



# TOWN OF FAIRFAX

## STAFF REPORT

### February 1, 2023

**TO:** Mayor and Town Council

**FROM:** Heather Abrams, Town Manager  
David Woltering, Interim Planning and Building Services Director

**SUBJECT:** Housing Element Project Update

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#### **RECOMMENDATION**

Receive informational update regarding the Town of Fairfax Sixth Cycle Housing Element Update Project

#### **HOUSING ELEMENT PROJECT UPDATE**

This report provides a year-end update on the status of the Town's Housing Element Update project. It includes a recap of tasks recently accomplished and an overview of next steps leading up to the release of the local Public Review Draft Housing Element document in late February or early March.

#### *Recent Tasks Completed*

Dyett and Bhatia Urban and Regional Planners (D&B), the Town's Housing Element Project consultant, has submitted drafts of a Housing Needs Assessment, a Constraints Analysis, and an Affirmatively Furthering Fair Housing (AFFH) report which staff and the Housing Element Subcommittee members have reviewed or are in the processing of reviewing and providing feedback on. The information in these documents will inform development of programs in the Draft Housing Element.

Per State Housing and Community Development Department (HCD) guidance materials, the AFFH document will identify and prioritize fair housing issues in Fairfax, summarizing the findings in a matrix, which will need to specify the meaningful actions the Town will take to assure fair housing practices along with metrics for monitoring progress and any geographic targeting of actions needed.

Town staff and D&B representatives met twice with HCD staff in December to develop a working relationship and provide a status update and discuss some specific challenges related to site eligibility and site capacity calculations. The first meeting was with the HCD staffer, Reid Miller, assigned to review the Fairfax Housing Element, and the second was with both the staffer and Paul McDougall, who heads up review of Housing Elements statewide for HCD. These meetings were particularly important, given that the Town of Fairfax, as is the circumstance with many other jurisdictions, will not be able to adopt and have a State compliant Housing Element by the January 31, 2023, deadline established for the Association of Bay Area Governments (ABAG) region in which Fairfax is located. The staff and consultant team are anticipating completing the project in June of 2023. Both meetings with the HCD representatives were constructive towards assisting to determine a path forward for completing this project. A summary of the discussions is provided immediately below:

- HCD staff clarified that even though many sites in Fairfax would otherwise make sense for higher density housing, they do not meet the strict parameters in State guidance materials for lower income Regional Housing Needs Allocation (RHNA) site suitability. However, there may be a

way to count units on these sites toward lower income RHNA if additional analysis is provided. Such analysis includes a record of residential development in similar areas affected by environmental constraints, e.g., liquefaction and flooding risk; property owner interest; and strong evidence of the likelihood of redevelopment (based on factors like assessed value ratio; low as built floor area ratio; commercial vacancy rates; age of existing structures). On this basis, D&B has identified candidate sites.

- HCD advised reaching out to the owners of non-vacant sites to gauge interest in redevelopment with housing, as that is a clear way to demonstrate viability to accommodate RHNA as required in State guidance. This is a feasible task, given the relatively small number of non-vacant sites that could be included on the inventory.
- In the interest of exploring all options for the sites inventory with HCD, staff and D&B representatives also discussed the potential for including the Marin Town and Country Club (MTCC) site on the inventory and projecting housing on that site within the current planning period. HCD indicated that during this Sixth Cycle some Southern California communities included sites subject to voter approval for zoning changes in their inventories and provided an example of how to structure a program for a similarly encumbered site. However, HCD staff clarified that they will require that the rezoning be completed before they will certify any Housing Element that relies on sites which require voter approval to rezone. Given that Fairfax will need to complete rezoning to accommodate RHNA by January 31, 2024 and in view of the significant effort and dedication of Town resources to mount a successful ballot initiative campaign in the timeframe needed to stay on course for completion of rezoning by the end of January 2024, this option presents major challenges. In fact, this effort could significantly impact the ability to complete this project which is already substantially delayed. As such, staff and D&B will focus on identifying a path to certification of the Housing Element that does not involve relying on the MTCC site. However, there could be an opportunity to include a policy in the Land Use Element regarding the site's potential for future housing development which could be beneficial to the Town in subsequent Housing Element updates, after 2031.
- HCD is open to future informal coordination meetings as the Town and its consultant, D&B, to develop and refine strategies to include in the Public Review Draft Housing Element. Consultations along the way will be very helpful to ensure the draft the Town ultimately delivers is in line with HCD expectations to the extent possible.

D&B has conducted an analysis of site suitability, using data from the Marin County Assessor, State environmental databases, Town building permit records, and the inventory of Town-owned open space land provided. This analysis has provisionally identified sites that can accommodate the Town's Sixth Cycle RHNA allocation of 490 units with a slim buffer. There is additional work to be done to confirm the assumptions that underpin the analysis.

Listed below is a summary of the assumptions on which the provisional calculations are based:

- Town staff has provided a list of all projects currently under review or in construction and expected to receive a Certificate of Occupancy (CofO) within the planning period. Per HCD guidance, these can be counted toward RHNA.
- There are 225 vacant sites in Fairfax with current zoning that allows for residential uses; however, the vast majority of these are located in steep terrain and their size or shape poses

significant challenges to development. However, D&B staff have identified 35 properties that are reasonably feasible candidates in view of their size and other conditions. These sites will be reviewed in greater detail with Town staff to confirm development feasibility. It is anticipated that some if not all of these sites can accommodate single-family housing and be counted toward Above Moderate RHNA.

- Of the Town-owned open space properties on the Open Space Committee spreadsheet, most are not viable candidates for housing in view of their small size, odd shape, or location/access conditions.
- D&B also conducted an analysis of non-vacant sites with potential for redevelopment in the planning period. This potential was assessed based on several factors noted above (assessed value (A/V) ratio; low as built floor area ratio (FAR); commercial vacancy rates; age of existing structures). A/V ratio considers the relationship between the value of the land and the improvements constructed on it. Where the value of the land is worth substantially more than the value of the structures on it, there is an incentive for the owner to redevelop with new uses that command higher rents or sales prices. Similarly, a low FAR means that the square footage of buildings is small compared to the overall size of the site, indicating the potential for redevelopment with other uses. High vacancy rate and older existing structures also typically indicate redevelopment potential. HCD requires at least three indicators of redevelopment potential for a site to be considered viable.
- Based on a review of construction permits issued for ADUs/JADUs in Fairfax since 2018, the Town can project at least 11 ADUs per year through the planning period for a total of 88. However, as noted in HCD's Housing Element Site Inventory Guidebook, this methodology represents "a conservative option [that] only account[s] for the effect of the new laws without local promotional efforts or incentives." If the Town would include a robust suite of programs to incentivize and promote ADU development in the Housing Element, it should be possible to project more than 88 units over the period. This strategy will be discussed with the Housing Element Subcommittee at its next meeting. Note also, the allocation between income categories is made on the basis of the findings of a regional ADU Affordability study conducted by ABAG, which HCD is expected to certify so that jurisdictions can rely on it for allocation of ADUs to RHNA categories.
- Two other strategies for accommodating additional RHNA units that D&B representatives and staff are pursuing include analysis of the potential for SB9 Housing units and for affordable housing on church properties. Given that there are few churches, synagogues or mosques in Fairfax, the potential for the latter is limited. Similarly, given the extent of environmental constraints in Fairfax, it is not anticipated that there will be many properties that meet the criteria for SB9 sites. Nevertheless, both strategies are worth pursuing as a means of building an adequate buffer to give the Town greater flexibility in navigating the no-net loss provisions of State law in the event that any sites on the inventory do not develop as anticipated over the planning period.

### *Next Steps*

1. D&B will prepare a map and list of SB9 candidate sites, together with a projection of total capacity. At the next Housing Element Subcommittee meeting potential strategies for incentivizing SB9 housing and the number of units that may be able to be counted toward RHNA will be discussed.

2. D&B will review the current administrative draft Housing Action Plan as well as the 2015-23 Element to evaluate existing ADU strategies. D&B will supplement that list with additional recommendations based on a survey of strategies successfully used by other California communities. With input from the Subcommittee, D&B and staff will develop a list of ADU programs to include in the Public Review Draft Housing Element.
3. Town staff will work to identify contact details for property owners of the non-vacant sites identified and, with D&B representatives, initiate contact as soon as possible. Ideally, consultations would occur prior to the release of the local Public Review Draft Housing Element; however, if consultation with property owners needs to continue into the 30-day public review period that is a workable option.
4. D&B will prepare a survey of recently approved housing projects involving redevelopment of non-vacant sites to use in bolstering capacity projections.
5. D&B and staff will continue to meet and review materials and strategies with the Housing Element Subcommittee.
6. D&B and staff anticipate releasing the local Public Review Draft Housing Element document in late February or early March.

#### *Additional Notes*

Recently staff has received questions about “Builder’s Remedy”. Attached is a brief fact sheet provided by Association of Bay Area Governments.

#### **ATTACHMENT**

Builder’s Remedy Overview from ABAG



**DISCLAIMER:** This document is intended solely as a technical overview of the provisions of certain provisions of the Housing Accountability Act. It is not intended to serve as legal advice regarding any jurisdiction's specific policies or any proposed housing development project. Local staff should consult with their city attorney or county counsel when determining the applicability of these provisions to any proposed housing development project in their jurisdiction.

## The “Builder’s Remedy” and Housing Elements

There have recently been press reports regarding the so-called “Builder’s Remedy” that can be used to avoid local zoning requirements when a locality’s housing element does not substantially comply with state law. These reports have stated that, if a locality has a noncompliant housing element the city or county must approve the housing development project, regardless of the local zoning.

The “Builder’s Remedy” arises from the Housing Accountability Act (Government Code Section 65589.5<sup>1</sup>; the HAA). This paper describes the provisions of the HAA that constitute the “Builder’s Remedy” and how they may apply to a proposed housing development project.

### How Does the “Builder’s Remedy” Work?

The HAA requires that cities and counties make one of five findings to deny, or to apply conditions that make infeasible, a housing development project “for very low, low- or moderate-income households” or an emergency shelter. (Section 65589.5(d).) A housing development project with 20 percent of the total units available to lower income households or with all of the units available for moderate or middle income households may qualify as housing “for very low, low- or moderate income households” (see detailed description below). Any of the five findings would allow denial of an eligible project:

1. The city or county has met or exceeded its Regional Housing Needs Allocation (RHNA) for the proposed income categories in the development.
2. The housing development or emergency shelter would have a specific adverse impact on public health and safety, and there is no way to mitigate or avoid the impact without making the development unaffordable. The impact must be based on objective, written public health or safety standards in place when the application was deemed complete.
3. The denial or condition is required to meet state or federal law, and there is no feasible method to comply without making the development unaffordable.
4. The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agriculture or resource preservation or there are not adequate water or sewage facilities to the serve the project.

<sup>1</sup> All future references are to the Government Code unless otherwise specified.

## Regional Housing Technical Assistance Program

- The project is inconsistent with both the zoning ordinance and the land use designation as specified in any general plan element. **However, a city or county cannot make this finding if it has not adopted a housing element in substantial compliance with state law.**

If a locality has not adopted a housing element in substantial compliance with state law, developers may propose eligible housing development projects that do not comply with either the zoning or the general plan. The term “Builder’s Remedy” is used to describe the situation where a local agency may be required to approve an eligible housing development project because it cannot make one of the other four findings.

### Are Projects Using the “Builder’s Remedy” Exempt from CEQA Review?

The HAA contains no exemptions from the California Environmental Quality Act. The HAA states specifically that nothing relieves the local agency from making the required CEQA findings and otherwise complying with CEQA. (Section 65589.5(e).) However, there is a growing debate as to the interplay between the Builder’s Remedy and CEQA. A project may be exempt from CEQA under other provisions of CEQA, other state laws, or the CEQA Guidelines. Agencies may wish to consult their legal counsel regarding the appropriate CEQA review.

### When Does a Housing Element No Longer Comply with State Law? Is There a Grace Period If the Housing Element Is Not Adopted by the Due Date?

Housing elements are required to comply with current state housing element law on the established due date (**January 31, 2023** in the ABAG region). State law has changed significantly since fifth cycle housing elements were adopted, and it would be unlikely that a fifth cycle housing element would substantially comply with current state law. If a sixth cycle element has not been adopted by the due date, the housing element would likely be out of compliance with state law until a complying sixth cycle housing element is adopted. **There is no grace period**, even for the period when a housing element is being reviewed by the Department of Housing and Community Development (HCD).

HCD approval is not required for a housing element to be found substantially compliant with state law. State law provides that a city or county may adopt its own findings explaining why its housing element is substantially compliant with state law despite HCD’s findings. (Section 65585(f).) However, HCD is authorized to refer agencies to the Attorney General if it finds a housing element out of compliance with state law. (Section 65585(j).)

### Are a Local Agency’s Development Standards Null and Void If the Housing Element is Not in Compliance with State Law?

No, the local agency’s development standards are not null and void if the housing element is not in substantial compliance with state law. The “Builder’s Remedy,” however, may require a local agency to approve an eligible housing development project despite its noncompliance with local development standards. Conversely, other projects may be challenged because a finding of general plan consistency cannot be made if the general plan is out of compliance with state law.

### What Projects Are Eligible to Use the “Builder’s Remedy”?

The “Builder’s Remedy” applies only to a housing development project “for very low, low- or moderate-income households” and to emergency shelters. The HAA defines a “housing development project” as either:

- Residential units only;
- Mixed-use developments with at least two-thirds of the square footage designated for residential use; or



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- Transitional housing or supportive housing.<sup>2</sup> (Section 65589.5(h)(2).)

“Housing for very low, low-, or moderate-income households” includes either:

- 20% of the total units sold or rented to lower income households;
- 100% of the units sold or rented to moderate income households; or
- 100% of the units sold or rented to middle income households.<sup>3</sup>

Monthly housing costs for lower income households cannot exceed 30 percent of 60 percent of median income, adjusted for household size, and the units must remain affordable for 30 years. Monthly housing costs for moderate income households cannot exceed 30 percent of 100 percent of median income. There are no standards in the HAA for housing costs for middle income households. (Sections 65589.5(h)(3), (h)(4).)

An emergency shelter is housing with minimal supportive services for homeless persons that is limited to occupancy of six months or less by a homeless person. No individual or household may be denied emergency shelter because of an inability to pay. (Section 65582(d); Health & Safety Code Section 50801(e).)

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<sup>2</sup> As defined in Section 65582.

<sup>3</sup> Those earning no more than 150 percent of median income.