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Mayor Catherine S. Blakespear
505 S. Vulcan Ave.
Encinitas, CA 92024
cblakespear@encinitasca.gov

RE: *ENCINITAS BLVD APARTMENTS 6.95, LP V. CITY OF ENCINITAS*
CASE NO. 37-2022-00003566-CU-WM-NC

Dear Mayor Blakespear:

We write regarding the City of Encinitas's (the "City") November 2021 disapproval of the Encinitas Boulevard Apartments multifamily housing development project (the "Project") and the above-referenced lawsuit challenging that decision. As explained below, the City's disapproval of the Project violated State laws that are intended to ensure that the State has sufficient housing to meet the needs of all Californians. We understand that the Petitioner in the above-referenced lawsuit intends to submit a revised Project proposal for the site. Although our office has not yet seen the plans for the revised Project, we understand that it will set aside 20% of its units for very low- and low-income housing. We welcome the news that the City will have the opportunity to take corrective action by considering the revised Project. Based on our current understanding of the revised Project, it appears that approval of the revised Project would be in the best interests of Californians and consistent with the City's obligations under State law. We urge the City to take prompt action to consider and approve the revised Project if and when a new application is submitted. If the City fails to do so, the Attorney General is prepared to take immediate steps to hold the City accountable.

A. The City Violated the Housing Accountability Act and the Density Bonus Law When It Disapproved the Project

Under the Housing Accountability Act, local agencies cannot disapprove housing development projects that comply "with applicable, objective planning, zoning, and subdivision standards and criteria, including design review standards, in effect at the time the application was deemed complete" absent public health or safety concerns. (Gov. Code, § 65589.5, subd. (j)(1).) If a local agency finds that a proposed housing development project is inconsistent with applicable and objective standards and criteria, it must provide the applicant with written documentation to that effect. (Gov. Code, § 65589.5, subd. (j)(2).)

Here, the City found that the Project was inconsistent with certain development standards. The Density Bonus Law compels local agencies to waive standards that preclude the

development of qualifying projects, subject to three limited exceptions. (Gov. Code, § 65915, subd. (e)(1).) The only such exception invoked by the City was that granting the waivers "would be contrary to state or federal law." (*Ibid.*) Specifically, the City contended that granting the waivers would be contrary *to the Density Bonus Law itself*. But nothing in the Density Bonus Law requires the City to apply any development standards, and no good faith reading of that statute could support that reading. (See *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346 ["Standards may be waived that physically preclude the construction of a housing development meeting the requirement for a density bonus, period."].) To the contrary, because the Project qualifies for a density bonus, Petitioner is entitled to an unlimited number of waivers of development standards that would otherwise have the effect of physically precluding the development of the Project. (See *Bankers Hill 150 v. City of San Diego* (2022), 74 Cal.App.5th 755, 289 Cal.Rptr.3d 268, 282, citing *Wollmer v. City of Berkeley*, *supra*, 193 Cal.App.4th at p. 1347.)

For these reasons, the City had no valid basis to deny the requested waivers under the Density Bonus Law. (See Gov. Code, § 65915, subd. (e)(1).) As those development standards were thus inapplicable to the Project, the City further had no valid basis to disapprove the Project under the Housing Accountability Act.[1] (See Gov. Code, § 65589.5, subd. (j)(1).)

B. In Disapproving the Project, the City Violated Its Obligation Under State Law to Affirmatively Further Fair Housing

Under Government Code section 8899.50, the City must affirmatively further fair housing, which means it must take "meaningful actions" to "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).) Level of income is a protected characteristic under this statute. (See Gov. Code, §§ 65008, subd. (b)(2)(B) [prohibiting local agencies from discriminating based on income]; 65583, subd. (c)(5).) Therefore, the City cannot take any action that is materially inconsistent with its obligation to "foster inclusive communities free from barriers that restrict access to opportunity based on" level of income. (Gov. Code, § 8899.50, subd. (a)(1).)

Under the circumstances here, the City's decision to disapprove the Project is inconsistent with its responsibilities under section 8899.50. The California Fair Housing Task Force has categorized the City as "Highest Resource," meaning it features relatively low poverty rates, high adult education attainment, close proximity to jobs and economic opportunity, quality schools, and healthy environments. (See https://belonging.berkeley.edu/2022-tcac-opportunity-

[1] For the reasons explained by the California Department of Housing and Community Development in its January 20, 2022 notice of violation, the City's application of its outdoor lighting regulation also violated the Housing Accountability Act, as well as section 65008 of the Government Code.

map.) The Olivenhain community has even higher home values than the City as a whole. And the City has identified the Project site as suitable for the development of multifamily, lower-income housing. Indeed, it is the only location in Olivenhain that has been designated for such development.[2] Thus, the Project presented the ideal opportunity to provide fair housing and foster inclusive development in the City. The City's decision to instead block the creation of 41 lower income households in this community is a contravention of state law.

Given this situation, we were pleased to learn that the revised Project proposal is expected to include additional units for lower-income households, including very low-income households. If and when the revised proposal is before the City, we strongly urge the City to approve the Project. To disapprove the revised Project would be materially inconsistent with the City's obligation to affirmatively further fair housing.

C. As it Considers the Revised Project, the City Must Comply with the Housing Accountability Act

The revised Project would meet the definition of a "housing development project … for very low, low-, or moderate-income households" for purposes of subdivision (d) of the Housing Accountability Act. (Gov. Code, § 65589.5, subds. (d), (h)(3).) Under subdivision (d), the City cannot deny a low-income housing development project unless it makes one of five specific findings in writing and based on a preponderance of the evidence in the record. Those findings are: (1) the City is in substantial compliance with the Housing Element Law and has met its share of the regional housing need that would be served by the housing development project; (2) 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"; (3) state or federal law requires disapproval; (4) the Project is on land zoned for agriculture or resource preservation and is also adjacent to land being used for those purposes, or there are not adequate water or wastewater facilities for the Project; or (5) the Project is inconsistent with both the zoning ordinance and general plan land use designation. (Gov. Code, § 65589.5, subd. (d).)

When the City considers the revised Project, it will not be able to make these findings. Encinitas has not met its share of the regional housing need for either very low- or low-income households; the Project will not have a significant, adverse impact on health or safety, nor will it violate state or federal law; and the Project is consistent with both the zoning and the general plan land use designation. The City will have no discretion but to approve the Project as revised.

In addition, HCD already notified the City that it violated the Housing Element Law when it disapproved the Project. If HCD finds that the City is no longer in substantial compliance with the Housing Element Law, then the City will not be able to disapprove any

[2] Further, due to the City's anti-growth measure, Proposition A, the City's legislative body lacks the discretion to plan and zone for such development anywhere else in the City, including Olivenhain.

qualifying housing development project simply because of its inconsistency with either the City's zoning or its general plan. (See Gov. Code, § 65589.5, subd. (d)(2)(A).)

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The Legislature enacted and strengthened measures like the Housing Accountability Act so that localities will promptly approve the development of new housing to address the State's housing crisis. Although the City violated state law when it disapproved the Project, it appears that the City will have the opportunity to correct that error by approving the revised Project in the near future. If the City fails to approve the revised Project, then the Attorney General will take prompt action to hold the City accountable.

Sincerely,

MATTHEW T. STRUHAR
Deputy Attorney General

For ROB BONTA
Attorney General

cc: Dolores Bastian Dalton, Esq.
Jeffrey Chine, Esq.
Timothy Hutter, Esq.