

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

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November 29, 2021

Andrew Thomas, Director
Planning, Building and Transportation
City of Alameda
2263 Santa Clara Avenue, Room 190
Alameda, CA 95401

RE: City of Alameda Measure A Provisions and Housing Element Compliance

Dear Andrew Thomas:

Thank you for your correspondence, dated February 16, 2021, requesting guidance regarding state law and local provisions restricting multifamily uses and allowable densities. In developing this guidance, the California Department of Housing and Community Development (HCD) has reviewed the City of Alameda's staff report File Number 2021-1017, Item Number 7-B, and generally agrees with the pertinent analysis, including the resolution attached to that item. HCD offers this additional information to assist the City in its decision-making.

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 Measure A), which sets the maximum residential density of one housing unit per 2,000 square feet (21.78 dwelling units (du)/acre) throughout the City. Each of these provisions is problematic and compromise the City's ability to comply with State Housing Element Law. Collectively, the Measure A Provisions prevent the City from complying with State Housing Element Law and other housing laws, and potentially trigger consequences related to a lack of housing element compliance.

Specifically, HCD finds and agrees with the staff analysis that Alameda City Charter Article 26 conflicts with state housing law and is preempted and unenforceable. Among other things, Article 26 of the City Charter is preempted by Government Code sections 65583.2, subdivision (c), and section 65583, subdivision (c)(1), which require, among other things, zoning for a variety of housing types, including multifamily rental housing. HCD also finds that Article 26 conflicts with Government Code sections 8899.50 and 65583, subdivision (c)(10), in that Article 26 provisions deny fair housing choices and are fundamentally contrary to affirmatively furthering fair housing (AFFH). HCD offers this additional information to assist the City in its decision-making.

Housing Element Compliance Issues

The Measure A provisions create a conflict with state law and particularly State Housing Element Law, including, but not limited to, the following:

- **Zoning Appropriate to Accommodate Housing for Lower-Income Households:** Government Code section 65583.2, subdivision (c)(3), requires jurisdictions to demonstrate that adopted densities accommodate the regional housing need for lower-income households. This analysis must address, but is not limited to, factors such as market demand, financial feasibility, or information based on development project experience within a zone or zones that provide housing for lower-income households. Alternatively, the statute deems specified densities (Default Density) appropriate to accommodate housing for lower-income households. Under these state law provisions, the default density for the City of Alameda is 30 units per acre. The Measure A Provisions cap allowable density at approximately 22 units per acre and, as a result, do not meet default densities. Further, given market demand, financial feasibility and other factors, the allowable densities of the Measure A Provisions would not be adequate to allow the City to demonstrate appropriate densities to accommodate housing for lower-income households. In turn, Alameda City would not be able to demonstrate adequate sites to accommodate housing for lower-income households and would not comply with State Housing Element Law.
- **Zoning for a Variety of Housing Types:** Government Code section 65583, subdivision (c)(1), requires jurisdictions to identify sites "...to facilitate and encourage the development of a variety of types of housing for all income levels, including multifamily rental housing, factory-built housing, mobile homes, housing for agricultural employees, supportive housing, single-room occupancy units, emergency shelters, and transitional housing." The Measure A Provisions explicitly prohibit multifamily housing, and as a result, the City of Alameda would not comply with this requirement and would not comply with State Housing Element Law.
- **Governmental Constraints:** Government Code section 65583, subdivision (a)(5), requires an analysis of potential constraints on housing, including the housing types listed above. (Gov. Code, § 65583, subd. (c)(1).) This analysis must address land use controls such as the Measure A Provisions and, among other provisions, must demonstrate efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need allocation (RHNA) in accordance with Government Code section 65584. Housing elements must address and remove, where appropriate and legally possible, identified constraints. (Gov. Code, § 65583, subd. (c)(3).) Constraints must be addressed regardless of demonstrating adequate sites to accommodate the regional housing need. The Measure A Provisions would be

deemed a constraint on development and without programs to address and remove the constraint, the housing element would not comply with State Housing Element Law.

- **Affirmatively Furthering Fair Housing:** Government Code section 8899.50 requires, among other provisions, all state and local agencies to ensure that their laws, programs, and policies affirmatively further fair housing. AFFH means “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.” This provision is an independent duty for the City, but it has also been incorporated into State Housing Element Law. In this context, Government Code section 65583, subdivision (c)(10), requires an assessment of fair housing that includes various components, including analyzing socio-economic patterns and trends and identifying contributing factors to fair housing issues. The Measure A Provisions deny fair housing choices and as a result are fundamentally contrary to AFFH. Without significant action to overcome the patterns caused by the Measure A Provisions, the City of Alameda will not comply with these provisions of State Housing Element Law.

HCD understands Alameda has adopted some measures to attempt to address these concerns, including a density bonus ordinance and a Multifamily Residential Combining Zone, but Measure A provisions remain a significant constraint on housing choices, supply, and affordability and conflict with several provisions of State Housing Element Law.

Consequences of a Lack of Compliance with State Housing Element Law

Housing availability is a critical issue with statewide implications, and most housing decisions occur at the local level. Housing elements are essential to developing a blueprint for growth and are a vital tool to address California’s prolonged housing crisis. As such, state law has established clear disincentives for local jurisdictions that fail to comply 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,
- Local Housing Trust Fund Program,
- Infill Infrastructure Grant Program,
- SB 1 Caltrans Sustainable Communities Grants, and
- 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 (l)(1), establishes a minimum fine of \$10,000 per month and up to \$100,000 per month. If a jurisdiction continues to remain noncompliant, a court can multiply 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 use inconsistency with zoning and general plan standards as reasons for denial of a housing project for very low-, low-, or moderate-income households.¹

Options for Complying with State Housing Element Law

The Measure A provisions are in conflict with state law and should be voided. In addition, the City should take actions, as noted in its resolution, to comply with State Housing Element Law and demonstrate adequate sites to accommodate the regional housing need. For example, the City could rezone sites at appropriate densities, similar to the City's multifamily overlay utilized in the 5th cycle update. These actions should be accompanied by additional and significant actions to address constraints on housing and to affirmatively further fair housing.

HCD appreciates the efforts taken to seek guidance and looks forward to working with the City to comply with State Housing Element Law and other state laws. For additional resources regarding these requirements, visit HCD's website at <https://hcd.ca.gov/community-development/housing-element>. If HCD can provide assistance, please contact me at paul.mcdougall@hcd.ca.gov.

Sincerely,



Paul McDougall
Senior Program Manager

¹ For purposes of the Housing Accountability Act, housing for very low-, low-, or moderate-income households is defined as having at least 20% of units set aside for low-income residents or 100% of units set aside for middle-income residents (Gov. Code § 65589.5, subd. (h)(3)).