



SUBJECT: An application for a General Plan amendment (GPA 24-001) to repeal the March 2023 Housing Element and adopt the City's Housing Element Update for the period of 2023-2031 (6th Cycle), in compliance with State housing element law.

DEPARTMENT: Community Development Department

STAFF: Alexis Morris, Director of Community Development
Erik Nolthenius, Planning Manager
Jennifer Hagen, Senior Planner

TITLE/RECOMMENDATION

Staff recommends that the City Council review and adopt the attached resolution approving a General Plan amendment (GPA 24-001) to repeal the March 2023 Housing Element and adopt the City's November 2023 Submittal to the California Department of Housing and Community Development (HCD) for the period of 2023-2031 (6th Cycle), in compliance with State housing element law.

The General Plan amendment is exempt from the California Environmental Quality Act (CEQA), pursuant to Section 15061(b)(3) of the CEQA Guidelines, as it can be seen with certainty that there is no possibility that it may have a significant effect on the environment.

FISCAL IMPACT

There is no fiscal impact associated with approving the General Plan amendment. The cost of the Housing Element update is included in the adopted 2022/23 – 2026/27 Capital Improvement Program (CIP), which includes the Housing Element Update and Safety Element Update, CIP Project No. 337-37258, which has been funded by State grants and the General Fund.

BACKGROUND

The City formally initiated the 6th Cycle (2023-2031) Housing Element Update (HEU) in October 2021 with substantive public meetings beginning in April 2022. Since then, there have been a number of opportunities for the public to participate and provide comments, including ten public workshops, outreach events, and hearings before the Planning Commission and City Council to review key components of the Housing Element. After initial review and public input, the first Draft Housing Element was



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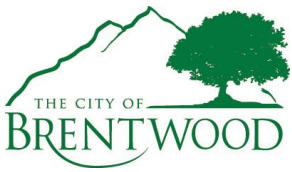
submitted to HCD on October 17, 2022. On January 13, 2023, HCD provided its formal response letter to City staff with comments on the initial draft.

On February 14, 2023, staff presented the City Council with HCD's comments on the first draft Housing Element Update and requested direction and input on specific goals and policies to be incorporated into a revised second Draft Housing Element. An additional hearing was held before the Planning Commission on February 28, 2023. The City Council approved Resolution No. 2023-31, adopted the second Draft Housing Element and authorized resubmittal to HCD on March 14, 2023. After public input and adoption, the adopted second Draft Housing Element was submitted to HCD on March 17, 2023. On May 16, 2023, HCD provided its formal response letter to the City staff, finding that the adopted Element did not comply with state law.

On August 8, 2023, staff presented the City Council with HCD's comments on the adopted Housing Element Update and requested direction and input on three of the comments provided by HCD regarding new or modified programs that had the potential to impact future City policies. After receiving City Council direction, as well as additional public input, staff met with HCD four times to discuss draft revisions culminating in the third and final Draft Housing Element, which was submitted to HCD on November 3, 2023. The November 2023 HCD Submittal draft is hereby referenced as the "Final Draft Housing Element." On January 2, 2024, HCD provided its formal response letter to City staff. The letter stated that the City's Final Draft Housing Element was in substantial conformance with State law and that the Final Draft Housing Element submitted to HCD on November 3, 2023, met all of the statutory requirements described in HCD's May 16, 2023, review letter. The final HCD letter is included for the City Council's reference as Attachment 2.

The Final Draft Housing Element, attached to the resolution that is put forth for City Council review, represents a culmination of the process to date incorporating responses to all of HCD's comments, as well as previous feedback and direction from the City Council. The attached Final Draft Housing Element is a redline showing all changes that have been made since the previously adopted March 2023 Housing Element.

On January 16, 2024, staff presented the Final Draft Housing Element to the Planning Commission. After significant deliberation, the Planning Commission recommended that the City Council should not approve the General Plan amendment and associated Housing Element Update. The Planning Commission findings for this recommendation to the City Council are outlined in the attached Resolution No. 24-005.



DISCUSSION

HOUSING ELEMENT REQUIREMENTS

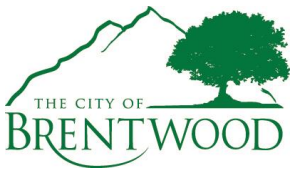
The Housing Element is one of seven State-mandated elements of the City's General Plan and is a comprehensive statement by the community of its current and future housing needs and proposed actions to facilitate the provision of housing to meet those needs at all income levels. Rising housing costs are not just a statewide or regional issue, but directly impact Brentwood residents and those faced with rising housing prices and increased incidence of homelessness.

Periodic updating of the Housing Element is required by State law; and thus, the Element provides a vehicle for the State's housing goal of "attaining decent housing and a suitable living environment for every California family," as well as incorporating the unique concerns of the community. The previous Housing Element, which was adopted by the City Council and certified by the State in 2015, covered the planning period from 2015-2022 (the 5th Cycle). A Housing Element Update for the current housing element planning period (the 6th Cycle) was required to be adopted by January 31, 2023, to address the period from 2023-2031. It was adopted by the City Council on March 14, 2023.

State law establishes a series of very specific requirements as to the scope, content, and process by which a Housing Element is updated and adopted, including review and approval (known as certification) by HCD.

Unlike the majority of the other required General Plan elements, the Housing Element must include very specific information to ensure compliance with the variety of complex housing laws. In accordance with State law, Brentwood's Housing Element must look at housing trends, zoning and market constraints, and evaluate various approaches to meeting housing needs across income levels. The inventory of available sites, or "Sites Inventory," is a key component of a Housing Element in which the City must identify land zoned for housing to meet the Regional Housing Needs Allocation (RHNA). Local governments must involve the public from all economic segments of the community in developing the Housing Element.

Additional information, including summaries of the various required components of the Housing Element, can be found within the [January 16, 2024 Planning Commission agenda report](#).



SUMMARY OF HCD COMMENTS AND REVISIONS

[On August 8, 2023](#), staff presented the second HCD comment letter to the City Council, along with a preliminary draft of proposed revisions to the Housing Element policies and programs/actions requesting direction and input to be incorporated into the Final Draft Housing Element. Based on City Council direction and HCD comments provided in its May 2023 letter, a number of actions/programs were modified or added to the previously adopted Housing Element. Some of the new actions/programs were required per State law, and some are in response to the requirement to address housing constraints. The three major programs which were reviewed and added by the City Council on August 8, 2023 that have the potential to impact future policies include the following:

Action H.1t: Mid-Point Policy *(page 4-10 within the attached November 2023 Housing Element)*

The City shall remove its mid-point policy to remove any added discretion or constraints, such as requiring the exercise of transferable agricultural credits, significant added amenities, extensive off-site public improvements, or other significant improvements for projects requesting densities above the mid-point for all residential land use categories.

Action H.1r: Parking Standards for Studios and 1-Bedroom Units *(page 4-9 within the attached November 2023 Housing Element)*

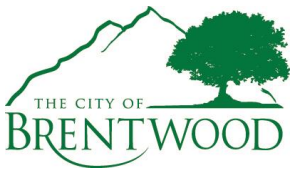
The City shall amend its parking standards for multi-family by requiring 1.5 parking spaces per 1-bedroom units and 1 parking space per 0-bedroom units. The City will also continue to provide parking reductions as needed and for projects that comply with the City's Affordable Housing Ordinance.

Action H.1s: CUP and Design and Site Development Review Findings *(page 4-9 within the attached November 2023 Housing Element)*

As part of the Zoning Code Update, the City shall amend approval findings for CUP and Design and Site Development Review applications to replace subjective language with objective standards.

FINAL RESIDENTIAL ANALYSIS CAPACITY

The City is not required to rezone any properties in order to address the RHNA. Appendix B (Candidate Sites Analysis) within the Housing Element identifies available sites for housing development to ensure that there is adequate capacity to address the RHNA in each of the affordability categories. As shown in Appendix B, the City's



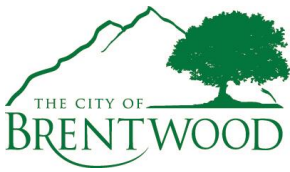
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existing zoning (i.e., residential development capacity that exists currently within Brentwood’s residential and mixed-use zoning districts) and “pipeline” of entitled projects is estimated to accommodate approximately 3,103 housing units; this number includes 112 ADUs that it is assumed will be built during the Housing Element period. Although HCD requested additional information on the City’s background information and analysis of the sites, no changes to the sites were required in the Final Draft Housing Element. Therefore, staff made no changes to the inventory from the March 2023 adoption. The Residential Analysis Capacity remains the same and is shown below for reference.

Table 1: Summary of Residential Capacity Analysis					
	Very Low-Income	Low-Income	Moderate-Income	Above Moderate-Income	Total
2023-2031 RHNA Allocation	402	232	247	641	1,552
Capacity Under Existing Zoning					
Projects Currently in the Pipeline	3	5	5	1,011	1,019
Projected ADU Production	66	34	34	12	112
Remaining Need	565	208	208	0	421
PA-1 (Innovation Center)	464	229	229	833	1,526
Vacant Residential Land	156	68	68	222	446
Total Unit Potential	689	336	336	2,078	3,103
Units +/- and Buffer/Gap %	+55 units, 9%	+89 units, 36%	+89 units, 36%	+1,437 units, 224%	+1,551 units, 100%

PLANNING COMMISSION RECOMMENDATION AND THE CONSEQUENCES OF NOT HAVING A HOUSING ELEMENT IN COMPLIANCE WITH STATE LAW

On January 16th, the Planning Commission recommended that the City Council should not approve the General Plan amendment and associated Housing Element Update. However, staff is recommending that the City Council adopt the attached Resolution approving a General Plan amendment to adopt the Final Draft Housing Element, included as an attachment to the proposed resolution. Staff understands this recommendation differs from the Planning Commission’s recommendation, but adoption by the City Council (and the subsequent certification anticipated by HCD) is critical for several reasons. As detailed further below, jurisdictions with noncompliant



Housing Elements have been subject to lawsuits and payment of attorney fees, loss of permitting authority and financial penalties.

“Builder’s Remedy” Applications

The so-called “Builder’s Remedy” is a tool that exists within the State’s Housing Accountability Act¹ (HAA). The HAA generally requires that, a city must be able to make particular findings if it desires to deny or reduce the density of an application for a housing development project that complies with applicable, objective general plan, zoning, and subdivision standards and criteria (including design review standards) in effect at the time the application is deemed complete. These findings are that the project would (1) have a specific, adverse impact on public health or safety, and (2) there is no feasible way to mitigate or avoid this impact, other than by denying the project or requiring a lower density.²

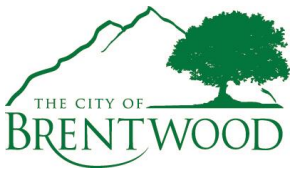
However, if the proposed project includes either (1) 20% lower-income units, or (2) 100% moderate-income units, then the City must make one of five additional findings to deny the project. One of these findings is that the project does not comply with **both** the zoning ordinance **and** the general plan land use designation. However, this finding cannot be made unless the City has adopted a housing element in substantial compliance with State law.³ Some developers have submitted projects to cities that violate either the zoning or the general plan and have asserted that the city cannot deny their project because the city has not adopted a housing element in compliance with State law, and the city cannot make any of the other four findings. This is called the “Builder’s Remedy,” in reference to a “remedy” available to builders for a city’s alleged non-compliance with State housing element law.

While the Builder’s Remedy was enacted over thirty years ago, in past housing element cycles it was not used frequently. In this cycle, developers have been much more willing to propose such projects. Although the City has a March 2023 adopted Housing Element that the City Council found to be in compliance with State law, HCD did not agree that the Element was in compliance. There is no presumption that an Element is out of compliance if HCD does not approve it. However, recent attempts by Beverly Hills and La Canada-Flintridge to defend their elements (which had not been approved by HCD) failed in the Los Angeles County Superior Court, although both cases are on appeal. While it may be argued that the City is still in substantial compliance with State law and that the Builder’s Remedy is not applicable, the City

¹ Government Code Section [65589.5](#)

² Government Code Section [65589.5\(j\)\(1\)](#)

³ Government Code Section [65589.5\(d\)\(5\)](#)



will have a much stronger defense against any challenge if the November 2023 Housing Element is adopted by the City Council and then certified by HCD.

HCD Enforcement Actions

HCD is authorized to review any action or failure to act by a local government that it determines is inconsistent with an adopted housing element or housing element law. HCD may refer a city that is not complying with housing element law to the Attorney General. Based on the experience of Southern California cities, many of which missed their adoption deadlines for this particular cycle, cities making continued good faith efforts to address HCD comments to adopt a substantially compliant Housing Element have in general not been subject to enforcement by the Attorney General. However, the Attorney General has challenged cities, such as the City of Coronado, that it may perceive as resisting conformance with State law. HCD has also indicated that it may refer additional cities to the Attorney General who have either not adopted compliant elements or have not adopted required zoning. So long as Brentwood continues its efforts to adopt a compliant Housing Element, HCD enforcement is unlikely.

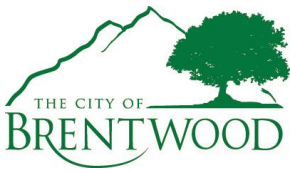
Court Actions

Lawsuits from Third-Parties

Developers and advocates may bring their own lawsuits against the City. At least ten cities have been sued by advocates in Southern California, and advocacy groups like YIMBY Law have already sued at least 12 cities in the Bay Area. These lawsuits primarily demand that the cities acknowledge they are subject to the Builder's Remedy. However, third parties have expanded these cases to challenges to the housing element itself, as occurred in Beverly Hills and La Canada-Flintridge. If a court finds that a city's housing element does not comply with state law, the court will typically order that the city adopt a housing element on a mandated schedule. Successful plaintiffs are usually entitled to attorney's fees.

Loss of Permitting Authority

Courts have authority to take local government residential and nonresidential permit authority to bring the jurisdiction's General Plan and housing element into substantial compliance with State law. The court may suspend the locality's authority to issue building permits or grant zoning changes, variances, or subdivision map approvals. Courts also have the authority to order the approval of proposed housing developments. A recent example of this is a Los Angeles Superior Court judge's order in a case involving Beverly Hills. Beverly Hills has continued to work with HCD to obtain a certified Housing Element; however, it does not yet have a Housing Element certified by HCD and has been sued by a number of advocates. The judge issued an



order in the case on December 21, 2023, prohibiting Beverly Hills from issuing building permits for anything other than new residential development until such time as it has an HCD-certified Housing Element. Beverly Hills has appealed the decision.

Financial Penalties and Court Receivership

Courts may issue judgements directing a jurisdiction to bring its housing element in substantial compliance with state housing element law. If a jurisdiction's housing element continues to be found out of compliance, courts can multiply financial penalties by a factor of six. Courts may also appoint an agent with all powers necessary to remedy identified housing element deficiencies and bring the jurisdiction's housing element into substantial compliance with housing element law.

Ineligibility for Various Funds

Many State and regional funding sources require a certified housing element or provide priority for cities with housing elements certified by HCD. These include, but are not limited to, the following:

- Affordable Housing and Sustainable Communities Grants (AHSC)
- SB 1 Planning Grants
- CalHOME Program Grants
- Infill Infrastructure Grants
- Local Housing Trust Fund
- Pro-Housing Designation Funding
- Regional transportation funds (e.g., MTC's OneBayArea Grants)

NEXT STEPS

The next key steps in the Housing Element include:

- February 14, 2024 – If adopted by the City Council, staff submits the adopted Final Housing Element to HCD.
- April 14, 2024 – HCD has up until this date (60 days after adoption by the City Council) to certify the final Housing Element. However, since HCD's substantial conformance letter did not require any additional edits, staff anticipates that this approval may happen sooner.
- Policy and Program Implementation, On-going – Staff has already begun to implement various policies and programs within the Housing Element including updates to the City's Density Bonus Ordinance. Additional Zoning Code updates will continue to be processed throughout 2024 and into 2025 as identified within the Housing Element. In addition, each year an Annual Progress Report



(APR) will be presented to the City Council in March with a summary of the City's progress towards meeting our Housing Element goals.

CITY COUNCIL STRATEGIC INITIATIVE

Focus Area 4: Community Development

Provide a diversity of housing opportunities, including equitable distribution of affordable housing for all socio-economic segments of the Brentwood community.

- Update the City's Housing Element including: an evaluation of the 2015 Housing Element; assessment of housing needs, resources, constraints; approval of an updated Regional Housing Needs Allocation; and adoption of housing goals, policies, and actions.

PREVIOUS ACTION

Previous Action by the City Council and Planning Commission is included on Attachment 1.

DATE OF NOTICE

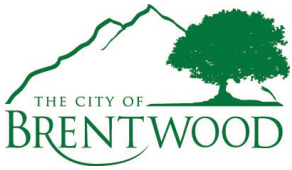
Advertisement of this item was published in The Brentwood Press on February 2, 2024. In addition, email notification was sent to all interested parties who have signed up on the City's Housing Element website (brentwoodhousingelement.com). As of February 7, 2024, no comments have been received.

ENVIRONMENTAL DETERMINATION

The project is exempt from the California Environmental Quality Act (CEQA) pursuant to Section §15061(b)(3) of the CEQA Guidelines because it can be seen with certainty that there is no possibility that the proposed 2023-2031 Housing Element Update would have a significant effect on the environment, in that no new policies adopted modify the density or physical design of housing and so do not have the potential for causing a reasonably foreseeable direct or indirect change in the physical environment.

ALTERNATIVE OPTION(S)

1. Do not approve staff's recommendation. Not complying with state law will trigger negative consequences as outlined in the staff report.
2. Modify staff's recommendation based on legally defensible findings.
3. Continue the item with direction for staff to return with additional information.



ATTACHMENT(S)

1. Previous Action
2. HCD letter dated January 2, 2023
3. City Council Resolution
 - a. HCD Comment Matrix
 - b. Statutory Provisions Checklist
 - c. November 2023 HCD Submittal Housing Element
4. Planning Commission Agenda Report – January 16, 2024