

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

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February 10, 2022

William Smith, City Manager
City of Colton
650 N. La Cadena Drive
Colton, CA 92324

Dear William Smith:

RE: City of Colton Denial of Litton-Brock Hillside Project and Applicability of the Housing Accountability Act and Housing Element Law – Notice of Violation

The California Department of Housing and Community Development (HCD) has reviewed the City of Colton's (City) denial of the application for the Litton-Brock Hillside Subdivision (referred to as the Project) and has found that in denying the Project, the City has violated the Housing Accountability Act (HAA) (Gov. Code, § 65589.5) and State Housing Element Law (Gov. Code, § 65580 et seq.), as detailed in this letter.

Under Government Code section 65585, 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, and HCD must issue written findings to the locality accordingly. (Gov. Code, § 65585, subd. (i).) Additionally, HCD must notify a locality when that locality takes actions that are in violation of Government Code sections 65589.5 and 65583 and may refer such violations to the California Office of the Attorney General. (Gov. Code, § 65585, subd. (i)(1), (j).)

The City has 30 days to respond to this letter. (Gov. Code, § 65585, subd. (i)(1)(A).) HCD requests that the City provide a written response to these findings no later than March 12, 2022, including, at a minimum, a specific plan for corrective action, including (1) approval of the Project and (2) allowing the Project to move forward with its plans without further delay.

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), including revocation of housing element compliance and referral to the California Office of the Attorney General.

The Project and the City's Actions

The Project is an application for the approval of Tentative Tract Map (TTM) No. 18233 and a Conditional Use Permit (CUP) for the development of 81 clustered single-family

units on 49.39 acres of an approximately 242.8-acre vacant, unimproved hillside located south of Litton Avenue, west of Bostick Avenue, and north of Palm Avenue in the City of Colton (Assessor's Parcel Nos. 0163351250000, 0163351280000, 0275071150000, 027508101000, and 0275081020000). The Project is a Housing Development Project as defined in Government Code section 65589.5, subdivision (h)(2)(A) and is located on the sites referred to above. These sites are listed in the City's 5th and 6th Cycle Housing Elements and are being used to meet the City's Regional Housing Needs Allocation (RHNA) for above-moderate income housing.

On February 23, 2021, the Planning Commission approved Resolution R-08-21, stating that the TTM is consistent and compatible with the General Plan and physically suitable for the type and density of development (City of Colton, Resolution R-08-21, §§ 1.b, 1.c), that the CUP is in accordance with general plan objectives and the purpose of the zone in which the site is located, and that the proposed use under the CUP complies with applicable provisions including the proposed "cluster" development pursuant to the City of Colton's Zoning Code section 18.04.120 (City of Colton, Resolution R-08-21, §§ 2.1, 2.3).

Timely appeals were filed with the City by Richard J. Zaragoza on behalf of the La Loma Hills Alliance. Appeal hearings were held on April 6 and May 4, 2021. On May 4, the City Council adopted Resolution No. R-29-21 and upheld the appeals, reversing the Planning Commission's February 23 approval, and authorized the Applicant, Modern Homes LLC, to resubmit a revised application addressing City and community concerns.

On June 15, 2021, the applicant submitted a revised application proposing an 81-lot single-family detached clustered development with minor revisions and a 79-lot alternative. On July 6, 2021, the City Council held a public hearing on the revised application, heard testimony, reviewed, and considered the revised application, voted unanimously to deny the Project, and adopted City Council Resolution No. R-84-21 formalizing the denial.

Denial of the Litton-Bostick Hillside Subdivision Project Violates the HAA

The City did not make the required findings under Government Code section 65589.5, subdivision (j), when it denied the Project on July 6, 2021. In failing to make appropriate findings under subdivision (j), the City violated the HAA.

First, as a matter of law, the City deemed the Project consistent and in conformity with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete. Under the HAA, the City was under a mandatory statutory duty to provide the applicant with notice about any inconsistencies within 30 days of the date the application was determined to be complete. On this point, the HAA is clear:

If the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows:

Within 30 days of the date that the application for the housing development project is determined to be complete if the housing development project contains 150 or fewer housing units.

(Gov. Code, § 65589.5, subds. (j)(2)(A)(i).)

As HCD understands it, the City neither identified nor notified the applicant of any such inconsistencies prior to or after February 23, 2021, which was when the application was initially approved by the Planning Commission, nor did the City notify the applicant on or before July 6, 2021, when the Project was denied by the City Council. Thus, as a matter of law, the housing development project is deemed consistent, compliant, and in conformity pursuant to Government Code section 65589.5, subdivision (j)(2)(B).

Second, projects that comply with applicable, objective general plan, zoning, and subdivision standards and criteria may only be denied in very limited circumstances. Where the local agency proposes to disapprove such a project, or to impose a condition that the project be developed at a lower density, the local agency shall base its decision upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density, ... and

There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

(Gov. Code, § 65589.5, subds. (j)(1)(A) and (B).) 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. (j)(1)(A).) However, the City failed to make these required findings pursuant to Government Code subsections (j)(1)(A) and (j)(1)(B).

Instead, the City denied the TTM under subdivision (j), stating that the proposed use is inconsistent with the General Plan, the objectives of the Zoning Ordinance, and the purposes of the zone in which the site is located (City of Colton, Resolution R-84-21, §§ 2.A, 2.B, and 2.C). The City also denied the CUP stating that the proposed use is inconsistent with the General Plan, the objectives of the Zoning Ordinance, and the purposes of the zone in which the site is located (City of Colton, Resolution R-84-21, §§ 3.A, 3.B, and 3.C). However, because the City had failed to make such findings within 30 days of the application being deemed complete, the project was deemed consistent with objective standards, as explained above. Therefore, the only finding that would have been available to the City pursuant to Government Code section 65589.5, subdivision (j), was that the housing development project would have a specific, unmitigable adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. In denying the project, the City failed to make the only possible finding available to it. Specifically, the City failed to provide written findings based on a preponderance of the evidence on record that the Project would have a specific, adverse impact upon public health or safety and that there is no feasible method to satisfactorily mitigate or avoid the impact.

As a result, HCD finds that the City improperly denied the Project in violation of the HAA. (Gov. Code, § 65589.5.)

Denial of the Litton-Brock Hillside Development Project Fails to Implement Housing Element Goals, Policies, and Programs

Denial of the Project also fails to implement multiple goals, policies, and programs of the City's 5th Cycle Housing Element, which was operative when the City acted, and the now-adopted 6th Cycle Housing Element. Relevant goals, policies, and programs in the 5th Cycle Housing Element (which are nearly identical to those in the adopted 6th Cycle Housing Element) include, but are not limited to:

- Provide "Move Up" Housing Opportunities: "What the City lacks is housing opportunities for current residents who are able and look to move up to higher-quality housing within this community where they have deep roots, and for higher-income households from outside the community who wish to move to Colton Until it provides opportunities for and incentives to the development community to build homes for such households to live, overall housing conditions will continue to suffer, and the City will be unable to establish a broader market for non-residential investment." (Pages 14-15.)
- GOAL H-1: "Provide opportunities for the development of quality housing for households at and above the median income – housing that does not currently exist in the City in sufficient quantities." (Page 15.)

- Provide Adequate Housing Sites: “A major element in meeting the [City of] Colton’s housing needs is designating sites citywide to accommodate all types, sizes, and prices of housing. Persons and households of different ages, incomes, and lifestyles have varying housing needs and preferences that evolve over time and in response to changing life circumstances. The Colton General Plan Land Use Policy Map and Zoning Code establish where housing may be located.” (Page 20.)
- GOAL H-4: “Provide suitable sites for housing development which can accommodate a range of housing by type, size, location, price, and tenure.” (Page 20.)
- Policy H-4.2: “Encourage development of residential uses in strategic proximity to employment, recreational facilities, schools, neighborhood commercial areas, and transportation routes.” (Page 20.)
- Policy H-4.3: “Encourage compatible residential development in areas where land use policies support higher densities.” (Page 20.)
- Policy H-4.4: “Allow flexibility in the City’s standards and regulations to encourage a variety of housing types.” (Page 20.)
- Program 9, Provision of Adequate Sites: “... Appendix D indicates that the City can accommodate the level of housing development identified in the RHNA for all income levels.” (Page 20.)
- Program 9, Objectives:
 - “Encourage new development to be constructed to maximize the density potential of limited land resources, with the goal of promoting residential densities that achieve at least 80 percent of the maximum allowable density for the specific property.” (Pages 20-21.)
 - “Continue to provide a variety of incentives to facilitate the development of vacant and underutilized properties. These include the planned development/cluster bonus, site area bonus, and affordable housing bonus.” (Page 21.)

In addition, by denying a project located on sites identified in the City’s 5th and 6th Cycle Housing Elements that are used to accommodate RHNA for above moderate-income levels, the City has acted contrary to its housing element commitments and failed to implement the housing element goals, policies, and programs noted above.

Consequences of 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 penalties 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 HAA (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

Conclusion

HCD finds that, by improperly denying the Litton-Brock housing development project, the City is in violation of the HAA (Gov. Code, § 65589.5.) and State Housing Element Law (Gov. Code, § 65585). 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 March 11, 2022, to provide a written response to these findings before taking any of the actions authorized by section 65585, including, but not limited to, referral to the California Office of the Attorney General.

As stated above, the City's response should include, at a minimum, a specific plan and timeline for corrective action, including (1) approval of the Project and (2) allowing the Project to move forward with its plans without further delay.

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 moderate- or middle-income residents (Gov. Code § 65589.5, subd. (h)(3)).

William Smith, City Manager
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If you have any questions or would like to discuss the content of this letter, please contact John Buettner of our staff at john.buettner@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