DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
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June 10, 2022

Elyse Lowe, Director
Development Services Department
City of San Diego
1222 First Avenue
San Diego, CA 92101

Dear Elyse Lowe:

RE: 2662 Garnet Avenue – Letter of Technical Assistance

The purpose of this letter is to provide technical assistance to the City of San Diego (City) regarding a proposed 100-percent affordable residential infill project to be located at 2662 Garnet Avenue (Project). The Project applicant submitted a request for technical assistance to the California Department of Housing and Community Development (HCD) on March 3, 2022, and the City subsequently asked for clarification on the relationship between State Density Bonus Law (SDBL) and the City's Coastal Height Limit Overlay Zone (CHLOZ) which was created via voter initiative. Specifically, the applicant wanted to know if the SDBL might permit a qualifying housing development to exceed the 30-foot building height limit established by the CHLOZ, given that the Project site is located outside of the State Coastal Zone (and is therefore not subject to the requirements of the Coastal Act or the City's Local Coastal Program).

Background

HCD understands the Project would create 60 deed-restricted units that would be affordable to low- and very low-income households. The Project would serve transitional aged youth, veterans experiencing homelessness, and low-income individuals. The ground floor would contain supportive services. HCD understands that the Project meets the criteria of Government Code section 65915, subdivision (b)(1)(G), and is located within one-half mile of a major transit stop. Therefore, pursuant to Government Code section 65915, subdivision (d)(2)(D), the project "shall . . . receive a height increase of up to three additional stories, or 33 feet."

The critical issue relates to the potential significance of the fact that the 30-foot height limit was established via voter initiative and not by City Council action (as local development standards are typically established). The City appears to believe that because its height restriction was created by a voter initiative, a state law like the SDBL cannot require the City to grant the height increase. Therefore, the question presented

is: *Is a development standard created by voter initiative immune from the requirements of the State Density Bonus Law?*

Brief Answer

No. The State Legislature can and does preempt local initiatives. "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 897, 16 Cal.Rptr.2d 215, 217. It makes no difference that the local law was created by voter initiative. Courts have repeatedly held that the Legislature can preempt local initiatives that conflict with state law. See, for example, Building Industry Association v. City of Oceanside, (1994) 27 Cal.App.4th 744, 771-72, 33 Cal.Rptr.2d 137, 154-55 (local growth control initiative invalid because of facial conflict with state housing policy).

Analysis

Under the California Constitution, a city or county may make and enforce ordinances and regulations "not in conflict with general laws." (Cal. Const., art. XI, section 7). Conversely, a city may not make or enforce a regulation that conflicts with state law. As noted above, "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." See, Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 897, 16 Cal.Rptr.2d 215, 217. The City of San Diego apparently interprets the development standard at issue here as disallowing the height increase guaranteed by SDBL. Accordingly, the development standard conflicts with SDBL and is void.

For purposes of preemption analysis, it makes no difference that the preempted local regulation was enacted by local voter initiative. California courts have repeatedly held that the Legislature can preempt local initiatives that conflict with state law. For example, in City of Watsonville v. State Department of Health Services (2005) 133 Cal.App.4th 875, 881, 35 Cal.Rptr.3d 216, 218, the court invalidated a local initiative prohibiting fluoridation of the water supply because the initiative conflicted with state law. Similarly, and especially relevant here, in Building Industry Association v. City of Oceanside, (1994) 27 Cal.App.4th 744, 771-72, 33 Cal.Rptr.2d 137, 154-55, the court struck down a local growth control initiative because it conflicted with state housing policy.[1]

[1] The fact that San Diego is a charter city does not change this analysis. California courts have repeatedly held that housing is a matter of statewide concern and that state housing laws preempt conflicting local law. See, for example, Ruegg & Ellsworth v. City of Berkeley (2021) 63 Cal.App.5th 277, 277 Cal.Rptr.3d 649 (SB 35, codified as Government Code section 65913.4, preempts conflicting charter city ordinance) and Anderson v. City of San Jose (2019) 42 Cal.App.5th 683, 709–710, 255 Cal.Rptr.3d 654 (Surplus Land Act preempts conflicting charter city ordinance). See also, Buena Vista Gardens Apartments Association v. City of San Diego (1985) 175 Cal.App.3d 289, 306, 220 Cal.Rptr. 732, 742 (Housing Element Law applies in the charter city of San Diego. "[I]f a matter is of statewide concern, then charter cities must yield to the applicable general state laws regardless of the provisions of its charter.").

The ability of state law to preempt conflicting local initiatives is necessary for the state to regulate areas of statewide concern. As the court stated in Mission Springs Water Dist. v. Verjil (2013) 218 Cal.App.4th 892, 920, 160 Cal.Rptr.3d 524, 545, "[i]f the state Legislature has restricted the legislative power of a local governing body, that restriction applies equally to the local electorate's power of initiative. . . . If the rule were otherwise, the voters of a city, county, or special district could essentially exempt themselves from statewide statutes."

Conclusion

HCD respects the challenges inherent in infill development and applauds the City's commitment to the production of affordable housing. Based on maps provided to HCD by City staff, it appears that a substantial amount of land shares the same particular characteristics as the subject site (i.e., located outside of the Coastal Zone but inside the 30-foot height limit area of the CHLOZ). It is HCD's hope that the determinations made in this letter might serve to further facilitate the production of affordable housing in these areas, especially insofar as the 30-foot height limit may have been a barrier to SDBL-enabled applications in the past. If you have questions or need additional information, please contact Brian Heaton, of our staff, at brian.heaton@hcd.ca.gov.

Sincerely,

Shannan West
Housing Accountability Unit Chief