DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
651 Bannon Street, Suite 400
Sacramento, CA 95811
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

April 18, 2025

Patty Nevins, Director of Planning
City of Fontana Planning Department
8353 Limonite Avenue
Fontana, CA 92335

Dear Patty Nevins:

RE: Fontana Housing Crisis Act Unit Bank – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) received a request for technical assistance regarding the compliance of the City of Fontana's (City) No Net Loss Program Ordinance (Program)[1] with the Housing Crisis Act of 2019 (HCA).[2] Among other provisions, the HCA requires concurrent compensatory increases in residential development capacity when a local government reduces the intensity of land use for a parcel. The purpose of this letter is to provide technical assistance for the benefit of the City on whether the City's No Net Loss Program complies with the HCA.

Background

HCD understands that the City's Program was created in October 2022 as an alternate pathway for compliance with the no net loss provisions of the Housing Crisis Act.[3] Under the Program, the City maintains a "unit bank" that receives development capacity (measured in housing units) that are lost when the City takes an action that reduces the development capacity (e.g., downzones a parcel). The bank can hold up to 2,200 units. These units can be held indefinitely until withdrawn and applied to housing developments located on residentially zoned parcels at least one acre in size through a 20-percent density bonus. Because of the bank's capacity limit, would-be applicants are dependent on the bank either having units to withdraw or excess space to deposit units into. If the bank is completely depleted, applicants will not be able to use the associated density bonus. If the bank has no available capacity for deposits, applicants will need to offset their reduction in development capacity by using concurrent and equivalent increases in capacity on other parcels. HCD understands that these additional units through the unit back are separate from any units that a project may receive through the application State Density Bonus Law.

[1] Article XV of the City of Fontana Zoning and Development Code)
[2] Gov. Code, § 66300.
[3] Gov. Code, § 66300(b)(1)(A).

HCD understands that developments that reduce land use intensity have been depositing units into the bank. In June 2023, the City approved two projects that rezoned residentially zoned land to commercial zones to facilitate the development of warehouses. The two projects between them deposited 1,280 units into the bank. HCD further understands that no units have yet to be withdrawn from the bank, though some projects are considering doing so.

HCA Compliance

Government Code section 66300 prohibits changing the land use designation or zoning of a parcel to a less intensive use or reducing the intensity of land use below what was allowed by the land use designation or zoning that was in effect on January 1, 2018. An exception to this is if the local government "concurrently changes the development standards, policies, and conditions applicable to other parcels within the jurisdiction to ensure that there is no net loss in residential capacity," where "concurrently" is defined as the same meeting of the legislative body. Therefore, the relevant question is: **Does the deposit into the unit bank of lost land use intensity constitute a concurrent change that satisfies the requirements of the HCA?**

The answer is "no." Although the City's No Net Loss program and its associated unit bank is technically a standard, policy, or condition, it fails to comply with the statutory mandate of Government Code section 66300 for the following reasons:

- **Meaning of "Other Parcels."** Unlike the conventional process of increasing capacity on identified parcels, the unit bank concept does not involve the identification of the specific parcel(s) that will receive the transferred development capacity – the method of compliance contemplated by the HCA. A plain language interpretation of the statutory language points to "other parcels" meaning specific identified parcels and not all other residentially zoned land in the City. A review of the bill analyses written for the bill that established the HCA does not include any discussion of alternative means of compliance (e.g., a unit bank and associated local density bonus program).[4] To the contrary, the analysis describes only the conventional pathway of identifying and concurrently upzoning specific parcels located elsewhere in the jurisdiction. This suggests that the Legislature did not consider unit banks as a form of compliance at the time the bill was passed.

- **Meaning of "Concurrent."** The term "concurrent" means that the city is responsible for identifying and reallocating the shortfall of capacity <u>at the time</u> in which the downzoning action occurs. However, under the unit bank system, the future location of the increased capacity is unknowable by definition and defers decision-making about where to reallocate residential capacity to some future time.

[4] SB 330 (Chapter 654, Statutes of 2019).

- **Unequal Transfer of Development Rights.** The associated density bonus program does not provide the same development rights as would be gained from upzoning one or more parcels. To successfully transfer development capacity under the Program, prospective applicants must meet the Program's many new requirements and await approval. For instance, the receiving site must be at least one acre in size, and the density bonus can only be used on residentially zoned parcels. This differs vastly from a concurrent transfer process, where a property would be immediately identified to take the extra housing capacity. The Program creates an inherently unequal and uncertain process, trading the legal surety of a zoning district for a merely potential increase in density.

- **Affirmatively Furthering Fair Housing.** The Program puts the future location of the transferred development capacity into the hands of a future applicant. This denies the opportunity for the local government to Affirmatively Further Fair Housing (AFFH) per Assembly Bill 686 (Chapter 958, Statutes of 2018) at the time the reduction in residential development capacity occurs. "Banking" development capacity, potentially indefinitely, has the potential to reduce housing for historically disadvantaged communities for years without recourse until a future applicant comes along. AFFH is a critical part of a jurisdiction's housing element, and the distribution of development capacity can have significant material effects on fair housing in the jurisdiction.

- **Questionable Program Efficacy.** The empirical performance of the Program is also questionable. According to City staff, in the two years that the Program has been in effect, no developer has withdrawn units from the bank. As such, the Program has effectively only been a way for the City to reduce its development capacity without consequence. If this trend continues in the long term, the City may reduce its development capacity by up to 2,200 units with no guarantee that the units will be distributed to other parcels.

Conclusion

HCD finds that the City has reduced its development capacity by the number of units currently deposited in the unit bank which is inconsistent with the HCA. The City must remedy the inappropriate use of the unit bank to satisfy the HCA immediately by taking actions that would create residential development capacity equivalent to 1,280 units. This would most commonly be accomplished by identifying and upzoning parcels to compensate for the lost capacity. HCD requests a response from the City by June 18, 2025, that includes a plan to remedy this issue.

HCD remains committed to supporting the City in facilitating housing at all income levels and hopes the City finds this clarification helpful. HCD would like to remind the City that HCD has enforcement authority over the HCA, among other state housing laws. Accordingly, if HCD finds that a city's actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law. If you have questions or need additional information, please contact David Ying at david.ying@hcd.ca.gov.

Sincerely,

Melinda Coy
Proactive Housing Accountability Unit Chief