incentive was modified in 2016 to state that it is a reduction or modification of standards "that results in identifiable and actual cost reductions, *to provide for affordable housing costs...or rents.*" (Gov't Code § 65915(k)(1); also (k)(3).) A reduction in costs by itself is not enough unless that reduction provides for affordable housing costs. Section 65915(j)(1) states specifically that a local agency may require "reasonable documentation" to demonstrate that an incentive meets the definition in subdivision (k).

However, the description of the City's density bonus policies in Program 2D has been modified to more closely mirror the language of the statute.

- 2. Housing Needs of Large Families.** The May 4 letter, but not the May 24 letter, suggested that the housing needs of large families be prioritized.

The City supports housing for all types of households, but the greatest current need is for housing for seniors, as the community continues to age. Therefore the City does not desire to prioritize family housing over senior housing.

3. **Program to Subdivide Sites.** There is no particular need to include a program to subdivide sites; developers are free to subdivide the sites into smaller parcels, so long as each parcel can accommodate 16 units at a density of at least 25 units per net acre. The Subdivision Map Act requires discretionary approval of subdivisions and does not allow such approvals to be accomplished in a ministerial process, because discretionary findings must be made.
4. **Housing Opportunities for All.** Program 5B in the Housing Element commits not only to funding for investigating fair housing complaints, but also commits to implementing actions identified in the Regional Analysis of Impediments to Fair Housing Choice (AI), which is intended to remove barriers to housing choice. Among the significant provisions included in the AI are programs to increase housing options for special needs population and diversifying and expanding the housing stock. The programs in the Draft Housing Element as a whole are all intended to implement these policies, of which the most significant are:
 - Programs 1A and 1B to upzone sites;
 - Program 1C regarding accessory dwelling units;
 - Programs 2A and 2C regarding affordable and inclusionary housing;
 - Program 2E regarding specialized housing types;
 - Program 2F to reduce homelessness; and
 - Program 5A regarding reasonable accommodation.

Please feel free to contact me if you have any further questions regarding the Joint Letter. My direct line is (760) 633-2712 or you can email me at bwisneski@encinitasca.gov.

Sincerely,



Brenda Wisneski, AICP
Director of Development Services

Attachments:

1. Carryover Analysis included in Measure T Housing Element.
2. Judgment Entered in Alameda County Superior Court in *Albany Housing Advocates v. City of Albany*.

ATTACHMENT 1

Sites Able to Accommodate Lower Income Housing in Fourth Planning Period

The sites able to accommodate lower income housing in the fourth planning period consisted of D-CM1 sites capable of developing at a density of 34 units per acre. After deducting lower income housing constructed during the planning period, the City's remaining lower income RHNA equaled 595 units. Sites in the D-CM1 zone could have accommodated 684 units. Because these were in mixed use zones, HCD gave credit for only one-half the site capacity, or for 342 units. Deducting 342 from 595 resulted in a carryover obligation of 253 units.

Site Number*	Unit Capacity	Site NumberP	Unit Capacity
45	27	66	10
49	23	67	29
50	24	68	71
54	24	316 - 319	11
55	24	341-342	7
59	18	752	11
60	52	755	3
64	23	766	4
65	323		

*Site numbers are found in Appendix A-1 in the Measure T Housing Element. Specific parcel numbers included in each site are shown below.

TOTAL: 684 unit capacity

Credit: 684 x .50 = 342 units

ATTACHMENT 1

Sites Able to Accommodate Lower Income Housing in Fourth Planning Period

Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
45	2580840400	458 Coast Hwy	GC	D-CM1	0.08	n.a.	34	2
	2580840500	466 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2580840600	476 Coast Hwy	GC	D-CM1	0.19	n.a.	34	6
	2580841400	444 Coast Hwy	GC	D-CM1	0.22	n.a.	34	7
	2580841600	111 Coast Hwy	GC	D-CM1	0.28	n.a.	34	9
<p><i>Notes: Older, low intensity commercial uses, including a surf shop, auto repair, a sign and printing store and a psychic. Parcels include large parking areas surrounding commercial structures. The site has a 0.1 to 1.9 improvement to land value ratio. TOTAL: 27.</i></p>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
49	2580830100	105 D	GC	D-CM1	0.09	n.a.	34	3
	2580830200	504 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2580830300	528 Coast Hwy	GC	D-CM1	0.07	n.a.	34	2
	2580830400	540 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
	2580830500	548 Coast Hwy	GC	D-CM1	0.10	n.a.	34	3
	2580830600	564 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2580830700	576 Coast Hwy	GC	D-CM1	0.18	n.a.	34	6
<p><i>Notes: Older, low intensity commercial and office uses, including a technology center, real estate office and insurance agency. Several store fronts are also currently vacant and available for lease. The site has a 0.0 to 2.9 improvement to land value ratio. TOTAL: 23.</i></p>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
50	2581620300	628 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581620500	666 Coast Hwy	GC	D-CM1	0.10	n.a.	34	3
	2581620600	682 Coast Hwy	GC	D-CM1	0.18	n.a.	34	6
	2581621400	608 Coast Hwy	GC	D-CM1	0.18	n.a.	34	6
	2581621600	642 Coast Hwy	GC	D-CM1	0.10	n.a.	34	3
	2581621700	656 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
<p><i>Notes: Older, low intensity commercial uses, including an acupuncturist, health center and phone repair shop. Parcels include several surface parking lots around commercial structures and some store fronts are also currently vacant and available for lease. The site has a 0.0 to 3.7 improvement to land value ratio. TOTAL: 24.</i></p>								

ATTACHMENT 1

Sites Able to Accommodate Lower Income Housing in Fourth Planning Period

Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
54	2581630100	710 Coast Hwy	GC	D-CM1	0.18	n.a.	34	6
	2581630200	750 Coast Hwy	GC	D-CM1	0.19	n.a.	34	6
	2581630300	760 Coast Hwy	GC	D-CM1	0.10	n.a.	34	3
	2581630400	766 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581630500	790 Coast Hwy	GC	D-CM1	0.19	n.a.	34	6
<p><i>Notes: Low intensity commercial uses, including an auto repair shop and offices for an investment group. Parcels include surface parking lots around the commercial structures. The site has a 0.0 to 0.9 improvement to land value ratio. TOTAL: 24.</i></p>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
55	2581810100	800 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581810200	810 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581810300	818 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581811700	850 Coast Hwy	GC	D-CM1	0.28	n.a.	34	9
	2581811900	830 Coast Hwy	GC	D-CM1	0.19	n.a.	34	6
<p><i>Notes: Older single family residences adjacent to low intensity commercial uses, including an auto repair shop, hair salon, real estate offices, and health club. The site has a 0.2 to 4.0 improvement to land value ratio. The parcel with a high improvement to land value ratio is due to ownership tenure and/or cumulative reassessment for recent tenant improvements. TOTAL: 24.</i></p>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
59	2581820100	111 H	GC	D-CM1	0.09	n.a.	34	3
	2581820200	912 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581820500	980 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581820600	940 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2581820700	960 Coast Hwy	GC	D-CM1	0.18	n.a.	34	6
<p><i>Notes: Older, low intensity commercial and recreational uses, including a church, auto repair shop, and spa. Parcels include surface parking lots that surround the commercial structures. Developer interest has been expressed in this area. TOTAL: 18.</i></p>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
60	2583170200	1038 Coast Hwy	GC	D-CM1	0.10	n.a.	34	3
	2583170300	1060 Coast Hwy	GC	D-CM1	0.19	n.a.	34	6
	2583170500	1055 2nd	GC	D-CM1	0.28	n.a.	34	9
	2583170800	1010 Coast Hwy	GC	D-CM1	1.02	n.a.	34	34
<p><i>Notes: Low intensity commercial uses, including a crafts store, antiques and various retail, and a café. Parcels include large surface parking lots surrounding the commercial structures. The site has a 0.0 to 0.8 improvement to land value ratio. TOTAL: 52.</i></p>								

ATTACHMENT 1

Sites Able to Accommodate Lower Income Housing in Fourth Planning Period

Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
64	2583160100	1108 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
	2583160200	1108 Coast Hwy	GC	D-CM1	0.10	n.a.	34	3
	2583160400	1126 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
	2583160700	1150 Coast Hwy	GC	D-CM1	0.12	n.a.	34	4
	2583160800	1150 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
	2583161900	1136 Coast Hwy	GC	D-CM1	0.22	n.a.	34	7
<p><i>Notes: Older, low intensity commercial uses, including several restaurants. Parcels include large surface parking lots surrounding the commercial structures. The site has a 0.2 to 0.5 improvement to land value ratio. TOTAL: 23.</i></p>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
65	2581901300	1031 Coast Hwy	GC	D-CM1	0.82	n.a.	34	27
	2581901400	967 Coast Hwy	GC	D-CM1	0.88	n.a.	34	29
	2581901500	927 Coast Hwy	GC	D-CM1	1.01	n.a.	34	34
	2581901600	897 Coast Hwy	GC	D-CM1	0.92	n.a.	34	31
	2581901700	851 Coast Hwy	GC	D-CM1	0.55	n.a.	34	18
	2581901800	765 Coast Hwy	GC	D-CM1	0.89	n.a.	34	30
	2581901900	745 Coast Hwy	GC	D-CM1	0.90	n.a.	34	30
	2581902000	725 Coast Hwy	GC	D-CM1	0.66	n.a.	34	22
	2583120300		GC	D-CM1	0.10	n.a.	34	3
	2583120400	1131 Coast Hwy	GC	D-CM1	0.09	n.a.	34	3
	2583120500		GC	D-CM1	0.08	n.a.	34	2
	2583120600	1151 Coast Hwy	GC	D-CM1	0.07	n.a.	34	2
	2583120900	1049 Coast Hwy	GC	D-CM1	0.63	n.a.	34	21
	2583121500	1205 Coast Hwy	GC	D-CM1	0.95	n.a.	34	32
	2583121600	1105 Coast Hwy	GC	D-CM1	1.15	n.a.	34	39
<p><i>Notes: Older, low intensity commercial uses, including auto repair and related uses, hair studio, alterations, photo/camera store, beads and crafts store, various retail establishments, nail salon, bank, and Stabucks. Parcels include large surface parking lots surrounding the commercial structures. The site has a 0.0 to 2.5 improvement to land value ratio. The parcel with a high improvement to land value ratio is due to ownership tenure and cumulative reassessment of recent tenant improvements which is expected in areas with high tenant turnover. Some uses are discontinued. TOTAL: 323.</i></p>								

ATTACHMENT 1

Sites Able to Accommodate Lower Income Housing in Fourth Planning Period

Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
66	2581610100	603 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
	2581610500	615 Coast Hwy	GC	D-CM1	0.17	n.a.	34	5
	2581611000	641 Coast Hwy	GC	D-CM1	0.08	n.a.	34	2
<i>Notes: Low intensity commercial uses, including various restaurants, used clothing boutiques, book store, a liquor store and a Western Union. The site has a 0.7 to 1.7 improvement to land value ratio. TOTAL: 10.</i>								
67	2580820100	505 Coast Hwy	GC	D-CM1	0.23	n.a.	34	7
	2580820200	527 Coast Hwy	GC	D-CM1	0.23	n.a.	34	7
	2580820300	553 Coast Hwy	GC	D-CM1	0.12	n.a.	34	4
	2580820400	563 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
	2580820500	575 Coast Hwy	GC	D-CM1	0.12	n.a.	34	4
	2580820600	583 Coast Hwy	GC	D-CM1	0.12	n.a.	34	4
<i>Notes: Low intensity commercial uses, including various restaurants, used clothing boutiques, bike shop and furniture retail. The site has a 0.8 to 1.3 improvement to land value ratio. Developer interest expressed in this area. TOTAL: 29.</i>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
68	2580360900	315 Coast Hwy	GC	D-CM1	0.81	n.a.	34	27
	2580361700	345 Coast Hwy	GC	D-CM1	0.33	n.a.	34	11
	2580361800	345 Coast Hwy	GC	D-CM1	0.47	n.a.	34	15
	2580810100	449 Coast Hwy	GC	D-CM1	0.18	n.a.	34	6
	2580810600	463 Coast Hwy	GC	D-CM1	0.16	n.a.	34	5
	2580810700	471 Coast Hwy	GC	D-CM1	0.23	n.a.	34	7
<i>Notes: Low intensity commercial uses, including various restaurants, real estate offices, movie theater, UPS branch, and record store. Parcels include large surface parking lots surrounding commercial structures. Developer interest expressed in this area. TOTAL: 71.</i>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
316-319	2580810200	S Coast Hwy 101	GC	D-CM1	0.11	n.a.	34	3
	2580810300	S Coast Hwy 101	GC	D-CM1	0.10	n.a.	34	3
	2580810400	S Coast Hwy 101	GC	D-CM1	0.11	n.a.	34	3
	2580810500	S Coast Hwy 101	GC	D-CM1	0.08	n.a.	34	2
<i>Notes: Related Party: L P Properties. TOTAL: 11.</i>								

ATTACHMENT 1

Sites Able to Accommodate Lower Income Housing in Fourth Planning Period

Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
341-342	2583160300 changed to the following APN in 2012: 2583162100	1108 and 1120 S Coast Hwy 101	GC	D-CM1	0.11	n.a.	34	3
	2583170700	1108 and 1120 S Coast Hwy 101	GC	D-CM1	0.12	n.a.	34	4
<i>Notes: Related Party: Ragone Family Trust 11-14-00. TOTAL: 7.</i>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
752	2580810200		GC	D-CM1	0.11	n.a.	34	3
	2580810300		GC	D-CM1	0.10	n.a.	34	3
	2580810400		GC	D-CM1	0.11	n.a.	34	3
	2580810500	459 Coast Hwy	GC	D-CM1	0.08	n.a.	34	2
<i>Notes: Low intensity commercial uses and open space. Uses discontinued or land vacant. TOTAL: 11.</i>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
755	2583160300	1120 Coast Hwy	GC	D-CM1	0.11	n.a.	34	3
<i>Notes: Older low intensity commercial strip mall with large surface parking lot. Uses are marginalized. TOTAL: 3.</i>								
Site ID	APN	Address	GP	Zoning	Acreage	Maximum Density	Potential Density	Unit Capacity
756	2583170700	Second Street	GC	D-CM1	0.12	n.a.	34	4
<i>Notes: Low intensity commercial use. Uses are marginalized. TOTAL: 4.</i>								

ENDORSED
FILED
ALAMEDA COUNTY

MAR 23 2015

CLERK OF THE SUPERIOR COURT
Anita Dhir

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11 ALBANY CITY COUNCIL

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF ALAMEDA

14 ALBANY HOUSING ADVOCATES *et al.*,

15 Petitioners and Plaintiffs;

16 v.

17 CITY OF ALBANY *et al.*,

18 Respondents and Defendants.

Case No.: RG13697761

Assigned for all purposes to
Hon. Evelio Grillo, Dept. 14

Exempt from Filing Fees [Gov. Code, § 6103]

**NOTICE OF ENTRY OF JUDGMENT;
EXHIBIT**

Action Filed: October 2, 2013

FAXED

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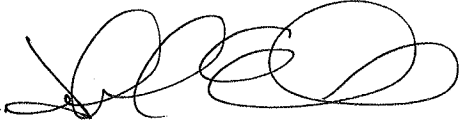
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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Alameda County Superior Court entered judgment in this action on March 11, 2015. A true, correct, and complete copy of that judgment is Exhibit A to this Notice.

DATED: March 13, 2015

GOLDFARB & LIPMAN LLP

By: 

JULIET E. COX
Attorneys for Respondents
CITY OF ALBANY and
ALBANY CITY COUNCIL

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Exhibit A: Judgment

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FILED
 ALAMEDA COUNTY

MAR 11 2015

By *Scott Seely*

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

14 ALBANY HOUSING ADVOCATES *et al.*,

Case No.: RG13697761

15 Petitioners and Plaintiffs;

Assigned for all purposes to
 Hon. Evelio Grillo, Dept. 14

16 v.

Exempt from Filing Fees [Gov. Code, § 6103]

17 CITY OF ALBANY *et al.*,

[PROPOSED] JUDGMENT; EXHIBIT

18 Respondents and Defendants.

Action Filed: October 2, 2013

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 Lipman LLP
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1 This Court's Order Denying Petition for Writ of Mandate, filed January 22, 2015, a true
2 and correct copy of which is attached hereto and incorporated herein as Exhibit A, resolves
3 completely the First and Second Causes of Action alleged by Petitioners and Plaintiffs Albany
4 Housing Advocates, Amber Whitson, and Betty Stephenson in their First Amended and
5 Supplemental Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief
6 (the "First Amended Petition"), filed in this action

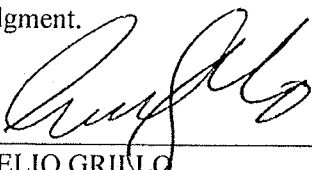
7 Petitioners and Plaintiffs have dismissed all other causes of action alleged in the First
8 Amended Petition.

9 Accordingly, this Court ORDERS, ADJUDGES, and DECREES that:

- 10 1. The peremptory writ of mandate applied for herein is denied;
- 11 2. Petitioners and Plaintiffs shall take nothing in this action;
- 12 3. Respondents and Defendants City of Albany and Albany City Council shall
13 recover costs.

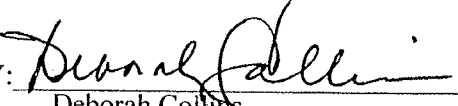
14 The Clerk is directed to enter this Judgment.

15 DATED: ^{March 11} February , 2015

16 
17 _____
EVELIO GRILLO
Judge of the Superior Court

18 APPROVED AS TO FORM:

19 Bay Area Legal Aid
20 The Public Interest Law Project

21 BY: 
22 Deborah Collins
23 Attorneys for Petitioners-Plaintiffs

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Exhibit A: Order

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FILED
ALAMEDA COUNTY

JAN 22 2015

By Scott Sander

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

ALBANY HOUSING ADVOCATES et al,
Plaintiffs,
v.
CITY OF ALBANY, et al,
Defendants.

Case No. RG13-697761

ORDER DENYING PETITION FOR WRIT
OF MANDATE.

DATE 1/7/15
TIME 1:30 PM
DEPT. 14

The Petition of Albany Housing Advocates et al for a writ of mandate came on for hearing on January 7, 2014, in Department 14 of this Court, the Honorable Evelio Grillo presiding. After consideration of the briefing and the argument, IT IS ORDERED: The Petition of Albany Housing Advocates for a writ of mandate is DENIED.

SUMMARY

The City of Albany (the "City") has an obligation under the Housing Element Law to assume its share of the region's need for low income housing as described under the Regional Housing Needs Allocation ("RHNA"). (Gov. Code 65580 et seq.) Petitioner Albany Housing

1 Advocates (“AHA”) argues that the City has failed to comply with the Housing Element Law’s
2 requirements for addressing unmet obligations from a prior planning period (Gov. Code
3 65584.09 or the “Carryover Statute”) because the City failed to adopt a housing element for the
4 1999-2006 planning period and the City’s housing element for the 2007-2014 planning period
5 double counted very low, low and moderate income housing sites to accommodate both the prior
6 and the current housing element.

7
8 Factually, the City’s housing element for the 2007-2014 planning period has a section
9 captioned “Review of Previous Housing Element” that sets out the City’s understanding of the
10 requirements of the Carryover Statute, sets out the City’s 1999-2006 RHNA, states what lower
11 income housing was actually constructed in the City during 1999-2006, identifies the sites that
12 could have accommodated lower income housing during 1999-2006, and explains in detail on a
13 site by site basis the circumstances of each site. (AR 55-70.) The City submitted the housing
14 element to the California Department of Housing and Community Development (“HCD”) and
15 the HCD approved the City’s housing element and proposed amendment to its general plan.
16

17 NATURE OF PETITION 18

19 The petition challenges the City’s decision to adopt Resolution 2014-19, which amended
20 the City’s general plan by adopting the 2007-2014 housing element. (AR 1-23.) This is a
21 challenge to a quasi-legislative action by a public agency and is for a writ of mandate under CCP
22 1085. *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th
23 498, 1248, states:

24 “The adoption or amendment of a general plan is a legislative act. (Gov.Code, §
25 65301.5.) A legislative act is presumed valid, and a city need not make explicit
26 findings to support its action. ... Judicial review of a legislative act under Code of
Civil Procedure section 1085 is limited to determining whether the public

1 agency's action was arbitrary, capricious, entirely without evidentiary support, or
2 procedurally unfair.

3 Similarly, *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1191, states:

4 There is a presumption that the adopted [housing] element is valid ... The burden
5 is on the challenger to demonstrate that the housing element, and by extension the
6 general plan, is inadequate. ... If the municipality has substantially complied with
7 statutory requirements, we will not interfere with its legislative action, unless that
8 action was arbitrary, capricious, or entirely lacking in evidentiary support.

9 The City's decision to adopt Resolution 2014-19 was a quasi-legislative action. Quasi-
10 legislative actions are different from quasi-judicial actions in that quasi-legislative actions
11 involve the gathering of information, deliberation over a period of time, and decision making on
12 a matter of general public concern by a public agency rather than the adversarial and conscious
13 presentation of evidence to a public agency before and at a hearing on a specific dispute.

14 (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464,
15 1482.) In part as a result of this difference, in a challenge to a quasi-legislative action under CCP
16 1085 the parties submit evidence to the court because there is no discrete "administrative record"
17 similar to one created in an administrative decision subject to challenge under CCP 1094.5.

18 The court GRANTS all the requests for judicial notice and OVERRULES all the
19 objections to evidence. The court has considered all the evidence submitted.

20 THE "CARRYOVER STATUTE" AND STATUTORY INTERPRETATION.

21 Each city must have a general plan and each general plan must have a housing element.
22 (Gov. Code 65302(c).) The Housing Element Law states that "The housing element shall
23 identify adequate sites for housing, ... , and shall make adequate provision for the existing and
24 projected needs of all economic segments of the community." (Gov. Code 65583.) The Housing
25
26

1 Element Law requires each local government to "review its housing element as frequently as
2 appropriate ...," and requires reviews at designated intervals (Gov. Code 65588.)

3 In the Bay Area, the ABAG first determines the housing needs of each area and prepares
4 a Regional Housing Needs Allocation ("RHNA"). (Gov. Code 65584-65584.08). Each local
5 government must then prepare "An inventory of land suitable for residential development."
6 (Gov. Code 65583 and 65583.2.)

7
8 In 2006, the Legislature adopted the "Carryover Statute" to address the issue of local
9 jurisdictions falling behind in their obligations to make adequate provision for housing. Gov.
10 Code 65584.09 states:

11 (a) For housing elements due pursuant to Section 65588 on or after January 1,
12 2006, if a city or county in the prior planning period *failed to identify or make*
13 *available adequate sites* to accommodate that portion of the regional housing
14 need allocated pursuant to Section 65584, then the city or county *shall, within the*
15 *first year of the planning period of the new housing element, zone or rezone*
16 *adequate sites to accommodate the unaccommodated portion of the regional*
17 *housing need allocation from the prior planning period.*

18 (b) The requirements under subdivision (a) shall be *in addition to* any zoning or
19 rezoning required to accommodate the jurisdiction's share of the regional housing
20 need pursuant to Section 65584 for the new planning period.

21 (c) Nothing in this section shall be construed to diminish the requirement of a city
22 or county to accommodate its share of the regional housing need for each income
23 level during the planning period set forth in Section 65588, including the
24 obligations to (1) implement programs included pursuant to Section 65583 to
25 achieve the goals and objectives, including programs to zone or rezone land, and
26 (2) timely adopt a housing element with an inventory described in paragraph (3)
of subdivision (a) of Section 65583 and a program to make sites available
pursuant to paragraph (1) of subdivision (c) of Section 65583, which can
accommodate the jurisdiction's share of the regional housing need.

(Emphasis added.)

AHA argues for an interpretation of Gov. Code 65584.09(a) that would impose a
carryover requirement if in a prior planning period a city did not actively *identify or make*

1 *available adequate sites* in its housing element update. AHA argues that “*did not identify*”
2 adequate sites means that in a prior planning period a general plan must have identified specific
3 sites in a housing element. (MP at 12:18-13:2.) AHA also argues that “*make available*”
4 adequate sites means that in a prior planning period a city must have rezoned existing sites to
5 make housing available. (MP 13:3-17.)

6 The City argues for an interpretation of Gov. Code 65584.09(a) that would impose a
7 carryover requirement only if during a prior planning period a city did not have adequate existing
8 sites available, and would permit the city to identify those adequate sites in a later housing
9 element update.

10 The court interprets the requirements of Gov. Code 65584.09 using its independent
11 judgment. (*Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891, 896; *Citizens for East Shore*
12 *Parks v. California State Lands Com.* (2011) 202 Cal.App.4th 549, 572-573.) The court applies
13 the established tools of statutory construction. (*Regents of University of California v. Superior*
14 *Court* (2013) 222 Cal.App.4th 383, 397-397; *Handyman Connection of Sacramento, Inc. v.*
15 *Sands* (2004) 123 Cal.App.4th 867, 881-882.)

16 The text of Gov. Code 65584.09(a) can be broken into a liability phrase and a remedy
17 phrase. The first phrase, the liability phrase, states that the carryover obligation applies “if a city
18 or county in the prior planning period failed to identify or make available adequate sites”
19 The use of the word “or” in the phrase “failed to identify or make available adequate sites”
20 compels the conclusion that a city has failed and the Carryover Statue applies if in a prior
21 planning period a city has either not actively identified adequate sites or has not made adequate
22 sites available.
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1 The second phrase, the remedy phrase, states that if the Carryover Statue applies "then
2 the city or county shall, within the first year of the planning period of the new housing element,
3 zone or rezone adequate sites to accommodate the unaccommodated portion of the regional
4 housing need allocation from the prior planning period." If the a city had a prior housing
5 element and the prior housing element found that existing sites met part of the RHNA allocation
6 or if the city implemented part of its housing element, then the city would presumably only be
7 required to zone or rezone to meet the unaccommodated balance of the RHNA allocation.
8

9 The remedy phrase does not address how the statute applies where a city has failed to
10 adopt a housing element and is ambiguous in that regard. The AHA's proposed reading is that if
11 a city failed to prepare a housing element in the prior planning period, then "the
12 unaccommodated portion of the RHNA from the prior planning period" is the entire prior RHNA
13 allocation because there were no findings in a prior housing element that existing sites met part
14 or all of the of the prior RHNA allocation. The result of this interpretation would be that within
15 the first year of the new housing element a city would be required to zone or rezone to provide
16 its entire prior RHNA allocation without regard to whether in the prior planning period the city
17 actually had existing sites that met part or all of the of the prior RHNA allocation. The City's
18 proposed reading is that if a city failed to prepare a housing element in the prior planning period,
19 then "the unaccommodated portion of the RHNA from the prior planning period" is only that
20 portion of the prior RHNA allocation that was in fact unaccommodated during the prior planning
21 period. The result of this interpretation would be that within the first year of the new housing
22 element a city would be required to zone or rezone to provide whatever portion of its prior
23 RHNA allocation was unaccommodated during the prior planning period. Both proposed
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1 readings are plausible. Because the text of the remedy phrase is ambiguous, the court moves on
2 to other tools of statutory construction.

3 The stated legislative intent in Housing Element Law favors the City's construction.
4 Gov. Code 65580(b) states, "The Legislature finds and declares [that the purpose of Housing
5 elements] is ... "to expand housing opportunities and accommodate the housing needs of
6 Californians of all economic levels." Gov. Code 65589(d) states, "The provisions of this article
7 shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply
8 of decent housing to meet the needs of all Californians." The legislative goal is to
9 "accommodate the housing needs of Californians" and to supply "a sufficient supply of decent
10 housing," not to regularly create documents regarding whether there is sufficient supply of
11 decent housing and to regularly adopt resolutions that amend land use plans. If a city actually
12 had zoning that actually permitted a sufficient supply of decent housing during a planning
13 period, then for the legislature's stated purposes it should not matter whether the city created a
14 document that described that situation.
15

16 The legislative intent in the legislative history favors the City's construction. (AR 4257-
17 4273.) The most pertinent legislative history is the comments to the Assembly concurrence in
18 the Senate version of AB 1233, which state:
19

20 COMMENTS: Every city and county in California *is* required to provide for its
21 RHNA share in the housing element of its general plan. According to the
22 proponents of this bill, a disturbingly large number of jurisdictions do not identify
23 and zone sufficient sites for this housing in the course of a planning cycle to meet
24 their RHNA requirement. Often when this happens, HCD is not aware of it, and
25 therefore bases its RHNA requirements for the next planning cycle on the
26 assumption that the city has complied. The portion of RHNA not provided for in
the first planning cycle effectively disappears. According to the author, this
provides an incentive for a city to avoid zoning land for housing, specifically
affordable housing, since the odds of being held responsible for the missing sites
are relatively low and the political benefits of avoiding possible "not in my back
yard" pressures are substantial.

1 This bill would remove this incentive by requiring that any portion of a city or
2 county's RHNA requirement for one planning cycle that remains unprovided for
3 at the end of the cycle be carried forward and provided for in the subsequent
4 cycle. A city or county with a housing element that is either certified by HCD or
5 self-certified but that has not managed to complete the zoning or rezoning called
6 for in that housing element will have to complete that zoning and rezoning in the
7 subsequent planning period. A city or county without a certified housing element
8 will have to zone or rezone adequate sites to make up for the deficit in its RHNA
9 number for the completed cycle in addition to the sites required in the new
10 planning period.

11 (AR 4264-4265.) This legislative history suggests that the Carryover Statute is designed to
12 ensure that local agencies met the requirements of a prior RHNA and prior planning element and
13 actually implement any unmet requirements in the first year of a new planning period. There is
14 no suggestion that the Carryover Statute was intended to create a greater obligation to provide
15 for low income housing than would have existed had the local agency complied with its legal
16 obligations during the prior planning period.

17 The text of the Housing Element Law as a whole favors the City's interpretation.

18 (*People v. Whaley* (2008) 160 Cal.App.4th 779, 793.) Other provisions of the Housing Element
19 law suggest that a housing inventory is part of a process and not an end in and of itself. Gov.
20 Code 65583.2(a) states "A city's or county's inventory of land suitable for residential
21 development ... shall be used to identify sites that can be developed for housing within the
22 planning period and that are sufficient to provide for the jurisdiction's share of the regional
23 housing need ..." Gov. Code 65583.2(c) states "Based on [the inventory of land], a city or
24 county shall determine whether each site in the inventory can accommodate some portion of its
25 share of the regional housing ..." The creation of inventories is therefore pertinent only as a tool
26 to further a sufficient supply of decent housing.

1 The court has not located any sections of the Housing Element Law that address directly
2 whether the “accommodation” of regional housing refers to (1) a change in city zoning to permit
3 a “sufficient supply of decent housing” or (2) existing or planned city zoning that currently
4 permits or will permit a “sufficient supply of decent housing.” A reasonable reading of the
5 statute, however, suggest that a lot zoned for higher density can “accommodate” low income
6 housing whether the lot was zoned for high density 30 years ago or in the prior planning period.

7 The Housing Element Law does not require that a city “[e]xpend local revenues for the
8 construction of housing, housing subsidies, or land acquisition.” (Gov. Code 65589.) Therefore,
9 a parcel of land can be an *available adequate site* in one planning period, remain vacant due to
10 market conditions and/or the decisions of the private parties that own the identified available
11 adequate sites, then continue to be an *available adequate site* in a subsequent planning period.
12 The city meets its housing obligation under the RHNA by having available adequate sites, not by
13 ensuring that units of very low, low, moderate, or above moderate housing are actually
14 constructed.
15

16 The Department of Housing and Community Development (“HCD”)’s general
17 memorandum on “Application of Government Code Section 65584.09” issued June 20, 2007,
18 and updated June 3, 2010, provides some guidance. (AR 4253-4256.) The general
19 memorandum is entitled to great weight because it reflects a long-standing statement of general
20 policy by the agency charged with enforcing the statute and was explicitly adopted or approved,
21 and then updated, by a senior official. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174,
22 1192-1194; *Allende v. Department of Cal. Highway Patrol* (2011) 201 Cal.App.4th 1006, 1018;
23 *Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113 fn 13.)
24
25
26

1 The HCD's memorandum does not address directly what a city is to do when it fails to
2 adopt an updated housing element for a prior planning period and is therefore not directly
3 instructive. The HCD's memorandum does, however, state that in calculating the
4 "unaccommodated housing need" for the prior planning period a city can give itself credit for
5 "Previously identified sites currently available (Capacity)." AHA would emphasize the words
6 "Previously identified" and argue that a city can only get credit for sites identified in a prior
7 housing element. The City would emphasize the words "currently available" and argue that a
8 city can get credit for any sites that were in fact available during the prior planning period.
9

10 The HCD's Informal Technical Assistance to the City dated 10/22/09 provides more
11 specific guidance. (AR 312-322.) The court "owe[s] a degree of deference to the [HCD's]
12 interpretation of the statute, even though that interpretation is embodied only in an informal
13 advice letter." (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 494.) The court
14 gives the HCD's Informal Technical Guidance less deference than the HCD memorandum
15 because it is case specific advice and does not clearly reflect a general or longstanding agency
16 interpretation by senior officials. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998)
17 19 Cal.4th 1, 23-24 (Mosk, concurring) [litigating positions were not entitled to as great a level
18 of deference as administrative rulings that were "embodied in formal regulation[s] or even
19 interpretive ruling[s] covering the ... industry as a whole....".])
20

21 The HCD's Informal Technical Assistance states:

22 Addressing Unaccommodated Need from the Previous Planning Period: Pursuant
23 to [the Carryover Statute], if Albany failed to identify or make adequate sites
24 available to accommodate the regional housing need in the prior planning period,
25 including failure to implement rezoning, the City must zone or rezone sites to
26 accommodate any unaccommodated need within the first year of the 2009-2014
planning period. As the City did not adopt an element in the prior planning period,
the element must demonstrate compliance with [the Carryover Statute], including
demonstrating adequate sites were made available to accommodate the regional

1 housing need in the prior planning period. While the element describes units
2 constructed by income group in the prior planning period and lists areas with
3 residential capacity by allowable density (page 10), it does not demonstrate how
adequate sites were made available in the prior planning period.

4 (AR 312 [emphasis in original].) This suggests that the HCD reads the Carryover Statute as
5 focusing on whether the City made adequate sites available in the prior planning period and not
6 whether the City created a contemporaneous inventory of housing sites. The Informal Technical
7 Assistance also uses the phrase “in the prior planning period” repeatedly, suggesting that the
8 HCD reads the carryover statute as permitting a retrospective analysis of the housing that was
9 available “in the prior planning period.”
10

11 The HCD’s letter and attached appendix dated 12/26/13 regarding the City’s draft
12 element also provides specific guidance. (AR 543-548) The court gives the HCD’s letter and
13 appendix of 12/26/13 substantial deference on the specific facts of this case.¹ On 9/25/13, the
14 Public Interest Law Project submitted a letter to the HCD asserting that the City’s carryover
15 analysis was erroneous (AR 3989-3997, especially 3993-3994); on 10/25/13, the City submitted
16 a letter with two exhibits to the HCD stating that “Albany had adequate sites to meet its RHNA
17 during the 1999-2006 period” and directing the HCD to the City’s analysis (AR 498-507); and
18 on 12/3/13, the Public Interest Law Project submitted another letter to the HCD again asserting
19 that the City’s carryover analysis was erroneous (AR 508-528, especially 510-511). The HCD’s
20 cover letter of 12/26/13 on the City’s draft element expressly states that “the Department
21 considered comments from the Public Interest Law Project.” (AR 543.) Therefore, the
22 HCD’s letter and appendix were prepared after having been presented with competing views on
23 the specific legal issue in this case. This strongly suggests that even though the comments in the
24

25
26 ¹ *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 [“the
binding power of an agency’s *interpretation* of a statute or regulation is contextual”].)

1 HCD's appendix were summary in nature that they reflected a reasoned consideration of the
2 issues and were not merely a routine administrative response.

3 The HCD's comments state:

4 Unaccommodated Need. The element generally concludes that there was not an
5 unaccommodated need during the [1999-2006] planning period based upon, in
6 part, having adequate sites during the [1999-2006] planning period. As most of
7 the identified sites for the [1999-2006] cycle RHNA are also utilized toward the
8 [2007-2014] cycle RHNA, the element must include analysis, described below,
9 demonstrating their suitability for development during the [1999-2006] planning
10 period.

11 This statement strongly suggests that the HCD permits cities to count the same sites as adequate
12 housing sites during different planning periods as long as the cities can demonstrate that the
13 housing sites were available during the prior planning period.

14 Finally, the HCD's letter of 6/3/14 found the City's housing element in compliance with
15 state law and also expressly states that "the Department considered comments from Bay Area
16 Legal Aid and the Public Interest Law Project." (AR 223.) This too suggests that the HCD
17 considered the issues of statutory construction presented in this case before it found the City's
18 housing element in compliance with state law.

19 The court concludes that the proper interpretation of the liability phrase in Gov. Code
20 65584.09 is that the statute applies if a city has failed to identify or make available adequate sites
21 during a prior planning period. The use of the word "or" compels the conclusion that a city has
22 failed if it has either not actively identified adequate sites by not adopting a housing element or
23 has not made adequate sites available by implementing its housing element.

24 The court concludes that the proper interpretation of the remedy phrase in Gov. Code
25 65584.09 is that "the unaccommodated portion of the RHNA from the prior planning period"
26 refers only to that portion of the prior RHNA allocation that was in fact unaccommodated during

1 the prior planning period. This reading of the remedy phrase permits a city to identify available
2 sites in a later housing element update and to demonstrate that they were available during the
3 prior planning period. This interpretation is consistent with the purpose of the statute as well as
4 with the interpretation of the statute by the HCD.

5 The court will not read the remedy phrase in Gov. Code 65584.09(a) to mean that when a
6 city has failed to prepare a housing element in the prior planning period, then the city must zone
7 or rezone to provide its entire prior RHNA allocation without regard to whether in the prior
8 planning period the city actually had existing sites that met part or all of the of the prior RHNA
9 allocation. Although perhaps not an "absurd result," this would be a result that is contrary to the
10 stated legislative purpose and the interpretation of the statute by the enforcing agency.
11

12 If a city has failed to prepare a timely housing element, then any person can file a petition
13 for a writ of mandate to compel the city to prepare a housing element and the remedy will be a
14 writ of mandate. There is, however, no indication that if a city has failed to prepare a timely
15 housing element that under the Carryover Statute the city is required to zone or rezone to provide
16 its entire prior RHNA allocation without regard to whether the city actually had existing sites
17 that met part or all of the of the prior RHNA allocation.
18

19 20 APPLICATION OF THE STATUTE TO THE FACTS OF THE CASE.

21 The court reviews the factual record to determine whether the housing element complies
22 with the statute. *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1185, states:

23 The court's review shall extend to whether the housing element or portion thereof
24 or revision thereto substantially complies with the requirements of [The Housing
25 Element Law]. ... Substantial compliance ... means *actual* compliance in respect
26 to the substance essential to every reasonable objective of the statute,' as
distinguished from 'mere technical imperfections of form. ... Simply stated,
"[j]udicial review of a housing element for substantial compliance with the

1 statutory requirements does not involve an examination of the merits of the
2 element or of the wisdom of the municipality's determination of policy. ... It
3 merely involves a determination whether the housing element includes the
4 statutory requirements. ... Under section 65587 and Code of Civil Procedure
5 section 1085, then, the court's role in determining a mandamus challenge to a
6 locality's housing element is simply to determine whether the locality has satisfied
7 statutory requirements. It is not to reach the merits of the element or to interfere
8 with the exercise of the locality's discretion in making substantive determinations
9 and conclusions about local housing issues, needs, and concerns.

7 In the factual analysis, the enforcing agency's approval of the plan creates a rebuttable
8 presumption that the plan complied with the statute. (Gov. Code 65589.3.)

9 The City failed to prepare a housing element for the 1999-2006 planning period and
10 therefore failed to identify adequate sites during that planning period. Therefore, under the
11 Carryover Statute's liability phrase the statute applies to the City's housing element for the 2007-
12 2014 planning period.

13 The City's housing element for the 2007-2014 planning period addresses the City's
14 obligations under the Carryover Statute's remedy phrase. The HCD approved the City's housing
15 element and proposed amendment to its general plan, which created a presumption that the plan
16 complied with the statute's remedy phrase. (Gov. Code 65589.3.) The Housing Element has a
17 section captioned "Review of Previous Housing Element" that sets out the requirements of the
18 Carryover Statute, sets out the City's 1999-2006 RHNA, states what lower income housing was
19 actually constructed in the City during 1999-2006, identifies the sites that could have
20 accommodated lower income housing during 1999-2006, and explains in detail on a site by site
21 basis the circumstances of each site. (AR 55-70.) In addition to the presumption of compliance,
22 the stated facts and analysis demonstrate substantial compliance. (*Fonseca*, 148 Cal.App.4th at
23 1185.) The evidence demonstrates that although the City had no housing element in the prior
24 planning period there nevertheless were no unaccommodated portions of the RHNA during the
25
26

1 prior planning period. Therefore, the City's housing element for the 2007-2014 planning period
2 substantially complies with the requirements of the Carryover Statute's remedy phrase.
3

4 STATUTE OF LIMITATIONS

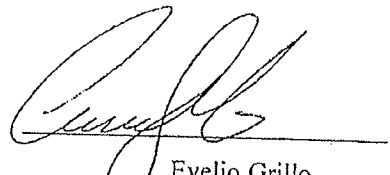
5 Having resolved the case on its merits the court does not reach the statute of limitations
6 issues.
7

8 CONCLUSION.

9
10 The petition of Petitioner AHA for a writ of mandate is DENIED. The court directs the
11 City to prepare a proposed judgment and submit it to AHA for review before submission to the
12 court. (CRC 3.1312.)

13 The court sets a case management conference for 1:30 pm on 2/25/15 in Dept 14 to
14 address any remaining issues in the case. The parties may request the court to drop the CMC if
15 no issues remain 5 days before the scheduled CMC.
16

17
18 Dated: January __, 2015

19 
20 Evelio Grillo
21 Judge of the Superior Court
22
23
24
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26

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG13697761

Case Name: Albany Housing Advocates vs. City of Albany

- 1) Order Denying Petition for Writ of Mandate

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown below by placing it for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

I declare under penalty of perjury that the foregoing is true and correct. Executed on

January 23, 2015 (51)

Scott Sanchez
Executive Officer/Clerk of the Superior Court
By M. Scott Sanchez, Deputy Clerk

NAOMI YOUNG (SBN 105041)
LISA S. GREIF (SBN 214537)
BAY AREA LEGAL AID
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Oakland, CA 94612

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PROOF OF SERVICE

Albany Housing Advocates v. City of Albany
Alameda County Superior Court No. RG13697761

I, Laura L. Luz, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. On the date set forth below, I served the document(s) described below on the interested parties in this action as follows:

NOTICE OF ENTRY OF JUDGMENT; EXHIBIT

By placing the original a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

BY OVERNIGHT DELIVERY: I deposited such envelope in a facility regularly maintained by FEDEX with delivery fees fully provided for or delivered the envelope to a courier or driver of FEDEX authorized to receive documents at Goldfarb & Lipman LLP, 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, CA 94612 with delivery fees fully provided for.

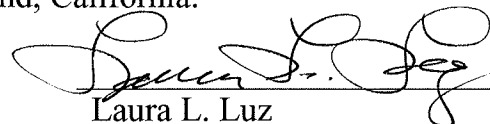
BY FACSIMILE: I sent via facsimile a copy of said document(s) to the above addressee(s) at the stated fax number(s) in accordance with the written confirmation of counsel in this action.

BY E-MAIL: I sent a copy of said document(s) to the interested parties in the above-referenced action by a complete electronic transmission without error to the stated electronic mail address.

[State] I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[Federal] I declare that I am employed in the offices of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on **March 20, 2015**, at Oakland, California.



Laura L. Luz

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May 24, 2018

SENT VIA EMAIL ONLY

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**RE: Supplemental Comments Regarding the City of Encinitas 2018
Draft Housing Element**

Melissa A. Morris
Staff Attorney
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Dear Mayor and Council Members;

Noah Kirshbaum-Ray
Legal Assistant
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nkirshbaum-ray@pilpca.org

San Diego Volunteer Lawyer Program, Inc., provides free legal assistance to low income families and individuals on a wide variety of issues, including housing. The Public Interest Law Project is a statewide support center that provides training and litigation support to legal services programs throughout California.

Linda Hill
Office Manager
Extension 123
lhill@pilpca.org

On behalf of our clients we submit the supplemental comments below to ensure the housing element complies with the requirements of housing element law and will fulfill the intent of the law to promote and facilitate housing for all income groups. Our supplemental comments are emphasized in bold, where possible, for your convenience. The element is deficient in several respects each outlined below. We detail the actions the City must take to comply with Housing Element Law.

Deborah Collins
(Retired)

Judith Gold (1952 - 2016)

A. RHNA

The City Must Plan for the Correct Carry-over Calculation from the Last Planning Period

The City Cannot Offset the Unmet Need from the Prior Planning Period with Sites that were Neither Identified in a Housing Element or Rezoned Pursuant to a Housing Element Rezoning Program to Ensure Suitability

HCD guidance informs jurisdictions how to calculate whether there was an unmet need from the prior planning period that must be accommodated in the current planning period. HCD Memorandum: Application of Gov. Code Section 65584.09, June 20, 2007, Updated: June 3, 2010 (“HCD 1233 Memo”). Specifically, a city may subtract (1) the number of units (by income level) that were constructed or approved during the prior planning period; (2) the number of

units that could be accommodated on appropriately zoned sites that were “specifically identified in the element adopted for the previous planning period”; (3) the number of units accommodated on sites that were **rezoned** for residential development “pursuant to the site identification programs in the element adopted for the prior planning period”; and (4) the number of units accommodated on sites **rezoned** for residential development in connection with the “element’s site identification programs...” The remaining balance constitutes the City’s “unaccommodated needs.” HCD 1233 memo.

The City subtracts units that were constructed and a further reduction of 342 units because there was allegedly zoning in place to allow residential development during the last planning period even though the City did not adopt a housing element that identified and made sites available. However, this reduction is not permissible.

Encinitas did not accommodate any units under factors 2 or 3 identified in the HCD 1233 memo because it did not adopt a housing element for the prior planning period. It also did not accommodate any units under factor 4 in the HCD 1233 memo because it did not rezone any sites to accommodate its low and moderate income housing needs pursuant to a program to identify adequate sites as required by Government Code section 65583(c)(1). The City simply looked back at the last planning period, now many years later, and chose sites that were zoned at a high residential density, and reported that those sites were “made available” for low and very low income housing solely because of their zoning without any other analysis as required by Housing Element law. However, that is not the standard to determine if sites were identified and “made available.” Pursuant to HCD’s formal guidance, the correct and simple carry-over calculation is the RHNA for the last planning period (691) decreased by the number of affordable units actually constructed in the last planning period (62 deed restricted and 34 non-deed restricted). The City’s RHNA for the last planning period for very-low and low-income units is 595 units.

	Correct Calculation	City’s Calculation
RHNA 2003-2010 Very low/Low income combined	691	691
Units Constructed-deed restricted	-62	-62
Units Constructed non-deed restricted	-34 ¹	-34
Unit Capacity of Sites Not identified in a Housing Element	0	-342
Total Remaining, or Carry-over	595	253

Ensuring sites are zoned at a high residential density is only one factor that is considered in determining whether sites are “made available.” Zoning is the threshold issue. Sites

¹ PILP and SDVLP have contested the City’s method of reducing the 2003-2010 RHNA by non-deed restricted units (34) on grounds that the City had provided no evidence as to the affordability of these units. However, in this draft housing element, the City provides information pertaining to the affordability of these units, specifically relying on the actual rents and sale prices reported in applications for Certificates of Occupancy. Draft, p. B-92. As a result, PILP and SDVLP have included the 34 unit reduction in calculating the carryover.

that are zoned at a high residential density meet the threshold requirement, but to qualify as adequate to accommodate low and very low income housing, the sites must meet the suitability standards set forth in Government Code Sections 65583 and 65583.2.

These sites were not determined to be adequate by HCD pursuant to an approved housing element, were not analyzed by the City under the statutorily required suitability factors, and were not actually made available for low and very low income housing. The City cannot claim these sites to reduce their carryover. The City's RHNA for the last planning period for very-low and low-income units is 595 units.

The City Cannot Reduce the RHNA for the Current Planning Period for Units Constructed Without Evidence that the Units are Affordable to Very Low and Low Income Households.

Encinitas reduces its current RHNA by 66 units to reflect units constructed without providing any information to support the affordability of those units. Draft, p. B-91. Without evidence that those units are either deed-restricted or affordable based on the rents and sale prices, these units cannot be used to reduce the RHNA.

In the May 9, 2018, Draft Housing Element (hereinafter "5-9-18 Draft"), Encinitas reduces its RHNA by 79 for Accessory Unit ("ADU") production. 5-9-18 Draft, p. 1-10. This is an increase from the 50 ADUs reported in the Draft Housing Element submitted to HCD in April.

In the April Draft, Encinitas calculated that 7.9% of ADUs constructed or permitted between January 2010 and December 2017 were affordable (16 of the 203 ADUs constructed). In the May Draft, Encinitas references new survey data to support a finding that 24.6% of ADUs were affordable. 5-9-18 Draft, p. B-89. The updated affordability percentage increased the anticipated affordable ADUs from 50 to 79 units.

Because of the dramatic increase in the percentage of affordable ADUs, it would be helpful to have access to a summary of the survey data.² Access to the survey data should be provided to explain the basis for the increased ADU projection. In addition, the Draft should include information, including the rents and the Area Median Income by year.

² For instance, the Area Median Income (AMI) increases each year and therefore an affordable rent with someone earning less than 50% of the AMI will change each year as well.

	Correct Calculation	City's Calculation
RHNA 2013-2021 Very low and Low income combined	1033	1033
Anticipated Accessory Units	-79*	-79
Units Constructed	0	-66
Adjusted RHNA	954	888

*Increased from 50 to 79, pending a review of the survey data upon which this increase is based.

B. Adequate Sites

The City Must Identify Sites to Accommodate 1549 Units

The City must identify sites that are available and suitable for residential development to accommodate both the current Regional Housing Needs Allocation (RHNA) and the carry-over from the last planning period (2008-2013) when the City did not adopt or implement a housing element. Government Code §§ 65583(a)(4) and 65584.09.

	Very Low and Low Income Units
2013-2021 RHNA	954
RHNA Carryover (2003-2013)	595
Remaining RHNA	1549

The Inventory of Adequate Sites in the Draft Housing Element is Not Sufficient to Meet the Current RHNA and Carry-over from the Last Planning Period

At a minimum, the sites must be adequate to accommodate 1549 low and very low income units. The proposed total site unit yield for the sites is 1431 (actual capacity is 590, as discussed below), hundreds of units short of the current RHNA and carry-over.

This unit yield is predicated on all of the sites being developed for affordable units at a capacity of 25 units/acre at rental or sales prices affordable to lower income households. Based on past development patterns in Encinitas it is unlikely that all of the sites identified for affordable housing will be developed with affordable housing. Without a surplus the City will soon find itself in violation of the No Net Loss Law. A surplus is necessary for a city to maintain sites for the actual production of lower income housing units during the planning period. If the City approves a project at a lesser density or for a different income level than the City would have to rezone another site within 180 days, which the City will not be able to do because the City interprets Proposition A to require voter approval for all land use and zoning changes (a constraint addressed below). Gov. Code § 65863.

Even if the proposed sites were adequate to meet the carryover and current RHNA, the draft housing element is deficient to the extent it is void of the legally required analysis of each site at the density proposed, including information pertaining to existing leases and

evidence supporting a “realistic and demonstrated potential to redevelop” during the planning period. Gov. Code Section 65583(a)(3). As a result, not only does the inventory of sites fail to provide for the current and carryover RHNA, the sites cannot be found adequate to accommodate even the units proposed.

The Inventory of Adequate Sites in the Draft Housing Element is Deficient

As detailed below, the City’s Draft Housing Element does not contain adequate sites to accommodate its current RHNA and the Carry-over RHNA from the last planning period. Gov. Code §65584.09. There is inadequate analysis to support the development potential of non-vacant sites, contracts for the development of some sites for purposes other than affordable housing, for several sites additional information is needed to determine the site’s suitability, and for some sites additional programs to facilitate consolidation are necessary for the sites to be included to facilitate affordable housing production.

The Proposed Non-Vacant Sites Cannot Be Deemed Adequate Without Further Analysis

When non-vacant sites are relied on to accommodate 50 percent or more of a city’s lower income housing needs, an existing use will be presumed to impede development:

When a city or county is relying on nonvacant sites described in paragraph (3) of subdivision (b) to accommodate 50 percent or more of its housing need for lower income households, the methodology used to determine additional development potential shall demonstrate that the existing use identified pursuant to paragraph (3) of subdivision (b) does not constitute an impediment to additional residential development during the period covered by the housing element. An existing use shall be presumed to impede additional residential development, absent findings based on substantial evidence that the use is likely to be discontinued during the planning period. Gov. Code § 65583.2(g)(2).

The City relies on non-vacant sites to accommodate more than 50 percent of the City’s lower income housing needs.³

City’s Calculation	# of Units	% of Units
Vacant	656	45.8%
Non-vacant	775	54.1%
Total	1431	100%

RHNA Allocation (including carryover) for very low and low income categories: 1549

³ The City’s timeline expects sites to be available in 2019 (after voter and Coastal Commission approval). This means that non-vacant sites identified for affordable housing must be available for residential development before the end of the planning period, or two years from the date the site is upzoned. Draft, pp. 1-12, 1-13

Supplemental Comments Regarding Encinitas Draft Housing Element

May 24, 2018

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Site	City's Proposed Capacity	Actual Capacity	Not Vacant Despite Vacant Designation ⁴	Lacks environmental constraint analysis ⁵	Lacks existing leases and uses analysis	Lacks program to address common ownership	Lacks evidence that site is "available"	Lacks owner interest	Other Constraints
Vacant									
01 Greek Church Parcel	No Allocation (including carryover) for very low and low income categories: 1549								✓
02 Cannon Property	173	160		✓					✓
05 Encinitas Blvd & Quail Gardens	117	100	✓	✓					✓
07 Jackel Properties	33	0							✓
AD1 Sage Canyon	60	45	✓	✓			✓	✓	✓
AD2 Baldwin & Sons	223	0	✓	✓			✓	✓	✓
Non-vacant									
08 Rancho Santa Fe (Gaffney/ Goodsens)	149	120		✓	✓	✓			✓
09 Echter Property	246	0		✓	✓		✓	✓	✓
10 Strawberry Fields	246	0			✓			✓	
12 Sunshine Gardens	84	70		✓	✓			✓	✓
AD8 Vulcan & La Costa	50	50			✓			✓	✓
Totals	1431	590*							

⁴ The Proposed Vacant Sites Cannot Be Deemed Adequate Without Further Analysis: The inventory of sites includes six "vacant" sites, however, whether or not these sites are actually vacant is not discernable from the draft housing element, or from the information presented at the

*** At most, 590 units can be accommodated on the sites proposed if the City provides statutorily mandated information to justify the suitability of those sites. See site inventory inadequacy summary below for site-by-site descriptions of information the City must provide.**

As stated below, the non-vacant sites in the draft housing element have existing uses that are presumed to be impediments to residential developing. The draft housing element is void of any evidence, much less substantial evidence, to support a finding that the uses are likely to be discontinued during the planning period. In addition, the draft housing element is void of the methodology used to determine additional development potential.

Site Inventory Inadequacies Summary

As stated above, the City must revise the draft housing element before the proposed sites can be considered suitable for affordable housing under the factors of Government Code Section 65583(a)(3).

At a minimum, the City must include a program to address common ownership, and provide additional information to show that site suitability has been determined pursuant to analyses of environmental constraints, and existing uses and leases. If this information was provided to support the suitability of these sites, the City's actual capacity would be 590 as reflected in the chart above; which is far below the 1549 unit capacity the City must accommodate.

The inventory of sites in the draft housing element fails to provide for the current and carryover RHNA of 1549 units, and is inadequate to accommodate even the 1431 units proposed. At most, 590 units can be accommodated on the sites proposed if, and only if, the City provides statutorily mandated information to justify the suitability of those sites.

01 Greek Church Parcel

Site 01, Greek Church Parcel, is specified as "Primarily vacant, open space." The decision to split the site may have been avoided because doing so would require evidence that the site would accommodate 16 units. While the use of "primarily" may be explained

Joint City Council/Housing Element Task Force immediately preceding the draft housing element submission to HCD. In addition, the owner of one of these allegedly vacant sites has requested that his site be removed from consideration.

⁵ Without Additional Information Pertaining to Environmental Constraints, Three Sites Cannot Be Deemed Adequate: For all sites, the inventory of land must include, "A general description of any environmental constraints to the development of housing within the jurisdiction, the documentation for which has been made available to the jurisdiction. This information need not be identified on a site-specific basis." Gov. Code § 65583.2(b). The sites reference environmental constraints but fail to provide sufficient specificity and analysis to support the sites' viabilities for residential development on the proposed net acreage at the proposed density. Without additional information pertaining to the environmental constraints on these sites, the sites cannot be found to be adequate for residential development at the identified densities.

by the fact that the entire site is not proposed for development (the draft housing element states “Owner has indicated they are interested in developing 2.00 acres of the 2.50 acre parcel”), given the definition of vacant in the draft housing element, this site is not vacant. Draft, p. C-7.

More information pertaining to structures or constraints on the site should be provided.

In addition, the unit capacity is 50 but the owner indicated interested in building “40 to 50” units. Averaging the unit amount as 45 may be a more prudent choice to avoid an overestimation of the units that may be produced on this site.

For this site to be included in the inventory, it must be available for affordable development. Residential units currently exist on the site and are restricted to church members. If the Greek Church intends to develop additional units on the site to house its members, it must specify whether the units will be affordable or market rate. If the owner intends the units to be market rate units, the site cannot be included in the inventory.

02 Cannon Property

This site contains environmental issues,⁶ including the need to preserve habitat. Preservation will reduce the developable area, thereby further reducing capacity.

Another issue with this site is traffic congestion, which is a concern because community opposition could prevent the timely development of affordable housing on this site if traffic mitigation measures are not taken. Roadway intersection mitigation can be completed by the City to reduce traffic congestion and thereby reduce potential community opposition to the development of affordable housing. Unless roadway intersection mitigation is proposed for timely implementation, capacity on this site may need to be reduced below the proposed 173 units to ensure a more practical reflection of development potential.

05 Encinitas Blvd & Quail Gardens

Site 05, Encinitas Blvd & Quail Gardens Parcels, may have been rejected for environmental issues in the past and may be unsuitable for residential development at the proposed acreage and density due to easements, powerlines, wetlands, and steep topography. These concerns were raised during public comment at the April 4, 2018,

⁶ At the May 9, 2018, Joint City Council and Housing Task Force meeting, City Council Members raised concern with this site based on its close proximity to the freeway. Citing air quality studies, a City Council Member suggested removing this site. However, the air quality studies discussed at the meeting are inapplicable to this site because they are based on cities not similarly situated to Encinitas, primarily cities in the Los Angeles region. In addition, any potential concerns could be mitigated by simple development standards, including triple plane glass windows. Moreover, the City recently approved market-rate developments near the freeway.

Joint City Council and Housing Task Force meeting.

The site has significant slope issues that will reduce its capacity beyond the reduction proposed by the City. The draft housing element acknowledges environmental concerns with the site including “Steep topography on some portions” and “Some manufactured slopes that are determined to not be a constraint on future development.” The draft housing element states “Acreage reduced per City Code.” However, an analysis is not provided or cited to in the draft housing element, and must be provided as evidence of site viability. Draft, pp. C-13, C-14.

Development on this site at the capacity proposed will face community opposition without roadway intersection traffic mitigation efforts. The City has chosen three sites (Sites 05, 12, and AD2, with a combined proposed capacity of 424 units) proximate to an intersection (Encinitas Boulevard and Quail Gardens Drive) that is already congested. Mitigation efforts must be completed or the number of units proposed on the site must be decreased.

07 Jackel Properties

Site 07, Jackel Properties, has serious impediments to development. For this site to be available for affordable housing development, the City would have to obtain approval from the Coastal Commission.

If the Coastal Commission approval process was not an issue, the site would still be problematic due to environmental constraints. This site contains a significant steep slope and ingress/egress challenges, which reduces actual capacity below what the City has proposed. In addition, the City may have recently completed an EIR for a Streetscape project on this site. If additional right of way access routes are included in the Streetscape project, capacity on this site may need to be further reduced.

Development on this site at the capacity proposed will face community opposition unless roadway infrastructure is first addressed by the City. The roadway infrastructure at the intersection of Highway 101 and La Costa Avenue will be used by units developed on this site and Site AD8. Unless the City proposes timely roadway intersection mitigation, capacity on this site may need to be reduced to reflect actual development potential.

AD1 Sage Canyon

The site is for sale and information pertaining to the status of the sale, including when escrow closes, is not provided. Water quality issues will impact this site because of the presence of a blue-line stream on the property. Blue-line stream areas provide surface and/or groundwater for vegetation and wildlife, as well as a natural corridor for wildlife movement. Blue-line stream courses are an important defining characteristic of the natural land, and grading, engineered slopes, housing construction, utilities, and other manmade features are generally prohibited within

a set number of feet (generally 30-100 feet) of the blue-line stream's centerline. Moreover, the development potential on a site with a blue-line stream is low given communities' interests in preserving and protecting environmental resources. The site's developmental capacity has to be significantly reduced to accommodate water quality measures on this site and to provide adequate setbacks from the blue-water stream. Additional information pertaining to the blue-line stream must be provided.

This site contains inland coastal bluffs and has significant soil issues, both of which may serve as impediments to residential development on this site. Soil remediation would be necessary for residential development, but the costs would be excessively high given the sensitive environmental issues present on the land, including the blue-line stream and inland coastal bluffs. The environmental constraints on this site, combined with the prohibitive costs of soil remediation necessary for residential development, undermine this site's viability. Most significantly, this site may not have passed HCD's environmental review standards in the past.

The draft housing element contains a letter from an individual who has "entered into a purchase agreement," however, no letter from the owner is provided nor is any information pertaining to the status of the sale or whether the purchase will be for multi-family housing. The letter regarding the purchase agreement states "The site is currently entitled for a residential subdivision consistent with the existing R-3 zoning. Please be advised that I would be interested in modifying the existing plans to create additional housing units should the City choose to increase the allowable density as part of the Housing Element Update. Draft, p. C-17, C-52.

Interest from the owner of this site must be provided as must the terms of the purchase agreement. Based solely on the information available, it appears this site is not available to accommodate affordable housing.

The site description states "some known environmental constraints that shrink the gross buildable area" which include "Steep Topography in some areas," "Some steep slopes adjacent to El Camino Real," "Environmentally sensitive areas," "Existing drainage canal," and "Telephone pole lines overhead." The Draft reduces the parcel size from 5.23 to 2.40 acres and states the net acreage was "determined from the net buildable area based on numerous studies of the topographic and environmental constraints by the owner." The draft housing element is void of information pertaining the City's review of the owner's studies or an analysis supporting the site viability determination.

The owner's topographic and environmental constraints studies, upon which the City made its determination, and the City's analysis should be made available to the public. Draft, p. C-17.

AD2 Baldwin & Sons

At the April 18, 2018, Joint City Council and Housing Element Task Force meeting, Baldwin & Sons Properties' representative Nick Lee stated that he was proposing to build market rate residential units on this site, with affordable units only provided through density bonus. Joint City Council and Housing Element Task Force, April 18, 2018, <http://www.ci.encinitas.ca.us/Government/Agendas-Webcasts> (Accessed May 4, 2018).

Mr. Lee stated that he will analyze the standards, but with the current standards expressed by the Joint City Council and Housing Element Task Force meeting, he will sending a letter to City Council and HCD requesting removal of the site.

This site cannot be included to meet the lower income RHNA.

The draft housing element lists constraints associated with Site AD2, Baldwin & Sons Properties, as "Some landlocked parcels," a "Utility easement," and "telephone pole lines overhead." The parcel size was reduced from 11.59 to 9.05 "based on numerous studies of the topographic and environmental constraints and a 50' riparian buffer requirement for off-site wetlands that encroaches on Parcel 2570203600." However, it is not clear why the acreage reduction applies to Parcel 2581309300, when the wetlands encroach on Parcel 2570203600. Draft, pp. C-19, C-20.

Environmental issues exist on this site. These issues, which will serve as constraints to residential development, are not specified or even identified in the site summary. This site has severe storm water, drainage, and sewer issues because the site is significantly below surrounding levels of elevation. More information pertaining to the environmental issues on this site must be provided.

Development on this site at the capacity proposed will face community opposition without roadway intersection traffic mitigation efforts. See discussion under Site 05, pertaining to the Encinitas Boulevard and Quail Gardens Drive intersection. Site capacity may need to be reduced.

Development of single-family residential units on this site has already faced significant neighborhood opposition. Unless the City proposes mitigation efforts to address traffic congestion, capacity on this site may need to be reduced below the proposed 223 units to ensure a more practical reflection of development potential.

08 Rancho Santa Fe (Gaffney/Goodsen)

Site 08 Rancho Santa Fe (Gaffney/Goodsen), lacks common ownership of the included parcels. Lack of common ownership is a constraint to the development of affordable housing.

To develop on these sites during the planning period, a developer would have to acquire parcels from multiple owners in a limited period of time. The need to enter into multiple

property acquisition transactions to develop on one site reduces the economic feasibility of an affordable housing development, thereby reducing the likelihood of development on the site during the planning period.

Moreover, it violates the Least Cost Zoning law which mandates the City to “designate and zone sufficient vacant land for residential use with appropriate standards” which means “densities and requirements with respect to minimum floor areas, building setbacks, rear and side yards, parking, the percentage of a lot that may be occupied by a structure, amenities, and other requirements imposed on residential lots pursuant to the zoning authority which contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors, the public health and safety, and the need to facilitate the development of housing affordable to persons and families of low or moderate income” Gov. Code § 65913.1 (emphasis added).

The Draft does not have a program to remove the constraints caused by lack of common ownership. As a result, this site is inadequate because it fails to have a “realistic and demonstrated potential for redevelopment during the planning period.” Gov. Code Section 65583(a)(3).

For this site to be adequate, the City must adopt a program to help developers consolidate the parcels. The draft housing element must contain programs and a timeline of actions to ensure sites with multiple owners result in actual development. Without additional assistance to ensure such sites are developed for lower income housing, the City cannot justify the inclusion of sites with multiple owners for lower income households.

The site consists of four parcels, one of the parcels has a separate owner than the other three parcels, and two of the parcels are developed.

The owners specified their interest in developing “198 affordable senior apartments” and on site there are already “Approximately five residential structures ranging from 1-2 stories and spread across multiple parcels.” However, there is no information provided describing the five residential structures, nor is there information pertaining to the existence of leases or contracts. Because this is a non-vacant site, a description for the existing use of each property must be included as well as an analysis as to whether the existing use would prevent redevelopment. The only reference to existing use is a “Viable Housing Site Summary” for one parcel submitted for Measure T consideration: “Site Description: The study area is predominantly vacant with three homes, located along a local collector, two-lane roadway. One home serves as a care facility with six or fewer persons.” Draft, pp. C-21-22, C-55-66.

Additional information pertaining to the five residential structures must be provided to overcome the presumption that the existing uses will impede residential development, and to support a finding of “realistic and demonstrated potential for redevelopment during the planning period.” Gov. Code §65583(a)(3).

In addition to the multiple owner issue, the site has significant topographical challenges that will limit capacity below the capacity proposed in the Draft. Information pertaining to environmental constraints must be provided.

This site may have been approved for a project that has yet to be developed, and the planning map for the proposed development may still be active. More information pertaining to recently approved projects for this site must be provided to show the site is available for the timely development of affordable housing.

Development on this site at the capacity proposed will face community opposition unless traffic mitigation efforts are proposed. Access to Encinitas Boulevard is limited, and access to Olivenhain Road and use of the Encinitas Boulevard intersection are challenged by existing traffic congestion, due to significant traffic impact at both morning and afternoon peak commute hours. Past development proposals on this site included much lower capacity, yet faced severe community opposition. The City should propose traffic mitigation efforts to reduce potential community opposition to development, or site capacity should be reduced.

09 Echter Property

On Site 09, Echter Property, 9.85 acres of the 16.90 gross acres are designated for housing and the site includes “Large service tanks,” “Interior roads,” and “Single-family residence in southwest corner.” The draft housing element states that the owner has expressed interest in developing 250 residential units in conjunction with a working agricultural practice. However, rather than including in the draft housing element the letter of interest from the site owner, as required, the draft housing element contains a letter issued to the owner by a development services agent regarding a concept plan for the site. A letter from the owner indicating interest is necessary. Draft, pp. C-23-24, C-67-71.

The draft housing element must also include a description for existing use and an analysis as to whether the existing use would prevent redevelopment.

Without this information, HCD must presume that the existing uses will impede residential development, and find that the site does not have a “realistic and demonstrated potential for redevelopment during the planning period.” Gov. Code § 65583(a)(3).

Most significantly, this site is subject to requirement that it be used for agricultural purposes in perpetuity and requires Coastal Commission action to remove that restriction.⁷ A proposal to remove the designation will face community opposition and resistance, particularly from owners of agricultural zoned parcels. Moreover, the Coastal Commission is unlikely to approve the removal of the restriction. Until the covenant restricting the use of the site is removed by the Coastal Commission,

⁷ 3.1.4.1 Agricultural Restrictive Covenant, Encinitas Ranch Developer Agreement: Leal Description for Property Subject to Encinitas Ranch Specific Plan, 1994-0713677, Sept. 24, 1994.

this site should be removed.

10 Strawberry Fields

The draft housing element description for Site 10, Strawberry Fields Parcel, fails to contain a letter from the owner indicating interest. Because this is a non-vacant site, a description for existing use must be included with an analysis as to whether the existing use would prevent redevelopment of the site. This information was not included in the draft housing element and must be added to comply with state law. Draft, pp. C-25.

Enclosed with the staff report for the April 4, 2018, Joint City Council and Housing Element Task Force meeting was a letter from the landowner supporting a developer's permit application for a 200-unit senior care facility. Joint City Council and Housing Element Task Force Agenda Report, April 4, 2018, Materials, p. 135. Proposed plans to develop the site for a purpose other than affordable housing prevents the City from relying on the site to meet the housing needs of lower income households.

During the public comment portion of the April 4, 2018, meeting, a representative of the developer, Greystar, stated that the site should be removed from housing element consideration for lack of services, environmental impact, and other reasons. The representative stated that his company has a contract with the site and had submitted a senior project development proposal, requesting to develop immediately since the current land use is consistent with the senior development proposal.

At the April 18, 2018, Joint City Council and Housing Element Task Force meeting, City Councilmember Tasha Boerner Horvath and Task Force member Bruce Ehlers encouraged the removal of this site. Joint City Council and Housing Element Task Force, April 18, 2018, <http://www.ci.encinitas.ca.us/Government/Agendas-Webcasts> (Accessed May 4, 2018). Councilmember Boerner Horvath addressed the inadequacy of the site, stating that the site would be impossible to use because the owner has said he no longer wants his site to be listed. Bruce Ehlers suggested that the removal of Strawberry Field was inevitable.

This site cannot be identified to accommodate affordable housing and the Draft should be revised to reflect this change.

This site potentially will be removed in subsequent revisions.

12 Sunshine Gardens

The draft housing element includes a letter of interest from the owner of Site 12, Sunshine Gardens Parcels. However, the letter of interest states "Our commitment is contingent upon the City of Encinitas finalizing development standards that adequately support this level of density and we are concerned and do not believe that the current zoning limitations of two-stories and 30-foot height maximum will achieve the required results." Draft, pp. C- 27, p. C-80-81.

Reviewed in conjunction with the City's plan to place relevant zoning and height changes on the November 2018 ballot with subsequent Coastal Commission review, the owner's conditional commitment undermines the likelihood that this site will be developed during this planning period at the proposed density (84 units).

Also concerning are the existing "1-story commercial building" and the "variety of retail uses" on the site. The letter of interest states that the leases are "short term" and "will all expire prior to the zoning and entitlement process." The owner provides assurance that the structures are "temporary and can be demolished very easily." Draft, pp. C- 27, p. C-80-81. The City must provide a description for existing uses and an analysis as to whether the existing uses would prevent redevelopment of the site for residential development.

Without an analysis of existing uses, the site's existing uses are presumed to impede residential development resulting in the site having no "realistic and demonstrated potential for redevelopment during the planning period." Gov. Code § 65583(a)(3).

Development on this site at the capacity proposed will face community opposition without roadway intersection traffic mitigation efforts. See discussion under Site 05, pertaining to the Encinitas Boulevard and Quail Gardens Drive intersection. Site capacity may need to be reduced.

Environmental issues exist on this site. While the Draft identifies moderate slopes, it fails to identify and provide an analysis of the site's environmental constraints. This site is significantly below surrounding levels of elevation which will cause drainage and sewer challenges. As a result, the site is not viable for affordable residential development due to the prohibitive costs of land remediation necessary for residential development.

AD8 Vulcan & La Costa

Site AD8, Vulcan & La Costa, contains "existing operational businesses" but no information pertaining to whether the existing use would prevent residential development on the site. The draft housing element states that the "majority of the site is occupied by temporary structures such as greenhouses." Draft, p. C-29. While the draft housing element contains an email from "'Cowboy' Steve Morris" indicating interest in submitting the land for consideration, it is not clear if Mr. Morris represents the landowner, Ronholm Craig Nichols John F. Existing uses are vague and contain no information pertaining to existing leases or other contracts: "flower field, shop, old resident, etc..." Draft, p.C-82.

The draft housing element must include a description of existing use and an analysis as to whether the existing use would prevent redevelopment of the site for additional residential development.

The information included for this site in the draft housing element is insufficient to overcome the presumption that the existing uses will impede residential development. **Moreover, there is no indication of owner interest for residential development, or for discontinuing existing uses on this site. If this information is not provided, this site must be removed.**

Development on this site at the capacity proposed will face community opposition without efforts to mitigate roadway infrastructure issues. The main access point to this site, at Vulcan and La Coast Avenues, is already highly impacted, and this site is in close proximity to Site 07, resulting in increased reliance on the Highway 101 and La Costa Avenue intersection. The City should propose traffic mitigation measures, including the installation of a traffic signal device, to decrease community opposition and resistance to affordable housing being built on these sites. If the City does not propose such measures, the site capacity may need to be reduced below the proposed 50 units to reflect actual development potential.

C. Governmental Constraints

Proposition A

The City requires increased density and height limits in order to identify adequate sites in its inventory and to comply with other state land use laws. §§65583 (Housing Element Law); 65913.1 (Least Cost Zoning Law); 65863 (No Net Loss Law). The City must also have the ability to upzone sites with appropriate development standards, such as increase height, in order to implement its required program to maintain adequate sites during the planning period. §65583(c)(1). And lastly, the City must be able to upzone sites, with appropriate development standards, to replace any sites identified to accommodate the lower income RHNA but are later developed at a decreased density or for housing that accommodate a higher income level. § 65863. The City's Proposition A, codified as Municipal Code 30.00.010, *et seq.*, requires any increase in density or height limits be approved by a majority of the City's voters. The cost, length of time, and uncertainty of the outcome all pose a significant constraint on the development of housing for lower income households. And, in terms of housing element compliance Proposition A has acted as a ban on the City's compliance for the last 5 years. The City acknowledges this constraint but does not identify any specific actions to remove the constraint. Draft, p. B-48.

The City cannot only focus on how it will reduce this constraint in the future once this Draft Housing Element is adopted and implemented (and approved by the voters) but it must actually act to remove this constraint now. Government Code section 65583(a)(5) requires not only an analysis of governmental constraints but "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 Section 65584...". This requirement is separate and distinct from the obligation to include a program to remove governmental constraints described in Government Code section 65583(c)(3). The Draft Housing Element must show the City's efforts to remove this constraint now. A nearly impossible

task as the City has taken no action to try and modify Proposition A or its impact. Developing housing elements to submit to the voters is not an effort to remove the constraint of requiring such an election and the lack of city action has clearly resulted in the City failing to meet its share of the regional housing need, expect, of course, for the housing needs of above-moderate income households.

Coastal Commission Approval

The City has proposed a timeline of 2019 for all rezoned sites to be available for residential development. This is less than two years before the end of the current planning period. Draft, pp. 1-12, 1-13. The City's reliance on non-vacant sites creates a constraint on development when the City's inventory of sites to accommodate the lower income RHNA will not be available until 2019 and sites non-vacant sites must show they have a realistic development potential before the end of the planning period.

Development Standards

The Draft Element evaluates each individual development standard and concludes that each individual standard, with some exceptions, does not impose a constraint on residential development. Draft, pp. B-42-58. But the analysis is too simplistic because first, most of the included analysis only pertains to whether the standard would be a constraint on affordable housing production, and second, more than one of these standards could apply at once and in concert these standards could impose a constraint on residential development. For instance, the height limit acts as a constraint on residential development that would accommodate moderate income households. Or, the scenic overlay may apply to sites that also are limited to the mid-point density limit. The application of these standards to all income levels should be evaluated as well as the effect when multiple requirements apply to any one site.

The Draft Housing Element should be revised to consider the impact of the development standards as they apply to actual projects not each as a singular requirement.

The City is considering new development standards and we will submit additional comments on the new proposed development standards when they are finalized.

Minimum Density

The site inventory to accommodate the lower income RHNA requires a minimum density and there a potentially realistic capacity calculation can be accomplished for those sites. But other sites, even those with a maximum density of 15 units/acre still permit single family development and have no minimum density requirement. Draft, p. B-59. Permitting single family development on sites included to accommodate housing affordable to moderate income households diminishes the opportunity for medium density projects and can drive up land costs with competition for the sites between different types of development. Also, where there is a clear preference in the public and

among elected officials for low density residential development the lack of minimum density on these sites is a constraint on development that would create housing opportunities at the maximum permitted density. *See* section [public statements about density and character], below The City must create a program to remove this constraint, either eliminating single family homes as a permitted use in these zones or establishing a minimum density that would not make single family homes feasible in these zones.

Location of SB2 Sites

The City plans to amend its zoning code to permit emergency shelters in the Light Industrial (LI) and Business Park (BP) zones in order to comply with the decade old requirements of SB 2. The City should evaluate whether the other permitted activities within the LI and BP zones are compatible with the residential nature of an emergency shelter. More information is required to evaluate whether these two zones will not act as a constraint on the development of an emergency shelter. For instance, how many vacant parcels are located within these two zones, whether any of the vacant sites, other than the .46 acre parcel identified in the Draft Housing Element are near transportation, or near other residential uses, as opposed to incompatible industrial uses. HCD's memo on SB 2 compliance and its Building Blocks offer sample analysis to determine if the zone identified to allow emergency shelters without discretionary review are appropriate shelter locations. *See* HCD Memo May 7, 2008, updated April 19, 2013.

Unit Limitations on Multi-Family Sites

Several sites included in the inventory to accommodate the lower income RHNA have a greater capacity than what is proposed by the City, either due to the owner's preference (Greek Church) or a response to neighborhood concerns (Echter site). The limit on capacity based on these stated interests does not itself pose a constraint, although it certainly creates an expectation that increased density, even when it is permitted, is not welcome or desirable in the City. What is an immediate identifiable constraint is that the entire parcel would have to be purchased even if only a fraction of the parcel could be developed. Increasing development land costs without the opportunity to recoup the costs through development of the entire site. Requiring a developer to purchase a 20 acres parcel when s/he will only be able to develop a fraction of that parcel poses a constraint on the development of any of the sites where the City has imposed a limit on the number of units that can be developed on the site despite the overall size and capacity of the site.

D. The Draft Housing Element Fails to Address All Nongovernmental Constraints

The housing element must include “[a]n analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels...” Gov. Code § 65583(a)(6). In addition to the analysis included in the Draft Housing Element concerning available financing, requests to develop at lesser densities, and permit approval time, the City should evaluate additional non-

governmental constraints.⁸ The Draft Housing Element should analyze vacancy rates in rental housing, NIMBY opposition to development.

Vacancy Rates

Depending on the outcome of that analysis, which presumably will show a very low vacancy rate due to a shortage of rental units available in the City, the City should evaluate what programs might mitigate this constraint. For instance the City might enact a moratorium on condominium conversions or adopt a policy the conversions cannot be approved unless the vacancy rate is over a particular percentage, such as 7 percent.⁹ At a minimum a conversion ordinance should provide adequate relocation assistance, both financial assistance and rental locations services, if there will a loss of rental units due to conversion to condominiums.

NIMBY Opposition

Neighborhood opposition is another non-governmental constraint that exists in Encinitas that can be mitigated. Statements such as the following make it clear that opposition to density is not just expressed by the public:

“So why can’t we just say no to this? None of us wants more traffic congestion. We don’t want to degrade the community’s character. And we certainly don’t want to exacerbate the flooding problems in Leucadia when it rains. But the reality is that the city doesn’t own the property — and the landowner has property rights. At the City Council and at the Planning Commission, we do everything possible to be scrupulously fair — protecting the community while recognizing and upholding the owner’s rights.”
(emphasis added)

“We can advocate at the state-level against laws that will create even more density in our city. I’ll soon be arguing that prohibiting cities from requesting studies or information from developers means that we cannot assess the full impact of densification — for example parking, character, crime prevention, etc.”

“I personally don’t like some of the changes in our community and I understand why residents are opposed to projects like this [referencing the Hymettus Estates site plan]. I understand the attachment to a piece of land that

⁸ Gov. Code section 65583(a)(6) includes the following examples of non-governmental constraints: the availability of financing, the price of land, the cost of construction, the requests to develop housing at densities below those anticipated in the analysis required by subdivision (c) of Section 65583.2, and the length of time between receiving approval for a housing development and submittal of an application for building permits for that housing development that hinder the construction of a locality’s share of the regional housing need in accordance with Section 65584. Gov. Code § 65583(a)(6).

⁹ <http://www.northeastern.edu/rugglesmedia/2016/04/20/how-vacancy-rate-points-to-an-unaffordable-housing-market/>

used to be open space — and now will host homes, people, and cars.”

“Straight Talk About Housing Density in Encinitas,” Mayor Blakespear, May 29, 2016
<http://catherineblakespear.com/52916-straight-talk-housing-density-encinitas/> (accessed April 22, 2018).

The Site selection process for this draft housing element is a good example of the influence of NIMBY opposition in Encinitas and the impact it has on the City’s continuing non-compliance with housing element law. On April 4, 2018 the City Council met to select the sites it would include in its housing element to accommodate the lower income RHNA. These sites had been discussed and debated for months and did not include all of the vacant sites, city owned, sites, or suitable sites for affordable housing but it still incurred much debate and many speakers not only came out to ask the Council to remove site L-7 but also submitted a petition with hundreds of signatures to ask the Council to remove site L-7. The Council voted 3-2 to include L-7 in the City’s draft element and submitted that element to HCD for review. Two weeks later, after meeting with neighbors of the L-7 site, Vice Mayor Mosca proposed at a City Council meeting that the City vote again on site L-7 and reversed course so that L-7 was not removed from the housing element by a vote of 3-2.

This is one example of the enormous constraint NIMBY opposition poses in Encinitas and a constraint that is not analyzed in the Draft Housing Element. Although, the City might not be able to completely erase the burden on multi-family development that is due to NIMBY opposition it must attempt to mitigate this constraint and include a program or development standards that will require less burdensome review of multi-family development.

Establishing concrete and objective development and design standards that require ministerial review for approval will aid in limiting the impact a subjective and lengthy discretionary process has on residential development, in particular the development of affordable housing which requires density in order to be financially feasible.

E. The Draft Housing Element programs Requires Additional Programs and All Programs Require Specifics To Comply With The Law.

In order to accomplish the goals identified in the housing element and make progress toward the City’s quantified objectives, the City’s housing element must contain programs which set forth “ a schedule of actions during the planning period, each with a timeline for implementation...such that there will be a beneficial impact of the programs within the planning period.” Gov. Code § 65583(c).

In a word the programs require specifics: specific actions and a specific timeline.¹⁰ Many of the programs included in the Draft Housing Element do not contain specifics,

¹⁰ Housing Element Law recognizes that some actions will be on-going throughout the planning period *Id.*

especially concerning areas that require immediate action in order to remove acknowledged constraints on development. See Draft, Appendix C, pp. 1-8.

Proposition A.

The City rightfully recognizes that the public vote required by Proposition A imposes a constraint on residential development and prevents timely compliance with state law. Draft, p. 1-22. But the City offers no specific actions it will take through Program 3C either now, or in the future to comply with Housing Element Law in the next planning period. Instead, the program states the City will develop strategies by January 2020. Government Code section 65583(c) requires more than this generality, but rather a description of what actions the City will take to remove this constraint. This program must be revised in order to set forth a schedule of actions and an appropriate timeline.

HCD's Building Blocks recommend identifying quantifiable outcomes whenever possible as part of any housing element program. Contrast Program 3C described above with the City's Program 1C to increase the number of Accessory Dwelling Units (ADU). Program 1C provides a description of various policies the City could continue to enforce or new possible policies with a stated goal of approving 40 ADU's a year. The specifics and measurable outcome in Program 1C is in sharp contrast to the vague idea of "develop strategies" of Program 3C. Even when including a measurable outcome is not possible, specific policies or steps are still possible and necessary. Program 3C should be revised to reflect the requirements of Housing Element law and HCD guidance.

Correctly Characterize the Density Bonus Law Requirements.

The Draft housing element should be revised to correctly describe the requirements of the state Density Bonus Law. Program 2D incorrectly states that concessions and incentives must be allowed if a development requires the concession or incentive make the units affordable. Draft, p. 1-18. This characterization is over broad. Density Bonus law requires concessions and incentives when the developer can show that they would lead to decreased costs for the project. Developers do not have to demonstrate that the incentives and concessions were required for them to provide the affordable units.

Program 2E Accommodate Special Housing Needs. The City commits itself to update the Zoning Code definitions to correctly define and permit transitional housing, supportive housing and emergency shelters. But the City identified in its analysis of special housing needs that large families in particular are rent burdened, and often extremely rent burdened, spending more than 50 percent of their income on housing, Draft, p. B-22.

Once this significant issue is identified the Draft Housing Element should include a program to help address the need for more subsidized units available to large families and decrease the heavy rent burden these families shoulder. There should be a program in the housing element to incentivize housing that addresses this special housing need. For instance, the City could prioritize any available funding for units that have 3 or more

bedrooms, or waive development fees for units of that size. The City should design a program that will help to accommodate this special housing need with enough specific and a definite time line to comply with Government Code section 65583(c).

SB 2 sites

SB2 was enacted in 2007 to ensure that every community permitted emergency shelters in at least one zone without discretionary review. Gov. Code § 65583(a)(4). The zone identified should have sufficient capacity to accommodate the need for shelter identified in the housing element's analysis of special housing needs. *Id.* The City's element cannot be in compliance with state law until it complies with the requirements of SB2. *See* HCD's Memo dated May 7, 2008, updated April 19, 2013. In addition, the City should elaborate on the availability of sites in the Light Industrial and Business Park zones.

Program to Subdivide Sites

The Draft must include a program to subdivide sites to help reduce the cost of developing affordable housing. As indicated above in the constraint analysis, such a program is necessary to allow a developer to avoid having to purchase an entire parcel when only a fraction of the parcel can be developed. The Draft must include a program to facilitate the subdivision of parcels. This could be accomplished by allowing subdividing by ministerial review or by waiving fees when the subdivision will result in the development of affordable housing.

Promote Housing Opportunities for All

The program must “[p]romote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability.” Gov. Code § 65583(c)(5). In addition to contributing funding to investigate fair housing complaints as described in Program 5B, the City must assess its land use decision and the impact of those decisions on protected classes. Draft, p. 1-26. The Draft recognizes has not adopted an approved housing element for decades and has not accommodated the housing needs of lower income households for decade and that has had a disparate impact on people of color. The Draft states that people of color have higher levels of poverty in Encinitas than whites. Draft, Table B-4. And yet the City has made land use decisions for decades that excludes housing for people with lower incomes and essentially barred people of color from accessing housing in Encinitas. The City should revise the Draft to address the long term pattern of refusing to accommodate the housing needs of lower income households in Encinitas.

Conclusion

We thank you for considering our comments and look forward to the reviewing a revised housing element that addresses the above-described legal inadequacies. Should you have any questions regarding these comments or need further clarification, please do not hesitate to contact us by email at jjadipm@gmail.com or vfeldman@pilpca.org.

Sincerely,



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