



# City of Alameda

## Staff Report

**File Number:**2021-1035

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City Council

**Agenda Date:** 7/6/2021

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**Agenda Number:** 6-D

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Public Hearing to Consider Adoption of Resolution of Intent to Prepare a Housing Element Update for the Period 2023-2031 that Maximizes the Use of City-Owned Land at Alameda Point and Encinal Terminals and Rezones Certain Sites and Districts to Permit Multifamily Housing and Residential Densities of at Least 30 Units Per Acre and Consider Impacts Relating to City Charter Article 26; and Consider Directing Staff to File an Appeal of the City's Regional Housing Needs Allocation. (Planning, Building and Transportation 481001)

To: Honorable Mayor and Members of the City Council

### EXECUTIVE SUMMARY

Staff seeks City Council adoption of a resolution to establish the City Council's intent to prepare a Housing Element update that is in compliance with State Law, maximizes the use of City-owned land at Alameda Point and Encinal Terminals to accommodate the Regional Housing Needs Allocation (RHNA), and rezones certain sites and districts to permit multifamily housing and residential densities of at least 30 units per acre. One concern with the proposed recommendation is that certain actions identified in the Housing Element update would potentially be in conflict with City Charter Article XXVI (Article 26); however, this update is consistent with the City's previous actions in 2012 and 2014 to comply with State Housing Law and staff is of the opinion that the proposed recommendation would continue to meet State Housing Law.

This staff report also discusses the RHNA appeal process and staff's conclusion that an appeal filed by the City of Alameda (City) while allowed has not traditionally been successful in the State and in the Bay Area. If the City Council chooses to file an appeal, it must be submitted by July 9, 2021. Staff is prepared to meet this deadline, should the City Council provide direction to file the appeal on July 6.

The June 2021 Draft Housing Opportunity Sites Table for the Housing Element update is attached as Exhibit 1 and the RHNA is attached as Exhibit 2.

### BACKGROUND

In 1973 the voters of Alameda approved an amendment to the City Charter that added Article 26 (Measure A). Measure A added Section 26-1 that states "[t]here shall be no multiple dwelling units built in the City of Alameda." Section 26-3 was adopted in 1991 by a subsequent ballot measure (also

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Measure A) which set maximum residential density of one housing unit per 2,000 square feet (21.78 dwelling units (du)/acre).

In 1980, the California Legislature adopted laws which required municipalities to prepare Housing Elements which contains state mandated policies and analysis to ensure that the City “facilitate[s] the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.” (Gov. Code, § 65580(d).) More specifically, the Legislature’s stated intent is “[t]o assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal...[and] [t]o assure that counties and cities will prepare and implement housing elements which...will move toward attainment of the state housing goal.” (Gov. Code, §§ 65581(a), (b).)

In a letter dated June 15, 2009, California Department of Housing and Community Development (HCD) concluded that the City was out of compliance with State law because of Article 26. (July 3, 2012 Staff Report, Exhibit 1.) In response, the City adopted a Multi-Family (MF) zoning overlay district in 2012 to allow multifamily housing at a density of 30 units per acre to comply with State law. (Alameda Municipal Code (AMC), § 30-4.23; Ordinance Nos. 3054 and 3183 [2017]; Housing Element Background Report, p. 48.) “The new overlay zone [was] designed to bring the City of Alameda into compliance with Government Code Sections 65583.c (1), 65583.2 and 65583.2c.” (July 3, 2012 Staff Report, p. 7; AMC, § 30-4.23(a).)

The City made it clear that the MF overlay zone was being implemented to comply with State law and would preempt Article 26. More specifically, AMC § 30-4.23(b)(1) states, “In the event of a conflict between the provisions of the MF Combining District and the provisions of the underlying district or the Alameda Municipal Code or Alameda City Charter Article 26, the provisions of the MF District shall govern.”

On July 7, 2020, the City Council submitted Measure Z for a vote of the people, which, if approved, would have fully repealed Article 26 and eliminated that conflict with State law. However, Measure Z was rejected by the electorate in November 2020.

In 2020, the Association of Bay Area Governments (ABAG) established the methodology for distributing the updated RHNA among Bay Area cities and counties. On December 1, 2020, the City Council reviewed and commented on ABAG’s draft methodology, which allocates approximately 1% of the region’s housing need (or approximately 5,400 housing units) to the City. The December 1, 2020 staff report and presentation identified the need to maximize use of City-owned lands and adopt zoning changes in conflict with Article 26 of the City Charter.

On January 25, 2021, the Planning Board reviewed the steps to update the Housing Element to accommodate the anticipated RHNA. The staff report and presentation identified the need to maximize use of City-owned lands and adopt zoning changes in conflict with Article 26 of the City Charter consistent with actions taken in 2012 and 2014.

On February 2, 2021, the City Council reviewed and endorsed the Housing Element update process

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on a vote of 3-2. The City Council report provided an initial site inventory for the Housing Element, which showed the importance of City-owned sites and the need to adopt multifamily zoning districts in conflict with Article 26 to accommodate the RHNA.

On February 8, 2021, the Planning Board reviewed the Annual Report on the General Plan and Housing Element implementation and identified priorities and issues to address in the Housing Element update.

On February 16, 2021, staff requested guidance from HCD regarding reconciliation of State Housing Law with Alameda City Charter Article 26. As of the date of this staff report, the City has not yet received a formal response from HCD.

On March 8, 2021, the Planning Board reviewed the initial sites inventory and list of sites and districts proposed for multifamily housing. At the same meeting, the Planning Board adopted a resolution in support of the Tidelands Exchange to reconfigure the City-owned land at Encinal Terminals to facilitate housing development on the site for the Housing Element update.

On May 25, 2021, the City received notification from ABAG that the State had approved the ABAG methodology, that the City's draft RHNA is 5,353 housing units and the deadline to appeal the RHNA is July 9, 2021.

On June 14, 2021, the Planning Board held a public hearing to consider a Planning Board Resolution of Intent. After considering public testimony and the materials, the Planning Board adopted Resolution No. PB-21-03 (attached as Exhibit 3), which differs from the City Council Resolution in that it does not include certain conclusions regarding preemption and the enforceability of Article 26 that the Planning Board felt it was not qualified to make. Specifically, the Planning Board Resolution does not include the following two sentences that are included in the City Council Resolution:

*"City Charter Article 26 is in direct conflict with state housing law and is preempted and unenforceable in these circumstances. More specifically, Article 26 of the City Charter is preempted by Government Code Sections 65583.2(c), (h), and (i) and Section 65583(c)(1) which require the City to allow multi-family housing, and Government Code Section 65583.2(c) (3) which requires the City to allow at least 30 du/acre to meet its RHNA".*

In all other respects, the Planning Board Resolution is substantively the same as the City Council resolution.

On the question of whether the City should appeal the RHNA, the Planning Board recommended that the City not appeal the RHNA. The Planning Board pointed out that the arguments that the speakers provided for appealing are addressed in the RHNA methodology and are not the basis upon which ABAG will be able to grant an appeal.

## DISCUSSION

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The following discussion addresses five frequently asked questions relevant to the draft resolution:

- What happens if the City Council does not adopt a Housing Element?
- Can the City Council reduce the RHNA through the appeal process?
- Why is it important to maximize the use of City-owned land at Alameda Point and Encinal Terminals?
- Why is Alameda Point limited to 1,282 housing units?
- Why is it necessary to rezone certain sites and districts to permit multifamily housing and residential densities of 30 units or more in conflict with Article 26 of the City Charter?

### **What happens if the City Council does not adopt a Housing Element?**

*Financial Consequences.* If the City Council fails to adopt a compliant Housing Element, most of Alameda's park expansion projects, transportation improvement projects, infrastructure improvement projects and housing improvement projects will no longer be eligible for State funding via State of California policies.

The City, the Alameda Housing Authority, and the City's partner non-profit affordable housing developers depend on State of California (matching) funds to develop affordable housing in Alameda. Failure to adopt a Housing Element will remove Alameda from eligibility for many State funding sources, including:

- Regional Transportation Funding, such as the One Bay Area Grant (OBAG) funding and Active Transportation Grant Program which funded \$2 million for Jean Sweeney Park and \$827,000 for the resurfacing of Grand Street between Shore Line Drive and Encinal Avenue scheduled for construction next year are examples of Alameda projects that benefit from this funding program. Without a certified Housing Element, Alameda will no longer be eligible for these types of funds.
- SB 1 Transportation Planning Grants, which pay for local transportation improvements, require a certified Housing Element.
- SB 2 Planning Grants pay for planning efforts to help the City maintain consistency with State planning requirements and require a compliant Housing Element.
- Infill Infrastructure Grants provide funds for infrastructure improvements in support of affordable housing. Affordable housing development, such as North Housing, plan to apply for

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these funds.

- Permanent Local Housing Allocation (PLHA) program funds affordable housing and owner occupied workforce housing. Affordable housing development in Alameda depends on these funds.
- Affordable Housing and Sustainable Communities program funds land use, housing, transportation, and land preservation projects. Affordable housing development in Alameda depends on these funds.
- CAL Home Program provides grants for affordable housing.
- Local Early Action Planning (LEAP) and Regional Early Action Planning (REAP) grants for transportation, and housing programs are contingent on a certified Housing Element.
- The City currently receives both Community Development Block Grant (CDBG) and Home Investments Partnerships (HOME) programs funds which require a certified Housing Element. CDBG General Allocation, Planning and Technical Assistance, Infill Incentive Grant, and Workforce Housing Reward Programs all require a certified Housing Element. CDBG funds were used for park and recreation facility improvements such as \$165,000 for Woodstock Park playground, picnic area and recreation center this year.
- The Multifamily Housing Program is a very common source of funding for affordable housing that requires compliance with the Housing Element. This source is needed for North Housing.
- Veteran's Homeless Housing Program is a State HCD program that the City is looking at for North Housing that requires Housing Element certification.
- The 4% bond/tax credit program has been critical to the City's success building affordable housing in Alameda. These funds are extremely competitive and are now prioritized for "pro-housing" cities. Failure to adopt a Housing Element will certainly make Alameda significantly less competitive for these funds for future affordable housing projects.

***Additional Housing Element Costs.*** If the City Council fails to adopt the Housing Element on schedule, the City Council must be prepared to revise its Housing Element more frequently in the future. Per Government Code § 65588(e)(4), the eight-year cycle will be revised to a four-year cycle until Alameda has adopted at least two consecutive revisions by the statutory deadline. By increasing the frequency by which the City is required to update its Housing Element, Alameda will experience a substantially increased administrative burden and cost. Depending on the timing of the updates, the jurisdiction may be subject to completing as many as three updates within an eight-year period in order to realign its update schedule with the required schedule.

***Fines.*** In accordance with State Law (AB 101), HCD is required to publish a list of cities that have failed to complete a certified Housing Element consistent with State Law. HCD is also required to

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notify the California Office of the Attorney General that a City is out of compliance with State Law. Should the Attorney General or a housing advocate file a lawsuit and should a court find that Alameda is in violation of State Housing Law, the City could potentially be fined between \$10,000 and \$600,000 per month, until the City Council adopts a compliant Housing Element.

A city can also face fines for each housing unit which is improperly denied. This includes fines of a minimum of \$10,000 for each housing unit, which can be multiplied by a factor of five if a court finds that the city acted in bad faith. (Gov. Code, §§ 65589.5(k)(1)(B) and 65589.5(l).)

**Litigation Costs.** If a city fails to adopt a compliant Housing Element, the city could potentially face litigation or enforcement action brought against the city. Some examples that other cities have faced are listed below.

- In 2006, local advocates filed a lawsuit against the City of Pleasanton, because the Pleasanton City Council refused to adopt a Housing Element in compliance with State law. The California Attorney General joined the suit in 2009. In its unsuccessful effort to defend itself, the Pleasanton City Council paid \$1.9 million just to cover the plaintiff's legal fees.
- The City of Folsom lost its defense and was ordered to comply with State Law.
- The City of Mission Viejo lost in its defense and was required to pay attorney's fees of more than \$800,000.
- The City of Huntington Beach lost in its defense. In addition to its legal fees, the City of Huntington Beach estimated that it missed out on the opportunity to receive as much as \$625,000 in SB 2 planning grant funds.

**Loss of Local Land Use Control.** If a City Council fails to adopt a certified Housing Element, the City could lose its ability to regulate land use in Alameda.

The legislature has placed the burden on cities to deny housing development projects, by requiring cities to adopt specific findings for denial or a reduction in density. (Gov. Code, §§ 65589.5(d) and (j), 65863.) This includes findings that (A) a city has adopted a housing element in substantial compliance with state law, (B) a city has met or exceeded its RHNA allocation, and (C) that denial of a housing project is consistent with a city's general plan, including the housing element. (Gov. Code, § 65589.5(d)(1).) If these findings cannot be made, a city is required to approve a housing project. The City is also explicitly precluded from relying upon a land use/zoning inconsistency as grounds for denial of a housing project where it does not have a certified housing element. (Gov. Code, § 65589.5(d)(5)(B).)

Legally, courts have the ability to take away the City's land use authority if the City Council fails to comply with State Housing Law. If a court finds that the City does not have a valid Housing Element, then it does not have a valid General Plan. Without a valid General Plan, it cannot determine if a project is consistent with the General Plan. Therefore, a court could suspend a local jurisdiction's

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ability to issue building permits and land use entitlements for both residential and commercial projects. (Gov. Code, § 65750 *et seq.*; *Camp v. Mendocino* (1981) 123 Cal.App.3d 334.)

The courts have the ability to approve housing projects given the mandates under Section 65589.5, and in some cases the court could halt approval of non-residential and commercial development, until the City brings its Housing Element and General Plan into compliance with State Law.

**Can the City Council reduce the RHNA through the appeal process?** On May 25, 2021, the City received notice from ABAG that the City's draft RHNA is 5,353 housing units and that the deadline for the City to submit an appeal of the Draft RHNA Allocation is July 9, 2021.

Planning staff does not recommend that the City Council appeal the RHNA because staff believes it is unlikely that an appeal will be successful for the following reasons:

- ABAG's RHNA represents Alameda's fair share of the regional obligation to provide housing to address the statewide housing crises. The fair share is determined by ABAG's methodology which is designed to protect the environment, reduce greenhouse gas emissions, reduce urban sprawl, place housing near job centers (i.e. the inner bay area) and support regional planning equity principles.
- The RHNA establishes Alameda's fair share as approximately 1% of the regional housing needs. Providing for 1% of the regional housing need will result in a 17% increase in the population in Alameda. Per the methodology, other inner bay area cities have a similar assigned growth rate including: Albany (17%), Piedmont (15%), Sausalito (17%), Belvedere (17%), Berkeley (19%), and Oakland (16%). Many have been assigned a higher grow rate than Alameda: Emeryville (27%), Lafayette (22%), Orinda (20%), San Francisco (22%), Palo Alto (22%), and Mountain View (32%).
- If ABAG reduces Alameda's RHNA, ABAG will need to approve a corresponding increase in the RHNA for other Bay Area cities. Every city in the Bay Area is struggling to determine how to accommodate its current RHNA, and, to staff's knowledge no city is looking for additional RHNA at this time. This creates an additional burden to overcome in an appeal.
- City Charter Article 26 ("Measure A") passed by the voters of Alameda and confirmed by the recent failure of Measure Z is not an argument for a reduction. Legally, local measures passed by the voters to limit housing or that have the effect of limiting housing are not a valid reason to reduce a jurisdiction's regional responsibilities. (Gov. Code, § 65584.04(g)(1)).
- The City would have to substantively demonstrate why Alameda's transportation and infrastructure constraints are worse than the transportation and infrastructure constraints in Oakland, San Francisco, Berkeley, San Leandro, and other neighboring cities. The ABAG methodology is based on the findings that almost every city in the Bay Area is struggling with transportation and infrastructure constraints.

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- The City would be required to demonstrate why Alameda's seismic hazards are worse than those in the neighboring cities. The Hayward Fault runs through the cities of Oakland, Berkeley, El Cerrito, and San Leandro.
- Alameda is uniquely vulnerable to rising sea levels and ground water as well as emergent ground water impacts. While all new developments in Alameda, both residential and non-residential, are required to mitigate these risks through site and building design, this is one of the few areas that Alameda could argue more substantively in an appeal if the City Council determines to move forward.
- As shown in the tables in Exhibit 1, Alameda has the land necessary to accommodate its RHNA.

If the City Council directs staff to file an appeal, staff requests that the City Council provide direction on the basis of the appeal that the City Council desires to emphasize. Appeals of the RHNA must be filed by July 9, 2021.

**Why is it important to maximize the use of City-owned land at Alameda Point and Encinal Terminals?** By maximizing the use of City-owned land at Alameda Point and Encinal Terminals, the City Council is minimizing the amount of additional housing that will need to be accommodated in other developed areas in the community. Alameda Point can accommodate approximately 1,282 of the 5,353 units, and Encinal Terminals can accommodate up to 589 of the units. Due to having a requirement of allocating 5,353 units, if the City Council were to approve the necessary land use entitlements at these two sites to construct the approximately 1,800 units that would address some of the required allocation and reduce the necessary housing allocation in other developed areas of the City. Decisions related to the disposition of City-owned land require a 4/5<sup>th</sup> vote of the City Council.

**Why is Alameda Point limited to 1,282 units?** Development of housing at Alameda Point is limited by a cap established by the U.S. Navy (the "Navy Cap"). The Navy Cap on housing was a precondition of the transfer of the land to the City. The Navy Cap limits the number of market rate homes to 1,506. Every market rate unit constructed after the 1,506th unit must pay a financial penalty to the Navy of over \$100,000 per unit, which serves a financial limit on the number of units that can be constructed. It is not financially feasible for the private sector to pay the Navy a \$100,000 penalty fee for every unit. Under State Housing Law, the Housing Element cannot promise to provide housing on sites that are not economically feasible to develop.

By January 2023, the City will have built 544 market rate units (Site A blocks 6, 7, 9 and 11), which means there are 962 market rate units remaining at Alameda Point for the 2023-2031 Housing Element. Per a settlement agreement with Renewed Hope, the City must require construction of one deed restricted affordable housing unit for every three market rate units (the "25% affordable" requirement). Affordable deed restricted units are exempt from the Navy Cap; therefore, the 962 market rate units will be accompanied by 320 deed restricted affordable units for a total of 1,282



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units.

**Why is it necessary to rezone certain sites and districts to permit multifamily housing and residential densities of 30 units or more in conflict with Article 26 of the City Charter?**

**State housing law requires** that the Housing Element provide lands that are zoned to permit multifamily housing and lands that are zoned to support affordable housing or for at least 30 units per acre. A Housing Element that fails to meet these two standards will not be certified by the State. Specifically:

- Government Code §§ 65583.2 and 65583(c) state that the City must make zoning available for all types of housing, *including multifamily housing*.
- Alameda City Charter Article 26 *prohibits construction of multifamily housing*.
- Government Code § 65583.2 states that the Housing Element and the City's zoning must support housing for all income levels in its RHNA; and residential densities under 30 units per acre do not support construction of housing for lower income households.
- Alameda City Charter Article 26 *prohibits residential densities above 21 units per acre*.

HCD previously raised these concerns with Article 26 in a 2009 letter in which HCD stated:

*"Prohibiting multifamily or limiting density is a fundamental constraint with significant impacts on the cost and supply of housing and particularly a variety of housing types. In addition, Measure A severely restricts promoting higher density housing and mixed-use development near jobs and transit to maximize land resources and address climate change."*

*"Pursuant to Government Code Sections 65583.2 and 65583(c), the City is required to make zoning available to encourage and facilitate multifamily development and address and remove constraints. As a result, the element must include programs to address and remove or modify the constraint, including making zoning available to allow multifamily housing."*

Adopting zoning that permits multifamily housing at residential densities of at least 30 units per acre is a necessary "program to address and remove or modify the constraint, including making zoning available to allow multifamily housing."

The City Council successfully approved Housing Elements in 2012 and in 2014 that allowed for multifamily housing and residential densities of 30 units per acre.

## ALTERNATIVES

The City Council may:

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- Approve the recommended resolution, which will provide clear direction to the staff, Planning Board and the community as to how to proceed with the preparation of the draft Housing Element, which must be adopted by the City Council and submitted to HCD for review and certification by January 2023.
- Direct staff to appeal the RHNA, with the specific arguments that the City Council would like staff to use in the appeal.
- Direct staff not to appeal the RHNA consistent with the Planning Board recommendation.
- Choose not to approve the resolution, and provide staff with direction of alternative ways the City Council would like the staff to research in meeting the Housing Element requirement consistent with State Law.

#### FINANCIAL IMPACT

This action would not have a financial impact on the General Fund. The preparation of the Housing Element is being funded through Planning and Building program revenues (Fund 209) and State grants received for this purpose. Failure to adopt a Housing Element consistent with State Law will have significant financial impacts on the General Fund and other City funds as described above under the discussion section of this report.

#### MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

Adoption of a Housing Element is consistent with State Law. The conflicts between State Housing Law and Alameda City Charter Article 26 are described above in the discussion section.

#### ENVIRONMENTAL REVIEW

This action is not a project under Public Resources Code section 21065 and CEQA Guidelines § 15378. The City Council's action is simply declaring the City Council's intent to comply with State law and directing staff to prepare a draft Housing Element (i.e. project description) for consideration and subsequent analysis under CEQA.

#### CLIMATE IMPACT

A Housing Element that accommodates the RHNA supports the region's Sustainable Communities Strategy to reduce greenhouse gas emissions. A decision by the City to not meet the RHNA would likely have a negative impact on the region's ability to reduce greenhouse gas emissions.

#### RECOMMENDATION

Approve the resolution of intent to prepare a Housing Element update for the period 2023-2031 that includes maximizing the use of city-owned land at Alameda Point and Encinal Terminals and rezones

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certain sites and districts to permit multifamily housing and residential densities of at least 30 units per acre contrary to City Charter Article 26 but consistent with 2012 and 2014 actions by the City Council; and provide direction to staff on whether to file an appeal of the RHNA.

CITY MANAGER RECOMMENDATION

The City Manager recommends that the City Council provide direction to the staff on how to move forward with the Housing Element for the period 2023-2031. The staff has provided a methodology that can be in compliance with the California requirements for Housing Element requirements including use of City land to address part of the allocation requirements and multifamily housing zoning consistent with similar actions taken in 2012 and 2014.

Respectfully submitted,  
Andrew Thomas, Planning, Building and Transportation Director

Financial Impact section reviewed,  
Annie To, Finance Director

Exhibits:

1. Draft Housing Element Housing Opportunity Sites
2. ABAG Regional Housing Needs Allocation
3. Planning Board Resolution No. PB-21-03

cc: Eric Levitt, City Manager