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MEMORANDUM OF LAW

DATE: December 4, 2006

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Adequacy of City of San Diego's Proposed Housing Element (2005-2010)

INTRODUCTION

Pursuant to California Housing Law [Government Code § 65580 et seq], the City of San Diego [City] is required to develop a Housing Element as a requisite part of the City General Plan and to update the Housing Element every five years. The City last developed and certified a Housing Element in 1999 for the 5-year cycle falling between 1999 and 2004. As of December 2006, the City has yet to update its prior Housing Element to cover the 5-year cycle falling between 2005 and 2010. A Proposed Housing Element will be presented to the City Council on December 5, 2006 for approval. In it, the City will commit itself to a 5-year plan of action to address the housing needs of the City which includes a need for several thousand additional affordable housing units. The comments provided herein attempt to inform the City Council of some inherent inadequacies in the Proposed Housing Element that it is being asked to adopt.

QUESTION PRESENTED

Does the Proposed Housing Element substantially address the requisite statutory requirements and the City's current affordable housing crisis?

SHORT ANSWER

No. The Proposed Housing Element does not substantially address requisite statutory requirements and the City's current affordable housing crisis. The Proposed Housing Element does not provide a realistic and achievable means of meeting the City's affordable housing needs. It is contrary to everything the City Council has emphasized in its declaration of a continuing state of housing emergency over the last several years.

ANALYSIS

I. General Observations:

The 2005-2010 Proposed Housing Element is very much like the 1999-2004 Housing Element with some changes made to reflect different statistics and additional criteria intended to reflect the Strategic Framework Element concepts and other goals. Seven years have passed since the last housing element was drafted, and yet many of the goals, objectives, programs and policies identified in the prior Housing Element are found in the current Proposed Housing Element. In or about 1999, the San Diego economy was such that housing affordability was substantially less an issue than it has been in the last five years. Although some numbers have been changed to reflect this, this alone is not enough to address the dramatic difference between housing affordability in San Diego in 1999 and in 2005. Such a dramatic change warrants a serious look at prior goals, policies, programs and objectives with the recognition that immediate and serious change is needed to address the considerable shortfall of the prior Housing Element's success. The City's prior Housing Element does not, as written, address the housing needs of San Diego during its 5-year coverage. Regional affordable housing needs have not been met during the prior 5-year cycle and will not be met for this 5-year cycle. A thorough revision of that prior document is needed to make the new Proposed Housing Element successful.

II. Statutory Criteria for Land and Site Inventory:

The Proposed Housing Element does not adequately address the statutory criteria and requirements for use and analysis of land and site inventories. *See* Government Code § 65580 et seq. The Proposed Housing Element states in Section D, Regional Share Goal, Page HE-12:

The regional share goal does not mean that San Diego must provide these numbers of housing units affordable in each income category. Instead, San Diego must have sufficient vacant and potentially redevelopable land zoned for residential use in various density categories to potentially meet the goals in each income group.

This Proposed Housing Element statement, which is the same language used in the 1999 Housing Element, mischaracterizes the statutory purpose of a housing element. It is not simply a document to identify potential opportunities and goals, it is a working document intended to play an instrumental role in setting forth direction and policy for how the City will actually go about achieving its housing needs for the 5-year period. It is not sufficient to make predictions that have no substantial basis in fact or without any significant analysis of whether the goals and objectives can be and will be realistically achieved to meet regional needs for the 5-year window.

Section 65584.09(c) makes very clear that:

[N]othing in this section shall be construed to diminish the **requirement** of a city...to **accommodate its share** of the regional housing need **for each income level** during the planning period...including the **obligations to (1) implement programs...to achieve the goals and objectives**, including programs to zone or rezone land, and (2) **timely adopt** a housing element with an inventory...and **a program to make sites available...which can accommodate** the jurisdiction's **share of the regional housing need**.

Emphasis added. California law requires in the housing element, pursuant to Section 64483(a)(3):

An assessment of housing needs and
An inventory of resources and constraints relevant to the meeting of these needs, including, among other things:
An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment.

As stated in Section 65583.2(a), this inventory of land “**shall be used** to identify sites that **can be developed** for housing **within the planning period** and that are **sufficient** to provide for the jurisdiction's share of the regional housing need for all income levels pursuant to Section 65584.” This includes housing that may not necessarily be occupied but can be developed (e.g., approved, begin construction, etc.) during the 5-year period covered by the Proposed Housing Element.

So specific are the requirements that the inventory must also discuss the availability of essential public facilities and services (e.g., sewer and water system trunk-lines and treatment facilities, roads, and storm drainage facilities) for sites identified for residential development. The analysis is to describe and analyze existing capacity and the capacity that will be provided during the current planning period of the element. Upon completing the infrastructure capacity analysis, the City is supposed to be able to identify where facilities and services are lacking in order to establish program **actions** (capital improvement plans, financing through general obligation or special district bonds, etc.) **that will permit** the development of sufficient units to meet the new construction objectives within the planning period. Page 68 *General Plan Guidelines*, State of California (Office of Planning and Research 2003).

Given these statutory requirements, it is not just a matter of identifying the available land, but also identifying an inventory of sites that can be realistically developed (begin the process of development for all income levels through approval) within the 5-year window. California housing law is very clear as to the statutory intent to mandate achievable goals that realistically

provide additional affordable housing within this 5-year cycle. This intent is evident in the following provisions.

As stated in Section 65583(c)(1)(A), where the inventory of sites does not identify adequate sites to accommodate the need for groups of all household income levels (as described in Section 65584), the Proposed Housing Element “**shall identify sites that can be developed for housing** within the planning period pursuant to Section 65583.2(h).” Section 65583.2(h) states:

The program required by [Section 65583(c)(1)(A)] shall accommodate **100 percent of the need** for housing for **very low and low-income households** allocated pursuant to Section 65584 for which site capacity has not been identified in the inventory of sites pursuant to paragraph (3) of subdivision (a) **on sites that shall be zoned** to permit owner-occupied and rental multifamily residential **use by right** during the planning period. These sites shall be zoned with minimum density and development standards that permit at least 16 units per site at a density of at least 16 units per acre....”

Emphasis Added. Government Code § 65583.2(h). For purposes of substantially complying with the requirement to identify an inventory of sites, no sites containing housing units scheduled or planned for demolition or conversion to nonresidential uses qualify as an adequate site. *See* Government Code § 65583.1(b).

As stated in Section 65584.9(a) of the Government Code:

For housing elements due pursuant to Section 65588 on or after January 1, 2006, if a city or county in the prior planning period failed to identify or make available adequate sites to accommodate that portion of the regional housing need allocated pursuant to Section 65584, then the city or county shall, within the first year of the planning period of the new housing element, zone or rezone adequate sites to accommodate the unaccommodated portion of the regional housing need allocation from the prior planning period.

Clearly, the intent is to require more than just the identification of potential sites, but to identify potential sites with the understanding that something actually can and will be done to make use of these sites for housing development during the 5-year window.

III. Evaluating Prior Success and Failure:

The Proposed Housing Element fails to adequately assess the prior success and failure of the previous housing element and to use this evaluation to develop realistic and effective new

goals, policies and programs for the new Proposed Housing Element. Section 65588 of the Government Code requires that:

- (a) Each local government shall review its housing element as frequently as appropriate to evaluate all of the following:
 - (1) The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal.
 - (2) The effectiveness of the housing element in attainment of the community's housing goals and objectives.
 - (3) The progress of the city, county, or city and county in implementation of the housing element.
- (b) The housing element shall be revised as appropriate, but not less than every five years, to reflect the results of this periodic review.
- (c) The review and revision of housing element required by this section shall take into account any low- or moderate-income housing provided or required pursuant to Section 65590.

These same objectives are further explained in the State of California's General Plan Guidelines (2003), where a housing element is characterized as a 3-step process:

1. Effectiveness of prior element: Section 64488(a)(2): "Review the results of the previous element's goals, objectives, policies, and programs. The results should be quantified where possible (e.g., the number of units rehabilitated), but may be qualitative where necessary (e.g., mitigation of governmental constraints)."
2. Implementation Progress: Section 65588(a)(3): "Compare what was projected or planned in the previous element to what was actually achieved. Analyze the significant differences between them. Determine where the previous housing element met, exceeded, or fell short of what was anticipated."
3. Goal, objective, and policy appropriateness: Section 65588(a)(1): "Based on the above analysis, describe how the goals, objectives, policies and programs in the updated element have been changed to incorporate what has been learned from the results of the previous element."

Page 62 *General Plan Guidelines*, State of California (Office of Planning and Research, 2003).

As emphasized in the General Plan Guidelines, the 5-year Proposed Housing Element should set forth "a five-year **schedule** of actions to **achieve the goals and objectives** of the element." Emphasis *added*. Programs are to be implemented through the administration of land use and development control; regulatory concessions and incentives; and, use of appropriate federal and state financing and subsidy programs." Page 62 *General Plan Guidelines*, State of California (Office of Planning and Research 2003).

The Proposed Housing Element does provide a summary table outlining whether the goals and objectives of the 1999-2004 Housing Element were achieved; however, neither this table nor the remaining text of the new Proposed Housing Element adequately evaluate whether the prior goals, objectives and policies were appropriate and effective given the City's continued state of affordable housing emergency. Even if every goal and objective were met for the previous five years, it is clear, given that the City remains in a housing crisis, these goals and objectives were neither effective nor appropriate. Furthermore, any housing element that attempts to carry forward with similar goals, objectives, policies and programs will also likely be a failure. The Proposed Housing Element begins with an acknowledgement that the City cannot realistically achieve its regional affordable housing need. Table 1, Page HE-13, of the Proposed Housing Element states that it can only feasibly achieve a goal of 6,590 units of affordable housing over this 5-year cycle. The City's share of affordable housing need for the period 1993 to 2010 is 18,735 units. As alleged in the Proposed Housing Element, the City has provided between 2,500 and 3,000 affordable units between 2003 and 2005, leaving a need deficit of approximately 15,735 units. The Proposed Housing Element also states that the City can only feasibly construct, rehabilitate and preserve a total of 6,590 units for this 5-year cycle, which leaves a remaining deficit of approximately 9,145 affordable units over this 5-year period. This alone should signal the need for revision with policies and programs identified that can adequately and substantially address the City's affordable housing crisis. Page HE-13 of Proposed Housing Element.¹

The Proposed Housing Element also states that, between 2005 and 2010, the City is at risk of losing an additional 12,576 affordable housing units due to the potential loss of subsidy obligations and other programs during this time period. The cost of adequately addressing this potential loss of affordable housing can run into the hundreds of millions of dollars. See Table 4 of Proposed Housing Element. "[T]he City has at its discretion approximately \$31 million annually" to preserve or replace "at-risk" funds; however,

[a] significant portion of this money is currently used to support ongoing community development activities, and to support the wide range of activities which comprise this City's multifaceted affordable housing strategy. Even if the City were to commit all available resources to preserve "at-risk" units, there are not sufficient funds to do so.

See page HE-65 of Housing Element. In other words, this \$31 million per annum is also not realistically available as a source of funding to replace the units that may be lost.

These numbers suggest that the real un-met affordable housing need for this 5-year cycle

¹This analysis and these assumptions are based upon the premise that the numbers relied upon in Table 29 of the Proposed Housing Element for Infill/Vacant >= 30 DU/AC is misplaced. See also Table 23 and Page HE-173 of Proposed Housing Element.

can range between 9,145 units and 21,721 units. This Proposed Housing Element, as written, will not take or guide the City out of its current affordable housing crisis.

IV. Affordable Housing Needs of Farmworkers and the Poor:

Section 65583(c)(1) of the Government Code requires the City to identify **adequate** sites with appropriate zoning, development standards and public facilities that encourage and facilitate a variety of housing types to accommodate all income levels. This should include sites for mobilehome park development, single room occupancy hotels and farmworker housing.

A. Single Room Occupancy Hotels (SROs):

Most SROs over the last 25 years, within the City of San Diego and elsewhere, have been demolished or replaced for other uses. As a consequence, fewer and fewer opportunities exist for the poorest of the poor—renters who subsist far below the federal poverty level—to find a place to reside and call home. It is well known that these SROs provide housing for the disabled, the elderly and persons making their way back from a state of homelessness into a more stable home and work life. Although the Proposed Housing Element gives generalized statements about the importance of these SROs, it does not reflect the reality; namely, the current City ordinance intended to preserve SROs has not prevented and cannot effectively prevent SROs from disappearing at a very rapid rate. The Proposed Housing Element acknowledges this direction of development over the last several years but does nothing to seriously address it.

B. Farmworker Housing:

The Proposed Housing Element does not adequately address the needs of farmworkers in that it simply preserves the status quo and provides for only an additional 20 units on City owned land. *See* page HE-240 of Proposed Housing Element.

Where the inventory of sites does not identify adequate sites to accommodate the need for farmworker housing, the program is required to provide for sufficient sites to meet the need with zoning that permits farmworker housing **use by right**, including density and development standards that could accommodate and facilitate the feasibility of the development of farmworker housing for low- and very low income households. *See* Government Code § 65583(c)(1)(B).

C. Mobilehomes:

With respect to mobilehomes, the Proposed Housing Element expressly states that the City will not endeavor to promote mobilehome development. *See* Page HE-28 and 33 of the Proposed Housing Element. However, State law is clear. Section 65583 requires that the housing element identify adequate sites for housing, including mobilehomes and shall make adequate provision for the existing and projected needs of all economic segments of the community. For many senior citizens and others, one of the very few means left for affordable housing are mobilehomes. Fewer are being constructed and more are being replaced for other uses. To the

extent the Proposed Housing Element reflects a policy of discouragement rather than support for mobilehome park development, then the City has effectively eliminated one of the very last remaining opportunities for affordable housing in San Diego.

Even the courts recognize the importance of mobilehomes as a source of affordable housing. In *Buena Vista Gardens Apartments Association v. City of San Diego Planning Department* (1985) 175 Cal. App. 3d 289, the court found that the City of San Diego Housing Element lacked any programs encouraging the conservation of mobilehome parks or existing affordable apartment rental units. In this case, the plaintiffs were tenants occupying a large apartment complex for which the City had approved a long-term plan to demolish the existing units and develop condos on the site. The Court found that the fact that the City had no basis upon which to deny the developer a demolition permit demonstrated the City's lack of a program to conserve affordable rental housing. As a result, the court prohibited the permit's issuance until the City amended its housing element with conservation programs substantially conforming to statutory requirements. *See* Page 63, 64 *General Plan Guidelines*, State of California (Office of Planning and Research 2003).

V. California Environmental Quality Act [CEQA] Compliance:

The City should not rely on an Addendum to the Strategic Framework Element (SFE) Environmental Impact Report [EIR] alone to approve the Proposed Housing Element since it is clearly a different project than the Strategic Framework Element, with new quantified goals and factual circumstances not known at the time of the SFE EIR and not adequately addressed by it.

An Addendum to a prior EIR may be prepared "if some changes or additions are necessary" and where none of the conditions requiring preparation of a subsequent EIR are present. Cal. Code Regs. [CCR] tit. 14, § 15164(a). A subsequent EIR should be prepared when an agency determines that any of the following circumstances exist:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR...due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances which the project is undertaken which will require major revisions of the previous EIR...due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable

diligence at the time the previous EIR was complete...shows any of the following:

- (A) The project will have one more significant effects not discussed in the previous EIR...;
- (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR....

14 CCR, § 15162.

The Proposed Housing Element is not the same in scope or detail as the SFE. This Proposed Housing Element project is an update to a separate and distinct element of the City's General Plan. Although there are limited similarities between the SFE and the Proposed Housing Element, the Proposed Housing Element is based upon new and different data than what was available when the SFE was prepared and adopted. In the Addendum, the Project Description indicates that the Proposed Housing Element has been designed "to be consistent with and help implement the goals of the Strategic Framework Element of the General Plan adopted October 2002." *Addendum* at 1. However, the project description does not contain any further reference to the SFE, but contains at least six explicit comparisons to the previous Housing Element. If the City is evaluating the Proposed Housing Element as part of the SFE, their nexus should be identified in the Project Description and demonstrated elsewhere.

In preparing an addendum, the lead agency should include "a brief explanation of the decision not to prepare a subsequent EIR." 14 CCR § 15164(e). The explanation of the agency's decision to decline preparation of a subsequent EIR "must be supported by substantial evidence." *Id.* In its Discussion section, the Proposed Housing Element Addendum notes, "[t]he Housing Element Update does not change any of the goals and policies of the...Strategic Framework Element...; therefore, it is anticipated that adoption of the Housing Element would result in similar impacts to those disclosed in the previously prepared EIR." *Addendum* at 6. This alone is not sufficient. The Addendum identifies the potential for implementation of the Proposed Housing Element to indirectly lead to zoning changes and community plan amendments, which it suggests were addressed in the SFE EIR. *Id.* This too is not sufficient. The City must explain the reasons why a new EIR is not needed in the Addendum and base that explanation on substantial evidence. This was not done. Attachment A provides a summary of relevant sections of the SFE and its EIR that, in a very limited way, attempt to address housing needs.

CONCLUSION

Honorable Mayor and
Members of the City Council

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December 4, 2006

The Proposed Housing Element does not substantially address requisite statutory requirements and the City's current affordable housing crisis. The Proposed Housing Element does not provide a realistic and achievable means of meeting the City's affordable housing needs. It is contrary to everything the City Council has emphasized in its declaration of a continuing state of housing emergency over the last several years. For the reasons outlined above, the Proposed Housing Element should be revised to reflect realistic and achievable affordable housing goals for this 5-year cycle.

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By

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MJA:SRE:pev
Attachment

cc: Elizabeth Maland, City Clerk
William Anderson, Director, City Planning and Community Investment
Marcella Escobar-Eck, Director, Development Services Department

ML-2006-30