

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

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February 7, 2020

Karen P. Brust, City Manager
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA 92024

**RE: City of Encinitas Notice of Violation of California's Housing Element Law
and Revocation of Compliance**

Dear Karen P. Brust:

The Department of Housing and Community Development (Department or HCD) is charged with reviewing and reporting findings on the City of Encinitas' Housing Element as well as its compliance with its Housing Element. Under Government Code section 65585, the Department must review any action or failure to act that it determines is inconsistent with an adopted Housing Element or Section 65583, and issue written findings to the locality as to whether the action or failure to act substantially complies with Article 10.6. (Gov. Code, § 65585, subd. (i).)

HCD finds that the City of Encinitas (City) has failed to implement a program action included in its Housing Element pursuant to Gov. Code section 65583, and that this failure has brought the City's Housing Element out of substantial compliance with California's Housing Element Law. (Gov. Code, § 65580 et seq.) HCD also finds that the City's actions are in violation of Section 65008 of the Government Code and the Housing Accountability Act (Gov. Code, § 65589.5.) HCD requests that the City provide a written response to these findings no later than February 27, 2020. HCD will review and consider the City's written response before taking any action authorized by Gov. Code section 65585.

Adoption of Encinitas' Fifth Cycle Housing Element

On October 8, 2019, HCD found that the City's Housing Element was in compliance with California's Housing Element Law. HCD based its compliance finding in part on the City's adoption of Program 3C: Right to Vote Amendment.

Program 3C requires Encinitas to first "seek judicial determination that state law preempts portions of Proposition A." Program 3C then sets out a particular timeframe in which to do so. If "declaratory relief is decided on the merits in favor of voting or dismissed on procedural grounds prior to December 2019," Encinitas then "must file

with the Registrar of Voters so that [a] ballot measure amending Proposition A and the Land Use Element appears on the March 2020 ballot.” An identical contingency is in place in the event Encinitas fails to prevail on the merits in advance of August 2020, and again in December 2020. The City proposed Program 3C in discussions with HCD.

Encinitas’ Failure to Implement the Fifth Cycle Housing Element

Pursuant to Program 3C, on September 6, 2019, the City filed a complaint seeking a judicial declaration that state Housing Element law partially preempts Proposition A, but over five months later, the City has not served its complaint. The December 2019 benchmark has now passed, as has the initial 60-day deadline (November 5, 2019) to serve the complaint. (Cal. Rules of Court, rule 3.110(b).) Indeed, Encinitas has twice sought an extension from the court, totaling 120 days, meaning that 180 days may elapse before Encinitas serves the complaint. Encinitas’ delay in prosecuting its action undermines Encinitas’ ability to implement Program 3C under the required timeline. As long as Encinitas delays in prosecuting the case, it avoids its obligation to ask its voters to amend or repeal Proposition A. This delay constitutes a failure to implement Program 3C.

Program 3C recognizes that as long as Proposition A’s local voting requirements are in place, the City is unable to meet its obligations under state law to adopt revised Housing Elements and related implementing legislation. Accordingly, the Department has determined that, by the City’s failure to implement Program 3C, the City has failed to act in compliance with Section 65583 and has failed to substantially comply with Housing Element law.

Encinitas’ Violation of Fair Housing Law / Discrimination in Land Use

Government Code section 65008 prohibits actions by a local government that deny residence, tenancy or ownership based on familial status or method of financing for proposed developments or intended occupancy of developments by persons of very low, low, moderate or middle-income. Proposition A as applied and on its face, disproportionately denies residence to families and persons of very low, low, and moderate-income.

The Regional Housing Need Allocation (RHNA) ensures that the quantity and mix of newly built housing is affordable to low and moderate-income households and in proximity to jobs. An appropriate stock of affordable housing is necessary not only for the current inhabitants of the City, but also to provide opportunity to all persons who consider moving or have recently moved to the City. The City has reported the following progress toward meeting its RHNA in its most recent Annual Progress Report to HCD. This cumulatively reflects calendar years 2013 through 2018.

RHNA Income Category	RHNA Units	Permits Issued	Remaining RHNA	Percentage of RHNA Satisfied
Very Low	587	45	542	7.7%
Low	446	26	420	5.8%
Moderate	413	11	402	2.7%
Above Moderate	907	915	0	100.9%

The City has failed to accommodate its RHNA for very-low, low- and moderate-income households. Currently, Encinitas has only six affordable housing developments with 118 units. Through Proposition A, the City evades its obligation to facilitate the production of the additional hundreds of affordable units the City needs. The production of housing in these income categories is necessary not only to achieve the City's RHNA, but also to ensure compliance with state law, including the Housing Accountability Act, Housing Element Law, Density Bonus Law, No Net Loss Law and Fair Housing Law.

Further, affordable housing developments are required to include accessible units, with specific design features for persons with mobility and sensory impairments. Because of the connection between affordable housing and accessible units, restrictions on affordable housing developments in the City may cause a disparate impact on lower-income persons with a disability. Persons with disabilities are underrepresented within the City of Encinitas (at 8.6 percent of the population) as compared to the county, metropolitan statistical area, and the state (10.6 percent). This may be the result of the lack of accessible, affordable housing in the City.

HCD and TCAC created opportunity maps to demonstrate the spatial dynamics of opportunity in California's neighborhoods and regions. The City of Encinitas includes entirely "high resource" and "highest resource" census tracts (Source: https://haasinstitute.berkeley.edu/sites/default/files/mappings/TCAC/opportunity_map_2019.html). The high and highest resource tracts include characteristics which have been shown by research to support childhood development and economic mobility for low-income families. Preventing the development of affordable housing in high resources communities directly impacts families and persons of color who are more likely to live in multifamily affordable housing.

The City's Safe Parking Program proposes a parking lot to accommodate a maximum of 25 vehicles for households living in their cars. In an email dated January 19, 2020, Mayor Blakespear stated, "This is not a program for the severely mentally ill, chronically homeless, or drug or alcohol-addicted." Chronically homeless persons and persons experiencing mental illness are considered to be disabled under state and federal law and are protected against discrimination.

Additionally, if the Safe Parking Program imposes preferences to participants from Encinitas and North San Diego County, such a preference, in the absence of a legitimate business need for such criteria, may have a discriminatory effect or disparate impact on protected classes.

Discriminatory effect manifests in the City's lack of affordable housing, which restricts housing choice for persons of very low, low, and moderate income; persons with disabilities; and based on familial status. The City's policies perpetuate segregation on persons in protected classes.

Housing Development Projects

The City has been reviewing a proposed development for a 277-unit apartment complex referenced as MULTI-003427-2019, BADJ-003432-2019, and DR-003433-2019 (Goodson Project). The Goodson Project is located on a site the City rezoned to the R-30 zoning district specifically to accommodate a portion of the City's RHNA for lower-income households. The site was zoned pursuant to the requirements of Gov. Code section 65583.2, subd. (h) and (i). It is outside the coastal zone, and zoning was immediately available to projects proposed on the site.

The Goodson Project site, and other sites zoned pursuant to Gov. Code section 65583.2 subd. (h) and (i), require multifamily projects including at least 20 percent of the units affordable to lower-income households be allowed as a use by right. The phrase "use by right" means that the local government's review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a "project" for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code.

Gov. Code section 65583.2 subd. (i) states, "a local ordinance may provide that 'use by right' does not exempt the use from design review. However, that design review shall not constitute a 'project' for purposes of Division 13 (commencing with Section 21000) of the Public Resources Code." Conditions generally required in conjunction with the California Environmental Quality Act cannot be required under the premise of design review. Furthermore, the City's Housing Element states projects on these sites are eligible to tier off of existing environmental reviews.

Design review must only include objective design standards. Pursuant to Gov. Code section 66300 subd. (a)(7), "objective design standard" means a design standard that involves no personal or subjective judgment by a public official and is uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal of an application.

In addition, a use by right for all rental multifamily residential housing shall be provided in accordance with subdivision (f) of Section 65589.5. Gov. Code section 65589.5 subd. (f) states, “development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development.”

Development projects, including development projects meeting the definition of housing for very low, low-, or moderate-income households pursuant to Gov. Code section 65589.5 subd. (h) must be processed according to the Housing Accountability Act. The Housing Accountability Act:

- prohibits local governments from conditioning project approval in a manner that makes the project infeasible. (Gov. Code, § 65589.5(d).)
- states, “[i]t is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” (Gov. Code, § 65589.5, subd. (a)(1)(L).)

HCD’s understanding is that the City deemed the Goodson Project’s application incomplete, required the Goodson Project to conduct a traffic study and a Greenhouse Gas Analysis, and that the City requested extensive additional information. HCD is aware that the developer of the Goodson Project has withdrawn his application for the Goodson Project. The City’s actions are inconsistent with a “use by right” and the Housing Accountability Act.

HCD reminds the City that failing to approve housing on sites identified in the element to accommodate housing is failing to implement City’s Housing Element. Approval of projects proposed on sites identified in the Housing Element, including the Goodson Project, implements Housing Element policies and programs. HCD encourages the City to work cooperatively with the developer of the Goodson Project, and the developers of all proposed projects, to facilitate the development of housing in Encinitas.

Additional Housing Laws

The City is required to follow additional housing laws as well. For instance, under the Density Bonus Law, the City must approve density bonus, including concessions and waivers, for qualifying development projects. (See Gov. Code § 65915.) Failing to approve density bonus for qualifying projects is a violation of law. In addition, the use of density bonus units does not create an inconsistency pursuant to the Housing Accountability Act.

The City must also comply with the Housing Crisis Act of 2019 (“SB 330”), which amended the Housing Accountability Act. Under SB 330, HCD has identified Encinitas as an “affected city,” and thus the City must comply with SB 330’s provisions.

Additionally, Assembly Bill (AB) 1483 Housing Data: Collection and Reporting (Chapter 662, Statutes of 2019) ("AB 1483") went into effect on January 1, 2020. AB 1483 requires additional transparency in the City's processes. Among other requirements, Gov. Code section 65940.1, subd. (a), compels the City to include complete, accurate information on its website including, fees, exactions, zoning, design, and developments standards that apply to each parcel.

HCD's authority pursuant to Gov. Code 65585 includes Article 10.6 of the Government Code (Housing Element Law), Section 65589.5 of the Government Code (Housing Accountability Act), Section 65863 of the Government Code, Chapter 4.3, commencing with Section 65915 of Division 1 of Title 7 of the Government Code (Density Bonus Law), and Section 65008 Government Code (Anti-Discrimination in Land Use).

Under Government Code section 65585(i), the Department must give the City a reasonable time, no longer than 30 days, to respond to these findings. The Department therefore provides the City 20 days from the date of this notice to respond with how the City intends to take affirmative, definitive corrective action to bring its Housing Element into substantial compliance with Government Code Article 10.6. We look forward to receiving timely documentation of the City's corrective action, including the City's plan to implement Program 3C within the required timeline. Failure to bring the Housing Element into compliance with applicable statutory requirements may result in further action authorized by Gov. Code section 65585, including referral to the Attorney General's Office.

The Department offers February 14 or 18, 2020 as dates to schedule the first of two optional meetings to discuss the City's failure to implement Program 3C and its ongoing noncompliance with Housing Element law. If we can be of assistance, please contact Robin Huntley of our staff at (916) 263-7422.

Sincerely,

A handwritten signature in black ink, appearing to read "Zachary Olmstead", written in a cursive style.

Zachary Olmstead
Deputy Director