

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

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October 12, 2021

Mayor Catherine Blakespear,  
Deputy Mayor Tony Kranz, and  
Council Members Kellie Hinze, Joe Mosca, and Joy Lyndes  
City of Encinitas  
505 S. Vulcan Avenue  
Encinitas, CA 92024

**RE: City of Encinitas – Encinitas Boulevard Apartments Project – Letter of Support and Technical Assistance**

Dear Catherine Blakespear, Deputy Mayor Tony Kranz, and Council Members Kellie Hinze, Joe Mosca, and Joy Lyndes:

The California Department of Housing and Community Development (HCD) understands that the City of Encinitas' (City) City Council will be hearing an appeal of the Planning Commission's denial of the Encinitas Boulevard Apartments Project (Project) on October 13, 2021. The purpose of this letter is to express HCD's support of the Project and provide technical assistance to the City regarding State Density Bonus Law (SDBL) (Gov. Code, § 65915) and the processing of projects qualifying as a "use by-right" (Gov. Code, § 65583.2).

HCD understands the Project proposes 277 units, including 236 market rate units and 41 units affordable to lower-income households. The project utilizes the provisions of SDBL and is allowed as a use by-right.<sup>1</sup> The Planning Commission passed Resolution 2021-27, denying the Project, at its August 19, 2021 public hearing. In denying the Project, Resolution No. 2021-27 identifies four development standards and states, "...the Planning Commission finds that the project design is inconsistent with the provisions of the Encinitas Municipal Code, and hereby denies the Design Review Permit."<sup>2</sup>

**State Density Bonus Law (Waivers)**

The Planning Commission's denial of the Project was based, in part, upon inconsistency with Encinitas Municipal Code Sections 30.16.010(B)(6) for height and stories as well as 30.16.0101(E)(11) for private storage. The finding of inconsistency was triggered by denial of the developer's request for waivers pursuant to SDBL.<sup>3</sup>

<sup>1</sup> Sapa'u, R. and Colamussi, A., Encinitas Planning Commission Staff Report, August 19, 2021, Agenda Item 8A, p 10.

<sup>2</sup> Encinitas Resolution No. 2021-27, Section 2, item c.

<sup>3</sup> Gov. Code, § 65915, subd. (e).

Beyond the concessions or incentives that a development project is entitled to under SDBL,<sup>4</sup> 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 at its permitted density and with the granted concession/incentives.<sup>5</sup>

Under SDBL:

- The developer may propose to have such standards waived or reduced.<sup>6</sup>
- The City may require the applicant to provide reasonable documentation to establish eligibility for the waiver.<sup>7</sup>
- The City may deny waivers only under limited conditions.<sup>8</sup>

Specifically, “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* (Sept. 28, 2021, No. 2D CIV. B303642) \_\_\_\_ Cal.App.5th \_\_\_\_ [2021 WL 4436987], at \*3.) 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. (*Id.* at \*5 [“A local ordinance is preempted if it conflicts with the density bonus law by increasing the requirements to obtain its benefits.”].)

As cited in HCD’s March 25, 2021 correspondence to the City, courts have held that the project applicant need not consider various alternatives that might be accommodated on the site without concessions, incentives, or waivers. Nor does the project need to be void of amenities to accommodate the needed density with fewer waivers. (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346–1347.) As the applicant provided reasonable documentation to establish eligibility for the waivers requested, the City must waive the development standards requested pursuant to Government Code section 65915, subdivision (e), as they preclude development of the project as proposed. (*Wollmer, supra*, at p. 1347.) The *only* exception is where the city can make

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<sup>4</sup> Gov. Code, § 65915, subd. (d).

<sup>5</sup> Gov. Code, § 65915, subd. (e); see also *Schreiber v. City of Los Angeles* (Sept. 28, 2021, No. 2D CIV. B303642) \_\_\_\_ Cal.App.5th \_\_\_\_ [2021 WL 4436987], at \*3.

<sup>6</sup> Gov. Code, § 65915, subds. (b)(1), (e).

<sup>7</sup> Gov. Code, § 65915, subd. (a)(2).

<sup>8</sup> The project has an adverse impact on health and safety that cannot be mitigated or avoided, the project has an adverse impact on a property in the California Register of Historic Properties, approving the waiver or reduction would be contrary to State or Federal law. Gov. Code, § 65915, subd. (e)(1).

findings about specific adverse impacts, as noted above.<sup>9</sup> Mere inconsistencies with design standards would not support such a finding.<sup>10</sup>

As the Council considers this appeal, HCD reminds the City of its obligation to implement its housing element Program 2D: Ensure that the Density Bonus Ordinance Continues to be Consistent with State Law (Program 2D). Program 2D states, “The City commits to continue to review and approve eligible requests under State Density Bonus Law (including requests for incentives, concessions, waivers, and parking reductions) so that projects that qualify are not prevented from developing at the densities to which they are entitled.”<sup>11</sup> The City Council has the opportunity to take an action consistent with Program 2D by reversing the Planning Commission’s denial of the Project.

### **Objective 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

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<sup>9</sup> Note that the receipt of a density bonus—including any increase in number of units, incentives, concessions, or waivers to development standards allowed under SDBL—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 finding under subdivision (j)(3) must therefore be based on provisions that are not subject to an incentive, concession, or waiver.

<sup>10</sup> Gov. Code, § 65915, subd. (e)(1) (incorporating by reference Gov. Code, § 65589.5, subd. (d)(2)). In that 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. The following shall not constitute a specific, adverse impact upon the public health or safety: (A) Inconsistency with the zoning ordinance or general plan land use designation.” (Gov. Code, § 65589.5, subd. (d)(2).)

<sup>11</sup> Encinitas 6<sup>th</sup> Cycle Housing Element 2021-2029, Section 1, p 1-31.

reviewing the project, and there should be no dispute between applicants and staff as to whether a project is consistent.<sup>12</sup>

The Planning Commission denied the Project, 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 inaccurate. Objectively, this standard applies to tennis courts, equestrian uses, and parks with outdoor lighting. Swimming pools defined for the exclusive use of residents are not expressly mentioned in the definition of “outdoor recreational facilities” covered by this prohibition.<sup>13</sup>

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.<sup>14</sup> If the intention of the Lighting Regulations is to include swimming pools in multifamily 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.

Resolution 2021-27 additionally includes the following recital, “Whereas, the slope analysis determination was inconclusive and would have required a third-party analysis.” It appears unsubstantiated to characterize a development standard as objective and uniformly verifiable when City’s staff cannot determine whether the Project’s application demonstrates consistency. Only objective standards may be applied during the design review of the Project’s application.

### **Affirmatively Furthering Fair Housing (AFFH)**

Resolution No. 2021-27 states, “The proposed provision of only Junior one bedroom and one-bedroom affordable units violates the Federal Housing Act and California Fair Employment and Housing Act by having a disparate effect on families and children.”<sup>15</sup>

HCD acknowledges the City’s observation and commends the City for taking seriously its obligations to AFFH. While SDBL does not require a proration of bedroom count in affordable units related to that of the overall project, HCD considers it a best practice in

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<sup>12</sup> [https://experience.arcgis.com/experience/b52bcd2cd9734f02b1c0502bbbe5028d/page/page\\_17/](https://experience.arcgis.com/experience/b52bcd2cd9734f02b1c0502bbbe5028d/page/page_17/)

<sup>13</sup> Encinitas Resolution No. 2021-27, Section 2, item b.4.

<sup>14</sup> This appears to be supported by Encinitas Municipal Code Section 30.04, which defines , “Recreational facilities, public and semi-public” to mean “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.]

<sup>15</sup> Encinitas Resolution No. 2021-27, Section 1, item f.

order to satisfy the City's obligation to AFFH pursuant to Government Code section 8899.50, subdivision (a)(1) which states, "The duty to AFFH extends to all of a public agency's activities and programs relating to housing and community development."

It is HCD's understanding that the applicant has revised the Project's density bonus application to reallocate the affordable units proposed within the Project to include a proportional number of units by bedroom count.<sup>16</sup> Therefore, at this time, the issue is resolved.

### **Housing Element Site Inventory**

HCD reminds the City that the Project is located on Sites 08 a and b which were identified in the City's 6<sup>th</sup> cycle housing element to accommodate multifamily housing. Denial of the project could place doubt upon the sites' capacity to realistically provide housing to accommodate the City's Regional Housing Need Allocation within the 6<sup>th</sup> cycle planning period.<sup>17</sup> Additional analysis, including an evaluation of the remaining capacity in the housing element's site inventory and analysis of the potential for No Net Loss<sup>18</sup> provisions, may be required.

The State of California is in a housing crisis, and the provision of housing is a priority of the highest order. HCD encourages the City Council to approve the Project by reversing the Planning Commission's improper denial. In denying this by-right project, the Planning Commission failed to make findings under the Housing Accountability Act (HAA). (Gov. Code, § 65589.5) The City Council should remain mindful of its obligations under the HAA as it considers the appeal. If you have any questions regarding the content of this letter or need additional assistance, please contact Robin Huntley at [Robin.Huntley@hcd.ca.gov](mailto:Robin.Huntley@hcd.ca.gov).

Sincerely,



Shannan West  
Land Use and Planning Unit Chief

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<sup>16</sup> 17 Junior One-Bedroom units, 8 One-Bedroom units, 13 Two-Bedroom Units, and 3 Three-Bedroom units.

<sup>17</sup> Gov. Code, § 65583.2, subd. (g).

<sup>18</sup> Gov. Code, § 65863.