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POLICY DEVELOPMENT

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Ms. Cathy Creswell
Acting Deputy Director
California Department of Housing and Community Development
1800 Third Street
Sacramento, CA 94252

Re: Alameda County Draft Housing Element

Dear Ms. Creswell:

The Home Builders Association of Northern California ("HBA") respectfully submits these comments to the California Department of Housing and Community Development ("Department") on Alameda County ("County")'s Draft Housing Element ("Draft") pursuant to Government Code § 65585, subd. (c).<sup>1</sup> The County submitted the Draft, as well as accompanying documents, to the Department on September 13, 2001.

HBA has thoroughly reviewed the documents submitted by the County and determined that the Draft does not comply with the requirements of Housing Element Law. As will be discussed more fully below, the Draft is deficient in these important respects:

- I. The Draft does not identify adequate sites necessary to accommodate the County's share of the regional housing need for any income category. Although the Draft contains a vacant land inventory which purports to establish that the County has identified adequate sites to accommodate 10,184 housing units, the inventory lacks basic information concerning site adequacy and therefore does not demonstrate that the Draft identifies sufficient sites to accommodate the County's housing need.

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1Gov't Code § 65585, subd (c) provides that "[t]he department shall receive and consider any written comments from any...group, or person regarding the draft...element under review." All further statutory references are to the Government Code.

II. The Draft does not adequately identify, discuss, and mitigate existing governmental constraints upon the development of housing in the County. Most glaringly, the Draft fails to identify Measure D—a recently adopted initiative measure that severely restricts housing development in the County—as a governmental constraint, and as a result contains no proposals to mitigate Measure D’s substantial housing related impacts.

III. The Draft does not explain how its quantified new construction objective—which the Department defines as “the number of units that potentially may be constructed over the planning period given the locality’s land resources [and] constraints which cannot be mitigated or removed”—can be squared either with the County’s total housing need or its asserted housing development capacity. The Draft’s quantified new construction objective is only 909 units. Yet the County’s housing need is 5,310 units and the Draft asserts that the County has identified existing sites that can realistically accommodate 10,184 units.

It is vitally important that the Department ensure that the County remedy the Draft’s substantial shortcomings. The County’s total housing need is the fourth largest of the 15 jurisdictions in Alameda County and represents approximately 11 percent of the County-wide housing need; its housing need for very low and low income units is the second largest. Without an effective housing element to guide and promote the development of adequate housing in the unincorporated area, there will be little hope that Alameda County as a whole will accommodate its share of the region’s housing need.

**I. The Draft Does Not Identify Adequate Sites Necessary to Accommodate the County’s Share of the Regional Housing Need For Any Income Category.**

A core provision of Housing Element Law is the “adequate sites” requirement. Section 65583 provides that “[t]he housing element shall identify adequate sites for housing...and shall make adequate provision for the existing and projected needs of all economic segments of the community.” To demonstrate compliance with the adequate sites requirement, a housing element must include “[a]n inventory of land suitable for residential development...and an analysis of the relationship of zoning and public facilities and services to these sites.” § 65583, subd. (a)(1).

The Department has determined that the land inventory must address each site’s zoning, applicable development standards, infrastructure availability, location, and physical and environmental features in sufficient detail to provide a basis for “determining the realistic number of dwelling units that could actually be constructed on those sites within the current planning period of the housing element.” California

Department of Housing and Community Development, *Housing Element Questions and Answers* (September 2000) ("*Housing Elements*"), p. 17. The Department has also determined that the land inventory establishes compliance with the adequate sites requirement only if the land inventory "demonstrates sufficient realistic capacity at appropriate densities and development standards to permit development...to accommodate the community's share of the regional housing need by income level." *Housing Elements*, p. 18.

The Draft addresses the adequate sites requirement at pp. 93-95. The Draft concludes that the County has identified sites to accommodate 10,185 housing units through the planning period, with the 10,185-unit capacity comprising 185 very-low and low income units and 10,000 moderate and above-moderate income units. Because the County's housing need includes 2,552 very-low and low income units, the Draft acknowledges that it does not identify sufficient sites to accommodate the County's housing need for these income levels.<sup>2</sup> The Draft does assert, however, that it identifies sufficient sites to accommodate the County's housing need for moderate and above-moderate income housing units.

While HBA concurs with the Draft's assessment that it does not identify adequate sites to accommodate the County's housing need for low and very-low income units, HBA strongly disagrees with the Draft's contention that it identifies adequate sites to accommodate the County's housing need for moderate and above-moderate income units. The Draft's land inventory simply contains none of the information necessary to allow the Department or the public to assess the Draft's conclusion that the County has identified existing sites that will accommodate 10,185 housing units. The Draft does not identify the location or size of any specific site, let alone the applicable planning and zoning designations and whether or not it has public facilities and services available. In short, the Draft provides no information concerning the actual development capacity for any site.

HBA urges the Department to find that the Draft does not comply with the adequate sites requirement and to request that the County provide the Department and the public with answers to the following questions for *each* site included in a revised land inventory:

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<sup>2</sup> In response to the acknowledged deficiency, the Draft identifies a preliminary list of implementation measures that will be "more fully developed...[and] assessed...prior to final adoption of the Update." (Draft, p.94). HBA reserves the right to provide additional comments once the County fleshes out the final list of implementation measures. At this time, HBA notes that none of the potential implementation measures relates to specific sites or actually commits the County to do anything.

- What is the site's specific location?
- What is the site's size?
- What is the site's general plan designation?
- What is the site's zoning designation?
- Is the site subject to an overlay zoning designation?
- What person or entity owns the site?
- Has that person or entity indicated an interest in developing the site with housing within the planning period?
- Are public facilities and services (including sewer and water) available to serve the number of housing units projected by the County for the site?
- What entity or entities are expected to provide public facilities and services?
- Are there any physical constraints to developing the site with the type and number of housing units projected by the County for the site?
- Are there any environmental constraints to developing the site with the type and number of housing units projected by the County for the site?
- Is the site within an area designated as critical habitat for either the California red-legged frog or the Alameda whipsnake?
- Would the development of the type and number of housing units projected by the County involve development that would protrude over a hilltop or ridgeline, occur on a slope of more than 20 percent, or occur within 100 feet of a riparian corridor?
- Is development of the type and number of housing units projected by the County for the site financially feasible?
- Has the County Supervisor in whose district the site is located committed to support development of the type and number of housing units projected by the County for the site?

Only by providing information sufficient to answer these questions will the Draft comply with the requirement that it provide a basis for "determining the *realistic* number of dwelling units that could *actually be constructed* on those sites *within the current planning period* of the housing element." *Housing Elements*, p. 17 (emphases added).

Two examples suffice to illustrate the point. The first relates to the critical habitat question. Measure D prohibits the development of housing in any area of the County that has been designated as critical habitat.<sup>3</sup> Within the last 13 months, the U.S. Fish & Wildlife Service has designated 241,161 acres in Alameda County as critical habitat for

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<sup>3</sup> HBA has submitted an Appendix of documents with this comment letter. The Appendix includes a copy of Measure D.

the California red-legged frog and 205,083 acres designated for the Alameda whipsnake.<sup>4</sup> As the entire County comprises 471,040 acres, these designations obviously will profoundly impact the "actual" ability to develop housing on many sites within the County.

The second example relates to the physical constraints question. Outside the context of the land inventory discussion, the Draft concedes that physical constraints will have a direct bearing on the development of housing in unincorporated areas:

In the County's unincorporated urbanized areas (e.g. Castro Valley), most of the remaining undeveloped parcels are infill parcels that have one or more physical constraints, such as slope, drainage, or traffic circulation. Housing projects on these infill sites must be evaluated under [CEQA], which may result in reducing the amount of land available for housing....  
Draft, p. 80

Without answers to the critical habitat, physical constraints, and other questions listed above, the Draft's land inventory will remain inadequate and the County unable to demonstrate compliance with the adequate sites requirement.

**II. The Draft Does Not Adequately Identify, Discuss, and Mitigate Existing Governmental Constraints Upon the Development of Housing in the County.**

A second core provision of Housing Element Law is the governmental constraints analysis requirement. Section 65583, subd. (a)(4) requires a housing element to include "[a]n analysis of potential and actual governmental constraints upon the...development of housing for all income levels.... The analysis shall also demonstrate local efforts to remove governmental constraints that hinder the locality from meeting its share of the regional housing need...." The Department has elaborated on the governmental constraints analysis requirement:

The analysis should describe past or current efforts to remove governmental constraints. Where the analysis identifies that constraints exist, the element should include program responses to mitigate the effects of the constraint.

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<sup>4</sup> The Appendix includes excerpts from the U.S. Fish and Wildlife Service's final rules designating critical habitat for both species that are relevant to Alameda County.



Each analysis should use specific objective data, quantified where possible. A determination should be made for each potential constraint as to whether it poses as an actual constraint. *Housing Elements*, p. 21.

The Department has identified the following measures as potential governmental constraints: growth controls; voter approval requirements for rezonings or general plan changes; urban growth boundaries; zoning (including density, parking requirements, lot coverage, lot sizes, unit sizes, design criteria, floor area ratios, setbacks); and open space requirements. *Housing Elements*, p. 23. As a general proposition, the Department has determined that the governmental constraints analysis "should demonstrate how the... [potential constraint] accommodates the locality's current regional housing need allocation for all income groups. If not, the element must include a program to mitigate the impact of the ordinance and allow accommodation of the total housing need." *Housing Elements*, p. 23.

The Draft addresses the governmental constraints analysis requirement at pp. 78-85. While the Draft identifies and discusses some potential governmental constraints, it does not identify or discuss the single most important actual governmental constraint impacting the County—Measure D. Incredibly, the Draft asserts that Measure D is a *non-governmental* constraint.<sup>5</sup> Based on this (mis)characterization of Measure D, the Draft avoids any substantive analysis of Measure D's direct impacts on the County's conceded inability to meet the adequate sites requirement for all income levels, and does not propose any programs or measures to mitigate those direct impacts.<sup>6</sup>

<sup>5</sup> It is HBA's understanding that the County's justification for characterizing Measure D as a non-governmental constraint is that Measure D was adopted by the electorate as an initiative measure. There is no support for this position. Since the local initiative process was added to the California Constitution, it has been universally understood that when adopting legislation through the initiative process, the electorate acts as a branch of *government* co-equal with elected representatives. Patently, therefore, measures adopted through the initiative process that constrain housing are *governmental* constraints and must be analyzed as such in the housing element. The Department recognizes this and has consistently treated initiative growth control measures such as Measure D as governmental constraints.

<sup>6</sup> It is important to note that Measure D itself contains no measures that mitigate its substantial impacts on housing development in the County. Measure D does not designate or zone any area for housing development within the urban growth boundary it establishes; Measure D does not facilitate or streamline housing development within the urban growth boundary; Measure D does not increase housing densities on any area within the urban growth boundary. Finally, while Measure D purports to authorize the Board of Supervisors to allow housing outside the urban growth boundary if certain

These omissions are striking in light of the fact that the County has previously clearly recognized Measure D's direct impact on the County's capacity to meet its housing need. Following Measure D's adoption, the County formally appealed to the Association of Bay Area Governments to reduce its housing need allocation. The County's appeal expressly referenced the passage of Measure D as the reason for the appeal:

The County is appealing its allocation in light of the passage of Measure D on November 7 by the voters of Alameda County. Measure D has largely removed the potential for significant residential development in much of the unincorporated County.... Measure D may also have impacts on the County's ability to meet its housing needs in other portions of unincorporated East County and the Castro Valley area. Letter from Alameda County Planning Department to Association of Bay Area Governments, Jan. 3, 2001.<sup>7</sup>

The County's appeal also indicated that "County planning staff is...working on a full analysis of Measure D's implications, including a discussion of its likely effect on the County's capacity to produce housing." The results of that analysis were presented by the staff of the County's Planning Commission in a March 19, 2001 document titled Staff Analysis of the Effect of the Measure D Initiative on County Policy ("Staff Analysis"). The Staff Analysis concluded that with the passage of Measure D, "[t]he County's capacity to address its State and ABAG-mandated fair-share housing requirements has been significantly affected...." (emphasis added).<sup>8</sup>

conditions are met, the conditions are so stringent that they render the authorization wholly illusory. For example, the Board may only authorize housing beyond the urban growth boundary if it is "indisputable" that there is no land within the urban growth boundary to meet the County's housing need. Of course, in practice this is an impossible standard to meet; such matters are always "disputable." Also, the Board cannot authorize housing beyond (or within) the urban growth boundary on any area designated as critical habitat. As discussed previously, hundreds of thousands of acres in the County have been designated as critical habitat. In sum, there is nothing in Measure D itself that affirmatively and effectively promotes the actual construction of housing *anywhere* in the County.

<sup>7</sup> The Appendix includes the appeal letter.

<sup>8</sup> The Appendix includes the Staff Analysis.

The County's earlier assessments of Measure D's impacts, prepared at a time when the County was seeking to establish an objective understanding of Measure D's effects on housing development in the County, substantially undermine the Draft's present treatment of Measure D. HBA urges the Department to find that the Draft does not comply with the governmental constraints analysis requirement and to request that the County provide the Department and the public with a revised governmental constraints analysis that: properly characterizes Measure D in general—and the provisions identified on pp. 91-92 in particular<sup>9</sup>—as governmental constraints; provides a detailed analysis of these provisions and their impact on the County's conceded inability to meet the adequate sites requirement for all income levels; and proposes programs and measures to mitigate those impacts. The analysis should focus particular attention on the relationship between the County's need to accommodate 2,552 very-low and low income units and that aspect of Measure D which permanently prevents the County from approving 12,500 housing units—including 1250 very-low and low income units—that were in the planning process in the eastern portion of the County (the "North Livermore Project").<sup>10</sup>

### **III. The Draft Does Not Justify Its Extremely Low Quantified New Construction Objective.**

A third core provision of Housing Element Law is the requirement that a housing element include a quantified objective for new housing construction over the planning period. Section 65583, subd. (b)(1) provides that a housing element shall include a "statement of the community's...quantified objectives...relative to...the development of housing." The Department has defined quantified objectives as "the number of units that potentially may be constructed over the planning period given the locality's land resources [and] constraints which cannot be mitigated or removed." *Housing Elements*, p. 47.

The Draft establishes the quantified objective for new construction over the planning period as 909 units (Draft, p. 127). The quantified objective comprises 145

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<sup>9</sup> In addition to the provisions identified on pp. 91-92, the analysis should discuss the other elements of Measure D that constrain housing development, including Measure D's stringent water supply requirement (Policy 236) which goes far beyond the requirements recently added to state law by SB 221, and Measure D's east County inclusionary zoning requirement (Policy 43) which contains no incentives or offsets to address the burden this requirement will impose on market rate housing.

<sup>10</sup> The Appendix includes the portion of the North Livermore Project Specific Plan that describes the Project's affordable housing component.



"affordable" units and 764 "market rate" units. The Draft's quantified objective is substantially below both the County's total housing need (5,310 units) and the number of units for which the Draft asserts it has identified adequate sites (10,184 units). While Housing Element Law allows a community's quantified objectives to be less than its housing need, it requires the variance to be *explained and justified*. The Draft makes no attempt to explain or justify. If 909 units is in fact "the number of units that potentially may be constructed over the planning period given [the County's] land resources [and] constraints," then it is clear that the Draft's conclusions regarding adequate sites and governmental constraints—particularly Measure D—are profoundly inaccurate.

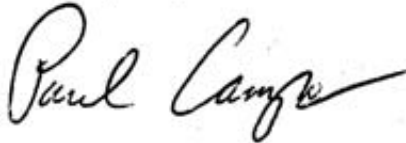
HBA urges the Department to find that the Draft does not comply with the quantified objectives requirement.

#### Conclusion

HBA has identified substantial deficiencies in the Draft and urges the Department not to certify the Draft as being in compliance with Housing Element Law. If and when the County responds to the Department's comments on the Draft, HBA reserves the right to comment on the County's response. Pursuant to the Public Records Act, HBA requests copies of all future correspondence and exchange of documents and information between the Department and the County.

HBA appreciates the opportunity to comment on this important matter. If you have questions or comments, please contact the undersigned at 925-820-7626.

Yours very truly,



Paul Campos  
General Counsel

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