

MEMORANDUM

To: Newport Beach Housing Element Update Advisory Committee Members

From: Larry Tucker

Date: June 15, 2020

Congratulations on your appointment to the Housing Element Update Advisory Committee (Committee). For those of you who are not familiar with the Housing Element Update process, and the requirements imposed upon cities and counties by State Law, what you are about to read may seem a bit overwhelming, but rest assured Staff (and I) will walk you and the public through the decisions the Committee will need to make so that you will have the background you need to come to a conclusion on each issue placed before the Committee.

Introduction

The goal of this Memo is twofold. First, to introduce you to the technical challenges that lie ahead for the Committee in a written form in advance of your hearing this same information again during public meetings of the Committee. Second, I want our more sophisticated active residents and property owners who participate in City land use matters to have a chance to see in some level of written detail how I presently foresee the primary work of the Committee playing out and why. That way, if our stakeholders or Committee members believe I am off-track, I'll hear about it early and we can quickly resolve the best approach to the Committee's work. In preparing this Memo, I have not tried to comment on, include or explain many provisions, details or nuances of the housing law or administrative interpretations so as to give you and the public a more focused, hopefully readable framework as a starting point.

Responsibilities of Committee

The Committee was formed by the City Council at the request of Staff to (i) provide direction to Staff in dealing with issues associated with the City's Regional Housing Needs Allocation (RHNA) adopted by the Southern California Association of Governments (SCAG) pursuant to State Law, (ii) provide guidance to Staff on other Housing Element related matters as requested by Staff, and (iii) review and ultimately make a recommendation to the City Council on an update to the City's Housing Element which the City is obligated to adopt under State Law not later than October, 2021 (at least under the current State schedule).

RHNA Background

The establishment of RHNA allocations begins at the state level with the California Department of Housing and Community Development (HCD). On October 15, 2019, HCD issued its final RHNA determination of 1,341,827 total housing units for the six-county, 197 jurisdictions in the SCAG region. The SCAG RHNA reflects the number of new housing units the region must plan for (not build *per se*) in the October 2021-October 2029 6th Housing Element planning period (6th Cycle). It is important to note that this HCD regional determination is final and cannot be appealed or challenged. SCAG is then responsible for allocating/distributing the final HCD regional determination to each individual jurisdiction in the six-county region, including the City of Newport Beach (City).

The RHNA allocation is further broken down into four income categories: very-low, low, moderate and above moderate. Each local jurisdiction is then required to plan for the inclusion of these new housing units in the Housing Element of its own General Plan. The 6th Cycle RHNA required of each SCAG jurisdiction was scheduled to be finalized by SCAG on May 7 but that decision was deferred for up to 120 days. The City currently expects its RHNA will be about 4,832 housing units based upon a draft allocation issued by SCAG. While this allocation is subject to appeal by each SCAG jurisdiction to an Appeals Subcommittee of SCAG, and the City plans to appeal, as noted above the total number of housing units required to be planned pursuant to the 6th Cycle by all 197 SCAG jurisdictions is final (a total of 1,341,834 housing units). Therefore, if an appeal by one jurisdiction is successful and the unit count for that jurisdiction is reduced, those units will have to be picked up by one or more other SCAG jurisdictions. As a result, the Appeals Subcommittee will likely not grant many appeals, meaning that the SCAG allocation is not likely to change much for any jurisdiction, including Newport Beach. So, while the City's final RHNA may not be known for a few months, the Committee should assume at this point that it may not be materially greater or lesser than 4,832 housing units.

Potential Credits to City's RHNA

The City is seeking clarification of the availability of certain credits to its RHNA so it has a more precise idea of the exact number of new units that will have to be planned on land not currently used for housing. In a letter to HCD dated April 24 2020, Mayor Will O'Neill asked HCD the extent to which potential future Accessory Dwelling Units (ADUs) will be allowed to count towards the City's RHNA, and of those potential ADU's what portion will be counted towards the

City's lower-income RHNA requirements. By virtue of recent legislation, ADU's may be more easily built in yards of existing homes, or even by conversion of existing space within an existing home. The question is, how many ADU's can the City assume will be built in the 6th Cycle because the number of ADU's that will actually be built in the 6th Cycle is unknowable. The Mayor has also requested that all live-aboard permits be counted towards the City's RHNA, with some of those vessels also qualifying as lower-income housing, although the current position of HCD is that only vessels connected to sewer may be counted (i.e. moorings will not count).

The higher the number of future ADU's the City is allowed to assume will be built in the 6th Cycle, and the higher the number of live-aboard vessels HCD recognizes as representing "housing," the fewer new housing units for which the City will be required to plan. Housing units that are entitled or permitted prior to June 30, 2021, but not completed, will also be counted towards the City's 6th Cycle requirement based upon the number of units for which permits are issued and at the affordability levels actually being built. The approved 350-unit (including 78 low income units) Newport Crossings development planned in the airport area is expected to be such a project.

After deducting the unit credits for the reasons described above (RHNA Credits), the balance of the City's RHNA would have to be planned for in the Housing Element update, and that would include changing the Land Use Element of the General Plan to show the properties in question as allowing residential land uses.

New Laws: Requirements for RHNA Recognized Sites

With the foregoing background, the Committee will endeavor to answer a simple question: What properties will be planned for housing units to meet the City's RHNA? Should be easy, right? Not exactly. There is a series of new rules that govern what land in the City (and units associated with that land) can be recognized as "suitable and available" for housing and therefore can be counted towards the City's RHNA. Land in the City will be categorized with one of two designations and different rules apply to each: Vacant land or Non-vacant land. Vacant land is empty land generally not improved or used, of which there is very little in the City. All other land (including minimally improved land such as a parking lot) is considered Non-vacant land.

If a jurisdiction expects 50% or more of its RHNA for lower-income households would be planned for Non-vacant land (as will be the case in Newport Beach),

recent legislation also now requires the City to presume the existing use will impede residential development on Non-vacant parcels absent “substantial evidence” that the existing use of a Non-vacant parcel designated for housing will not prevent it from being available for housing during the 6th Cycle, as further discussed below. Only then can a potential site be deemed an “adequate site” that may be planned for housing and therefore recognized as applying towards the City’s RHNA. While HCD has provided examples of substantial evidence, there is no specific broader definition of the term “substantial evidence.” The Mayor’s letter has therefore also asked HCD to provide objective, simple and market-friendly guidance as to how cities may demonstrate substantial evidence.

Identifying Sites will be Primary Focus of Committee

You are probably wondering about now if you really need to know all these details. The answer is no, but the important point to know is this: Locating sites that are likely to be recognized by HCD as “adequate” and therefore may count towards the City’s RHNA (Sites) will be the primary focus of the Committee. Ultimately, the Committee and Staff will need to generate an “inventory” of land suitable and available for residential development (Sites Inventory). The Sites Inventory will be included in the City’s Housing Element update. The Sites Inventory will be prepared on an HCD Sites Inventory form pursuant to instructions just published by HCD in a 44-page “Sites Inventory Guidebook.”

Under the new rules, inclusion of Non-vacant Sites in the Sites Inventory list will need to be supported by substantial evidence demonstrating the basis upon which the City finds that each such Site will be available for housing in the 6th Cycle. The Sites will be owned entirely, or almost entirely, by private parties. By definition, these are Sites that are already being used for a non-housing use. The City should therefore anticipate that substantial evidence that such Sites will likely become housing sites in the 6th Cycle may have to include information (i) establishing there are no substantial legal impediments to a change to a housing use (such as, for example, long term leases by existing users, or prepayment restrictions on existing long term mortgages) and (ii) that demonstrates the economic, site planning, design and other justifications making a change of use sufficiently likely. The City’s consultants know how to present information and policies in Housing Elements sufficient to gain approval of HCD, however, they are not versed in the economics or design of housing, nor is that an expertise a municipal staff would normally have, so the Committee with help from Staff, and

with public input, should expect to initially undertake the function of figuring out what Sites in the City can meet the “suitable and available for housing” standard.

Potential Use of Zoning Overlays

If it appears that identifying enough Sites to rezone to meet the City’s RHNA at the required affordability levels will be difficult, the City may want to consider zoning alternatives to residential rezoning. One such approach would be to create housing overlay districts in certain commercial areas. An overlay district (sometimes, District) is a zoning tool used occasionally by cities to encourage the addition of preferred land uses in areas not otherwise zoned for those land uses. For example, a housing overlay in a commercial area could allow the existing commercial property uses to continue, but also would allow a housing use to be added to, or even replace, an existing commercial use in the overlay district. An overlay would allow a parcel with a commercial use to add housing above a surface parking lot for an office building that remains in place.

However, using overlay districts to help satisfy a jurisdiction’s RHNA could mean less City oversight in the development process. Use of overlays often come with requirements or conditions. Accordingly, the use targeted by an overlay (in this case, housing) may have to be free of potential subjective impediments to such a use. Otherwise, the overlay may not achieve its intended purpose of allowing a housing use to help meet a RHNA. Therefore, HCD can be expected to require that the right to use the land in an overlay district for housing counting towards the City’s RHNA will have to be similar to a “by-right” use.

By-right means that impediments to a housing use may have to be removed or modified in material respects (e.g. height restrictions, setback restrictions, open space requirements, landscaping requirements and other discretionary reviews, to name a few) to satisfy HCD that the overlay both objectively grants the right to, and provides incentives to, the development of housing in the District. That would mean that the normal “discretionary” site and architectural reviews currently applicable to larger projects under the Newport Beach Municipal Code (e.g. site development review or use permits) and which currently may be a basis to deny or downsize a development proposal, may no longer apply. So, it is possible that the types of design quality features and development intensity limitations that are otherwise routine in Newport Beach may not be able to be imposed to the same extent in Districts. And importantly, if no discretionary

review of a project is required, the environmental review of that project under the California Environmental Quality Act will not be legally required either. Accordingly, the use of Districts would seem more appropriate in select areas, rather than citywide.

The bottom line is that the State has passed a raft of new housing legislation the past couple of years with the goal of removing barriers to housing construction and most, if not all, SCAG jurisdictions will have some level of difficulty in understanding and dealing with the new requirements of a new regulatory framework. The City's goal is to satisfy the City's RHNA and the Committee will be looking for ways to do that. Overlays in some parts of town may have to be part of the City's strategy.

Planning Commission and City Council Roles

The updated Housing Element recommended by the Committee will also be the subject of hearings at the Planning Commission as well. Ultimately the updated Housing Element recommended by the Committee (and the Planning Commission), presumably with Sites that can be planned for 4,832 housing units, less RHNA Credits, will be reviewed and debated by the City Council, which alone will make the final decision on the City's updated Housing Element including of course the Sites Inventory. Changes to the Land Use Element and perhaps the Circulation Element will be necessary in order for the City to allow housing or increase housing density on the parcels identified in the Sites Inventory, while attempting to minimize the impacts on traffic in the City that would result from the addition of a few thousand extra housing units that our roads were not necessarily designed to carry. Likewise, changes to those Elements would also be subject to Planning Commission and City Council public hearings.

"Plan to Comply" with RHNA Requirements

The Mayor has made clear that prudence requires that the City must have a plan to comply with the housing mandates of the State, even if the City Council finds those mandates ill-advised. That is because some of the recent laws passed by the State enable HCD to impose severe financial and other penalties on jurisdictions with non-compliant Housing Elements. So, in putting together the Sites Inventory (with densities that add up to 4,832 +/- units, less the RHNA Credits), it will not be the role of the Committee to decide if land use changes to accommodate such a significant increase in housing units are desirable or wise. The Committee's primary job is technical in nature: To locate adequate Sites to

accommodate the City's RHNA, less the RHNA Credits. The City Council will decide what to do with that information, after, as noted below, hearing from the public.

Public Input will be Sought

There will be many opportunities for public input and comment at each stage of the Housing Element update process. State Law contemplates that the City will make a diligent effort to achieve public participation in the development of the updated Housing Element. A public outreach program was put in place last year in a process originally designed to encourage public participation in an update to the City's General Plan. An initial public forum and 7 workshops (one for each Council District residents), featuring a segment on the City RHNA, were part of that outreach. The Committee will re-visit that outreach program and work with Staff and the City's housing consultant to ensure the scope of further public outreach is appropriate.

Prioritizing Parcels in Sites Inventory

Finally, I would recommend that the Committee make one tweak to the Sites Inventory before completing its work. HCD is expecting a rather large number of housing units in the SCAG jurisdictions in the 6th Cycle. It is certainly possible that there will political repercussions of so many housing units being required in the 197 jurisdictions that are part of SCAG. If too many jurisdictions have difficulty finding land to accommodate the unit count determined by HCD (i.e., 1,341,834 units), complaints about the requirements dictated by the State could arise prior to the start of the 6th Cycle in late 2021. Accordingly, in addition to recommending the Sites that could accommodate the units expected of Newport Beach under its RHNA, I believe the Committee should also prioritize those Sites from least objectionable to most objectionable. That way, if the City's RHNA is reduced in the future to say, for example, 3,000 units, the Committee will have a recommendation ready for the City Council as to which Sites (i.e. aggregating, in this example, 1,832 units) should be dropped off the Sites Inventory as the City Council deems appropriate.

Affordability Factors in Sites Inventory

As previously mentioned, the RHNA includes different affordability levels, almost half of which are supposed to be affordable to lower-income levels. Sites identified to accommodate the lower-income RHNA needs must generally allow a minimum density of at least 30 dwelling units per acre. How the Committee could

realistically ensure that such Sites when developed are affordable to lower-income households is not clear just yet. I am not sure how the Committee will find property owners who are willing to entertain residential uses on their properties and at the same time be willing to meet SCAG requirements for Newport Beach to have about 30% of those units affordable to those making 50% or less of the Orange County median income, and another 19% affordable to those making 80% or less of the Orange County median income. Or alternatively, finding landowners who are willing to have all of their units, or more than a fair share of their units, be affordable to lower income levels so that other property owners will have no affordability requirements on any, or fewer, of their units.

To state the obvious, property owners will not make land available for housing without a sufficient financial incentive to justify the time, cost and risk to do so. How the City could fully, or at least partially, address the affordability expectations of its RHNA is a discussion that will occur in more detail as we get further into our process. A Subcommittee of those with knowledge about the development and financing of affordable housing will probably be formed to educate the Committee on its choices.

Materials for Future Reference

You do not need to master the technical details of the RHNA or the new housing laws to be able to fulfill your role on the Committee. However, if you would like to dig into more of the details and nuances than this Memo attempts to cover, attached are the following reference materials:

1. Most recent published draft RHNA for all SCAG Agencies (by income categories);
2. Letter dated April 24, 2020 from Mayor O'Neill to HCD;
3. Housing Element Sites Inventory Guidebook from HCD; and
4. Current Newport Beach Housing Element.

In addition, you may Google CA Government Code Section 65583 for more detail on identifying "adequate sites" and other Housing Element minutia.

I look forward to working with you on this most important regulatory requirement. Thank you for your willingness to serve your City.