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June 26, 2013

Clerk of the Board
Air Resources Board
1001 I Street
Sacramento, California

RE: Air Resources Board Hearing on Draft Plan Bay Area

Dear Members of the Board:

The Public Interest Law Project is a state support center for local legal services programs serving lower income households in California. We write on behalf of individuals in need of affordable housing in the Bay Area in safe, healthy and “high opportunity” neighborhoods with access to affordable transit and proximate to good jobs. The draft Plan Bay Area undermines rather than maximizing social equity by steering of 70% of new residential development to Preferred Development Area’s (PDAs) self-nominated by local governments rather than also to other high opportunity areas with similar access to transportation and employment opportunities. This skewed allocation, drawn from the legally flawed methodology used by ABAG in its proposed Regional Housing Need Allocation (RHNA), violates state Housing Element Law and state and federal civil rights laws. Its incorporation in the draft Plan deprives the Board of the basic information necessary to approve the Plan. Accordingly, unless ABAG/MTC amends the Plan to incorporate an adequate methodology and adjusted RHNA, the Board must reject the Plan pursuant to Government Code §65080(b)(2)(J)(ii).

The Legal Deficiencies Deprive the ARB of the Bases to Accept or Reject the Plan

We and several local, regional and state organizations, brought the serious deficiencies to the attention of ABAG, MTC, the state Department of Housing and Community Development (HCD) and the federal Department of Housing and Urban Development (HUD) almost a year ago in a detailed letter, and that letter is attached to this submission.¹ Both HCD and HUD responded, notifying ABAG of

¹ We provided comment to ABAG regarding its adoption of the RHNA methodology on July 16, 2012, which is attached. These issues were previously raised with ABAG in numerous letters, including in comments submitted by members of the 6 Wins Network and in letters from the Public Interest Law Project with respect to the fair housing issues on October 26 and December 22, 2011.

serious legal inconsistencies of the methodology and allocation. Those letters are also attached to this submission and as established in the most recent letter from HCD—sent to ABAG just last week—ABAG has yet to bring the RHNA allocation into compliance with the law.

Government Code §65080(b)(2)(B) provides that an SCS must consider state housing goals, and California’s state housing goals reside in California’s Housing Element Law (Government Code §§65580-65589.8). The Housing Element Law provides that each local government must make adequate provision for its share of the regional housing needs of all economic segments of the community. And it makes clear that the regional Council of Governments (in this case ABAG) must distribute the housing needs according to objective factors and not on local government’s voluntarily electing to accept an allocation.

Government Code §65080(b)(2)(J)(ii) in turn establishes that the ARB’s acceptance or rejection of an SCS must be based on a determination that the SCS would achieve the greenhouse gas emission reduction targets established by the Board. It is not possible *per se* for the Board to make this determination when the submitted SCS is predicated on an illegal methodology and regional housing needs allocation. Any determination would necessarily be arbitrary, lacking sufficient basis.

The Plan is Inconsistent with the Recommendations of the RTAC

As the Board is aware, ARB’s Regional Targets Advisory Committee (RTAC) determined that a guiding principle in the implementation of SB 375 was to “maximize social equity.” (RECOMMENDATIONS OF THE REGIONAL TARGETS ADVISORY COMMITTEE (RTAC) PURSUANT TO SENATE BILL 375 [“RTAC Report”], p. 3.) Without a correction to its inequitable distribution of regional housing needs, the Plan Bay Area undermines rather than maximizes social equity. As the RTAC found:

Inequitable land use practices and inadequate public transit access as well as economic and racial segregation can result in exclusion, limitations on employment opportunities, sprawl and excess VMT. [RTAC Report at 28.]

Moreover, the RTAC recommended that ARB “work closely with other state agencies that have a key role in land use and transportation planning to coordinate strategies so that they do not conflict with other state goals and priorities...” (RTAC Report at 14) In this regard the report acknowledges that the “Department of Housing and Community Development (HCD) is responsible for ensuring that local housing elements meet requirements, which will have a new connection to the RTP process as a result of SB 375.” (*Ibid.*) Until the deficiencies identified by HCD are rectified, the Board must not approve the Plan.

Specific Problems with the RHNA Methodology

The RHNA allocation as incorporated into the Plan is weighted heavily on whether a city or county has voluntarily established one or more PDAs and local jurisdiction preferences about the size and nature of those PDAs. Accordingly, the factors and objectives set forth by statutes play no role in the distribution of the lion's share of the RHNA. Areas with substantial jobs and in-commuting are allowed to opt out. In fact, the methodology relies primarily on the one factor that the statutes explicitly prohibit from consideration – the “existing zoning ordinances and land use restrictions of a locality....”² This is an explicit criterion in the establishment of the PDAs, which are limited to places that are “planned or [are] planning for more housing.”³ This methodology is wholly inconsistent with the fundamental principle of Housing Element Law that local governments all have a responsibility to accommodate their fair share of the regional need for lower income housing.⁴

While a criterion for the establishment of PDAs is that “[t]he area is near existing or planned fixed transit (or served by comparable bus service),” many cities with areas that meet the criterion did not volunteer to establish PDAs. By statute, the allocation methodology must include “opportunities to maximize the use of public transportation and existing transportation infrastructure,”⁵ yet ABAG's proposed methodology arbitrarily includes this factor only with respect to PDAs, excluding other places that are similarly situated in all relevant respects. This amounts to an abdication of the duty to allocate the RHNA based on an analysis of objective factors.

The Methodology and RHNA Allocation Run Afoul of Civil Rights & Fair Housing Laws

Finally, the failure of the proposed methodology to allocate the RHNA based on objective and equitable factors runs contrary to state and federal fair housing and civil rights laws. By concentrating 70 percent of new housing development into PDAs volunteered by local governments, the proposed methodology perpetuates and may exacerbate racial segregation. One significant purpose of the fair housing and housing element laws is to increase the housing opportunities of lower income households in high opportunity communities historically walled-off from affordable housing by restrictive zoning practices. The methodology will aid and abet jurisdictions that seek to exclude new residents, especially lower-income residents of color, by arbitrarily allowing cities opposed to new development to opt out of any share of 70 percent of the RHNA. The

² Government Code §65584.04(d)(2)(B). All statutory citations are to the Government Code unless otherwise indicated.

³ *Application Guidelines for Priority Development Area Designation*, available at http://www.bayareavision.org/pdaapplication/ApplicationGuidelines_OCT2011_FINAL.pdf.

⁴ See §§65580, 65581 and 65583 of the Housing Element Law.

⁵ §65584.04(d)(3).

opportunity for exclusion of affordable housing is antithetical to the obligation of local governments under state and federal law to provide opportunities for equal housing to lower income households, racial and ethnic minorities, persons with disabilities, and families with children.

The Voluntary PDA Methodology Exacerbates GHG Emissions.

The RHNA methodology fails to adequately address the jobs-housing relationship required by Housing Element Law (§65584.04(d)(1)), and as a result, increased commuting and greenhouse gas emissions will result owing that the additional vehicle miles traveled, caused by this imbalance. ABAG commendably prepared a preliminary analysis in September 2011 on the local jobs-housing fit, however this analysis played no role whatsoever in the adopted methodology.

The jobs housing imbalance affects the entire ABAG region, but some specific comparisons highlight the increased emissions to be caused by the allocation. Healdsburg, Novato and Larkspur have a combined total of over 27,000 workers commuting into jobs each day, and all are slated to have SMART train stations which will be in service by 2016, yet none has volunteered to create even a single PDA. As a result, the methodology allocates these three cities (with combined population of about 75,000) a total combined RHNA of only 700 units. That share is far too low for transit-connected job centers. In fact, other cities of similar size which have volunteered for even modest PDAs are receiving more appropriate allocations: for instance, Walnut Creek, San Ramon and other cities of under 75,000 in population are slated to receive RHNA shares ranging from 1,285 to 2,203. Dublin, a PDA volunteer with a similar but smaller population than Novato's and with 12,000 in-commuters to Novato's 15,000, will receive 2,176 units, to Novato's 413.⁶

In addition to vehicle miles traveled, ABAG's decision to concentrate 70 percent of the RHNA in the voluntary PDAs runs afoul of §65584.04(3), which requires the allocation methodology to include "opportunities to maximize the use of public transportation and existing transportation infrastructure." One of ABAG's three criteria for the designation of a PDA is that "[t]he area is near existing or planned fixed transit (or served by comparable bus service)." Public transportation facilities and services, however, exist both in PDAs and in places throughout the Bay Area that have not established PDAs. Many non-PDA jurisdictions, for instance, include PDA-like sites eligible for "Transit Priority Projects" (TPPs), a new project-type created by SB 375.⁷

⁶ On the County level, 56% of Napa County's workforce—27,592 workers—are in-commuters, yet the County's RHNA allocation has been reduced from 3705 for the current period to 1482 for the next planning period—a 60% reduction. And Marin County is not far behind. 47% of Marin County's workforce—55,477 workers—are in-commuters, yet the County's RHNA allocation has been reduced from 4882 for the current period to 2292 for the next planning period—a 53% reduction.

⁷ A "Transit Priority Project" (TPP), a new category of development that must (1) contain at least

To be consistent with §65584.04(d)(3), ABAG's methodology should treat all of these TPP-eligible PDA-like places similarly.⁸ Instead, the methodology allocates 70 percent of the RHNA exclusively to those places served by transit which have voluntarily established PDAs. Other transit-connected places have not been assigned any portion of the 70 percent share of RHNA set aside for PDAs.⁹ Moreover, even the distribution of the 70 percent share of the RHNA is largely arbitrary and fails to maximize the use of public transit, as it is based almost exclusively on the amount of growth that each local jurisdiction has volunteered for in its PDA.

Improper Concentration of RHNA Within Voluntary PDAs

Even among the jurisdictions that have volunteered PDAs, ABAG has allocated the vast majority of PDA growth to a small number of the volunteer jurisdictions. In fact, over 80 percent of that growth (56% of the entire RHNA) is confined to just 24 jurisdictions,¹⁰ with only 20 percent allotted to the other 54 jurisdictions with PDAs. While these latter 54 have formally volunteered, they have done so on a very minimal basis.

50 percent residential use or a Floor Area Ratio (FAR) of not less than 0.75 if containing between 26 and 50 percent residential use; (2) provide a minimum net density of at least 20 units per acre; and (3) be located within one-half mile of a major transit stop (a site with an existing rail station, a ferry terminal served by bus or rail connections, or two or more major intersecting bus routes, with service at least every 15 minutes during peak commute hours) or a high-quality transit corridor included in a regional transportation plan (RTP). Public Resources Code § 21155(b). A high-quality transit corridor has fixed route bus service with service intervals no longer than 15 minutes during peak commute hours. § 21155(b)(3). There are many sites outside of voluntary PDAs that would fulfill the transit requirement of SB 375's TPP requirements..

⁸ In fact, ABAG's Executive Board on July 21, 2011, unanimously approved a proposal directing staff to "distribut[e] total housing growth numbers to: a) job-rich cities that are PDAs and PDA-like; b) connected to the existing transit infrastructure; and c) lack the affordable housing needed to accommodate low-income in-commuters." *Proposal to Modify the Focused Growth Scenario, as adopted by ABAG Executive Board on July 21, 2011*, available at:

http://www.publicadvocates.org/sites/default/files/library/proposal_to_modify_the_focused_growth_scenario_adopted_on_07_21_11.pdf.

⁹ If the PDA process were rational, there would be some rough correlation between population and share of PDA growth. Instead cities with the same share of PDA growth have vastly divergent populations (e.g., a range from 8,618 for Cloverdale to 69,516 for Union City to 92,438 for Vacaville, all with the same 0.15% PDA share, or a range from 10,080 for Emeryville to 63,000 for South San Francisco, to 116,000 for Santa Clara, all with the same 1.17% share). And cities with roughly the same populations have quite disparate PDA shares (e.g., a range from 0.24 to 0.88 for cities with about 28,000 in population, from 0.42% to 1.37% for cities with about 64,000, and from 0.7 to 2.15 for cities with just over 100,000 in population.)

¹⁰ These 24 jurisdictions are Oakland, San Leandro, Alameda County, Concord, Pittsburg, Contra Costa County, San Francisco, Redwood City, San Mateo, San Jose, Sunnyvale, Santa Clara, Fairfield, Santa Rosa, Mountain View, Milpitas, Palo Alto, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, and South San Francisco.

Many of the 54 jurisdictions that have volunteered small PDAs are places in which more housing is not only appropriate, but desperately needed. Of those 54, 21 are cities that meet at least two of the following three criteria: (1) poor jobs/housing fit (as measured by in-commuting low-wage workers), (2) high opportunity (as measured by median home value), and (3) transit-connectedness. When the demographics of these 21 high-opportunity transit-connected job centers with tiny PDAs¹¹ are compared with the 22 cities that are taking on 80 percent of the growth, we find that they are 57% non-Hispanic white, compared to 37% for the top 22.

By statute, ABAG's methodology for distributing the regional housing need "shall include" the statutory factors in § 65584.04 (d) and must be "consistent with all of the" objectives set forth in § 65584 (d). ABAG has some discretion in how it addresses these statutory factors and objectives, but it abuses that discretion when it ignores them or arbitrarily applies them to some cities while failing to apply them to other similarly situated cities.

Conclusion

The RHNA methodology improperly limits access to job-rich, transit-connected "high opportunity" areas to those communities that happen to volunteer. This flawed RHNA methodology is carried through to the Plan Bay Area. ABAG must revise the proposed methodology and allocation to comply with the Housing Element Law, SB 375 and fair housing and civil rights laws. The ARB should join HCD and HUD in directing ABAG to make corrections to its methodology prior to adopting the Plan Bay Area.

Sincerely,

THE PUBLIC INTEREST LAW PROJECT, BY:

A handwritten signature in blue ink that reads "Michael Rawson". The signature is fluid and cursive, with the first name being the most prominent.

Michael Rawson, Director
Craig Castellanet, Staff Attorney

¹¹ These 21 cities are Alameda, Pleasanton, Lafayette, Martinez, Orinda, San Ramon, Walnut Creek, San Rafael, Belmont, Burlingame, Menlo Park, Millbrae, San Carlos, Campbell, Cupertino, Gilroy, Los Altos, Los Gatos, Morgan Hill, Saratoga and Sebastopol.



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July 16, 2012

Stephen Ronfeldt
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BY EMAIL AND MAIL DELIVERY

Ezra Rapport, Executive Director
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Re: Final Draft Regional Housing Need Allocation Methodology and
Sub-regional Allocation

Judith Gold
Staff Attorney
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Dear Mr. Rapport,

Patti Prunhuber
Staff Attorney
Extension 125
pprunhuber@pilpca.org

We write on behalf of individuals in need of affordable housing in the Bay Area and regional organizations interested in the development of below market rate housing, including Urban Habitat Program, Latinos Unidos del Valle de Napa y Solano, Sonoma County Housing Advocacy Group and Center for Sustainable Neighborhoods. We write to comment on the proposed RHNA methodology and bring to your attention significant legal deficiencies in the methodology.¹

Julie McNulty
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ABAG's Regional Housing Need Allocation (RHNA) methodology and sub-regional allocation, even if adjusted as proposed in the July 10 Staff Report, fails to comply with the requirements of state Housing Element Law (Government Code §§65580 – 65589.8). If adopted as drafted, ABAG's inadequate RHNA methodology would also violate state and federal laws prohibiting discrimination against racial and ethnic minorities, families, persons with disabilities and affordable housing and run afoul of ABAG's obligation to affirmatively further fair housing. The methodology must be revised to conform to the requirements of state and federal law immediately, and the allocations, including the sub-regional allocations, adjusted accordingly.

Griselda Aceves
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Contrary to Housing Element Law, the methodology allocates the overwhelming majority – 70 percent – of the RHNA to jurisdictions that have *volunteered* for housing growth by establishing Priority Development Areas (PDAs), ignoring the factors and objectives of the Housing Element Law. The allocation instead is based solely on whether a city or county has voluntarily established one or more PDAs and local jurisdiction preferences about the size

¹ These issues have previously been raised with ABAG in numerous letters, including in comments submitted by members of the 6 Wins Network and in letters submitted by the undersigned with respect to the fair housing issues on October 26 and December 22, 2011.

and nature of those PDAs. Accordingly, the factors and objectives set forth by statutes play no role in the distribution of the lion's share of the RHNA. Areas with substantial jobs and in-commuting are allowed to opt out. In fact, the methodology relies primarily on the one factor that the statutes explicitly prohibit from consideration – the “existing zoning ordinances and land use restrictions of a locality...”² This is an explicit criterion in the establishment of the PDAs, which are limited to places that are “planned or [are] planning for more housing.”³ This methodology is wholly inconsistent with the fundamental principle of Housing Element Law that local governments all have a responsibility to accommodate their fair share of the regional need for lower income housing.⁴

While a criterion for the establishment of PDAs is that “[t]he area is near existing or planned fixed transit (or served by comparable bus service),” many cities with areas that meet the criterion did not volunteer to establish PDAs. By statute, the allocation methodology must include “opportunities to maximize the use of public transportation and existing transportation infrastructure,”⁵ yet ABAG's proposed methodology arbitrarily includes this factor only with respect to PDAs, excluding other places that are similarly situated in all relevant respects. This amounts to an abdication of the duty to allocate the RHNA based on an analysis of objective factors.

Finally, the failure of the proposed methodology to allocate the RHNA based on objective and equitable factors runs contrary to state and federal fair housing and civil rights laws. By concentrating 70 percent of new housing development into PDAs volunteered by local governments, the proposed methodology perpetuates and may exacerbate racial segregation. One significant purpose of the fair housing and housing element laws is to increase the housing opportunities of lower income households in high opportunity communities historically walled-off from affordable housing by restrictive zoning practices. The methodology will aid and abet jurisdictions that seek to exclude new residents, especially lower-income residents of color, by arbitrarily allowing cities opposed to new development to opt out of any share of 70 percent of the RHNA. The opportunity for exclusion of affordable housing is antithetical to the obligation of local governments under state and federal law to provide opportunities for equal housing to lower income households, racial and ethnic minorities, persons with disabilities, and families with children.

² Government Code §65584.04(d)(2)(B). All statutory citations are to the Government Code unless otherwise indicated.

³ *Application Guidelines for Priority Development Area Designation*, available at http://www.bayareavision.org/pdaapplication/ApplicationGuidelines_OCT2011_FINAL.pdf.

⁴ See §§65580, 65581 and 65583 of the Housing Element Law.

⁵ §65584.04(d)(3). We and others have made objections to similar flaws in the housing distribution of the proposed Sustainable Communities Strategy (SCS). Flaws that if not corrected will raise serious concerns about the legality of the SCS.

A. The Methodology Violates State Housing Element Law.

By statute, ABAG's methodology for distributing the regional housing need "shall include" the statutory factors in § 65584.04 (d) and must be "consistent with all of the" objectives set forth in § 65584 (d). ABAG has some discretion in how it addresses these statutory factors and objectives, but it abuses that discretion when it ignores them or arbitrarily applies them to some cities while failing to apply them to other similarly situated cities. The proposed methodology without legal basis limits access to job-rich, transit-connected "high opportunity" areas to those communities that happen to volunteer.

In short, the proposed methodology ignores or arbitrarily limits the use of required factors, while making prominent use of a prohibited factor, and is not consistent with the statutory objectives.

1. ABAG's RHNA Methodology.

The proposed methodology proceeds in two steps. First, it determines each jurisdiction's aggregate share of the RHNA. It does so by allocating 70 percent of the RHNA (131,593 units) on the basis of projected PDA growth, and the remaining 30 percent (56,397 units) on the basis of projected growth outside of PDAs. ABAG begins by calculating each jurisdiction's share of the region's PDA growth and non-PDA growth in the preferred alternative Sustainable Communities Strategy (SCS),⁶ and then allocates PDA and non-PDA growth based on these proportions. For instance, the SCS allocates to the City of Pleasanton 0.69% and 2.0% of the region's PDA and non-PDA growth, respectively. The methodology therefore allocates to Pleasanton 0.69% of 131,593 units in PDAs (906 units) and 2.0% of 56,397 units not in PDAs (1,128 units), for a total RHNA of 2,034. The non-PDA portion is then adjusted based on several factors (past RHNA performance, employment, and transit); however, none of these adjustment factors are applied to the PDA portion. Other very minor normalizing adjustments then are made to the aggregate RHNA allocation. However, none of these adjustment factors are applied to the PDA portion.

Second, the methodology distributes each jurisdiction's aggregate share of RHNA by income level. The proposed adjustments to this allocation in the July 10 Staff Report do not appreciably alter the allocations.

⁶ Also known as the Plan Bay Area "Jobs-Housing Connection Strategy."

2. The Proposed Methodology Arbitrarily Fails to Include the Allocation Factors Mandated by Statute.

With respect to the statutory factors set forth in § 65584.04(d), ABAG's action is unlawfully arbitrary for three reasons. First, it has failed to include several of the statutory factors at all in determining the allocation of the vast majority of the RHNA to the self-selected PDA areas. Second, it has placed primary reliance on a factor that the statute expressly prohibits. Finally, it has arbitrarily applied some factors to some cities while failing to apply them in a similar manner to similarly-situated cities.

a. The Methodology Fails to Apply All the Required Factors.

First, ABAG has failed to apply several factors. Indeed, its staff report and appendix of July 10 make no mention of most of the factors. For instance, ABAG has failed to incorporate the loss of units contained in assisted housing developments (§65584.04(d)(6)), high housing cost burdens (§65584.04(d)(7)) or the housing needs of farmworkers (§65584.94(d)(8)). Ignoring the loss of affordable housing and housing costs will result in an inaccurate determination of the true need. The general emphasis in the methodology on infill development makes consideration of farmworker housing need particularly critical because steering development to infill potentially overlooks the needs persons working in agriculture far from those areas. The minute shift that would result from the growth concentration adjustment of proposed Action One in the Staff Report (pp. 3-4) would not address this problem. In fact, Sonoma and Solano Counties would receive smaller allocations and there is no change for Napa or Marin Counties.⁷

Several other factors, such as jobs-housing relationship (§65584.04(d)(1)), received at best cursory consideration and played a negligible role in determining RHNA shares.⁸ Indeed, local jobs-housing fit, for which ABAG commendably prepared a preliminary analysis in September 2011, plays no role whatsoever in the methodology.

Examples of the arbitrary and inconsistent results of the methodology abound. To give just one, Healdsburg, Novato and Larkspur have a combined total of over 27,000 workers commuting into jobs each day, and all are slated to have SMART train stations which will be in service by 2016, yet none has volunteered to create even a tiny PDA. As a result, the proposed methodology allocates these three cities (with combined population

⁷ Part of the rationale for the small RHNA allocated to Marin County appears to be the claimed shortage of transit facilities. But construction is already underway of the new SMART commuter rail system linking most Marin and Sonoma County jurisdictions.

⁸ The Appendix attached to the July 10 staff report states: "iv. Employment: *In non-PDA areas*, the employment was factored using the 2010 job estimates for a jurisdiction. . . ." (pdf page 15 of 71, emphasis added.) Public transportation (§65584.04(d)(3)) was also arbitrarily restricted in its application, as discussed below. Under the current methodology, no level of employment or imbalance in the relationship between jobs and housing would be sufficient to give a non-volunteer jurisdiction any share of the 70 percent portion of the RHNA.

of about 75,000) a total combined RHNA of only 700 units. That share is far too low for transit-connected job centers. In fact, other cities of similar size which have volunteered for even modest PDAs are receiving more appropriate allocations: for instance, Walnut Creek, San Ramon and other cities of under 75,000 in population are slated to receive RHNA shares ranging from 1,285 to 2,203. Dublin, a PDA volunteer with a similar but smaller population than Novato's and with 12,000 in-commuters to Novato's 15,000, is slated to receive 2,176 units, to Novato's 413.⁹

b. The Methodology Relies Heavily on an Impermissible Factor.

In addition to failing to apply these factors, ABAG's methodology makes prominent use of a factor that the statute expressly prohibits. While the availability of land suitable for development within a jurisdiction is a statutory factor that ABAG must include (§65584.04(d)(2)(B)), it may not rely upon that jurisdiction's willingness to zone available land for housing as a factor:

The council of governments may not limit its consideration of suitable housing sites or land suitable for urban development to existing zoning ordinances and land use restrictions of a locality, but shall consider the potential for increased residential development under alternative zoning ordinances and land use restrictions... (§65584.04(d) (2) (B).)

ABAG's Priority Development Area criteria, however, expressly restrict the designation of PDAs to those places where a city has "planned or is planning for more housing."¹⁰ Fully 70 percent of the RHNA allocation has been made on the basis of this prohibited factor. This violates the statute by limiting available land on the basis of local decisions not to make that land available for housing development. It also results in an arbitrary application of the statutory factors, since it excludes suitable land in non-PDA cities from consideration for any share of the 70 percent portion of the RHNA.

⁹ On the County level, 56% of Napa County's workforce—27,592 workers—are in-commuters, yet the County's RHNA allocation has been reduced from 3705 for the current period to 1482 for the next planning period—a 60% reduction. And Marin County is not far behind. 47% of Marin County's workforce—55,477 workers—are in-commuters, yet the County's RHNA allocation has been reduced from 4882 for the current period to 2292 for the next planning period—a 53% reduction.

¹⁰ ABAG has established three PDA criteria: "Applicants must demonstrate that an area proposed for designation as a priority development area meets all of the following criteria:

- The area is within an existing community.
- The area is near existing or planned fixed transit (or served by comparable bus service).
- The area is planned or is planning for more housing."

c. The Methodology Arbitrarily Applies Some Factors to Some Areas and Not to Others.

Finally, the methodology arbitrarily applies certain statutory factors to some places but not to others that are similarly situated in all relevant respects. Most egregiously, ABAG's decision to concentrate 70 percent of the RHNA in PDAs that exist only where, and to the extent that, cities have volunteered to establish them, treats like cases differently with respect to §65584.04(3), which requires the allocation methodology to include "opportunities to maximize the use of public transportation and existing transportation infrastructure." One of ABAG's three criteria for the designation of a PDA is that "[t]he area is near existing or planned fixed transit (or served by comparable bus service)." Public transportation facilities and services, however, exist both in PDAs and in places throughout the Bay Area that have not established PDAs. Many non-PDA jurisdictions, for instance, include PDA-like sites eligible for "Transit Priority Projects" (TPPs), a new project-type created by SB 375.¹¹

To be consistent with §65584.04(d)(3), ABAG's methodology should treat all of these TPP-eligible PDA-like places similarly.¹² Instead, the methodology allocates 70 percent of the RHNA exclusively to those places served by transit which have voluntarily established PDAs. Other transit-connected places have not been assigned any portion of the 70 percent share of RHNA set aside for PDAs.¹³ Moreover, even the distribution of

¹¹ A "Transit Priority Project" (TPP), a new category of development that must (1) contain at least 50 percent residential use or a Floor Area Ratio (FAR) of not less than 0.75 if containing between 26 and 50 percent residential use; (2) provide a minimum net density of at least 20 units per acre; and (3) be located within one-half mile of a major transit stop (a site with an existing rail station, a ferry terminal served by bus or rail connections, or two or more major intersecting bus routes, with service at least every 15 minutes during peak commute hours) or a high-quality transit corridor included in a regional transportation plan (RTP). Public Resources Code § 21155(b). A high-quality transit corridor has fixed route bus service with service intervals no longer than 15 minutes during peak commute hours. § 21155(b)(3). There are many sites outside of voluntary PDAs that would fulfill the transit requirement of SB 375's TPP requirements..

¹² In fact, ABAG's Executive Board on July 21, 2011, unanimously approved a proposal directing staff to "distribut[e] total housing growth numbers to: a) job-rich cities that are PDAs and PDA-like; b) connected to the existing transit infrastructure; and c) lack the affordable housing needed to accommodate low-income in-commuters." *Proposal to Modify the Focused Growth Scenario, as adopted by ABAG Executive Board on July 21, 2011*, available at: http://www.publicadvocates.org/sites/default/files/library/proposal_to_modify_the_focused_growth_scenario_adopted_on_07_21_11.pdf.

¹³ If the PDA process were rational, there would be some rough correlation between population and share of PDA growth. Instead cities with the same share of PDA growth have vastly divergent populations (e.g., a range from 8,618 for Cloverdale to 69,516 for Union City to 92,438 for Vacaville, all with the same 0.15% PDA share, or a range from 10,080 for Emeryville to 63,000 for South San Francisco, to 116,000 for Santa Clara, all with the same 1.17% share). And cities with roughly the same populations have quite disparate PDA shares (e.g., a range from 0.24

the 70 percent share of the RHNA is largely arbitrary and fails to maximize the use of public transit, as it is based almost exclusively on the amount of growth that each local jurisdiction has volunteered for in its PDA.

For all these reasons, the proposed methodology is starkly inconsistent with the clear and mandatory requirements of statute.

3. The Allocation of RHNA to Self-Selected PDAs is Inconsistent with the Statutory Objectives.

The proposed methodology also fails to comply with the requirement that it “shall be consistent with all of the . . . objectives” set forth in § 65584 (d). The methodology is inconsistent with each of the four statutory objectives.

The first objective is “[i]ncreasing the supply and mix of housing types, tenure and affordability in *all* cities and counties within the region in an *equitable* manner...” (§65584(d)(1), emphasis added). The proposed methodology increases the supply and mix in an inequitable manner by excluding non-PDA jurisdictions from any share in 70 percent of the RHNA.

The second objective is “[p]romoting infill development *and* socioeconomic equity...” (§65584(d)(2), emphasis added). The methodology arbitrarily limits the promotion of infill development to volunteering cities, while exempting others that are similarly situated in all relevant respects. It also fails to promote socioeconomic equity. In existing low-income communities, which overlap to a significant extent with PDAs,¹⁴ the methodology is likely to increase land values and gentrification which will have the effect of displacing many existing families. At the same time, by failing to allocate sufficient housing growth to job centers in high-opportunity communities, the methodology will “hasten the suburbanization of poverty,”¹⁵ not in the region’s more affluent inner-ring suburbs, but in communities isolated from jobs, transit, and opportunity generally in the outer fringes of the region such as eastern Contra Costa County.

to 0.88 for cities with about 28,000 in population, from 0.42% to 1.37% for cities with about 64,000, and from 0.7 to 2.15 for cities with just over 100,000 in population.)

¹⁴ ABAG’s map overlaying PDAs with the location of concentrations of low-income and minority populations is available at http://www.bayareavision.org/initiatives/PDFs/Region_PDAs_CoC_11x17_4.pdf.

¹⁵ See Federal Reserve Bank of San Francisco, *Suburbanization of Poverty in the Bay Area* (Jan. 2012), available at <http://www.frbsf.org/publications/community/research-briefs/suburbanization-of-poverty.cfm>.

Third, the methodology is inconsistent with the statutory objective of “[p]romoting an improved intraregional relationship between jobs and housing.” (§65584(d)(3)), because it exempts from any share of the 70 percent portion of the RHNA, or allocates a very small share of it, to many mid-size cities that are rich in jobs, especially lower-wage jobs.

The final statutory objective is “[a]llocating a lower proportion of housing need to an income category when a jurisdiction already has a disproportionately high share of households in that income category...” (§65584(d)(4)). By exempting many cities from any share in the 70 percent portion of the RHNA, the total RHNA that it distributes to these cities is so small that the lower-income portion of their RHNA is also extremely small. While there is an attempt to address this problem through the proposed income distribution adjustment of Action One of the Staff Report (pp. 4-5), the adjustment is quite small and fails to overcome the effect of the exclusion of 30% of the cities from the concentrated PDA allocation.

B. The Proposed Methodology Violates State and Federal Fair Housing And Civil Rights Laws.

1. The Methodology will Result in Discrimination Against the Development of Subsidized Housing Intended for Occupancy by Lower Income Households in Violation of Government Code §65008.

The focused allocation of RHNA to communities with self-selected PDAs and to the exclusion of jurisdictions with high opportunity areas that fail to volunteer for PDA status violates Government Code §65008’s prohibition of discrimination against subsidized housing or housing intended for occupancy by lower or moderate income households. Section 65008 proscribes any action by local governments that has the purpose or *effect* of discriminating against residential development based on the method of financing of the housing or the intended occupancy of the housing by lower, moderate and middle income persons.¹⁶

The methodology’s reliance on cities opting in to the focused PDA allocation encourages jurisdictions improperly seeking to exclude affordable housing to do so simply by opting out. The allocation of a disproportionate amount of RHNA for lower income housing to volunteer communities, moreover, will result in the other communities receiving a proportionately lesser share of lower income housing need. And because the Housing Element Law obligates jurisdictions to zone sufficient sites at multifamily densities to accommodate the lower income portion of their RHNA (§65583(c)(1) & §65583.2(h)), the non-PDA jurisdictions will be obligated to make proportionately fewer sites available for affordable housing. An adverse impact on the development of decent, affordable housing in those jurisdictions will necessarily follow.

¹⁶ See e.g. *Keith v. Volpe* 618 F.Supp. 1132, 1158-1159 (C.D. Cal. 1985), *aff’d*, 858 F.2d 467, 485 (9th Cir. 1988).

The proposed income distribution adjustment in Action One of the Staff Report (pp. 5-6) does not remove the disparity. 70% of the focused RHNA allocation will still go only to communities that volunteer.

2. The Methodology Has an Illegal Disparate Impact on Persons and Groups Protected by the Fair Housing and Civil Rights Laws and will Perpetuate Segregation.

California and federal fair housing laws and state civil rights laws also prohibit land use actions that have the purpose or effect of discriminating against groups protected under those laws. California's Fair Employment and Housing Act¹⁷ and the federal Fair Housing Act¹⁸ prohibit land use actions by local government that discriminate on the basis of race, national origin, disability and family status among other protected classes. And California Government Code §11135 prohibits discrimination based on each of those categories except family status by recipients of state funding. As explained above, the focused allocation of RHNA to communities with self-selected PDAs will steer affordable housing away from non-PDA communities. This will perpetuate segregation and have a disparate impact on persons of color, person with disabilities and families with children that tend to constitute a significantly greater proportion of the resident population of housing affordable at below market rates.

Examination of the racial demographics associated with the PDA structure ABAG has created is illustrative of the discriminatory effect based on race and national origin. First, when jurisdictions with PDAs are compared as a whole to those without PDAs, the White, non-Hispanic share of the population in the former is far lower than in the latter: 41% in places with PDAs, compared to 64% in places with no PDAs. Put differently, volunteer jurisdictions as a whole have 59% minority populations, compared to only 36% in non-volunteer jurisdictions.

Even within the subset of jurisdictions that have volunteered for PDAs, there are enormous differences in the extent to which they have volunteered to open their doors to affordable housing. ABAG has allocated the vast majority of PDA growth to a small number of volunteer jurisdictions. In fact, over 80 percent of that growth (56% of the

¹⁷ Gov. C. §12901 *et seq.* The portions of the law focusing on housing begin at §12955 *et. seq.* See specifically §12955.8 setting out the standard for determining whether a local agency land use law or action has an illegally discriminatory effect.

¹⁸ 42 U.S.C. §3601 *et seq.* See *Pfaff v. U.S. Dept. of Housing and Urban Development*, 88 F.3d 739 (9th Cir. 1996); *Keith v. Volpe, supra*, 858 F.2d 467, describing federal standard for illegal discriminatory effect.

entire RHNA) is confined to just 24 jurisdictions,¹⁹ with only 20 percent allotted to the other 54 jurisdictions with PDAs. While these latter 54 have formally volunteered, they have done so on a very minimal basis.

Many of the 54 jurisdictions that have volunteered small PDAs are places in which more housing is not only appropriate, but desperately needed. Of those 54, 21 are cities that meet at least two of the following three criteria: (1) poor jobs/housing fit (as measured by in-commuting low-wage workers), (2) high opportunity (as measured by median home value), and (3) transit-connectedness. When the demographics of these 21 high-opportunity transit-connected job centers with tiny PDAs²⁰ are compared with the 22 cities that are taking on 80 percent of the growth, we find that they are 57% non-Hispanic white, compared to 37% for the top 22.

This data illustrates the discriminatory effect of the proposed methodology on race and ethnicity in several respects. First, by relying heavily on voluntary PDAs as the basis for allocating 70 percent of the RHNA, the methodology directs the region's housing growth predominantly into communities with a significantly higher proportion of minority population than those cities that have not volunteered for growth, thereby resulting in over-concentration of lower income households and perpetuating segregation. At the same time, cities in which racial minorities with low-incomes are concentrated will face greater displacement pressures. Finally, even among the PDA volunteers, most of the 70 percent PDA portion of the RHNA will fall on two dozen cities that have far higher concentrations of minority population than those cities that need more housing but are volunteering for only a very tiny portion of PDA growth.

3. The Methodology Violates ABAG's Obligation to Affirmatively Further Fair Housing.

The Fair Housing Act requires the Department of Housing and Community Development (HUD) to administer its programs in a manner to affirmatively further fair housing. 42 U.S.C. § 3608(e)(5). Accordingly HUD requires that recipients of the Sustainable Communities Regional Planning Grant not only to refrain from actions discriminating against person protected by the Act, but also to take affirmative steps to further integration and reduce segregation. As a sub-recipient of the a HUD SC Regional Planning Grant, therefore, ABAG must ensure that its regional planning efforts will

¹⁹ These 24 jurisdictions are Oakland, San Leandro, Alameda County, Concord, Pittsburg, Contra Costa County, San Francisco, Redwood City, San Mateo, San Jose, Sunnyvale, Santa Clara, Fairfield, Santa Rosa, Mountain View, Milpitas, Palo Alto, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, and South San Francisco.

²⁰ These 21 cities are Alameda, Pleasanton, Lafayette, Martinez, Orinda, San Ramon, Walnut Creek, San Rafael, Belmont, Burlingame, Menlo Park, Millbrae, San Carlos, Campbell, Cupertino, Gilroy, Los Altos, Los Gatos, Morgan Hill, Saratoga and Sebastopol.

affirmatively further fair housing throughout the nine-county area in PDA and non-PDA areas alike.²¹ Actions that will affirmatively further fair housing are activities that “will reduce racial segregation and concentration of poverty, employing regional- or metropolitan-level strategies, when applicable.”²² . Directing residential development away from PDA-like areas will also interfere with the efforts of the state and local governments in the Bay Area to fulfill their independent obligations to affirmatively further fair housing.

In our letters of October 26 and December 22, 2011, we asked ABAG to conduct the fair housing analyses required by HUD pursuant to the terms of the Sustainable Communities grant early enough to affect the decision in selecting a preferred alternative SCS and in proposing a RHNA allocation.²³ ABAG has to date failed to conduct any of those HUD-mandated analyses. It is critical that ABAG perform these analyses for the RHNA is finalized. As Secretary Donovan has explained:

Sustainability also means creating “geographies of opportunity,” places the effectively connect people to jobs, quality public schools, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one’s zip code predicts poor education, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.²⁴

Conclusion

ABAG must revise the proposed methodology and sub-regional allocation to comply with the Housing Element Law, SB 375 and fair housing and civil rights laws. To avoid enabling and perpetuating existing patterns of discrimination ABAG should revise its proposed methodology and sub-regional allocation to avoid the current disparate RHNA allocation to volunteered PDAs. The methodology should treat PDA and PDA-like areas similarly, allocating a greater share of the RHNA to cities with tiny PDAs and/or PDA-like high opportunity areas based on the factors and objectives of the Housing Element Law, rather than depending on the prohibited factor of volunteerism. If it did, there would be a significant increase in the availability of residential sites zoned to

²¹ HUD, *Fair Housing Planning Guide* p. 1-3 (1995)

²² *Notice of HUD’s FY2011 NOFA Policy Requirements and General Section to HUD’s FY2011 NOFAs for Discretionary Programs* (Docket No. FR-5500-N-01).

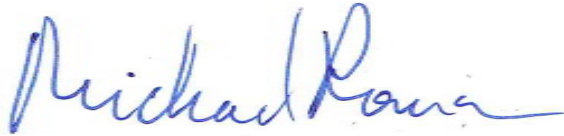
²³ See fn 1.

²⁴ Shaun Donovan, HUD Secretary, written testimony to the House Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, February 23, 2010, FY2011 Budget Request for HUD, available at <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2010/2010-02-23>.

accommodate affordable housing, benefiting the entire Bay Area by improving our economic and environmental sustainability and the fairness and inclusiveness of our communities.

Sincerely,

THE PUBLIC INTEREST LAW PROJECT, BY:

A handwritten signature in blue ink that reads "Michael Rawson".

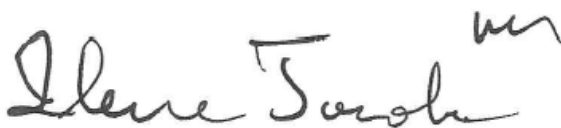
Michael Rawson, Director
Craig Castellanet, Staff Attorney

PUBLIC ADVOCATES INC., BY:

A handwritten signature in black ink that reads "Richard A. Marcantonio".

Richard A. Marcantonio, Managing Attorney
Elisabeth Voigt, Senior Staff Attorney
Sam Tepperman-Gelfant, Senior Staff Attorney
Parisa Fatehi-Weeks, Staff Attorney

CALIFORNIA RURAL LEGAL ASSISTANCE, BY:

A handwritten signature in black ink that reads "Ilene Jacobs".

Ilene Jacobs, Director of Litigation, Advocacy & Training
Attorney for Latinos Unidos del Valle de Napa y Solano

LAW OFFICE OF DAVID GRABILL, BY:

A handwritten signature in blue ink that reads "David Grabill". The signature is written in a cursive, flowing style.

David Grabill
Attorney for Latinos Unidos del Valle de Napa y Solano and
Sonoma County Housing Advocacy Group

cc:

Linn Warren, Director, Department of Housing and Community Development
Steve Heminger, Executive Director, Metropolitan Transportation Commission
Mary Nichols, Chairperson, California Air Resources Board
Kamala Harris, State Attorney General
Secretary Shaun Donovan, U.S. Department of Housing and Urban Development

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
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June 21, 2013

Mr. Ezra Rapport
Executive Director
Association of Bay Area Governments (ABAG)
101 Eighth Street
Oakland, CA 94607

RE: Regional Housing Need Allocation (RHNA) Methodology and Plan

Dear Mr. Rapport:

Thank you for your May 10, 2013 response to the Department's February 6, 2013 letter requesting that ABAG address stakeholder concerns regarding the inadequacy of ABAG's RHNA allocation methodology. As identified in the Department's letter and in on-going conversations with ABAG on these matters beginning in 2012, the response you provided does not adequately address our concerns regarding the RHNA allocation process. Our concerns are detailed in the remainder of this letter.

Methodology and Plan Deficiencies

Government Code (GC) Section 65584 states: "The allocation plan prepared by a council of governments shall be prepared pursuant to GC Sections 65584.04 and 65584.05 with the advice of the Department." ABAG's proposed final RHNA, released with a June 3, 2013 memo, is inconsistent with GC Sections 65584(d), 65584.04(d), and 65584.04(f). Because the RHNA methodology started with a calculation derived from jurisdictions self-nominating "priority development areas" (PDAs), other jurisdictions possessing areas with comparable characteristics could opt out and receive allocations on a different procedural basis. The Department acknowledges the mitigating factors ABAG applied to non PDA areas to address the fair allocation of housing; however, allowing and relying on baseline local decisions in the RHNA process is contrary to both the RHNA's intent and statute.

Recommendations to Remediate RHNA Methodology and Plan Deficiencies

ABAG still has an opportunity to make RHNA adjustments to fully comply with statutory requirements to treat jurisdictions which chose not to nominate PDAs (but that have PDA-like areas) to the same criteria applied to jurisdictions that chose to nominate PDAs. As a result of ABAG changing its RTP adoption date to July 18, 2013, the RHNA could be adopted as late as January 31, 2014 to distribute RHNA to localities 12 months before the housing

element due date without ABAG having to re-start the entire methodology process or make significant changes to the distribution of RHNA.

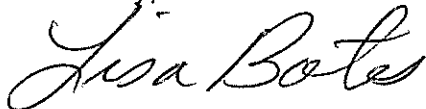
Pursuant to GC Section 65584.04(c) which does not prescribe a timeframe or limitation on revisions to a RHNA plan, ABAG could consider the Department's comments and advice as public comment and input and make appropriate revisions. Below are key statutory timelines per GC 65584 (b) and 65584.05 (a) through (h) for the RHNA process displaying the potential for modification of some steps. Further information and technical assistance can be provided by our staff.

ACTION	TIMEFRAME
• Adjust/issue revised RHNA allocations (at least 18 months before housing element due date (est. 1/31/2015))	July 2013
• Process revision requests from jurisdictions receiving higher RHNA (within 60 days from providing <i>adjusted</i> increased draft allocation)	September 2013
• Complete affected jurisdictions' appeals (includes 60 day public hearing period)	December 2013
• Issue Final RHNA Plan (within 45 days of public hearing)	January 2014
• Adopt Final RHNA Plan	January 2014

We appreciate the challenges and efforts of ABAG and MTC to improve the integration of housing and transportation planning in developing the region's One Bay Area Plan, RHNA Plan, and Sustainable Communities Strategy. In the spirit of improving this effort, the Department offers to help ABAG meet timeframes to adjust its RHNA methodology and plan as set forth in this letter. Also, we can commit to an expedited review time of the Final (revised) RHNA Plan once adopted by ABAG.

Please contact me or Glen Campora, Assistant Deputy Director, at (916) 445-4728 for assistance.

Sincerely,



Lisa Bates
Deputy Director

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February 6, 2013

Mr. Ezra Rapport
Executive Director
Association of Bay Area Governments
101 Eighth Street
Oakland, CA 94607

RE: Regional Housing Need Allocation Plan Methodology

Dear Mr. Rapport:

This letter comments on the regional housing need allocation (RHNA) methodology Association of Bay Area Governments (ABAG) has adopted for its RHNA Plan to distribute shares of regional housing need to each locality. Government Code (GC) Section 65584(b) requires the RHNA plan be prepared pursuant to Sections 65584.04 and 65584.05 with the advice of the Department of Housing and Community Development (Department).

The Department has received several stakeholder letters sent to ABAG expressing concerns regarding reliance on the "voluntarily" designated Priority Development Areas (PDAs) in distributing ABAG's regional housing need. Department staff appreciates you and Ms. Chion meeting with us to discuss RHNA methodology and stakeholder concerns. We advise ABAG, if it has not yet done so, to formally address the methodology concerns raised regarding the adequacy of the RHNA methodology in complying with State law, particularly GC sections 65584(d), 65584.04(d) and (e).

ABAG's RHNA methodology appears to be based in part on the *Jobs-Housing Connection Strategy*, which allocates new housing development within PDAs and non-PDAs. The RHNA methodology begins by distributing a higher proportion of RHNA share to local governments that "voluntarily" seek PDA designation and a lesser proportion of RHNA share to local governments that "choose" not to apply for PDA designation, despite having areas possessing characteristics similar to areas meeting PDA qualifications. In addition, the *Jobs-Housing Connection Strategy* indicates that housing growth was adjusted "to ensure that no county or city's proposed growth substantially deviates from local plans."¹ Pursuant to Section 65584.04(d)(2)(B), a council of governments may not limit its consideration of suitable housing sites or land suitable

¹ *Jobs-Housing Connection Strategy, Plan Bay Area, Revised May 16, 2012, Page 45*

for urban development based on localities' existing zoning ordinances and land use restrictions. The statutory intent reiterated in Section 65584.04(f) is clear to implement the statutory objective for each local government to share responsibility for addressing regional housing needs in an equitable manner precluding maintenance of exclusionary land use restrictions and zoning ordinances where they may exist.

The Department appreciates the extraordinary level of effort Association of Bay Area Governments and Metropolitan Transportation Commission have undertaken to coordinate the RHNA with the update of the regional transportation plan. Staff are available to consult with you regarding how RHNA methodology concerns might be addressed prior to adoption of the pending regional transportation plan and its sustainable community strategy.

Sincerely,

A handwritten signature in blue ink that reads "Lisa Bates". The signature is written in a cursive, flowing style.

Lisa Bates
Deputy Director



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April 9, 2013

Ezra Rapport, Executive Director
Association of Bay Area Governments
101 Eighth St.
Oakland, CA 94607

RE: Regional Housing Need Allocation Methodology

Dear Mr. Rapport:

Our office wrote to you in September of 2012 regarding ABAG's Sustainable Communities grant and the Regional Housing Needs Allocation (RHNA) methodology for the Bay Area. Since last writing to you, the Department has received multiple letters from various interested parties reiterating their concerns with ABAG's use of Priority Development Areas (PDAs) in its housing allocation. Therefore, the Department wants to provide you with further information regarding ABAG's obligations under fair housing law and regarding its certification that it will affirmatively further fair housing as a condition of the Sustainable Communities grant.

We note that ABAG's RHNA methodology is largely based upon its PDA program which allocates the majority of housing development in areas that local jurisdictions have voluntarily committed for future housing, transit, and job growth. Consequently, jurisdictions without PDAs are allocated a smaller portion of housing than jurisdictions with PDAs, despite many of them having neighborhoods comparably suited for the same type of growth. Interested parties have written to us with concerns that this methodology will limit housing options for low-income families and negatively impact minorities.

In our September 2012 letter, we encouraged ABAG to analyze how the voluntary PDA program will impact the distribution of future housing development using its Fair Housing & Equity Assessment (FHEA). As you are aware, the FHEA, a document ABAG is required to prepare as part of its Sustainable Communities grant, is used to address fair housing impediments. While this analysis would be valuable information to include in your FHEA, ABAG is currently scheduled to adopt its final RHNA in July of this year – well before the FHEA will be completed.

As a result, if ABAG waits to analyze issues related to the PDA program until after the final RHNA has been adopted, ABAG risks implementing a policy without fully understanding how it will affect classes protected under fair housing law. Therefore, the Department urges ABAG to address in a timely manner the concerns regarding the RHNA methodology in order to assure the methodology does not conflict with fair housing law and with the obligation to affirmatively further fair housing.

We remind you that the Fair Housing Act prohibits governmental bodies from adopting discriminatory land-use plans. Importantly, this prohibition is not limited to intentional discrimination. As recently formalized in our February 15th Final Discriminatory Effects Rule, the Department has long held the position that even absent intentional discrimination, a policy or practice by a government agency may violate the Fair Housing Act if it actually or predictably results in a disparate impact on groups protected by the Fair Housing Act.

In addition to the Fair Housing Act, a recipient of federal funding must comply with its certification to affirmatively further fair housing and with Title VI of the Civil Rights Act of 1964. To affirmatively further fair housing, a recipient must promote fair housing choice by fostering inclusive housing patterns throughout its region regardless of race, color, national origin, religion, sex, familial status, or disability and by ensuring its programs are conducted in a non-discriminatory manner. Moreover, under Title VI of the Civil Rights Act of 1964, a recipient may not utilize criteria or methods of administration which have the effect of subjecting certain groups to discrimination because of their race, color, or national origin. Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 similarly prohibit policies which limit choice by persons with disabilities. By complying with these obligations, ABAG can help fulfill the Department's goal of equal access to housing for all.

In our September 2012 letter, we encouraged ABAG to analyze the extent to which local jurisdictions with neighborhoods eligible for PDA designation were participating in or foregoing participation in the PDA program in order to determine how the PDA program would impact housing in the Bay Area. In performing such analysis, ABAG should compare the areas designated as PDAs to areas that are not PDAs, particularly considering differences in the racial and ethnic demographics.

The various stakeholders that have written to us are concerned that the PDA program will perpetuate patterns of segregation because some jurisdictions with areas of high educational and economic opportunity – but relatively limited diversity – are entering into the PDA program to a lesser extent than other jurisdictions. As a result, minorities and individuals with disabilities may be denied the opportunity to live in these areas of opportunity due to the lack of affordable housing. Thus, if the RHNA methodology allocates housing, particularly lower-income housing, to racially or ethnically concentrated areas of poverty at a disproportionately higher rate than it allocates housing in other areas, ABAG is potentially failing to comply with its fair housing obligations.

The Department also urges ABAG to examine the impact the PDA program may have on housing choice within individual jurisdictions. ABAG should consider whether local jurisdictions are selectively designating only some areas within their municipal boundaries for PDA status despite having other areas that qualify for the PDA program. For example, if local municipalities are only selecting neighborhoods in racially-concentrated areas of poverty for the PDA program despite having other qualifying neighborhoods in more racially-diverse areas, the RHNA methodology may disproportionately promote the concentration of housing, including low-income housing, into certain neighborhoods rather than encouraging a wide range of housing choice. This could, without any legitimate justification, perpetuate segregation within city boundaries and prevent families from accessing areas of opportunity.

Furthermore, ABAG should consider how the RHNA's emphasis on transit-oriented development impacts housing access in more rural and suburbanized areas. Specifically, ABAG should examine whether the RHNA does not allocate a sufficient amount of affordable housing around areas of

agricultural employment where farmworkers, who are disproportionately minority, may seek housing. ABAG should also address whether the RHNA methodology unjustifiably discourages affordable-housing development in suburban areas with greater educational opportunities.

We recognize the important role your agency holds as a regional council of governments, and we are encouraged by ABAG's decision to use its Sustainable Communities grant to develop the San Francisco Bay Area Regional Prosperity Plan, a strategy to increase access to regional prosperity for all groups living here. We hope that ABAG will use both the Regional Prosperity Plan and all of its programs to promote fair housing choice and to ensure inclusive sustainable communities throughout the Bay Area.

If you wish to discuss this matter further, please do not hesitate to contact our office. Thank you for your time and attention to this matter.

Sincerely,



Anné Quesada, Director
Office of Fair Housing & Equal Opportunity
U.S. Department of Housing & Urban Development
San Francisco Regional Office

- Cc: Steve Heminger, Executive Director
The Metropolitan Transportation Commission
101 Eighth St., Oakland, CA 94607
- Cc: Lisa Bates, Deputy Director of Housing Policy Development
California Department of Housing & Community Development
1800 Third St., Sacramento, CA 95811
- Cc: Ilene Jacobs, Director
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631 Howard St., Suite 300, San Francisco, CA 94105
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131 Steuart St., San Francisco, CA 94105
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