

# Housing Element Update FAQ

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## 1. Background

The Housing Element is part of Portola Valley’s General Plan and identifies policies and programs to meet the housing needs of the Town’s current and future residents. State law (Government Code Sections 65580-65589.8) requires that every city/town and county in California adopt a Housing Element approximately every eight years. Portola Valley’s current Housing Element covers the planning period from 2014-2022 and was adopted in 2015. The new Housing Element will cover 2023-2031<sup>1</sup> and is called the 6<sup>th</sup> Cycle. In addition, the State Department of Housing and Community Development (HCD) reviews and certifies that each jurisdiction’s Housing Element meets all the requirements of the law.

Every jurisdiction in California receives a target number of homes to plan for. This is called the Regional Housing Needs Allocation or RHNA (pronounced ‘ree-nuh’). Cities/towns do not need to build the housing, but do need to put in place the proper zoning and address constraints so the private sector can build the housing. The RHNA is broken down by income category. Portola Valley’s income specific RHNA is:

<b>Income Level</b>	<b>Number of Units</b>
Very Low Income (<50% of Area Median Income)	73
Low Income (80% of Area Median Income)	42
Moderate Income (80-120% of Area Median Income)	39
Above Moderate Income (>120% of Area Median Income)	99
<b>Total</b>	<b>253</b>

## 2. Reasons Why 6<sup>th</sup> Cycle Housing Element Is Different from Previous Cycles

There have been many changes to Housing Element law since the Town prepared the last Housing Element. Those changes are highlighted below.

**2a. Increased Allocation:** Virtually all cities in California have experienced a tripling or quadrupling of their RHNA allocations. This is largely due to extreme demand for housing in California coupled with the historic lack of housing production. In Portola Valley, much of our increased allocation is attributable to an equity adjustment. This is based on the State’s policy that more affluent, well-resourced communities should accommodate more housing, in particular increased lower income housing.

**2b. Restrictions on Sites:** The State has modified its site selection criteria, on the one hand, to prioritize vacant sites between .5 acre and 10 acres and, on the other hand, to de-emphasize built out sites.

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<sup>1</sup> Some stakeholders use the start date of 2022, because some of the modeling starts in this year. Because Portola Valley’s Housing Element will likely not be adopted until 2023, this report uses the later date.

**2c. Affirmatively Furthering Fair Housing:** There is a new requirement to ensure that site selection is furthering fair housing goals and that affordable housing is not located in one particular area.

**2d. Multi-family housing and “Mullin Default Density”:** Many cities find it challenging to prove to HCD that the selected sites will in fact yield true affordable housing. To address this, State Assemblymember Mullin sponsored legislation that instead permits municipalities to rely on specified default densities to achieve their affordable housing quota. The Mullin default density (the name references the bill’s author) for Portola Valley is 20 units per acre. In most cities, it is fairly easy to designate sufficient sites with this density. Because multi-family zoning is a new concept to Portola Valley (and much more challenging to envision in rural communities), this represents a major change to the Town’s longstanding single family zoning.

**2e. Town’s Physical Constraints:** The Town has a series of physical constraints that make site selection more difficult. These include wildfire risk, evacuation concerns, seismic and geological risks, and extensive parks and open space. The numerous constraints result in fewer sites which in turn results in the need for higher density at those sites.<sup>2</sup>

**2f. HCD Oversight:** HCD has been taken a more proactive and scrutinizing role in reviewing housing elements and with urging from many advocates has been granted more authority – and resources-- to enforce the Housing Element law. HCD has also increased their review period, creating scheduling challenges for cities (see the “Zoning Code Amendments” section below for details on HCD oversight after a housing element is adopted).

### 3. What have been the Town Council actions on the Housing Element update so far?

On October 14, 2020, the Town Council authorized the Town to enter into an agreement to collaborate on the Housing Element Update process with all the other jurisdictions in the County through 21 Elements. On April 28, 2021, the Town Council provided direction on the overall approach to the Housing Element update, including appointment of a Council Subcommittee and formation of the Ad Hoc Housing Element Committee. On July 14, 2021, Town Council approved a contract with Urban Planning Partners for Housing Element consulting services. The contract included the initial steps to evaluate the level of environmental review that would be required but did not include the funding for the analysis and production of the document, which will be part of the FY 2022-23 budget.

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<sup>2</sup> Based on HCD’s review of housing elements from other municipalities with similar constraints, including wildfire and sea level rise, HCD does not appear willing to make adjustments for such physical constraints. Instead their response is to increase density in otherwise developable areas.

March 22, 2022 Update on Town Process - The Ad Hoc Housing Element Committee (AHHEC) has met eight times since August 2021, and continues to advance its charge to develop a Housing Element that complies with State law and will be certified, while maintaining Town values.

The AHHEC has also studied, discussed and as applicable, provided guidance to staff and consultants regarding the following key building blocks of the Housing Element update process:

- Organization/evaluation of existing Housing Element - challenges and opportunities
- Portola Valley demographic and housing trends
- Housing affordability income categories
- Housing Element law – The California Department of Housing and Community Development (HCD) annual reporting requirement and consequences of not meeting Town’s Regional Housing Needs Allocation (RHNA)
- RHNA Zoning Target Concept (buffer) – including State’s No Net Loss Law
- Accessory Dwelling Units (ADUs) – past and forecasted Town production and affordability categorization
- Resilience and safety - wildfire risk and geology and seismic considerations
- Housing Element interaction with other General Plan Elements
- The Town’s Affiliated Housing Program – expansion or revision of the program
- Implications of [SB9](#)

Particularly critical to the AHHEC’s work is to recommend key sites for the Housing Sites Inventory, an inventory of land suitable for residential development, including vacant sites and sites with potential for redevelopment. The Committee first discussed housing sites at its October 18, 2021 [meeting](#) (see p. 5 for introduction to topic). As a first step, staff presented to the committee an analytical framework for sites analysis in the form of land use maps to identify constraints such as fire risk, geologic safety and limiting topography that may impact the analysis of potential housing sites. Staff then presented to the Committee several housing [site scenarios](#) previously assessed for market feasibility by the Town’s Housing Element consultant 21 Elements.

The Committee expressed interest in continued analysis of the two scenarios demonstrating the highest housing unit yield: Scenario B – increase density in Community Commercial (C-C) and Administrative Professional (A-P) districts by allowing increased Floor Area Ratio (FAR) and residential use and Scenario C – allow multi-family (minimum 20 dwelling units/acre) along Alpine Road and Nathhorst Triangle area. The 20 dwelling units/acre is widely accepted by the State as a minimum “default density” required to facilitate the development of affordable housing units.

The AHHEC resumed housing sites discussions at its February 21, 2022 meeting – see [staff report](#) (beginning on p. 5) – where the Committee reviewed a new series of maps (p. 17-28) to further refine the analysis of housing site scenarios B and C. In its discussion, the Committee expressed support for ongoing consideration of both site scenarios however, requested that staff and consultants provide an analysis of the Glen Oaks parcel of land owned by Stanford on Alpine Road to ascertain whether the parcel could serve as a potential housing site.

The February 28, 2021 AHHEC meeting – see [staff report](#) (beginning on p. 5) – again focused on housing sites analysis. The meeting was well-attended, with over 160 members of the public joining the virtual meeting. Typical meeting attendance is approximately 30 members of the public. Most public comment on the housing sites agenda item was provided by residents of the Nathorst Triangle area who largely expressed opposition to Scenario C – establishment of a new multi-family zone. The Committee also received some comments from business owners opposing Scenario B – allow residential in C-C and A-P zones. In response, Committee discussion culminated in the following new direction to staff:

1. Explore new housing sites including further analysis of the Glen Oaks Stanford parcel, the El Mirador parcel behind Town Hall and the Neely property on Portola Road
2. Further study the potential for mixed use in the Town's C-C and A-P zones while preserving local-serving businesses
3. Further study the development potential of the two vacant parcels on Alpine Road as sources of multi-family housing
4. Explore an “opt-in” approach where property owners could volunteer for upzoning
5. Investigate dispersing housing sites throughout the community via an overlay zone allowing for up to six dwelling units/acre, with the understanding that such units would be market rate with the potential for a small number of affordable units
6. Revisit the list of Town-owned property to see if there is development potential
7. Consider using the Town's affordable housing fund to provide incentives for affordable housing (such as multifamily or ADUs)
8. Revisit ADU process to see if additional streamlining is possible

For the remainder of its tenure, the AHHEC is anticipated to review the following:

- Housing Element policies and programs
- Continue Housing Sites Inventory discussion
- Implementing Housing Element Concepts – including necessary zoning code amendments to accommodate new housing sites
- Review Draft Housing Element

## 4. What Makes Up A Housing Element Update?

The update to the Housing Element necessitates three important steps by the Town: 1) Update to the Housing Element itself; 2) Zoning Code Amendments to implement the policies in the Housing Element; and 3) Environmental review under the California Environmental Quality Act (CEQA). There is a complex interplay between the timing and requirements for the Housing Element, Zoning Amendments, and CEQA review. Each of these items is discussed below, with additional details about timing and legal requirements.

The timeline for completion is very challenging and the different components have complex interdependencies. The information presented in this report is the best available at this time. As communication with HCD continues, the situation may continue to evolve.

### 5a. Housing Element

As cities/towns throughout California have been updating their housing elements, additional information has become available on HCD approach and timing:

- Since our initial scoping for the Housing Element Update, Urban Planning Partners now has a better sense of HCD's review process and expectations for these documents (based on reviewing comment letters in Southern California and Sacramento areas)
- We expect more than just one round of review given some cities are receiving three review letters. (Two to three is the norm in the SCAG region).
- HCD will try to accommodate two 90-day review periods, but this timeline is not guaranteed.
- We cannot rely on any informal or expedited review process (unlike in previous years).

From a practical point of view, the first submittal to HCD can be thought of as the rough draft and the second submittal as the final draft. Different cities are taking a different approach to the timing of each of these submittals. There is no clear best practice on how to approach the timing questions. Here are key issues for the Town Council to be aware of, working backwards from final certification:

- The Housing Element due date for certification by HCD is January 31, 2023
- There is a 120 day period beyond that date that can be used for the final HCD review and certification. If the Town is being conservative, this 120 day period should not be thought of as a grace period for the Town to use. Instead, it is intended to use for the back and forth with HCD to receive certification. The HCD review could take up to 90 of the 120 days.
- Intensive public meetings will be required in October-December 2022. Special meetings of the Planning Commission and Town Council may be required.
- HCD review is anticipated from late June to late September. This is considered the latest feasible submittal window. Some cities are submitting their draft housing elements as early as April.
- There is a required 30 day public review period prior to submittal to HCD.

- The full draft Housing Element needs to be completed to meet the above requirements and also go through appropriate public review.
- It is critical for the work of the Ad Hoc Housing Element Committee to continue at a brisk pace to meet the schedule outlined above.

### 5b. Zoning Code Amendments: the case for local control

In the last few years, State law has changed the requirements for zoning code amendments that are associated with housing elements. In past housing element cycles, it was common for jurisdictions to adopt a housing element with a “program” that required that city/town to adopt zoning code amendments after the housing element was approved. As a result, the zoning code amendment process typically followed the housing element process. State law now discourages that practice by requiring prescriptive regulations if the zoning is adopted after the housing element. If the Zoning Amendments are not approved by January 31, 2023 then the Town:

- Must rezone sufficient sites to accommodate the lower income shortfall within three years and 120 days from the beginning of the planning period. All rezoned sites must allow for at least 20 units per designated site and must accommodate at least 16 units.
- Ensure a) at least 50 percent of the shortfall of low- and very low-income regional housing need can be accommodated on sites designated for exclusively residential uses, or b) if accommodating more than 50 percent of the low- and very low-income regional housing need on sites designated for mixed-uses, all sites designated for mixed-uses must allow 100 percent residential use and require residential use to occupy at least 50 percent of the floor area in a mixed-use project.<sup>3</sup>
- Must permit owner-occupied and rental multifamily uses by right for developments in which 20 percent or more of the units are affordable to lower income households. By right means local government review must not require a conditional use permit, planned unit development permit, or other discretionary review or approval.

Note these requirements are in place for the whole Housing Element cycle, not just until zoning amendments are completed.

As a result, the Town has been proceeding with the Housing Element Update process under the assumption that the Zoning Code Amendments should be completed by January 2023 to retain more local control, if at all possible. According to the current work program, the Ad Hoc Housing Element Committee would lead the initial development of the Zoning Amendments to compliment the Housing Element. The formal review of zoning code amendments requires a specific procedure under State law, including a public hearing by Planning Commission and two reviews by the Town Council. As currently conceptualized, the Zoning Amendments

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<sup>3</sup> Government Code section 65583(f) and Government Code section 65583.2(h).



would have a light touch, with only the necessary changes and limited graphics or exploration of options.

The Town Council may wish to consider whether completing the Zoning Amendments by January 2023 is a critical priority, or whether it would be acceptable to complete them soon after the Housing Element is adopted. From a practical point of view, completing the Zoning Amendments after the Housing Element would mean if a housing developer submitted a multi-family project for one of the sites in the Town's Site Inventory consisting of 16 market rate units and 4 lower income units, the Town would be required to approve the project by right. This means the project would not be subject to a Planned Unit Development (PUD), Conditional Use Permit (CUP), design review or even site development discretionary review. This by right approval is similar to the by right approval required for ADUs and SB 9 projects. However since the Town does not currently have any adopted development standards for multi-family housing projects, the developer would likely assert they are not subject to even the basic setbacks and height requirements. Further since the project is ministerial or "by right", the California Environmental Quality Act would not apply to the project either.

It is not possible to know how likely it will be for a developer to come in right after Housing Element adoption to propose a project. As such, it is a judgement decision for the Town Council to consider the benefits and consequences of implementing the Zoning Code Amendments after adoption of the Housing Element.

### 5c. Environmental Review

Housing Element and zoning code amendments require environmental review under the California Environmental Quality Act (CEQA). Implementation of CEQA requires specific types of analysis in defined topic areas depending on the scope of the project/program. Additionally, it necessitates its own timeline including a public comment period. In order for the CEQA analysis to begin, the scope of the project/program that you are studying needs to be (relatively) set. Typically, there is no way to expedite the environmental review process beyond coordination with the consultants performing the analysis. As the Council is aware, consultants that conduct this type of work are very busy because all of the jurisdictions in the Bay Area are undertaking their Housing Element Updates at the same time. To complete the CEQA document in time, the work needs to begin in April and proceed without significant changes to the project scope.

In addition, State laws for environmental review have changed in recent years to require a different type of traffic analysis; Vehicle Miles Traveled (VMT) has replaced Level of Service (LOS). Staff has been working with the consultant team since last fall on the initial steps required for the Town to implement VMT for the Housing Element Update so that this step would not delay the review process.

The current Urban Planning Partners contract includes the initial VMT analysis; however, the contract does not include the full environmental analysis or production of the CEQA document itself. In July 2021, when the contract was approved, it was not known what type



of environmental analysis would be required. Staff recommended starting the initial steps and returning to Town Council when additional information became available. The preliminary work on the CEQA topic areas indicates that a Mitigated Negative Declaration (MND) is the appropriate CEQA document for the Housing Element and associated Zoning Amendments. The budget for that work is \$152,918, not including a staff-recommended contingency. This is anticipated to be budgeted in the FY 2022-23 budget.

## 5. What Happens if the Town Does Not Have a Certified Housing Element?

State law has always required HCD to certify Housing Elements. In the past failure to receive certification carried little consequence. Over the past few years the State legislature has ratcheted up the consequences for failing to comply with the Housing Element law. As part of the 2021-2022 state budget, HCD received additional staff to grow its accountability efforts and formed the Housing Accountability Unit (HAU). The HAU also has authority to refer enforcement actions to the California Attorney General for prosecution.<sup>4</sup> As described below, there are now also consequences for submitting a late housing element as well as failing to submit a compliant housing element. And most significant, there are now consequences for failing to actually produce the housing planned for in the Housing Element, though those penalties are currently not as robust as the penalties for not submitting a housing element.

### 6a. Consequences of Submitting a Late Housing Element

Towns that fail to adopt a valid housing element within 120 days of the statutory deadline to revise the housing element must complete all necessary rezones within one year (as opposed to three years) of that statutory deadline. Towns that adopt more than one year from the statutory deadline cannot be found in substantial compliance with Housing Element Law until the local government has completed any required rezoning.

### 6b. Consequences of Not Submitting a Housing Element to HCD

Below is a summary of the most common penalties for not adopting a compliant Housing Element.

**6c. Additional Housing Element Costs.** If the City Council fails to adopt the Housing Element on schedule, the Town Council will be required to revise its Housing Element more frequently in the future. Per Government Code Section 65588(e) (4), the eight-year cycle will be revised to a four-year cycle until the Town has adopted at least two consecutive revisions by the statutory deadline. By increasing the submission frequency, the Town will experience a substantially increased administrative burden and cost. Depending on the timing of the updates, the Town may be subject to completing as many

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<sup>4</sup> A recent example of the vigilance of the HAU or “Housing Force Strike Team” is the recent warning issued by the Attorney General to Woodside relative to their SB 9 ordinance.

as three updates within an eight-year period in order to realign its update schedule with the required schedule.

**6d. Financial Consequences.** If the Town Council fails to adopt a compliant Housing Element, the Town will no longer be eligible for State funding grants, such as planning and transportation grants which the Town has received in the past.

**6e. Fines.** In accordance with State Law (AB 101), HCD is required to publish a list of cities that have failed to adopt a certified Housing Element consistent with State Law. HCD is also required to notify the California Office of the Attorney General of all towns that are out of compliance. Should the Attorney General or a housing advocate file a lawsuit and should a Court find that the Town is in violation of State Housing Law, the court has the power to issue progressive fines from \$10,000 to \$600,000 per month, until the Council adopts a compliant Housing Element.

**6f. Litigation Costs.** If the Town fails to adopt a compliant Housing Element, the Town should be prepared to defend itself against litigation and/or enforcement action brought against the Town and incur potentially significant litigation costs. If the Town loses the litigation, it not only pays for its own defense costs but also pays the attorney's fees of the advocates bringing the action. Some examples include:

- In 2006, local advocates filed a lawsuit against the City of Pleasanton, because the Pleasanton City Council refused to adopt a Housing Element in compliance with State law. The California Attorney General joined the suit in 2009. In its unsuccessful effort to defend itself, the Pleasanton City Council paid \$1.9 million just to cover the plaintiff's legal fees.
- In 2012, the City of Menlo Park settled a lawsuit filed by three housing advocate groups for failure to adopt a Housing Element. Menlo Park paid \$114,000 in attorney's fees to plaintiffs to cover the filing of the lawsuit.
- The City of Mission Viejo lost in its defense and was required to pay attorney's fees of more than \$800,000.
- The City of Huntington Beach lost in its defense. In addition to its legal fees, the City of Huntington Beach estimated that it missed out on the opportunity to receive as much as \$625,000 in SB2 planning grant funds.

Staff is not aware of a single California city that has failed to adopt a compliant Housing Element and has successfully defended its decision in court.

**6g. Loss of Local Land Use Control.** If the Town Council fails to adopt a compliant Housing Element, the Town Council should be prepared to lose its ability to regulate local land use. If a court finds that the jurisdiction's Housing Element is inadequate, it must include one or more of the following remedies in its order:

- Suspension of the jurisdiction's authority to issue building permits or related permits prior to the issuance of such permits for housing projects;

- Suspension of the jurisdiction's authority to grant zoning changes, variances, and map approvals;
- Mandated approval of residential housing projects. (Gov. Code 65755).
- If a town has not adopted a compliant Housing Element within 18 months following a court order, the court may appoint a receiver to take all governmental actions necessary to bring the jurisdiction's Housing Element into compliance. (Gov. Code 65585).

## 6. What Happens if the Town Does Not Build Housing on the Town's Site Inventory List?

In 2017, SB 35 was adopted to allow for a Streamlined Ministerial Approval Process for developments in towns that have not yet made sufficient progress towards their allocation of the regional housing need. SB 35 requires towns to file an Annual Progress Report (APR) on April 1 of each year, reporting on how many housing units it permitted in the prior calendar year compared to the number of units projected in the housing element. If the Town does not meet its housing quota for the year, developers are allowed a streamlined ministerial permitting process for qualifying multi-family projects. Eligible developments must include a specified level of affordability, be on an infill site, comply with existing residential and mixed-use general plan or zoning provisions, and comply with other requirements such as locational and demolition restrictions. The affordable housing percentage required to qualify depends on the local jurisdiction's progress toward meeting their Regional Housing Needs Allocation (RHNA) targets. The other locational restrictions are similar to those contained in the new SB 9 legislation.

In Portola Valley, it is likely that SB 35 eligible sites would be the new multi-family sites designated in the Housing Element inventory. Since SB 35 sites must meet some additional criteria above and beyond the criteria necessary for inclusion on the housing inventory, staff does not anticipate developers to take advantage of SB 35. However, because the RHNA is so high this cycle and it will be more challenging to comply with the annual housing production requirements, staff wants to emphasize the potential impact of this new penalty. In addition, staff anticipates the Legislature will continue to increase penalties for failing to build housing units.

## 7. What are the Next Steps in the Update Process Post the March 23<sup>rd</sup> Council Meeting?

There are several factors currently influencing the work plan and timing. First is the latest information about the HCD review process that compresses the time the Town has to complete the first full draft of the Housing Element (discussed above). Second is the planned leave of one of the Town's key staff members. Third is the robust public engagement and detailed work of the Ad Hoc Housing Element Committee.

At their February 28<sup>th</sup> meeting, the Ad Hoc Housing Element Committee expressed the desire to consider additional approaches to the Site Inventory<sup>5</sup> that would require additional time and resources. It appeared as if the additional time necessary to complete this analysis would mean that the original schedule and budget could no longer be met. As a result, staff has been in communication with the consultant team, additional consultants, other municipalities (particularly similarly-sized with similar land use patterns), and colleagues to develop possible options to move forward. As the Council may recall, the State laws that govern timing of the Housing Element and Zoning Amendments are new with this update and are all subject to interpretation. This discussion is based on the best available information.

At this point in the Housing Element Update, it is clear that additional resources will be necessary to reach completion. Staff has identified a range of options for the Council to consider.

### 8a. Additional Resources- Critical for Completion

- Urban Planning Partners - \$85,410 (\$98,222 with contingency)  
These additional funds would cover the planned leave of a full time staff member, additional funds to explore the Ad Hoc Housing Element Committee's ideas, and additional funds to coordinate with HCD and make revisions per their comments. Some of these funds would be expended this fiscal year and some next fiscal year.
- Economic Feasibility Firm - \$15,000 - \$30,000 (depending on scope)  
Based on the recent work of Ad Hoc Housing Element Committee, staff's opinion is that additional financial feasibility analysis will be required. This proposal includes a new contract with a firm that conducts financial feasibility analysis for land development. Staff has identified a firm that will likely be available but it will depend on the final timing and the Town's needs. The scope of the work and the costs will depend on the specific implementation of the Committee's ideas. The previous firm that conducted analysis for the Town is not available to complete additional work. These funds would be needed this fiscal year.

### 8b. Additional Resources - for Council Consideration

- Zoning Amendments - \$75,000 – 125,000 (depending on scope)  
One of the firms that bid on the Housing Element update contract had originally only provided a proposal to the Town for just the Zoning Amendments. Staff reached back out to them to see if they would be interested in joining the team. Bringing this firm on board provides benefits to the overall process. First, they have architects and urban designers on their staff so they can provide more of a graphics based approach to the zoning code amendments. Based on

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<sup>5</sup> The Site Inventory is the part of the Housing Element that designates specific sites for increased housing development, including affordable housing. This typically requires upzoning.

suggestions from the community, this may be a helpful skillset to bring into the process. Second, their approach to the Zoning Amendments would be more comprehensive, which may better meet the expectations of the community. Third, their participation would open up capacity for Urban Planning Partners to complete other work as needed. This work would be spread over this fiscal and next, with the majority of the work next fiscal year.

If the Council decides that it is not a priority to complete the Zoning Amendments by the deadline (as discussed above), then these funds are not needed at this time.

- **Additional Department Support - \$20,000**  
Add additional consultant staffing to the Planning and Building Department to increase overall capacity. Given the community's high level of involvement and requests for additional communications, it would benefit the process for the Director to spend additional time on this work. The additional funds would be spent on a Management Analyst to assist the Planning and Building Director with management of the department, such as contract amendments, scheduling the many priorities of the department with a project management approach, grant administration, and reporting. These funds are for this fiscal year only.