

October 3, 2022

## **LEGAL AUTHORITY SUPPORTING DEVELOPMENT APPLICATION FOR SEASIDE RIDGE**

The submitted Senate Bill (SB) 330 Preliminary Application is for a housing development project<sup>1</sup> (“Project”) located on two 6<sup>th</sup> Cycle candidate housing sites identified in the City’s North Bluff area. The Project includes 49% of its base units designated as affordable (85 of 173 rental units comprised of 42 lower income units, 43 moderate units, and 88 market units) consistent with Govt. Code § 65583(g)(4), and qualifies for 50% density bonus due to a 24% lower income set aside. The set aside authorizes 86 bonus units for a total of 259 apartment rental units (Govt Code § 65583(g)(1)&(4)). The Project includes requests under State Density Bonus Law for 86 bonus units, three concessions (lot coverage, vehicle stall depth, and steep slopes), three waivers (FAR, height, and stories), and parking ratios per Govt Code § 65915(p)(1).

The Project provides much needed housing for Del Mar in all income ranges and gives equitable access to coastal resources, including households with low, very low, and extremely low income. As the site is situated on the City’s North Bluff, it is sensitively designed and includes ample lateral and vertical public access, onsite public parking, and increased blufftop setbacks for above/below grade structures to account for coastal hazards and to ensure sufficient lateral blufftop public access is accommodated in compliance with the City’s Local Coastal Program and Chapter 3 of the Coastal Act. The housing development project meets all objective design standards per the City’s certified HEI-OZ (DMMC Chapter 30.92). The following analysis provides the background and authority State Housing Law for the submitted Project and SB 330 Preliminary Application

This memorandum is intended to identify the legal authority supporting the application related to development of Seaside Ridge (the “Project”). Further, this memorandum will supplement the Project application, which requests issuance of an administrative rezone, Coastal Development Permit, Boundary Adjustment, encroachment permit and tree removal permit.

### **I. Housing Accountability Act and the Housing Crisis Act**

The Housing Accountability Act (Govt. Code §§ 65589.5 *et seq.*) authorizes local governments to require housing development projects to comply with objective, quantifiable, written development standards, conditions, and policies that are appropriate and consistent with meeting the jurisdiction’s share of regional housing needs under Government Code section 65583. (Govt. Code § 65589.5(f)(1)–(2).) “Objective” development standards, conditions, and policies are those that involve “no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.” (Govt. Code §

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<sup>1</sup> “Housing development project” is defined as a use consisting of any of the following: (i) residential units only; (ii) mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; and/or (iii) transitional housing or supportive housing. (Govt. Code § 65589.5(h)(2)).

65589.5(h)(8); *Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820.)

As amended by Senate Bill 330 (the "Housing Crisis Act" or "SB "330) and Senate Bill 8 ("SB 8"), for the period of 2020–2034, the applicable objective standards, conditions, and policies (*i.e.*, general plan, community plan, specific plan, zoning, design review standards, development impact fees, and other exactions) may only be those that were adopted and in effect when an applicant submits a "preliminary application" under Government Code section 65941.1, which sets forth the list of information that a local government may require for a preliminary application. (Govt. Code § 65589.5(o)(1).) These rules apply to a housing development project that submits a preliminary application prior to January 1, 2030. Within 180 days after submitting a preliminary application, the applicant must submit a complete application, as defined under the Permit Streamlining Act, consistent with Government Code sections 65940, 65941, and 65941.5. An application for a housing development project is "deemed complete" under the Housing Crisis Act when the applicant submits a preliminary application that includes the information identified in Government Code section 65941.1(a), along with payment of the applicable permit processing fee. (Govt. Code § 65589.5(h)(5).)

A housing development project must be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provisions "if there is substantial evidence that would allow a reasonable person to conclude that the ... project or emergency shelter is consistent, compliant, or in conformity." (Govt. Code § 65589.5(f)(4).) If a local jurisdiction determines that a housing development project is inconsistent with an objective standard, it must give applicants written notice and an explanation of the basis for inconsistency. (Govt. Code § 65589.5(j)(2)(A).) Such notice must be provided within thirty (30) days after the project application is deemed complete if the project has 150 units or less, or within sixty (60) days of that date if the project has more than 150 units. (Govt. Code § 65589.5(j)(2)(A).)

Government Code section 65589.5(d) further imposes limits on a city's or county's ability to either deny a housing development that includes affordable housing or to impose conditions on either in a manner that renders the project infeasible for development of very low-, low-, or moderate-income units.<sup>2</sup>

## II. Housing Element Law

Enacted in original form in 1969, the Housing Element Law (Govt. Code §§ 65580 *et seq.*) requires that all cities and counties in California engage in detailed planning for their residential needs by including housing as an element of their comprehensive plans. The housing element process is intended to focus the attention of city policymakers on identifying land sites for housing, and on policy actions that would make it easier or less expensive to provide additional

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<sup>2</sup> "Housing for very low, low-, or moderate-income households" means that either: (A) at least 20 percent of the total units shall be sold or rented to lower income households; or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income [as defined], or persons and families of middle income. (Govt. Code § 65589.5(h)(3).)

housing units. The Housing Element Law requires that the housing element include, among other things, an inventory of land suitable and available for residential development.

When the inventory in an agency's housing element does not identify sites sufficient to meet the agency's share of the regional housing needs assessment at all income levels without rezoning, the housing element must identify sites that can be developed for housing within the planning period. (Govt. Code § 65583(c)(1).) The housing element must commit to rezone sites to make up any shortfall between the amount of low- and very-low-income units identified in the inventory and the needs assessment. The rezoning must allow owner-occupied and rental multifamily residential "use by right." (Govt. Code § 65583.2(h).) "Use by right" sites must meet statutory minimum density standards. Development of "use by right" sites for low- and very-low-income residential uses do not require discretionary agency approvals or review that would constitute a "project" under California Environmental Quality Act (Pub. Res. Code §§ 21000 *et seq.*) ("CEQA"). (Govt. Code § 65583.2(i).)

Once a local update has been drafted, California Department of Housing and Community Development ("HCD") reviews it to gauge whether the plan can enable the targeted number of units — including specific amounts of housing for households of very low, low, moderate, and "above moderate" incomes. If so, HCD certifies the housing element. If not, the jurisdiction may change its plan to incorporate HCD's suggestions. If the element is adopted without satisfying HCD's concerns — or fails to be updated at all — the city or county is regarded as noncompliant. That judgment limits its eligibility for certain state and federal funds for affordable housing and renders it more vulnerable to lawsuits that can halt development in the community. There have been frequent conflicts between state and local policymakers over housing element compliance.

Assembly Bill 1398 ("AB 1398") requires a local government that fails to adopt a housing element that the HCD has found to be in substantial compliance with state law within 120 days of the statutory deadline to complete the rezoning of sites identified in the housing element update no later than one (1) year from the statutory deadline for the adoption of the housing element. AB 1398 prohibits a jurisdiction that adopts a housing element more than one (1) year after the statutory deadline from being found in substantial compliance, as described above, until required rezoning is completed, as specified. (Govt. Code § 65583(c)(1)(A).)

If a local government fails to complete the rezoning by the deadline, a local government may not disapprove a housing development project, nor require a conditional use permit, planned unit development permit, or other locally imposed discretionary permit, or impose a condition that would render the project infeasible, if the housing development project: (A) is proposed to be located on a site required to be rezoned pursuant to the program action required by that subparagraph; and (B) complies with applicable, objective general plan and zoning standards and criteria. (Govt. Code § 65583(g)(1).) **For purposes of this provision, a housing development project is defined as a residential development having at least 49% of the housing units for very low-, low-, and moderate-income households.** (Govt. Code § 65583(g)(4).) The resultant application shall be for design review and shall not constitute a "project" for purposes of CEQA. (*Id.*) Any subdivision of sites shall be subject to the Subdivision Map Act (Govt. Code §§ 66410 *et seq.*). (*Id.*)

In response to AB 1398, the California Legislature passed Senate Bill 197 (“SB 197”). However, SB 197 does not apply to extend the timeline for approval. Instead, SB 197 amends the Government Code to read:

..., a local government shall have three years and 120 days from the statutory deadline in Section 65588 for adoption of the housing element to complete any rezonings required by subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 and subdivision (c) of Section 65583.2 if all of the following apply:

(1) The statutory deadline in Section 65588 for adoption of the sixth revision of the housing element was in the 2021 calendar year

(2) The local government failed to adopt a sixth revision of the housing element that the department had found to be in substantial compliance with this article within 120 days of the statutory deadline in Section 65588 for adoption of the housing element.

**(3) The local government adopts a sixth revision of the housing element and the department finds the adopted element to be in substantial compliance with this article within one year of the statutory deadline established pursuant to Section 65888 for adoption of the housing element.**

(Govt. Code § 65583.4(a) [emphasis added].) The City of Del Mar (“City”) does not meet criteria (3). Instead, SB 197 was intended to help out cities and counties with the October 15, 2021 statutory deadlines. These jurisdictions are limited 191 out of 197 cities and counties within the Southern California Association of Governments (LA, OC, Riverside, San Bernardino, Ventura, Imperial).

The City’s statutory deadline was April 15, 2021 – meaning the one (1) year grace period provided by SB 197 would have terminated on April 15, 2022 (well in advance of the passage of this bill). Therefore, SB 197 cannot provide the City additional time to come into compliance with the Housing Element Law before it would be required to rezone identified sites.

## **A. City of Del Mar’s 6<sup>th</sup> Cycle**

The City’s draft 6th Cycle of the Housing Element (“6<sup>th</sup> Cycle”) includes Program 6G to develop objective design standards that would be located in Del Mar Municipal Code (“DMMC”) Title 23. The goal of this program would be to apply objective design standards to all multiple dwelling unit development subject to “by right” allowances, including those authorized by: (i) Government Code Section 65583.2 (h)-(i); and (ii) State Density Bonus law.

The 6th Cycle identified the North Bluff as part of its “Program IE.” Implementation of Program IE is intended only as a contingency in case the City’s preferred strategy – Program 3A – to secure an agreement with the 22<sup>nd</sup> District Agricultural Association to build at least fifty-four (54) units for lower income households at the State Fairgrounds, including all regional housing needs assessment (“RHNA”) units assigned for extremely low-income households, is not obtained within thirty-six (36) months of adoption of the Housing Element.

The below table was included in the 6th Cycle.

<b>Residential Capacity no Sites to be Rezoned Under the Contingency Program</b>			
<b>Site Number/Name</b>	<b>Gross Acreage</b>	<b>Potential Units at 20-25 du/ac</b>	
		Lower Income	Above Moderate
North Bluff Boarder Avenue Properties	12.39	47-61	200-250
South Stratford Properties	4.94	19-25	80-99
Total	17.33	66-86	280-349

Below is the timeline of relevant events related to the processing, and rejection by HCD, of the City's 6<sup>th</sup> Cycle.

<b>Date</b>	<b>Action or Event</b>
3.25.2021	City Council adopted the 6th Cycle to replace the prior 5th Cycle Housing Element ("5 <sup>th</sup> Cycle").
4.15.2021	5th Cycle planning period ends and the 6th Cycle planning period begins. This is the statutory deadline for adoption of the 6 <sup>th</sup> Cycle.
7.9.2021	HCD submitted letter to the City stating the 6 <sup>th</sup> Cycle required revisions to comply with the Housing Element Law prior to HCD making a finding of substantial conformance.
8.13.2021	Deadline set by AB 1398 for HCD to find City's 6 <sup>th</sup> Cycle in substantial conformance with Housing Element Law. If this deadline is not met, the City is required to complete rezoning of the inventory sites identified in the 6 <sup>th</sup> Cycle prior to 4.15.2022.
12.13.2021	City Council re-adopted the 6 <sup>th</sup> Cycle following revision to address HCD Comments
3.21.2021	HCD submitted letter to the City stating the 6 <sup>th</sup> Cycle required revisions to comply with the Housing Element Law prior to HCD making a finding of substantial conformance.
4.15.2022	Deadline set by AB 1398 for City to rezone its inventory sites identified in the 6 <sup>th</sup> Cycle. If this deadline is not met, HCD cannot make a finding that the City's 6 <sup>th</sup> Cycle is in substantial conformance until the requisite rezoning occurred.
4.21.2022	City has not addressed March HCD letter. City has not completed requisite rezones. City has not adopted 6 <sup>th</sup> Cycle despite finding of non-compliance.

Important to note, HCD issued a response letter to the City dated March 21, 2022 ("Response Letter"). This Response Letter determines that the 6<sup>th</sup> Cycle is still deficient, and, at no point,

does the letter make a finding of substantial compliance. As recently as August 25, 2022, HCD issued a letter of inquiry (“Letter of Inquiry”) to the City requesting that the City provide a specific timeline for submitting an updated draft housing element and obtaining compliance with the State Housing Element by September 25, 2022. Per HCD’s compliance tracker, nothing further has been submitted by the City since the issuance of the March 21, 2022 Response Letter.

Presently, under the Housing Element Law and AB 1398, the City does not have a compliant 6<sup>th</sup> Cycle. Therefore, the City is required to rezone the North Bluff sites as identified in the 6<sup>th</sup> Cycle.

## ***B. Housing Element Implementation Overlay Zone***

On March 21, 2021, the City approved an ordinance for the creation of the Housing Element Implementation Overlay Zone (“HEI-OZ”), which will allow for a residential density range of 20-25 dwelling units per acre (“du/ac”) of “by right” multiple dwelling unit development when an affordable unit component is included. “By right” means that the City cannot apply subjective or discretionary review when processing development applications. This means that these types of projects would not be subject to the City’s Design Review process or reviews by the City’s Design Review Board, Planning Commission, or City Council.

Following approval of the HEI-OZ, the ordinance was sent to the California Coastal Commission (“CCC”) for final certification. The CCC considered the HEI-OZ during its meeting on May 11, 2022, and made certain amendments. The City approved these amendments on May 16, 2022 and June 6, 2022 (Ordinance No. 989). The CCC accepted these amendments July 13, 2022. The HEI-OZ is the City’s implementing mechanism to rezone certain parcels pursuant to Housing Element programs. The HEI-OZ could be applied to parcels throughout the City via rezone actions in the future as necessary to implement the City’s Housing Element and comply with State law. The HEI-OZ is a zoning tool that can be used to specify allowances and standards on a specific parcel(s) when subject to certain State-required rezone programs in the Housing Element pursuant to Government Code Section 65583.2 (h) and (i). The HEI-OZ could be applied to parcels throughout the City via rezone actions processed in the future as necessary to implement the City’s Housing Element requirements. The certified HEI-OZ is codified as a part of DMMC Chapter 30.92 and identifies the areas of applicability. The HEI-OZ does not apply to any property until a rezone action is formally processed. All rezone actions to apply the HEI-OZ to a parcel(s) will be subject to an administrative level ministerial approval process where submitted development applications will be reviewed for compliance with the published development standards and mitigation, monitoring, and reporting criteria.

The HEI-OZ identifies the process for permit approval, development standards, and mitigation, monitoring, and reporting requirements that would be required of all new development on a parcel located within the HEI-OZ. Pursuant to State law, rezone programs in the HEI-OZ will be subject to an administrative, ministerial approval process where submitted development applications will be reviewed for compliance with the published development standards and mitigation, monitoring, and reporting criteria. More specifically, an administrative Coastal Development Permit (“CDP”) would be required for proposed development.

Specific to development under the HEI-OZ, DMMC section 30.75.080(E) states City's Planning Director is the Issuing Authority for this type of administrative, ministerial permit. The Planning Director would approve a CDP application in the HEI-OZ if the proposed housing development is consistent with the requirements of the City's certified LCP. As proposed, DMMC section 30.75.140 states the required findings for permit approval and further clarify that no local public hearing can be required. Once a final decision is made, the Planning Director's decision must be reported to the Executive Director of the CCC within five (5) working days and to any interested parties who request notice in writing. As proposed, public notice will be provided in accordance with DMMC section 30.75.120.

The development standards applicable to proposed development in the HEI-OZ shall be in accordance with the applicable base zone and overlay zones applying to a parcel(s) and all applicable objective provisions of DMMC Title 30, unless otherwise indicated in DMMC Chapter 30.92 or where necessary to comply with Federal and State law. Through project reviews in the HEI-OZ, the City must meet applicable Federal and State law requirements while accommodating a project design that can meet the required density range of 20-25 du/ac and local development standards to the extent feasible; however, projects may require "accommodation" by the. HCD indicated the best example to refer to for understanding of this expected local accommodation process is set forth in the State's Density Bonus ("SDB") Law regulations for "waivers" and "concessions."

Implementation of the HEI-OZ would similarly not require an additional LCP amendment. Pursuant to Ordinance No. 989, as certified, the overlay zone could be applied to parcels throughout the City via rezone actions in the future as necessary to implement the City's Housing Element and comply with State law. The applicable LCP amendment, which approved the application of the HEI-OZ to any property identified in the 6<sup>th</sup> Cycle, was already processed and certified (as amended) by the CCC. The processing of the HEI-OZ into the LCP was intended to include the sites identified by the 6<sup>th</sup> Cycle, as identified in the May 11, 2022 CCC staff report:

The LCP amendment would also apply the new HEI-OZ zone to two existing parcels, known as "Watermark," which fulfills the obligations of Program 2G of the City's 5th Housing Element Cycle. These two parcels are vacant lots that were identified by the City as its "adequate sites" to support the development of affordable housing in the prior 4th Cycle Housing Element, but because no action was taken by the City during that time to implement the housing program on those sites or to otherwise identify and process approval of an equivalent replacement with sufficient density, the City is required to process this action through Program 2G as part of its 5th Cycle. **While Program 2G required the rezoning of only two parcels, the City created the new overlay in anticipation of applying it to various parcels during the City's 6th Housing Element Cycle (2021-2028). These include, but are not limited to, up to six parcels along Border Avenue/North Bluff and up to three vacant parcels at the south end of Stratford Court.**

(Emphasis added.)

**III. State Density Bonus Law**

The State Density Bonus (“SDB”) Law (Govt. Code §§ 65915 *et seq.*) is a mechanism which allows developers to obtain more favorable local development requirements in exchange for offering to build or donate land for affordable or senior units. The SDB Law provides developers with powerful tools to encourage the development of affordable and senior housing, including up to a 50% increase in project densities for most projects, depending on the amount of affordable housing provided, and an 80% increase in density for projects which are completely affordable. The SDB Law is about more than the density bonus itself, however. It is actually a larger package of incentives intended to help make the development of affordable and senior housing economically feasible. Other tools include reduced parking requirements, and incentives and concessions such as reduced setback and minimum square footage requirements.

The amount of the density bonus is set on a sliding scale, based upon the percentage of affordable units at each income level, as shown in the attached chart. Please note that maximum density bonus amounts for very low, lower and moderate income housing were increased by legislation approved in 2020.

In addition to the density bonus, the city or county is also required to provide one or more “incentives” or “concessions” to each project which qualifies for a density bonus. A concession or incentive is defined as:

- A reduction in site development standards or a modification of zoning code; or architectural design requirements, such as a reduction in setback or minimum square footage requirements; or
- Approval of mixed use zoning; or
- Other regulatory incentives or concessions which actually result in identifiable and actual cost reductions.

The number of required incentives or concessions is based on the percentage of affordable units in the project:

<b>Number of Incentives/Concessions</b>	<b>Very Low Income %</b>	<b>Low Income %</b>	<b>Moderate Income %</b>
1	5%	10%	10%
2	10%	17%	20%
3	15%	24%	30%
4	100% Low/Very Low/ Mod. (20% Moderate allowed)	100% Low/Very Low/ Mod. (20% Moderate allowed)	100% Low/Very Low/ Mod. (20% Moderate allowed)



A development qualifying for a density bonus also receives two additional forms of assistance which have important benefits for a housing project:

- **Waiver or Reduction of Development Standards.** If any other city or county development standard would physically prevent the project from being built at the permitted density and with the granted concessions/incentives, the developer may propose to have those standards waived or reduced. The city or county is not permitted to apply any development standard which physically precludes the construction of the project at its permitted density and with the granted concessions/incentives. The city or county is not required to waive or reduce development standards that would cause a public health or safety problem, harm historical property, or would be contrary to law. The waiver or reduction of a development standard does not count as an incentive or concession, and there is no limit on the number of development standard waivers that may be requested or granted.
- **Maximum Parking Requirements.** Upon the developer's request, the city or county may not require more than the following parking ratios for a density bonus project (inclusive of parking for persons with disabilities):

Studio	1 space
1 bedroom	1 space
2 bedroom	1.5 spaces
3 bedroom	1.5 spaces
4 bedroom	2.5 spaces