RUTAN & TUCKER LLP
ATTORNEYS AT LAW

611 ANTON BOULEVARD, FOURTEENTH FLOOR
COSTA MESA, CALIFORNIA 92626-1931
DIRECT ALL MAIL TO: POST OFFICE BOX 1950
COSTA MESA, CALIFORNIA 92628-1950
TELEPHONE 714-641-5100 FACSIMILE 714-546-9035
INTERNET ADDRESS www.rutan.com

ORANGE COUNTY
SILICON VALLEY
(408) 289-8777
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL: ATTORNEY-CLIENT COMMUNICATION

TO: The Honorable Mayor and Members of the Town Council

FROM: Joel D. Kuperberg

DATE: November 2, 2005

FILE NO.: 024741-0001

RE: Analysis of Potential Land Use and Housing Vulnerability

Pursuant to the request from your Town Manager, this office has reviewed a number of Town documents relating to land use and housing matters in the Town of Apple Valley, researched applicable law, and prepared this assessment of the Town's potential vulnerability on issues relating to land use and housing. It is our understanding that this assessment was requested in response to the August 23 and 25, 2005 letters to the Town's Mayor and Planning Department from Cathy E. Creswell, Deputy Director of the California Department of Housing and Community Development ("HCD"). These letters are critical of the Town's performance under its 2000 Housing Element and raise questions regarding the adequacy of the Housing Element in light of issues relating to the allowable residential densities set forth in the Housing Element.

This memorandum is organized in three parts. In Section I, we discuss the authority of HCD to administer and enforce California's housing element legislation and other housing laws. Section II of this memorandum analyzes the potential consequences of a successful housing element litigation challenge, including restrictions upon a local agency's discretion to issue building permits and other development entitlements after a court has found its housing element inadequate. Finally, in Section III of this memorandum, we review the Town's adopted Housing Element, the land use development restrictions and requirements described in that document, and other land use policies, including the Town's "Measure N" initiative passed in 1999.

The following is a summary of the major observations, findings and conclusions contained in the memorandum:

- HCD has extensive power with respect to the preparation of housing elements by local agencies, and the contents of those housing elements, due to HCD's mandated reviews of draft and adopted elements, and the statutory presumption

that a housing element certified as adequate by HCD complies with the housing element law.

- With respect to enforcement powers, HCD has the general power to initiate lawsuits, but it rarely has directly litigated housing element challenges; rather, HCD uses its review authority, and the text of its housing element review letters, to provide support to those persons and entities who do file housing element challenges. HCD also has the power to condition the award of certain housing grants on the adequacy of an applicant agency's housing element; and it is anticipated that future legislation will increase the enforcement power of HCD.

- Under state law, if a court finds a housing element to be statutorily inadequate, the court must order the jurisdiction to revise its element within 120 days; until the housing element revision is determined to meet legal requirements, the court must suspend the jurisdiction's power to issue land use entitlements and building permits for projects other than those for lower income housing, and require the jurisdiction to approve entitlements and permits for lower income housing projects. The court would also likely require the local agency to pay the attorneys fees incurred by the prevailing challenger in the housing element litigation. Individual councilmembers or other officials would not be personally liable if a court found the agency's housing element invalid.

- A successful housing element challenge could serve as the basis for a Federal Fair Housing Act claim; and, if the jurisdiction were found liable under the Fair Housing Act, the jurisdiction would likely be required to pay the attorneys fees incurred by the prevailing challenger. A court order finding an agency in violation of the Fair Housing Act would likely not expose individual councilmembers or other municipal officers to personal liability.

- The statute of limitations has run on housing element challenges to the extent they are not brought in support of lower income housing. Should such a challenge be brought, the apparent limit of 10 units per acre in the Town's multi-family designation exposes the Housing Element to a determination of inadequacy because that density level likely will not facilitate the development of housing to meet the Town's allocated regional need. Should the Town be required to amend its Housing Element, or should it be updated, recent legislative changes now essentially require that the Town permit residential development on at least a portion of the available sites at 15 units per acre or higher.

- With respect to the Town's land use regulations described in the adopted Housing Element, we believe that, notwithstanding HCD's certification of the Housing

Element, the parking requirements and processing fees are likely in conflict with one or more state statutes.

- Finally, we agree with the analysis of the Town Attorney that Measure N applies only to the R-SF designation, and not to the R-M or planned unit development designations; and, to the extent that the Town interprets or applies Measure N to designations other than the R-SF designation, the Town's action will likely render the Town unable to satisfy its regional housing need allocation, and conflict with a recent statutory amendment.

Each of these observations, findings and conclusions is set forth in greater detail in the remainder of this memorandum.

I. The Department of Housing and Community Development's Authority to Administer and Enforce Housing Element Legislation

Under California law, HCD has significant authority with respect to the ***administration*** of housing element legislation, but its ***enforcement*** authority – while significant – is indirect and implicit. With respect to the interpretation, application and administration of housing element laws, HCD has the authority under Government Code Section 65584[1] to develop the statewide existing and projected housing need, and to allocate those need quantifications to each council of government for sub-allocation to individual cities and counties. This authority enables HCD to determine where in California it believes that most of the future housing development should occur. HCD also administers numerous state-wide grant and loan programs for the development and rehabilitation of housing for lower income and special needs households. *See* Health and Safety Code Section 50500, *et seq.*

HCD's greatest and best known power, however, relates to its authority to review draft and adopted housing elements. Section 65585(b) requires each local jurisdiction to submit its draft housing element or housing element amendment to HCD for review. Legislative amendments to the California Government Code over 15 years ago explicitly changed the "advisory" nature of HCD findings regarding the adequacy of housing elements to a ***mandatory review process***. Now, under Section 65585(f), when HCD determines that a local jurisdiction's housing element does not comply with the housing element statutes, the local jurisdiction must revise its draft element or amendment pursuant to HCD's review, or adopt specific findings explaining why the locality believes that the draft element or amendment substantially complies with the housing element legislation despite HCD's finding of non-compliance. HCD also has the power, under Section 65585(h), to review the adopted housing element or amendment of each local jurisdiction, and report its findings of housing element adequacy to the jurisdiction's

[1] Unless otherwise indicated, all statutory references are to the California Government Code.

planning agency. Finally, under 65589.3, HCD's approval of a local jurisdiction's housing element provides the jurisdiction with a "rebuttable" presumption of validity in any litigation challenge brought against the adequacy of that housing element. Implicitly, therefore, a determination by HCD that a housing element does not comply with the statutory requirements can be interpreted as creating a ***presumption of invalidity***.

HCD's authority to enforce Housing Element legislation is less direct and explicit than its administrative and interpretive power. As previously indicated, HCD has the authority to administer a number of housing-related grant and loan programs, and Government Code Sections 65583(e) and 65585.2 implicitly authorize HCD to condition the award of grants and loans upon its determination that an applicant's housing element is adequate. Approximately five years ago, California State Senator Joe Dunn sought to strengthen and make explicit HCD's housing element legislation enforcement power by introducing SB 910. This legislation would have imposed monetary fines on jurisdictions that failed to adopt housing elements or housing element amendments that HCD found statutorily adequate. While SB 910 failed passage, it sparked considerable debate among municipalities and housing advocates; and it is likely that new and different legislative sanctions for Housing Element noncompliance will be introduced in the coming years.[2]

HCD also has implicit or indirect enforcement power with respect to litigation challenges to the adequacy of housing elements and housing element amendments. First, HCD has the authority under Government Code Section 65585(c) to receive and consider any written comments from any person or group regarding a draft or adopted Housing Element under review by the Department, and to consult with any person or group regarding the adequacy of a housing element or amendment under review by HCD. As a result, HCD may act as a conduit for housing element critiques brought by advocates for builders or lower income groups. HCD has historically worked closely with lower income housing advocates (*e.g.*, legal aid societies), and intermittently with developer advocacy groups (*e.g.*, BIA), to advance these entities' criticisms of

---

[2] The Legislature has continued to expand general enforcement authority relating to housing issues. For example, Assembly Bill 1390, enacted as Chapter 409 of the 2005 Statutes, addresses the failure of redevelopment agencies to comply with the "housing set-aside" requirements, and extends the period for challenging a redevelopment agency's compliance with those requirements to 10 years. This legislation also requires an agency found to have "set-aside" less funds than required, or expended set-aside funds for purposes other than those explicitly allowed by statute, to repay the fund with interest in one lump sum (with certain exceptions). The Legislature also acted this year to introduce Assembly Bill 549 (Salinas) which, in addition to other changes, would require a jurisdiction to pay actual damages as compensation for documented quantifiable losses suffered by a plaintiff or petitioner in an action brought as a direct result of the jurisdiction disapproving or conditioning its approval of an affordable housing development. Assembly Bill 549 did not pass this year.

an agency's housing element, by including the critique in an HCD review letter as its own determination of the element's non-compliance with housing element laws. By this coordination with housing advocacy groups, HCD has historically advanced housing element "requirements" that are not explicit in the housing element legislation. Given that an HCD determination of housing element non-compliance may be interpreted by the courts as an implied presumption of housing element invalidity, HCD's cooperation with housing advocacy groups significantly increases the power (and leverage) of those advocacy groups in housing element litigation.

While HCD has the general authority under Health & Safety Code Section 50406(a) to sue and be sued in California courts, no legislation expressly authorizes HCD to institute lawsuits against local jurisdictions that HCD has found to be non-compliant with regard to housing element requirements. In at least one case, however, *Davis v. Newport Beach*, Orange County Superior Court Case No. 329585 (filed 1980), HCD was named as a "real party in interest" in a lawsuit brought by low income housing advocates against the City of Newport Beach; as a "real party in interest," HCD then filed a cross-complaint against that city, accusing the jurisdiction of housing element inadequacies and other violations of law that essentially mirrored those brought by the housing advocates in the main complaint. Ultimately, the trial court in *Davis v. Newport Beach* granted the city's motion to dismiss HCD from the lawsuit, finding that its presence was the product of collusion between HCD and the lower income housing advocates; and the Fourth District Court of Appeal upheld that dismissal in an unpublished opinion in the mid-1980s.

II Legal Consequences of an Inadequate Housing Element

A. State Law Consequences

In the early 1980's, the California Legislature enacted Government Code Section 65750, *et seq.*, setting forth a court's specific powers when it finds a housing element inadequate. Under Section 65752, courts must give priority in scheduling the trials of housing element and other general plan litigation challenges in order that they may be speedily tried and determined. If a court finds that a housing element or other general plan mandatory element is inadequate, Section 65754(a) requires that the jurisdiction must bring its element into compliance with the California Government Code within 120 days. During that period, a court is ***required*** under Section 65755 to suspend the authority of the local jurisdiction to issue building permits, other construction-related permits, zone changes, variances and subdivision map approvals. That statute also ***requires*** the court to require the local jurisdiction to approve certain building permits, zone changes and subdivision maps "where the approval will not impact on the ability of the city, county, or city and county to properly adopt and implement an adequate housing element."

Section 65760 provides that housing developments containing at least 25% of the units as affordable to low and moderate income occupants are conclusively presumed not to have an impact on the ability of the local jurisdiction to properly adopt and implement an adequate housing element. Sections 65755 and 65760 thus essentially require a court, upon finding a locality's housing element to be invalid, to prevent the locality from issuing any development approvals other than those relating to low and moderate income housing, and to require the locality to grant any applications brought on behalf of low and moderate income housing projects.

A judicial determination of housing element invalidity can also serve as evidence of, or lead to, violation of other housing laws. For example, housing element inadequacies can be used by housing advocates to fashion claims of lower income housing discrimination, in violation of Gov. Code Section 65008. *See, e.g., Building Industry Ass'n of San Diego v. City of Oceanside*, 27 Cal.App.4th 744 (1994). Housing element inadequacies can also be used as evidence of "exclusionary zoning," in violation of the State's due process clause, as articulated by the California Supreme Court in *Associated Home Builders etc. v. City of Livermore*, 18 Cal. 3d 582 (1976). Housing advocates have historically predicated Section 65008 discrimination claims and exclusionary zoning claims on allegations of housing element invalidity.

1. Examples of Judicial Housing Element Remedies

Over the course of the past two decades, California courts have not been hesitant to suspend the land use regulatory approval authority of cities and counties whose housing elements have been found inadequate, or to invalidate land use development project approvals after finding that the approving agency's housing element fails to meet statutory requirements. The following are ***examples*** of cases in which courts have intervened to restrict local agency land use authority after finding the agency's housing element inadequate:

- *Committee for Responsible Planning v. City of Indian Wells,* 209 Cal.App.3d 1005 (1989): The Fourth District Court of Appeal upheld the trial court's issuance of a broad order prohibiting the city from issuing any building permits or other discretionary land use approvals until its general plan was brought into compliance, and prohibited a developer with an approved subdivision map from commencing construction of its project.

- *Wetlands Restoration Society v. City of Seal Beach*, Orange County Superior Court Action G009822 (1991): A local environmental group challenged a residential project approval, based upon the city's inadequate and outdated housing element. After the court found the housing element to be non-compliant, the court invalidated the development approval on the ground that a development approval cannot be granted when a portion of the general plan is inadequate.

- *Hoffmaster v. City of San Diego*, 55 Cal.App.4th 1098 (1997): The Fourth District Court of Appeal affirmed the decision of a trial court invalidating the housing element adopted by the City of San Diego, and ordering the city to approve all conditional use permits submitted for homeless shelters and other transitional housing until the city adopted a housing element that complied with State law.

- *Marin Family Action v. Town of Corte Madera*, Marin County Superior Court No. 17493 (1998): The trial court entered judgment invalidating the town's housing element, and enjoining the town from issuing any land use approvals for purposes of development, other than affordable housing, pending the adoption of an adequate housing element.

- *Sonoma County* (2000): To settle litigation filed by a housing advocacy group against its housing element, the county agreed to a limited moratorium on development until it adopted a new housing element and rezoned adequate land for multi-family housing affordable to lower income persons.

- *Hallfeldt v. City of Folsom*, Sacramento County Case No. 01CS01149 (2002): In this case, filed by a legal aid office, the trial court entered judgment finding the city's housing element inadequate, and suspending the city's power to allow development on certain vacant parcels until the housing element was brought into compliance. The city ultimately agreed to rezone a number of sites to meet its housing needs allocation for very low and low income households, and to remove certain regulatory restrictions deemed to be "governmental constraints" on affordable housing.

2. *Payment of Legal Fees to Successful Housing Element Challenges*

Challenges to the statutory adequacy of a housing element must be brought as writs of mandate (Section 65751), and the procedures applicable to writs of mandate require the petitioner to sue the agency adopting the housing element. In mandate cases, the judicial remedies are in the nature of injunctive relief and mandatory court orders, such as the orders described above suspending the land use regulatory powers of local jurisdictions whose housing elements were found invalid. While monetary damages are generally not available in mandate actions, it bears noting that housing advocacy groups that successfully litigate housing element claims are entitled to have their attorneys fees paid by the losing city under the "private attorney general" provisions of Code of Civil Procedure Section 1021.5, for the enforcement of an "important right affecting the public interest." Courts have routinely awarded attorneys fees under this statute to housing advocacy groups (but not developers, who are not eligible due to

their pecuniary interest) under this statute.[3] While every case is unique, attorneys fees awards in "typical" housing element writ actions can range from $50,000 - $250,000. When these claims are combined with § 65008 and exclusionary housing claims, the amount of the attorneys fees awards can increase by as much as 200%.

3. Personal Liability for an Invalid Housing Element

While local agencies may be forced to pay significant funds as attorneys fees to successful housing element challengers, individual councilmembers normally do not have financial exposure. Typically, the members of the legislative body (*i.e.,* city councilmembers) are not named in housing element challenges brought in state court, either in their official capacity or personally; and the law currently protects members of the legislative body from personal liability because of the policy nature of a decision to adopt or amend a housing element, which is a legislative act. *See Black Property Owners Ass'n v. City of Berkeley*, 22 Cal.App.4th 974, 980 (1994); *Landi v. County of Monterey*, 139 Cal.App.3d 934, 936 (19)83). As legislative acts, these decisions fall under the discretionary immunity provided by Government Code § 820.2., which provides that a public official is not liable for an injury resulting from an act or omission arising out of "the exercise of the discretion vested in him, whether or not such discretion is abused." Section 820.2 confers immunity to local officials for "basic policy decisions," or activity that may be characterized as the "planning" rather than the "operational" level of decision making. *Sandborn v. Chronicle Publishing Co.*, 18 Cal.3d 406, 414-15 (1976).

B. Federal Law Challenges Based Upon Housing Element Inadequacies

Housing element inadequacies can serve as the basis for claims under the Federal Fair Housing Act, 42 U.S.C. Section 3601, *et seq.* The Fair Housing Act prohibits racial discrimination in housing, including both intentional discrimination and actions taken "because of race"; and governmental entities can be sued under the Fair Housing Act, *see, e.g., U.S. v. City of Parma, Ohio,* 661 F.2d 562, 572 (6th Cir. 1981). While courts have held that racial discrimination cannot be proven ***solely*** from actions that have a disproportionate impact on lower income persons, *Ybarra v. Town of Los Altos Hills,* 503 F.2d 250, 253 (9th. Cir. 1974), violations of the Fair Housing Act have been established from municipal actions that inhibit lower income housing, where the principal victims are members of racial minorities, *see, e.g, Keith v. Volpe,* 618 F.Supp. 1132 (C.D. Cal. 1985); *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055 (4th Cir. 1982); *Resident Advisory Board v. Rizzo,* 564 F.2d 126 (3rd Cir. 1977); *U.S. v. City of Black Jack, Mo.*, 508 F.2d 1179 (8th Cir. 1974). Housing advocates have in the past sought to link housing element inadequacies with alleged Fair Housing Act violations, particularly in

[3] With rare exceptions, local agencies that successfully defend against housing element claims are not eligible for the payment of their attorneys fees by the unsuccessful challenger.

challenges against communities with lower minority populations than the surrounding region. *See, Davis v. Newport Beach, supra.* To date, however, these efforts have been unsuccessful.

Successful Fair Housing Act challenges can result in compensatory damage awards against the unsuccessful jurisdiction, as well as injunctive relief and the payment of the challenger's attorneys fees under 42 U.S.C. Section 1988;[4] but these cases usually do not expose public officials to personal liability. Generally, city councilmembers have absolute immunity from a civil rights claim, analogous to a Fair Housing Act claim, if the claim is based on a legislative act. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S.Ct. 966, 972 (1998); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 412-13, 99 S.Ct. 1171, 1179 (1979) (holding individual members of a local regional planning agency absolutely immune). Even where absolute immunity is unavailable because the challenged action is administrative (*i.e.*, consideration of a subdivision approval or conditional use permit), rather than legislative, local officials will have "qualified immunity." Under this doctrine, public officials cannot be held personally liable for acts taken in the scope of their official duties "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and the contours of the right allegedly violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). A decision on qualified immunity is fact-specific, and an official is immune if the applicable law is unclear or if a reasonable official could believe that his or her conduct was lawful in light of precedent and the information he or she possessed. *Franklin Bldg Corp. v. City of Ocean City*, 946 F.Supp. 1161, 1172 (D.N.J. 1996).

III. Review of Town's Adopted Housing Element and Other Land Use Policies and Regulations

A. Apple Valley's Adopted Housing Element

The Town's current Housing Element, which was adopted in 2000, is immune from most challenges due to the passage of time, but could be challenged by a person or entity in support of lower income housing. Government Code Section 65009 establishes three different limitations periods for challenging adopted housing elements. The "general" limitations period is Section 65009(c)(1); under this statute, any challenge to the adequacy of a general plan, or any general plan element, must be brought within 90 days of the adoption of the challenged plan or element.[5]

---

[4] Because Fair Housing Act cases are highly fact-dependent, and are resolved in evidentiary trials (unlike housing element writ of mandate cases, which are tried on administrative records), the legal fees in Fair Housing Act cases can be two to three times as high as those in "typical" writ of mandate cases challenging the statutory adequacy of housing elements.

[5] Under Section 65009(b), the scope of any such challenge is generally limited to the issues

Section 65009(c)(2) qualifies the 90-day limitation period by allowing the filing of an action or proceeding challenging a housing element within 60 days following the date that HCD issues its review of the adopted element pursuant to Section 65585(h), even if that 60-day period runs later than the "principal" statute of limitations in subdivision (c)(1). Given the Town's 2000 adoption of its Housing Element, and HCD's November, 2000 letter reviewing that adopted Housing Element, the limitations period for general housing element challenges ran by approximately February 1, 2001.

However, the statute would allow the filing of an action at this time challenging the Town's adopted Housing Element, if the challenge were brought in support of low or moderate income housing. Section 65585(d) allows the filing of a litigation challenge to an adopted housing element within approximately fourteen months following the filing of a notice alleging specific defects in the housing element, regardless of the date of adoption of the housing element,[6] if the challenge is "brought in support of or to encourage or facilitate the development of housing that would increase the community's supply of housing to persons and families with low and moderate incomes..." This subdivision sets forth no deadline by which the challenger's notice may be submitted to the agency; as a result, so long as a challenger files the requisite notice specifying alleged housing element deficiencies, the challenger may file the notice, and subsequently commence the litigation challenge, at any time.

The greatest threat to the validity of the adopted Housing Element relates to the Town's conclusion that its R-M (multi-family residential) land use designation permits the development of a maximum of only 10 dwelling units per acre. Although the Housing Element indicates that the R-M designation allows development of multi-family housing at an intensity of up to 20 dwelling units per acre (Housing Element, pp. 42, 54), the Land Use Element and Policy H-1.1 of the Housing Element (at page 69) both reflect that development in the R-M designation may not exceed 10 units per acre. It appears that the Town's determination that it could satisfy its regional housing need allocation for low and very low income households was based on the assumption that developers could develop multi-family housing at non-density bonus intensities of up to 20 units per acre. HCD noted in the first paragraph of its August 25, 2005 letter to the Town that HCD's finding of adequacy for the Town's Housing Element was based on the Element identifying sites with appropriate zoning to accommodate the Town's allocation of lower income housing need, and that the Town had ample land zoned for multi-family uses at

---

raised in the public hearing, assuming that the agency included a statement so requiring in its public hearing notice.

[6] Section 65009(d) provides that this housing element challenge may not be commenced until 60 days after the challenger provides written notice to the agency, specifying the deficiencies in the housing element, and that the challenge can be brought for up to a year following the expiration of that 60-day notice (or an earlier date on which the agency responds to the challenger's notice).

densities of up to 20 units per acre. However, HCD's assessment of the adequacy of the Housing Element changes if the Town does not allow development of multi-family uses at densities above 10 units per acre:

> "If in fact, the maximum density is only 10 units per acre, the element would no longer comply with housing element law and the Town should take immediate action to amend and submit its housing element to identify adequate sites to accommodate its share of the regional housing need for lower-income households and to provide a variety of housing types." (August 25, 2005 HCD letter, page 1)

Any person or entity seeking to challenge the Town's Housing Element in order to advocate for lower income housing would be able to use HCD's assessment that the Town's Housing Element does not comply with the statutory requirements based upon the R-M designation allowing no more than 10 dwelling units per acre. Given the language in HCD's letter, it is questionable whether the Town would be able to rely on the year 2000 HCD letter, and claim a presumption of adequacy under Section 65589.3. Accordingly, should a lower income housing advocate file suit against the Town, it is likely that a court would invalidate the Housing Element because the Element does not identify sufficient sites at appropriate densities to meet its allocated need, based upon the maximum allowable density of 10 units per acre in the R-M land use designation. Should a court do so, then, pending a determination that the Town has revised its Housing Element to cure the defects noted by the court, the court would be required to suspend the Town's discretionary authority to regulate and entitle most residential land uses, and mandate that the Town approve any applications for lower income housing,

As a result of recent amendments to the housing element law, revisions to the Town's Housing Element to address these requirements in response to HCD's comments by action other than increasing the allowable density in the R-M designation may be difficult. By way of background, Government Code Sections 65583 (a)(3) and 65583.2 require that a local jurisdiction include in its housing element an inventory of available land suitable for residential development at levels sufficient to meet the locality's regional housing needs. To the extent that the housing element inventory does not provide the opportunity for the Town to fully satisfy its regional housing need, Section 65583(c)(1) requires the Town to identify sites that can accommodate the Town's share of its allocated regional lower income housing need, and to identify actions to be taken to make such additional sites available, "with appropriate zoning and development standards," to accommodate that portion of the agency's need that is not met from its inventory of appropriately zoned lands. Section 65583.2(c)(3)(B) defines densities that are deemed to be "appropriate to accommodate housing for lower income households" for purposes of the housing element's inventory of available sites. For incorporated cities in non-metropolitan

counties,[7] the minimum density level is 15 units per acre. Accordingly, to revise the Housing Element's inventory of available sites to satisfy the regional housing need allocation for all income levels, the Town would likely be required to increase its maximum R-M density to 15 dwelling units per acre for the sites in the Element's inventory.

To the extent that the Town concludes in its Housing Element that Apple Valley cannot satisfy its regional housing need allocation through development of the sites in the Town's inventory at their maximum allowable density, Section 65583(c)(1) provides that the Town must identify actions that it will take to meet the remaining unmet regional housing need, through actions to "make sites available during the planning period of the general plan with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city's or county's regional housing need for each income level that could not be accommodated on sites" in the Town's site inventory. Section 65583.2(h) was recently enacted to provide that, in order to comply with the "action identification" requirement in Section 65583(c)(1), a nonmetropolitan jurisdiction must designate and zone sufficient sites, with "minimum density and development standards that permit at least 16 units per site at a density of at least 16 units per acre".

Accordingly, should the Town amend its Housing Element to address the comments in HCD's August 25, 2005 letter, rather than amend the Land Use Element to increase the residential density in the R-M land use designation from 10 to 20 units per acre,[8] the Town will be required either to redesignate and rezone sites in its inventory to at least 15 units per acre, or allow development of at least 16 units per acre on sufficient land to satisfy the allocated regional need.

The Town should be aware that, either in amending the Housing Element in response to HCD's recent comments, or in updating the Housing Element as required by statute, demographic and economic factors may force the Town to include additional sites within its inventory, and increase densities higher than those required by the recent amendments to the housing element law discussed above. It bears noting that the determination in the adopted Housing Element that the Town can satisfy its allocated housing need appears to be based, in part, on the relatively low housing costs in Apple Valley. According to pages 25-26 of the

---

[7] It is assumed that San Bernardino County qualifies as a "nonmetropolitan" county. If it is determined that the County is "suburban" or "urban," the Town's minimum required density would increase to 20 or 30 units per acre, respectively.

[8] Given that Section 2(B) of voter-approved Measure N "reaffirms and readopts" all of the land use designations in the Land Use Element, Elections Code Section 9217 would preclude the Town from increasing the density within the R-M designation to 20 units per acre without an affirmative vote of the electorate.

Housing Element, as of 2000, 30% of the households in the Town "overpaid" for housing by paying more than 30% of their incomes for housing. Given the recent region-wide significant increases in housing costs (both for the purchase and rental of housing) that are reported to have outpaced increases in wages and other personal income, it is likely that the proportion of the Town's households "overpaying" for housing has increased. In order to address this increased housing need, the Town may need to designate additional sites in its inventory, and potentially consider higher allowable densities than those required by Section 65583.2, in order to satisfy the "overpayment" component of housing need.

B. Other Housing and Land Use Regulations and Requirements

While not identified by HCD as potential constraints to housing, we believe that certain land use regulations and requirements identified in the Housing Element may be vulnerable to legal challenge. The following is a summary of those regulations and requirements:

1. *Parking Standards*: The Housing Element (at page 56) identifies the Town's parking requirements as 2 enclosed spaces for single family detached units regardless of size, while the requirement is 2 spaces for a 1-bedroom multi-family unit, and 3 spaces for a 2-bedroom multi-family unit. The Housing Element provides no explanation why apartments and condominiums create a need for more parking spaces than do single family detached units. Absent a methodologically sound analysis concluding that the parking demands of single family detached units do not change as the homes get larger (or contain more bedrooms), but that condominiums and apartments generate increased parking needs as the bedroom count increases, the Town's parking standards are vulnerable as "governmental constraints" under Section 65583(c)(3), and expose the Town to challenge under the "least cost zoning" provisions of Government Code Section 65913.1.

2. *Processing Fees:* Page 57 of the Housing Element indicates that the City's processing fees for land use approvals (*e.g.*, general plan amendments, zone changes and subdivision approvals) include both a flat fee and a fee per acre or lot. Unless the Town has a methodologically sound study that concludes that the Town's cost of processing is directly related to the size of the site, or the number of lots in a subdivision,[9] it would appear that the fee structure (at least with respect to large parcels and subdivisions) may exceed the reasonable cost of providing the service, in violation of Government Code Section 66014(a). In addition, the emphasis upon land size in the fee structure may make that fee vulnerable to challenge under Article XIIID of the State Constitution (*i.e.*, "Proposition 218").

---

[9] This seems unlikely, since planning costs frequently have little to do with the size of a parcel. For example, a 5-acre parcel impacted by endangered species and drainage issues, at a controversial location, likely will require a greater planning effort by the Town than a 500-acre parcel without these constraints.

3. *Development Impact Fees*: The Housing Element describes the Town's schedule of development impact fees at page 58, and notes that they are comparable to those charged by neighboring cities of comparable size, but does not analyze or describe the relationship between the fee and the impact being mitigated.[10] We are informed and the Town has recently commissioned a fee study. If this study analyzes the cost per dwelling of mitigating traffic, for both detached and attached housing units, that supports the impact fee schedule, the schedule should be adequate under Section 66001, which requires such an analysis, as well as Section 66005, which requires a reasonable relationship between the fee and the cost of mitigating the impact.

4. *Measure N*: It is our understanding that the Apple Valley voters passed Measure N at the November, 1999 election, and that the Measure became effective on January 1, 2000. Measure N makes findings supportive of retaining the Town's existing rural atmosphere and equestrian lifestyle, prohibits any change to a number of Land Use Element policies and goals until 2020, and also prohibits until that date any change to the 2 units per acre density limit and the 18,000 square foot minimum lot size for development within the R-SF designation. The Town Attorney has opined that Measure N continues the ½ acre minimum lot size in the R-SF designation, but does not apply to the R-M designation. The Town Attorney also concluded that Measure N does not change any of the existing Land Use Element policies regarding specific plans and planned unit developments; these policies allow residential lots smaller than 18,000 square feet within a specific plan or planned unit development, so long as the overall density of the project does not exceed 2 dwelling units per acre.

We have reviewed the Town Attorney's opinion and concur in its conclusions. While Measure N contains broad language in its "Findings and Purpose" section that could be construed as limiting all single family detached housing to ½ acre lots, these provisions do not amend the General Plan. The specific provisions of Measure N that actually effect a change to the General Plan maintain for 20 years the adopted Land Use Element Goals and Policies (Measure N, Section 2(A)), and maintain the Land Use Element designations and maps for the same period (Measure N, Section 2(B)). Most of the Land Use Element Goals and Policies do not relate specifically to residential density issues, instead addressing more general policy matters. Land Use Element Policy LU 3.1 does specifically provide that "The Town will encourage single-family detached housing on lots of no less than 18,000 feet," and Policy LU-3.4 provides that "Open space equivalent to that provided by single-family units or 18,000 sq. ft. net lots shall be

[10] In this regard, the development impact fee schedule reflects that the street/traffic fee is over 50% higher for single family detached units than for multi-family units, implying that a single family detached unit creates a street or traffic impact that is at least 50% greater than the impact created by a multi-family unit. However, the Town imposes a greater parking requirement on multi-family units than on single family detached units, seemingly in conflict with the conclusion inferred from the traffic fee schedule.

provided for in all specific plans." Finally, Measure N amends the single family residential (R-SF) land use designation to provide that, for the same 20-year period, the maximum residential development density within this designation shall not exceed two units per acre, and the existing minimum lot size requirements shall not be reduced (Measure N, Section 2(C)).

By its terms, therefore, Measure N maintains existing Land Use Element Goals, Policies, designations and densities; further, it does not address multi-family housing or specific plans and PUDs other than to maintain the adopted Land Use Element text with respect to these uses. The only specific land use designation referenced in Measure N is the R-SF designation; notably, Measure N neither refers to, nor enacts regulations for, the R-M designation or the designation that allows specific plans and planned unit developments. As a result, while restricting until 2020 changes to the density and minimum lot size within the R-SF designation, and the existing Land Use Element Goals, Policies and maps, Measure N makes no changes to existing provisions relating to multi-family housing or to specific plans and PUDs.[11]

From the foregoing, we do not believe that Measure N can be interpreted to impose an 18,000 square foot minimum lot size on specific plan or planned unit development projects, or reduce the maximum density in the R-M designation below 10 units per acre. However, assuming that the Town wishes to expansively "interpret" Measure N to impose a ½ acre minimum lot size on development in the R-M designation or upon specific plans and planned unit developments, or formally amend the Zoning Code to effect such changes, the Town's action would likely render the Housing Element deficient in meeting the Town's regional housing needs. This results from the fact that the Element's projection of future housing development in the R-M designation and on sites allowing specific plans and planned unit developments apparently did not assume 2-unit per acre and 18,000 square foot minimum lot size restrictions. As a result, the Housing Element would face the same legal issues described above with respect to the 10-unit per acre limit in the R-M designation.

In addition, an interpretation of Measure N to impose a ½-acre minimum lot size within the R-M designation and on specific plan and planned unit development sites would appear to violate both the "least cost zoning" requirements of Government Code Section 65913.1, and Government Code Section 65863(b). Section 65863(b) was enacted to ensure that local jurisdictions refrain from making land use regulatory changes that render infeasible the programs, policies and quantified objectives in the jurisdiction's housing element. This statute prohibits a local jurisdiction from reducing "the residential density that is below the density that

[11] In fact, Section 2(B) of Measure N, which "reaffirms and readopts, until December 31, 2020, the Land Use Designations and Land Use Policy Map,..." seems specifically to provide that the existing R-M density of up to 10 units per acre, and the existing ability to develop smaller lots so long as the overall 2 units per acre density is maintained in Specific Plan projects, remain as part of the General Plan.

was utilized in determining compliance with housing element law," unless the local agency finds, based on substantial evidence, both that the reduction is consistent with the adopted general plan, including the housing element, and that the remaining sites identified in the housing element can accommodate the jurisdiction's share of the regional housing need.

Any action to interpret or apply Measure N to impose a ½-acre minimum lot size for R-M, specific plan or planned unit development, would seemingly result in a reduction in the residential density; and, in light of the fact that the R-M designation can currently only accommodate 10 units per acre, it is highly unlikely that reduced R-M, specific plan or planned unit development designations would allow the Town to satisfy its regional housing need. Further, it seems unlikely that the Town would be able to make either of the two required finding for effecting the reduction resulting from such an interpretation of Measure N. Consequently, extension of Measure N's ½ acre minimum lot size requirements or 2 unit per acre limits to the R-M designation, or extension of Measure N's ½ acre minimum lot size requirement to specific plans or planned unit developments, would likely both preclude the Town from satisfying its regional housing need allocation, and violate Government Code Sections 65863 and 65913.1.

* * *

I look forward to meeting with the Town Council to discuss the issues raised in this memorandum, and to address any questions that you may have.