

INDIAN WELLS CITY COUNCIL

April 4, 2024



To: City Council
From: Community Development
Prepared by: Jon Berg, Community Development Director
Subject: **Resolution Approving General Plan Amendment No. 2024-01 to Adopt the 6th Cycle 2021-2029 Housing Element, and Finding the Action Exempt under the California Environmental Quality Act (CEQA)**

RECOMMENDED ACTIONS:

Council **OPENS** the Public Hearing, takes any public testimony, and **CLOSES** the Public Hearing; and

ADOPTS Resolution approving General Plan Amendment No. 2024-01 for the 6th Cycle 2021-2029 Housing Element; and

FINDS the action exempt from the California Environmental Quality Act (CEQA) in accordance with Section 15061(b)(3) of the CEQA Guidelines.

BACKGROUND:

The Housing Element is a state-mandated element of the City's General Plan and is required to be updated every 8-years and certified by the State Department of Housing and Community Development ("HCD"). California cities are currently in the 6th Housing Element Cycle, which includes the 8-year period between 2021-2029. The primary purpose of the City's Housing Element is to identify existing and projected housing needs, and include the City's goals, policies, quantified objectives, and programs for the preservation, improvement, and development of housing. Government Code Section 65302(c) mandates that Housing Elements adequately plan for the City's existing and projected housing needs, including its share of the regional housing need allocation (RHNA). The City of Indian Wells has been assigned an allocation of 382 new housing units as its share of the RHNA in Southern California for the 6th Housing Element cycle.

The City Council reviewed and adopted the 2021-2029 Housing Element at its Public Hearing on June 2, 2022, and re-adopted a subsequent draft of the Housing Element at its Public Hearing on July 6, 2023, where the Council directed staff to submit the re-adopted Housing Element to HCD for its 60-day review to consider certification. Staff did

so. However, HCD issued a letter on September 5, 2023 (Attachment 2), finding that further revisions were necessary to comply with state Housing Element Law. Since that time, staff has worked with the City's consultant, DeNovo Planning Group, and our City Attorney's office to respond to HCD comments and to create a final draft Housing Element.

The final draft Housing Element was posted on the city's website and emailed to interested parties for the required 7-day public review period on November 8, 2023 and then submitted to HCD for its 60-day review on November 15, 2023. HCD issued a letter on December 12, 2023 (Attachment 3), finding that the final draft Housing Element itself meets the statutory requirements of state Housing Element Law, but that the city must formally adopt the final version and complete any necessary rezoning as described in Program 3 (Production of New Housing/Shorfall Program) of the city's Housing Element before HCD can certify the Element. Specifically, HCD found that the Housing Element will substantially comply with state Housing Element Law (Gov. Code, § 65580 et seq.) once (1) the City formally adopts it, (2) the City completes the required rezoning, (3) the City submits the formally adopted final Element to HCD, and (4) HCD approves it.

The Planning Commission recently reviewed the final draft Housing Element at a Public Hearing on February 29, 2024, and unanimously adopted a Resolution (Attachment 4) recommending that the City Council approve the General Plan Amendment to adopt the 2021-2029 Housing Element. The required rezoning will follow.

DISCUSSION:

In response to comments received from HCD, the City's final draft Housing Element has been updated to address HCD's concerns and has been formatted in a redline strike-out format to show where the updates have been made (Attachment 5). The highlighted text in the document represents the latest updates responding to HCD's September 5, 2023, comment letter. The revisions requested by HCD can be grouped into two topic areas:

1. Affirmatively Furthering Fair Housing (AFFH) Research, Analysis, and Programs
2. Reducing/Removing Governmental Constraints

Below is a summary of the revisions made to the Housing Element to address HCD's requests:

Affirmatively Furthering Fair Housing (AFFH) Research, Analysis, and Programs

- Added approved and entitles projects to the AFFH Analysis
- Revised the following programs to include specific actions, metrics, geographic targets, and/or timelines

- Program 1: Rehabilitation and Community Revitalization
- Program 2: Preservation of At-Risk Units
- Program 3: Production of New Housing Units (Shortfall Program)
- Program 5: General Plan Update
- Program 8: Accessory Dwelling Units and SB 9 Units
- Program 20: Affirmatively Furthering Fair Housing Program

Reducing/Removing Governmental Constraints

- Revised Program 13: Development Code Amendments - Housing Constraints

Coordination with HCD on Adopted, Readopted, and Subsequent Draft Housing Element

Per City Councils direction, staff and representatives from De Novo have conducted proactive contact and discussions with HCD to achieve certification of the City’s Housing Element. This diligent and deliberate process has included dozens of points of contact, including emails, phone calls, video conferences, and in-person meetings starting in June 2022 (upon Council’s adoption of the Housing Element) and continuing to this day. As directed by City Council, staff and De Novo have advocated for the City’s ability to retain local land use control and decision-making authority. To support in this effort, staff and De Novo reviewed over twenty certified Housing Elements for other jurisdictions throughout the State to identify specific language and programs that were “acceptable” in other jurisdictions and presented these facts to HCD for consideration during their course of review. Additionally, while most jurisdictions are provided a single point-of-contact/reviewer at HCD, unfortunately due to circumstances entirely outside of the City’s control, the City has had four separate reviewers since June 2022, and each reviewer has their own perspective and interpretation of Housing Element requirements, State law, and new statutory requirements such as fair housing and analysis of emergency shelters.

Moreover, following Council’s adoption of the Housing Element in June 2022, numerous significant pieces of legislation came into effect with little or no advanced notice. This includes SB 197 and AB 2339, which significantly impacted the requirement to complete necessary rezones prior to certification and the analysis of emergency shelters, respectively. Despite these challenges, staff and De Novo continued to assert Council’s directive for maintaining the City’s best interest throughout all coordination with HCD by proposing solutions that reflected the spirit and values of the Indian Wells community. In instances where HCD requested a revision or amendment inconsistent with the priorities of the City, staff and De Novo clearly articulated Council’s preferences to HCD and explained why their request was incompatible with the community and provided alternative creative ideas to address their concerns. Through this process, staff and De Novo were ultimately able to prepare a Subsequent Draft Housing Element that maintains the best interests of Indian Wells while being found in compliance with State Housing Law. Below is a summary of coordination with HCD between June 2022 and today, including a description of SB 197 and AB 2339 which came into effect during this period.

Summary of Contact

- 6/13/22: Submitted Adopted HE
- 6/16/22: Informed by HCD that a new reviewer was assigned
- 6/17/22: Introductory email sent to new reviewer
- 6/30/22: SB 197 signed into law (no guidance provided by legislature or HCD)
- 7/15/22: General email from HCD with guidance on SB 197
- 7/19/22: City check-in with reviewer seeking to proactively address any outstanding issues
- 7/19/22: Response from reviewer that the review was still in process
- 7/19/22: City request for expedited review to meet SB 197 requirements (HCD guidance only provided four days prior)
- 7/29/22: Informal response from HCD saying informal review complete
- 8/3/22: Meeting to discuss informal feedback and feedback matrix provided which identified over two dozen requests for revisions on all topic areas (review and revision, housing needs, housing programs, quantified objectives, and public participation). Revisions requested were substantial and additional coordination, including examples from HCD on acceptable language, were requested
- 8/8/22: City reached out to reviewer to request a follow-up call ASAP to discuss solutions to address HCD comments on housing mobility programs (no response received)
- 8/12/22: HCD Review Letter Received
- 8/31/22: Follow-up email to email sent on 8/8/22
- 9/1/22: HCD indicated they would think about the issues and provide us examples
- 9/29/22: City emails HCD to ask for the examples they promised (no response received)
- 10/5/22: City emails HCD director requesting feedback or direction on the numerous outstanding items (no response received)
- 10/26/22: Follow-up email to email sent on 10/5/22
- 11/1/22: Response from HCD indicating that they needed to prioritize other projects but they did share some limited example program solutions
- 12/29/22: HCD AB 2339 Memo Issued, requires new analysis of Emergency Shelters to be included in the Housing Element (applied retroactively)
- 1/1/23-5/30/23: Preparation and internal review of responses to comments
- 7/7/23: Resubmittal of Housing Element to HCD
- 8/17/23: New reviewer assigned, internal coordination and proactive outreach to HCD to resolve outstanding issues
- 8/29/23: Conference with HCD to discuss review; during this discussion, reviewer indicated nearly all comments were resolved
- 9/5/23: HCD Review Letter Received with numerous comments still provided
- 11/15/23: Subsequent Draft Submitted to HCD for review
- 11/16/23: New reviewer assigned
- 11/17/23: Preliminary review provided by HCD
- 12/8/23: Informal revisions provided to HCD for review
- 12/12/23: Pre-Certification Letter Received

SB 197 (Required Rezoning Program and Certification)

Prior law required rezoning specified in housing elements to be completed within one year (instead of three years) if the jurisdiction was not found in compliance with Housing Element Law within 120 days of the statutory deadline.

SB 197, which was signed into law on June 30, 2022, changed the rezoning deadlines for jurisdictions with statutory housing element deadlines in 2021, including Southern California Association of Governments (SCAG) jurisdictions. SCAG jurisdictions could only maintain the approximate three-year rezoning deadline if their adopted housing element were found in compliance by October 15, 2022. A housing element that is adopted and found in compliance means HCD has completed its review of the adopted element and has issued a review letter finding the element in compliance with Housing Element Law.

Jurisdictions seeking to maintain the three-year deadline for rezoning were advised to “plan accordingly given the statutory review timelines, which are 60 days for adopted and subsequent draft submittals”. In other words, to receive certification by October 15, 2022, an Adopted Housing Element would need to have been submitted to HCD by August 15, 2022 with no further revisions required. At the time HCD’s guidance was received, the City of Indian Wells was *already* in the middle of its 60-day state mandated review period and was expecting its letter by August 11, 2022.

Additionally, SCAG jurisdictions could not be found in compliance with Housing Element Law until all necessary rezones are complete if they fail to adopt a housing element found in compliance by October 15, 2022. All rezoning must be complete prior to certification.

Statutory Housing Element Update Schedule

State law has established clear disincentives for local jurisdictions that have not yet adopted their 6th Cycle Housing Element and received HCD’s certification. AB 1398 became effective on January 1, 2022, which imposes penalties for not having a certified Housing Element. Every city that has not adopted and received a letter from HCD finding its Housing Element to be in substantial compliance with state law by February 12, 2022, is now required to complete any rezoning identified in their housing program before HCD may certify the Element.

Various consequences may apply if the City does not have a Housing Element that is certified as being in substantial compliance with state Housing Element Law. Many are significant, including:

- **Ineligibility for State Funding:** Noncompliance automatically results in ineligibility or delay in receiving state funds that require a compliant housing element as a prerequisite.

- **Financial and Legal Issues:** Jurisdictions without a certified Element 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, state law provides for court-imposed penalties for persistent noncompliance, including fines and other financial penalties.
- **Loss of Local Land Use Control:** Other potential consequences include a court order limiting our local land use authority. Ultimately, the State may seek, and court may appoint an agent (akin to a receiver) to step in and take control of the City's Housing Element process.
- **Make NIMBY's Pay Act:** Attorney General Rob Bonta and San Francisco Senator Scott Weiner, recently rolled out a new bill that would put the financial squeeze on cities found by a court to have violated state housing law. In short, the bill would impose fines (\$10,000 per month) for any city being in violation of housing laws. The cities would begin racking up legal debt starting on the day they stop following the law. They call it, "the make nimby's pay" Act.

Those are just the potential consequences with respect to the State. There are other significant consequences that don't directly involve the State, including:

- **Private Lawsuits:** Private parties may sue the City to compel the City to adopt a compliant Element and complete required rezoning. There is a growing group of very active special-interest groups that are doing exactly that, with frequent success (e.g., Californians for Homeownership, YIMBY, and Housing Defense Fund). Whether these private lawsuits speed up the process of Housing Element-certification and rezoning is debatable (most cities are moving as fast as they can), but the groups do ask for and get significant attorney-fee awards for their involvement. (Even when they join a suit brought by the State, which they do.)
- **Builders Remedy:** The other main private-side consequence of not having a certified Housing Element is exposure to the so-called "builder's remedy" under the Housing Accountability Act ("HAA"). The HAA prevents a city that does not have a certified Housing Element from denying an application for a housing development project with at least 20 percent of the units are affordable — regardless of whether the project complies with the city's general plan and zoning. In other words, a city must ignore inconsistencies with its general plan and zoning, with only limited and rare exceptions (e.g., demonstrable imminent and unmitigatable threats to public health and welfare).

Cities without a certified Housing Element are feeling pressure from the threat of the "builder's remedy" even more acutely right now since La Cañada / Flintridge recently suffered a significant loss in LA County Superior Court in connection with a builder's

remedy project that ignored the city's adopted general plan and zoning standards. The state Attorney General joined the suit against the city, and the special-interest group Housing Defense Fund ("HDF") filed its own related lawsuit, and the developer and HDF are expected to seek substantial attorney-fee awards. The La Cañada / Flintridge city council must now go back and reconsider the project without regard to the conflicting provisions of the general plan and zoning code — which, the court essentially held, are preempted by the builder's remedy in state law because the city didn't have a certified Housing Element when the applicant applied their initial application with the city.

Whether it is the threat of a builder's remedy project or of a private or public-agency lawsuit or of the loss of local land-use control or of repeated fines that quickly escalate to six figures — there are many reasons why cities now feel compelled to get their Housing Elements certified without any delay.

The Planning Commission has recommended that the City Council adopt the final draft of the 6th Cycle Housing Element. With the City Council's formal adoption, staff will return to the Planning Commission with the associated rezoning program (Program 3) for formal recommendation to City Council. HCD has committed to certifying the city's 6th Cycle 2021-2029 Housing Element once the rezoning program is complete.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA):

This action has been assessed in accordance with the authority and criteria contained in the California Environmental Quality Act (CEQA), the state and local CEQA Guidelines, and the environmental regulations of the City. The city, acting as Lead Agency, has reviewed the project's potential effects on the environment and has determined that the project is exempt from CEQA in accordance with Section 15061(b)(3) of the CEQA Guidelines because the activity is governed by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment, and it can be seen with certainty that there is no possibility that the adoption of this policy document would have a significant effect on the environment, directly or indirectly.

ATTACHMENTS:

1. Resolution
2. HCD September 5, 2023 Comment Letter
3. HCD December 12, 2023 Pre-Certification Letter
4. Planning Commission Resolution
5. Final Draft 6th Cycle 2021-2029 Housing Element