

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

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October 12, 2022

Jason Behrmann, City Manager
City of Elk Grove
8401 Laguna Palms Way
Elk Grove, CA 95758

Dear Jason Behrmann:

RE: City of Elk Grove Denial of 9252 Elk Grove Boulevard Housing Project and Applicability of Senate Bill (SB) 35, Housing Accountability Act, Discrimination in Land Use Law, Affirmatively Furthering Fair Housing, and State Housing Element Law – Notice of Violation

The California Department of Housing and Community Development (HCD) has reviewed the City of Elk Grove's (City) processing and denial of the Oak Rose Apartments application for 67 units of permanent supportive housing at 9252 Elk Grove Boulevard (Project).

Under Government Code section 65585, HCD must notify a locality when that locality takes actions that are in violation of Government Code sections 65913.4,¹ 65589.5,² 65008,³ 8899.50,⁴ and 65583⁵ and may notify the Office of the Attorney General. (Gov. Code, § 65585, subd. (j).) In addition, HCD must review any action or failure to act that it determines to be inconsistent with either an adopted housing element or Government Code section 65583, including any failure to implement programs included in the housing element, and must issue written findings to the locality as a result of this review. (Gov. Code, § 65585, subd. (i)(1)(A).) If necessary, HCD may revoke its findings of compliance for the City's housing element and/or refer such violations to the Office of the Attorney General. (Gov. Code, § 65585, subds. (i)(1)(B), (j).)

HCD finds that, in denying the Project, the City violated Government Code sections 65913.4, 65589.5, 65008, and 8899.50. Additionally, HCD finds that the City has failed to implement goals, policies, and program actions included in its adopted 6th cycle

¹ Streamlined Ministerial Approval Process (Senate Bill 35).

² Housing Accountability Act.

³ Discrimination in Land Use.

⁴ Affirmatively Further Fair Housing.

⁵ State Housing Element Law (Article 10.6 of the Government Code).

housing element in violation of State Housing Element Law. (Gov. Code, § 65580 et seq.)

The City has 30 days to respond to this letter. (Gov. Code, § 65585, subds. (i)(1)(A).) HCD requests that the City provide a written response to these findings no later than November 11, 2022, including, at a minimum, a specific plan for corrective action, including allowing the Project to move forward at 9252 Elk Grove Boulevard.

HCD will review and consider the City's written response, if any, before taking any action authorized by Government Code section 65585, subdivisions (i)(1)(B) or (j). If the City does not respond by this deadline, HCD may revoke its findings of compliance for the City's housing element and/or refer the violations to the Office of the Attorney General. (Gov. Code, § 65585, subds. (i)(1)(B), (j).)

In Denying the Project, the City Violated SB 35

Senate Bill (SB) 35 (Chapter 366, Statutes of 2017; Gov. Code, §§ 65400, 65582.1, and 65913.4) was part of a 15-bill housing package aimed at addressing the state's housing shortage and high housing costs. Specifically, it requires the availability of a Streamlined Ministerial Approval Process for developments in localities that have not yet made sufficient progress toward their allocation of the regional housing need. Elk Grove is one of those localities and is therefore subject to the provisions of SB 35. The intent of the legislation is to facilitate and expedite the construction of housing.

The Planning Commission's June 2, 2022, Resolution No. 2022-19 denies the Project's application by finding, "the Project is not eligible for streamlined ministerial approval under SB 35 as the Project does not comply with the City's objective standards including, without limitation: 1. The Old Town Special Planning Area commercial use zoning designation."

The City Council's July 27, 2022, Resolution No. 2022-192 denies the Project applicant's appeal, "... affirming the Planning Commission's decision that the Project does not comply with the City's General Plan Community Commercial land use and the objective zoning standards of the City's Old Town Special Planning Area commercial use zoning designation, and specifically the ground floor residential use restriction for this commercial zoned site, and the Project, therefore, is not eligible for SB 35 ministerial approval."

Both the Planning Commission's and City Council's denials are inconsistent with the provisions of SB 35 for the reasons outlined as follows:

The City failed to provide a sufficiently detailed written determination of inconsistency within 60 days.

As the Project consists of fewer than 150 housing units, the City had 60 days from the date of submittal to provide the developer with its determination on the project's inconsistency with SB 35's objective planning standards. The notification must identify which standard(s) the development conflicts with, and an explanation for the reason(s) the development conflicts with the standard(s). (Gov. Code, § 65913.4, subd. (c)(1).) If timely written notification is not provided or if the determination insufficiently describes the inconsistency, the project is deemed to satisfy the objective planning standards. (Gov. Code, § 65913.4, subd. (c)(2).)

The preapplication was submitted on November 9, 2021, and tribal consultation ended and a formal application was submitted on March 4, 2022. Although the City issued its SB 35 determination letter on April 15, 2022, it did not claim in that letter that the project conflicted with the ground floor use restriction. Nor did it claim that the project was inconsistent with the commercial land use designation. The City did not identify any conflict between the project and the ground floor use restriction until the Planning Commission issued specific findings to that effect on June 2, 2022, which was 90 days after the application was complete.⁶

The Project is deemed consistent with all standards related to density.

Government Code section 65913.4, subdivision (a)(5)(A), states, "A development shall be deemed consistent with the objective zoning standards related to housing density, as applicable, if the density is compliant with the maximum density allowed within that land use designation...." Because the City found at Item 7 of its SB 35 Application Determination Letter that the project was consistent with the general plan land use designation regarding housing density, the City was required to deem the project consistent with all objective zoning standards related to density. That includes the ground floor use restriction, which directly relates to housing density by placing categorical limits on which part of a site can be used for housing, thereby significantly reducing housing density within the project to below that permitted under the general plan and the SDBL. In sum, because the project complies with the general plan's limits on density, the City was required to treat the project as consistent with the ground floor use restriction for SB 35 purposes.

Finally, Government Code section 65913.4, subdivision (n), states that it is the policy of the state that section 65913.4 be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply. Denial of the Project fails to implement this legislative intent.

⁶ The Planning Commission's findings found the project inconsistent with the commercial use designation, but it did not explain how. Even so, the Planning Commission did not issue such findings until June 2, 2022, which was 90 days after the application was complete.

In Denying the Project, the City Violated the Housing Accountability Act (HAA)

In enacting the HAA, the Legislature intended “to significantly increase the approval and construction of new housing for all economic segments of California’s communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects.” (Gov. Code, § 65589.5, subd. (a)(2)(K).) Furthermore, the Legislature declared, “It is the policy of the state that this section should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” (Gov. Code, § 65589.5, subd. (a)(2)(L).) Approval of projects such as the current Project fulfills this legislative intent.

The City failed to provide written notice of inconsistency within 30 days.

The Project’s application was submitted on March 4, 2022. The Permit Streamlining Act states that local governments have 30 days after an application for a housing development project is submitted to inform the applicant whether or not the application is complete. If the local government does not inform the applicant of any deficiencies within that 30-day period, the application will be deemed complete. (Gov. Code, § 65943.) Because no deficiencies were identified within 30 days, the application was deemed complete as of April 3, 2022.

As the Project consists of fewer than 150 housing units, the City then had 30 days from the date the application is determined to be complete – in this case, until May 3, 2022 – to provide the developer with written documentation of the project’s inconsistency, noncompliance, or nonconformity with the City’s applicable plans, programs, policies, ordinances, standards, requirements, or other similar provisions. (Gov. Code, § 65589.5, subd. (j)(2)(A)(i).) If timely written documentation identifying the noncompliant provision(s) and an explanation of the reason(s) it considers the project inconsistent is not provided or insufficiently describes the inconsistency, the project is deemed to satisfy the City’s objective planning and zoning standards. (Gov. Code, § 65589.5, subd. (j)(2)(B).)

Although the City issued its SB 35 Application Determination Letter on April 15, 2022 and referenced a requirement that the second and third floors be residential while the ground floor be used for commercial development,⁷ it did not reference the HAA, include written documentation finding inconsistency between the Project and applicable objective standards, or explain with sufficient specificity that the Project ran afoul of a rule that no residential development is permitted at all on the ground floor. Instead, the letter stated, “the project as proposed does not currently include a *pedestrian oriented* commercial use on the ground floor” (emphasis added) – which fails to identify any

⁷ In its April 15, 2022, determination letter, the City also asserted the application was incomplete. However, the application was considered complete as of April 3, 2022. Additionally, the City’s assertion was not based upon the application lacking the contents required under Government Code section 65941.1, but rather based on the City’s (incorrect) conclusion that it required more information to determine whether the project was eligible for ministerial approval under SB 35.

inconsistency with an *objective* standard (since the determination of whether a commercial use is sufficiently pedestrian is vested in the discretion of the planning director). The City did not clearly identify a conflict between the Project and the ground floor use restriction until the Planning Commission issued specific findings to that effect on June 2, 2022, which was well beyond the 30-day requirement.

The City failed to make the findings required under subdivision (d).

The project qualifies as a “project for very low-, low-, or moderate-income households” as more than 20 percent of the units are affordable.⁸ As such, it qualifies for protection under Government Code section 65589.5, subdivision (d). Although subdivision (d) provides five pathways for denial of a project, the City is limited to denial under paragraph (d)(2) as none of the other paragraphs apply to this Project.⁹

Paragraph (d)(2) significantly limits a jurisdiction’s discretion to deny a compliant housing development for very low-, low-, or moderate-income households, unless specific public health and safety findings are made and supported by a preponderance of the evidence in the record, as follows:

The housing development project or emergency shelter as proposed 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 or rendering the development of the emergency shelter financially infeasible. 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).)

Denying the Project without making the required public health and safety findings described above constitutes a violation of the HAA. The City did not make appropriate findings under subdivision (d), the pathway for projects with at least 20 percent affordability; therefore, the City violated the HAA.

⁸Government Code section 65589.5, subdivision (h)(3).

⁹ Although the City has an adopted a compliant housing element, it is not meeting its Regional Housing Needs Allocation (par. (d)(1)); denial of the Project is not required by State or Federal Law (par. (d)(3)); the site is not located on Agricultural or Resource Preservation lands (para. (d)(4)); and given the City’s failure to notify the applicant of any inconsistency with objective planning and zoning standards within 30 days, the Project is not inconsistent with both the general plan land use designation and zoning ordinance (par. (d)(5)).

In Denying the Project, the City Violated Discrimination in Land Use Law

California's Planning and Zoning Law (Gov. Code, § 65000 et seq.) prohibits jurisdictions from engaging in discriminatory land use and planning activities. Specifically, Government Code section 65008, subdivision (a), deems any action taken by a city or county to be null and void if such action denies to an individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in the State due to illegal discrimination. Under the law, it is illegal to discriminate based on a protected class such as race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information. The law further states the imposition of different requirements on a residential use by a protected class or by persons of very low, low moderate, or middle income, other than those generally imposed upon other residential uses is discriminatory. (Gov. Code, § 65008, subd. (d)(2)(A).)

On May 5, 2022, the City's Planning Commission approved the Elk Grove Railroad Courtyards Project (EGRCP) at 9676 Railroad Street. The EGRCP is a multifamily, market-rate project that includes ground floor residential units.¹⁰ The EGRCP's site is located within the Old Town Special Planning Area (OTSPA) and the site is zoned Commercial. This is the same regulatory environment that applies to the Project. Approval of the EGRCP demonstrates a double standard in how the City applies its regulatory standards in the Commercial zone of the OTSPA. By allowing ground floor residential uses in a market-rate project while denying the same request to a project providing 100 percent of the units affordable to lower-income households, the City has violated Government Code section 65008.

Such a double standard is particularly notable considering that in its 5th cycle planning period, the City met 195 percent of its above moderate income need but just 7.2 percent and 7.5 percent of its very low income and low income need, respectively.¹¹ The City continues this pattern into the 6th cycle planning period, so far meeting 12.2 percent of its above moderate income need compared to 0.8 percent and 5.3 percent of its very low income and low income need, respectively.¹²

In Denying the Project, the City Violated its Obligation to Affirmatively Further Fair Housing (AFFH)

Assembly Bill (AB) 686 (Chapter 958, Statutes of 2018) amended Government Code section 8899.50 to strengthen California's commitment to fair housing and access to opportunity by mandating that all public agencies must AFFH through their housing and

¹⁰ https://elkgrove.granicus.com/MetaViewer.php?view_id=14&clip_id=2231&meta_id=174975

¹¹ Cumulative data as reported by the City in Table B of its Annual Progress Reports from 2013 through 2021.

¹² Data as reported by the City in Table B of its 2021 Annual Progress Report.

community development programs. Government Code section 8899.50, subdivision (a)(1), defines “affirmatively furthering fair housing” as taking meaningful actions, in addition to combatting discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.

The duty to AFFH extends to all of a public agency’s activities and programs relating to housing and community development. Public agencies are required to take meaningful actions to AFFH and take no action that is materially inconsistent with its obligation to AFFH.¹³

The Project’s site, 9252 Elk Grove Boulevard, is located within a High Resource Opportunity Area according to the California Tax Credit Allocation Committee and HCD’s opportunity maps.¹⁴ These maps identify neighborhoods with characteristics shown by research to support positive economic, educational, and health outcomes for low-income families—particularly children. Denial of an affordable housing project located within a High Resource Opportunity Area is an action inconsistent with the City’s obligation to AFFH. Furthermore, suggesting alternative locations for a “good project” that are in a Medium Resource Opportunity Area, an area with lesser opportunity for positive outcomes for residents, is also inconsistent with the City’s obligation to AFFH.

Additionally, as described below, denial of the Project fails to implement multiple goals, policies, and actions included within the City’s General Plan Housing Element that are explicitly intended to AFFH by providing mobility opportunities for lower-income and special-needs households.

In Denying the Project, the City Violated State Housing Element Law

Denial of the Project failed to implement multiple Goals, Policies, and Programs of the City’s housing element,¹⁵ adopted on December 8, 2021, and determined to comply with State Housing Element Law on February 16, 2022.

- “Goal H-1: Adequate sites to accommodate the City’s housing needs.
 - Policy H-1-3: Promote development where affordable housing is near services, shopping, and public transportation.”
- “Goal H-2: Adequate housing stock to meet the needs of extremely low-, very low-, low-, and moderate-income households and special-needs groups.

¹³ Government Code section 8899.50, subdivision (b).

¹⁴ <https://belonging.berkeley.edu/2022-tcac-opportunity-map>.

¹⁵ Elk Grove General Plan 2021-2029 Housing Element, pgs. 3-16.

- Policy H-2-4: Continue to support housing opportunities for agricultural workers, homeless people, seniors, single-parent households, large families, and persons with disabilities.”
- “Goal H-3: Development regulations that remove constraints to the maintenance, improvement, and development of housing.
 - Policy H-3-3: Encourage creative and flexible design for residential developments.”
- “Goal H-5: Housing opportunities for all persons, regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability.”
- “Action 7, Development Streamlining (New, State Law): The City will establish a written policy or procedure and other guidance, as appropriate, to specify the Senate Bill (SB) 35 streamlining approval process and standards for eligible projects, as set forth under California Government Code, section 65913.4.” The policy or procedure was to be established by June 2021 with ongoing implementation.
- “Action 16, Development Incentives for Low Income Households and Special Needs Groups: Continue to provide regulatory incentives for the development of units affordable to extremely low-, very low-, and low-income households, including second dwelling units, senior housing, infill projects, mixed-use and multifamily units, and housing for special-needs groups, including agricultural employees, persons with disabilities (including developmental disabilities), and individuals and families in need of emergency/transitional housing. The City will take subsequent action, as appropriate, to make the development of such units more financially feasible including providing financial incentives such as reducing, waiving, and/or deferring fees, where feasible, offering fast track/priority processing, density bonuses, and flexibility in development standards.” The program’s timeframe for implementation is ongoing as projects are processed through the Development Services Department. The program’s stated objective is to incentivize the development of 350 housing units, 200 of which are units in high opportunity areas for the purpose of promoting access to resources and mobility for lower-income and special-needs households.
- “Action 19, Affirmatively Further Fair Housing (New, State Law)”: This program includes multiple actions, including, “During the planning period, facilitate housing mobility by assisting 400 lower-income households to locate affordable housing opportunities” and “Increase residential infill opportunities...Encourage place-based revitalization through facilitating development of 140 residential infill units.”

It is important to note that HCD explicitly identified Actions 16 and 19 as particularly important to effectively implement in its February 16, 2022, findings of compliance.¹⁶

Consequences for Lack of Compliance with State Housing Element Law

Various consequences may apply if the City does not have a housing element in compliance with State Housing Element Law. First, noncompliance will result in ineligibility or delay in receiving state funds that require a compliant housing element as a prerequisite, including, but not limited to the following:

- Permanent Local Housing Allocation Program
- Local Housing Trust Fund Program
- Infill Infrastructure Grant Program
- SB 1 Caltrans Sustainable Communities Grants
- Affordable Housing and Sustainable Communities Program

Second, jurisdictions that do not meet their housing element requirements may face additional financial and legal ramifications. HCD may notify the California Office of the Attorney General, which may bring suit for violations of State Housing Element Law. Further, statute provides for court-imposed penalties for persistent noncompliance, including financial penalties. Government Code section 65585, subdivision (I)(1), establishes a minimum fine of \$10,000 per month, up to \$100,000 per month. If a jurisdiction continues to remain noncompliant, a court can multiple the penalties up to a factor of six. Other potential ramifications could include the loss of local land use authority to a court-appointed agent.

In addition to these legal remedies available in the courts, under the Housing Accountability Act (Gov. Code, § 65589.5, subd. (d)), jurisdictions without a substantially compliant housing element cannot rely on inconsistency with zoning and general plan standards as a basis for denial of a housing project for very low-, low-, or moderate-income households.¹⁷

The Project is Entitled to Concessions and Incentives Under State Density Bonus Law (SDBL)

City Council's Resolution No. 2022-192 correctly states that the Developer did not request a concession or incentive under SDBL regarding relief from the requirement that residential uses be limited to the second and third floors. Under SDBL, concessions or incentives must result in identifiable and actual cost reductions to provide for

¹⁶ [City of Elk Grove's 6th Cycle \(2021-2029\) Adopted Housing Element \(ca.gov\)](#).

¹⁷ For purposes of the Housing Accountability Act, housing for very low-, low-, or moderate-income households is defined as having at least 20 percent of units set aside for low-income residents or 100 percent of units set aside for middle-income residents. (Gov. Code § 65589.5, subd. (h)(3).)

affordable housing costs.¹⁸ However, for your information, Resolution 2022-192 incorrectly states that the Project would be ineligible for such a concession or incentive as it would not result in identifiable and actual cost reductions as required by SDBL.

The City is taking an unacceptably narrow view of cost savings by concluding that construction of ground floor commercial space is less costly than the construction of 19 ground floor housing units, without accounting for the cost of constructing those same 19 units not on the ground floor. The City must consider documentation provided by the developer specifying the additional costs associated with building a fourth floor to accommodate 19 units if they were not located on the ground floor. Additionally, the City must consider the income generated by the 19 units, which contributes to the ongoing financial feasibility of the Project. Loss of income from the 19 units may render the project financially infeasible. Therefore, identifiable and actual cost savings are achieved by allowing residential ground floor development. If the Developer requests a concession or incentive for ground floor residential development, it should be approved.

Moreover, 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 waiver and thus denying the Project, is not consistent with this interpretive directive.

Finally, HCD reminds the City that modifications to objective standards granted as part of a density bonus concession, incentive, or waiver pursuant to SDBL shall not be considered when determining a project’s consistency with standards under the HAA or SB 35. (Gov. Code, § 65589.5, subd. (j)(3); Gov. Code, § 65913.4, subd. (a)(5).) By nature, SDBL concessions, incentives, and waivers are intended to provide relief from standards that would cause a project’s proposed design to be inconsistent with the City’s standards. It was not the Legislature’s intent to exclude projects that qualify for the provisions allowed under SDBL. Therefore, the Project cannot be denied because a concession, incentive, or waiver requested may potentially create an inconsistency between the Project and the City’s standards.

Conclusion

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 November 11, 2022 to provide a written response to these findings before taking any of the actions authorized by section 65585, including revocation of its findings of compliance for the City’s housing element and/or referral of the violations to the Office of the Attorney General.

¹⁸ Government Code section 65915, subdivisions (d)(1)(A) and (k).

As stated above, the City's response should include, at a minimum, a specific plan for corrective action, including allowing the Project to move forward at 9252 Elk Grove Boulevard.

If you have any questions or would like to discuss the content of this letter, please contact Robin Huntley 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