

December 18, 2020

Mr. Kome Ajise, Executive Director  
Southern California Association of Governments  
900 Wilshire Boulevard, Suite 1700  
Los Angeles, California 90017

RE: Comment on Orange County Cities' Appeals of Their Share of the Regional Housing Needs Assessment Allocation

Dear Director Ajise and the 6<sup>th</sup> Cycle Appeals Board,

The Public Law Center ("PLC") is a 501(c)(3) legal services organization that provides free civil legal services to low-income individuals and families across Orange County. We provide services across a range of substantive areas of law, including consumer, family, immigration, housing, and health law. Specifically, the mission of our Housing and Homelessness Prevention Unit includes preserving and expanding affordable housing.

Orange County is facing an affordable housing and homelessness crisis. In 2020, Orange County renters need to make 3.2 times the state minimum wage to afford the average monthly rent of \$2,196.<sup>1</sup> In 2019, Orange County saw 6,860 people experience homelessness.<sup>2</sup> Through the Housing Element process, cities have the opportunity to tackle these issues by increasing the housing supply and the mix of housing types, tenure, and affordability; promote infill development and socioeconomic equity; promote an improved intraregional relationship between jobs and housing; allocate housing need to diversify the share of households in each income category; and affirmatively further fair housing.<sup>3</sup> Thus, I write on behalf of individuals in need of affordable housing to comment on the appeals submitted by cities in Orange County. Seventeen cities in Orange County have appealed their allocated share of the regional housing need as part of the Southern California Association of Government's ("SCAG") Draft Regional Housing Needs Assessment ("RHNA") Allocation Plan.

While some cities have experienced a modest increase in their RHNA allocations from the previous RHNA Cycle, other allocations have increased exponentially. Meeting such high allocations is undoubtedly a daunting task. As such, Government Code Section 65584.05 permits a jurisdiction to appeal its RHNA allocation based on failure to determine the allocation in accordance with the methodology, failure to consider local planning factors and information affirmatively furthering fair housing ("AFFH"), or significant and unforeseen change in circumstances. However, some cities have taken the RHNA appeals process as an opportunity to raise concerns that are outside the scope of relevant statutes and published procedures.

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<sup>1</sup> California Housing Partnership, Orange County 2020 Affordable Housing Needs Report (May 2020).

<sup>2</sup> U.S. Department of Housing and Urban Development, 2019 Point In Time Estimates of Homelessness in the U.S., 2007-2019 Point-in-Time Estimates by CoC (accessed December 9, 2020).

<sup>3</sup> Cal. Gov. Code § 65584(d).

While we have submitted specific comment letters for most of the jurisdictions in Orange County, those appeals will not be heard until later in the process. Many of the other appeals raise issues similar to those raised by Orange County jurisdictions and will be heard prior to Orange County appeals. We submit this letter with general comments on these similar issues in an effort to promote consistency across all jurisdictions within SCAG's authority.

### **Methodology**

An appeal based on methodology addresses SCAG's failure to determine the share of the regional housing need: (1) in accordance with the information described in Section 65584.04, (2) in accordance with the methodology established in Section 65584.04, and (3) in a manner that furthers, and does not undermine, the intent of the objectives listed in Section 65584(d).<sup>4</sup> An appeal on this basis should address whether SCAG inaccurately applied its methodology to the jurisdiction or whether SCAG's application of the methodology conflicted with the objectives listed in Section 65584(d). Instead, some jurisdictions allege that the data utilized by SCAG to determine projected and existing housing needs is either inaccurate or outdated.

SCAG calculates a jurisdiction's projected housing need based on SCAG's Connect SoCal Regional Transportation Plan/Sustainable Communities Strategy Growth Forecast between 2020 and 2030.<sup>5</sup> Jurisdictions compared this data with housing need projections from recent Freddie Mac and Embarcadero reports to argue that the disparity means SCAG's calculations are incorrect and to ask that SCAG incorporate different data sources.

When calculating existing housing need, SCAG considers the jurisdiction's population within disadvantaged communities ("DAC") and High Quality Transit Areas ("HQTAs").<sup>6</sup> Jurisdictions claimed that SCAG's use of outdated information caused them to be excluded from the DAC exemption, that the California Tax Credit Allocation Committee ("TCAC")/the Department of Housing and Community Development ("HCD") Opportunity Index Scores were not designed to identify DACs, and that the reallocation of residual needs units to non-DAC jurisdictions was unfair. These cities ask that SCAG consider applying the DAC exemption to jurisdictions with less than 50% of its population living in DACs, to use different data sources to determine what qualifies as a DAC, and to reassess how residual needs units are reallocated.

Some jurisdictions also contested the amount of units allocated to them based on conceptual HQTAs. The HQTAs at issue are in the early stages of planning, are not funded, and may not be built during the 6th RHNA Cycle or may not be built at all. Because of this, jurisdictions asked that their RHNA allocations be reduced by the number of units assigned to them based on conceptual transit stops.

As a result of these claims, jurisdictions allege that SCAG's methodology does not further the objectives stated in Government Code Section 65584(d).

However, to rectify these alleged claims, SCAG would need to alter its Final RHNA Allocation Methodology and apply changes for all jurisdictions. The purpose of the RHNA

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<sup>4</sup> Cal. Gov. Code § 65584.05(b)(2).

<sup>5</sup> SCAG, 6th Cycle Final RHNA Allocation Methodology, 4 (March 4, 2020).

<sup>6</sup> SCAG, 6th Cycle Final RHNA Allocation Methodology, 5 (March 4, 2020).

Appeals process is to allow a jurisdiction to appeal for a revision of their share of the regional housing need, not to appeal the data used in SCAG’s methodology.<sup>7</sup> Further, on January 13, 2020, HCD sent SCAG a letter reviewing SCAG’s Draft RHNA Methodology.<sup>8</sup> HCD described SCAG’s method of calculating projected and existing need and did not comment on any errors or ask for revisions.<sup>9</sup> Ultimately, HCD found that SCAG’s methodology furthers the statutory objectives of the RHNA.<sup>10</sup> HCD confirmed its previous finding that SCAG’s methodology furthers the statutory objective of the RHNA in its December 10, 2020 Comment on Appeals of the Draft Regional Housing Need Allocation (RHNA) Plan letter.<sup>11</sup> This letter went into even further detail explaining how the application of the methodology with regards to DACs furthers the objective to affirmatively further fair housing and an alteration to this aspect of the methodology would risk not fulfilling that statutory objective. Thus, when reviewing appeals containing these arguments, we ask that SCAG consider the limits of appeals based on methodology and whether HCD has already addressed the issue.

In addition to claiming that SCAG’s approved methodology does not meet the statutory objectives, some jurisdictions have used this basis for an appeal to air their grievances about the adopted methodology and seek to alter the methodology itself or apply an entirely different methodology. However, a jurisdiction’s dissatisfaction with the methodology that was adopted or the process by which it was adopted are not within the scope of permitted appeals under the statute. The appeals process is not a mechanism by which the methodology should be altered, but a mechanism to ensure that the methodology has been properly applied to all jurisdictions.

### **Local Planning Factors and Information Affirmatively Furthering Fair Housing**

A jurisdiction may appeal its RHNA allocation based on local planning factors and information affirmatively furthering fair housing if SCAG failed to adequately consider the information submitted pursuant to Section 65584.04(b).<sup>12</sup> The most common concerns raised under this basis were the presence of protected land, cities being “built out,” and designation as a High Fire Risk Area.

#### **Protected Land**

Some jurisdictions contain large portions of protected land that is utilized as green space or environmental preserves. Although jurisdictions noted these areas in their survey responses, some claim that such high RHNA allocations mean that SCAG ignored this information. While these factors should be considered, no jurisdiction provided any evidence supporting the claim that this information was not taken into consideration. Jurisdictions are required to base a claim on comparable data available for all jurisdictions and the accepted planning methodology, and be

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<sup>7</sup> Cal. Gov. Code § 65584.05(b).

<sup>8</sup> HCD Letter to SCAG Regarding Review of Draft Regional Housing Need Allocation (RHNA) Methodology (January 13, 2020).

<sup>9</sup> HCD Letter to SCAG Regarding Review of Draft Regional Housing Need Allocation (RHNA) Methodology, 1-3 (January 13, 2020).

<sup>10</sup> HCD Letter to SCAG Regarding Review of Draft Regional Housing Need Allocation (RHNA) Methodology, 2 (January 13, 2020).

<sup>11</sup> HCD Letter to SCAG Regarding Comment on Appeals of the Draft Regional Housing Need Allocation (RHNA) Plan, 2 (December 10, 2020).

<sup>12</sup> Cal. Gov. Code § 65584.05(b)(1).

supported by adequate documentation.<sup>13</sup> Additionally, these appeals fail to provide any analysis or support showing that the land within in the jurisdiction that is suitable for development cannot accommodate the jurisdictions RHNA through rezoning and increased densities.<sup>14</sup> Without this information, SCAG cannot properly review such claims. As a result, SCAG should take the lack of evidence into account when considering the merits of these claims.

#### Available Land

Jurisdictions also explained that Orange County’s sprawling suburban area is almost entirely “built out” with few vacant sites and few sites that are expected to change uses during the 6th Cycle. Some existing developments are new and unlikely to be converted in the near future. Others are highly utilized commercial areas or sources of employment. However, an appeal based on a jurisdiction’s existing zoning ordinance and land use restrictions is not permitted.<sup>15</sup> The housing element looks toward the future and SCAG must consider the potential for increased residential development under alternative zoning ordinances and land use restrictions.<sup>16</sup> Cities are not responsible for obtaining land to develop its assigned RHNA allocation, but simply must identify areas for future housing opportunity. Additionally, appeals fail to provide analysis or data demonstrating that the conversion of uses to residential, rezoning, and increased densities will not yield in enough sites to accommodate the RHNA.<sup>17</sup> Therefore, SCAG should encourage cities to look at current developments’ future use and not grant appeals on this basis.

#### Fire Risk

Due to the numerous fires California experienced this year, various jurisdictions have raised concerns regarding fire risk to future development. While there is no doubt that the changing climate is cause for concern, a jurisdiction may not appeal its RHNA allocation for a reason other than those listed in Government Code Section 65584.05(b) or Section I.C. of SCAG’s published 6<sup>th</sup> RHNA Cycle Appeals Procedures.<sup>18</sup> On August 31, 2020, the California Legislature passed SB 182 to amend Government Code Section 65584.04(e) to address these very concerns.<sup>19</sup> SB 182 would have required that SCAG take into account the amount of land within a jurisdiction’s very high fire risk area and allocate a lower proportion of housing to a jurisdiction if it is likely that the jurisdiction would otherwise need to identify lands within a very high fire risk area as adequate sites to meet its housing need allocation. However, the Governor vetoed SB 182 on September 30, 2020. In accordance with the limited, statutorily permitted bases of appeal and this veto, SCAG should not consider fire risk as a basis for appeal and should not grant appeals on this basis.

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<sup>13</sup> Cal. Gov. Code § 65584.05.

<sup>14</sup> HCD Letter to SCAG Regarding Comment on Appeals of the Draft Regional Housing Need Allocation (RHNA) Plan, 1-2 (December 10, 2020).

<sup>15</sup> Cal. Gov. Code Section 65584.04(e)(2)(B).

<sup>16</sup> Cal. Gov. Code Section 65584.04(e)(2)(B).

<sup>17</sup> HCD Letter to SCAG Regarding Comment on Appeals of the Draft Regional Housing Need Allocation (RHNA) Plan, 1-2 (December 10, 2020).

<sup>18</sup> Cal. Gov. Code § 65584.05(b); 6<sup>th</sup> RHNA Cycle Appeals Procedures, I.D.1.

<sup>19</sup> SB-182, 2020 Leg., 2019-2020 Reg. Sess. (Cal. 2019) (vetoed).

### **Change in Circumstances**

A jurisdiction may appeal its RHNA allocation if it has experienced a significant and unforeseen change in circumstances after April 30, 2019 that merits a revision of the information submitted pursuant to subdivision (b) of Section 65584.04.<sup>20</sup> Only the jurisdiction where the change occurred may appeal its RHNA on this basis.<sup>21</sup> Many jurisdictions expressed concerns about the COVID-19 economic downturn and the effect of rising unemployment rates on their projected housing needs. Some jurisdictions predict that the economy will not rebound from the Pandemic for a number of years.

If SCAG were to approve a reduction in units allocated to a jurisdiction on this basis, it would have to make similar considerations for all jurisdictions throughout the region that are also experiencing decreases in current employment rates and expected employment growth. A determination that the Pandemic constitutes a change in circumstances justifying a reduction in RHNA would ultimately be futile, as all jurisdictions would be eligible for this reduction and the reduced units from all of the jurisdictions would simply be redistributed back to the same jurisdictions resulting in substantially no net change in the allocation. While the impact of the COVID-19 pandemic cannot be understated, the duration or lasting nature of those impacts cannot be predicted at this time and may not even last the term of the housing element cycle, as was the case with the previous economic downturn and the 5th Cycle. Without evidence that the COVID-19 pandemic will continue to restrict the population's movement and employment in the same manner for the next eight (8) years, it would be unreasonable to use current data as a justification for the reduction of a city's RHNA allocation for the entire 6th Cycle. Additionally, while the pandemic has changed circumstances for cities, it has also amplified and exacerbated the state's housing crisis. As HCD also pointed out in its comment letter, "[e]nsuring everyone has a home is critical to public health" and the "pandemic has only increased the importance that each community is planning for sufficient affordable housing" to prevent and reduce overcrowding and homelessness.<sup>22</sup> Therefore, SCAG should consider the impact of COVID-19 across the entire region and should not grant an appeal on this basis.

### **Connect SoCal**

In appeals based on both methodology and local planning factors, jurisdictions have alleged that the RHNA violates state law because it is inconsistent with the local regional transportation plan, Connect SoCal. The most common claim is that RHNA allocations far surpass Connect SoCal's growth forecasts and that this inconsistency renders the RHNA invalid or illegal.

Jurisdictions seem to argue that the term "inconsistency" means incompatibility.<sup>23</sup> However, SCAG is asking jurisdictions to go beyond Connect SoCal to zone for more housing opportunities, a task that is not "incapable of association or harmonious coexistence"<sup>24</sup> with

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<sup>20</sup> Cal. Gov. Code § 65584.04(b)(3); SCAG, 6th RHNA Cycle Appeals Procedures, I.C.3.

<sup>21</sup> Cal. Gov. Code § 65584.04(b)(3).

<sup>22</sup> HCD Letter to SCAG Regarding Comment on Appeals of the Draft Regional Housing Need Allocation (RHNA) Plan, 2 (December 10, 2020).

<sup>23</sup> Merriam-Webster Dictionary, *Definition of inconsistent*, accessed December 10, 2020, <https://www.merriam-webster.com/dictionary/inconsistent>.

<sup>24</sup> Merriam-Webster Dictionary, *Definition of incompatible*, accessed December 10, 2020, <https://www.merriam-webster.com/dictionary/incompatible>.

Connect SoCal, as cities could meet its Connect SoCal growth forecast while simultaneously meeting their RHNA obligation.

Even if the RHNA and Connect SoCal were incompatible, again, a jurisdiction cannot appeal its RHNA allocation based on any other criteria other than those listed in Section I.C. of the published 6<sup>th</sup> RHNA Cycle Appeals Procedures.<sup>25</sup> Further, some jurisdictions may be misunderstanding Government Code Sections 65584.05(b) and 65080(b)(2), which require that an appeal must be consistent with, and not to the detriment of, the development pattern in Connect SoCal. However, it does not permit a jurisdiction to submit an appeal arguing that the RHNA is inconsistent with Connect SoCal.

Additionally, the Connect SoCal growth forecast for the entire SCAG region has been surpassed by the RHNA. If SCAG were to accept an appeal on this basis, all jurisdictions would be eligible for this reduction and the reduced units from all of the jurisdictions would be redistributed back to the same jurisdictions resulting in substantially no net change in the allocation. Therefore, SCAG should consider the scope of permitted appeals and not grant an appeal on these bases.

### **Regional 1.34 Million RHNA Allocation**

On September 18, 2019, SCAG wrote to the Department of Housing and Community Development (“HCD”) to object to its assignment of 1.34 million units for a number of reasons.<sup>26</sup> On October 15, 2019, HCD responded to each of SCAG’s points of contention and elected to substantially maintain SCAG’s RHNA allocation.<sup>27</sup> While many jurisdictions object to the regional 1.34 million RHNA allocation in their appeals, SCAG already exhausted its opportunities to appeal this allocation.<sup>28</sup> Additionally, this is not a proper basis for an individual jurisdiction’s appeal of its RHNA as there is no basis in statute for this appeal and SCAG has no authority to alter the region’s total allocation.

### **Conclusion**

Maintaining the assigned shares of the RHNA allocation as drafted is imperative to increasing a diverse housing supply, promoting development and socioeconomic equity, improving the relationship between jobs and housing, encouraging affordable housing, and affirmatively further fair housing. Although affordable housing is difficult to build, providing housing opportunities for very low and low-income households is essential to solving California’s housing crisis. To promote these objectives, we ask that SCAG consider this information as it continues to hold cities accountable for their fair share of the RHNA.

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<sup>25</sup> Cal. Gov. Code § 65584.05(b); 6<sup>th</sup> RHNA Cycle Appeals Procedures, I.D.1.

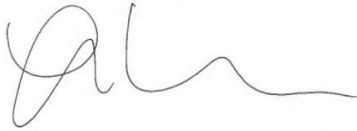
<sup>26</sup> SCAG Letter to HCD Regarding Objection to HCD’s Regional Housing Need Determination (September 18, 2019).

<sup>27</sup> HCD Letter to SCAG Regarding Final Regional Housing Need Assessment (October 15, 2019).

<sup>28</sup> “There are no further appeal procedures available to alter the SCAG region’s RHND (Regional Housing Needs Determination) for this cycle.” HCD Letter to SCAG Regarding Comment on Appeals of the Draft Regional Housing Need Allocation (RHNA) Plan, 3 (December 10, 2020).

Sincerely,

**THE PUBLIC LAW CENTER, BY:**

A handwritten signature in black ink, appearing to read 'Alexis Mondares', with a long horizontal flourish extending to the right.

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