

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

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January 20, 2022

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

Dear Pamela Antil:

**RE: City of Encinitas Notice of Violation Under State Density Bonus Law, the
Housing Accountability Act, Housing Element Law, and Affirmatively
Furthering Fair Housing**

The California Department of Housing and Community Development (HCD) has reviewed the City of Encinitas' (City) processing and denial of the multifamily development application for the Encinitas Boulevard Apartment project located at 2220, 2228, and 2230 Encinitas Boulevard (Case Nos. MULTI-003587-2020 and DR-003589-2020) (referred to as the Project). Under Government Code section 65585, HCD must review any action or failure to act by a city that it determines to be inconsistent with an adopted housing element or section 65583 generally, and it must issue written findings to the city accordingly. (Gov. Code, § 65585, subd. (i).) Additionally, HCD must notify the city and may notify the Office of the Attorney General when a city takes actions that are inconsistent with an adopted housing element or Government Code sections 65583 and 65915, among other laws. (Gov. Code, § 65585, subd. (j).)

This letter details HCD's findings that in improperly denying the Project, the City violated State Density Bonus Law (SDBL) (Gov. Code, § 65915 et seq.), the Housing Accountability Act (HAA) (Gov. Code, § 65589.5), and its duty to Affirmatively Further Fair Housing (AFFH) (Gov. Code, § 8899.50). HCD also finds that in denying the Project, the City has failed to implement the goals, policies, and program actions included in its adopted, 6th cycle housing element. This failure does not comply with State Housing Element Law. (Gov. Code, § 65580 et seq.)

Under Government Code section 65585, subdivision (i), HCD must give the City a reasonable time, no longer than 30 days, to respond to these findings. HCD provides the City until February 19, 2022 to provide a written response to these findings—providing a detailed plan for corrective action—before taking any of the actions authorized by section 65585, including revocation of housing element compliance and referral to the California Office of the Attorney General. The City's response should

include, at a minimum, a commitment to take immediate corrective action, including (1) approval of the Project and (2) allowing the Project to move forward with its plans without further delay.

The Project and the City's Actions

The Project is an application for the construction of a 277-unit apartment development consisting of 236 market-rate units and 41 units affordable to lower-income households.¹ The application utilizes the provisions of SDBL (Gov. Code, § 65915.) The Project is located on a site designated in the City's housing element as suitable for lower-income housing and is included within the R-30 Overlay Zone.² The Project is eligible for "by-right" approval, which means that the Project is only subject to design review approval and is not subject to any discretionary review, including review under the California Environmental Quality Act.³

On August 19, 2021, the Planning Commission voted unanimously (with Chair Ehlers recused and not participating) to deny the Project with the adoption of Planning Commission Resolution No. PC-2021-27.⁴ Timely appeals were filed with the City by the applicant, Randy Goodson, and the Encinitas Residents for Responsible Development.⁵ On November 10, 2021, the City Council voted unanimously to uphold the Planning Commission's denial of the Project and deny both appeals with the adoption of Resolution Nos. 2021-93 and 2021-95.

Denial of the Encinitas Boulevard Apartment Project Violates SDBL

As described in HCD's October 12, 2021 correspondence, denial of the Project was based, in part, upon alleged inconsistencies with Encinitas' Municipal Code section 30.16.010(B)(6) for height and stories as well as section 30.16.010(E)(11) for private storage. The finding of inconsistency followed the denial of the developer's request for waivers of these two provisions pursuant to SDBL. (Gov. Code, § 65915, subd. (e).) Beyond the concessions or incentives that a development project is entitled to under SDBL (Gov. Code, § 65915, subd. (d)), a project is entitled to an unlimited number of waivers from development standards. Specifically, the City is not permitted to apply any development standard that physically precludes the construction of the Project as proposed at its permitted density and with the granted concession and incentives. (Gov. Code, § 65915, subd. (e)(1); *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346.)

¹ Sapa'u, R. and Colamussi, A., Encinitas City Council Agenda Report, November 10, 2021, Agenda Item 10A, p. 2.

² *Id.* at p. 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Under SDBL:

- The developer may propose to have such standards waived or reduced. (Gov. Code, § 65915, subds. (b)(1), (e).)
- The City may require the applicant to provide reasonable documentation to establish eligibility for the waiver. (Gov. Code, § 65915, subd. (a)(2).)
- The City may deny waivers only under limited conditions. (Gov. Code, § 65915, subd. (e)(1).)

The showing or “reasonable documentation” required by the applicant is that the project qualifies for a density bonus. Once a project qualifies for a density bonus, “the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards.” (*Bankers Hill 150 v. City of San Diego* (January 7, 2022, No. D077963) 2022 WL69108, at *9 (*Bankers Hill*)). “The city may refuse the waiver or reduction only ‘if the waiver or reduction would have a specific, adverse impact . . . upon health, safety, or the physical environment,’ would have ‘an adverse impact’ on an historic resource, or ‘would be contrary to state or federal law.’ ([Gov. Code,] § 65915, subd. (e)(1).) Subdivision (e) imposes no financial criteria for granting a waiver.” (*Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 556.) In this context, specific adverse impact “means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.” (Gov. Code, §§ 65915, subd. (e)(1), 65589.5, subd. (d)(2).)

This provision does not authorize the City to deny the proposed project based on the theory that another project, with a similar number of units, might conceivably be designed differently and accommodated without waivers. (*Wollmer, supra*, 193 Cal.App.4th at pp. 1346–1347 [project amenities, such as a pool or other recreational facilities, are a reasonable ground under section 65915 for seeking a waiver]; *Schreiber, supra*, 69 Cal.App.5th at p. 558 [“A local ordinance is preempted if it conflicts with the density bonus law by increasing the requirements to obtain its benefits.”].) A project that meets the requirements of SDBL is entitled to waivers if they are needed, “period.” (*Wollmer, supra*, at pp. 1346–1347.)

Thus, project applicants need not consider various alternatives that might be plausible on the site without concessions, incentives, or waivers. As the applicant provided reasonable documentation to establish eligibility for the waivers requested—in that it qualified for a density bonus and could not build the project as designed without them—the City must waive the development standards requested pursuant to Government Code section 65915, subdivision (e). (*Wollmer, supra*, at p. 1347.) The *only* exception is where a city can make findings about specific adverse impacts, as noted above. Mere inconsistencies with design standards would not support such a finding.

Disregarding these provisions of SDBL, the City hired a consultant to invent a project that would not require a waiver or might be built with fewer waivers. It concluded that with this alternative design—proposed by RRM Design Group (RRM)—waivers were not needed to “accommodate permitted concessions” nor were they needed to accommodate a project designed by RRM with different features (and at seemingly substantially greater cost) than the project proposed by the applicant. Based on this, the City found that waivers could be denied for this project. (City of Encinitas, Resolution 2021-93, § 1, A.5.) The City’s findings were not in accord with the requirements of SDBL.

As noted above, the courts have made it very clear that if a project qualifies under SDBL, and if waivers are needed to physically allow that project to go forward with the incentives and concessions granted, the waivers must be granted. The City may not deny a waiver based on the possibility that someone else might propose a project with other features than the project submitted, no matter how “similar” the two are perceived to be. It could only deny the waiver because granting the waiver “would have a specific, adverse impact ... upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact” or “would have an adverse impact on any real property that is listed in the California Register of Historical Resources, or to grant any waiver or reduction that would be contrary to state or federal law.” (Government Code, § 65915, subd. (e)(1).)

Furthermore, the City may not deny a waiver because it perceives that the developer can afford to build a project of a different design. SDBL was modified in 2008 to eliminate consideration of economic feasibility in the granting of waivers. (*Wollmer, supra*, at p. 1346.) An analysis of the viability of those alternative designs is not relevant and should not be required.

Finally, HCD notes that California is experiencing a housing crisis, and the provision of housing remains of the utmost priority. Recognizing this, SDBL directs that it is to be “interpreted liberally in favor of producing the maximum number of total housing units.” (Gov. Code, § 65915, subd. (r).) Denial of the Project on the grounds asserted by the City is not consistent with this interpretive directive.

Denial of the Encinitas Boulevard Apartment Project Violates the Housing Accountability Act by Failing to Make Appropriate Findings

The City did not make appropriate findings under either subdivision (d) or subdivision (j) of the HAA when it denied the Project. (Gov. Code, § 65589.5, subds. (d), (j).) In failing to make appropriate findings under subdivision (d), the pathway for projects with at least 20 percent affordability, or subdivision (j), the pathway for projects with less than 20 percent affordability, the City violated the HAA.

As the City knows, as an R-30 project, the City could not disapprove the Project during this critical housing crisis unless it made specific written findings, based on a preponderance of the evidence in the record, that the Project:

would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households

(Gov. Code, § 65589.5, subd. (d)(2).) As used in this paragraph, a “specific, adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. (Gov. Code, § 65589.5, subd. (d)(2).) An inconsistency with any particular zoning code standards or general plan designations, if such an inconsistency were present, would not suffice to support this finding. (Gov. Code, § 65589.5, subd. (d)(2).)

The City takes the position that the Project does not qualify for protection under subdivision (d). (City of Encinitas, Resolution 2021-93, § 1, B.4.) Even assuming for the sake of argument that the City were correct on this limited point, HCD notes that the City failed to make appropriate findings under subdivision (j) anyway.

The City rejected the Project under subdivision (j) because of inconsistencies with certain zoning standards. (City of Encinitas, Resolution 2021-93, § 1, B.5.) But the inconsistencies would have been resolved if the City had granted the waivers requested under SDBL, noted above. (*Bankers Hill, supra*, at *10 [“Thus, even if we assume the Project as designed is inconsistent with some of the City’s design standards, the Density Bonus Law would preclude the City from applying those standards to deny this project.”].) The receipt of a density bonus—including any increase in number of units, incentives, concessions, or waivers to development standards allowed under SDBL—simply may not serve as a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision. Receipt of a density bonus can include a bonus in number of units, incentives, concessions, or waivers to development standards allowed under SDBL. (Gov. Code, § 65589.5, subd. (j)(3).) Any HAA finding that subdivision (j)(1) does not apply must, therefore, be based on local provisions or standards that are not subject to an incentive, concession, or waiver. This is also clear from the text of subdivision (j)(1), which is triggered whenever a project complies with *applicable* local provisions or standards. Because the standards at issue here were subject to a waiver under the SDBL, they did not apply to the Project at hand, and thus the HAA required the City to make the necessary findings under subdivision (j) in order to deny the Project.

Denial of the Encinitas Boulevard Apartment Project Violates the Housing Accountability Act by Subjectively Applying Design Standards

Multifamily, use-by-right projects are subject to review only against objective, quantifiable, written design standards, conditions, and policies. (Gov. Code, § 65583.2, subd. (i), citing *id.*, § 65589.5, subd. (f).) Objective standards similarly are defined in Government Code sections 65913.4 and 66300 as standards that:

- Involve no personal or subjective judgment by a public official.
- Are uniformly verifiable by reference to an available, external, uniform benchmark or criterion; and
- Are knowable by both the development applicant and the public official before submittal of a project application.

Objectivity requires that a standard can be measured and be verifiable (i.e., no “gray area” for interpretation). Objective design standards should have a predictable input: knowing what the requirements are and how they are measured. Objective standards should also result in a predictable output: a determination of consistency that can be validated. The result should be the same consistency determination no matter who is reviewing the project, and there should be no dispute between applicants and staff as to whether a project is consistent.⁶

The City Council upheld the Planning Commission’s denial of the Project, which was in part, based upon inconsistency with Encinitas Municipal Code Section 30.40.010(H), Olivenhain Outdoor Lighting Regulations (Lighting Regulations). Resolution 2021-27 states the Lighting Regulations apply to “all outdoor recreational areas.” This is an inaccurate reading of the Lighting Regulations. The Lighting Regulations explicitly reference tennis courts, equestrian uses, and parks with outdoor lighting. Swimming pools defined for the exclusive use of residents in a multifamily housing development are not expressly mentioned in the definition of “outdoor recreational facilities” covered by this prohibition.⁷ Elsewhere in the code, pools for residential housing, including multifamily housing developments, are defined as “accessory structures” rather than “outdoor recreation facilities.” (Encinitas Mun. Code, § 30.16.010(F)(6).)

A swimming pool amenity located within a multifamily development project which is provided for the use of residents is not a recreational facility as defined in the City’s municipal code.⁸ If the intention of the Lighting Regulations is to include swimming pools

⁶ HCD’s Housing Open Data Tools - Approaches and Considerations for Objective Design Standards, https://experience.arcgis.com/experience/b52bcd2cd9734f02b1c0502bbbe5028d/page/page_17/

⁷ Encinitas Resolution No. 2021-27, Section 2, item b.4.

⁸ This appears to be supported by Encinitas Municipal Code Section 30.04, which defines “Recreational facilities, public and semi-public” to mean “swimming pools, tennis courts, paddles tennis courts, and other similar uses as determined by the Planning and Building Director, which are available for use by persons *who do not reside in the project* (includes membership clubs).” [Emphasis added.]

in multifamily housing developments, the standard is neither uniformly verifiable by reference to an available benchmark nor is it knowable by both the development applicant and public official. Objective criteria involve no personal or subjective judgment by a public official.

In Olivenhain, single-family residential uses with swimming pools are not denied lighting pursuant to the Lighting Regulations. However, the City seeks to deny lighting to multifamily residential uses with a swimming pool. This inconsistent application of the standard to residential uses demonstrates both the subjectivity of the standard and its discriminatory effect.

Denial of the Encinitas Boulevard Apartment Project Fails to Implement Housing Element Goals, Policies, and Programs

Denial of the Project fails to implement multiple Goals, Policies, and Programs of the City's 6th cycle housing element, adopted on April 7, 2021, including, but not limited to:

- Goal 1: The City will encourage the provision of a wide range of housing by location, type of unit, and price to meet the existing and future housing needs in the region and city.⁹
- Policy 1.1: Strive to maintain a balance of housing types in the City.¹⁰
- Policy 1.2: Strive to provide a wide variety of housing types so that a range of housing needs and types will be made available to existing and future residents.¹¹
- Policy 1.4: Provide opportunities for low- and moderate-income housing in all five communities¹² in the City and ensure that its location will not tend to cause racial segregation and will provide access to areas of high opportunity. Require that such housing should be high quality in terms of design and construction without sacrificing affordability.¹³
- Policy 1.9: Support ongoing efforts of the state and federal agencies and local fair housing agencies to enforce fair housing laws, as well as regional efforts to affirmatively further fair housing.¹⁴

⁹ Encinitas 6th Cycle Housing Element 2021-2029, Section 1, p. 1-10.

¹⁰ *Id.*

¹¹ *Id.*

¹² The City is divided into five communities: Olivenhain, Leucadia, Old Encinitas, New Encinitas, and Cardiff-by-the-Sea. The Project is located on the only site identified in the housing element to accommodate lower-income housing in the Olivenhain community.

¹³ Encinitas 6th Cycle Housing Element 2021-2029, Section 1, p. 1-10.

¹⁴ *Id.*

- Goal 2: Sound Housing will be provided in the City of Encinitas for all persons.¹⁵
- Policy 2.1: Encourage developers to provide a balance of housing types and sizes.¹⁶
- Program 2D: Ensure that the Density Bonus Ordinance Continues to be Consistent with State Law.¹⁷

“The City will...update the ordinance consistent with current requirements of State Density Bonus Law *and technical guidance issued by HCD*”¹⁸ [emphasis added] as consistent with SDBL.”

“The City will continue to annually monitor the effectiveness and appropriateness of existing *adopted policies* [emphasis added] and update the ordinance as needed and will ensure that its local ordinance remains consistent with state law, but *will apply current state law even before local amendments are adopted* [emphasis added].”

“The City commits to continue to review and approve eligible requests under SDBL (including requests for incentives, concessions, *waivers* [emphasis added], and parking reductions) so that projects that qualify are not prevented from developing at the densities to which they are entitled.”

- Program 3B: Modify Regulations that Constrain the Development of Housing.¹⁹

“The Housing Accountability Act and SB 35 require that the City review housing development projects based on objective standards... The City currently reviews all housing development applications for conformance with adopted general plan, zoning, subdivision, and *objective* [emphasis added] design standards.”

- Program 3D: Improve the Efficiency of the Development Review Process for Housing Projects.²⁰

“The City will continue to find opportunities to streamline the permitting process *to remove unnecessary barriers, while implementing objective design standards* [emphasis added]...”

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at pp. 1-30 to 1-32.

¹⁸ HCD issued formal guidance to the City regarding implementation of SDBL on December 16, 2020, March 25, 2021, July 13, 2021, and formal guidance specific to this Project on October 12, 2021.

¹⁹ *Id.* at p. 1-37

²⁰ *Id.* at p. 1-40.

- Goal 5: The City will develop strategies and actions to reduce or eliminate governmental and non-governmental constraints to the development of housing.²¹
- Policy 5.1: The City periodically evaluates adopted zoning provisions, entitlement procedures, fees and other city requirements that may create constraints to the development of housing and will implement policies to reduce or eliminate those constraints.²²
- Program 5A: Affirmatively Further Fair Housing.²³

“In accordance with Federal and State fair housing and Housing Element Law, the City will affirmatively further fair housing choice and promote equal housing opportunity.”

In denying a project located on a site identified in the City’s housing element to accommodate Regional Housing Needs Allocation (RHNA) for lower-income households,²⁴ the City has acted contrary to its housing element commitments and failed to implement the housing element Goals, Policies, and Programs noted above.

Denial of the Encinitas Boulevard Apartment Project Violates the City’s Duty to AFFH

In addition to the City’s duty under State Housing Element Law to “make adequate provision for the existing and projected needs of all economic segments of the community” and to “facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing” (Gov. Code, § 65583, subd.(c)(1)), which would be achieved through implementation of a substantially compliant housing element, the City has an independent duty to AFFH. (Gov. Code, § 8899.50.)

Specifically, the City has a statutory duty to “administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing and take no action that is materially inconsistent with its obligation to affirmatively further fair housing.” (Gov. Code, § 8899.50, subd. (b).)

“Affirmatively furthering fair housing” means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and

²¹ *Id.* at p. 1-12.

²² *Id.* at p. 1-12.

²³ *Id.* at p. 1-48.

²⁴ Encinitas 6th Cycle Housing Element 2021-2029, Appendix C (Site 08, including sites 08 a and b), pp. C-18 to C-21.

foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.

(Gov. Code, § 8899.50, subd. (a)(1).) As noted above, the Project is appropriately located for multifamily and affordable housing, and indeed the site was identified by the City as appropriate for multifamily housing, was specifically rezoned by the City to accommodate multifamily housing, and is identified in the City's current housing element as the only site in the entire Olivenhain area suited for multifamily housing. In denying the Project, the City also neglected its duty under section 8899.50 as it is memorialized in the City's adopted housing element Policy 1.4 to "[p]rovide opportunities for low- and moderate-income housing in all five communities in the City and ... provide access to areas of high opportunity."

Conclusion

As mentioned above HCD provides the City until February 19, 2022 to provide a written response to these findings—providing a detailed plan for corrective action—before taking any of the actions authorized by section 65585, including revocation of housing element compliance and referral to the California Office of the Attorney General. The City's response should include, at a minimum, a commitment to take immediate corrective action, including (1) approval of the Project and (2) allowing the Project to move forward with its plans without further delay.

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

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Zisser", with a long horizontal flourish extending to the right.

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability