

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

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February 4, 2019

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

Dear Karen P. Brust:

**RE: Review of the City of Encinitas' 5<sup>th</sup> Cycle (2013-2021) Draft Housing Element**

Thank you for submitting the City of Encinitas' draft housing element received for review on December 21, 2018 along with revisions received on January 3, 10, and 31, 2019.

Pursuant to Government Code section 65585, subdivision (b), the Department of Housing and Community Development (HCD) is reporting the results of its review. Our review was facilitated by multiple telephone conversation with Brenda Wisneski, Development Services Director; Diane Langager, Principal Planner; and Barbara Kautz and Eric Phillips, attorneys with Goldfarb and Lipman.

Pursuant to Gov. Code section 65585, subd. (c).HCD considered comments from: Public Interest Law Project, Building Industry Association of San Diego County, DCM Properties, Zephyr Partners, Wood Partners, Fox Point Farms, Integral Communities, DeLano & DeLano, Quail Meadows Properties, Sheila S. Cameron, Ed and Eugenia Welch, Carol Phillips Mclver, Cynthia Sheya-Palmer, Keith Harrison, Bob Kent, Peter Stern, Diane Thompson, Craig Campion, Eve Mayall, Patricia Mahaffey, Diane Thompson, Brian Burke, Damien Mavis, Sean McDaniel, Donna Westbrook, Jon. R. Williams, and Scott Graydon Carter.

Revisions are necessary to comply with state housing element law (Article 10.6 of the Government Code). In addition, all approvals necessary to implement appropriate zoning and development standards, including California Coastal Commission approval of a Local Coastal Plan amendment, are required for HCD to find Encinitas' housing element compliant with state housing element law. Pending California Coastal Commission approval, HCD expects zoning and development standards are immediately available on the two rezoned sites outside the coastal zone (Sites 06 and 08) and that applications for sites within the coastal zone are processed prior to, and in anticipation of, California Coastal Commission approval of the Local Coastal Plan amendments.

As stated in HCD's June 12, 2018 findings, HCD does not consider Site numbers 06a and 06b, Armstrong Parcels, adequate sites to meet any portion of the Regional Housing Needs Allocation for lower-income households. As such, they should not be considered adequate, available or additional sites pursuant to Gov. Code Section 65863 (No-Net Loss Law).

Necessary zoning amendments include rezoning for a shortfall carryover of adequately zoned sites pursuant to Gov. Code section, 65584.09 and permitting emergency shelters without discretionary action pursuant to Gov. Code Section 65583, subd. (a)(4)(A). In addition, the following describes the revisions needed to comply with state housing element law.

*Address and, where appropriate and legally possible, remove governmental and nongovernmental constraints to the maintenance, improvement, and development of housing, including housing for all income levels and housing for persons with disabilities. (Gov. Code, § 65583, subd. (c)(3).)*

Cumulative Impact of Development Standards: The city carries out a complex set of regulations which negatively impact housing development. Each standard impacts the other and could affect the ability to achieve maximum densities allowed in a zoning district. For example, the cumulative effect of constraining heights by measuring from the lower of natural grade or finished grade, net acreage calculations, third floor setbacks, unit sizes, parking, open space, and lot coverages, as a whole, can have constraining effects. Prior to housing element compliance, the city must revise its regulatory environment to facilitate development at maximum densities allowed in the zoning district without requiring discretionary approval of the Planning Commission, including:

- Measure height from the finished pad as opposed to the lower of natural or finished grade.
- Increase allowable 3-story heights to a minimum of 35 feet for a flat roof and 39 feet for a pitched roof, allowing an additional 5 feet for necessary projections on the roof.
- The calculation of net acreage should not deduct private access roads, parking lots, driveways, and drive aisles.
- Ensure all standards, including, but not limited to design review standards, are objective in nature, containing no subjectivity. The following are examples of subjective standards that are not objective in nature. In order to facilitate timely project review and provide certainty to developers, they must be eliminated or revised to be objective in nature.
  - Encinitas Municipal Code 23.08.080 (Regulatory Conclusions – Generally) item D. “The project would tend to cause the surrounding neighborhood to depreciate materially in appearance or value (Ord. 2003-10),”

- Encinitas Municipal Code 30.16.010 (Development Standards) paragraph (B)(2)(b) "In order to exceed mid-range density up to the maximum density for projects containing five or more dwelling units or residential lots, allowed for the subject site, the following findings must be made by the appropriate agency:
  - (i) the project shows high sensitivity to the neighboring properties and area to ensure compatibility with land uses and community character; and
  - (ii) the project design significantly exceeds the minimum standards for development (lot size setbacks, lot width and depth, landscape standards and design standards); and
  - (iii) the project either:
    - (A) Provides needed public improvements that are significantly beyond the requirements for the project, or
    - (B) Provides private or public recreational facilities that significantly exceed the project's requirements, or provides other significant benefits."

Program 3C: Right to Vote Amendment: Program 3C fails to adequately mitigate the effects of the Right to Vote Amendment (Proposition A).

To obtain housing element compliance, the city must rezone sufficient sites to accommodate a 1,141-unit shortfall of adequately zoned sites for lower-income households. The shortfall includes units from both the current 5<sup>th</sup> housing element cycle and a carryover from the 4<sup>th</sup> housing element cycle. As a result of Proposition A, voter approval is required to implement the rezoning actions, including adoption of development standards, necessary to obtain housing element compliance.

Proposition A has proven to be a constraint for the city to achieve housing element compliance as demonstrated by voter rejection of two proposed housing elements – Measure T in 2016 and Measure U in 2018. In *Building Industry Association of San Diego County, San Diego Tenants United and Lorraine Del-Rose v City of Encinitas*, the court ruled to preempt Proposition A for the 5<sup>th</sup> cycle planning period and directed the city to bring its general plan into compliance with housing element law. The ruling also required HCD review and approval within the prescribed timeframes of Government Code section 65754.

As you know, a local government may not adopt ordinances that conflict with the State Planning and Zoning Law. (Gov.Code, § 65000 et seq.) A local government "may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) A conflict exists if the local legislation contradicts general law, i.e., is inimical thereto. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897–898, 16 Cal.Rptr.2d 215, 844 P.2d 534.) Accordingly, Program 3C must be revised to commit the city to

take necessary action(s) to amend or invalidate Proposition A, relevant to state housing laws, including, but not limited to, Article 10.6 of the Government Code and State Density Bonus Law.

Gov. Code section 65588, subd. (e)(4) requires a jurisdiction that failed to adopt its housing element within 120 calendar days from the statutory due date to revise its element every four years until adopting at least two consecutive revisions by the applicable due dates. The City of Encinitas did not meet the requirements of Gov. Code section 65588, subd. (e)(4); therefore, it is subject to the four-year revision requirement until the city has adopted at least two consecutive updated revisions by the applicable due dates.

Several federal, state, and regional funding programs require housing element compliance as an eligibility or ranking criteria. For example, CalTrans Senate Bill (SB) 1 Sustainable Communities grants; the Strategic Growth Council and HCD's Affordable Housing and Sustainable Communities programs; and the upcoming SB 2 planning grant as well as ongoing SB 2 funding require housing element compliance and/or annual reporting requirements pursuant to Gov. Code section 65400. Without a compliant housing element, Encinitas may be ineligible for these and other funding sources.

In addition, Chapter 370 Statutes of 2017, Assembly Bill (AB) 72, expands and clarifies HCD's enforcement authority. HCD is charged with the review of a local government's compliance with Article 10.6 of the Government Code to determine whether the city's action or failure to act is inconsistent with state housing laws. If HCD makes findings that the city's failure to act is inconsistent with Article 10.6 of the Government Code or that the city has taken an action in violation of Gov. Codes section 65589.5, 65863, 65915 and/or 65008, HCD may refer such violations to the California State Attorney General's Office.

If you have any questions or need technical assistance, please contact Robin Huntley, of our staff, at (916) 263-7422.

Sincerely,



Zachary Olmstead  
Deputy Director